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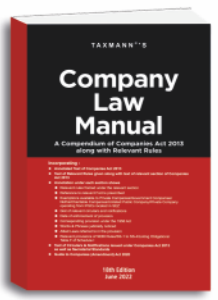

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At a Glance

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Section 238A, read with section 5(8) and 5(7), of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Limitation period - IBHL bank sanctioned financial assistance to borrowers and corporate debtor stood as corporate guarantor - Borrowers defaulted in payment - IBHL assigned its debts to appellant bank - Since payment was still pending, appellant initiated proceedings before Debt Recovery Tribunal and obtained a recovery certificates against borrowers and guarantor - On basis of said recovery certificates, appellant claimed to be a financial creditor filed an application for initiating CIRP against guarantor and

same was admitted by Adjudicating Authority - NCLAT by impugned order held that since default was of year 1997, CIRP application filed in year 2018 was hopelessly time barred and, thus, order admitting CIRP application was to be set aside - Whether liability in respect of a claim arising out of a recovery certificate would be a financial debt within meaning of section 5(8) and consequently, holder of recovery certificate would be a financial creditor within meaning of section 5(7) - Held, yes - Whether holder of such certificate would be entitled to initiate CIRP, if initiated within a period of three years from date of issuance of recovery certificate - Held, yes - Whether since application under section 7 was filed within a period of three years from date on which recovery certificate was issued, i.e. in year 2017, NCLAT had erred in holding that it was barred by limitation and, thus, order of NCLAT was to be set aside - Held, yes (Paras 84 and 85)

- **Vallal Rck *v.* Siva Industries and Holdings Ltd.**
  (2022) 139 taxmann.com 68 (SC) • P165

Section 12A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Withdrawal of application - Whether when 90 per cent and more of creditors, in their wisdom after due deliberations, find that it will be in interest of all stakeholder to permit settlement and withdraw CIRP, NCLT or NCLAT cannot sit in an appeal over commercial wisdom of Committee of Creditors (CoC); interference would be warranted only when NCLT or NCLAT finds decision of CoC to be wholly capricious, arbitrary, irretional and de hors provisions of statute or rules - Held, yes - Petition for initiation of CIRP against corporate debtor was admitted by NCLT - Settlement plan of appellant, promoter of corporate debtor, under section 12A for withdrawal of CIRP was approved by members of CoC by 94.23 per cent voting shares - NCLT, while holding that said plan was not a settlement simpliciter under section 12A but a 'business restructuring plan', rejected application for withdrawal of CIRP and approval of settlement plan - Vide another order, NCLT initiated liquidation process of corporate debtor as well - Appeal against both orders were dismissed by NCLAT - Whether since decision of CoC was taken after members of CoC had due deliberation to consider pros and cons of settlement plan and took a decision exercising their commercial wisdom, neither NCLT nor NCLAT were justified in not giving due weightage to commercial wisdom of CoC. - Held, yes - Whether thus, orders passed by NCLT and NCLAT were to be set aside and application filed by RP before NCLT for withdrawal of CIRP was to be allowed - Held, yes (Paras 26 and 28)

- **Ruchi Soya Industries Ltd. *v.* Joint Commissioner of Labour And Class Cess Assessment Office**
  (2022) 140 taxmann.com 499 (NCLAT - New Delhi) • P-169

I. Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Resolution plan - Approval of - Whether after approval of resolution plan, all claims which have not been filed in CIRP and are not part of resolution plan stand extinguished - Held, yes - Whether where respondent Joint Commissioner of Labour and Class Cess Assessment Officer demanded labour cess on construction work undertaken by appellant-corporate debtor, however, he had not filed any claim in CIRP of appellant, after approval of resolution plan respondent could neither press any claim nor issue any demand notice - Held, yes (Paras 20 and 21)

II. Section 14 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - General - Whether subsequent to closure of CIRP of corporate debtor, proceedings initiated under section 63 (1-A) of Maharashtra Tenancy and Agricultural Land Act, 1948 could very well be proceeded with and could not be subject matter of insolvency process - Held, yes (Para 23)

I. Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether where appellant homebuyers who had booked their flats with corporate debtor, a real estate company, filed their claims before RP after resolution plan was duly approved by CoC, they could not have been included in List of Creditors - Held, yes (Para 15)

II. Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether where appellant-homebuyers who had booked their flats with corporate debtor, a real estate company, filed their claims before RP after Resolution Plan was duly approved by CoC, claim of appellants could not be said to have been extinguished as extinguishment of claim of appellants would happen only after approval of plan by Adjudicating Authority - Held, yes (Paras 16 and 18)

III. Section 31 of the Insolvency and Bankruptcy Code, 2016, read with regulation 36 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Appellants-homebuyers who had booked their flats with corporate debtor, filed claims before RP after resolution plan was duly approved by CoC - Aforesaid claims of homebuyers were rejected by RP as being filed belatedly - Aggrieved by same, homebuyers filed an application before NCLT - NCLT refused to entertain their belated claims - On appeal, it was found that appellants being homebuyers had made payments to corporate debtor, and there was obligation on part of corporate debtor to provide possession of houses alongwith attached liabilities - Whether Information Memorandum ought to have included claim of those homebuyers, who had not even filed their claims to correct liabilities of corporate debtor for its appropriate resolution - Held, yes - Whether non-consideration of such claims, which were reflected in records, lead to inequitable and unfair resolution - Held, yes - Whether thus, direction was to be issued to Resolution Professional to submit details of homebuyers, whose details were reflected in records of corporate debtor including their claims to resolution applicant, on basis of which resolution applicant would prepare an addendum to resolution plan, which was to be placed before CoC for consideration - Held, yes (Paras 23, 25 and 26)

Section 238A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and section 18 of the Limitation Act, 1963 - Corporate Insolvency Resolution Process - Limitation period - Whether section 18 of Limitation Act, 1963 provides that a fresh period of limitation shall be computed from time when acknowledgement of accepting its liability is signed by corporate debtor - Held, yes - Corporate debtor committed default in repayment of a debt - Financial creditor filed an application under section 7 against corporate debtor - NCLT by impugned order admitted said application - Corporate debtor challenged said order on ground that date of default was 15-4-2011 and, therefore, application filed on 25-11-2019 was barred by limitation - Whether since corporate debtor had issued letters to financial creditor on 19-9-2018, 9-11-2018 and 15-7-2019 wherein it had given one time settlement proposal, said letters amounted to acknowledgement of liability by corporate debtor - Held, yes - Whether therefore, application filed under section 7 on 25-11-2019 was not time barred - Held, yes - Whether thus, impugned order passed by NCLT was to be upheld - Held, yes (Para 20)

Section 12A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate Insolvency Resolution Process - Withdrawal of application - CIRP was admitted against corporate debtor at instance of respondent-financial creditors - Corporate debtor had reached settlement with financial creditor and filed application under section 12A before NCLT for withdrawal of CIRP - NCLT rejected said application on ground that post public announcement, IRP had received 134 claims and if withdrawal of CIRP was permitted, it would lead to multiplicity of proceedings, and also substantial claims of financial creditors could not be disregarded in view of settlement with a single creditor - Whether since, NCLT had not taken into consideration regulation 30A(1)(a) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, while passing impugned order and application was filed before constitution of CoC, impugned order was to be set aside and matter was to be remanded back to NCLT to decide it after taking into consideration import of regulation 30A - Held, yes (Paras 12 and 13)

- **Aashray Social Welfare Society *v.* Saha Infratech (P.) Ltd.**
  (2022) 140 taxmann.com 503 (NCLAT - New Delhi) • P-181

Section 21, read with section 25A, of the Insolvency and Bankruptcy Code, 2016 and Regulation 16A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Committee of Creditors - Whether as per statutory scheme, there is no such requirement in law that Authorised Representative (AR) shall represent creditors in a class before Adjudicating Authority in an adjudication - Held, yes - Whether AR has a limited role assigned under statutory scheme i.e. to attend meetings of CoC and to cast votes on behalf of creditors in a class - Held, yes - Appellant No. 1 was a registered society comprised of 102 members who were all allottees of a real estate project being developed by corporate debtor - Appellants were also allottees in said project of corporate debtor - Pursuant to commencement of CIRP of corporate debtor, two financial creditors (Respondent Nos. 2 and 3) filed their claims before IRP but same were rejected - Thereafter, they filed an application before NCLT in which appellants had not not been impleaded as party respondents - Accordingly, appellant-homebuyers filed an application and prayed for impleadment to oppose claim filed by respondent Nos. 2 and 3 - NCLT rejected impleadment application filed by appellants on ground that Authorised Representative (AR) of homebuyers who were creditors in class were not representing creditors in a class before Adjudicating Authority - Whether it could not be said that since AR had not came up before Adjudicating Authority for filing impleadment application, appellants who themselves were homebuyers had no right to participate in adjudication initiated by filing applications by respondent Nos. 2 and 3 - Held, yes - Whether since allegation of connivance had been made against appellants by respondent Nos. 2 and 3 before Adjudicating Authority, appellants had every right to be heard before Adjudicating Authority - Held, yes - Whether thus, Adjudicating Authority committed error in rejecting impleadment application filed by appellants to implead them as party respondent - Held, yes (Paras 16,18,19, 22 and 23)

- **Ram Kishor Arora, Suspended Director of Supertech Ltd. *v.* Union Bank of India**
  (2022) 140 taxmann.com 558 (NCLAT - New Delhi) • P-186

Section 5(8), read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Corporate debtor was a real estate company engaged in construction of various projects in National Capital Region - Respondent-financial creditor granted credit facilities to corporate debtor for development of Eco Village II project - Account of corporate debtor was declared as

Non-Performing Asset - Financial creditor filed an application under section 7 against corporate debtor - NCLT by impugned order admitted said application and directed for initiation of CIRP - On appeal, appellant-suspended director of corporate debtor submitted that corporate debtor had been running a large number of projects, substantial number of projects had already been completed, existing promoters were willing to complete projects in a time bound manner along with discharging liabilities of all financial creditors, homebuyers and even operational creditor - It was further submitted that CIRP need not to be allowed to continue for all 20 projects rather it might be undertaken on projects basis - Whether since promoters were ready to extend all co-operation with all their employees to IRP, IRP was to be directed to proceed with construction of all projects under his overall supervision and control - Held, yes - Whether Committee of Creditors was to be constituted only for Eco Village II project with all financial creditors and it should start process for resolution of said project - Held, yes - Whether even for Eco Village II project, IRP should carry project and continue it as ongoing project by taking all assistance from ex-management, employees and workmen - Held, yes - Whether however, other projects apart from Eco Village II should proceed as ongoing projects under overall supervision of IRP - Held, yes - Whether pendency of CIRP proceedings should in no manner hinder appellant to approach financial creditors for entering into settlement with financial creditors with regard to disbursement to financial creditors - Held, yes (Paras 22, 23 and 24)

- **Ranjeet Kumar Burnwal *v.* Committee of Creditors, Supriyo Kumar Chaudhuri**
  (2022) 140 taxmann.com 560 (NCLAT - New Delhi) • P-193

Section 5(13) of the Insolvency and Bankruptcy Code, 2016 and section 202 of the Companies Act, 2013 and rule 17 of Companies (Meetings of Board and its Powers) Rules, 2014 - Corporate insolvency resolution process - Insolvency resolution process costs - Appellant was appointed as Executive Director of corporate debtor - NCLT ordered initiation of CIRP of corporate debtor - Resolution Professional (RP) pursuant to his appointment, terminated appointment of appellant due to some irregularities - In pursuance of same, appellant filed an application before NCLT seeking payment of leave encashment and compensation for loss of office/employment with interest - NCLT held that only leave encashment would be treated as a part of CIRP cost and rejected other compensatory claims - Whether Adjudicating Authority had rightly recorded that leave encashment amount payable to appellant would be treated as part of CIRP cost - Held, yes - Whether however, keeping in view agreement between appellant and corporate debtor and also rule 17(3) of Rules, 2014, there was no provision for payment of compensation to appellant and, hence, same was not payable - Held, yes (Para 9)

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

From Chairman's Desk

I congratulate Team ICSI IIP, who, under the stewardship and guidance of its Chief Operating Officer, Ms. (CS) Alka Kapoor, successfully conducted joint events (with IBBI) on IBC across different cities in India. These programs, which were aimed at spreading awareness on the Insolvency Profession and withspecific focus on the Graduate Insolvency Programme, involved a great deal of prior planning, preparation and coordination to be carried out with other institutions which agreed to host them in their premises and facilities. Starting with the very first day of the month (as also the iconic week allocated under the theme *Azadi ka Amrit Mahotsav*), we had the opening ceremony conducted at the National Law Institute University, Bhopal (NLIU, Bhopal) and a parallel IBC awareness session at the Maharashtra National Law University, Mumbai. The NLIU, Bhopal, which is now prepared to roll-out the GIP starting from academic year 2022-23, as also the Maharashtra National Law University (MNLU) with which ICSI IIP has conducted a joint program on IBC in the past, saw a huge turn-out of the students as well as other stakeholders. The excitement to explore and learn the nuances of this new Insolvency and Bankruptcy law regime in India amongst the students who participated at these respective Universities was evident from their sheer attendance figures. I am also very happy to learn and would like to thank the Professional Members/IPs who volunteered to contribute as Speaker/Faculty

in these sessions and sharing their knowledge and experience. If I may venture-in to say that the Program became a movement of the stakeholders, by the stakeholders and for the stakeholders!

The month of June also witnessed a series of other very significant activities being carried-out by the Ministry of Corporate Affairs (MCA), ICSI, IBBI and other statutory bodies. These activities formed a part of the much-needed reform process that started a few years ago. Over the past few years, the nation has witnessed a paradigm shift in different spheres of governance activities, especially in the regulatory framework concerning resolution of stressed assets. There can be no better testimony to it than the introduction and successful functioning of IBC. The most profound impact of IBC has been in terms of its impact on creditor-debtor relationship,and with more than 5 years of its successful functioning and implementation (especially the implementation of Corporate Insolvency Resolution mechanism under IBC), events like these provide a good opportunity to the stakeholders to share their experience, knowledge and vision as also to take a stock of the progress made so far and the expectations for the future.

The supremacy of position of a Financial Creditor over an Operational Creditor in deciding the future of a company which is undergoing resolution process is a well-established legal proposition under the IBC. Infact, with the recognition of CoC being vested with commercial wisdom, the area of judicial interference by the Courts in CoC's decisions has got minimised under the IBC. This is one factor that is leading to claims being made by the creditors who claim to be a financial creditor instead of being an operational creditor. This is one of the issue that got agitated before Hon'ble Supreme Court in a matter involving resolution of a real estate company.Given the complexities involved and a plethora of parties before the Court having their own varied and conflicting interests, it becomes the bounden duty of the Courts to lay such matters to rest through an interpretation and construction of the provisions of the law. In the case mentioned, one of the issues involved was "whether local industrial development authorities, in particular the New Okhla Industrial Development Authority ("**NOIDA**"), should be classified as financial creditor or operational creditor, by virtue of the lease deeds they enter into with various corporate debtors."The Hon'ble Court *vide* its judgment dated May 17,

2022, settled the position holding NOIDA as an OC under IBC. The issue involved was whether a 90 year lease entered into between NOIDA and the CD (real estate company) gave rise to a financial or an operational debt in the event that a CIRP gets triggered against the CD.

After considering the contentions raised and arguments advanced by the parties in support of their respective legal contentions on the issue whether the *inter se* agreement had the commercial effect of borrowing, Hon'ble SC recognised NOIDA as an OC and not an FC. It based its decision on the reasoning *firstly*, that the lease deed executed *inter se* parties does not satisfy requirements of s. 5(8)(*f*), IBC, *secondly*, it can also not be classified as a 'financial lease'; and thirdly a financial debt involves disbursement of a debt which is missing in this case.

Though the likelihood of this matter getting finally settled with this decision from Hon'ble SC is something which we shall see as things progress further, the decision has indeed paved the way for successful resolutions of real estate companies atleast for the present since many resolution plans got stalled at the hands of NOIDA at the stage of approval from AA, citing its qualification as a financial creditor.

