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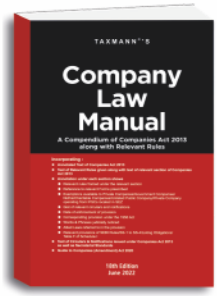


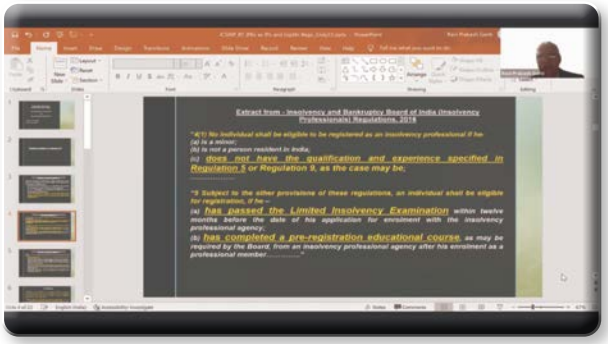
NEWS FROM THE INSTITUTE

These are from the IP Conclave conducted by IBBI on 10th June 2022 in New Delhi

ROUND-TABLE DISCUSSIONS CONDUCTED IN JULY, 2022

Round-table Discussion dt. 2nd July 2022

Round-table Discussion held on 2nd July 2022 on two IBBI Discussion Papers dt. 14th June 2022 respectively on "Streamlining the Liquidation Process" and "Enabling Entities to become Insolvency Professionals"

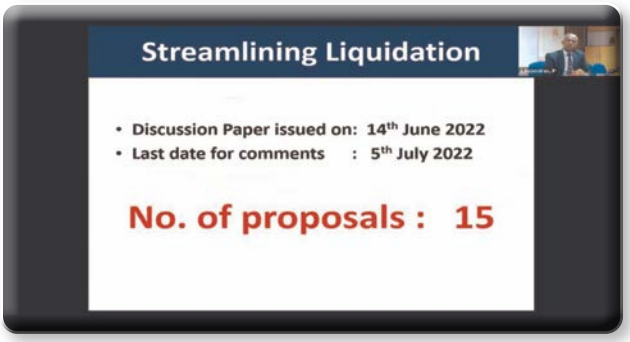


Round-table Discussion dt. 4th July 2022

Round-table Discussion held in collaboration with the ICSI-EIRO on 4th July 2022 on two IBBI Discussion Papers dt. 14th June 2022 respectively on "Streamlining the Liquidation Process" and "Enabling Entities to become Insolvency Professionals"

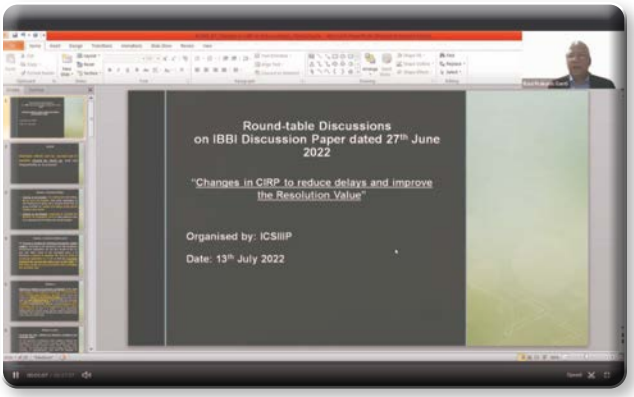
Round-table Discussion dt. 5th July 2022

Round-table Discussion held in collaboration with the ICSI-SIRO on 5th July 2022 on two IBBI Discussion Papers dt. 14th June 2022 respectively on "Streamlining the Liquidation Process" and "Enabling Entities to become Insolvency Professionals"



Round-table Discussion dt. 13th July 2022

Round-table Discussion held on 13th July 2022 on IBBI Discussion Paper dt. 27th June 2022 on "Changes in CIRP to reduce delays and improve the Resolution Value".



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- **Tulip Trade Link** *v.* **Harsha Exito Engineering (P.) Ltd.**
  (2022) 141 taxmann.com 320 (NCLT - Chennai) (SB) • P-197

Section 5(8) of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Whether term financial debt denotes a debt along with interest, which is disbursed against consideration for time value of money - Held, yes - Applicant as financial creditor had filed a claim in Form-C to Resolution Professional (RP) for amount advanced to corporate debtor along with interest - RP rejected claim of applicant in capacity as financial creditor in respect of corporate debtor on ground that claim amount

was not based on any valid loan agreement and there was no satisfactory evidence to establish intention to pay it as financial debt - It was found that applicant had placed on record a letter from banker evidencing that money had been transferred by way of RTGS to corporate debtor - However, there was no document placed on record to show as to what interest was agreed between parties and applicant had also not attached FORM 26AS in order to prove that it had deducted TDS - Whether amount had been disbursed to corporate debtor, however, applicant had miserably failed to establish that said debt would qualify as financial debt - Held, yes - Whether since, there was no dispute between parties that amount was received through banking channel, claim of applicant was to be admitted under category of other creditors - Held, yes (Paras 23 to 25)

- **Bank of India** *v.* **Sri Balaji Forest Products (P.) Ltd.**
  (2022) 141 taxmann.com 337 (NCLT - Kolkata) • P-205

Section 49, read with section 66, of the Insolvency and Bankruptcy Code, 2016 and section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Corporate liquidation process - Transactions defrauding creditors - Applicant/Resolution Professional filed instant application alleging that respondent Nos. 1 and 2, suspended board of directors of corporate debtor, on behalf of corporate debtor entered into a grossly undervalued transaction wherein, under garb of lease deed, all plant and machinery of corporate debtor along with land was leased to respondent No. 3 for a meagre amount and, thus, prayed for a declaration that execution of lease deed was in nature of transaction as described in section 45 and said lease deed be declared null and void and cancelled in terms of section 49 - It was found that applicant had successfully shown that lease deed was grossly undervalued to detriment of creditors of corporate debtor and entire business of corporate debtor had been transferred to a related party to corporate debtor, being respondent No. 3 - Further, applicant had also been able to show that said lease deed itself was grossly fraudulent, illegal and void ab initio inasmuch as same had been executed after issuance of notice under section 13(2) of SARFAESI Act, 2002 - Whether therefore, lease deed having been executed fraudulently and being grossly undervalued was to be set aside - Held, yes (Paras 39 to 41)

Section 43 of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Preferential transactions and relevant time - Applicant/Resolution Professional challenged numerous related party transactions with respondent Nos. 6 and 7 - It was found that there was no justification for transactions entered into with related parties within look back period - Whether in absence of justifications said transactions fell within ambit of section 43 and accordingly, respondent Nos. 6 and 7 were to be directed to make payments of Rs. 11.10 lakhs and Rs. 5.50 lakhs respectively for being related party preferential transactions under section 43 - Held, yes (Para 42)

Section 66 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Fraudulent or wrongful trading - Applicant/Resolution Professional alleged that brand name owned and used by corporate debtor was also being used by respondent No. 3 without any license/right to use such brand - Whether in absence of any valid agreement assigning trademark of corporate debtor in favour of respondent No. 3, respondent No. 3 was to be restrained from using property of corporate debtor - Held, yes (Para 43)

- **Teena Saraswat Pandey, RP of Rajpal Abhikaran (P.) Ltd.,** ***In re***
  (2022) 141 taxmann.com 316 (NCLT - Indore) • P-209

Section 25, read with section 31, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution professional - Duties of - CIRP against Corporate debtor was admitted and Interim Resolution Profes-

sional (IRP)/RP was appointed - Resolution plan submitted by successful resolution applicant was approved by CoC and had been submitted before Adjudicating Authority for approval under section 30(6) - Suspended management filed their objections to application for approval on ground that they being participant of CoC meetings were never provided with copies of resolution plan placed before CoC, which was against provisions of Code - Whether suspended management must be provided with copy of resolution plan, however, Resolution Professional can take an undertaking from members of erstwhile Board of Directors to maintain confidentiality - Held, yes - Whether Resolution Professional was to be directed to provide resolution plans to suspended management and then convene a meeting of CoC and CoC would deliberate on resolution plans afresh - Held, yes - Whether time utilized in these proceedings was be excluded from period of resolution process of corporate debtor - Held, yes (Paras 6, 8 and 9)

- **ICICI Prudential Venture Capital Fund Real Estate Scheme I** *v.* **Anand Divine Developers (P.) Ltd.**
  (2022) 140 taxmann.com 209 (NCLAT - New Delhi) • P-213

Section 12A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Withdrawal of application - Appellant-financial creditor had extended some credit facilities to corporate debtor - Due to default, CIRP was initiated against corporate debtor - Subsequently, NCLT permitted financial creditor to withdraw CIRP in lieu of terms of settlement that was entered into between parties prior to formation of Committee of Creditors but failed to grant liberty to financial creditor to restore/revive CIRP, in case of failure of corporate debtor to fulfil its obligations under settlement terms - Whether impugned order passed by NCLT was to be modified to effect that terms of settlement would form part and parcel of impugned order and that financial creditor could initiate contempt proceedings based on term of settlement in happening of contingency of corporate debtor in committing breach of terms of settlement and impugned order passed by NCLT - Held, yes (Para 44)

- **Sanjeev Mahajan** *v.* **India Bank (Erstwhile Allahabad Bank)**
  (2022) 141 taxmann.com 203 (NCLAT - New Delhi) • P-215

Section 60, read with sections 3(12) and 5(7), of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Adjudicating Authority - Corporate debtor and its other three entities were engaged in hospitality business and against corporate debtor and its other three entities certain amounts were due to financial creditor-bank - A compromise proposal offered by corporate debtor for Rs. 260 crores was accepted by financial creditor and an amount of Rs. 154 crores was paid and 102 crores was remained to be paid - Consequently, an earlier compromise failed and an application under section 7 was filed against corporate debtor - During pendency of section 7 application, financial creditor had issued a proposal for sale of NPA's to Asset Reconstruction Companies (ARC) - Thereafter, corporate debtor gave a one time settlement offer (OTS) of same amount at which financial creditor proposed to assign its debt to Asset Reconstruction Company - However, said OTS proposal was rejected by financial creditor - NCLT by impugned order admitted section 7 application - Corporate debtor submitted that due to obstinate attitude of financial creditor, corporate debtor could not be able to settle matter and revive its business - Whether settlement had to be encouraged in IBC but no direction can be issued to financial creditor to positively grant benefit of OTS to a corporate debtor - Held, yes - Whether since there was an existence of debt and default, NCLT had rightly admitted application filed by financial creditor under section 7 - Held, yes (Para 12)

- **Union of India** *v.* **Infrastructure Leasing and Financial Services Ltd.**
  (2022) 141 taxmann.com 315 (NCLAT - New Delhi) • P-218

Section 61 of the Insolvency and Bankruptcy Code, 2016 - Corporate Person's Adjudicating Authority - Appeals and Appellate Authority - CIRP was admitted against corporate debtor at instance of financial creditor - On other hand, corporate debtor sent restructuring proposal regarding settlement of its outstanding debt, which was approved by financial creditor of corporate debtor - Corporate debtor filed instant application seeking approval to implement restructuring proposal - Corporate debtor also sought directions that claims of operational/CAPEX creditors be extinguished - Basis given by corporate debtor to extinguish claims was that proceedings were initiated against it and its group companies under PMLA and said creditors were also under scope of investigation and Adjudicating Authority under PMLA passed provisional order directing corporate debtor not to make any kind of payment to said creditors - Whether since there was no order of Adjudicating Authority under PMLA confirming or continuing said order and claim of operational/CAPEX creditors had been admitted by Claim Management Advisor, prayer of corporate debtor for extinguishing claim of operational creditors was not acceptable - Held, yes - Whether admitted claims of operational/CAPEX creditors had to be dealt with in resolution plan when it would be drawn - Held, yes - Whether thus, restructuring proposal of corporate debtor was to be allowed but relief sought to extinguish claims of operational creditor was not allowed - Held, yes (Paras 34, 35 and 36)

- **Jaipur Trade Expocentre (P.) Ltd.** *v.* **Metro Jet Airways Training (P.) Ltd.**
  (2022) 141 taxmann.com 317 (NCLAT - New Delhi) • P-222

I. Section 5(21), read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Operational debt - Appellant/operational creditor entered into a 'Licence Agreement' with respondent/corporate debtor where corporate debtor took premises of appellant at a license fee for running an Educational Institution - License was granted for use of premises with fittings and fixtures, electrical and flooring as per good corporate standard - Appellant filed an application under section 9 claiming an amount towards unpaid license fee - Adjudicating Authority dismissed said application holding that claim arising out of grant of license to use of immovable property did not fall in category of goods or services and, thus, amount claimed in section 9 application was not an unpaid operational debt - Whether since corporate debtor had taken a licensed premises for running an Educational Institution, all cost incurred by corporate debtor and cost which remained unpaid would become a debt on part of operational creditor - Held, yes - Whether debt pertaining to unpaid license fee was fully covered within meaning of 'operational debt' under section 5(21) - Held, yes - Whether therefore, Adjudicating Authority committed error in holding that debt claimed by operational creditor was not an 'operational debt' - Held, yes (Paras 24, 39 and 40)

II. Section 3(6), read with section 3(11), of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Claim - Whether claim of operational creditor for payment of license fee is fully covered as 'claim' of definition under section 3(6), and similarly liability or obligation in respect of claim becomes a debt on part of corporate debtor within meaning of section 3(11), which defines debt to mean a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt - Held, yes (Para 25)

- **Ashok Tiwari** *v.* **DBS Bank India Ltd. (DBIL)**
  (2022) 141 taxmann.com 318 (NCLAT - New Delhi) • P-229

Section 61, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and rule 49(2) of the National Company Law Tribunal Rules, 2016 - Corporate person's Adjudicating Authorities - Appeals and Appellate Authority - Respondent bank filed an application to initiate CIRP against appellant-corporate debtor - Notices were is-

sued by NCLT, which were served on corporate debtor and date was fixed on which Advocate appeared on behalf of corporate debtor - But said Advocate having not filed a Vakalatnama was not heard by NCLT and NCLT proceeded and passed an order admitting said application - Against said order corporate debtor filed an appeal that corporate debtor be granted liberty to file an application under rule 49(2), wherein corporate debtor would be able to explain facts and circumstances of case - Whether prayer of corporate debtor was to be allowed permitting corporate debtor to file an application under rule 49(2), which would be considered by NCLT in accordance with law - Held, yes - Whether two weeks period was granted to corporate debtor to file application and till then further steps in CIRP would not be taken in pursuance to order passed by NCLT - Held, yes (Paras 5 and 6)

- **Avantha Holdings Ltd.** *v.* **Abhilash Lal, Resolution Professional for Jhabua Power Ltd.**
  (2022) 141 taxmann.com 319 (NCLAT - New Delhi) • P-231

I. Section 12A of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Withdrawal of application - Whether settlement plan under section 12A for withdrawal of CIRP cannot be forced upon lenders - Held, yes - Whether promoters, who led to insolvency process of corporate debtor, cannot claim to submit a resolution plan indirectly by way of proposal under section 12A and ask lenders to evaluate their resolution plan - Held, yes (Paras 15 and 17)

II. Section 31, read with section 29A, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Resolution plan - Approval of - CIRP was initiated against corporate debtor - Resolution applicant 'NTPC' submitted its resolution plan - Said resolution plan got approved by Committee of Creditors (CoC) and subsequently by NCLT - Appellant, being promoter of corporate debtor, filed an application seeking declaration that 'NTPC' was not compliant with section 29A - According to appellant, two related entities of 'NTPC', i.e. RGPPL and KLL had been classified as NPA and, thus, 'NTPC' was disqualified to submit resolution plan - NCLT by impugned order rejected said application - It was noted that NPA classification date was 21-5-2018 and from that classification date, grace period of one year as appearing in section 29A(c) had not been elapsed when CIRP of corporate debtor commenced, i.e. on 27-3-2019 and, hence, there was no disqualification under section 29A - Further, resolution plan was approved by 100 per cent vote of CoC - Whether thus, there was no error in decision of NCLT rejecting application filed by appellant - Held, yes (Paras 26 and 28)

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

From Chairman's Desk

No one can reduce their mistakes to zero, but you can learn to harness your drive to prevent them and channel it into better decision making.

Dear Professional Member(s),

It is always a pleasure to connect with you all. Though my discussions these days are largely confined to the virtual platform, I do look forward to meet all of you very soon in a physical meeting. I thank you for your continued trust, encouragement and unequivocal support to ICSI IIP. It is with your support that the organization is emerging stronger and healthier and is scaling new heights. I have my complete faith and confidence in the Team working at ICSI IIP under the very able guidance and stewardship of its COO, Ms (CS) Alka Kapoor. We are bouncing back to the old glorious days moving towards a bright and prosperous future.

Cutting down delays under IBC remains to be the war cry of Government as well as the Regulator. In fact, IBBI has been at pains to collect and analyse data to identify different reason(s) responsible for such delays and to amend its regulations so as to introduce corrective measures to overcome the challenge. The very well-researched and thought-out discussion papers circulated by the IBBI bear a clear testimony to this fact. At ICSI IIP, as a part of our responsibility, we have been holding round-table discussions inter se the professional members

with utmost frequency so as to bring-out better suggestions on different proposals. In a democracy, there cannot be a better and feasible way of ensuring an informed decision-making process by the regulator. As per the information available under IBBI's quarterly newsletter (January-March 2022), the average time that is taken in completion of CIRP (i.e., from start of CIRP to approval of resolution plan by the judiciary) is 408 days which includes the time taken in completion of judicial process. Thus, there is a clear need to strengthen capacity at NCLTs. The other change/reform that can be brought about with ease is to separate administration functions from judicial decision making by the Courts. This shall help in expediting assignment of cases, and also anticipate future case-loads. Improvement in the physical infrastructure and human resources (in the form of researchers and training programmes) for the Tribunals will definitely help in overcoming the challenges.

The other issue which also gets highlighted as leading to delays pertains to increasing exercise of judicial discretion in the IBC process. On many occasions, the timelines *vis-à-vis* the NCLT and NCLAT have been held to be directly in nature by Hon'ble Supreme Court, and extensions have been provided quite frequently. The most recent illustration of this fact is the judgment delivered by Hon'ble Apex Court in the matter of *Vidarbha Industries Power Ltd.* v. *Axis Bank Ltd.* (2022) 140 taxmann.com 252. Courts have also allowed new applicants to put in their resolution plans or earlier applicants to revise their plans even after the due date. There are some orders passed by the Courts which have effectively diluted rights of secured lenders.

In its recent report, the Insolvency Law Committee (ILC) has suggested measures for improving timely completion of different insolvency resolution processes. These include greater reliance on information utility for establishing 'default'; curbing judicial interventions on issues such as acceptance of unsolicited resolution plans, revision of resolution plans, and finally, adherence to timelines for approval or rejection of resolution plans.

While the great efforts made on the part of Courts and Tribunals in trying to adhere to the timelines cannot be denied or doubted, the fact remains that the Courts feel inclined to intervene in cases where they believe their intervention would lead to upholding principles of natural justice. While a written law will always be incomplete, and would lend some room for judicial discretion, such discretion needs to be more on the rationale

behind the provision including the incentives laid down for various stakeholders, and the downstream effects of the law on markets and the national economy.

It has been our experience from 1985 to 2015 (under the SICA legal regime) that one of the most important and crucial factor which decides on success of a resolution process is the point of trigger. Under SICA, where the threshold for filing a reference with BIFR was the test of net-worth erosion, there was hardly any scope for a fruitful rehabilitation of the business entity. There was a definite value destruction of distressed assets due to delays at all levels (including the judiciary), and all stakeholders suffered collectively. Therefore, some objective criteria for admission were extremely critical to be introduced into the law itself for an effective corporate insolvency process to take place. The balance-sheet test which is one of the methods for determining insolvency of an entity was clearly discounted by the BLRC under the IBC since it is vulnerable to the quality of accounting standards. The twin-test of debt and default was thus included under the IBC with the hope that this would minimise litigations at the admission stage, and would enabling quicker resolution of distressed assets.

The aforementioned ruling from Hon'ble Supreme Court is likely to radically impact the already settled process and principles. The judgment provides that even in cases where the NCLT is satisfied that a financial debt exists and that CD has committed a default, it may not admit the case and order for initiation of CIRP. The CDs are likely to use this precedent in order to resist their admission into CIRP which itself would open flood gates for more litigations in future and thus delays in the IBC process, and a consequent value destruction in the underlying distressed business. Unless the NCLT consciously restrains itself from an unwarranted use of this discretion at the admission stage, IBC may well end up the SICA way.

There is a Bill which is already introduced in the Parliament which seeks to amend the Insolvency and Bankruptcy Code. The Bill aims to introduce provisions on cross-border insolvency, and also being changes in the CIRP and liquidation process.

I urge each and every one of you to stay safe and take care of your loved ones.

My Best Wishes to all of you!