CS ALKA KAPOOR
COO (Designate)

COO's Message

The Azadi Amrit Mahotsav means elixir of energy of independence; elixir of inspiration of the warriors of freedom struggle; elixir of new ideas and pledges; and elixir of Aatmanirbharta. Therefore, this Mahotsav is a festival of awakening of the nation; festival of fulfilling the dream of good governance; and the festival of global peace and development

...His Excellency, Hon'ble Prime Minister of India, Sh. Narendra Modi

As the nation celebrates *Azadi Ka Amrit Mahotsav* (AKAM), an initiative by the Government of India to celebrate and commemorate 75 years of Indian independence and our glorious history, culture and achievements, IBBI and ICSI IIP conducted awareness sessions on IBC at different locations across India. The official journey of AKAM commenced on 12th March 2021 with a 75-week countdown to our 75th anniversary of independence culminating on 15th August 2023. The activities undertaken and events organised by IBBI as part of the Utsav, includes: (*a*) awareness programmes on IBC which was conducted jointly with the 3 IPAs in 75 districts, giving specific reference to the Graduate Insolvency Programme (GIP); (*b*) International Research Conference on Insolvency and Bankruptcy,which was conducted jointly with the Indian Institute of Management, Ahmedabad from 30th April to 1st May, 2022; (*c*) National Online Quiz on IBC, 2016,

which was organised in collaboration with MyGov.in and BSE Investors' Protection Fund. This quiz program was intended to promote awareness and understanding of IBC amongst different stakeholders.

Apart from the above, a technical session on *5 Years of IBC - Achievements and Way Forward* was held on 7th June 2022, wherein different stakeholders got together for a discussion on the perspectives of Adjudicating Authority, IBBI, Financial Creditors, Resolution Applicant and Professionals on IBC's journey so-far as also the way ahead. A Conference on *Entrepreneurship Liberty: Freedom of Entry, Competition and Exit* and an *IP Conclave* was also conducted in this month on 10th June which saw presence of a very large number of stakeholders connected with IBC ecosystem, including the adjudicating authorities, insolvency professionals, registered valuers, economists, financial creditors, service providers, researchers, students, professionals, regulators, academia and government officers.

With IBC in place, the nation hastruly traversed a long way in terms of improving its credit culture and discipline. The legislation, thus, deserves support and patience from all stakeholders.At the same time, the attitude towards this reformative piece of legislation cannot be based on some figures concerning outcomes of certain recoveries made out of cases where the Corporate Debtor was in a state of distress for a very long period. Besides IBC, it is necessary to continue improving the regulatory regime for out-of-court resolutions through suitable harmonisation of the regimes across various classes of regulated entities as well as periodic review of the framework to keep pace with the changes in the economy and financial system. In other words, as with any public policy, it remains as a work-in-progress with a definite scope for improvement at any point in time.

IBC, as an insolvency resolution mechanism, is gradually becoming the preferred choice lenders. This is also leading to a positive sum game, wherein, instead of each creditor moving ahead to realise their security interest in the CD, the creditors get together and participate in the insolvency resolution process. Needless to say, that, without participation of all lenders, any effort made towards resolution of insolvency is bound to be a mere postponement of the inevitable reckoning. Moreover, the time lost in pursuing such incomplete resolutions compounds the

eventual loss to the creditors and results in a heavy cost to the financial system as well.

A concern that is lingering for some time now concerns the delay that takes place between the date of CIRP application and its eventual admission. While IBC envisages and lays down a period of 14 days for admission, the reality reveals that it is taking much longer. Statistics reveal that the average time taken for admission of an insolvency application (filed by an OC) has increased from 468 days in 2020-21 to 650 days in 2021-22. Such delays defy and hit not only at the intent of the Code, but also leading to weakening of creditors' confidence in the efficiency of the Code. It is worth mentioning that if the admission process itself is taking longer than the prescribed period for completion of entire CIRP, then the objective of value maximization will remain only a far-fetched dream for us. Therefore, the factors which are driving these delays in admission of insolvency applications need to be identified and fixed with optimum solutions.

The Supreme Court has reaffirmed the paramount status conferred on commercial wisdom of the CoC under the IBC. This ruling, which gave a succour to the creditor-in-control model envisioned under the IBC, came from Hon'ble Supreme Court *vide* its judgment delivered this month in the matter of *Vallal RCK* v. *M/s Siva Industries and Holdings Limited and Ors.*, Civil Appeal Nos. 1811-1812 of 2022.The Court, while upholding right of Authorities (NCLT and NCLAT) to interfere in cases wherein they find CoC's decision to be wholly capricious, arbitrary, irrational and *de hors* IBC, reiterated what was stated in the matter of *Arun Kumar Jagatramka*v. *Jindal Steel and Power Ltd.* The NCLT and the NCLAT had earlier rejected RP's application filed u/s 12Aseeking withdrawal of proceedings in view of settlement arrived at *inter se*creditors and CD's management. Under the impugned order,the NCLAT had orderedfor initiation of liquidation proceedings against the CD (Siva Industries) which came to be challenged before Hon'ble SC. The facts of the case reveal that while CD's debt was to the tune of Rs, 4,863 crore,under the settlement plan, FCs had agreed to take a haircut of ~ 93.5% by approving CD's offer of Rs. 328.21 crores as one-time settlement sum. This may create a doubt as to the efficiency of IBC as a recovery mechanism, however, we cannot loose sight of the fact that a resolution plan can fetch only the best possible sum to the creditors, but the extent of that sum depends

on the underlying value stored in the CD. As we move ahead in terms of implementing IBC, I am sure, cases like these which involves very high haircut would be very *far and few between*.

The IBBI, *vide* its circular dated 6th June 2022, has now notified a minimum cooling-off period which needs to be observed between two successive attempts by a candidate for LIE or Valuation examination, as the case may be. Therefore, the notification now requires every candidate who would appear in the said examinations to necessarily observe a 2-month gap between his two succeeding attempts. This requirement shall, however, get implemented after 3 months from the date of notification of this circular.

I look forward to have an active interaction with our professional members and would also thank you for your increasing support and confidence in the functioning of ICSI IIP.

INTERVIEW

SANYAM GOEL
Advocate, IP, CS
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1. I would like to start by asking your views on journey of Code so far as it has been quite some time since the introduction of this Insolvency law.

Reply: Yes it has been quite some time in terms of years, however when we look at the way Insolvency Law has rapidly evolved in a short period of about 5-6 years, it feels that the Law has been around for much longer. The original format of this law has undergone significant changes over this time by way of parliament amendments, judicial pronouncements, and regulatory body introductions. It has been of paramount importance for IP's and other stakeholders to keep abreast with these paradigm shifts taking place in the Insolvency Law almost on a fortnightly basis.

2. How has your overall experience as an Insolvency Professional been so far?

Reply: Working as an IP comes with its own set of challenges. An IP has to be strong not only academically but mentally as well. This job is tasking and at times takes a toll. Having said that, in about 15 years of my total experience, the last

5 of them acting as and IP or advisor or counsel, has helped me significantly grow as a professional. I am now able to look at the scenario of a distressed company or for that matter any business, from the point view of an entrepreneur as well as that of a Compliance Officer. Such change in the perspective and a result oriented approach definitely provides immense professional satisfaction.

3. One of the major challenges faced by IPs in this profession is fees, and with IBBI also coming up with the idea of streamlining of this issue, what are your views on it?

Reply: The discussion paper floated by the good office of IBBI on the subject of fee is a welcome step and with quality inputs from all the stakeholders, I am optimistic that an SOP will be formed which will go a long way in resolving, if not all, at least majority of disputes related to Fee, quantum and payments both, that keep arising between an IP and COC.

4. Since, you have handled number of assignments, how cooperative are the Promoters of the Corporate Debtors?

Reply: The situation of promoter cooperation or the lack of it is well known in this line of work. In almost all the matters, IP's often face stiff resistance from promoters in obtaining complete or accurate information. The roster of each Hon'ble Bench is filled with Section 19(2) applications *qua* the non-cooperation from the promoters. I firmly believe that introduction of certain penal provision in Section 19(2) of IBC will go a long way in resolving this matter.

5. During the Corporate Insolvency Resolution Process (CIRP), an IP has to deal with various authorities such income tax departments, local police authorities etc. to carry out the process. So, during the course of your assignments how has your experience been while dealing with such authorities? How do they perceive this insolvency regime?

Reply: As of now, compared to the situation in the past, there has been a sea change in the view of Government Authorities in the way they look at proceedings under Insolvency Law. The issues relating to recovery by Government Departments post approval of Resolution Plan have been more or less settled by way of Judicial pronouncements. If we talk about Local Law Enforcement, although we rarely have to deal with them, on those rare occasions when we had to, my experience has been that the police department is inclined to follow the orders of the High Courts or the Judicial courts where they are appearing regularly. However I believe that with the passage of time, their perspective will also improve.

6. What are your views on the Inspection conducted by IPAs w.r.t. assignments handled by the respective Insolvency Professionals?

Reply: (Laughs) I am not sure that what

can be my view on the inspection except that no one would like to face the same. All said and done an effective monitoring regime is an essential limb for maintaining the balance between letter and spirit of any Law.

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

Reply: The Law will evolve further upon introduction of the provisions which have been kept under eclipse till date viz cross border insolvency, individual bankruptcy etc. However the thrust of the Law being "timely" resolution cannot be achieved by pushing the IP's alone. All other stakeholders and authorities involved in the process need to facilitate the same. Some format of code of conduct for the stakeholders, other than IP's, as well will prove far more effective in furthering the objective of the Code.

8. Any advice to the professionals who are seeing their career in Insolvency Law?

Reply: Yes. Please bear in mind that this is a demanding job. It requires constant study and adaptation with particular focus on applied law driven by a clear & focused mind. Please follow the Law in letter and spirit and you will find the profession rewarding.

9. How significantly do you think the IBBI and IPAs serve the profession of Insolvency Professionals and what is the scope of improvement according to you?

Reply: Being the principal regulator and frontline regulator of the IP's, the importance and value does not require any validation. It will not be right for me to suggest any improvement to the regulators as I am not in that position. However I would say that a little more faith in the working of IP's will boost morale as few bad instances should not be used as a bench mark of performance of entire professional community.

10. Lastly, where do you see yourself as an IP and this insolvency law in the upcoming years?

Reply: With the introduction of cross border insolvency on the tethers and impending implementation of bankruptcy regime of individual and partnership firms, the work load should be a happy problem to have.

Insight!

Monitoring GST Claims in Insolvency Cases

DR. SANJIV AGARWAL
FCA, FCS

With large amounts of public money locked up in non-performing assets (stuck up bank loans), there was a new piece of legislation introduced in India in 2016, *i.e.*, Insolvency and Bankruptcy Code, 2016 (IBC Code) by virtue of which, both financial creditors and operational creditors or other creditors need to lodge their claims before the Resolution Professional (RP).

IBC Code and Creditors

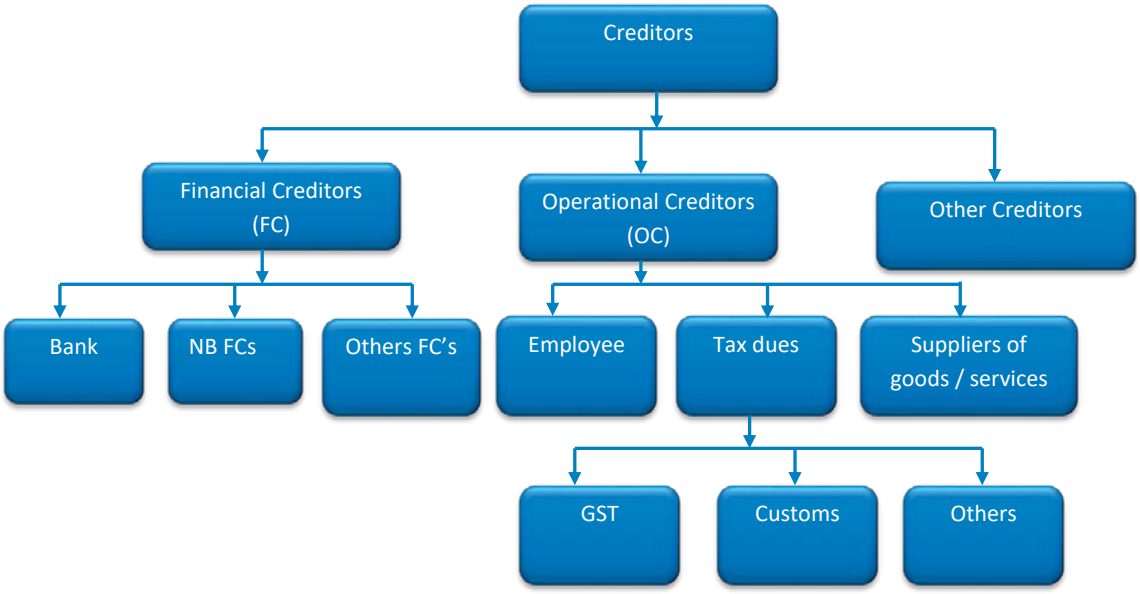
The Insolvency and Bankruptcy Code (IBC), 2016, was enacted to consolidate the fragmented laws pertaining to insolvency. The IBC handles the insolvency proceedings cases through tribunals *i.e.* National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT). The Code recognizes three different types of creditors, viz, Financial Creditors, Operational Creditors and other Creditors. Section 5(20) of the Code defines an Operational debt as "a claim in respect of the provisions of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central

Government, any State Government or any local authority."

Tax Dues covered under Operational Creditors

For the purposes of IBC Code, Customs and Goods & Services Tax (GST) authorities shall be considered as operational creditors, like any other creditor and they do not enjoy any privilege. As such, GST/Customs authorities need to submit claim against the corporate debtor against whom demand is in arrear before the Resolution Professional (IRP or RP as the case may be) as per IBC Code, 2016 and procedure stipulated therein. Accordingly, GST and Customs Authorities have been classified as Operational Creditors and are required to submit their claims against corporate debtors when the Corporate; insolvency and resolution process is initiated and public announcement inviting claims is made by the insolvency professional.

Creditors in IBC cases



An operational creditor has the right to file an application to initiate the insolvency resolution process of a corporate debtor and to file a claim in the insolvency resolution process and to participate, without voting rights, in a committee of creditors through their representatives.

Delay in filing tax claims

A timeline of 90 days from the insolvency commencement date is available for filing of claims. However, the experience so far is that tax authorities have shown laxity in filing tax claims or have filed the claims belatedly resulting in claims not being lodged or lodged belatedly resulting in loss of tax revenue whether due to negligence of officers or otherwise. Later on, the authorities then litigate on the rejection of such claims, despite the settled position that no claims can be raised once the plan is approved and no demands can be raised on the resolution applicant who

has taken over the company through such a resolution plan.

One of the reasons for such delay in filing of claims is that concerned Zonal office has not received information regarding initiation of the process in timely manner. Accordingly, CBIC has proposed that IBBI would share the details of the public announcement on a regular basis to an identified office/officer or a centralized system and hence it has been requested that such office/officer/system in Central Board of Indirect Taxes and Customs (CBIC) needs to be identified and intimated to the IBBI for implementing the system for sharing of information.

New Standard Operating Procedure for monitoring claims

To overcome this problem, CBIC has issued a set of instructions called Standard Operating Procedure (SOP) to ensure proper compliances in matters of National Company Law Tribunal (NCLT) cases in respect of IBC Code, 2016 *vide* instruction No. 1083/04/2022 dated 23-5-2022. These SOPs accordingly, ensure a robust mechanism of communication from the nominated officer to the field formations and vice-versa and subsequent monitoring of action taken by the field formations on such communication by the Nodal Officer.

For this purpose CBIC has nominated Additional Director General, Director General of Performance Management (ADG-DGPM) as Nodal Officer. The basic purpose of nominating a Nodal Officer is to ensure filing of the claims with the IBBI in a timely manner and within the period of 90 days from the insolvency commencement date. In the interest of protection of government revenue and to make the entire process smooth and effective, CBIC has nominated the Additional Director General, DGPM as the Nodal Officer for the CBIC for the receipt of information regarding initiation of the insolvency resolution process and dissemination of the same to the field formations for necessary action at their end in terms of the provisions of the Insolvency and Bankruptcy Code, 2016.

The Gist of SOP is as follows:

- GST and Customs Authorities have been classified as operational Creditors and are required to submit their claims against corporate debtors when the Corporate Insolvency and Resolution Process (CIRP) is initiated and public announcement inviting claims is made by the insolvency professional.
- The delay in filing the claims by GST/ custom authorities as operational creditors leads to their claims hot being admitted and extinguished once a resolution plan is approved.
- CBIC shall appoint a Nodal Officer to ensure filing of the claims with the IBBI in a timely manner and within the period of 90 days from the insolvency commencement date.
- Nodal officer nominated by CBIC shall be Additional Director General, DGPM as the Nodal Officer for the CBIC for the receipt of information regarding initiation of the insolvency resolution process and dissemination

of the same to the field formations for necessary action.

- The Nodal Officer will disseminate the information received by him, through official email, to all Zonal Principal/Chief Commissioners with a copy to the concerned Principal Commissioner/ Commissioner within 02 (Two) working days.
- The concerned office/ Commissionerate which has arrears pending against the unit/ company shall file its claims timely for safeguarding and realisation of the government dues and inform the fact of having filed its claim to the Nodal Officer through the ADC/ JC in the Chief Commissioner's Office (CCO).
- Correspondences with the Resolution Professional (RP) should be made regarding finalisation of the Resolution Plan. Timely verification should also be done from the website www.ibbi.gov.in to check if any orders were issued by NCLT with respect to resolution, liquidation, and/or withdrawal of application.

The SOP, inter alia, provides for as follows:

- The Additional Director General, DGPM Nodal Officer will receive the information regarding initiation of the insolvency resolution process of a unit/company from the IBBI for which a dedicated email ID, to be accessed by the said Nodal Officer, will be created. The Nodal Officer may nominate JC/ADC (TAR), DGPM as alternate Nodal Officer for assisting him in his work.
- The Nodal Officer will disseminate the information received by him, through official email, to all Zonal Pr./ Chief Commissioners with a copy to the concerned Pr. Commissioner/ Commissioner within 02 (Two) working days.
- For faster and timely dissemination of the information a dedicated WhatsApp group will also be created by the Nodal Officer which will have ADC/JC concerned (who may be nominated as nodal officer for the Zone) in the Principal/ Chief Commissioner's office, and the Principal Commissioners/ Commissioners concerned as its members.
- The concerned office/Commissionerate which has arrears pending against the unit/company shall file

its claims timely for safeguarding and realisation of the government dues and inform the fact of having filed its claim to the Nodal Officer through the ADC/ JC in the Chief Commissioner's Office (CCO).

- The daily exercise to check for any new parties going in to insolvency from the website www.ibbi.gov.in will also be undertaken by all field formations for filing timely claims, as necessary.
- Correspondences with the Resolution Professional (RP) should be made regarding finalisation of the Resolution Plan. Timely verification should also be done from the website www.ibbi.gov.in to check if any orders were issued by NCLT with respect to resolution, liquidation, and/or withdrawal of application.
- A monthly report of work done in terms of checking the public announcements, filing of claims, if any, liasoning with CIRP for providing updates on cases would be sent to the Nodal Officer by the ADC/ JC in the CCO, in the attached Format.
- The Nodal Officer will submit a consolidated monthly report to the Board for the purpose of review of progress/ action taken by the field formations.

The monthly report shall reveal the following:

(*a*) Opening Balance of the claims filed

(*b*) No. of intimations received pertaining to arrears pending in the zone

(*c*) No. of claims filed during the month

- No. of claims filed in the prescribed time limit (Out of C)
- No. of claims filed after the expiry of the prescribed time limit (Out of C)

(*d*) No. of final orders issued for liquidation, resolution etc. along with brief details

(*e*) Closing Balance (A)+(B)-(D)

Summing - up

It is expected that with this SOP, the cases of claim rejection of tax department may come down. In fact, Department should also fix accountability of jurisdictional tax authorities for any negligence leading to rejection or non-submission of claims under IBC law.

Pre-Packaged Insolvency Resolution Process

AKANSHA RATHI

BACKGROUND

- After considering experience of Insolvency Code, the Insolvency Law Committee (ILC), at its meeting on 16th May 2020, decided to constitute a sub-committee to study pre-packaged Insolvency Resolution Process (PPIRP) for speedier resolution of insolvency, and submit their recommendations. Accordingly, a sub-committee of ILC was constituted by Ministry of Corporate affairs vide order dated 24th April, 2020, under Chairmanship of Dr. M S Sahoo, Chairperson of IBBI.
- The sub-committee submitted its recommendations on 31st October, 2020 to Government. On basis of the recommendations of sub-committee, it was decided to amend Insolvency Code. Accordingly, President promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 on 4th April, 2021 to introduce PPIRP under the Code for this purpose. PPIRP is built on trust and honours the honest MSME owners by enabling resolution when the company remains with them.
- With the background of the formal process in India being afflicted with high costs, pre-pack allows for a cost-effective and speedy resolution process. Pre-pack also identifies and alienates the role of the Insolvency/ Resolution professional as an expert in the process.

NEED FOR PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS

- Normal procedure as specified in Part II Chapter II of Insolvency Code (sections 4 to 32A) are cumbersome. Hence a comparatively simple procedure has been

prescribed in Chapter III-A (sections 54A to 54P) in Part II of Insolvency Code.

- Micro, small, and medium enterprises (MSMEs) are critical for India's economy.
- They contribute significantly to gross domestic product and provide employment to a sizeable population.
- The COVID-19 pandemic has impacted their business operations and exposed many of them to financial stress.
- Resolution of their stress requires different treatment, due to the unique nature of their businesses and simpler corporate structures.
- Therefore, it was considered expedient to provide an efficient alternative insolvency resolution process under the Code for corporate MSMEs, that ensures quicker, cost-effective and value maximising outcomes for all the stakeholders, in a manner which is least disruptive to the continuity of their businesses, and which preserves jobs.

BENEFITS OF PRE-PACK INSOLVENCY RESOLUTION PROCESS

- It consolidates the benefit of both formal and informal proceedings of resolution, thus broadening the options for stakeholders
- Initial spade work is done before making application to Adjudicating Authority(AA) and some sort of informal understanding has been reached with financial creditors.
- The Base Resolution Plan prepared by corporate debtor having inside knowledge of business is a good starting point. In fact, if there is no impairment of operational creditors, Committee of Creditors can accept the Base Resolution Plan itself, with some improvements.
- Corporate debtor is allowed to be partner with other person to submit the base resolution plan.
- Swiss challenge method to get best possible resolution plan
- Reduced burden on NCLT due to out of court settlements.
- It allows the corporate debtor retain control till a settlement is reached with the creditors.
- The pre-pack in contrast is limited to a maximum of 120 days with only 90 days available to the stakeholders to bring the resolution plan to the NCLT.

PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS

- The concept of PPIRP has been introduced to insulate the MSMEs as well as the creditors from prolonged legal battles at a time when financial liquidity in the market is essential to bring back the crippled economy on its feet.

- Restructuring of the corporate debtor is agreed in advance with the creditors and other important stakeholders of such debtor before insolvency is declared. In simple terms, it is a plan which offers a quasi-formal mechanism to finalize the resolution plan before insolvency proceedings (under the Code) are initiated by any creditor.
- Thus, PPIRP strives to achieve a balance between an informal settlement like a one-time settlement plan (which is both economic and flexible but does not have any certainty or statutory backing) and a regular CIRP under the Code (which has legal certainty and proper statutory backing but is time-consuming and involves severe costs or massive haircuts).

HOW ARE PRE-PACKS BETTER THAN CIRP?

- One of the key criticisms of the CIRP has been the time it takes for resolution. At the end of March 2021, 79 per cent of the 1,723 ongoing insolvency resolution proceedings had crossed the 270-day threshold. A major reason for the delays is the prolonged litigation by erstwhile promoters and potential bidders.
- The pre-pack in contrast, is limited to a maximum of 120 days with only 90 days available to stakeholders to bring a resolution plan for approval before the NCLT.
- Another key difference between pre-packs and CIRP is that the existing management retains control in the case of pre-packs; in the case of CIRP, a resolution professional takes control of the debtor as a representative of financial creditors. Experts note that this ensures minimal disruption of operations relative to a CIRP.

SECTION GOVERNING PRE-PACKAGE INSOLVENCY

Section 54A to 54P of the Insolvency and Bankruptcy Code, 2016 ('Code') read with the the Insolvency and Bankruptcy (Pre-packaged Insolvency Resolution Process) Rules, 2021 and Insolvency and Bankruptcy Board of India (Pre-packaged Insolvency Resolution Process) Regulations, 2021 which lays down the provisions of a pre-packaged insolvency resolution process with respect to its initiation, manner of carrying out the process, appointment of resolution professional, termination etc.

WHO CAN FILE AN APPLICATION TO INITIATE THE PPIRP?

Any corporate person *i.e.*, a company or a Limited Liability Partnership (LLP), classified as an MSME under section 7(1) of the MSME Act, 2006 (CD).

To evidence that the Corporate Debtor is an MSME, the applicant shall attach either a copy of the latest and updated **Udyam Registration Certificate** or **proof of investment in plant and machinery or equipment and turnover** as per Notification No. 2119(E) dated 26th June, 2020 of the Ministry of MSMEs.

MSME THRESSHOLD

Class	*Capital Investment in Plant and machinery or equipment (Crores)*	*Turnover (Crores)*	*Applicability of Pre-pack*
Micro Enterprise	1	5	✓
Small Enterprise	10	50	✓
Medium Enterprise	50	250	✓

MINIMUM DEFAULTED AMOUNT FOR PRE-PACKAGED INSOLVENCY

The Ministry of Corporate Affairs *vide* its notification dated April 09, 2021 specified ten lakh rupees as the minimum amount of default for the matters relating to the pre-packaged insolvency resolution process of corporate debtor.

DURATION OF PPIRP

According to section 54D of the code, entire PPIRP needs to be completed within a time period of 120 days from date of initiation of the commencement date. In addition, the insolvency professional shall be required to submit resolution plan as approved by the Committee of Creditors (CoC) within a period of 90 days from the insolvency commencement date and if no plan is approved by the CoC in the designated time frame, then the insolvency professional shall be required to file for termination of PPIRP with the adjudicating authority.

ELIGIBILITY OF CORPORATE DEBTOR FOR PPIRP

As per section 54A, Corporate Debtor (CD), is eligible to apply for initiation of PPIRP, subject to following conditions:–

- Corporate Debtor (CD), which is an MSME under sub-section (1) of section 7 of the Micro, Small and Medium Enterprises Development Act, 2006.
- CD has committed a default of atleast INR 10 Lakh and
  - is eligible to submit a resolution plan under section 29A of the Code;
  - has not undergone a PPIRP during the three years preceding the initiation date;

- has not completed a CIRP during the three years preceding the initiation date;
- is not undergoing a CIRP; and
- is not required to be liquidated by an order under section 33 of the Code;
- Approval of 66% of unrelated financial creditors for initiation of PPIRP and appointment of proposed insolvency professional as the resolution professional.

  CD needs to provide copy of the special resolution, base resolution plan conformity with the requirements provided u/s 54K, Declaration to financial creditors for obtaining the aforesaid permission.
- Declaration from majority of directors/partners that-
  - CD will file application for initiation of PPIRP within 90 days.
  - PPIRP has not initiated to defraud any person
- Passing of special resolution in case of company or approval of more than ¾ of partners in case of LLP for approving the filing of application for initiation of PPIRP.

SECTION 54B – DUTIES OF RESOLUTION PROFESSIONAL (RP) BEFORE INITIATION PPIRP

- The duties of the RP shall commence from the date of obtaining approval from 66% financial creditors section 54A(2)(e).
- Prepare a report in the prescribed Form P8 confirming whether the Corporate debtor meets requirements of Section 54A and the resolution plans conform the requirements u/s 54A(4)(c).
- File such reports and documents as may be required by the Insolvency Board and undertake such other duties as may be specified by the Insolvency Board in accordance with Section 17 of Chapter III of Insolvency and Bankruptcy Board of India (Pre-packaged Insolvency Resolution Process) Regulations, 2021.
- The duties of the RP will cease if the application is not initiated within 90 days from the date of default as required u/s 54A (4) (c) or such application is rejected or admitted (along with payment of fee and costs) by the Insolvency Board.

FILING OF APPLICATION WITH AA WITHIN 90 DAYS FROM DATE OF DECLARATION U/S 54C (1)

- The corporate applicant files the Application in Form 1 with fees of Rs. 15,000 with the AA (Jurisdictional NCLT Bench) in accordance with rules 20, 21, 22, 23, 24, 26 of the National Company Law Tribunal Rules, 2016.

- The corporate applicant serves a copy of the application to the Board (IBBI) before filing the same with the AA.
- The acknowledgement of serving a copy to the Board shall be attached with the Application Form filed with the AA.
- **The Application shall be accompanied by:**

  Declaration, Special resolution, Approval of financial creditors for initiation of PPIRP, Name and written consent of the RP proposed to be appointed in prescribed **Form P5** in accordance with Insolvency and Bankruptcy Board of India (Pre-packaged Insolvency Resolution Process) Regulations, 2021, Report of the RP under Sec 54B(1)(*a*), Declaration of existence of any transactions which are in the scope of avoidance of transactions which are fraudulent or wrongful under Chapter III or VI in prescribed **Form P7** in accordance with Insolvency and Bankruptcy Board of India (Pre-packaged Insolvency Resolution Process) Regulations, 2021 , Information relating to Books of account and any other information.

AFTER FILING OF APPLICATION

- Admission or rejection by the AA (Adjudicatory Authority) within 14 days of filing. However, before rejecting an application, the AA must give notice to the Applicant to rectify the defect in the application within a period of 7 days from such notice The date of admission is the insolvency commencement date (ICD).
- Moratorium shall be declared and effective from the ICD.
- As per section 54H Management of affairs of CD, shall continue to be vest in the hand of Board of directors or partners as the case may be. But according to section 54J, if the COC at any time during PPIRP resolve to vest the management of business with Resolution professional by 66% of voting shares, then RP shall make application to AA for the same. AA if think fit shall pass an order vesting the management of the corporate debtor with the resolution professional.
- The Applicant shall submit a base resolution plan within 2 days from the Pre-Packaged Insolvency Commencement date to the resolution professional and the unrelated committee of creditors ("CoC") for their consideration.
- The COC must be constituted within 7 days of the commencement of PPIRP by the resolution professional. The CoC may approve the resolution plan or grant an opportunity to the corporate debtor to revise the resolution plan. The assent of at least 66% of the creditors constituting the CoC is imperative for a resolution plan to succeed.
- Confirmation of the appointment of the RP.

- Public announcement of the initiation of the PPIRP to be made by RP.
- Claim Verification.
- Once the base resolution plan is presented, the CoC may approve the base resolution plan for submission to the AA only if it does not impair any claims owed by the Applicant to the operational creditors. AA will pass order within 30 days of receipt of such resolution plan.
- Where - (a) the CoC does not approve the base resolution plan; or (b) the base resolution plan impairs any claims owed by the AA to the operational creditors, the resolution professional may invite prospective resolution applicants to submit a resolution plan to compete with the base resolution plan (i.e., swiss challenge process). However, the CoC is also empowered to provide the Applicant the opportunity to revise the base resolution plan, prior to inviting competing bids.
- After CoC & AA approve the plan, then it is binding on all stakeholders.

INITIATION OF CIRP

Section 54-O provide COC an option at any time after commencement date of PPIRP but before approval of resolution plan, by vote of not less than 66% of voting shares may resolved to initiate CIRP. Resolution professional will intimate the AA about the COC decision. AA will pass the appropriate order to terminate the PPIRP and initiation of CIRP or not.