CS ALKA KAPOOR
COO (Designate)

COO's Message

Law is a tool for social transformation and progression

Dear Professional Member(s),

The legal system of a country, at any given point of time, is the result of continuous and conscious efforts to move towards solution. In other words, it is neither the creation of a single person not is it the outcome of a single day; it is a cumulative fruit of continuous endeavour, experience, thoughtful planning and patient labour of a large number of stakeholders. Thist statement goes well with the evolution and progression of IBC as well. IBC got introduced in the year 2016 and marked a fundamental change in the relationship between borrowers and lenders; a complete departure was made from the erstwhile debtor-in-possession model which did not yield the desired results and was infact plagued with huge delays and costs. The creditor-in-control model envisaged under the IBC led to a shift in the balance of power away from the corporate borrower, and to prevent loss of value of business assets, the entire process was made a time-bound resolution process. IBC was meant to discipline errant borrowers, who, under the previous legal regime were gaming the system. The success of IBC was in its attempt to transform the credit culture in the country. Faced with the threat of losing control over the firms, the borrowers started honouring their obligations. Thus, this threat itself became a credible deterrence for defaults. The figures available

till March 2022 inform us that 21,000 applications filed for CIRP initiation got resolved even before their admission by the AA.

The IBC recognised the time value of money and addressed it through two ways. First, it put in place strict timelines related to when a petition needs to be admitted, when a resolution plan needs to be approved, and at what point should the decision to liquidate the firm be made. Second, it reduced the scope for judicial discretion. This was done so that time would not get wasted in litigation, and courts would not get involved in commercial decisions. It was not for the courts to judge whether an outcome was valid, or fair, or optimal, as long as it was accepted by the committee of creditors. The court's mandate was only to ensure that the correct procedure was followed. IBC is not the first attempt at dealing with the issues pertaining to insolvency of firms. However, it is different from the attempts made earlier in that it recognises that any delay (in either recognition of the financial stress or in completion of rescue mechanism) has a direct negative bearing on value of assets. Stating it differently, if a firm has defaulted, then value of its assets can only be salvaged if it is taken into the insolvency process quickly because each passing day shall lead to reduction in the realization for stakeholders.

The above achievements of IBC, however, did not prevent challenges from creeping-in. In fact, the very introduction of the Code had upset the apple cart by disturbing the status quo and made some persons (who had their vested interest in continuation of the erstwhile legal framework) feel uncomfortable with this change. There were others, who, though, initially had a fear of the unknown because of this change taking place, but, gradually they also realized the need and merits of this new framework, and were thus able to find their comfort with IBC. In the life of IBC, there was also a time when huge haircuts (taken by financial creditors under resolution plans) got translated as a proof of IBC's failure. Responding to this unfounded criticism, I recall a very apt statement made by Dr. M. S. Sahoo, former Chairperson, IBBI reminding that "IBC is not a panacea for all ills and requires systematic and holistic assessment... if claims and realisations are adjusted to their real level, haircut figures will be lower." Infact to drive home the point, Dr. Sahoo also drew a comparison of IBC with an orchestra, wherein he remarked that, under this new legal framework, everyone has a role

and if anyone does not cooperate then the process may not either conclude in time, or reach the optimum outcome. These challenges and other roadblocks which appeared in the way of IBC, gradually subsided as the system was able to face and overcome them with courage and commitment.

In the month of July, a ruling which came from Hon'ble Supreme Court (delivered in the matter of *Vidarbha Industries Power Ltd.* v. *Axis bank Ltd.(2022) 140 taxmann.com 252*) took many stakeholders by surprise. The matter involved interpretation of the language of section 7(5)(*a*), IBC, and the Court construed the expression "...it may, by order, admit such application" (employed therein) as requiring the AA to examine factors other than existence of 'debt' and 'default' as well before directing for initiation of CIRP against a CD. Such factors would include viability and overall financial health of CD, feasibility of initiation of CIRP et al. A distinction of the language of this provision was further drawn with the language employed in s. 9(5) which provides that "the AA shall...by an order- (*i*) admit the application..." to come to the conclusion that admission of an OC's application filed u/s 9(1) is mandatory (if other requirements of the section are satisfied). As stated above, prior to this judgment, the understanding was, that to initiate a CIRP by an FC, what is to be proved is the existence of debt and default in order for the AA to admit the application and order initiation of CIRP. This allowed a relatively quick process *vis-à-vis* admission of cases. But, with this judgment in place, the AA shall now also take into account other grounds that the CD may make out against admission of such application. This is likely to create a space for some s. 7 applications getting rejected. In other words, this ruling now requires the AA to also delve into aspects like financial position of the corporate debtor to inquire if such default is due to cash flow distress or otherwise. The aspects which were perceived as a subject matter of commercial consideration are perhaps being placed now with the AA, and thus the apprehension that this judgment may lead to introduction of considerations which perhaps were not envisaged under the BLRC is being anticipated. It may not be out of place to believe that if admission of cases becomes a matter of discretion for the AA, the same may prevent IBC from continuing to be an effective deterrent for errant borrowers. The delays in either admission of cases or completion of resolution process would definitely lead to further destruction of asset

value, and therefore, the responsibility to ensure adherence to timelines is all the more necessary. I am sure that as we move forward more clarity shall come on this subject as well.

With a realization that a lot of new and constructive ideas and subjects are emerging which require a definite discussion *inter se* the Professional Members, we have raised frequency of our round-table discussions (through both physical as well as virtual medium), and I thank you all for your increasing participation in such discussion.

Looking forward to meet you all!

INTERVIEW

CS SATYADEVI ALAMURI
CS & IP

REPLY TO YOUR QUESTIONNAIRE

1. What are your views on this law, Insolvency and Bankruptcy Code, 2016 which has gradually emerged over the years.

I would like to thank the Government of India for enactment of this Insolvency and Bankruptcy Code, 2016 and the consequent changes or amendments that were brought in effectively to fill the gaps in the initial Code that was enacted.

AS already pointed in the Report of the Bankruptcy Law Reforms Committee of November 2015, which is a primary source document for enactment of the Code in 2016, the difficulties in the earlier arrangement was explained where the debtor had control even when there was default by the debtor as the Laws were conflicting and multiple with recovery rates being low and hence lenders emphasized on secured credit. This resulted in debtors with prospective ideas without collaterals being starved of credit. With the enactment of IBC, 2016 when Creditors feel confident that they have a recourse on default, many creditors who can be fund mobilisers/resourcers

will emerge eventually resulting in economic growth as well as the emergence of strong industries backed by viable ideas. Of course there is teething problem and it is expected that once these are sorted out and the code reaches even the Common man than the results will be excellent.

I have from my experience seen that even a common man without education skills had been participating in the e-auction during liquidation and this is a proof that when he/she understands the benefits of Creditors under IBC, 2016 corporate bonds or pooling of funds for infrastructure projects or any other projects will become easier with the resultant benefit that accrues to any entrepreneur who is skilled and runs the business honestly .

2. How has this profession as an Insolvency Professional shaped your professional career from the time you got yourself registered.

A wonderful journey from the time I got myself registered with continuous learning and gaining lot of experience till date. I being an Insolvency Professional registered in the initial years was at an advantage of handling many assignments till date. Though I have handled merger/demerger under the Companies Act, 2013 this experience had been unique. While handling such assignments we could see that the balance sheet of many companies comprised of assets which did not reflect the true value and by wiping off through IBC we are confident that the balance sheets reflect the realistic value and therefore any survey/reports conducted by any agency including Government will be based on predictable values.

It is very evident from my early assignments that there is a vast change in interpretation of the law with many case laws and amendments brought in to fill the gaps . Though there are various enactments, still there exists problems with respect of implementation of the Code in its true sense. Many of the Corporate Debtors are not going concern as on the date of commencement of insolvency date , thus the object of keeping the CD as a going concern and maximization of assets could not be achieved in the real sense.

3. Since you are also a Company Secretary by profession, how does being a Company Secretary help you in handling the assignments.

Being a Company Secretary by profession with post qualification experience of about 35 years, it helped me in undertaking the responsibility of each assignment with professional standards and ethics besides complying with the principles of Corporate Governance as envisaged in the Companies Act, 2013 and SEBI Regulations. Besides it also helped in application of the concepts of various laws, management principles, Corporate Governance while dealing with all the assignments in IBC, 2016. The task of handling an IP assignment is more than compliance and it requires patience in dealing with all the stakeholders and also applying market analysis in making various decisions which shall be the role of entrepreneur also.

4. What are the challenges faced by you as an IP while handling the assignments

Of course there are many challenges

faced as an IP with variation in degree with respect to each assignment.

(*a*) First and foremost challenge is that the Corporate Debtor is not a going concern with no employees, electricity to guide an IRP immediately on admission of CD under CIRP. Though machinery is available , to make it a going concern , the need of electricity is cardinal. Hence the immediate requirement of IRP or RP to make it a going concern by running the machineries has become practically impossible as the EB insists on payment of the entire dues for reconnection. Therefore in such cases, an amendment should be brought in wherein the order admitting the CD to CIRP should give directions to the concerned EB Department to provide electricity from the date of CIRP without insisting on the earlier dues for which claim may be filed (on the presumption that bills will be paid from CIRP DATE by IRP) so that the IRP/RP can move to the next step.

(*b*) There are instances where there are no employees or many employees will still be attending the office though there is no work on the premise that their dues were not settled. This aspect needs to be worked out while the admission of the application for CIRP is being heard with a statement from the management on the future running of the CD and retrenchment of employees IF ANY is required to be made by him.

(*c*) In most of the cases the assets i.e. Plant and Machinery, Stocks etc. does not tally with the assets of the CD with no Registers of whatsoever name is available. In such a situation, the available assets should be the assets of the CD as on date. In spite of making an application seeking cooperation from the management and without proper records, the procedures as per IBC requires to be undertaken to comply with the time guidelines as time is the essence. This results in lot of problems particularly during CIRP after approval of the plan though the assets are sold in "AS IS WHERE IS AND WHAT IS THERE BASIS" approach is adopted.

(*d*) As already said above, Fixed Assets Register is not being maintained or even if there is one does not match with the actual assets available which causes major impediment in valuation of the assets. The valuation of the assets is grossly mismatched with the audited accounts or the valuation done by the Secured creditor while advancing loans. This anomaly should be corrected.

(*e*) The debtors as per books of account of the CD in most of the cases are not recoverable and only it is in books for window dressing with the result that much time and energy is spent on taking steps for recovery of unrealizable debtors. Therefore a provision may be brought in that if the debtors are not confirmed for the previous three years, the IRP/RP , can write off the same

after exploring the possibility of recovery as it results in many small trading companies being dissolved immediately thus saving lot of time and energy.

(*f*) There is still no clarity with regard to payment of PF, Gratuity with so many rulings when there is no specific fund set apart for this purpose.

(*g*) Income-tax during liquidation should not be applicable so that the procedure with regard to TDS will not arise. Still many Sub-Registrars while registering land and building sold during liquidation are insisting on payment of TDS.

(*h*) Police Stations are still refusing to file FIRs and hence an IRP/RP/ Liquidator has to proceed with the elaborate procedure of filing NCLT application for this purpose. This has to be done away with a direction in the admission order to the local Jurisdiction police Station as well as to the respective Thasildhar to provide necessary protection for the assets of the CD as well as IRP/RP/Liquidator.

(*i*) The claims during CIRP can be accepted only upto 90 days as per IBBI(Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and in case of liquidation within the time lines (30 days) as per the publication calling for claims is made by the Liquidator. However it is seen that the Liquidator is in receipt of claims with orders of NCLT to consider the claim even after 365 days which may be avoided by way of amendment though there are some recent judgments that claim filed belatedly cannot be accepted viz. NCLAT in the matter of *The Regional PF Commissioner EMPF* v. *Mr. Vasudevan, RP and Liq of Titanium Tantalum Products Limited.*

(*j*) Instead of moving an application to the Courts, guidelines may be laid through enactment of Law so that litigation can be avoided except in essential cases where opportunity is to be given to the other party.

(*k*) Determination of PUFE transactions had been a difficult proposition and could not be determined within the time limit and even if determined the transaction auditor in many of my cases felt that the documents furnished is not sufficient to say that the transaction is fraudulent.

(*l*) If some responsibility is enforced on the ex-management, most of the above problems may be resolved. CD in most of the cases either do not attend or if they attend the CoC meeting, they state that they are no longer responsible in spite of stating the guidelines that only powers are suspended and not duties. A legislation to make the CD responsible even during CIRP by imposing penalty

may be considered as the section 19(2) application disposal takes a long time with so many counters being filed by CD as well as reply to counter by IRP/RP/Liquidator or even if an order is passed, they simply ignore it.

(*m*) To keep the Corporate Debtor as a going concern requires the cooperation of the ex- management, and that of workers/employees also. IRP/RP is not certain if workers/ employees union will support if a project is under taken during CIRP as their demands may vary after the initial agreement which results in litigation . This decision making is very complicated and creates an apprehensive situation where IRP/RP has to be doubly sure that if undertaken the new projects can be implemented with certainty . Hence right now the emphasis is only on completion of the projects that are work in progress. There may be industries like consumables where day to day operation is predictable but in certain type of industry the situation may not be the same.

(*n*) The Statutory auditors are not taking any responsibility for the earlier audited accounts and state that their accounts is based on the statement of the management. They should be held responsible in assisting the IRP/RP/Liquidator relating to the period for which audit is done by them.

5. One of the major challenge faced by IPs in this professional is fees paid to Insolvency Professionals, so what is your take on this challenge.

True. Payment of fees paid to Insolvency Professionals is a big challenge where in the CoC has to seek approval from their higher ups which is time consuming though they are supportive in decision of making of RP/Liquidator. As for other payments also , an IP has to seek the approval of CoC during CIRP which again takes lot of time and due to which , the time guidelines as per IBC could not be followed . This factor does have a negative impact on the entire process like not able to employ a suitable person for the job required etc.

The CoC's object is mostly on recovery and therefore to satisfy them when there are no recoverable assets to their expectation which is based on their valuation while advancing loan or based on claims is a big challenge. The IPs have been taking assignments even where there are no assets as besides recovery there are various other formalities that have to be adhered to . This requires that the efforts of the RP/Liquidator should be respected and compensated properly. Dissolution of a CD has become very difficult in spite of selling all the assets due to various litigations that are pending before various courts. CIRP expenses is being met with considerable delay or in some cases they even expect that CIRP expenses may be met out of resolution plan proceeds which caused undue hardship for conducting the CIR process.

6. What is your take on the implementation of prepackaged Insolvency Resolution framework for Corporate MSMEs

Pre-packaged insolvency Resolution framework is a welcome proposition for MSMEs except for wilful defaulters. In fact this may be made applicable to other Corporate Debtors also subject to Section 29A and other applicable provisions of IBC, 2016 , so that the management will cooperate and a fruitful and positive situation may emerge.

7. What are your views on inspection conducted by Insolvency Professional Agencies of their respective IPs

Inspection is very much welcome but factors beyond the Control of IPs must be taken into consideration while report submission by the Agency and the action taken by the agency should not be punitive in nature except for fraudulent activities .

8. It has been observed that timeline as specified in the code for completion of CIRP is hardly achieved, what are your views on non-completion of CIRP within due timeline as per the Code.

There are various factors for non-completion of CIRP within due timelines as per the Code. Some of them are decisions by CoC not being taken on time as they have to seek approval from their higher ups, litigation by parties and delay with Adjudicating Authorities in disposing of the application.

9. How significantly do you think the regulators serve the profession of Insolvency Professionals and what suggestion you want to give for the improvement

The Regulator can be more supportive instead of seeking information alone and a separate Cell may be created by the Regulator for rendering such services.

For *e.g.* If there is a specific problem that is being faced by an IP, the Regulator should have the right to immediately intervene and offer solutions (may be with fee also which can be a CIRP cost). Filing of return can be in a simplified form.

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

Entry into a business by way of incorporation is very simple where as exit is tedious and IBC, 2016 has been a platform to deal with such tedious and cumbersome process. I envisage a bright future for this Law provided the time lines for the implementation part as per Code is strictly adhered to at all levels.

SATYADEVI ALAMURI

Place: Chennai Date: 14th July 2022

Insight!

Value maximisation under Insolvency Process

DINESH KUMAR SETH
IP

The value maximisation of the Corporate Debtor undergoing Insolvency Proceedings is the main objective of Insolvency & Bankruptcy Code, 2016. However, the value derived from either Resolution or Liquidation in most of the cases fall between 20-30% of the total claims. The reasons have been well discussed at many fora. The focus of this article is to realise value from assets that are often ignored but having potential for extracting hidden value.

It has been observed that the admission of Corporate Debtor (CD) into Corporate Insolvency Resolution Process (CIRP) is taking unusually long time and the non availability of any protection against the assets of the proposed entity, puts it at risk of squandering the current assets under the garb of usual business transactions. The eco system under insolvency resolution has been developed in such a manner that the promoters cooperation is far from achieved and the revival & turnaround remains cliche words in most of the cases. The Resolution Professional takes over the CD with only those assets that could not be encashed as a usual business transaction and the lack of funds in the account of the CD does not allow

him the leeway to trace the historical transactions in detail. The Committee of Creditors (COC) is not willing to put good money after the bad money and the only job left for the Resolution Professional is to liquidate the immovable assets. Despite these challenges, the approach of the RP can make a difference in deriving value from various assets.

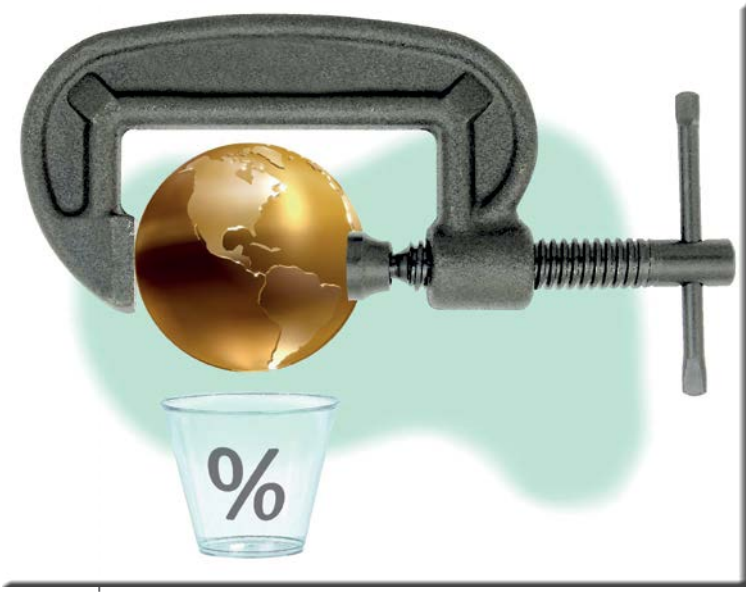
Current Assets

In this background, the realisation of current assets become an important constituent of the performance of the RP. However, the trade creditors, inventory and debtors that form significant part of net current assets are intertwined with each other in a manner that the build up in one of these gives a release to the other. Thus, the creditors in most of the cases are found to be unpaid, but the inventory made from the contributions made out of these creditors is either not available or found locked in debtors. These debtors could be spread all over the country and also in the foreign territories. The correspondence with these persons yield little results as either there would be no response from their side or the quality issue of the material supplied is invariably raised to escape the obligation of payment.

The RP has to get deep into these transactions to find out the agreements made in these transactions, the date of supply, the mode of transport used, the acceptance of the invoice/Lorry Receipt/ Bill of Lading, the quality issue raised on these supplies within a reasonable time and the action chart followed by the CD for the realisation of the pending dues. If the chain of the events described above is complete, then the realisation has to be pursued through persuasion, visits and eventually through the filing of recovery suits or filing insolvency application with the relevant authorities. In case of export of goods, where the outstanding debtors are not yet realised, the knowledge of international law plays an important role. The availability of bill of lading/airway bill will make the transaction authentic and the non-realisation of the dues can be pursued in that geography through filing recovery suits in that country. If the recovery through legal means is uncertain and longg drawn one, the services of a collection agency can also be hired, where, the amount realised is shared between the agency and the principal.

The countries at the international front do have bilateral/multilateral treaties and the understanding of that treaty for such transactions can prove really beneficial. In case, the reciprocal arrangements are in vogue between India and the nation that host the debtor, the action can be pursued in the foreign territory through the issuance of letter rogatory by the Indian Court. The Letter Rogatory is a formal written request by a court/judge to a court/judge in a foreign jurisdiction to summon and cause to be examined a specified witness within its jurisdiction and transmit his testimony for use in a pending action. The lack of awareness/ willingness on these counts with the COC and/or the RP does not allow to achieve the objective of maximisation of the value of the assets of the CD under Insolvency Proceedings. Moreover, the availability of RBI database for non-realisation of export proceeds within a specified time period

also helps in pursuing our cause in foreign territories, as the evidence value of the documents issued during the international business transactions is always high. Further, it would not be a gainsay that the actions taken on these lines would also yield higher value of the CD at the time of inviting bids from the prospective Resolution Applicants, as the value of the current assets can be suitably factored in the total value.



It may also be noted that in case of non-realisation of debtors for a long period, the forensic audit also encompass the transactions of such nature and track the money trails for the same. However, the RP has to carry out the analysis of all transactions that are under look back period to ascertain the preferential, undervalued and/or fraudulent transactions. The timely action on the outstanding debtors position can help in alleviating the pain of negative cash flows and make the CD operations viable in the eyes of the prospective Resolution Applicants.