SECTION 11A-PPIRP VIS-À-VIS CIRP - ORDER OF PRIORITY

- In case of pending CIRP Applications as on date of filing which are older than 14 days, the CIRP Applications will first be decided and then the application for pre-pack shall be taken.
- However, Section 11A does not apply to the applications filed under sections 7, 9 and 10 of the IBC that are pending as on the date of the commencement of the Ordinance.

THE AA MAY PASS AN ORDER OF TERMINATION IN THE FOLLOWING CASES.

- CoC passes a resolution seeking termination;
- Resolution plan is not submitted to the AA within 90 days;
- Resolution plan approved by the CoC is rejected by the AA.

FIRST CASE FILED U/S 54A OF IBC 2016

- "GCCL Infrastructure and Projects Limited" becomes the first corporate debtor against which the Pre-Packaged Insolvency Resolution Process is initiated under section 54A of the Insolvency and Bankruptcy Code, 2016.
- The Corporate Debtor is a Micro, Small & Medium Enterprises (MSME), and is eligible to file this application as per the Section 54A (1) of IBC. It

is engaged in turnkey constructions for commercial and residential real estate development. It was incorporated in 1994 and is based in Ahmedabad, India.

- The total debt amount payable by the corporate debtor to its various creditors is Rs. 54.16 lakh and the date of default was 31st December 2020.
- A Special Resolution' by the Members of the Corporate Debtor to initiate the Pre-Packaged Insolvency Resolution Process (PPIRP) under section 54A(2)(g) of the Code was passed, and the Financial Creditor approved the decision of the directors to file this application as contemplated under section 54A(3) of the Code.
- The Financial Creditor approved the appointment of Parag Sheth as the resolution professional.
- The applicant has also produced the audited financial statements of the company for the year 2019-20 and 2020-21. List of the assets and liabilities of the corporate debtor, names and amount of the debt of all Financial Creditors and Operational Creditors and names of all the Directors and Members of the Corporate Debtor have also been produced by the applicant.
- The Ahmedabad bench of the NCLT admitted the application filed by GCCL Infrastructure and Projects to initiate Pre-Packaged Insolvency Resolution Process.
- Under Section 54F(5), the personnel of the Corporate Debtor will extend all assistance and cooperation to RP. In case of non-cooperation, the RP can approach this Adjudicating Authority under section L9(2) of the Code. The management of the Corporate Debtor will remain vested with the Board of Directors of the Corporate Debtor as per the provisions of Section 54H subject to action under section 54J of the Code, if, any. The Board of Directors will discharge their duties as specified under section 54H(b) and Section 54H(c) of the Code.

CASES FILED UNDER SECTION 54A (PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS)

Date of Announcement	*Name of corporate debtor*	*Status*
15-09-2021	GCCL Infrastructure and project limited	Admitted, ongoing
09-12-2021	Loon Land Developers Ltd.	Admitted, ongoing

COMMON PROVISIONS OF CODE APLICABLE TO PPIRP

SECTIONS	*PROVISIONS*
14 (2) & (3)	Moratorium (Refer section 54E (1))
19 (2) & (3)	Personnel of the corporate debtor shall extend all assistance and cooperation to the resolution professional
21	Meeting of Committee of Creditors (Refer section 54-I (3))
24	Meeting of creditors
25A	Voting by authorised representative of class of financial creditors if financial creditors give conflicting directions, his remuneration.
26	Filing of application for avoidance of transactions by the resolution professional shall not affect the proceedings of the corporate insolvency resolution process.
27	Committee of Creditors (CoC) can change the resolution professional with 66% voting, subject to a written consent from the proposed resolution professional in the specified form.
28	Prior approval of Committee of Creditors (CoC) for certain actions by resolution professional.
29A	Persons not eligible to act as resolution applicant. This provision applies to PPIRP also, except where exemption has been given to MSME under section 240A of Insolvency Code.
30(1),30(2) and 30(5)	Requirements and contents of resolution plan (Refer section 54K (3))
31(1)	Resolution plan once approved by AA binding on all (see section 54L (2))
31 (3)	Moratorium ceases after approval of resolution plan and records to be returned (see section 54L (2))
31(4)	Approval from other authorities within specified period after approval of resolution plan (see section 54L (2))
32A	Immunity from prosecution of corporate debtor after approval of PPIRP, in respect of past transactions, if there was change in management.
33	Liquidation if resolution plan contravened by corporate debtor (refer section 54N)
43-51	Preferential transactions (sections 43 and 44), Undervalued transactions (sections 45, 46, 47 and 48), section 49 (Action if corporate debtor had defrauded creditors), sections 50 and 51 (extortionate credit transaction)

SECTIONS	*PROVISIONS*
Chapter VI	Adjudicating Authority for corporate persons and penalties- sections 60 to 67
Chapter VII	Offences and punishments - sections 68 to 77A

MODEL TIMELINE FOR COMPLETION OF PPIRP

SECTION OF CODE/ REGULATION NO.	DESCRIPTION OF ACTIVITY	NORM	TIMELINE
Section 54C	Commencement of PPIRP and appointment of RP	-	T
Sections 54G and 54K	Submission of list of claims, preliminary information memorandum and Base Resolution Plan	Within 2 days from commencement of PPIRP	+2
Section 54E/Regulation 19	Publication of public announcement	Within 2 days from commencement of PPIRP	T+2
Regulation 38	Appointment of registered valuers	Within 3 days from appointment of RP	T+3
Section 54I	Constitution of CoC	Within 7 days from commencement of PPIRP	T+7
Section 54I	First Meeting of the CoC	Within 7 days from constitution of CoC	T+14
Regulation 43	Submission of Information Memorandum	Within 14 days from commencement of PPIRP	T+14
Regulation 43	Publication for invitation for resolution plan	Within 21 days from commencement of PPIRP	T+21
Regulation 43	Receipt of resolution plans	At least 15 days from publication	T+36
Regulations 47 & 48	Evaluation and approval of resolution plan	Within 89 days from commencement of PPIRP	T+89

SECTION OF CODE/ REGULATION NO.	DESCRIPTION OF ACTIVITY	NORM	TIMELINE
Regulation 41	RP to form opinion on avoidance transactions	Within 30 days from commencement of PPIRP	T+30
	RP to make determination on avoidance transactions	Within 45 days from commencement of PPIRP	T+45
	RP to file application to AA for appropriate relief	Within 60 days from commencement of PPIRP	T+60
Section 54D/Regulation 48	Submission of CoC approved resolution plan/ application for termination of PPIRP	Within 90 days from commencement of PPIRP	T+90
Section 54L	Approval of resolution plan/order for termination of PPIRP	Within 30 days of application under section 54D	T+120

COMPARISON - PRE-PACK v. RESTRUCTURING UNDER JUNE 7

Parameter	*Prepack*	*Restructuring Under June 7*
Haircut to operational creditors	Prepack allows for haircuts to operational debts (albeit throwing the process open to a swiss auction), which will enable the company to holistically restructure its debt in line with the cashflows, to the benefit of the financial creditors.	Under June 7 restructuring, the debts of operational creditors remain unchanged
Seal of Approval	In prepack, the resolution plan receives the approval of NCLT, thereby assuring the lenders of implementation and minimizing risk of default	Under June 7, there is no formal court approval process once the restructuring plan approved by the lenders.
Timelines	The process is relatively faster, as the majority of the preparatory work is completed before an application is made to NCLT. The process after admission, is bound by a 120 day timeline.	A restructuring under June 7 circular is bound by 180 days of time from the end of the review period.

Moratorium	Under pre-pack, a moratorium gets placed for the period of pre-pack insolvency resolution process, thereby suspending ongoing litigation and stopping initiation of new proceedings. Payment to banks is also suspended, allowing for conservation of cash. This allows the company to focus its efforts towards resolution.	Under June 7, there is no concept of a moratorium.

LIST OF FORMS FILED UNDER PPIRP

FORMS	*PURPOSE*
Under Rules	
Form 1	Application by Corporate Applicant to initiative PPIRP
Under Regulation	
Form P1	Written consent by IP to act as RP/IRP
Form P2	List of creditors to be provided by the applicant
Form P3	Approval of terms of appointment of RP, by Unrelated Financial creditors (UFCs)
Form P4	Approval for filing application to initiate PPIRP, by UFCs
Form P5	Written consent by IP to act as Authorised Representative
Form P6	Declaration by majority of directors/partners
Form P7	Declaration regarding existence of avoidance transaction(*s*)
Form P8	Report by the IP proposed to be appointed as the RP
Form P9	Public announcement by the RP
Form P10	List of claims by CD
Form P11	Brief particulars of the invitation for resolution plans
Form P12	Compliance certificate by the RP
Form P13	Application for termination of PPIRP

INSIGHTS

Power of NCLT to Exercise Contempt Jurisdiction

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INTRODUCTION

NCLT was intended to be introduced in the Indian legal system in 2002 under the framework of Companies Act, 1956 however, due to the litigation with respect to the constitutional validity of NCLT which went for over 10 years, therefore, it was notified under the Companies Act, 2013. It is a quasi-judicial authority incorporated for dealing with corporate disputes that are of civil nature arising under the Companies Act.

As we all know, contempt jurisdiction is an extraordinary jurisdiction that cannot be exercised by ordinary courts/ Tribunals unless specifically authorised. As a result, tribunals, unlike constitutional courts, require appropriate legislation to continue with contempt actions.

When dealing with Insolvency & Bankruptcy Code, 2016 (IBC) matters, the National Company Law Tribunal (NCLT) is an Adjudicating Authority created by IBC, not the Companies Act, and the jurisdiction is not interchangeable between Adjudicating Authority under IBC and the Tribunal under Companies Act, 2013, except to the extent permitted by law.

The eleventh schedule of the IBC makes significant amendments to the Companies Act, 2013 to bring it into compliance with the IBC. The IBC has made certain sections of the Companies Act, 2013 that pertain to the NCLT applicable. Section 429 of the Companies Act, 2013 was revised in this manner, allowing the NCLT to request the assistance of the Chief Metropolitan Magistrate, Chief Judicial Magistrate, or District Collector to take custody or control of all property, books of account, or other documents. The amendment to Section 429 indicates that the legislature did not believe that Section 5(1) alone was sufficient to authorise the application of Section 429 in IBC proceedings. As a result, the absence of a corresponding modification to Section 425 shows that the legislators intended

to make Section 425 inapplicable not IBC proceedings.

In light of this, this article intends to analyse whether NCLT has the jurisdiction and power to punish for contempt in IBC related matters.

LEGAL FRAMEWORK

Section 5(1) of the Insolvency & Bankruptcy Code, 2016 ('**IBC'**) designates the National Company Law Tribunal ('**NCLT'**) to act as the adjudicating authority in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors.

Section 425 of the Companies Act, 2013 confers to the NCLT and the National Company Law Appellate Tribunal ('NCLAT'), the power to punish for contempt.

Also, Article 215 of the Constitution of India makes it clear that the High Courts are courts of record and shall have powers of such a court including the person to punish for contempt of itself, as quoted below:

> "215. High Courts to be courts of record–Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself."

However, Section 425 of the Companies Act, 2013, the Tribunal or the Appellate Tribunal has not been delegated with all the power of a Courts of record. Under Section 425, the Tribunal and the Appellate Tribunal are only empowered with powers under 'Contempt of Courts Act, 1971' in respect of contempt of itself as the High Court.

DEBATE AROUND THE ISSUE

In view of the legislative framework, various benches of the NCLT have issued contradictory opinions on the application of the Companies Act, 2013 related to contempt provisions to IBC proceedings.

Those who oppose the applicability of the power of contempt to the Adjudicating Authority when adjudicating IBC matters say that there is no specific provision in IBC that extends the power of contempt under section 425 of the Companies Act, 2013 to IBC proceedings. Another argument is that any modification to the provisions of the Companies Act that has not been formally stated cannot be inherently implied to IBC.

Those who support the applicability of the power, claim that because the IBC appoints the NCLT as the Adjudicating Authority for proceedings under the IBC, the NCLT naturally draws the powers granted on it by the Companies Act, 2013.

JUDICIAL PRONOUNCEMENTS

In *Vicky Enterprises vs. Om Printing & Flexible Packaging Private Limited,* The NCLT Mumbai bench held one Mr. Shekhar Sonawane guilty of using physical force on the Resolution Professional, as well as injuring and threatening him. The Bench very sternly put, "*In view of the above precarious situation, this Bench felt that this is a punishable offence under IPC, apart from this, threatening the RP and not handing over their possession deliberately also amounts to offence punishable under section 70 (1)(b) of IBC. This Bench having vested with power with contempt also take cognizance of the same.*" The Bench also went on to provide police protection to the Resolution Professional and directed the Superintendent of Police, Malegaon Branch, Maharashtra to instruct the SHO Vadner Khakurdi Police Station to register a FIR against Mr. Shekhar threatened to take appropriate action against the police if they failed to discharge their duties in accordance with the law.

On the other hand, in a contradictory ruling, in the case of *K.K. Agarwal v. Soni Infratech Private Limited,* the NCLT Principal Bench had examined the applicability of section 425 of the Companies Act, 2013 to the proceedings under IBC. The bench ruled that "*the section 425 of the Companies Act is not applicable to IBC, therefore this application is dismissed as misconceived.*"

ANALYSIS

At this juncture, it is important to read the provision that brought the NCLT into existence:

Section 408 of the Companies Act, 2013: "*The Central Government shall, by notification, constitute, with effect from such date as may be specified therein, a Tribunal to be known as the National Company Law Tribunal consisting of a President and such number of Judicial and Technical members, as the Central Government may deem necessary, to be appointed by it by notification, to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force.*"

The provision giving the NCLT the power to punish for contempt is in Section 425, which reads:

> "*The Tribunal and the Appellate Tribunal shall have the same jurisdiction, powers and authority in respect of contempt of themselves as the High Court has and may exercise, for this purpose, the powers under the provisions of the Contempt of Courts Act, 1971, which shall have the effect subject to modifications that—*
>
> (*a*) *the reference therein to a High Court shall be construed as including a reference to the Tribunal and the Appellate Tribunal; and*
>
> (*b*) *the reference to Advocate-General in section 15 of the said Act shall be construed*

as a reference to such Law Officers as the Central Government may, specify in this behalf."

The wordings used in section 425 state that the NCLT has authority under the Contempt of Courts Act, 1971 while adjudicating all actions before it. It is not specified in section 425 that the provisions of the powers under the provisions of the Contempt of Courts Act, 1971 are only applicable for actions before the Tribunal in relation to the requirements of the Companies Act, 2013.

In accordance with Section 60 of the IBC, the NCLT is the Adjudicating Authority. As a result, any proceeding initiated under the provisions of the IBC before the Adjudicating Authority is considered as a proceeding before the NCLT.

When dealing with the powers of NCLT, it is argued that a combined reading of provisions is required to really comprehend the degree to which the NCLT may exercise its powers under IBC. In this case, sections 408 and 425 of the Companies Act of 2013 must be interpreted together. This would imply that the NCLT would have the authority to penalise for contempt while adjudicating on topics other than the Companies Act and the IBC.

CONCLUSION

Legislative amendments are aimed to minimise uncertainty in interpretation and expedite the peaceful coexistence of several pieces of law. However, it is equally important to ensure that such changes do not result in linguistic superfluity. After analysing the legislation, if there is an ambiguity, statutory interpretation guidelines recommend that the courts should firmly oppose a view that renders a statute meaningless.

In the lack of any particular contempt provisions in the IBC, it is only reasonable to turn to the parent law of NCLTs, the Companies Act of 2013. It is impossible to believe that the legislators had no intention of granting the Adjudicating Authority contempt powers under the IBC. If the IBC is interpreted in such a way that the NCLT loses its power of contempt, the NCLT will be reduced to the status of a toothless tiger. It will devolve into a rubber stamp that performs administrative duties. In a dynamic law like IBC, there might be a slew of difficulties that arise during the process's implementation. It is critical to have an adjudicating body that can take necessary measures to guarantee IBC compliance. While the adjudicating authority under IBC is technically distinct from the Tribunals formed under the Companies Act, the establishment of Tribunals is drawn primarily from the Companies Act.

A cross-sectional examination of the provisions of both the IBC and the Companies Act indicates that the NCLT—the Adjudicating Authority under the IBC, can exercise Contempt Proceedings.

(2022) 138 taxmann.com 567 (SC)

SUPREME COURT OF INDIA

Kotak Mahindra Bank Ltd. *v.* A. Balakrishnan

L. NAGESWARA RAO, B.R. GAVAI AND A.S. BOPANNA, JJ.

CIVIL APPEAL NO.689 OF 2021†

MAY 30, 2022

Section 238A, read with section 5(8) and 5(7), of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Limitation period - IBHL bank sanctioned financial assistance to borrowers and corporate debtor stood as corporate guarantor - Borrowers defaulted in payment - IBHL assigned its debts to appellant bank - Since payment was still pending, appellant initiated proceedings before Debt Recovery Tribunal and obtained a recovery certificates against borrowers and guarantor - On basis of said recovery certificates, appellant claimed to be a financial creditor filed an application for initiating CIRP against guarantor and same was admitted by Adjudicating Authority - NCLAT by impugned order held that since default was of year 1997, CIRP application filed in year 2018 was hopelessly time barred and, thus, order admitting CIRP application was to be set aside - Whether liability in respect of a claim arising out of a recovery certificate would be a financial debt within meaning of section 5(8) and consequently, holder of recovery certificate would be a financial creditor within meaning of section 5(7) - Held, yes - Whether holder of such certificate would be entitled to initiate CIRP, if initiated within a period of three years from date of issuance of recovery certificate - Held, yes - Whether since application under section 7 was filed within a period of three years from date on which recovery certificate was issued, i.e. in year 2017, NCLAT had erred in holding that it was barred by limitation and, thus, order of NCLAT was to be set aside - Held, yes (Paras 84 and 85)

FACTS

- During the period between the years 1993-1994, Ind Bank Housing Limited (IBHL) sanctioned separate credit facilities to three companies. The R2 stood as the corporate guarantor/ mortgagor and mortgaged its immovable property by deposit of title deeds to secure the aforesaid credit facilities sanctioned to the borrower entities.

- Borrower entities defaulted in repayment of the dues and subsequently IBHL classified all the facilities availed by them as Non-Performing Asset (NPA) in November 1997. Pursuant thereto, IBHL filed three civil suits before the High Court against the borrower entities and the Corporate Debtor, for recovery of the amounts due. During the pendency of the suits, the appellant bank (KMBL) and IBHL entered into a Deed of Assignment, wherein IBHL assigned all its rights, title, interest, estate, claim and demand to the debts due from borrower entities, to KMBL.

- Pursuant to the said deed, KMBL and the borrower entities entered into a compromise on 7-8-2006. The High Court vide a common judgment dated 26-3-2007, recorded the said compromise between the parties to the effect that the R2 was jointly and severally liable to pay the amount of Rs. 29 crores due from the borrower entities to KMBL.

- Aggrieved by the continuous default of payment by the R2 and the borrower entities, KMBL filed three applications under section 31(A) of the erstwhile Recovery of Debts Due to Banks and Financial Institutions Act, 1993, before the Debt Recovery Tribunal for issuance of Debt Recovery Certificates in terms of the said compromise entered into between the parties. In year 2017, said applications came to be allowed by the DRT and separate Recovery Certificates came to be issued against each of the borrower entities and the R2.

- On the basis of the said Recovery Certificates, claimed to be a financial creditor, filed an application under section 7 of IBC, before the NCLT and sought initiation of Corporate Insolvency Resolution Process against the R2. The said application came to be admitted by the NCLT. The R1, Director of the R2 filed an appeal against the said order of the NCLT before the NCLAT. The grounds raised by the R1 in the said appeal were with regard to the application for initiating CIRP against the Corporate Debtor being filed after the expiry of limitation period. The said appeal filed by the R1 came to be allowed.

- On appeal to the Supreme Court:

HELD

- A person to be entitled to be a 'financial creditor' has to be owed a financial debt and would also

include a person to whom such debt has been legally assigned or transferred to. Therefore, the only question that would be required to be considered is, as to whether a liability in respect of a claim arising out of a Recovery Certificate would be included within the meaning of the term 'financial debt' as defined under clause (8) of section 5. (Para 43)

- It will be pertinent to note that in clause (8) of section 5 i.e., the definition clause of the term 'financial debt', the words used are 'means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes'. (Para 44)

- The trigger point for initiation of CIRP is default of claim. 'Default' is non-payment of debt by the debtor or the Corporate Debtor, which has become due and payable, as the case may be, a 'debt' is a liability or obligation in respect of a claim which is due from any person, and a 'claim' means a right to payment, whether such a right is reduced to judgment or not. It could thus be seen that unless there is a 'claim', which may or may not be reduced to any judgment, there would be no 'debt' and consequently no 'default' on non-payment of such a 'debt'. When the 'claim' itself means a right to payment, whether such a right is reduced to a judgment or not, we find that if the contention of the respondents, that merely on a 'claim' being fructified in a decree, the same would be outside the ambit of clause (8) of section 5 is accepted, then it would be inconsistent with the plain language used in the IBC. The definition is inclusive and not exhaustive. Taking into consideration the object and purpose of the IBC, the legislature could never have intended to keep a debt, which is crystallized in the form of a decree, outside the ambit of clause (8) of section 5. (Para 52)

- Having held that a liability in respect of a claim arising out of a Recovery Certificate would be a 'financial debt' within the ambit of its definition under clause (8) of section 5 as a natural corollary thereof, the holder of such Recovery Certificate would be a financial creditor within the meaning of clause (7) of section 5. As such, such a 'person' would be a 'person' as provided under section 6 who would be entitled to initiate the CIRP. (Para 53)

- A liability in respect of a claim arising out of a Recovery Certificate would be a 'financial debt' within the meaning of clause (8) of section 5 and a holder of the Recovery Certificate would be a 'financial creditor' within the meaning of clause (7) of section 5. Thus, a person would be entitled to initiate CIRP within a period of three years from the date on

which the Recovery Certificate is issued. (Para 69)

- It could be seen that sub-section (22) of section 19 of the Debt Recovery Act empowers the Presiding Officer to issue a certificate of recovery along with the final order, under sub-section (20), for payment of debt with interest. The certificate is given for the purposes of recovery of the amount of debt specified in the certificate. Sub-section (22A) of section 19 of the Debt Recovery Act provides that any Recovery Certificate issued by the Presiding Officer under sub-section (22) shall be deemed to be decree or order of the Court for the purposes of initiation of winding up proceedings against a company, etc. (Para 71)

- From the plain and simple interpretation of the words used in sub-section (22A) of section 19 of the Debt Recovery Act, it would be amply clear that the Legislature provided that for the purposes of winding up proceedings against a Company, etc., a Recovery Certificate issued by the Presiding Officer under sub-section (22) of section 19 of the Debt Recovery Act shall be deemed to be a decree or order of the Court. It is thus clear that once a Recovery Certificate is issued by the Presiding Officer under sub-section (22) of section 19 of the Debt Recovery Act, in view of sub-section (22A) of section 19 of the Debt Recovery Act it will be deemed to be a decree or order of the Court for the purposes of initiation of winding up proceedings of a Company, etc. However, there is nothing in sub-section (22A) of section 19 of the Debt Recovery Act to imply that the Legislature intended to restrict the use of the Recovery Certificate limited for the purpose of winding up proceedings. The contention of the respondents, if accepted, would be to provide something which is not there in sub-section (22A) of section 19 of the Debt Recovery Act. (Para 77)

- In any case, when the Legislature itself has provided that any Recovery Certificate issued under sub-section (22) of section 19 of the Debt Recovery Act will be deemed to be a decree or order of the Court for initiation of winding up proceedings, which proceedings are much severe in nature, it will be difficult to accept that the Legislature intended that such a Recovery Certificate could not be used for initiation of CIRP, which would enable the Corporate Debtor to continue as an ongoing concern and, at the same time, pay the dues of the creditors to the maximum. Therefore, there is no substance in the said submission. (Para 78)

- To conclude, a liability in respect of a claim arising out of a Recovery Certificate would be a 'financial debt' within the meaning of clause (8) of section 5. Consequently, the holder of the Recovery Certificate would be a financial creditor within the meaning of clause (7) of section

5. As such, the holder of such certificate would be entitled to initiate CIRP, if initiated within a period of three years from the date of issuance of the Recovery Certificate. (Para 84)

- In the facts of the present case, the application under section 7 was filed within a period of three years from the date on which the Recovery Certificate was issued. As such, the application under section 7 was within limitation and the learned NCLAT has erred in holding that it is barred by limitation. (Para 85)

- In the result, the appeal is allowed and the impugned judgment and order passed by the National Company Law Appellate Tribunal, is quashed and set aside. (Para 86)

CASE REVIEW

A. Balakrishnan v. *Kotak Mahindra Bank Ltd.* (2021) 125 taxmann.com 215/164 SCL 603 (NCLAT - New Delhi) (para 86) *reversed*.

Dena Bank v. *C. Shivkumar Reddy* (2021) 129 taxmann.com 60 (SC) (para 85) *followed*.

CASES REFERRED TO

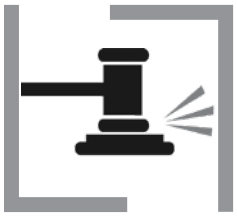
Dena Bank v. *C. Shivakumar Reddy* (2021) 129 taxmann.com 60 (SC) (para 9), *State of U.P.* v. *Nawab Hussain* (1977) 2 SCC 806 (para 11), *Gulabchand Chhotalal Parikh* v. *State of Bombay* (1965) 2 SCR 547 (para 11), *Paramjeet Singh Patheja* v. *ICDS Ltd.* (2007) 74 SCL 55 (SC) (para 12), *Subhankar Bhowmik* v. *Union of India* (2022) SCC Online Tri. 208 (para 13), *Jignesh Shah* v. *Union of India* (2019) 109 taxmann.com 486/156 SCL 542 (SC) (para 14), *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Co. (India) Ltd.* (2019) 109 taxmann.com 395/156 SCL 397 (SC) (para 14), *Nirmal Jeet Kaur* v. *State of Madhya Pradesh* (2004) 7 SCC 558 (para 14), *Secretary to Govt. of Kerala, Irrigation Department* v. *James Varghese* (2022) SCC Online SC 545 (para 14), *P.S. Ramamoorthy Sastry* v. *Selvar Paints and Varnish Works (P.) Ltd.* (C.R.P. No. 1950 of 1981, dated 28-4-1983) (para 17), *Mukul Agarwal* v. *Royale Resinex (P.) Ltd.* (2022) 138 taxmann.com 254 (NCLAT - New Delhi) (para 17), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 40), *Dilworth* v. *Commissioner of Stamps* (1899) AC 99 (para 45), *Associated Indem Mechanical (P.) Ltd.* v. *W.B. Small Industries Development Corpn. Ltd.* (2007) 3 SCC 607 (para 46), *Karnataka Power Transmission Corpn.* v. *Ashok Iron Works (P.) Ltd.* (2009) 3 SCC 240 (para 48), *Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India* (2019) 108 taxmann.com 147/155 SCL 622 (SC) (para 50), *Rameswar Prasad Kejriwal & Sons Ltd.* v. *Garodia Hardware Stores* (2002) 36 SCL 738 (para 58), *Union of India* v. *Dhanwanti Devi* (1996) 6 SCC 44 (para 60), *Regional Manager* v. *Pawan Kumar Dubey* (1976) 3 SCC 334 (para 61), *Vashdeo R. Bhojwani* v. *Abhyudaya Co-operative Bank Ltd.* (2019) 109 taxmann.com 198/156 SCL 539 (SC) (para 63), *Balakrishna Savalram Pujari Waghmare* v. *Shree Dhyaneshwar Maharaj Sansthan* AIR 1959 SC 798 (para 63), *Mohd. Shahabuddin* v. *State of Bihar* (2010) 4 SCC 653 (para 74), *Nasiruddin* v. *Sita Ram Agarwal* (2003) 2 SCC 577 (para 76), *Thoday* v. *Thoday*

(1964) 2 WLR 371 (para 83) and *Bhanu Kumar Jain* v. *Archana Kumar* (2005) 1 SCC 787 (para 83).

Gurukrishna Kumar, Sr. Adv., **Mahesh Agarwal**, **Rohan Talwar**, Advs. and **E.C. Agrawala**, AOR *for the Appellant.* **V. Prakash**, **S. Prabhakaran**, Sr. Advs., **Ms. Iyengar Shubharanjani Ananth**, AOR, **M.A. Gouthaman**, **Ms. R. Sowmya**, **Adarsh Mohandas**, **Abinesh S.**, Advs., **K.V. Vishwanathan**, Sr. Adv., **Nishant Sharma**, **Rahul Sangwan** and **Sivagnanam K.**, Advs. *for the Respondent.*

† Arising out of order of NCLAT - New Delhi in *A. Balakrishnan* v. *Kotak Mahindra Bank Ltd.* (2021) 125 taxmann.com 215/164 SCL 603.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 138 taxmann.com 567 (SC)



(2022) 139 taxmann.com 68 (SC)

SUPREME COURT OF INDIA

Vallal Rck *v.* Siva Industries and Holdings Ltd.

B.R. GAVAI AND HIMA KOHLI, JJ.

CIVIL APPEAL NOS. 1811 & 1812 OF 2022†

JUNE 3, 2022

Section 12A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Withdrawal of application - Whether when 90 per cent and more of creditors, in their wisdom after due deliberations, find that it will be in interest of all stakeholder to permit settlement and withdraw CIRP, NCLT or NCLAT cannot sit in an appeal over commercial wisdom of Committee of Creditors (CoC); interference would be warranted only when NCLT or NCLAT finds decision of CoC to be wholly capricious, arbitrary, irrational and de hors provisions of statute or rules - Held, yes - Petition for initiation of CIRP against corporate debtor was admitted by NCLT - Settlement plan of appellant, promoter of corporate debtor, under section 12A for withdrawal of CIRP was approved by members of CoC by 94.23 per cent voting shares - NCLT, while holding that said plan was not a settlement simpliciter under section 12A but a 'business restructuring plan', rejected application for withdrawal of CIRP and approval of settlement plan - Vide another order, NCLT initiated liquidation process of corporate debtor as well - Appeal against both orders were dismissed by NCLAT - Whether since decision of CoC was taken after members of CoC had due deliberation to consider pros and cons of settlement plan and took a decision exercising their commercial wisdom, neither NCLT nor NCLAT were justified in not giving due weightage to commercial wisdom of CoC. - Held, yes - Whether thus, orders passed by NCLT and NCLAT were to be set aside and application filed by RP before NCLT for withdrawal of CIRP was to be allowed - Held, yes (Paras 26 and 28)

FACTS

- IDBI Bank had filed an application under section 7 for initiation of Corporate Insolvency Resolution Process (CIRP) in respect of the corporate debtor. The NCLT admitted the said application, as a result of which, CIRP in respect of the corporate debtor was initiated.
- The appellant, who was the promoter of the corporate debtor, filed a settlement application before the NCLT under section 60(5), showing his willingness to offer onetime settlement plan. The appellant sought necessary directions to the CoC to consider the terms of settlement plan as proposed by him. The meetings of the CoC were held to consider the settlement plan as submitted by the appellant. Deliberations took place in the

said meetings with regard to the said settlement plan and the final settlement proposal which was submitted by the appellant came to be considered by the CoC. Initially, the said settlement plan received only 70.63 per cent votes. However subsequently, one of the financial creditors viz. IARCL having voting share of 23.60 per cent, decided to approve the said settlement plan and intimated the RP about the same.

- Since the said plan stood approved by more than 90 per cent voting share, the RP filed an application before the NCLT seeking necessary directions based on the request of IARCL. The NCLT ordered the RP to reconvene a meeting of CoC and place the e-mail of IARCL before it. Accordingly, the CoC meeting was convened, wherein the said settlement plan was approved with a voting majority of 94.23 per cent. Accordingly, the RP filed an application before the NCLT seeking withdrawal of CIRP initiated against the corporate debtor in view of the approval of the said settlement plan by CoC.