Investment in Subsidiaries/Associate Entities

Another relatively unexplored option of realising the assets of the CD are in the form of investments made in subsidiaries and associate entities. With the consent of the COC, the CD, as a major shareholder can bring suitable changes to realise its investment in specific entities that harbour assets as a result of investments made in that entity. The control of those entities can also be taken by change of directors and bringing desired policy changes in the business operations. Many a times, the related party transactions with the investment entities puts the value into the assets created by these subsidiaries and associates. The investment made might have created fixed as well as current assets and by bringing in the requisite policy frameworks, the same could be extracted without affecting their normal business functions. To give an example, charging royalty or interest from the investment entities by altering the terms of the investment can bring the much needed cash flows into the CD under insolvency. Similarly, sale of some assets of the invested entities could be another option to provide a sigh of relief to the main entity. The options can be many and would have to be worked out on case to case basis. However, the moot point is to control the operations of the invested entities by taking necessary consent from the COC. The parent entity under CIRP, if used as an investment vehicle to invest in various related parties can be a case in point, where, this approach will yield sound results.

ORDER BOOK

Another tool to extract value can be the order book through which the orders have been placed with the CD for supply within a specified time period. These orders can either be fulfilled through in house operations or the same can be outsourced. In a specific case under Insolvency, where the CD was into heavy fabrication work and had location advantages for supply of these fabricated parts, it was observed that the clients *viz.* L&T, Tata Projects, etc. were ready to supply the raw material for their own work, even during the CIRP, after taking due consent from the COC that the material supplied will be put to use for the specific work and in case of non-completion of work, the same will be returned without accounting it in the books of the CD. In this way, the entity under CIRP was kept operational and could attract maximum prospective resolution applicants.

INTANGIBLE ASSETS

The intangible assets viz, Patent, Trademark, Brand, etc. are another way to realise value from the hidden assets. Although, the valuation of these assets is always uncertain, yet the same can be used for collecting royalty and other payments. There have been cases, where, the brand has been built and other intangible assets like trademarks have been created. The same could be utilised in a way that it could reflect in value maximisation by keeping the image and perception intact and thereby not diluting such assets due to admission under Insolvency. This might entail a few expense and the same should be got approved from the COC by detailing out the advantages and inherent value contained in these intellectual property rights.

BENEFICIAL AMENDMENTS UNDER INCOME TAX ACT

The accumulated losses and unabsorbed depreciation are another tools that can be used for creating value in the mind of the prospective resolution applicants. The Income-tax Act has carried out a suitable amendment in Section 79, whereby, the Resolution Applicant will be allowed to utilise the benefits of carry forward of these entries. Similarly, Section 115JB has also been amended under the Income-tax Act so that the aggregate of brought forward losses and unabsorbed depreciation can be reduced from the book profits for calculating the Minimum Alternate Tax. The Resolution professional need to put these numbers in perspective through the Information memorandum that is provided to the eligible applicants. These numbers would help the prospective resolution applicant in making an effective Resolution Plan, whereby, the Merger and Acquisition with the existing entity can be planned so as to save future taxes by acquiring the entity under insolvency. In order to reap these benefits, the enhanced value can be offered for the Corporate Debtor.

LAND ASSET

Last but not the least, the land available with the Corporate Debtor needs to be evaluated from the perspective of alternative usage. Most of the land assets are industrial in nature, however, with time, the erstwhile industrial area might have become prime area for commercial,

warehousing, residential activities. In order to attract relevant bidders, the appointed valuers should be asked to opine on the change of land use, the area available for development after that change, the cost involved in getting the stated change of use and the viability of the planned project after CLU. A special mention should be made of these probable projects so that the interest in the property can be attracted from various participants.

CONCLUDING REMARKS

It has been observed that any organisation that functioned for a reasonable period of time, there are various tangible and intangible assets that would get created during the way. The insolvency proceedings can dampen the value of these assets but can not negate it completely. The Resolution Professional need to bring out the value from these assets and operational benchmarks through diligent efforts and logical approach. The Information Memorandum should capture all these details, even if the execution of some of the steps is a work in progress. The resolution applicant rely on the contents of the IM and prepare its plan taking into consideration the various avenues that can fetch value after acquiring the entity under stress. The Resolution Professional has a duty to bring into the knowledge of the prospective applicants, the complete details of the milestones achieved during the journey of the Corporate Debtor from incorporation till the admission into insolvency. The completeness of the Information Memorandum is a sine *qua* non for achieving the objective of value maximisation and special attention need to be paid while preparing the same. The information made available through the IM should not only be historical but also prospective in nature. The value of the entity/assets is not always written large on the face of it but hidden in its prospective usage. The Resolution Professional need to change its approach and orientation for maximising the value of the Corporate Debtor just like all the other stakeholders involved in the process.

Pre-Packaged Insolvency Resolution Process under IBC

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Background of Pre-packaged Insolvency Resolution Process (PPIRP)

Micro, Small and Medium scale Enterprises (MSMEs)play very important role in Indian economy contributing to GDP and employment. MSME sector suffered hugely during Covid-19 Pandemic. After the one year old suspension of filing of CIRP cases was withdrawn by the Government on 24-3-2021, there was need to address urgently the concern of MSME and to set out the Covid-19 effect.

With the objective of Value maximization for all the stakeholders, IBC (Amendment) ordinance 2021 was promulgated on 4-4-2021 and "Pre-packaged Insolvency Resolution Process for MSME"- PPIRP was introduced by the Government. New Sections 11(A), 54A to 54N have been added in IBC in this regard. Chapter III A has been added in IBC for the PPIRP. The Insolvency and Bankruptcy Code (Amendment) Act in this regards was published on 1-8-2021. IBBI also released the IBBI (Pre-Packaged Insolvency Resolution Process) Regulations, 2021 on 9-4-2021.

A Corporate Debtor i.e. a company/ Limited liability partnership (LLP) falling under MSME sector and which has defaulted in payment, can file an application with Adjudication Authority for initiation of Pre-Packaged Insolvency Resolution Process and for approval of Resolution Plan. Thus PPIRP provides opportunity to MSME sector enterprise to get its own Resolution Plan approved, in case of default.

Salient Features of PPIRP

- PPIRP is applicable to MSME (Micro, Small and Medium sector Enterprises) only.

- During Pre-packaged Insolvency Resolution Process, control of the affairs of the company remains with Corporate Debtor (CD) unlike the CIRP wherein the control is shifted to Creditors.
- MSME itself can offer Resolution and avoid the liquidation
- Interest of Operational Creditors (OCs) not to be impaired. Pertinently, OCs are also generally MSMEs.
- law about PPIRP is hybrid of informal and formal inasmuch as the Debtor and creditors agree informally in the beginning and then Adjudicating Authority approves formally the Resolution Plan
- Process of Resolution to be complete in 120 days from date of filing of application

Disposal of CIRP Application (Section 11A)

New law has clearly stated that CIRP and PPIRP cannot go simultaneously against an MSME borrower.

- If any application filed for initiating PPIRP (Section 54C) is pending, it is to be disposed of first by the Adjudicating Authority, before considering any new application under sections 7, 9 & 10
- If any application for initiating PPIRP is filed by the MSME borrower within 14 days of CIRP application filed under section 7, 9 or 10 of IBC, the PPIRP application will have to be first disposed of.
- Where application for initiating PPIRP is filed after 14 days from filing of CIRP application section 7, 9 or 10, the Adjudicating Authority to dispose of the CIRP application first.
- If an application under section 7,9 or 10 of IBC is already pending as on 4-4-2021, above provisions do not apply.

Definition of MSME

Since the PPIRP law is applicable to MSME sector only, it is important to understand the definition of MSME.With effect from 1-7-2020, Section 7(1) of MSME Development Act, 2006 gives following criteria to identify an industry under MSME sector:

(Rs. In crore)

	Value of Plant & Machinery- Not more than(Written Down Value)	*Annual Turnover not more than*
Micro	1	5
Small	10	50
Medium	50	250

- Written Down Value (WDV) is taken as per the Income-tax Act, at the end of the previous financial year
- Incase of new units self-declaration can be submitted by the promoters about Investment in Plant & Machinery as per Income-tax return of previous year.
- Udyam Registration certificate is required as per notification 2119 (E) dated 26-6-2020.

Eligibility & Pre-conditions for application to initiate PPIRP (Sec. 54A)

- Applicant firm should be in MSME sector only.
- Amount of default not to be less than Rs. 10 lakh.
- Company & Limited Liability Partnership forms (LLP) only are eligible. Partnership/Proprietary firms are not eligible for filing application for initiating PPIRP.
- There should not be any PPIRP/ CIRP completed against the applicant Corporate Debtor (CD) in last three years.
- There should not be any CIRP under progress at the time of filing application for initiating Pre-Packaged Insolvency Resolution Process (PPIRP).
- Applicant CD should be eligible under section 29A to submit Resolution plan.
- No liquidation order should have been passed earlier against the applicant Corporate debtor (CD) under section 33
- Special resolution to be passed by members of Corporate Debtor and in case of LLP, consent of 3/4th of its partners to be obtained for filing application for PPIRP.
- Approval of Financial Creditors to be obtained (by not less than 66% votes in value of financial debt by unrelated Financial Creditors) to file PPIRP application. Regulation 14(8) provides that if there is no unrelated financial creditor, the applicant shall convene a meeting of Operational Creditors and obtain the required approval with 66% of votes in value.
- Applicant CD has to propose name of Insolvency Professional, approved by Financial Creditors (Not being related party) by minimum 66% votes in value.
- Where there is no financial creditor (unrelated party), such approvals to be obtained by calling meeting of unrelated operational creditors.
- Declaration to be signed by majority of Directors/ partners of the Corporate Debtor that (i) Purpose of application PPIRP is not to defraud creditors, (ii) Application will be filed within 90 days and (iii) Name of Insolvency professional is approved by financial creditors.

Seeking approval of Financial Creditors to file Application by Corporate Debtors U/S 54A

Corporate Debtor will submit to Financial Creditors (Not being a Related party) the following documents seeking latter's approval to submit PPIRP application to Adjudicating Authority:

(*i*) Special Resolution of Members/ Partners' resolution for filing application

(*ii*) Declaration signed by majority directors/ partners as mentioned above

(*iii*) Base resolution Plan

(*iv*) Any other specified information

Duties of Insolvency Professional (Section 54B)

- Stage I

Duties of Insolvency Professional (IP) start as under from the date of approval of the name of the IP by Financial Creditors:

- To Prepare Report on
  - *i.* Whether Corporate Debtor meets the criteria for initiating Pre-Packaged Insolvency Resolution Process (PPIRP).
  - *ii.* Whether Base Resolution Plan (BRP) complies with Section 54A sub-section (4) clause (*c*) and Section 54K.
- File such report with the Board
- Stage I duties of Insolvency Professional cease
  - *i.* If application to initiate Pre-Packaged Insolvency Resolution Process is not filed as per the declaration of partners/ directors
  - *ii.* Application is rejected/ admitted by Adjudicating Authority.
- Fees of IP (Regulation 8)
- If application is admitted, it is a part of PPIRP cost
- If application is not filed or is rejected on filing, fees of Insolvency Professional to be borne by Corporate Debtor.

Filing of Application to initiate PPIRP with Adjudicating Authority (Section 54C)

- To file the application with Adjudicating Authority in prescribed form
- Enclosures to be attached with Application
  - *i.* Declaration of partners/ directors
  - *ii.* Resolution/ special resolution passed by partners/ members
  - *iii.* Approval of Financial Creditors (not being related parties)
  - *iv.* Name of Insolvency Professional, approved by Financial Creditors (not being related parties), along with his written consent and his Report as per section 54B sub-section (1) clause (*a*).
  - *v.* Declaration about existence of avoidance transactions
  - *vi.* Information about books of account of the Corporate Debtor and other documents as specified.
- Application to be filed with Adjudicating Authority within 90 days from the date of Declaration
- Adjudicating Authority shall, within 14 days from the date of filing application, admit the application for initiating Pre-Packaged

Insolvency Resolution Process, if application is complete or reject it, if incomplete.

- It is provided that Adjudicating Authority may give notice to applicant to rectify defect, if any, within seven days from date of notice.
- Date of admission of application is called PPICD (Pre-packaged Insolvency Commencement Date).
- As per Regulation 19, Resolution Professional shall make public announcement about PPIRP within two days from the PPIRP commencement date.

Timelines for Pre-Packaged Insolvency Resolution Process (PPIRP) (Section 54D)

- Resolution Professional to submit the Resolution Plan approved by Committee of Creditors (COC) to Adjudicating Authority (AA) within 90 days from PPIRP Commencement Date.
- Resolution Plan to be approved by Financial Creditors (not being Related party) with not less than 66% votes in Financial Debt
- If no Resolution Plan is approved by COC within 90 days, Resolution Professional shall file application with Adjudicating Authority for closure of PPIRP, after expiry of such 90 days.
- Adjudicating Authority shall approve the Resolution Plan within 30 days of filing.
- Total timelines under Pre-Packaged Insolvency Resolution Process(PPIRP)- 120 days

Moratorium (Section 54E)

In addition to the admission of application for initiating PPIRP, the order of Adjudicating Authority shall include the following:

- Declaration of Moratorium as per Section 14(1) & 14(3)
- Appointment of Resolution Professional
- Order for Publication of Public Announcement
- Order of Moratorium continues to be effective till Pre-Packaged Insolvency Resolution Process comes to an end

Duties and Powers of Resolution Professional (Section 54F)

- On order of appointment by Adjudicating Authority, the Insolvency Professional whose name was proposed by the Corporate debtor as per approval of Financial Creditors, becomes Resolution Professional and stage -II of his duties starts.

Stage-II Duties of Resolution Professional

- To carry out the process of Pre-packaged Insolvency Resolution during the period
- To Confirm list of claims submitted by Corporate Debtor

- Inform Creditors of the claims which have been confirmed
- Maintain list of updated claims
- Monitor management of affairs of Corporate debtor
- Form Committee of Creditors (COC), convene and attend all meetings
- Inform COC of any breach of obligation by Board of Directors/ Partners of the corporate Debtor under PPIRP
- Prepare Information Memorandum (IM) based on Preliminary Information Memorandum (PIM) and other information received.
- File Application with Adjudicating Authority regarding avoidance transactions under Chapter III/ Chapter VI of IBC, viz,
  - (*i*) Preferential transaction- Section 43
  - (*ii*) Undervalued transaction- Section 45
  - (*iii*) Fraudulent transaction- Section 66
  - (*iv*) Extortionate transaction- Section 50

*Resolution professional is required to form opinion about Avoidance transactions within 30 days from date of commencement of PPIRP (PPICD). He has to determine PUFE transactions within 45 days from the PPICD and application shall be filed with the Adjudicating Authority within 60 days from PPICD.

Powers of Resolution Professional (Section 54F)

- Access to Books and records- Physical & electronic - of Corporate Debtor whether lying with Corporate Debtor or the Information Utility or the auditor, accountants, government authorities, others etc.
- Appoint Accountants and legal and other professionals
- Attend meetings of Directors, Promoters and Board of Directors
- Collect information about assets, finances and operations of Corporate Debtor for determining financial position and Avoidance transactions
- All Financial Creditors are required to provide information as called for by RP
- Corporate Debtor and its officials are required to co-operate with the Resolution Professional. Resolution Professional may file application before Adjudicating Authority under section 19(2), 19(3) of IBC for non-co-operation of Corporate Debtor and its officials

List of Claims and Preliminary Information Memorandum (PIM) (Section 54G)

Within 2 days of commencement of Pre-packaged Insolvency Resolution Process (PPIRP), the Corporate debtor has to provide to Resolution Professional the following information updated till that date:

- List of claims with details of creditors, security interest and guarantees
- Preliminary Information Memorandum (PIM)containing details required to prepare Information Memorandum
- Resolution Professional will inform every creditor and Information Utility (IU) and place on website of corporate debtor the information about claims
- Objections, if any, by any creditor, to be submitted to Resolution Professional within 7 days of receipt of information. Resolution professional may call evidence/ clarification for substantiation of claims.
- Resolution Professional shall update claims as and when required.
- If any claim is missed by Corporate Debtor in its list of claims causing loss to the creditors, then promoters, directors and responsible officials of Corporate Debtor will be liable to be sued and to pay compensation.

Management of affairs of Corporate Debtor (Sections 54H & 54J & Regulation 50)

- During the Pre-Packaged Insolvency Resolution Process, the management and Control of the Corporate Debtor continues to remain with Board of Directors/ partners of Corporate Debtor
- It is duty of Board of Directors/ partners of the Corporate Debtor to protect and preserve value and property and keep the corporate debtor as a going concern
- Promoters/ members/ personnel/ partners of the corporate debtor will discharge their rights and obligations in relation to corporate debtor as per provisions of chapter on PPIRP in IBC.
- Corporate Debtor prepares monthly report in consultation with Resolution Professional and submits to COC members
- Resolution Professional may visit Corporate Debtor's premises and inspect records/ assets
- Corporate debtor shall maintain separate accounts for PPIRP cost which will be operated by Resolution Professional (Regulation 8(2)). Resolution professional has no control over company's bank accounts.
- If Committee of Creditors (CoC) decides at any time with 66% or more votes in financial value, to vest the Corporate debtor's management with Resolution

professional, then Resolution professional will file an application with Adjudicating Authority for the purpose.

- Adjudicating Authority may order for vesting of management of corporate debtor in the Resolution professional if

  a. Affairs of the Corporate debtor are conducted by promoters in fraudulent manner

  b. There is gross mis-management of affairs of Corporate Debtor

In the situation when the control and management of the Corporate debtor has been vested with the Resolution professional as per order of adjudicating authority as mentioned above, the provisions about role of Interim Resolution professional/ Resolution professional as mentioned in sections 14(2), 14(2A), 17,18 (c, e, f, g),19,20,25(1), 25(2)-a, c, k and 28 shall apply mutatis mutandis.

Preliminary Information Memorandum (PIM)

- PIM submitted by the Corporate debtor to the Resolution Professional will contain the following:

  i. Details of Asset and liabilities

  ii. Latest Annual statements

  iii. Audited financial statements of last 2 years

  iv. Debt from/ to related parties

  v. List of claims of creditors

  vi. Guarantees given by others for debt of CD

  vii. All material litigations

  viii. List of Shareholder with stake of more than 1 per cent stake in the CD

  ix. No. of workers, employees & dues payable to them by CD

- Resolution professional will finalize Information memorandum (IM) and submit to COC members within 14 days of PPIRP commencement date, after obtaining an undertaking of confidentiality

Committee of Creditors (Section 54-I)

- Committee of creditors (COC) shall comprise of Financial Creditors (Not being related party). Quorum of COC shall be 33% of votes present in person or through video/audio.
- If there is no unrelated Financial Creditor , then top 10 Operational Creditors (OC) by value shall form COC along with one representative each from workmen and employees
- Resolution Professional is required to form COC within 7 days from the Pre-packaged Insolvency Commencement Date, on the basis of list of claims.
- Composition of COC shall change with admission of more claims but decisions taken in the past by previous COC will not be affected.
- First meeting of COC shall take place within 7 days from the date of its formation

Consideration of Resolution Plan (Section 54K)

- Within 2 days of PPIRP commencement date, the corporate debtor shall provide Base Resolution Plan to Resolution Professional who shall present it to COC
- Base resolution Plan (BRP) can be submitted alone or with other person.
- COC may approve BRP if interest of Operational Creditors is unimpaired or COC may advise Corporate Debtor to improve the BRP
- Or COC may also decide to invite alternate plans from Prospective Resolution Applicant (PRA). In that case, the Resolution Professional shall invite prospective plans and provide the basis of evaluation of Resolution Plan to PRAs. Resolution Professional shall place the Resolution plans received before the COC with matrix based evaluation to select best plan.
- The Base Resolution Plan or the Resolution plan shall confirm to the requirements under section 30 sub-sections 1 and 2 of IBC.
- List of contents of Resolution plan has been provided in Regulations 44, 45. A Resolution Plan shall provide for the measures, as may be necessary, for maximization of value of its assets.
- Mandatory contents of the Resolution Plan shall include:

  (*i*) An affidavit that resolution applicant is eligible to submit the resolution plan under the IBC

  (*ii*) An undertaking that every information and records provided is correct

  (*iii*) A resolution plan shall provide for its implementation schedule, management and control of business of CD during the term and adequate means for supervision and capability of resolution applicant for its implementation.

  (*iv*) A resolution plan shall demonstrate that it is feasible and viable and addresses the cause of default

  (*v*) A resolution plan shall include a statement as to how it has dealt with interest of all stakeholders including Financial creditors and operational creditors

- COC shall decide on Competition process between Base Resolution Plan and selected plan
- COC shall evaluate and approve best resolution plan by minimum 66% votes as per value of financial debt.
- Priorities under section 53(1) and feasibility and viability of resolution plan shall be considered.
- If interest of operational creditors is impaired as per the Resolution plan submitted by corporate debtor, COC may require promoters of

Corporate debtor to dilute stake in the company

- Resolution Professional shall file the COC approved resolution plan with Adjudicating Authority within 90 days of the PPIRP commencement date.
- If resolution plan is not approved by COC within 90 days of the PPIRP commencement date, Resolution professional shall file with Adjudicating Authority an application for termination of the PPIRP.