- The NCLT, while holding that the said settlement plan was not a settlement simpliciter under section 12A but a Business Restructuring Plan, rejected the application for withdrawal of CIRP and approval of the settlement plan. NCLT *vide* another order the NCLT initiated liquidation process of the corporate debtor as well. Being aggrieved thereby, the appellant preferred two appeals before the NCLAT and same came to be dismissed. Hence, the present appeal.

HELD

- A perusal of the Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016 would reveal that where an application for withdrawal under section 12A of the IBC is made after the constitution of the Committee, the same has to be made through the interim resolution professional or the resolution professional, as the case may be. The application has to be made in Form-FA. It further provides that when an application is made after the issue of invitation for expression of interest under Regulation 36A, the applicant is required to state the reasons justifying withdrawal of the same. The RP is required to place such an application for consideration before the Committee. Only after such an application is approved by the Committee with 90% voting share, the RP shall submit the same along with the approval of the Committee to the adjudicating authority. It could thus be seen that a detailed procedure is prescribed under Regulation 30A of the 2016 Regulations as well. (Para 18)

- If the CoC arbitrarily rejects a just settlement and/or withdrawal claim, the learned NCLT and thereafter

the learned NCLAT can always set aside such decision under the provisions of the IBC. (Para 20)

- The commercial wisdom of the CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the IBC. It has been held that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. (Para 21)

- When 90 per cent and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stakeholders to permit settlement and withdraw CIRP, the Adjudicating Authority or the Appellate Authority cannot sit in an appeal over the commercial wisdom of CoC. The interference would be warranted only when the adjudicating authority or the appellate authority finds the decision of the CoC to be wholly capricious, arbitrary, irrational and *de hors* the provisions of the statute or the Rules. (Para 24)

- In the present case, the proceedings of the meetings of CoC would clearly show that there were wide deliberations amongst the members of the CoC while considering the settlement plan as submitted by the appellant. Not only that, the proceedings would also reveal that after suggestions were made by some of the members of the CoC, suitable amendments were carried out in the settlement plan by the appellant. One of the members of the CoC having voting share of 23.60 per cent, though initially opposed the settlement plan, subsequently decided to support the same. Accordingly, the NCLT itself, directed the RP to reconvene the CoC meeting. As per the directions of the NCLT, the meeting of the CoC was reconvened, wherein the Settlement Plan was approved by 94.23 per cent votes. (Para 25)

- It is thus clear that the decision of the CoC was taken after the members of the CoC, had due deliberation to consider the pros and cons of the Settlement Plan and took a decision exercising their commercial wisdom. Therefore neither the NCLT nor the NCLAT were justified in not giving due weightage to the commercial wisdom of CoC. (Para 26)

- In the result, the appeals are allowed; and the impugned judgment delivered by the NCLAT and the orders passed by the NCLT are quashed and set aside; and the application filed by the Resolution Professional before the NCLT for withdrawal of CIRP is allowed. (Para 28)

CASE REVIEW

Vallal RCK v. *Siva Industries and Holdings Ltd.* (2022) 138 taxmann.com 8 (NCLAT - Chennai) (para 28) *reversed*.

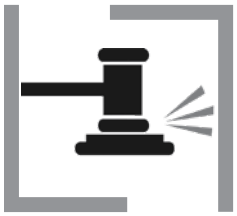
CASES REFERRED TO

Swiss Ribbons (*P.*) *Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 19), *K. Sashidhar* v. *Indian Overseas Bank* (2019) 102 taxmann.com 139/52 SCL 312 (SC) (para 21), *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 21), *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh* (2020) 113 taxmann.com 421/158 SCL 567 (SC) (para 21), *Kalpraj Dharamshi* v. *Kotak Investment Advisors Ltd.* (2021) 125 taxmann.com 194/166 SCL 583 (SC) (para 21), *Jaypee Kensington Boulevard Apartments Welfare Association* v. *NBCC* (*India*) *Ltd.* (2021) 125 taxmann.com 360/166 SCL 678 (SC) (para 21) and *Arun Kumar Jagatramka* v. *Jindal Steel and Power Ltd.* (2021) 125 taxmann.com 244/165 SCL 652 (SC) (para 27).

Dr. Abhishek Manu Singhvi, Sr. Adv., **P.H. Arvind Pandian**, Sr. Adv., **Ankur Kashyup**, AOR, **Ajith S. Ranganathan**, **Aavishkar Singhvi**, **Rohit Rajershi**, **Avinash Krishnan Ravi**, **Aman Bajaj** and **Aadarsh Prakash**, Advs. *for the Appellant.* **Anish R. Shah**, AOR, **Abhishek Swaroop**, Adv., **Shashank Manish**, AOR and **Palash Agarwal**, Adv. *for the Respondent.*

† Arising out of Order of NCLAT - Chennai in *Vallal RCK* v. *Siva Industries and Holdings Ltd.* (2022) 138 taxmann.com 8.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 139 taxmann.com 68 (SC)



(2022) 140 taxmann.com 499 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Ruchi Soya Industries Ltd. *v.* Joint Commissioner of Labour And Class Cess Assessment Office

JUSTICE ASHOK BHUSHAN, CHAIRPERSION AND NARESH SALECHA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INS.) NOS. 68 TO 71 OF 2022†

JUNE 3, 2022

I. Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Resolution plan - Approval of - Whether after approval of resolution plan, all claims which have not been filed in CIRP and are not part of resolution plan stand extinguished - Held, yes - Whether where respondent Joint Commissioner of Labour and Class Cess Assessment Officer demanded labour cess on construction work undertaken by appellant-corporate debtor, however, he had not filed any claim in CIRP of appellant, after approval of resolution plan respondent could neither press any claim nor issue any demand notice - Held, yes (Paras 20 and 21)

II. Section 14 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - General - Whether subsequent to closure of CIRP of corporate debtor, proceedings initiated under section 63(1-A) of Maharashtra Tenancy and Agricultural Land Act, 1948 could very well be proceeded with and could not be subject matter of insolvency process - Held, yes (Para 23)

FACTS-I

- Corporate Insolvency Resolution Process (CIRP) was initiated against the appellant corporate debtor. A notice was issued by the Respondent No. 1- Joint Commissioner of Labour and Cess Assessment Officer *inter alia* stating that the appellant had undertaken construction work for an estimated cost of construction of Rs. 77.30 lakhs and failed to pay the 1 per cent cess on the same. In response to the above, the appellant sent a demand draft of Rs. 77,300.

- In the CIRP, Resolution Plan was submitted by 'Patanjali Consortium' which was approved by the Adjudicating Authority. Thereafter, letter was received from Respondent No. 1 claiming that a sum of Rs. 76.53 lakhs was outstanding which was asked to be paid within seven days. A show-cause notice was issued by the respondent No. 1 stating that the appellant had

failed to pay the cess amount of Rs. 76.53 lakhs.

- The appellant filed an Application before the Adjudicating Authority challenging the illegal notice sent by the Respondent No. 1 which was disposed of by impugned order observing that the corporate debtor had now been taken by Patanjali Consortium, hence, after the approval of the Resolution Plan, these matters be dealt with Monitoring Committee. The appellant was directed to take up the matter with the Monitoring Committee after the approval of the Resolution Plan.

- Aggrieved by the said order, instant appeal has been filed.

HELD-I

- The appellant has prayed for quashing of the orders/or any other letter/ notice relating to the alleged cess payable for the construction of Oil Palm Division in Ampapuram Village, Bapulapadu Mandal, Krishna. The challenge in the application was labour cess which was demanded by the respondent. By order, amount of Rs. 76.53 lakhs as labour cess was demanded. In the Rejoinder, it has been brought on record that the aforesaid cess relate to period 2009 to 2010. (Para 12)

- Similarly prayer was made to quash and set aside the order by which demand was raised for the period 2013 to 2015. (Para 13)

- Similarly the Commissioner of Central Tax, after demand notice, has issued a letter confirming the demand and penalty related to the period from June, 2010 to December, 2010. (Para 14)

- It is viewed that the applications filed by the appellant before the Adjudicating Authority deserved to be allowed and the Adjudicating Authority had not adverted to the law as laid down by the Supreme Court, that after approval of the Resolution Plan, all claims which have not been filed in the CIRP and are not part of the Resolution Plan stand extinguished. (Para 20)

- From the facts brought on the record, it is clear that the respondents have not filed any claim in the CIRP. Thus, after approval of the Resolution Plan, they can neither press any claim nor issue any demand notice. Thus, the Company Appeals are allowed. (Para 21)

CASE REVIEW-I

Order passed by NCLT, Mumbai Bench in IA Nos. 1418/2021, 2562/2021 and 2577/2021 dated 3-12-2021 (Para 21) *reversed*.

Ghanashyam Mishra & Sons (P.) Ltd. v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132/166 SCL 237 (SC) and *Ruchi Soya Industries Ltd. ETC* v. *Union of India* (2022) 139 taxmann.com 266 (SC) (para 20) *followed*.

CASE REVIEW-II

Order passed by NCLT, Mumbai Bench

in IA No. 111/2021 dated 3-12-2021 (Para 23) *affirmed*.

Embassy Property Developments (P.) Ltd. v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC) (para 23) *followed*.

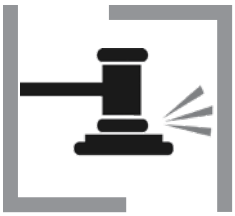
CASES REFERRED TO

Ghanashyam Mishra & Sons (P.) Ltd. v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132/166 SCL 237 (SC) (para 7), *Ruchi Soya Industries Ltd. ETC* v. *Union of India* (2022) 139 taxmann.com 266 (SC) (para 7) and *Embassy Property Developments (P.) Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC) (para 23).

Jayant K. Mehta, Sr. Adv., **Simranjeet Singh**, **Kunal Vaishnav**, **Ms. Amrita Grover** and **Ms. Smiti Verma**, *for the Appellant*. **T. Kanaka Raju**, *for the Respondent*.

† Arising out of order passed by NCLT, Mumbai Bench in IA Nos. 111/2021, 1418/2021, 2562/2021 and 2577/2021 dated 3-12-2021.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 140 taxmann.com 499 (NCLAT - New Delhi)



(2022) 140 taxmann.com 500 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Puneet Kaur *v.* K V Developers (P.) Ltd.

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

COMPANY APPEAL (AT) (INSOLVENCY) NOS. 390 TO 394 OF 2022†

JUNE 1, 2022

I. Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether where appellant homebuyers who had booked their flats with corporate debtor, a real estate company, filed their claims before RP after resolution plan was duly approved by CoC, they could not have been included in List of Creditors - Held, yes (Para 15)

II. Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Whether where appellant-homebuyers who had booked their flats with corporate debtor, a real estate company, filed their claims before RP after Resolution Plan was duly approved by CoC, claim of appellants could not be said to have been extinguished as extinguishment of claim of appellants would happen only after approval of plan by Adjudicating Authority - Held, yes (Paras 16 and 18)

III. Section 31 of the Insolvency and Bankruptcy Code, 2016, read with regulation 36 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Appellants-homebuyers who had booked their flats with corporate debtor, filed claims before RP after resolution plan was duly approved by CoC - Aforesaid claims of homebuyers were rejected by RP as being filed belatedly - Aggrieved by same, homebuyers filed an application before NCLT - NCLT refused to entertain their belated claims - On appeal, it was found that appellants being homebuyers had made payments to corporate debtor, and there was obligation on part of corporate debtor to provide possession of houses alongwith attached liabilities - Whether Information Memorandum ought to have included claim of those homebuyers, who had not even filed their claims to correct liabilities of corporate debtor for its appropriate resolution - Held, yes - Whether non-consideration of such claims, which were reflected in records, lead to inequitable and unfair resolution - Held, yes - Whether thus, direction was to be issued to Resolution Professional to submit details of homebuyers, whose details were reflected in records of corporate debtor including their claims to resolution applicant, on basis of which resolution applicant would prepare an addendum to resolution plan, which was to be placed before CoC for consideration - Held, yes (Paras 23, 25 and 26)

FACTS

- The Adjudicating Authority admitted the application against corporate debtor a real estate company under section 7 filed by LIC Housing Finance Limited, a financial creditor and an Interim Resolution Professional was appointed, who was subsequently confirmed as Resolution Professional. The Resolution Professional published Form-A inviting claim from creditors on or before specified date. Publication was also made in two newspapers.
- The appellant(s) who had booked their flats with the corporate debtor, could not know about the publication of Form-A and the initiation of CIRP as they were not residing in Noida, where the office of the corporate debtor was situated and, hence, could not file their claims within time.
- Appellant filed an application before the Adjudicating Authority praying for direction to the Resolution Professional to admit their claims, which application came to be rejected by impugned order observing that claims had been filed after gap of eight months from the last date of the submission of the claim, hence, they could not be admitted. Further, CoC had already approved the Resolution Plan.
- On appeal before the NCLAT:

HELD

Whether Adjudicating Authority has rightly rejected applications filed by appellant(s) seeking direction to include their claims, which was belatedly filed?

- There is no dispute between the parties that the claim by the appellant(s) were filed beyond the timeline prescribed in Form-A. Form-A required that the claims to be filed by 11-11-2020, whereas the claims were filed by the appellant(s) on 14-7-2021, 23-7-2021 and on 9-11-2021.(Para 13)
- The List of Creditors was already published by Resolution Professional, which did not include the name of the appellant(s). The Resolution Plan as submitted by Resolution Applicant was based on List of Creditors as published by Resolution Professional. It is true that homebuyers whose number runs in several hundred in real estate project belong to different class of financial creditors. All homebuyers who have booked a flat may not normally be residing in the area where corporate debtor has its corporate office and registered office. The publication in the newspaper is normally done in the area where corporate debtor has its registered office and corporate office and there is every likelihood that all homebuyers could not know within the fourteen days period allowed in Form-A to file their claim and practically homebuyers who are hundreds in number neither come to know about the CIRP nor did they file their claim within the fourteen days' time allowed. Even in maximum 90 days period as provided in section 12(2), on several occasion,

homebuyers could not file their claims. The homebuyers are a class belonging to middle class of society and majority of whom, who book flat has taken loan from banks and other financial institutions and they are saddled with liability to pay their loan from their hard-earned income they make payment to the corporate debtor in hope of getting a possession of the flat for their residence. Non-submission of claim within the time prescribed is a common feature in almost all project of real estate. But as law exists today, they cannot be included in the List of Creditors and that too after approval of Plan by CoC. Thus, there is no ground to interfere with order of the Adjudicating Authority rejecting their application for admission of their claim.(Para 15)

Whether after approval of the Resolution Plan by CoC, claim of appellant(s) stood extinguished?

- The submission raised on behalf of Resolution Professional as well as Successful Resolution applicant is that after approval of the Resolution Plan by CoC, the claim of all the appellant(s) stood extinguished, which submission is refuted by the appellant(s). The question to be answered is as to whether after the approval of the Resolution Plan by the CoC, which does not include the claim of the appellant(s), the claim of the appellant(s) stood extinguished? The answer is to be found in statutory provision of section 31, sub-section (1), which deals with the approval of Resolution Plan.(Para 16)

- The Supreme Court in *Ghanashyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132/166 SCL 237 while dealing with the above question, concluded and held that once Resolution Plan is approved by the Adjudicating Authority, the claims as provided in the Resolution Plan shall stand frozen and all such claims, which are not part of Resolution Plan shall stand extinguished.(Para 17)

- It is thus clear that extinguishment of claim of the appellant(s) shall happen only after approval of the Plan by the Adjudicating Authority. The argument of the Respondents that since CoC has approved the Resolution Plan, the claim of the appellant(s) have been extinguished, cannot be accepted as there is no extinguishment of claim of the appellant(s) on approval of Plan by the CoC. (Para 18)

Whether Resolution Professional was obliged to include details of homebuyers as reflected in records of corporate debtor in Information Memorandum, even though they have not filed their claim before Resolution Professional within time? And Whether Resolution Applicant ought to have also dealt with Resolution Plan regarding homebuyers, whose names and claims are reflected in record of corporate debtor, although they have not filed any claim?