Approval of Resolution Plan (Section 54L & 54M)

- If Adjudicating Authority is satisfied that Resolution Plan submitted fulfills all the requirements of Section 30(2), it shall within 30 days of receipt of the Plan approve the same
- Adjudicating Authority (AA) shall look into the provisions of effective implementation of the Resolution Plan. If not satisfied, AA may reject the plan within 30 days of the receipt of the same.
- The plan approved by the Adjudicating Authority shall be binding on the Corporate Debtor , Directors, Partners, employees, creditors and all the stakeholders.
- In case of fraudulent management or mismanagement by Promoters, where the management has been vested with the Resolution Professional as per order of Adjudicating Authority under section 54J(2) and if the COC approved Resolution Plan does not result into change of control and management to a person who was not the promoter or in management, Adjudicating Authority shall reject the Resolution Plan, terminate the PPIRP and order for liquidation of the Corporate debtor.
- Appeal can be filed within 30 days from the date of the order to Appellant Authority under section 61(3) of IBC, on grounds of contravention of law, material irregularity by Resolution Professional during the PPIRP, non- safeguarding of interest of operational creditors and IRP cost not having been given with priority of payment.

Termination of PPIRP/ Initiation of CIRP (Sections 54N and 54-O)

- If resolution plan is not approved by COC within 90 days of the PPIRP commencement date, Resolution professional shall file with Adjudicating Authority an application for termination of the PPIRP.
- If COC decides with 66% of votes in financial value to terminate the CIRP process, the Resolution Professional shall file application with AA for such termination. The Adjudicating Authority shall, within 30 days, order for termination of PPIRP and shall appoint IRP with his consent. The PPIRP cost shall become part of CIRP cost.

- In case of fraudulent management or mismanagement by Promoters, where the management has been vested with the Resolution Professional as per order of Adjudicating Authority under section 54J(2) and if the COC approved Resolution Plan does not result into change of control and management to a person who was not the promoter or in management, Adjudicating Authority shall reject the Resolution Plan, terminate the PPIRP and order for liquidation of the Corporate debtor.

Penalty/ Punishment

- For fraudulent acts of Corporate Debtor or its officials, Adjudicating Authority may order penalty of not less than Rs. 1 lakh up to a maximum of Rs. 1 crore
- Other punishable actions include giving false information in application, false information on Claim and contravening the law
- Punishment may also include imprisonment upto 3 years

Forms to be used in PPIRP

- P1... Written consent of Insolvency Professional
- P2... List of Creditors to be given by Corporate Debtor
- P3... Approval for terms of appointment of IP including fees
- P4... Approval by Financial Creditors for initiating the PPIRP
- P5... Written consent to act as Authorized Representative (AR)
- P6... Declaration of the Directors/ Partners.
- P7... Declaration regarding PUFE/ avoidance transactions
- P8... Report by Insolvency Professional
- P9... Public announcement
- P10..List of Claims
- P11..Invitation of Resolution Plans
- P12..Compliance certificate by Resolution Professional to be filed with Adjudicating Authority along with COC approved Resolution Plan
- P13..Application for termination of PPIRP
- P14..Application for vesting of management with Resolution Professional

Limitation under the IBC Law

DR. SANJIV AGARWAL
FCA, FCS
Insolvency Professional

Background

The Insolvency Law Committee Report released in March, 2018 lays down the legislative intent behind the enactment of the IBC Code as "...*the introduction of this legislation was done with the aim of replacing the existing framework for insolvency, which was visibly inadequate, ineffective and wrought with delays.*"When a legislation that is a complete comprehensive Code in itself, there are bound to be overlaps and inconsistencies that it faces with other laws in the country. Since the Code is a special law that deals with the entirety of insolvency and bankruptcy law of the country and hence it does prevail over other laws. For practicality, the IBC Code holds within it a *non obstante* clause, i.e., Section 238 read with Section 14 of the Code that speaks of a moratorium being widely applicable have made the intent of the legislation clear in the sense of it superseding over all other legislations.

Non Obstante Clause

Section 238 of the IBC Code reads as follows:

> "The provisions of this 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."

Ever since the Code has sprouted into existence, there have been multiple clashes with other legislations. The conflicts ranged from there being inconsistencies with State Acts or there being inconsistencies with the Central Acts. For deciding of matters where there are conflicts between State Acts and the Code if the subject matter of both legislations is common. In such scenarios the doctrine of implied repeal shall be applicable.

In the case of *Innoventive Industries Ltd. v. ICICI Bank Ltd. (2017) 84 taxmann.com 320/143 SCL 625 (SC)*, the Apex court while discussing the prevalence of the Code over other state legislations held that, "*if the subject matter of the State legislation or part thereof is identical with that of the Parliamentary legislation, so that they cannot both stand together, then the State legislation will be said to be repugnant to the Parliamentary legislation. However, if the State legislation or part thereof deals not with the matters which formed the subject matter of Parliamentary legislation but with other and distinct matters though of a cognate and allied nature, there is no repugnancy.*"

This was iterated in the matter of *Duncans Industries Ltd. v. A. J. Agrochem (2019) 110 taxmann.com 131/156 SCL 478 (SC)* wherein Hon'ble Supreme Court was considering the issue of prevalence of the Code over the Tea Act, 1953. In the matter, initiation of insolvency proceedings were disputed on the ground that under the Tea Act, all organisations governed by it must obtain consent from the Central Government before winding up would be initiated. The issue in the instant case was whether consent of the Central Government under the Tea Act was required before initiation of proceedings under section 9 of the IBC Code. The Apex Court in the matter had upheld the supremacy of the Code over the special legislation as it was analysed that the same would be in line with the legislative intent of the IBC Code.

In *Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd. (2017) 88 taxmann.com 124/ (2018) 145 SCL 449 (Delhi)* Delhi High Court held that the proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the arbitral award in favour of the Corporate Debtor will not be set aside merely because moratorium declared by the Adjudicating Authority under section 14 of the IBC Code. Discussing the legislative intent of the Code once again, Delhi High Court found that the moratorium would not apply to proceedings that would be in favour of the Corporate Debtor. In the matter, if the arbitral award was stayed, the Corporate Debtor would be at a loss for not having recovered their dues. This matter brought to light a differing view on the interpretation of the non obstante clause wherein it held that the interpretation of section 238 should be beneficial to the Corporate Debtor and not strict, such that it does not hamper recovery of dues and enhances the maximisation of assets.

Limitation under IBC Law

Section 238A of the IBC Code reads as follows:

> "*The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be*"

The provision was inserted by virtue of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018. This in simple terms would mean that insolvency petitions cannot be admitted for time barred debts. On a plain reading of the provision, it is clear Section 238A of the

Code should apply the provisions of the Limitation Act, "*as far as may be.*" Therefore, where periods of limitation have been laid down in the Code itself, they will apply notwithstanding anything to the contrary contained in the Limitation Act.In the matter of *Sesh Nath Singh v. Baidyabati Sheoraphuli Co-Operative Bank Ltd. (2021) 125 taxmann.com 357/166 SCL 507 (SC)*, the Apex Court has already addressed this interpretation by holding that the phrase `as far as may be' means that the provisions of the Act would apply *mutatis mutandis* to proceedings under the Code in the Adjudicating Authority.

Over the years, the Supreme Court has laid to rest a lot of uncertainties emanating from the inception and interpretation of the Code. One of the major issues that has been landed is that of applicability of Limitation. The judgment of *B.K. Educational Services (P.) Ltd. v. Parag Gupta & Associates.(2018) 98 taxmann.com 213/150 SCL 293 (SC)* and *Vashdeo R. Bhojwani v. Abhyudaya Co-op. Bank Ltd. (2019) 109 taxmann.com 198/156 SCL 539 (SC)* have contributed majorly to laying to rest these concerns. In the *B.K. Educational Services (P.) Ltd.* (Supra) case the Apex Court held that if the default had occurred more than three years prior to the date of filing of application for initiation of insolvency, it would be barred under article 137 of the Limitation Act, 1963. This would not be applicable to cases where section 5 of the Limitation Act would be applicable leading to condonation of delay. This matter also clarified that Section 238A though procedural in nature, would have a retrospective effect.

In the case of *Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries (P.) Ltd.(2020) 118 taxmann.com 323 (SC)*, the Hon'ble Supreme Court while mentioning that the date that the IBC Code came into force, *i.e.*, on 01.12.2016, is irrelevant to the triggering of any limitation period for the purposes of the Code, held that the right to apply under the IBC accrues on the date when the default occurs. If the default had occurred over three years prior to the date of filing the application, the application would be time-barred, save and except in those cases where, on facts, the delay in filing may be condoned. The case also mentioned the extent to which Limitation Act, 1963 would apply to the IBC Code wherein it held that an application under section 7 of the IBC is not for enforcing mortgage liability and therefore article 62 of the Limitation Act would not apply to this application.

The abovementioned pronouncements decided on the issues of whether the Limitation Act, 1963 is applicable to the

IBC Code, the extent to which the Act will be applicable to the Code, whether continuous default of the debt amounts to continuing period of Limitation, whether the applicability will have a retrospective or a prospective effect on the Code.

On the applicability of section 18 of the Limitation Act to the IBC Code, Section 18 of the Limitation Act, 1963 states as follows:

> "18. Effect of acknowledgement in writing.—
>
> (1) Where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.
>
> (2) Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received."

The Apex Court in *Laxmi Pat surana v. Union Bank of India (2021) 125 taxmann.com 394/166 SCL 318* decided in March 2021 held that Section 18 of the Limitation Act will be applicable to the Code. The Apex Court also went on to say how entries in a balance sheet may amount to an acknowledgement of debt for the purposes of section 18 of the Limitation Act. Apex Court directed that a fresh period of limitation be computed from the date of acknowledgement of a debt by the principal borrower and/or the corporate guarantor, including the last communication dated December 8, 2018. Resultantly, the application of the FC under section 7 of the IBC was found to be within the limitation by granting the benefit of exclusion of time under section 18 of the Act.

Recently, on 22 March 2021, the Supreme Court in *Sesh Nath Singh* (Supra) whether a financial creditor could have initiated proceedings under the Code seven years after the debt become due, when the delay was justified under previous proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI). In this instance, the application of provisions of Section 14 of the Limitation Act to the Code was discussed. section 14 of Limitation Act talks of exclusion of the time spent in *bona fide* proceeding in a court without jurisdiction, for the purpose of computing the limitation period. This matter answered two fold concerns, *i.e.*, one being of applicability of section 14 of Limitation Act to section 7 proceedings under the Code and the other being whether the proceedings under SARFAESI would be considered to be civil proceedings to attract the applicability of said section 14.

While drawing parallels with Arbitration and Conciliation Act, 1996, the Apex Court reasoned that section 238A of the Code provides for the application of the provisions of the Limitation Act, `as far as

may be', and in the absence of an express provision excluding the application of section 14 of the Act to the Code, there is no reason why section 14 must not be applicable to it. The Hon'ble Court while adopting the principle of harmonious interpretation between the object of the Code and its intent, concluded that any or all provisions of the Limitation Act shall apply to the proceedings before the Adjudicatory Authority under the Code only to the extent that they are not 'patently inconsistent' with the provisions and the intent of the Code. Following the same line of thought and reasoning where the intent of the legislation is granted supremacy over its literal interpretation, the Supreme Court held that the expression 'court' in Section 14(2) must be interpreted liberally, and would be deemed to be any forum for a civil proceeding including any tribunal or any forum under the SARFAESI.

In *Chand Prakash Mehra v. Praveen Bansal, IRP of Silverton Spinners Ltd. (2022) 134 taxmann.com 28/169 SCL 536 (NCLAT- New Delhi),* it was held that CIRP application filed within three years of letter of corporate debtor clearly acknowledging its debt liability, was well within limitation period and not barred by limitation Act, 1963 The Appellate Tribunal observed that section 238 provides that the Code applies notwithstanding anything in-consistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Keeping this provision in view, section 7 of IBC which provides that financial creditor either by itself or jointly with other financial creditors or any other person on behalf of finance creditor as may be notified by the Central Bank may file an application for initiating corporate Insolvency Resolution Process against a corporate debtor before the Adjudicating Authority when a default has occurred. Further, if the Lead Bank for any reason does not take steps or fails to take steps, the other Banks in the consortium cannot be left high and dry without any remedy, as Limitation Act does not differentiate on such count.

In *BSE Ltd. v. KCCL Plastic Ltd. (2022) 135 taxmann.com 176/170 SCL 584 (NCLAT-New Delhi),* listing fee to Bombay stock exchange was due from corporate debtor. On the nature of dues, it was held that listing fees is a regulatory due and not an operational debt and cannot be recovered under 'operational debt'. As per the Listing Agreement, the respondent was obliged to pay the requisite Annual Listing Fees on or before the 30th day of April, every year. The Adjudicating Authority had given finding that debt fell due on 01.04.2015 as admitted by the petitioner, hence the application filed under section 9 is barred by limitation. It was held that listing fees comes under the ambit of 'regulatory dues' which SEBI is entitled to recover. The respondent being an entity registered under SEBI was under an obligation to follow the Regulations prescribed by SEBI for recovery of its dues. The dues so said are not 'Operational Dues' but 'Regulatory Dues'. The Insolvency Law Committee suggests that Regulatory Dues are not to be recovered under 'Operational Debt'.

Epilogue

The applicability of provisions of Limitation Act, 1963 to the IBC Code, 2016 is inverse to the objective of the Code to

be a comprehensive piece of legislation. However, the insertion of Section 238A and the interpretation of the applicability in the aforementioned judgments has made it unequivocally clear that the provisions of Limitation Act will be attracted under applications made under the Code. However, the issues arising in the case-to-case basis, issues based on differing facts and circumstances of the case, issues of applicability of sections 19 and 14 of the Limitation Act, 1963 still being ambiguous, has made it clear that the interplay and the interpretation of the provisions of both Limitation Act and the Code, is far from over.

•••

(2022) 141 taxmann.com 320 (NCLT - Chennai) (SB)

NATIONAL COMPANY LAW TRIBUNAL, CHENNAI BENCH (SPECIAL BENCH)

Tulip Trade Link *v.* **Harsha Exito Engineering (P.) Ltd.**

S. RAMATHILAGAM, JUDICIAL MEMBER AND

SAMEER KAKAR, TECHNICAL MEMBER

IA (IBC)/640/CHE/2021 IBA/471/2020

JULY 8, 2022

Section 5(8) of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Whether term financial debt denotes a debt along with interest, which is disbursed against consideration for time value of money - Held, yes - Applicant as financial creditor had filed a claim in Form-C to Resolution Professional (RP) for amount advanced to corporate debtor along with interest - RP rejected claim of applicant in capacity as financial creditor in respect of corporate debtor on ground that claim amount was not based on any valid loan agreement and there was no satisfactory evidence to establish intention to pay it as financial debt - It was found that applicant had placed on record a letter from banker evidencing that money had been transferred by way of RTGS to corporate debtor - However, there was no document placed on record to show as to what interest was agreed between parties and applicant had also not attached FORM 26AS in order to prove that it had deducted TDS - Whether amount had been disbursed to corporate debtor, however, applicant had miserably failed to establish that said debt would qualify as financial debt - Held, yes - Whether since, there was no dispute between parties that amount was received through banking channel, claim of applicant was to be admitted under category of other creditors - Held, yes (Paras 23 to 25)

FACTS

- The applicant was in the business of lending for micro, small and medium business enterprises having office at Chennai. During the year 2019 in the due course of business, the corporate debtor's managing director BD got acquainted with the applicant. The said BD was looking for funding for his company, as his business was reeling in debts lent by banks and other creditors and sought funds from the applicant to a tune of Rs. 2.50 crores.
- According to applicant, the first tranch of Rs. 26 lakhs was paid as on 3-10-2019 as a consideration for the time value of money viz. interests, through the applicant company to which the corporate debtor acknowledged the same. Thereafter an amount of Rs. 2.18 crores was loaned to corporate debtor company vide company's sister concern and an email was caused by the finance manager of corporate debtor which evidenced the amounts received from the applicant company and the interest accrued.
- The applicant sent a claim in Form-C to the Resolution Professional for an amount of Rs. 43.51 lakhs being the principle of Rs. 26 lakhs and interest for 18 months viz Rs. 17.51 lakhs at the rate of 36 per cent per annum.
- The Resolution Professional had replied to the claim form rejecting the claim by stating that the claim amount was not based on any valid loan agreement and no satisfactory evidence was furnished to establish the intention to pay it as a financial debt.
- The applicant filed an application under section 60 before NCLT to set aside rejection order passed by Resolution Professional.

HELD

- From the submissions made it could be seen that the RP has rejected the claim of the applicant in the capacity as the financial creditor in respect of the corporate debtor on the ground that claim amount is not based on any valid loan agreement. No satisfactory evidence furnished to establish the intention to pay it as a financial debt. (Para 20)
- It could be seen that the applicant has not placed on record any financial contract in order to substantiate the claim filed before the RP. Further, from the submissions made it could be seen that there is no contract/agreement entered into between the parties for the disbursement of the said loan to the corporate debtor. (Para 21)
- It could be seen that the term financial debt denotes a 'debt' along with interest, which is disbursed against the consideration for the time value of money. In the present case, the amount has been disbursed to the corporate debtor, however there is no document placed on record to show as to

what is the interest which is agreed between the parties. (Para 23)

- Thus, it could be seen that the applicant himself has left it to the discretion of this Tribunal to fix the rate of interest, which itself shows that there is no rate of interest agreed between the parties. Further, the applicant has also not attached the Form 26AS in order to prove that they have deducted TDS. It could be seen that the applicant has placed on record a letter from its banker viz. Bank of Baroda which states that a sum of Rs. 26 lakhs has been transferred by way of RTGS to the corporate debtor. Thus, the amount has been disbursed to the corporate debtor, however the applicant has miserably failed to establish that the said debt would qualify as 'financial debt'. (Para 24)

- It could be seen that there is no dispute between the parties that the amount was received through banking channel. In the said circumstances, the respondent is directed to admit the claim of the applicant to the tune of Rs. 26 lakhs without interest, under the category of 'other creditors'. (Para 25)

CASES REFERRED TO

Hindustan Infrastructure Construction Corpn. Ltd. v. *R.S. Woods International* (CRP No. 19 of 2018, dated 13-12-2018) (para 18) and *Afsal Baker* v. *Maya Printers* (CRP No. 640 of 2015, dated 25-9-2015) (para 18).

E. Om Prakash, Sr. Adv. and **Harish Chowdary**, Adv. *for the Applicant.* **S.R. Raghunathan**, Sr. Adv. *for the Respondent.*

ORDER

Sameer Kakar, Technical Member. - This is an application filed under section 60 (5)(*c*) of the Insolvency and Bankruptcy Code, 2016 seeking relief as follows:

"(*i*) To set-aside the rejection passed by the resolution professional dated 25-4-2021

(*ii*) To direct the resolution professional to re-verify the books of the Corporate Debtor and admit the amount claimed Rs. 26,00,000/- exclusive of interest as the same shall be as fixed by this Tribunal.

(*iii*) To induct the Applicant as Financial Creditor in the Committee of Creditors.

(*iv*) To pass any such order deem fit and proper in the interest of justice."

2. It is averred in the Application that the Applicant is in the business of lending for micro, Small & Medium business enterprises having office at Chennai. It was submitted that during the year 2019 in the due course of business, the Corporate Debtor's managing director Mr. B. Dhanraj got acquainted with the Applicant through SMS Foundation & Investments LLP designated partner Mr. Sanjay Kumar P Shah.

3. It was further averred in the Application that Mr. Dhanraj was looking for funding for his company, Harsha Exito Engineering Pvt. Ltd., as his business was reeling in debts lent by banks and other creditors

and sought funds from the Applicant to a tune of Rs. 2,50,00,000/- (Rupees Two Crore & Fifty Lakhs Only).

4. It was submitted that Mr.Dhanraj persisted that his company also facing cases before this Tribunal by one Operational Creditor namely, Kapil Agencies, Manali, and Chennai in IBA/981/2019. The Suspended Director also insisted that upon receipt of the funds, he was ready and willing to pay interest on a quarterly basis and repay the entire amounts after successfully coming out of the litigations and NPA's.

5. It was submitted that on 3-10-2019, based on the discussion with Mr. B. Dhanraj, the Operational Creditor counsel was instructed to take time before this Tribunal and the same was accorded by this Tribunal and re-posted to 16-10-2019. Pursuant to the extension granted by this Bench, the first tranche of Rs. 26,00,000/- was paid as on 3-10-2019 as a consideration for the time value of money *viz.* interests, through the Applicant company to which the Corporate Debtor acknowledged the same.

6. It was submitted that on 16-10-2019, it was informed to the applicant company that part amount had been paid to the Operational Creditor Kapil Agencies and it was informed to the operational creditor to take further time on account of filing settlement terms before this Tribunal. Accordingly, on 16-10-2019, this Tribunal was pleased to call the matter and again on 23-10-2019 for reporting settlement.

7. It was submitted that Mr. Dhanraj was insisting the Applicant to transfer balance funds, however it was submitted that the applicant has withheld and has stated that a Settlement is required to be arrived at between the parties and the matter is also required to be disposed of. Accordingly, on 23-10-2019 a memorandum was filed for withdrawal of the case from the file of this Tribunal and accordingly an order was passed with liberty to file fresh in the event the Corporate Debtor failed to pay in accordance with the settlement arrived between parties.

8. It was submitted that believing the words of Mr. B. Dhanraj the Proceedings was closed before this Tribunal and an amount of Rs. 2,17,50,000/- was loaned to the Corporate Debtor Company *vide* the company's sister concern and a separate Application in this regard has been filed. It was submitted that on 8-1-2020, an e-mail was caused by the finance manager of Corporate Debtor with attachment on the confirmation of accounts from 1-8-2019 to 31-12-2019 which evidenced the amounts received from the applicant company and the Interest accrued as on 31-12-2019 which stated a closing balance of Rs. 28,28,230/- being the principle as Rs. 26,00,000/- and interest on Loan as Rs. 2,28,230/-.

9. It was further submitted that it was informed to the Applicant by SMS Foundation and Investments LLP partner Mr. Sanjay Kumar P Shah that Kapil Agencies had pursued the closed IBA against the Corporate Debtor for not honouring the settlement terms in IBA/471/2020 before this Tribunal and the order came to be passed on 24-3-2021.

10. Pursuant to the order, a claim in Form-C as financial creditor was sent to the Resolution professional as on 15-4-2021 for an amount of Rs. 43,50,593/- being the

principle of Rs. 26,00,000/-and interest for 18 months *viz.* Rs. 17,50,593/- at the rate of 36% p.a.

11. That the resolution professional had replied to the claim form rejecting the claim by stating that "Claim amount is not based on any valid loan agreement. No satisfactory evidence furnished to establish the intention to pay it as a financial debt". Aggrieved by the said decision, the Applicant has preferred the present Application before this Tribunal.

COUNTER FILED BY THE RP:

12. The Learned Counsel for the Respondent had filed a counter wherein it was stated that the Applicant is not a company as presented in the application. It is an unregistered partnership firm cannot file a suit in a court of law as per provisions of section 69(3) of Indian Partnership Act, 1932.

13. Further it was averred in the counter that it is not known whether an unregistered partnership firm could provide funds to the tune of Rs. 2,50,00,000/- to one single Company. As per section 73 of the Companies Act, 2013 a Private Limited Company cannot obtain unsecured loans from a partnership firm. Section 2(*c*) of the Companies (Acceptance of Deposits) Rules, 2014 prescribes that any money received by a company would come under the category of deposit only.

14. The main bone of contention of the Respondent is that there was no payment received by the Corporate Debtor form the Applicant and the books of account do not have ledger Account in the name of the applicant, Tulip Trade Link.

15. It was submitted by the learned counsel for the Respondent that the claim submitted in Form C is not supported by proper documentary evidence required to accept the claim. The applicant failed to submit the documentary evidences as required under regulation 8(2)(*a*) and 8(2)(*b*). He has not furnished any financial contract or loan agreement as evidence. Therefore, the claim filed by the applicant was not admitted. Further it is to be observed that no payment was received by the Corporate Debtor from the applicant. Therefore, the claim submitted by the applicant is a false claim. The last limb of argument of the Respondent is that the Applicant has no '*locus standi*' as there is no contract of loan or loan agreement between the applicant and the Corporate Debtor.

REJOINDER FILED BY THE APPLICANT:

16. The learned Counsel for the Respondent had filed a rejoinder to the Counter filed by the Respondent. The Respondent had countered the Application primarily of two grounds amongst other vexatious denials. One being that the unregistered partnership firm cannot file a suit in a court of Law as per section 69(3) of the Indian Partnership Act, 1932. The other being that there was No Entry in the books of account of the corporate debtor to the effect that any amount was paid by the Applicant. The Applicant has refuted that the first ground that the Respondent had cited an irrelevant sub-section as per the Indian Partnership Act which is not applicable to the present application.

17. Further it was submitted that from the Bank Accounts filed by the Applicant in Annexure-IV of the Applicants paper

book shows clearly that the amounts were transferred from bank of Baroda account to bank account of the Corporate Debtor and not paid by cash. The fact of transfer of funds are confirmed by the corporate debtor by way of confirmation of balance E-mail dated 30-12-2019 annexed at Annexure VII of the Applicants paper book.

18. With regard to the issue raised by the Respondent that whether the Applicant has locus to file the present application before this Tribunal under section 69(2) of the Indian Partnership Act, 1932 which is well established in the judgment rendered by Hon'ble Delhi High Court while dismissing a revision filed in *Hindustan Infrastructure Construction Corpn. Ltd.* v. *R.S. Woods International* (CRP No. 19 of 2018, dated 13-12-2018) wherein it was held that the Enforcement of Liability of the Applicant under Insolvency and bankruptcy code as the cause of Action for this Application is based on the Rejection of the Claim by the Insolvency Resolution Professional and since the Application is not basis on any contract between parties the Bar under section 69 (2) of the Act would not Apply. The Judgment cited *supra* is following a predeceased judgment by the Hon'ble Kerala High Court in *Afsal Baker* v. *Maya Printers* (CRP No. 640 of 2015, dated 25-9-2015).

19. It is clear the Bar is only against a suit arising out of disputes that are Civil and triable in nature and that the present Application is not a suit as contemplated under the Civil procedure code and hence the present application is maintainable.

FINDINGS OF THIS TRIBUNAL:

20. We have heard the submissions made by the Learned Counsel for both the parties. From the submissions made it could be seen that the RP has rejected the claim of the Applicant in the capacity as the Financial Creditor in respect of the Corporate Debtor on the following ground;

> "Claim amount is not based on any valid loan agreement. No satisfactory evidence furnished to establish the intention to pay it as a financial debt".

21. It could be seen that the Applicant has not placed on record any financial contract in order to substantiate the claim filed before the RP. Further, from the submissions made it could be seen that there is no contract/agreement entered into between the parties for the disbursement of the said loan to the Corporate Debtor.

22. As per the definition of the expression 'financial debt' in sub-section (8) of section 5 of IBC, 2016 which is as follows:—

(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes-

(*a*) money borrowed against the payment of interest;

(*b*) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(*c*) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(*d*) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(*e*) receivables sold or discounted other than any receivables sold on non-recourse basis;

(*f*) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

Explanation. -For the purposes of this sub-clause, -

(*i*) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(*ii*) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (*d*) and (*zn*) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(*g*) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(*h*) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(*i*) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (*a*) to (*h*) of this clause;

23. It could be seen that the term financial debt denotes a 'debt' along with interest, which is disbursed against the consideration for the time value of money. In the present case, the amount has been disbursed to the Corporate Debtor, however there is no document placed on record to show as to what is the interest which is agreed between the parties. At this juncture, the relief (*b*) as sought by the Applicant is extracted hereunder;

"*b*. To direct the resolution professional to re-verify the books of the Corporate Debtor and admit the amount claimed Rs. 26,00,000/- exclusive of interest as the same shall be as fixed by this Tribunal"

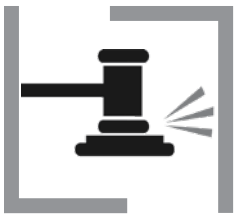
(Emphasis Supplied)

24. Thus, it could be seen that the Applicant himself has left it to the discretion of this Tribunal to fix the rate of interest, which itself shows that there is no rate of interest agreed between the parties. Further, the Applicant has also not attached the Form 26AS in order to prove that they have deducted TDS. It could be seen that the Applicant has placed on record a letter from its banker *viz.* Bank of Baroda which states that a sum of Rs. 26,00,000/- (Rupees Twenty-Six Lakh) has been transferred by way of RTGS to the Corporate Debtor. Thus,

the amount has been disbursed to the Corporate Debtor, however the Applicant has miserably failed to establish that the said debt would qualify as 'financial debt'.

25. It could be seen that there is no dispute between the parties that the amount was received through banking channel. In the said circumstances, we hereby direct the Respondent to admit the claim of the Applicant to the tune of Rs. 26,00,000/- without interest, under the category of 'other creditors'.

26. With the above said directions, this Application stands disposed of.



(2022) 141 taxmann.com 337 (NCLT - Kolkata)

NATIONAL COMPANY LAW TRIBUNAL, KOLKATA BENCH

Bank of India *v.* **Sri Balaji Forest Products (P.) Ltd.**

ROHIT KAPOOR, JUDICIAL MEMBER

AND HARISH CHANDER SURI, TECHNICAL MEMBER

I.A. NO. 742/KB/2020 CP (IB) NO. 518/KB/2018

JULY 4, 2022

Section 49, read with section 66, of the Insolvency and Bankruptcy Code, 2016 and section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Corporate liquidation process - Transactions defrauding creditors - Applicant/Resolution Professional filed instant application alleging that respondent Nos. 1 and 2, suspended board of directors of corporate debtor, on behalf of corporate debtor entered into a grossly undervalued transaction wherein, under garb of lease deed, all plant and machinery of corporate debtor along with land was leased to respondent No. 3 for a meagre amount and, thus, prayed for a declaration that execution of lease deed was in nature of transaction as described in section 45 and said lease deed be declared null and void and cancelled in terms of section 49 - It was found that applicant had successfully shown that lease deed was grossly undervalued to detriment of creditors of corporate debtor and entire business of corporate debtor had been transferred to a related party to corporate debtor, being respondent No. 3 - Further, applicant had also been able to show that said lease deed itself was grossly fraudulent, illegal and void ab initio inasmuch as same had been executed after issuance of notice under section 13(2) of SARFAESI Act, 2002 - Whether therefore, lease deed having been executed fraudulently and being grossly undervalued was to be set aside - Held, yes (Paras 39 to 41)

Section 43 of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Preferential transactions and relevant time - Applicant/Resolution Professional challenged numerous related party transactions with respondent Nos. 6 and 7 - It was found that there was no justification for transactions entered into with related parties within look back period - Whether in absence of justifications said transactions fell within ambit of section 43 and accordingly, respondent Nos. 6 and 7 were to be directed to make payments of Rs. 11.10 lakhs and Rs. 5.50 lakhs respectively for being related party preferential transactions under section 43 - Held, yes (Para 42)

Section 66 of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Fraudulent or wrongful trading - Applicant/Resolution Professional alleged that brand name owned

and used by corporate debtor was also being used by respondent No. 3 without any license/right to use such brand - Whether in absence of any valid agreement assigning trademark of corporate debtor in favour of respondent No. 3, respondent No. 3 was to be restrained from using property of corporate debtor - Held, yes (Para 43)

FACTS

- The Respondent Nos. 1 and 2 were suspended board of directors of the corporate debtor. As the suspended board of directors refused to co-operate with the applicant/ resolution professional and hand over documents, assets and information pertaining to corporate debtor, applicant instituted an application under section 19 and the Adjudicating Authority directed the suspended board of directors to hand over custody of all assets, liabilities, and books of account to the applicant.

- Despite directions as above having been passed, the suspended board of directors did not co-operate and accordingly by an order, the Adjudicating Authority *suo motu* issued show-cause notice for initiation of contempt proceedings against the suspended board of directors of corporate debtor, being respondent Nos. 1 and 2 herein.

- However, respondents, having given numerous opportunities had purposely not filed any response to the serious allegations levelled against them. It was only respondent No. 3 who belatedly filed its reply without substantiating any cogent reasoning for the purported lease deed dated 30-11-2016 executed by the corporate debtor in favour of respondent No. 3 by which all land, plot and machinery had been leased by the corporate debtor to respondent No. 3.

- The RP filed an application under sections 43 and 45, read with section 49 and sections 66 and 60(5) seeking various reliefs under section 49 and section 66 which was dismissed on preliminary issues.

- The RP challenged order of Adjudicating Authority before the Appellate Tribunal which allowed the said appeal of the Resolution Professional and broadly returned the following conclusions:

  a. The timeline prescribed in regulation 35A of CIRP Regulations is directory and not mandatory;

  b. For transactions defrauding creditors and fraudulent trading or wrongful trading as under section 66 the timeline prescribed under section 46 is not applicable; and

  c. There are express pleadings of fraud in the application. Thus, the application contained the allegations which were falling both under sections 43, 45 and sections 49, 66 and insofar as the allegations referable to

sections 49, 66 the timeline prescribed under section 46 were not attracted.

- In light of final judgment passed by the NCLAT New Delhi in *Aditya Kumar Tibrewal v. Om Prakash Pandey* (2022) 138 taxmann.com 433 the present application had been revived. In present application the RP alleged that respondent Nos. 1 & 2, suspended board of directors of corporate debtor, on behalf of corporate debtor entered into a grossly undervalued transaction wherein, under garb of alleged lease deed, all plant and machinery of corporate along with land was leased to respondent No. 3 for a meagre amount and thus prayed for a declaration that execution of lease deed was in the nature of transaction as described in section 45 and hence the lease deed executed on 30-11-2016 be declared as cancelled, null and void in terms of section 49 or such other relevant provisions. In addition to the above, the applicant/Resolution Professional had also challenged numerous related party transactions with respondent No. 6 and respondent No. 7. It had been further been contended by the applicant/ Resolution Professional that the brand name 'AEON', owned and used by corporate debtor was also being used by respondent No. 3 without any license/right to use such brand.

HELD

- From the documents made available in the application and subsequent pleadings, the applicant/resolution professional has successfully shown that the lease deed dated 30-11-2016 is grossly undervalued to the detriment of the creditors of the corporate debtor. Furthermore, by virtue of the said lease deed dated 30-11-2016, the applicant/ Resolution Professional has also been successful to show that the entire business of the corporate debtor has been transferred to a related party to corporate debtor, being respondent No. 3. (Para 39)

- Without even considering the aforesaid facts, the applicant/ resolution professional has been successful in showing that the lease deed dated 30-11-2016 itself is grossly fraudulent, illegal and void ab initio inasmuch as the same has been executed after the issuance of the notice under section 13(2) of the SARFAESI Act, 2002. (Para 40)

- The above facts clearly demonstrate that the lease deed dated 30-11-2016 has been executed fraudulently and is grossly undervalued in order to defraud the creditors of corporate debtor and accordingly such act of respondents is liable to be prosecuted under section 45, section 49 and section 66. Accordingly, the lease deed dated 30-11-2016 is set aside by the Adjudicating Authority in light

of the powers conferred under section 45, section 49 read with section 66. (Para 41)

- In addition to the above, the respondent Nos. 6 and 7 have failed to appear and/or place their submissions before the Adjudicating Authority. In the absence of any justification to the transactions entered into with related parties, being respondent Nos. 6 and 7 within the look back period, the said transactions fall under the ambit of section 43 and accordingly, respondent Nos. 6 and 7 are hereby directed to make payments of Rs. 11.10 lakhs and Rs. 5.50 lakhs respectively for being related party preferential transactions under section 43. (Para 42)

- With respect to the reliefs sought pertaining to infringement of trademark, this Adjudicating Authority refuses to interfere in disputes arising out of Intellectual Property Rights. However, it is made clear that in the absence of any valid agreement assigning the trademark of corporate debtor in favour of respondent No. 3, the respondent No. 3 is hereby restrained from using the property of the corporate debtor. (Para 43)

- In light of the aforesaid, the present application is allowed in terms of the directions aforestated and the respondent Nos. 3 to 5 are hereby directed to handover peaceful, vacant, undisturbed and unhindered access to the plant, factory, land, building, shed and premises located within the 17.25 acre of land to the resolution professional/applicant. (Para 44)

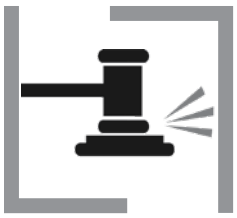
- The application is therefore disposed off in terms of the directions aforestated. (Para 45)

CASES REFERRED TO

Aditya Kumar Tibrewal v. *Om Prakash Pandey* (2022) 138 taxmann.com 433 (NCLAT - New Delhi) (para 3), *Revenue Divisional Officer, Kurnool District* v. *M. Ramakrishna Reddy* (2011) 11 SCC 648 (para 16), *Mannalal Khetan* v. *Kedar Nath Khetan* AIR 1977 SC 536 (para 18), *GE Power India Ltd.* v. *NHPC Ltd.* (2020) 119 taxmann.com 158 (Delhi) (para 26), *Dy. Director, Directorate of Enforcement* v. *M.K. Patel Exim (P.) Ltd.* (OC No. 1473 of 2021, dated 6-12-2021) (para 34), *Directorate of Enforcement* v. *Manoj Kumar Agarwal* (2021) 126 taxmann.com 210/168 SCL 433 (NCL-AT) (para 34), *Mahanivesh Oils & Foods (P.) Ltd.* v. *Directorate of Enforcement* AIR 2016 Delhi 54 (para 34) and *Mannalal Khetan* v. *Kedarnath Khetan* AIR 1977 SC 536 (para 40).

Joy Saha, Sr. Adv., **Sidhartha Sharma, Ms. Shalini Basu,** Advs., **Aditya Kumar Tibrewal, R.P., Siddhartha Sharma, Ms. Mousumi Dey, Ms. Jayati Chowdhury, Ms. Ranjana Seal** and **Jitendra Patnaik,** Advs. *for the Appearing Parties.*

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 141 taxmann.com 337 (NCLT - Kolkata)



(2022) 141 taxmann.com 316 (NCLT - Indore)

NATIONAL COMPANY LAW TRIBUNAL, INDORE BENCH

Teena Saraswat Pandey, RP of Rajpal Abhikaran (P.) Ltd., *In re*

MADAN BHALCHANDRA GOSAVI, JUDICIAL MEMBER AND KAUSHLENDRA KUMAR SINGH, TECHNICAL MEMBER

IA/12 (MP.) 2022 CP(IB) 6 OF 2020

JULY 1, 2022

Section 25, read with section 31, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution professional - Duties of - CIRP against Corporate debtor was admitted and Interim Resolution Professional (IRP)/ RP was appointed - Resolution plan submitted by successful resolution applicant was approved by CoC and had been submitted before Adjudicating Authority for approval under section 30(6) - Suspended management filed their objections to application for approval on ground that they being participant of CoC meetings were never provided with copies of resolution plan placed before CoC, which was against provisions of Code - Whether suspended management must be provided with copy of resolution plan, however, Resolution Professional can take an undertaking from members of erstwhile Board of Directors to maintain confidentiality - Held, yes - Whether Resolution Professional was to be directed to provide resolution plans to suspended management and then convene a meeting of CoC and CoC would deliberate on resolution plans afresh - Held, yes - Whether time utilized in these proceedings was be excluded from period of resolution process of corporate debtor - Held, yes (Paras 6, 8 and 9)

CASE REVIEW

Vijay Kumar jain v. *Standard Chartered Bank* (2019) 102 taxmann.com 14/152 SCL 56 (SC) (para 6) *followed*.

CASES REFERRED TO

Vijay Kumar Jain v. *Standard Chartered Bank* (2019) 102 taxmann.com 14/152 SCL 56 (SC) (para 4).

Madhav Lahoti, Ld. Adv., **Ms. Teena Saraswat Pandey**, Ld., **Rashesh Sanjanwala**, Ld. Sr. Adv. and **Nilesh P. Udernani**, Ld. Adv. *for the Appearing Parties.*

ORDER

1. This application under section 30(6) read with section 31 of Insolvency & Bankruptcy Code, 2016 (IBC, 2016) is filed by the applicant Ms. Teena Saraswat Pandey- Resolution Professional of the corporate debtor- Rajpal Abhikaran Private Limited for approval of the Resolution Plan submitted by Agarwal Real City Private Limited.

2. The Corporate Debtor was admitted in the Corporate Insolvency Resolution Process ("CIRP") on 26-3-2021. Ms. Teena Saraswat Pandey was appointed as Interim

Resolution Professional (IRP), who made public announcement of CIRP of the Corporate Debtor and called upon its creditors to submit claims with requisite proof.

3. The brief submissions made by the applicant are as under:

(*i*) The IRP formed the Committee of Creditors ("COC") consisting of the following financial creditors having voting percentage right as stated below:

Sl. No.	*Name of Financial Creditor*	*% Voting Share*
(*i*)	State Bank of India	23.24%
(*ii*)	Volark Auto Private Limited	1.61%
(*iii*)	Suraksha ARC	42.36%
(*iv*)	AU Small Finance Bank Limited	12.45%
(*v*)	Sundaram Finance Limited	0.63%
(*vi*)	Shri Ram City Union Finance Limited	7.98%
(*vii*)	Toyota Financial Services India limited	11.12%
(*viii*)	PPG Asian Paints Private Limited	0.60%

(*ii*) During the CIRP of the corporate debtor, the CoC received two resolution plans in pursuance of the publication of Form-G dated 5-6-2021, however pursuant to reissue of the Form-G dated 2-10-2021 CoC received 5 resolution plans. The plans were discussed on 6-12-2021, 7-12-2021 and 8-12-2021 in the 16th COC meeting and e-voting was done on 14-12-2021;

(*iii*) The members of the CoC in its 17th meeting dated 17-12-2021 were informed that Agarwal Real city Private Limited is declared as successful resolution applicant with 90.41% votes as per the e-voting result and hence, the resolution plan submitted by the successful resolution applicant has been submitted before the Adjudicating Authority for approval under section 30(6) of the IBC, 2016. The liquidation value and fair value of the corporate debtor is reported at Rs. 18,39,91,863/- and Rs. 23,22,47,203/- respectively;

4. The supended management filed their objections to the present application. One of the objection placed by the suspended management is that the suspended management being the participant of the CoC meetings was never provided with the copies of the resolution plan placed before the CoC which is against the provisions of the Code. Reliance is placed on the judgment passed by Hon'ble Supreme Court in the matter of *Vijay Kumar Jain* v. *Standard Chartered Bank* (2019) 102 taxmann.com 14/152 SCL 56.