- It is noticed above that in the event a claim belatedly filed by a

homebuyer is not accepted to be taken up, such homebuyer cannot be included in the List of Creditors as prepared under CIRP Regulations. The case of homebuyers has been now recognized as financial creditors under the provisions of the Code as amended by Act 26 of 2018 (with retrospective effect from 6-6-2018). The amendment in Code was brought to mitigate the misery of homebuyers and to give them participation in the CIRP of a real estate Company. Looking to the procedure as is prevalent regarding filing of the claim by financial creditors, large number of homebuyers are unable to file their claim within the time due to various genuine reasons related to such homebuyers. Homebuyers make payment to the corporate debtor, receive allotment letter from the corporate debtor and also enter into builder buyers agreement. All the documents pertaining to homebuyers are on the record of the corporate debtor and Interim Resolution Professional/ Resolution Professional does take charge also of all the records of the corporate debtor. Even though, Interim Resolution Professional/ Resolution Professional are not obliged to include the name of such homebuyers, who have not filed the claim within the time in their List of Creditors, but there is no reason for not collating the claims of such homebuyers whose claims are reflected from the records of the corporate debtor, including their payments and allotment.(Para 19)

- There are two important provisions of regulation 36 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Regulation 36(2)(a) and regulation 36(2)(l). Regulation 36(2) oblige the Resolution Professional to include the details of corporate debtor regarding assets and liabilities. (Para 20)

- When the allotment letters have been issued to the homebuyers, payments have been received, there are homebuyers and there is obligation on the part of real estate company to provide possession of the houses along with other attached liabilities. The liability towards those homebuyers, who have not filed their claim exists and required to be included in the Information Memorandum. Further, under regulation 36, sub-regulation 2(l), there is column for other information, which the Resolution Professional deems relevant to the Committee. The liabilities which have been undertaken by the corporate debtor, huge money received by the corporate debtor from homebuyers, whose claims, which could not be filed within time, could not be wished away by the Resolution Professional, on the convenient ground that claims have not been filed by such homebuyers. The purpose of CIRP of corporate debtor is to find out all liabilities of the corporate debtor and take steps towards resolution. Unless all liabilities of the corporate debtor are not known or included in the Information Memorandum, the

occasion to complete the CIRP shall not arise.(Para 21)

- Thus, it is opined that Information Memorandum ought to have included the claim of those homebuyers, who have not even filed their claims to correct liabilities of the corporate debtor for its appropriate resolution.(Para 23)

- During the course of hearing, when pointed query was made to the Resolution Professional and Successful Resolution Applicant that what is the provision made for those claims including the claims of the appellant(s), who have not filed their claim. The answer given was that their claims shall stand extinguished. Earlier in reply an impression was given that claim of the homebuyers, who have not filed their claims have been dealt with in the Resolution Plan, but during the submission, it has been stated that their claims stand extinguished.(Para 24)

- The appellant(s), who are homebuyers and have made payments to the corporate debtor, has every right to agitate their claim. The Resolution Professional and Resolution Applicant having not given any credence to their claims, cannot be heard in saying that appellant are abusing the process by filing appeal in the appellate Tribunal.(Para 25)

- In the instant case there is no denial that details of the appellant(s) and other homebuyers, who could not file their claims has not been reflected in the Information Memorandum. There being no detail of claims of the appellant(s), the Resolution Applicant could not have taken any consideration of the claim of the appellant(s), hence, Resolution Plan as submitted by Resolution Applicant cannot be faulted. However, it is viewed that the claim of those homebuyers, who could not file their claims, but whose claims were reflected in the record of the corporate debtor, ought to have been included in the Information Memorandum and Resolution Applicant, ought to have taken note of the said liabilities and should have appropriately dealt with them in the Resolution Plan. Non-consideration of such claims, which are reflected from the record, leads to inequitable and unfair resolution as is seen in the instant case. To mitigate the hardship of the appellant, it is viewed that ends of justice would be met, if direction is issued to Resolution Professional to submit the details of homebuyers, whose details are reflected in the records of the corporate debtor including their claims, to the Resolution Applicant, on the basis of which Resolution Applicant shall prepare an addendum to the Resolution Plan, which may be placed before the CoC for consideration.(Para 26)

- Thus, these appeal(s) are disposed of with following directions:

  (1) The Resolution Professional shall provide all details of homebuyers along with their

claims as reflected from the record of the corporate debtor, who had not filed their claims, including the appellant(*s*) to the Resolution Applicant within a period of one month from today.

(2) The Resolution Applicant shall prepare an addendum on the basis of information as submitted by Resolution Professional and place the same before the CoC within a further period of one month.

(3) The CoC shall consider the addendum in its meeting and decision of the CoC on the Information Memorandum and addendum be placed before the Adjudicating Authority. The CoC shall take decision in its meeting within a period of one month from the date of submission of addendum by the Resolution Applicant.

(4) The Adjudicating Authority while considering approval of the Resolution Plan, which is pending consideration shall consider the addendum and the minutes of the CoC at the time of finalizing the Resolution Plan.(Para 27)

- The Resolution Professional shall bring into the notice of the Adjudicating Authority, the order of this date, so as to enable the Adjudicating Authority to await the filing of addendum along with the minutes of the CoC.(Para 28).
- The appeal(s) are disposed of in view of the above terms.(Para 29)

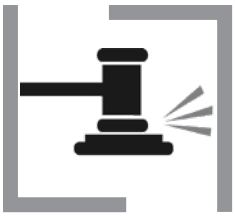
CASES REFERRED TO

Mukul Kumar v. *RPS Infrastructure Ltd.* (Company Appeal (AT) (Insolvency) No. 1050 of 2020, dated 30-7-2021) (para 13), *Harish Polymer Product* v. *George Samuel, Jay Overseas* (*P.*) *Ltd.* (Company Appeal (AT) (Insolvency) No. 420 of 2021, dated 18-6-2021) (para 14), *Ghanashyam Mishra & Sons* (*P.*) *Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* (2021) 126 taxmann.com 132/166 SCL 237 (SC) (para 17), *Santosh Wasantrac Walokar* v. *Vijay Kumar V. Iyer* (2020) 118 taxmann.com 151/164 SCL 60 (NCLT - New Delhi) (para 22) and *Amit Goel* v. *Piyush Shelters India* (*P.*) *Ltd.* (Company Appeal (AT) (Insolvency) No. 700 of 2021, dated 18-1-2022) (para 26).

Mahesh Kumar and **Ms. Simran Soni**, Advs. *for the Appellant.* **Abhinav Vasisht**, Sr. Adv., **Rakesh Kumar Bajaj**, **Harish Taneja**, **Nitin Kumar**, **Gagan Gulati**, **Sumesh Dhawan** and **Ms. Vatsala Kak**, Advs. *for the Respondent.*

† Arising out of order passed by NCLT, New Delhi, Bench-III in I.A. No. 5146 of 2021 in C.P. (IB) No. 236/(ND)/2020, dated 11-11-2021.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 140 taxmann.com 500 (NCLAT - New Delhi)



(2022) 140 taxmann.com 501 (NCLAT - Chennai)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI BENCH

CH Ravindra Babu Promoter, Director and Shareholder of Chadalavada Infratech Ltd. *v.* State Bank of India

M. VENUGOPAL, JUDICIAL MEMBER AND DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (CH) (INS) NO.276 OF 2021†

JUNE 10, 2022

Section 238A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and section 18 of the Limitation Act, 1963 - Corporate Insolvency Resolution Process - Limitation period - Whether section 18 of Limitation Act, 1963 provides that a fresh period of limitation shall be computed from time when acknowledgement of accepting its liability is signed by corporate debtor - Held, yes - Corporate debtor committed default in repayment of a debt - Financial creditor filed an application under section 7 against corporate debtor - NCLT by impugned order admitted said application - Corporate debtor challenged said order on ground that date of default was 15-4-2011 and, therefore, application filed on 25-11-2019 was barred by limitation - Whether since corporate debtor had issued letters to financial creditor on 19-9-2018, 9-11-2018 and 15-7-2019 wherein it had given one time settlement proposal, said letters amounted to acknowledgement of liability by corporate debtor - Held, yes - Whether therefore, application filed under section 7 on 25-11-2019 was not time barred - Held, yes - Whether thus, impugned order passed by NCLT was to be upheld - Held, yes (Para 20)

FACTS

- The corporate debtor had availed a loan facility for an amount of Rs. 281.23 Crore from R1 financial creditor. The corporate debtor was unable to repay the loan and thus, financial creditor in accordance with relevant banking provisions declared the loan facilities as 'Non-Performing Assets' (NPA) due to failed restructuring.
- Subsequently, financial creditor filed an application under section 7 to initiate against corporate debtor. Said application was admitted by NCLT.
- Corporate debtor challenged said order on ground that corporate debtor was declared NPA on 15-4-2011 whereas the financial creditor had filed an application before NCLT under section 7 on 25-11-2019 and hence, application was hopelessly time barred under the relevant provisions of the Limitation Act, 1963.

HELD

- It is undisputed fact that the corporate debtor has borrowed the funds from financial creditor and the amounts claimed to be in default is approximately Rs. 216.95 Crore.

- The corporate debtor vide its letters dated 19-9-2018, 9-11-2018 and 15-7-2019 has submitted one time settlement proposals to the State Bank of India. The application filed before the NCLT is on 25-11-2019.
- The financial creditor has also submitted the balance sheet for the year 2013-14 which also reflects borrowings.
- All the above suggests that at any point of time some acknowledgement of accepting its liability by corporate debtor exists and that too within stipulated time period of three years (Article 137 of the Limitation Act, 1963). Hence, section 18 of the Limitation Act, 1963 provides for a fresh period of limitation shall be computed from the time when the acknowledgement was so signed and hence, the stand of the appellant does not seem to be correct.
- Now, it is a settled law that the Code does not exclude the application of section 14 or section 18 or any other provisions of Limitation Act. Hence, the provisions of section 18 of the Limitation Act, 1963 are applicable to the proceedings under the Code and hence, the impugned order deserves to be upheld.
- Accordingly, the impugned order of the Adjudicating Authority is upheld the appeal fails & hence dismissed (Para 20)

CASE REVIEW

Order of NCLT - Hyderabad in CP No. 1/7/HDB/2020, dated 23-9-2021(para 20) *affirmed.*

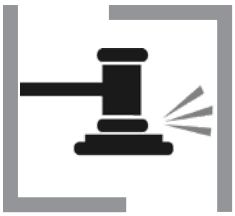
CASES REFERRED TO

B.K. Educational Services (P.) Ltd. v. *Parag Gupta* (2018) 98 taxmann.com 213/150 SCL 293 (SC) (para 9), *Babulal Vardharji Gurjar* v. *Veer Gurjar Aluminium Industries (P.) Ltd.* AIR 2000 SC 4668 (para 9), *V. Hotels Ltd.* v. *Asset Reconstruction Co. India Ltd.* 2019 SCC Online NCLAT 91 (para 9), *Sumeet Maheshwari* v. *Navbharat Press (Bhopal) (P.) Ltd.* (2020) 118 taxmann.com 495/161 SCL 571 (NCL-AT) (para 9), *Stressed Asset Stablization Fund* v. *Royal Bushes (P.) Ltd.* (Comp. Appeal (AT) (Ins.) No. 949 of 2020, dated 4-11-2020) (para 9), *UCO Bank* v. *Deegee Orchards (P.) Ltd.* (2022) 136 taxmann.com 431 (NCLT - Mum.) (para 9), *Innoventive Industries Ltd.* v. *ICICI Bank* (2017) 84 taxmann.com 320/143 SCL 625 (SC) (para 11), *Asset Reconstruction Co. India Ltd.* v. *Bishal Jaiswal* (2021) 126 taxmann.com 200/166 SCL 82 (SC) (para 12), *Sesh Nath Singh* v. *Baidyabati Sheoraphuli Co-operative Bank Ltd.* (2021) 125 taxmann.com 357/166 SCL 507 (SC) (para 12), *Laxmi Pat Surana* v. *Union Bank of India* (2021) 125 taxmann.com 394/166 SCL 318 (SC) (para 13) and *Dena Bank* v. *C. Shivakumar Reddy* (2021) 129 taxmann.com 60 (SC) (para 14).

P.H. Arvindh Pandian, Sr. Adv. *for the Appellant.* **Ms. Vidyalakshmi Vipin** and **Ms. Mummaneni Vazra Laxmi**, Advs. *for the Respondent.*

† Arising out of order of NCLT- Hyderabad in CP No. 1/7/HDB/2020, dated 23-9-2021.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 140 taxmann.com 501 (NCLAT - Chennai)



(2022) 140 taxmann.com 502 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Anil Chhabria *v.* SBICAP Trustee Company Ltd.

RAKESH KUMAR JAIN, JUDICIAL MEMBER KANTHI NARAHARI AND DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INS) NO. 378 OF 2022†

JUNE 2, 2022

Section 12A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate Insolvency Resolution Process - Withdrawal of application - CIRP was admitted against corporate debtor at instance of respondent-financial creditors - Corporate debtor had reached settlement with financial creditor and filed application under section 12A before NCLT for withdrawal of CIRP - NCLT rejected said application on ground that post public announcement, IRP had received 134 claims and if withdrawal of CIRP was permitted, it would lead to multiplicity of proceedings, and also substantial claims of financial creditors could not be disregarded in view of settlement with a single creditor - Whether since, NCLT had not taken into consideration regulation 30A(1)(a) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, while passing impugned order and application was filed before constitution of CoC, impugned order was to be set aside and matter was to be remanded back to NCLT to decide it after taking into consideration import of regulation 30A - Held, yes (Paras 12 and 13)

CASE REVIEW

NCLT Mumbai's order in CP (IB) No. 380 (MAH)/2021, dated 28-3-2022 (para 41) *reversed*.

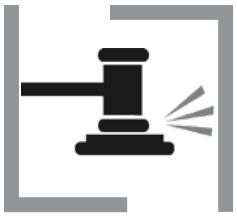
CASES REFERRED TO

Gouri Prasad Goenka v. *Surendra Kumar Agarwal* (2020) 118 taxmann.com 401/ (2021) 164 SCL 57 (NCL-AT) (para 8), *Anuj Tejpal* v. *Rakesh Yadav* (2021) 129 taxmann.com 296 (NCL - AT) (para 8) and *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 9).

Kumar Anurag Singh and **Zain A. Khan**, Advs. *for the Appellant.* **Ms. Aastha Kaushal**, **Amogh Joshi**, **Ms. Sneha Jaisingh**, **Anshul Singh**, **Yash Jariwala**, **Nausher Kohli** and **Jash Shah**, Advs. *for the Respondent.*

† Arising out of order of NCLT - Mumbai in CP (IB) No. 380 (MAH)/2021, dated 28-3-2022.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 140 taxmann.com 502 (NCLAT - New Delhi)



(2022) 140 taxmann.com 503 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Aashray Social Welfare Society *v.* Saha Infratech (P.) Ltd.