5. However, resolution professional through its reply dated 21-5-2022, replied to the objections of the suspended management; the reply to the said objection is reproduced below:

> "2. In the present case, in the 4th CoC meeting dated 3-7-2021, wherein the suspended management along with

other members were informed about the procedure of obtaining data/ documents of the company , RP stated in the meeting that she will create a data room where IM/all data of the company will be uploaded and access will be provided to those who will submit the confidentiality undertaking. Needless to mention that RP kept reiterating in various meetings that undertaking is required for obtaining any data of the company….."

6. We have heard the learned counsels for the resolution professional and the suspended board of management and perused the documents available on record. It appears that it is undiputed fact that the copy of resolution plan has not been provided to the suspended management. Further the law has been well settled by the Hon'ble Supreme Court in the case of *Vijay Kumar Jain* (*supra*) in the following words:

"13. It is also important to note that every participant is entitled to a notice of every meeting of the committee of creditors. Such notice of meeting must contain an agenda of the meeting, together with the copies of all documents relevant for matters to be discussed and the issues to be voted upon at the meeting *vide* Regulation 21(3)(*iii*). Obviously, resolution plans are "matters to be discussed" at such meetings, and the erstwhile Board of Directors are "participants" who will discuss these issues. The expression "documents" is a wide expression which would certainly include resolution plans.

14. Under Regulation 24(2)(*e*), the resolution professional has to take a roll call of every participant attending through video conferencing or other audio and visual means, and must state for the record that such person has received the agenda and all relevant material for the meeting which would include the resolution plan to be discussed at such meeting. Regulation 35 makes it clear that the resolution professional shall provide fair value and liquidation value to every member of the committee only after receipt of resolution plans in accordance with the Code (see regulation 35(2)). Also, under Regulation 38(1)(*a*), a resolution plan shall include a statement as to how it has dealt with the interest of all stakeholders, and under sub-clause 3(*a*), a resolution plan shall demonstrate that it addresses the cause of default. This Regulation also, therefore, recognizes the vital interest of the erstwhile Board of Directors in a resolution plan together with the cause of default. It is here that the erstwhile directors can represent to the committee of creditors that the cause of default is not due to the erstwhile management, but due to other factors which may be beyond their control, which have led to non-payment of the debt. Therefore, a combined reading of the Code as well as the Regulations leads to the conclusion that members of the erstwhile Board of Directors, being vitally interested in resolution plans that may be discussed at meetings of the committee of creditors, must be given a copy of such plans as part of "documents" that have to be furnished along with the notice of such meetings."

7. In view of the above, the suspended management must be provided with the copy of the resolution plan. However,

the resolution professional can take an undertaking from members of the erstwhile Board of Directors to maintain confidentiality. In the present case, the reply of resolution professional to the objection of the suspended management, states about the 4th CoC meeting, wherein the procedure to obtain the data was informed; the said relevant part of the 4th CoC meeting is reproduced below:

> "Item NO 5. .....RP further informed CoC members that she is in process of creating Data room where IM/updated IM/all data of the company will be uploaded & access will be provided to RA & COC members who submit undertaking of confidentiality."

Hence, the 4th CoC meeting talks about the access to be provided to RA & CoC members and nowhere it talks about the access to be provided to the suspended management.

8. Considering the above, we hereby direct the resolution professional to provide the resolution plans to the suspended management and then convene a meeting of the CoC and the CoC will deliberate on the resolution plans afresh and either reject them or approve them with the requisite majority, after which, the further procedure detailed in the Code and the Regulations will be followed. Further, the resolution professional and CoC may consider the other objections of the suspended management, if relevant. It is to be done within two weeks.

9. We may indicate that the time has been utilized in these proceedings must be excluded from the period of the resolution process of the corporate debtor as has been held in *Vijay Kumar Jain* (*supra*).

10. IA/12(MP)2022 to come up in cause list after the resolution professional files minutes of the meeting of the CoC as above.

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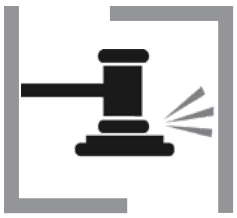


(2022) 140 taxmann.com 209 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

ICICI Prudential Venture Capital Fund Real Estate Scheme I *v.* Anand Divine Developers (P.) Ltd.

M. VENUGOPAL, JUDICIAL MEMBER AND MS. SHREESHA MERLA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INS) NO. 703 OF 2022†

JULY 6, 2022

Section 12A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Withdrawal of application - Appellant-financial creditor had extended some credit facilities to corporate debtor - Due to default, CIRP was initiated against corporate debtor - Subsequently, NCLT permitted financial creditor to withdraw CIRP in lieu of terms of settlement that was entered into between parties prior to formation of Committee of Creditors but failed to grant liberty to financial creditor to restore/revive CIRP, in case of failure of corporate debtor to fulfil its obligations under settlement terms - Whether impugned order passed by NCLT was to be modified to effect that terms of settlement would form part and parcel of impugned order and that financial creditor could initiate contempt proceedings based on term of settlement in happening of contingency of corporate debtor in committing breach of terms of settlement and impugned order passed by NCLT - Held, yes (Para 44)

FACTS

- The Adjudicating Authority (NCLT), passed the impugned order for withdrawal of the CIRP proceedings initiated against the corporate debtor by the financial creditor in lieu of the terms of settlement that were entered into between parties.
- The grievance of the financial creditor was that the 'NCLT' had failed to grant liberty to it to restore/revive the CIRP from the stage of admission of CIRP of the corporate debtor and pre-constitution of Committee of Creditors, in case of failure by the corporate debtor to fulfil its obligations under the settlement terms.

HELD

- The NCLT in the impugned order had not granted liberty to the financial creditor to initiate contempt proceedings or such other suitable proceedings against the corporate debtor and the corporate debtor group in case of default/breach/failure on their part to comply with any of the terms, conditions, covenants and/or undertakings of

the corporate debtor group and the terms of settlement and any other documents/ deeds/undertakings/ writings pursuant thereto. (Para 42)

- In the instant appeal, the financial creditor is an individual whose right is infringed upon by an act complained of, having substantial and tangible, reasonable, grouse and a genuine grievance and as such, the instant appeal preferred by the appellant is perfectly maintainable in Law. (Para 43)

- In the light of the foregoing discussions, to meet the ends of justice, impugned order passed by the NCLT is modified to the effect that the terms of settlement shall form part and parcel of the impugned order; accords permission to the financial creditor to seek restoration/revival of main petition as per terms of settlement terms to initiate contempt proceedings or any other permissible proceedings, based on terms of settlement in the happening of contingency of the corporate debtor in committing breach of the terms of settlement and the impugned order passed by the NCLT. (Para 44)

CASE REVIEW

Order passed by NCLT-New Delhi in IA No. 2391/2022 in C.P. IB. No. 1101/PB/2020, dated 25-5-2022 (para 44) *modified*.

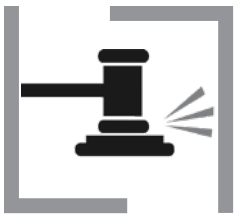
CASES REFERRED TO

Anand Divine Developers (P.) Ltd. v. *ICICI Prudential Venture Capital Fund Real Estate Scheme* (Company Appeal (AT) (INS) No. 400 of 2022) (para 8), *Sree Bhadra Parks and Resorts Ltd.* v. *Sri Ramani Resorts and Hotels (P.) Ltd.* (CA (AT) (CH) (INS) No. 6 of 2021) (para 17), *Krishna Garg* v. *Pioneer Fabricators (P.) Ltd.* (2021) 130 taxmann.com 127 (NCL-AT) (para 17), *G. Sreevidhya* v. *Karismaa Foundations (P.) Ltd.* (C.P. IB 769 of 2018, dated 23-7-2018) (para 17), *ICICI Bank Ltd.* v. *Opto Circuits (India) Ltd.* (2022) 139 taxmann.com 348 (NCLAT - Chennai) (para 18), *Himadri Foods Ltd.* v. *Credit Suisse Funds AG* (2021) 131 taxmann.com 151 (NCL-AT) (para 20), *Ruchita Modi* v. *Mrs. Kanchan Ostwal* (2020) 113 taxmann.com 310/157 SCL 705 (NCL-AT) (para 28), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 29) and *NUI Pulp and Paper Industries (P.) Ltd.* v. *Roxcel Trading GMBH* (2019) 108 taxmann.com 356/155 SCL 462 (NCL-AT) (para 30).

Rohan Rajadhyaksha, **Angad Varma**, **Toyesh Tewari** and **Nikhil Mendiratta**, Advs. *for the Appellant*. **Kartik Nayar** and **Krish Kalra**, Advs. *for the Respondent*.

† Arising out of Order of NCLT - New Delhi in IA No. 2391/2022 in C.P. IB No. 1101/PB/2020, dated 25-5-2022.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 140 taxmann.com 209 (NCLAT - New Delhi)



(2022) 141 taxmann.com 203 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Sanjeev Mahajan *v.* **India Bank (Erstwhile Allahabad Bank)**

JUSTICE ASHOK BHUSHAN, CHAIRPERSON AND NARESH SALECHA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 03 OF 2022†

JULY 4, 2022

Section 60, read with sections 3(12) and 5(7), of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Adjudicating Authority - Corporate debtor and its other three entities were engaged in hospitality business and against corporate debtor and its other three entities certain amounts were due to financial creditor-bank - A compromise proposal offered by corporate debtor for Rs. 260 crores was accepted by financial creditor and an amount of Rs. 154 crores was paid and 102 crores was remained to be paid - Consequently, an earlier compromise failed and an application under section 7 was filed against corporate debtor - During pendency of section 7 application, financial creditor had issued a proposal for sale of NPA's to Asset Reconstruction Companies (ARC) - Thereafter, corporate debtor gave a one time settlement offer (OTS) of same amount at which financial creditor proposed to assign its debt to Asset Reconstruction Company - However, said OTS proposal was rejected by financial creditor - NCLT by impugned order admitted section 7 application - Corporate debtor submitted that due to obstinate attitude of financial creditor, corporate debtor could not be able to settle matter and revive its business - Whether settlement had to be encouraged in IBC but no direction can be issued to financial creditor to positively grant benefit of OTS to a corporate debtor - Held, yes - Whether since there was an existence of debt and default, NCLT had rightly admitted application filed by financial creditor under section 7 - Held, yes (Para 12)

FACTS

- The corporate debtor and its other three entities was engaged in the hospitality business, and against the corporate debtor and the other three entities of corporate debtor, the amounts were due to the financial creditor.
- Thereafter, the compromise proposal of corporate debtor was accepted by financial creditor for Rs. 260 crores by a letter dated 19-3-2019 and, as per the compromise, Rs. 154 crores was to be paid on 31-3-2019 and the remaining balance of Rs. 102 crores was to be paid within 90 days.

- However, the corporate debtor, including other entities, made the payment of Rs. 154 crores but could not make the balance payment within three months as per the time granted.
- The application under section 7 was filed by the financial creditor against the corporate debtor after acceptance of the compromise proposal was withdrawn on 11-4-2019.
- During the pendency of the section 7 application, the financial creditor issued a proposal for the sale of NPA's of the corporate debtor to Asset reconstruction companies.
- Thereafter, the corporate debtor gave a one time settlement offer (OTS) of the same amount at which the financial creditor proposed to assign its debt however, the said OTS plan was rejected by the financial creditor.
- The NCLT admitted section 7 application, holding that there was debt and default on the part of the corporate debtor.
- The corporate debtor filed an instant appeal on ground that the financial creditor invited a bid for NPA of corporate debtor and when same amount with same conditions of repayment was offered by the corporate debtor same had been rejected by the financial creditor therefore, due to obstinate attitude of the financial creditor, corporate debtor could not be able to settle the matter and revive its business.

HELD

- The instant is a case where the corporate debtor is not denying its financial liabilities to the financial creditor Bank. A compromise proposal was accepted for Rs. 260 crores against the Nimitaya Group consisting of corporate debtor and three other entities. An amount of Rs. 154 crores was paid on 31-3-2019 and due was only Rs. 102 crores which remains to be paid. Consequently, an earlier compromise failed. Subsequent to filing section 7 application, the financial creditor had issued a proposal for sale of NPAs to Asset Reconstruction Companies (ARC's)/ Non-Banking Financial Companies (NBFC's)/Financial Institution (FI's) vide its notice dated 18-1-2021. Copy of the proposal for sale notice in the appeal in which under heading "NPAs with book balance of above Rs. 50.00 Crores and upto 100 Crores. (Para 8)
- It was after the said sale proposal that on 3-12-2021, the corporate debtor gave an offer of Rs. 81 crores which has been rejected on 6-12-2021 by the financial creditor. In April, 2021 also the appellant made a request to the IRP for submitting an application under section 12A which according to the appellant has also not been accepted by the CoC. In the instant

case, 100 per cent CoC member is the respondent bank. There are no other financial creditors except the respondent bank. (Para 9)

- The primary object of the IBC is to revive the corporate debtor and to ensure that it starts running. The Supreme Court has observed that the settlements have to be encouraged because the ultimate purpose of the IBC is to facilitate the continuance and rehabilitation of a corporate debtor. (Para 10)

- The law has been clearly laid down by the Supreme Court in ES Krishnamurthy v. Bharath Hi Tech Builders (P.) Ltd. (2021) 133 taxmann.com 159/(2022) 169 SCL 644 that although settlement has to be encouraged in the IBC but no direction can be issued to the financial creditor to positively grant the benefit of OTS to a borrower. The debt and default having been found by the Adjudicating Authority by admitting application which debt and default having not been questioned, no error in the order of the Adjudicating Authority admitting section 7 application was found. (Para 12)

CASE REVIEW

Order of NCLT (New delhi) in CP (IB) 1913(ND)(2019), dated 24-12-2021 (para 12) *affirmed*.

ES krishnamurthy v. *Bharath Hi Tech Builders (P.) Ltd.* (2021) 133 taxmann.com 159/(2022) 169 SCL 644 (SC) (para 12) and *Bijnor Urban Co-operative Bank Ltd.* v. *Meenal Agarwal* 2021 SCC OnLine SC 1255 (para 12) *followed*.

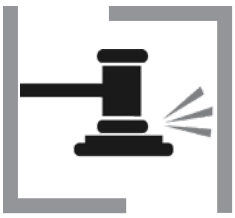
CASES REFERRED TO

ES krishnamurthy v. *Bharath Hi Tech Builders (P.) Ltd.* (2021) 133 taxmann.com 159/(2022) 169 SCL 644 (SC) (para 10) and *Bijnor Urban Co-operative Bank Ltd.* v. *Meenal Agarwal* 2021 SCC OnLine SC 1255 (para 11).

Abhijeet Sinha, **Kumar Anurag Singh**, **Zain A. Khan** and **Vinayak Bhandari**, Advs. *for the Appellant*. **Rajesh Kumar Gautam** , **Anant Gautam**, **Nipun Sharma** and **Vidur Ahluwalia** *for the Respondent*.

† Arising out from order of NCLT (New Delhi) in CP (IB) 1913(ND)(2019), dated 24-12-2021.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 141 taxmann.com 203 (NCLAT - New Delhi)



(2022) 141 taxmann.com 315 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Union of India *v.* Infrastructure Leasing and Financial Services Ltd.

JUSTICE ASHOK BHUSHAN, CHAIRPERSON DR. ALOK SRIVASTAVA AND SHREESHA MERLA, TECHNICAL MEMBER

I.A. NO. 59 OF 2021 & 516, 517, 543 & 795 OF 2022 COMPANY APPEAL (AT) NO. 346 OF 2018

JULY 4, 2022

Section 61 of the Insolvency and Bankruptcy Code, 2016 - Corporate Person's Adjudicating Authority - Appeals and Appellate Authority - CIRP was admitted against corporate debtor at instance of financial creditor - On other hand, corporate debtor sent restructuring proposal regarding settlement of its outstanding debt, which was approved by financial creditor of corporate debtor - Corporate debtor filed instant application seeking approval to implement restructuring proposal - Corporate debtor also sought directions that claims of operational/ CAPEX creditors be extinguished - Basis given by corporate debtor to extinguish claims was that proceedings were initiated against it and its group companies under PMLA and said creditors were also under scope of investigation and Adjudicating Authority under PMLA passed provisional order directing corporate debtor not to make any kind of payment to said creditors - Whether since there was no order of Adjudicating Authority under PMLA confirming or continuing said order and claim of operational/CAPEX creditors had been admitted by Claim Management Advisor, prayer of corporate debtor for extinguishing claim of operational creditors was not acceptable - Held, yes - Whether admitted claims of operational/CAPEX creditors had to be dealt with in resolution plan when it would be drawn - Held, yes - Whether thus, restructuring proposal of corporate debtor was to be allowed but relief sought to extinguish claims of operational creditor was not allowed - Held, yes (Paras 34, 35 and 36)

FACTS

- CIRP was initiated against corporate debtor at the instance of financial creditor.
- On other hand, corporate debtor sent restructuring proposal regarding settlement of its outstanding debt, which was approved by financial creditor of corporate debtor.
- Application had been filed by corporate debtor seeking approval of instant Tribunal to implement restructuring proposal corporate debtor in terms of the term sheet received from the Consortium of Banks following the applicant sought

for implementing the Restructuring Plan. In the Application prayers had been made to permit and approve the restructuring proposal sought to be implemented to restructure the debt of corporate debtor on the terms set out above and as set out in the respective term sheets by the Consortium of Banks; Following the approval of the ITPCL Restructuring Plan, direct that the said Restructuring Plan be binding on all stakeholders of corporate debtor (including Group, Operational and CAPEX Creditors) and that any claim, entitlement or contingent liability (disclosed or undisclosed) of any nature (statutory, contractual or otherwise), and whether existing at or relating to a period prior to the Cut-off date which was specifically not provided/contemplated in the Restructuring Plan be extinguished immediately upon implementation of the Restructuring Plan. Basis given by corporate debtor to exclude the transactions was the 'Forensic Audit Report' through Grant Thornton India LLP submitted by Transaction Review Auditor wherein adverse findings had been given with regard to said creditors. Further proceeding were initiated against it and its group companies under PMLA and said creditors were also under scope of investigation. Adjudicating Authority under PMLA passed provisional order directing corporate debtor not to make any kind of payment to said creditors.

- Prayer to implement restructuring proposal was allowed.
- While time was granted to the Operational Creditors who were to be affected by other prayers of corporate debtor. In pursuance of liberty granted impleadment application and objections had been filed by the Operational Creditors/CAPEX Creditors who were going to be effected by the prayers in the application.
- The case of creditor was that it was engaged as EPC Contractor by the corporate debtor and contract namely 'Offshore Equipment Supply Contract' was executed. Creditor Stated that it had completed 100% supply under the 'Offshore Equipment Supply Contract'. There had been deliberations between the parties for the outstanding amount held in the year 2018. Although a part of amount was paid, amount of USD 16,638,568 remained unpaid. In furtherance of the public announcement published on the website of corporate debtor, the claim was filed to the Claim Management Advisor namely 'Grant Thornton India LLP' admitted the claim of the creditor to the tune of INR 123,07,68,178/-. It was submitted that inspite of admitted claim of the creditor the corporate debtor on the plea of restructuring of debt of corporate debtor was trying to extinguish the claim of creditor.

HELD

- Section 17 of PMLA provides for scheme for search and seizure. Sub-section (4) of section 17 requires that authority seizing any record or property or freezing any record or property shall, within a period of thirty days from such seizure or freezing, file an application, requesting for retention of such record or property seized under sub-section (1) or for continuation of the order of freezing, before the Adjudicating Authority. In instant case there is no order of the Adjudicating Authority confirming or continuing the Freezing Order. Thus, directions issued by the Investigating Officer cannot be said to be still continuing so as to inhibit the corporate debtor to make payment to Operational Creditors/CAPEX Creditors. (Para 30)

- The Freezing Order issued by the Investigating Officer shall not continue, more so, when Provisional Attachment Order has been passed where there is no reference of the Freezing Order or continuation of the Freezing Order. The arguments raised by creditors that on the basis of PMLA proceeding cannot be ground for depriving the payments of the dues of creditors. It is always open for the authority which is making payment to the Operational Creditors to obtain appropriate security before payment, to safeguard the interest on account of any pending proceedings which may have adverse effect on any payments made. (Para 31)

- When the claims of CAPEX Creditors/Operational Creditors has been admitted by the Claim Management Advisor, which is also admitted fact, the prayer of the corporate debtor for extinguishing the claim of the CAPEX Creditors and the Operational Creditors, is not acceptable. The admitted claim of CAPEX Creditors/Operational Creditors has to be dealt with in the Resolution Plan when it will be drawn. As noted above, the claim of Operational Creditors/ CAPEX Creditors are sought to be dealt with in a plan of restructuring debt under Reserve Bank of India Circular dated 7-6-2019. For dealing with admitted debts of Operational Creditors/CAPEX Creditors, an appropriate Resolution Plan has to be made for addressing the claims. The Restructuring Plan has been arrived between the lenders and the borrower *i.e.* corporate debtor. The corporate debtor, who was bound to consider the admitted claim of the Operational Creditors/CAPEX Creditors, has to consider the claims appropriately and arrive at a fair and reasonable resolution of the claims. The claims of CAPEX Creditors/Operational Creditors are being tried to dealt with a side wind without properly appreciating their claim. There are adverse observations in Transaction Review Report and Forensic Audit Report against corporate debtor.

The borrower, who has been charged with collusive and unfair dealings in awarding the contracts and conducting other affairs, could not be allowed to defeat the claim of Operational Creditors/CAPEX Creditors citing its own shortcomings and misdeeds. (Para 34)

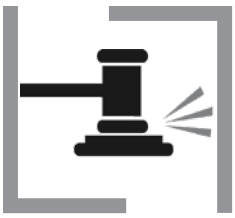
- The claim of Operational Creditors/ CAPEX Creditors has to be appropriately considered in a fair and reasonable Resolution Plan. The effect and consequence of contract entered by it with Operational Creditors/CAPEX Creditors cannot be done away with as now sought to be prayed by corporate debtor in prayers. (Para 35)
- Thus, while prayer for implementation of restructuring was allowed, prayers of corporate debtor to extinguish claim of creditor should not be allowed.

CASES REFERRED TO

OPTO Circuit India Ltd. v. *Axis Bank* (2021) 127 taxmann.com 290/165 SCL 703 (para 13).

Ramji Srinivasan, Sr. Adv., **Raunak Dhillon**, **Abhijeet Das**, **Adarsh Saxena**, **Vikash Kumar Jha**, **Shubhankar Jain**, **Ms. Isha Malik**, **Nihaad Dewan**, **Ritu Vishwakarma**, **Ms. Drishti Das**, **Ms. Ananya Choudhury**, Advs., **Ms. Meenakshi Arora**, Sr. Adv., **Divyansh Khurana**, **Amit Anand Tiwari**, **Ranjit Prakash**, **Ms.Vishalakshi Singh**, **Ms. Devyani Gupta**, **Atul Sharma**, **Abhishek Sharma**, **Ms. Ashly Cherian**, **Ms. Harshita Agarwal**, **Sanjay Bajaj** and **Sanjeev Sen**, Advs. *for the Appearing Parties.*

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 141 taxmann.com 315 (NCLAT - New Delhi)



(2022) 141 taxmann.com 317 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Jaipur Trade Expocentre (P.) Ltd. *v.* Metro Jet Airways Training (P.) Ltd.

JUSTICE ASHOK BHUSHAN, CHAIRPERSON RAKESH KUMAR JAIN AND RAKESH KUMAR, JUDICIAL MEMBER BARUN MITRA AND NARESH SALECHA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 423 OF 2021†

JULY 5, 2022

I Section 5(21), read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Operational debt - Appellant/ operational creditor entered into a 'Licence Agreement' with respondent/corporate debtor where corporate debtor took premises of appellant at a license fee for running an Educational Institution - License was granted for use of premises with fittings and fixtures, electrical and flooring as per good corporate standard - Appellant filed an application under section 9 claiming an amount towards unpaid license fee - Adjudicating Authority dismissed said application holding that claim arising out of grant of license to use of immovable property did not fall in category of goods or services and, thus, amount claimed in section 9 application was not an unpaid operational debt - Whether since corporate debtor had taken a licensed premises for running an Educational Institution, all cost incurred by corporate debtor and cost which remained unpaid would become a debt on part of operational creditor - Held, yes - Whether debt pertaining to unpaid license fee was fully covered within meaning of 'operational debt' under section 5(21) - Held, yes - Whether therefore, Adjudicating Authority committed error in holding that debt claimed by operational creditor was not an 'operational debt' - Held, yes (Paras 24, 39 and 40)

II Section 3(6), read with section 3(11), of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Claim - Whether claim of operational creditor for payment of license fee is fully covered as 'claim' of definition under section 3(6), and similarly liability or obligation in respect of claim becomes a debt on part of corporate debtor within meaning of section 3(11), which defines debt to mean a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt - Held, yes (Para 25)

FACTS

- The appellant/operational creditor entered into a 'Licence Agreement' with the respondent/corporate debtor and corporate debtor took the premises of appellant for the purpose of running an Educational

Establishment at the licence fee of Rs. 4 lacs per month. License was granted for an initial period of 5 years. The appellant who was a Licensor received part payment made by the corporate debtor towards outstanding License Fee. Cheque amounting to Rs. 20 lakhs was handed over to the appellant by the corporate debtor towards part payment which on presentation was dishonoured and returned unpaid. Another Cheque amounting to Rs. 20 lakhs was handed over to the appellant by the corporate debtor which too was dishonoured.

- When despite several reminders and e-mails, the corporate debtor did not clear outstanding payment towards license fee, a demand notice under section 8 was issued by the appellant to the corporate debtor claiming an outstanding dues of Rs. 1.31 crore. The demand notice was not replied by the corporate debtor. After receipt of demand notice, the corporate debtor initiated civil proceedings.
- The appellant filed an application under section 9 claiming an amount of Rs. 1.31 crore including interest. The Adjudicating Authority issued notice to the corporate debtor in section 9 application and reply was filed by the corporate debtor, disputing the debt.
- The Adjudicating Authority dismissed section 9 application holding that claim arising out of grant of license to use of immovable property did not fall in the category of goods or services, thus, the amount claimed in section 9 application was not an unpaid operational debt and therefore, application could not be allowed.
- On appeal by the appellant/ operational creditor two member Bench *vide* its order dated 7-3-2022, referred following two questions for consideration by larger Bench.

  (*i*) Whether the Judgment of this Tribunal in *M. Ravindranath Reddy* v. *G. Kishan* (2020) 113 taxmann.com 526 (NCL - AT) lays down the correct law.

  (*ii*) Whether claim of the Licensor for payment of license fee for use and occupation of immovable premises for commercial purposes is a claim of 'Operational Debt' within the meaning of section 5(21).

- The three Member Bench heard the parties and vide its order dated 9-3-2022 directed that questions framed on 7-3-2022 be placed before the larger Bench.
- On Appeal before the larger Bench of five Members.

HELD

- The Government of India for the purpose of drafting of a single, comprehensive and internally consistent bankruptcy law, constituted

a Bankruptcy Law Reforms Committee to deal with the task to create a uniform framework that would cover matters of insolvency and bankruptcy of all legal entities and individuals. The Bankruptcy Law Reforms Committee submitted its report dated 4-11-2015 to Finance Minister, Government of India. (Para 9)

- Chapter 2 of the Code deals with The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. (Para 10)
- Section 3(37) provides that words and expressions used but not defined in this Code but defined in other statutes, shall have the meanings respectively assigned to them in those Acts. (Para 12)
- The key question to be answered in the present appeal is as to whether the license fee, which is claimed to be due from the corporate debtor, is an 'operational debt' within the meaning of section 5(21) or not? (Para 13)
- Certain key features of the License Agreement which are reflected from the Agreement dated 15-4-2017 are as follows:

  (*i*) License was granted with regard to Admin Building, which has super area measuring 31,000 Sq. ft., which was referred to as Demised Premises in the Agreement. The Recitals also contains following: -

  'Whereas the Demised Premise is a Warm Shell Building with fittings and fixtures, electrical, flooring, as per good corporate standards and as per the requirement of the LICENSEE'.

  (*iii*) Licensee has agreed to take the Demised Premises for the purpose of running an educational establishment on the terms and conditions appearing in the Agreement. (Para 15)

- Now coming back to the definition of 'operational debt' as contained in section 5(21), the definition clause provides that 'operational debt' means a claim in respect of the provision of goods or services. (Para 16)
- Apart from definition as contained under section 5(21), the 'operational debt' has not been explained in any other provisions of the Code. The definition under section 5(21) uses the expression 'operational'. The expression 'services' used in section 5(21) has also not been defined in the Code. When an expression used in statute is not defined, the Court has to explain the meaning of undefined expression in accordance with the well-established rules of statutory interpretation. (Para 17)
- When a statute does not contain a definition of a particular expression employed in it, it becomes the duty of the Court to expound

the meaning of the undefined expression in accordance with law with the well-established rules of statutory interpretation. It needs to be explained as to what is the meaning of expression 'services' in general parlance. (Para 18)

- Clause 4 of the Agreement dealing with License Fee stipulates that Licensee shall pay all government taxes including but not limited to Service Tax, VAT, GST, Excise etc., over and above license fee. The agreement itself thus support payment of GST. The payment of GST is contemplated only for 'goods' and 'services' and clause 4 of the agreement clearly indicates that when licensee is to be taxed for GST, it being taxed for 'services'. (Para 20)

- The agreement dated 15-4-2017 is not with regard to any 'goods'. The agreement dated 15-4-2017 has to read to mean that the agreement between the parties was with regard to 'services' within the meaning of section 5, sub-section (21). Had the agreement dated 15-4-2017 did not contemplate services, there was no occasion for making the licensee liable to pay GST over and above the license fee. The license fee to be paid under the agreement included Government Taxes like GST etc. The above clause of agreement, thus, throws considerable light on the nature of provision, which was provided by the licensor by the agreement. (Para 22)

- It is noticed above that section 3(33) deals with 'transaction'. Agreement dated 15-4-2017 is fully covered within the meaning of word 'transaction' as defined in section 3(33). One may also need to look into the meaning of expression 'operation'. The word 'operation' is derived from the word 'operate'. Various expressions relating to 'operation' and 'operate' have been defined. (Para 23)

- The 'operating cost' as defined, is an expense incurred in the conduct of the principal activities of the enterprise. The 'operational debt' is also a debt which is incurred in the conduct of principal activities of the enterprise. In the present case, the corporate debtor has taken a licensed premises for running an Educational Institution. All cost incurred by the corporate debtor and cost which remained unpaid shall become a debt on the part of operational creditor. The payment of license fee is an obligation on the corporate debtor under the agreement dated 15-4-2017. (Para 24)

- The claim of the operational creditor for payment of license fee is fully covered as 'claim' of the definition under section 3, sub-section (6) and similarly liability or obligation in respect of claim becomes a debt on the part of the corporate debtor within the meaning of section 3(11) which defines debt to mean a liability or obligation in respect of a claim which is due from any

person and includes a financial debt and operational debt. (Para 25)

- What Bankruptcy Law Reforms Committee Report in 2015 mentioned while explaining the 'operational debt' is relevant and can be fully relied for interpreting the expression 'operational debt' as reflected in section 5, sub-section (21). (Para 27)

- Section 14, sub-section (2) to which reference has been made, deals with supply of essential goods or services to the corporate debtor. The said provision has nothing to do with the extent and expense of 'operational debt' within the meaning of section 5(21). The observation that 'any debt arising without nexus to the direct input or output produced or supplied by the corporate debtor, cannot be considered to be operational debt' is conclusion drawn by this Tribunal contrary to the scheme of the Code. The 'operational debt' as defined in section 5(21) has meaning much wider than the essential goods and services. Essential goods and services are entirely different concept and the protection under section 14(2) as provided for is an entirely different context. Thus, the observations made that there has to be nexus to the direct input or output produced or supplied by the corporate debtor, is a much wider observation not supported by scheme of the Code. (Para 35)

- The judgment of the Tribunal in case of M. Ravindranath Reddy (supra) does not consider the extent and expanse of the expression 'service' used in section 5(21). As noted, the Tribunal in the above case has relied on section 14(2) for interpreting 'service', which was only a very restricted meaning of service. Thus, it is viewed that the judgment of this Tribunal in M. Ravindranath Reddy (supra) does not lay down the correct law. (Para 36)

- The judgment of the Tribunal in Promila Taneja v. Surendri Designe (P.) Ltd. (Co. Appeal (AT) (Ins.) No. 459 of 2020, dated 10-11-2020) which was a case again of section 9 application, which was dismissed by this Tribunal relying on M. Ravindranath Reddy's case (supra). In Promila Taneja's case (supra) this Tribunal again reiterated the view taken in M. Ravindranath Reddy's case (supra). This Tribunal held that the reliance on the definition of 'service' in Consumer Protection Act, 2019 and Central Goods and Services Tax Act, 2017 are not relevant. (Para 37)

- The Tribunal relying on section 3(37) observed that words and expression used in IBC, which have not been defined, but which have been defined under section 3(37) can be directly imported. The Tribunal held that definition of 'service' in Consumer Protection Act, 2019 and Central Goods and Services Tax Act, 2017 are not covered

under section 3(37). Hence, they cannot be treated as supply of service. (Para 38)

- The observation of the Tribunal in respect of definition of 'service' under Consumer Protection Act, 2019 and Central Goods and Services Tax Act, 2017 are not covered by section 3(37), with regard to which observation, no exception can be taken. However, in the facts of the instant case, where agreement itself contemplate payment of GST for the services under the agreement, on which GST is payable, the definition of 'service' under Central Goods and Services Tax Act, 2017 cannot be said to be irrelevant. More so, even if an expression is not defined in the statute, the meaning of expression in general parlance has to be considered for finding out the meaning and purpose of expression. After making above observation in Promila Taneja's case (supra), the Tribunal did not dwell with the question as to what is the meaning of expression of 'service' used in section 5(21). Reference to section 5(8)(*d*) regarding 'financial debt' by the Tribunal in the above case also was not relevant for finding out definition of expression 'service' under section 5(21). Thus, it is viewed that both in M. Ravindranath Reddy's (supra) and Promila Taneja's (supra) this Tribunal did not dwell upon the correct meaning of expression 'service' used in section 5(21). In any view of the matter, in the above mentioned two cases, the dues were in the nature of rent of immovable property whereas the present is a case of license granted for use of premises on Warm Shell Building with fittings and fixtures, electrical, flooring as per good corporate standards. Hence, the licensee was licensed for a particular kind of service for use by the licensee for running a business of Educational Institution. Hence, in the present case, debt pertaining to unpaid license fee was fully covered within the meaning of 'operational debt' under section 5(21) and the Adjudicating Authority committed error in holding that the debt claimed by the operational creditor is not an 'operational debt'. (Para 39)

- In view of the foregoing discussion, the two questions referred to the larger Bench are answered in the following manner:

  (1) Judgment of the Tribunal in *M. Ravindranath Reddy's* (*supra*) as well as judgment in *Promila Taneja's* case (*supra*) does not lay down the correct law.

  (2) The claim of Licensor for payment of license fee for use of Demised Premises for business purposes is an `operational debt' within the meaning of section 5(21). (Para 40)

- In the result of foregoing discussion, appeal is allowed and impugned judgment of the Adjudicating Authority dated 4-3-2020 is set aside and it is held that the application filed by the operational creditor (appellant herein) deserves admission under section 9. (Para 41)

CASE REVIEW

Jaipur Trade Expocentre (P.) Ltd. v. *Metro Jet Airways Training (P.) Ltd.* (2022) 137 taxmann.com 235 (NCLT - Jaipur) (para 41) *set aside*.

M. Ravindranath Reddy v. *G. Kishan* (2020) 113 taxmann.com 526 (NCL - AT) (para 39) *distinguished*.

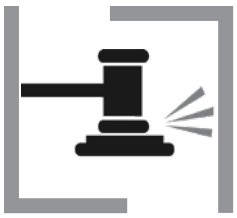
CASES REFERRED TO

Anup Sushil Dubey v. *National Agriculture Co-operative Marketing Federation of India Ltd.* (2021) 123 taxmann.com 70/163 SCL 714 (NCL-AT) (para 6), *Sarla Tantia* v. *Ramaanil Hotels & Resorts (P.) Ltd.* (2019) 104 taxmann.com 115/153 SCL 112 (NCL-AT) (para 6), *M. Ravindranath Reddy* v. *G. Kishan* (2020) 113 taxmann.com 526 (NCL-AT) (para 7), *Promila Taneja* v. *Surendri Designe (P.) Ltd.* (Co. Appeal (AT) (Ins.) No. 459 of 2020, dated 10-11-2020) (para 7), *Keshavlal Khemchand & Sons (P.) Ltd.* v. *Union of India* (2015) 53 taxmann.com 470/129 SCL 780 (SC) (para 17), *P. N. Ramanatha Iyer* v. *Collector of Central Excise* 1988 taxmann.com 697 (CEGAT - Chennai) (para 18), *Mobilox Innovations (P.) Ltd.* v. *Kirusa Software (P.) Ltd.* (2017) 85 taxmann.com 292/144 SCL 37 (SC) (para 26) and *Sanjeev Kumar* v. *Aithent Technologies (P.) Ltd.* (2021) 123 taxmann.com 88 (NCL-AT) (para 30).

Ms. Sanjana Saddy, **Sanyat Lodha** and **Ms. Harshita Singhal**, Advs. *for the Appellant*. **Vikrant Arora** and **Manish Verma**, Advs. *for the Respondent*.

† Arising out of order passed by NCLT, Jaipur Bench in *Jaipur Trade Expocentre (P.) Ltd.* v. *Metro Jet Airways Training (P.) Ltd.* (2022) 137 taxmann.com 235.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 141 taxmann.com 317 (NCLAT - New Delhi)



(2022) 141 taxmann.com 318 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Ashok Tiwari *v.* **DBS Bank India Ltd. (DBIL)**

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

COMPANY APPEAL (AT) (INSOLVENCY) NO. 418 OF 2022†

JULY 4, 2022

Section 61, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and rule 49(2) of the National Company Law Tribunal Rules, 2016 - Corporate person's Adjudicating Authorities - Appeals and Appellate Authority - Respondent bank filed an application to initiate CIRP against appellant-corporate debtor - Notices were issued by NCLT, which were served on corporate debtor and date was fixed on which Advocate appeared on behalf of corporate debtor - But said Advocate having not filed a Vakalatnama was not heard by NCLT and NCLT proceeded and passed an order admitting said application - Against said order corporate debtor filed an appeal that corporate debtor be granted liberty to file an application under rule 49(2), wherein corporate debtor would be able to explain facts and circumstances of case - Whether prayer of corporate debtor was to be allowed permitting corporate debtor to file an application under rule 49(2), which would be considered by NCLT in accordance with law - Held, yes - Whether two weeks period was granted to corporate debtor to file application and till then further steps in CIRP would not be taken in pursuance to order passed by NCLT - Held, yes (Paras 5 and 6)

Arvind Verma, Sr. Adv., **Kumar Ayush, Ashuthosh Thakur, Prabhat Ranjan Raj, Sidharth Sarthi, Anil Kumar** and **Shaswat Anand,** Advs. for the Appellant. **Dhruv Malik, Palak Nenwani, Mannat Sabharwal and Ritu Rastogi,** Advs. for the Respondent.

ORDER

1. Heard Mr. Arvind Verma, Learned Sr. Counsel for the Appellant and Mr. Dhruv Malik, Learned Counsel appearing for the Respondent No. 1.

2. This Appeal has been filed against the Order dated 25th March, 2022 passed by the Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi) by which Application under section 7 filed by the DBS Bank India Ltd. has been admitted.

3. The Appellant's case in the Appeal is that notices were issued by the Adjudicating Authority on 22nd March, 2022 which was served on the Appellant on 07th March, 2022 and 25th March, 2022 was date fixed on which date the Advocate appeared on behalf of the Appellant but he having not filed a Vakalatnama he was not heard by the Adjudicating Authority and

Adjudicating Authority proceeded and passed an order admitting the Application.

4. Mr. Arvind Verma, Learned Sr. Counsel for the Appellant submits that the Appellant be granted liberty to file an Application under Rule 49(2) of the NCLT, Rules, 2016 wherein the Appellant shall be able to explain the facts and circumstances of the case. Rule 49 provides:

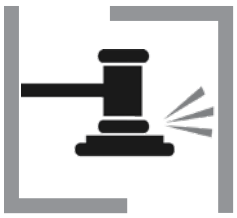
> "49. *Ex parte Hearing and disposal.*—(1) Where on the date fixed for hearing the petition or application or on any other date to which such hearing may be adjourned, the applicant appears and the respondent does not appear when the petition or the application is called for hearing, the Tribunal may adjourn the hearing or hear and decide the petition or the application *ex parte*.
>
> (2) Where a petition or an application has been heard *ex parte* against a respondent or respondents, such respondent or respondents may apply to the Tribunal for an order to set it aside and if such respondent or respondents satisfies the Tribunal that the notice was not duly served, or that he or they were prevented by any sufficient cause from appearing (when the petition or the application was called) for hearing, the Tribunal may make an order setting aside the *ex parte* hearing as against him or them upon such terms as it thinks fit. Provided that where the *ex parte* hearing of the petition or application is of such nature that it cannot be *set aside* as against one respondent only, it may be *set aside* as against all or any of the other respondents also."

5. This Appeal was entertained by this Tribunal on 18th April, 2022 and an Interim Order was passed directing that no further steps be taken in pursuance of the Order dated 25th March, 2022. Learned Counsel for the Respondent submits that Committee of Creditors had already been constituted. Be that as it may, Learned Sr. Counsel appearing for the Appellant has prayed liberty to withdraw the Appeal to enable him to avail remedy under Rule 49(2), we are of the view that prayer of the Appellant be allowed permitting the Appellant to file an Application under Rule 49 (2) which may be considered by the Adjudicating Authority in accordance with the law. We make it clear that we are not expressing any opinion on the merits of the Application which is to be filed by the Appellant under section 49(2). Learned Sr. Counsel for the Appellant undertakes to file the Application within one week from today.

6. Looking to the facts of the present case, we observe that for a period of two weeks, further steps in the 'Corporate Insolvency Resolution Process' be not taken and further steps in the 'CIRP' shall be taken in accordance with the Order of the NCLT in the aforesaid application.

With these observations, the Appeal is disposed of.

†Arising out of order of NCLT, dated 25-3-2022.



(2022) 141 taxmann.com 319 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Avantha Holdings Ltd. *v.* **Abhilash Lal, Resolution Professional for Jhabua Power Ltd.**

JUSTICE ASHOK BHUSHAN, CHAIRPERSON MS. SHREESHA MERLA AND NARESH SALECHA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 304 OF 2022†

JULY 4, 2022

I. Section 12A of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Withdrawal of application - Whether settlement plan under section 12A for withdrawal of CIRP cannot be forced upon lenders - Held, yes - Whether promoters, who led to insolvency process of corporate debtor, cannot claim to submit a resolution plan indirectly by way of proposal under section 12A and ask lenders to evaluate their resolution plan - Held, yes (Paras 15 and 17)

II. Section 31, read with section 29A, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Resolution plan - Approval of - CIRP was initiated against corporate debtor - Resolution applicant 'NTPC' submitted its resolution plan - Said resolution plan got approved by Committee of Creditors (CoC) and subsequently by NCLT - Appellant, being promoter of corporate debtor, filed an application seeking declaration that 'NTPC' was not compliant with section 29A - According to appellant, two related entities of 'NTPC', i.e. RGPPL and KLL had been classified as NPA and, thus, 'NTPC' was disqualified to submit resolution plan - NCLT by impugned order rejected said application - It was noted that NPA classification date was 21-5-2018 and from that classification date, grace period of one year as appearing in section 29A(c) had not been elapsed when CIRP of corporate debtor commenced, i.e. on 27-3-2019 and, hence, there was no disqualification under section 29A - Further, resolution plan was approved by 100 per cent vote of CoC - Whether thus, there was no error in decision of NCLT rejecting application filed by appellant - Held, yes (Paras 26 and 28)

FACTS

- The appellant, being promoter of corporate debtor, submitted a One Time Settlement (OTS) offer to the Resolution Professional (RP), which was considered by CoC and was not found prudent and commercially viable. RP invited Expression of Interest (EoI) from prospective resolution applicants for submission of resolution plan.
- The RP in CoC meeting apprised the CoC about two quotations received from the resolution

applicants one from 'NTPL' and other from 'Adani'. The Resolution Professional presented both the resolution plans before the CoC. On other hand, appellant made a proposal to the Members of CoC through RP under section 12A for settlement of debt owed by the corporate debtor.

- The CoC discussed the resolution plan submitted by 'NTPC' and found it feasible and viable. CoC requested the RP to proceed with the voting process of 'NTPC' plan. CoC had already noticed in the earlier Minutes that 'Adani' being initially shown interest and submitted the plan, but had requested to withdraw the plan and to return the Bank Guarantee, which was permitted by the CoC. The voting on the plan took place. The Plan was unanimously approved with 100 per cent voting of the CoC. Thereafter, application was filed by the RP before the NCLT for approval of the resolution plan.

- The appellant filed an application seeking declaration that 'NTPC' was not compliant with section 29A. According to appellant, two related entities of 'NTPC', i.e. RGPPL and KLL had been classified as NPA and thus, 'NTPC' was disqualified to submit resolution plan.

- NCLT rejected the application filed by the appellant and held that the NTPC was not disqualified under section 29A. On the withdrawal proposal submitted under section 12A by the appellant, CoC was of the view that CoC does not want to pursue any withdrawal under section 12A and it does not want to go ahead with the proposal submitted by the promoters. Aggrieved by the order passed by the NCLT instant Appeal had been filed.

HELD

- Section 12A proposal cannot be forced upon the lenders. The Promoters, who led to insolvency process of corporate debtor cannot claim to submit a Resolution Plan indirectly by way of proposal under section 12A and ask the lenders to evaluate their Resolution Plan. Something which is not permissible directly by virtue of prohibition under section 29A for submitting Resolution Plan by the Promoters, cannot be permitted to be done indirectly. Further, the commercial wisdom of the CoC, is not liable to be judicially reviewed. (Para 15)

- There is no error in rejection of the proposal submitted by the Appellant claimed to be under section 12A by the CoC, after due consideration and the Adjudicating Authority has rightly refused to interfere with the commercial decision of the CoC in application filed by the appellants praying for setting aside the decision of the CoC rejecting their proposal. (Para 17)

- The ineligibility of the Resolution Applicant is sought to be questioned on the strength of section 29A(*c*)

and (*j*), Explanation (1). The relevant provisions of section 29A are as a person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor. (Para 19)

- The statutory provision under section 29A, sub-clause (*c*) is plain and clear that grace period of one year has been given and if after expiry of grace period, Resolution Applicant is unable to pay the dues and the NPA continues, the Resolution Applicant becomes ineligible. The purpose for statutory requirement that at least one year has elapsed from the date of such classification is to see that within a period of one year from classification, if the Resolution Applicant did not get away from NPA, it should be declared as NPA. The NPA classification and the period of one year had not elapsed till 27-3-2019, when CIRP commenced. Since on the date of commencement of CIRP, period of one year has not elapsed, the disqualification under section 29A(*c*) shall not attach to the NTPC, who was Resolution Applicant. Thus, NTPC was eligible on 30-12-2019 when it submitted the Resolution Plan. When Resolution Applicant was eligible on 30-12-2019, it continued to be eligible in entire process of the CIRP. The CoC, which is statutorily authorised to conduct the CIRP with the object of reviving the Corporate Debtor is fully competent to ask the Resolution Applicant to revise its Plan, improve its Plan and submit the revised Resolution Plan. (Para 26)

- The Resolution Applicant being eligible, was entitled to submit Resolution Plan and was also entitled to revise its Plan from time to time as per the Scheme of the Code. The Plan having approved by 100 per cent vote of CoC, we do not find any error in the decision of the NCLT rejecting the application filed by the Appellant. (Para 28)

- For the reasons as indicated above, the NCLT has rightly rejected the application seeking disqualification of the Resolution Applicant as well as praying for setting aside the decision of CoC rejecting the proposal of appellant under section 12A. (Para 29)

CASE REVIEW

Decision of NCLT-Kolkata in IA (IB) No. 537/KB/2021 in CP(IB) No. 634/KB/2017, dated 8-3-2022 (para 29) *affirmed*.

CASES REFERRED TO

ArcelorMittal India (P.) Ltd. v. *Satish Kumar Gupta* (2018) 98 taxmann.com 99/150 SCL 354 (SC) (para 4), *Arun Kumar Jagatramka* v. *Jindal Steel & Power Ltd.* (2021) 125 taxmann.com 244/165 SCL 652 (SC) (para 14), *K. Sashidhar* v. *Indian Overseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 16), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 25) and *Kalpraj Dharamshi* v. *Kotak Investment Advisors* (2021) 125 taxmann.com 194/166 SCL 583 (SC) (para 27).

Dr. Abhishek Manu Singhvi, **K. Datta**, Sr. Advs., **Prateek Kumar**, **Ms. Raveena Rai** and **Ms. Smriti Nair**, Advs. *for the Appellant*. **Abhinav Vasisht**, Sr. Adv., **Ms. Anindita Roy Chowdhury**, **Raghav Chadha**, Advs., **Arun Kathpalia**, Sr. Adv., **Vaijayant Paliwal**, **Nikhil Mathur**, **Ms. Prabh Simran Kaur**, **Anoop Rawat**, Advs., **Ramji Srinivasan**, Sr. Advs., **Ramakant Rai**, **Ms. Rajshree Chaudhary**, **Varun Kumar Tikmani** and **Somesh Srivastava**, Advs. *for the Respondent*.

† Arising out of order of NCLT - Kol. in IA (IB) No. 537/KB/2021 in CP (IB) No. 634/KB/2017, dated 8-3-2022.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 141 taxmann.com 319 (NCLAT- New Delhi)

Code of Conduct for Insolvency Professional

Insolvency Professional submitted the resolution plan to NCLT when the conditions of RFRP were not fulfilled. NCLT requested IBBI to look into the conduct of Insolvency Professional and initiate appropriate action against the Insolvency Professional

CASE TITLE	*State Bank of India v. PPS Enviro Power Private Limited*
CASE CITATION	IA (IBC) No. 144/2021 CP (IB) No. 407/7/HDB/2018
DATE OF ORDER	24-12-2021
COURT/ TRIBUNAL	NCLT, Hyderabad Bench

BRIEF FACTS

- The resolution plan was approved by the Committee of Creditors and the same was filed before the Adjudicating Authority. Thereafter, the matter was listed before Adjudicating Authority on several dates and every time the Resolution Applicant pleaded time for submission of performance bank guarantee (PBG) as required under the Request for Resolution Plan (RFRP).

- On 23-9-2021, the successful Resolution Applicant appeared and sought four weeks' time which was granted and recorded. However, the Resolution Applicant failed to submit the PBG on the ground of Covid induced pandemic. one weeks' time was further granted with clear orders from the bench that in case of default, the opportunity would stand forfeited and appropriate orders shall be passed by the Adjudicating Authority. On next hearing date again the Successful Resolution Applicant pleaded time for submission of PBG.
- Insolvency Professional filed IA seeking a direction to Resolution Applicant to furnish PBG.

PROVISIONS REFERRED

Regulation 36(B)(4A) of IBBI (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 provides that:

"The request for resolution plans shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of section 30, to provide a performance security within the time specified therein and such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule."

DECISION

Hon'ble NCLT stated that

"we fail to understand why the Resolution plan was submitted by the Resolution Professional to the Adjudicating Authority for approval when the conditions of RFRP were not fulfilled.

In this backdrop we are astonished to note that the Resolution Professional has filed IA 478/2021 seeking a direction to Resolution Applicant to furnish PBG. We have no hesitation to hold that the act of filing IA 478/2021 is nothing but dereliction of his functions as Resolution Professional, besides violation of CIRP Regulations referred supra. Here the conduct of CoC member also raises serious questions/doubts in approving the resolution plan in a mechanical and callous manner and presenting it for approval before this Authority. It is needless to say that, once the Resolution Applicant is found to have been breached the terms and conditions of Resolution plan at this Tribunal, it is the duty of Resolution Professional to move for liquidation.....

It appears to us that the Resolution Professional was not serious in the conduct of CIRP of the Corporate Debtor"

Hon'ble NCLT was not satisfied with the conduct of CIRP by the Insolvency Professional and requested IBBI to look into the conduct of Insolvency Professional and initiate appropriate action against the Insolvency Professional.

Since, the Resolution Plan was rejected, NCLT appointed another Insolvency Professional to act as Liquidator.

FAQs on Limitation Act *vis-a-vis* IBC

1. What are the provisions related to Limitation Act under Insolvency and Bankruptcy Code of India?

Section 238A of the Code stipulates that "the provisions of the Limitation Act, shall as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the debt recovery tribunal or the debt recovery appellate tribunal, as the case may be.

It is clear that all the relevant provisions of the Limitation Act will be applicable while adjudicating an application or claim under the IBC. The phrase "as far as may be" means that the provisions of the Act would apply *mutatis mutandis* to proceedings under the Code.

Further, since the Limitation Act is applicable to applications filed under sections 7 and 9 of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. The application has to be filed within a time period of three years from the date of default and there is no continuing cause of action once the default takes place.

2. Which sections of Limitation Act are frequently referred during IBC proceedings?

Section 18 of the Act provides for "effect of acknowledgement in writing"

As per Section 18,

(1) where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his

title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

(2) Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Section 19 of the Act provides for "effect of payment on account of debt or of interest on legacy"

Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.

Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgement of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

Section 14 of the Act provides for "exclusion of time of proceeding *bona fide* in court without jurisdiction"

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

3. Explain the applicability of Section 18 of the Limitation Act under IBC proceedings.

As per the decision of Apex Court dated March 26, 2021 in the matter of *Laxmi Pat* v. *Union Bank of India,* the provisions of Limitation Act have been made applicable to the proceedings under the Code, as far as may be applicable. There is no reason to exclude the effect of Section 18 of the Limitation Act to the proceedings initiated under the Code. Fresh period of limitation be computed from the date of acknowledgement of a debt by the principal borrower or the corporate guarantor (corporate debtor), as the case may be, provided the acknowledgement is before expiration of the prescribed period of limitation.

4. Explain the applicability of Section 19 of the Limitation Act under IBC proceedings.

As per the decision of NCLAT *vide* its order dated 14th August, 2020 in the matter of Rajendra Narottamdas read with Apex Court dated March 26, 2021 in the matter of *Laxmi Pat* v. *Union Bank of India*, the provisions of Limitation Act have been made applicable to the proceedings under the Code, as far as may be applicable. Accordingly, where payment is made on account of a debt or interest before expiration of the prescribed period by the person liable to pay, a fresh period of Limitation shall be computed from the time when the payment was made.

5. Does entries in balance sheet amounts to an acknowledgement for the purpose of Section 18 of the Limitation Act?

In reference to the discussions held in the matter of *Asset Reconstruction company (India) Limited* v. *Bishal vide* its order dated 15th April, 2021 there is a compulsion in law to prepare a balance sheet but no compulsion to make any particular admission, is correct in law as it would depend on the facts of each case as to whether an entry made in a balance sheet *qua* any particular creditor is unequivocal or has been entered into with caveats, which then has to be examined on a case by case basis to establish whether an acknowledgement of liability has, in fact, been made, thereby extending limitation under section 18 of the Limitation Act.

6. In what circumstances exclusion of time as per Section 14 of the Limitation Act is applicable under IBC?

In the matter of *Sesh Nath* v. *Baidyabati Sheoraphuli Co-operative Bank vide* order dated 22nd March, 2021, the court held that the proceedings under the SARFAESI Act qualifies to be a "civil proceeding" for exclusion of time under section 14 of the Act. Interpreting section 14 liberally and more broadly, the court held that the Section 14 exclusion is available to a creditor filing an application under section 7 of the IBC.

Regulatory updates

- MCA *vide* its notification dt. 5th July 2022 notified regarding appointment of Smt. Anita Shah Akella, Joint Secretary, Ministry of Corporate Affairs as the *ex officio* member in the IBBI to represent the MCA in IBBI. The notification can bee accessed @ **https://ibbi.gov.in//uploads/legalframwork/c698aa899d1488c5c4f707204b8c567d.pdf.**

- The MCA *vide* its notification dt. 5th July 2022 notified regarding Central Government rescinding notification of Government of India in the Ministry of Corporate Affairs published on 1st February, 2022, in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-section (*ii*) *vide* S.O. 408(E), dated the 28th January, 2022, except as respect things done or omitted to be done before such rescission. The notification can be accessed **@https://ibbi.gov.in//uploads/legalframwork/34d195f1a8ebe6ee35aa04abf6a531ad.pdf.**

- The MCA *vide* its notification dt. 14th July 2022 notified regarding appointment of Shri Jayanti Prasad, as a Whole time member of the Insolvency and Bankruptcy Board of India. The notification can bee accessed @ **https://ibbi.gov.in//uploads/legalframwork/ee1b0d8f046d80343567912ac936f172.pdf.**

Cross border Insolvency Regime in Japan

In essence, for in-court insolvency proceedings, Japanese insolvency law recognizes four types of procedures, each of which is governed by separate legislation and can be categorized into one of two general types, depending on whether the aim of the proceedings is to liquidate a debtor(liquidation-type proceedings) or rehabilitate a debtor (rehabilitation-type proceedings).

The Japanese Corporate Reorganization Law and the Civil Rehabilitation Law provide for procedural consolidation when the administration of reorganizing companies is practical and reasonable. The reorganization proceedings regarding group companies are administered in a collaborative manner by a team of trustees who are closely related to each other, and all the proceedings are developed simultaneously or at a harmonized pace.

There are five insolvency proceedings in Japan: (1) bankruptcy (hasan) under the Bankruptcy Law (hasan ho); (2) special liquidation (tokubetsu seisan) under the Commercial Code (sho ho); (3) corporate reorganization (kaisha kosei) under the Corporate Reorganization Law (kaisha kosei ho); (4) civil rehabilitation (minji saisei) under the Civil Rehabilitation Law (minji saisei ho); and (5) corporate arrangement (kaisha seiri) under the Commercial Code.

CROSS BORDER INSOLVENCY

One of the most significant legislation to Japanese insolvency law was the enactment of the Law on Recognition and Assistance of a Foreign Proceeding (gaikoku tosan syonin enjo ho, Recognition Law) in 2000, which adopts the Model Law on Cross-Border Insolvency (Model Law) as promulgated by the United Nations Commission on International Trade Law (UNCITRAL).

It has been made clear that the Japanese court has jurisdiction over an insolvency case, as long as the debtor has either address, residence, business or other offices, or assets, in the case of a bankruptcy or Corporate Reorganization Law proceeding, or has its business offices, in the case of a corporate reorganization, within Japan.

To deal with cross-border insolvency cases fairly and appropriately, the Recognition Law permits Japanese courts to defer to an insolvency proceeding in foreign countries and to cooperate with foreign courts by enjoining actions against a debtor or its assets in Japan. The mechanism for this cooperation is an "ancillary proceeding" brought by a foreign insolvency representative for these purposes. The Recognition Law is modeled after the UNCITRAL Model Law but adopts rules subject to the Japanese law as mentioned above.

A Japanese court will dismiss a petition for recognition of a foreign insolvency proceeding if a Japanese insolvency proceeding, such as bankruptcy, civil rehabilitation or corporate reorganization, is initiated with respect to the same debtor, unless all of the following conditions are met: (1) the foreign insolvency proceeding is a main proceeding; (2) it is in the general interests of the creditors to take assistance measures pursuant to Chapter 3 of the Recognition Law in respect to the foreign insolvency proceeding; and (3) there is no likelihood of the interest of Japanese creditors being unreasonably prejudiced if the court grants assistance measures pursuant to Chapter 3 of the Recognition Law in respect to the foreign proceeding.

Japan is one of the first countries to enact legislation enabling recognition of and provision of assistance in foreign insolvency proceedings pursuant to the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"). The "Act on Recognition of and Assistance for Foreign Insolvency Proceedings" (the "RAFIP") was enacted in Japan to enable the Tokyo District Court (the "TDC") to recognize and provide assistance in respect of foreign insolvency proceedings in Japan. Although the RAFIP contains most of the key functions found in the Model Law on provision of assistance in foreign insolvency proceedings, there exist some differences between the two.

The Act on Recognition of and Assistance for Foreign Insolvency Proceedings" (the "RAFIP")

The RAFIP provides for two main types of relief. First, enforcement by creditors is restricted through prohibitions on enforcement, suspension of lawsuits, and similar measures. Second, the power of debtors to dispose of assets in Japan is restricted through the need for appointment of recognition trustees and similar requirements. Under current practice,

if the foreign insolvency proceeding is a DIP-type proceeding (such as proceedings under Chapter 11 in the U.S.), the TDC would generally issue an order to restrict enforcement by creditors. Pursuant to Article 28 of the RAFIP, such orders typically take the form of a prohibition against compulsory execution ("Stay Order").

On the other hand, if the foreign insolvency proceeding is a trustee-type proceeding (such as proceedings under Hong Kong insolvency laws), the TDC would, pursuant to Article 32 of the RAFIP, generally issue an order to restrict the powers of the debtor through the appointment of a trustee ("Administration Order"). The trustee has the power to administer the debtor's business and assets in Japan, although the approval of the TDC is required before selling or disposing of the debtor's assets in Japan (Article 35 of the RAFIP). The RAFIP does not enable assistance to be provided for purposes of giving effect to various court orders issued in the foreign insolvency proceedings, such as orders for the discharge of debts, avoidance of asset transfers and the like.

Differences between the Model Law and RAFIP

Issue	***Model Law***	***RAFIP***
Legal Effects of Recognition	Automatic relief will be given for foreign main proceedings. Discretionary relief is available for foreign non-main proceedings.	Recognition is the prerequisite for assistance and relief. Assistance and relief will be provided at the court's discretion regardless of the foreign main proceedings or non-main proceedings.
Relationship between recognition proceedings and domestic proceedings	Both proceedings can exist concurrently	Cannot co-exist under the principle of "one proceeding for one debtor". If the foreign insolvency proceeding (*i.e.,* the non-Japanese proceeding) is the foreign main proceeding, the Japanese proceeding will likely be suspended if such suspension benefits creditors in general and does not harm creditors' interests in Japan.
Court-to-court communication and cooperation	Article 25 of the Model Law provides for court-to-court cooperation and court-to-trustee cooperation.	No provision. (Provisions on cooperation with foreign trustees are embedded in Japanese insolvency laws.)

CONCLUSION

It has been made clear that the Japanese court has jurisdiction over an insolvency case, as long as the debtor has either address, residence, business or other offices, or assets, in the case of a bankruptcy or CRL proceeding, or has its business offices, in the case of a corporate reorganization, within Japan.

Special provisions for harmonization with foreign insolvency proceedings CRL has already introduced various provisions in order to harmonize the CRL proceeding with foreign insolvency proceedings, and RAFIP introduced similar provisions to the Bankruptcy Law and Corporate Reorganization Law.

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