JUSTICE ASHOK BHUSHAN, CHAIRPERSON AND SHREESHA MERLA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 904 OF 2021†

JUNE 1, 2022

Section 21, read with section 25A, of the Insolvency and Bankruptcy Code, 2016 and Regulation 16A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 - Corporate insolvency resolution process - Committee of Creditors - Whether as per statutory scheme, there is no such requirement in law that Authorised Representative (AR) shall represent creditors in a class before Adjudicating Authority in an adjudication - Held, yes - Whether AR has a limited role assigned under statutory scheme i.e. to attend meetings of CoC and to cast votes on behalf of creditors in a class - Held, yes - Appellant No. 1 was a registered society comprised of 102 members who were all allottees of a real estate project being developed by corporate debtor - Appellants were also allottees in said project of corporate debtor - Pursuant to commencement of CIRP of corporate debtor, two financial creditors (Respondent Nos. 2 and 3) filed their claims before IRP but same were rejected - Thereafter, they filed an application before NCLT in which appellants had not not been impleaded as party respondents - Accordingly, appellant-homebuyers filed an application and prayed for impleadment to oppose claim filed by respondent Nos. 2 and 3 - NCLT rejected impleadment application filed by appellants on ground that Authorised Representative (AR) of homebuyers who were creditors in class were not representing creditors in a class before Adjudicating Authority - Whether it could not be said that since AR had not came up before Adjudicating Authority for filing impleadment application, appellants who themselves were homebuyers had no right to participate in adjudication initiated by filing applications by respondent Nos. 2 and 3 - Held, yes - Whether since allegation of connivance had been made against appellants by respondent Nos. 2 and 3 before Adjudicating Authority, appellants had every right to be heard before Adjudicating Authority - Held, yes - Whether thus, Adjudicating Authority committed error in rejecting impleadment application filed by appellants to implead them as party respondent - Held, yes (Paras 16,18,19, 22 and 23)

FACTS

- The appellant No. 1 is a registered society comprised of 102 members who all are allottees of a real estate

project being developed by the corporate debtor. Appellant Nos. 2 to 5 are allottees in the above project of the corporate debtor.

- Corporate Insolvency Resolution Process (CIRP) of the corporate debtor commenced vide order passed by the Adjudicating Authority on an application under section 7 filed by three individual financial creditors.
- Interim Resolution Professional (IRP) did not take charge in pursuance of the order passed by the Adjudicating Authority, hence, appellant filed an application seeking replacement of the IRP.
- Subsequently, the Adjudicating Authority appointed the new IRP. The Committee of Creditors (CoC) comprised of the Homebuyers (99.85 per cent) and members of the appellant No. 1 constituted 70 per cent of the CoC.
- Respondent Nos. 2 and 3 as financial creditors filed their claim before the IRP. Respondent Nos. 2 and 3 filed an application seeking direction against the IRP to admit their claims. The IRP partially rejected the claim of respondent No. 2 and completely rejected the claim of respondent No. 3, both respondent Nos. 2 and 3 being related parties of the corporate debtor.
- Being aggrieved by the decision of the IRP, the respondent Nos. 2 and 3 have filed two applications which are pending adjudication before the Adjudicating Authority.
- In the aforesaid two applications respondent Nos. 2 and 3 had not impleaded the appellants as party respondent, hence, appellants filed applications for being impleaded in the said applications, which applications have been rejected by the impugned order. The Adjudicating Authority took the view that Authorised Representative of the Homebuyers since have no role in receipt or verification of the claims of creditors of the class he represents, then the association or the allottees shall have no role in receipt or verification of claims of creditors and rejected the applications.
- Being aggrieved of the order of rejection instant appeal has been filed.

HELD

- The statutory scheme as is reflected from section 21(6A) and section 25-A indicates that the Authorised Representative is chosen to represent the creditor in a class in the CoC. The Authorised Representative needs to attend the meeting of the CoC and vote on behalf of the financial creditor to the extent of voting share of the financial creditor. The Adjudicating Authority in its order has referred to regulation 16A sub-regulation (5) of the CIRP Regulations, 2016. Regulation 16A deals with the Authorised Repre-

sentative. Regulation 16A provides for procedure of choosing an Authorised Representative of creditors of the respective class. (Para 12)

- The clarification under regulation 16A(5) is that the Authorised Representative shall have no role in receipt or verification of claims of creditors of the class he represents. The Authorised Representative is to be chosen after claims of financial creditors in a class is submitted in Form-CA. The stage of choosing an Authorised Representative of a creditor in a class is much after receipt of a claim under Chapter IV of the Regulation and after verification of a claim under regulation 13. After verification of claim under regulation 13, list of creditors is made available for inspection by the person who have submitted proof of claim and is available for inspection by others as enumerated under regulation 13. The clarification appended to regulation 16A(5) is only clarification to the statutory scheme delineated under the Regulations and the Code that the Authorised Representative has no role in respect of verification of claim of a creditor in class. Can it be said that the Authorised Representative has no role in respect of verification of claims of creditors, therefore, the financial creditors in a class themselves have also no right with regard to receipt or verification of claims. The answer is obviously no. The financial creditor in class have every right to submit their claim giving proof of verification. (Para 13)

- The mere fact that the Authorised Representative of a creditor in a class have no role in receipt and verification of the claim of the creditors, it cannot be held to mean that creditors in a class have no right with regard to receipt and verification of their claim. The clarification as contained in regulation 16A(5) has been read by the Adjudicating Authority to an extent which it never meant. The conclusion recorded by the Adjudicating Authority on the basis of erroneous interpretation of regulation 16A(5) resulted in a wrong conclusion that the creditors in a class have no role in receipt or verification of claims of creditors. (Para 14)

- The present is a case where the question for consideration is the right of impleadment of appellants in applications filed by respondent Nos. 2 and 3 challenging the rejection of their claim as financial creditors. The appellants are also financial creditors in a class and they represent majority of the Homebuyers in class, as has been pleaded by the appellants. The financial creditors in a class, who at present consist of 99.85 per cent of CoC, have every right to be heard in the applications filed by respondent Nos. 2 and 3 whose claim has been partly and fully rejected, respectively by the

IRP. The Authorised Representative under the statutory scheme as noticed above is to represent the financial creditors i.e. Homebuyers in a class for a limited purpose i.e. for attending meetings of the CoC and voting on behalf of the financial creditors in a class. It cannot be said that since the Authorised Representative has not came up before the Adjudicating Authority for filing the impleadment application, the appellants who themselves are Homebuyers have no right to participate in the adjudication initiated by filing applications by respondent Nos. 2 and 3. (Para 15)

- The Supreme Court in the case of Phoenix Arc (P.) Ltd. v. Spade Financial Services Ltd. (2021) 124 taxmann.com 24/165 SCL 21 observed that claim of one financial creditor to keep out other financial creditor from CoC need to be examined and order passed without opportunity to financial creditors shall not operate as res judicata. (Para 18)

- In the instant case the claim of respondent Nos. 2 and 3 to be member of CoC has been rejected by the IRP challenging which order applications have been filed by respondent Nos. 2 and 3 before the Adjudicating Authority. The appellants, before the Adjudicating Authority who are financial creditors in a class and appellant No. 1 representing more than 60 per cent of Homebuyers prays for impleadment to oppose the claim filed by respondent Nos. 2 and 3. The judgment of the Supreme Court in Phoenix Arc Pvt. Ltd. (supra) fully supports the contention raised by the appellants. It has already been held that there is no provision in the Code that before the Adjudicating Authority it is the Authorised Representative who has to represent the creditors in a class. Authorised Representative has a limited role assigned under the statutory scheme i.e. to attend the meetings of CoC and to cast votes on behalf of the creditors in a class. As per the statutory scheme, there is no such requirement in law that the Authorised Representative shall represent the creditors in a class before the Adjudicating Authority in an adjudication. It has also been noticed while noticing facts of the present case that prior to filing of the applications, the respondent Nos. 2 and 3 had filed an application seeking direction against the IRP to admit the claim of respondent Nos. 2 and 3 in which application the Adjudicating Authority heard the appellants and granted time to file their written submissions. (Para 19)

- In pursuance to the above liberty granted by the Adjudicating Authority, the appellants had also filed written submissions. When the Adjudicating Authority itself has heard the appellants in the earlier adjudication where respondent Nos. 2 and 3 came before the

Adjudicating Authority seeking direction to admit their claim, there is no reason in not giving opportunity to the appellants when subsequently applications were filed by the respondent Nos. 2 and 3 after rejection of their claim by the IRP. (Para 20)

- One more submission has been raised by the appellants that the respondents in their written submission filed before the Adjudicating Authority have made allegations against the appellants. It is the case of respondent Nos. 2 and 3 that the Homebuyers Association and the IRP are in connivance with each other against them. (Para 21)
- When allegation of connivance has been made against the appellants by the respondent Nos. 2 and 3 themselves before the Adjudicating Authority, it is viewed that the appellants have every right to be heard before the Adjudicating Authority. (Para 22)
- In view of the foregoing discussion, it is viewed that the Adjudicating Authority committed error in rejecting impleadment application filed by the appellants to implead them as party respondent. In result, the appeal is allowed. (Para 23)

CASE REVIEW

Order passed by NCLT, New Delhi Bench II in I.A. No. 2365 of 2021 and I.A. No. 2366 of 2021 in I.A. No. 2286 of 2021 and I.A. No. 2275 of 2021 in C.P. (IB) No. 1781 (ND)/2018) dated 21-10-2021 *set aside*.

Phoenix Arc (P.) Ltd. v. *Spade Financial Services Ltd.* (2021) 124 taxmann.com 24/165 SCL 21 (SC) (para 19) *followed*.

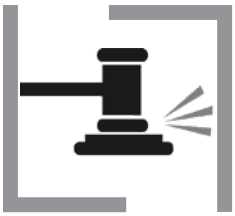
CASES REFERRED TO

Phoenix Arc (P.) Ltd. v. *Spade Financial Services Ltd.* (2021) 124 taxmann.com 24/165 SCL 21 (SC) (para 16).

Krishnendu Datta, Sr. Adv. and **Raghavendra M. Bajaj**, Adv. *for the Appellant.* **Ashish Makhija**, **Ms. Richa Singh**, Advs., **Virendra Ganda**, Sr. Adv., **Atul Sharma**, **Ms. Renuka Iyer**, **Aditya Vashisth**, **Gaurav Mitra** and **Ms. Himanshi Vashisht**, Advs. *for the Respondent.*

† Arising out of order passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench II in I.A. No. 2365 of 2021 and I.A. No. 2366 of 2021 in I.A. No. 2286 of 2021 and I.A. No. 2275 of 2021 of 2021 in C.P. (IB) No. 1781 (ND)/2018) dated 21-10-2021.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 140 taxmann.com 503 (NCLAT - New Delhi)



(2022) 140 taxmann.com 558 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Ram Kishor Arora, Suspended Director of Supertech Ltd. *v.* Union Bank of India

JUSTICE ASHOK BHUSHAN, CHAIRPERSON AND NARESH SALECHA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 406 OF 2022†

JUNE 10, 2022

Section 5(8), read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Financial debt - Corporate debtor was a real estate company engaged in construction of various projects in National Capital Region - Respondent-financial creditor granted credit facilities to corporate debtor for development of Eco Village II project - Account of corporate debtor was declared as Non-Performing Asset - Financial creditor filed an application under section 7 against corporate debtor - NCLT by impugned order admitted said application and directed for initiation of CIRP - On appeal, appellant-suspended director of corporate debtor submitted that corporate debtor had been running a large number of projects, substantial number of projects had already been completed, existing promoters were willing to complete projects in a time bound manner along with discharging liabilities of all financial creditors, homebuyers and even operational creditor - It was further submitted that CIRP need not to be allowed to continue for all 20 projects rather it might be undertaken on projects basis - Whether since promoters were ready to extend all co-operation with all their employees to IRP, IRP was to be directed to proceed with construction of all projects under his overall supervision and control - Held, yes - Whether Committee of Creditors was to be constituted only for Eco Village II project with all financial creditors and it should start process for resolution of said project - Held, yes - Whether even for Eco Village II project, IRP should carry project and continue it as ongoing project by taking all assistance from ex-management, employees and workmen - Held, yes - Whether however, other projects apart from Eco Village II should proceed as ongoing projects under overall supervision of IRP - Held, yes - Whether pendency of CIRP proceedings should in no manner hinder appellant to approach financial creditors for entering into settlement with financial creditors with regard to disbursement to financial creditors - Held, yes (Paras 22, 23 and 24)

FACTS

- The corporate debtor was a real estate company engaged in construction of various projects in National Capital Region.

- The respondent-financial creditor granted credit facilities to the corporate debtor for development of Eco Village II project.
- The credit facilities were secured by execution of mortgage and with corporate guarantees and personal guarantees.
- The account of corporate debtor was declared as Non- Performing Assets on 20-6-2018.
- The financial creditor filed an application dated 20-3-2021 under section 7 against corporate debtor.
- NCLT by impugned order admitted said application and directed for initiation of CIRP.
- On appeal, appellant-suspended director of corporate debtor submitted that corporate debtor had been running a large number of projects, substantial number of projects had already completed, existing promoters were willing to complete projects in a time bound manner along with discharging liabilities of all financial creditors, homebuyers and even operational creditors and further submitted that CIRP need not to be allowed to continue for all 20 projects rather it might be undertaken on projects basis.

HELD

- From the status report submitted by the IRP dated 31-5-2022, it is clear that IRP in his Report has listed 20 projects of the corporate debtor which also included Eco Village II Project for which the finance was given by the Union Bank of India who has filed the application under section 7 for initiation of the CIRP. By the admission of the application under section 7 by the Adjudicating Authority, CIRP has commenced against the corporate debtor and when CIRP has commenced against the corporate debtor, all projects which had been undertaken and under construction comes under CIRP. As per the IRP status report, IRP has taken a stock of situation by visiting the sites which are under construction. The IRP has held several meetings with the project director. (Para 11)
- The IRP has given the details of 20 projects of the corporate debtor which also included Eco Village II Project, Eco Village I project and III. The IRP has also given the details of banks/Financial Institutions who has provided loan to corporate debtor. (Para 12)
- The appellant submitted that in view of the fact that large number of projects of the corporate debtor are ongoing projects where substantial completion has been made and large number of units have also been handed over to the homebuyers and rest units shall also be handed over, in event the construction of the projects are allowed to proceed as ongoing project, the promoters of the corporate debtor are willing to extend all co-operation to the

IRP for carrying out the ongoing projects. It is submitted that CIRP need not to be allowed to continue for all the 20 projects rather it may be undertaken on projects basis as has been held by Appellate Tribunal in its Judgment of *Flat Buyers Association Winter Hills-77, Gurgaon* v. *Umang Realtech (P.) Ltd.* (2020) 119 taxmann.com 50 (NCLAT - New Delhi). (Para 14)

- The Appellate Tribunal in the case of 'Flat Buyers Association Winter Hills-77, Gurgaon' (supra) was faced with a case regarding insolvency of a real estate company. In the said judgment, the Appellate Tribunal dealt with 'Reverse Corporate Insolvency Resolution Process'. (Para 15)

- The Appellate Tribunal also made observations that 'Secured Creditor' such as 'financial institutions/banks', cannot be provided with the asset (flat/apartment) by preference over the allottees (unsecured financial creditors) for whom the project has been approved. Appellate Tribunal directed for following 'Reverse Corporate Insolvency Resolution Process' in case of real estate infrastructure companies in the interest of allottees and survival of the real estate infrastructure companies and to ensure completion of projects. (Para 16)

- In the said case, one of the promoters were directed to co-operate with the Interim Resolution Professional and to disburse the amount not as a promoter but as the outside Lender and direction for phase-wise completion of the project as well as direction for payment of financial institutions/ banks simultaneously. (Para 17)

- An appeal was also filed before the Supreme Court in the matter of *Narendra Singh* v. *Umang Realtech (P.) Ltd.* (Dairy No. 13889 of 2020, dated 11-8-2020) against the Order Flat Buyers Association Winter Hill-77, Gurgaon (supra) which was dismissed by an Order dated 11-8-2020 (Para 18)

- From the facts, which has been brought on record especially the status report by the IRP it is clear that all 20 Projects which are of the corporate debtor are ongoing projects where substantial units of the total units have been sold. (Para 19)

- The Union Bank of India who has initiated CIRP by filing section 7 application has stated in section 7 application that it had given finance for Eco Village II Project. In the status report of the IRP, Union Bank of India has shown to have given finance for Eco Village II Project, Eco Village III Project, Eco Village IV and One Romano Project. With regard to the Eco Village II Project, there is another financial creditor i.e. IDBI Bank who has filed Intervention Application. Large number of homebuyers who has filed Intervention Application has prayed that CIRP be confined to

Eco Village II Only. With regard to the other projects, the construction may be allowed to be completed so that home buyers may get their flats. (Para 20)

- It is noticed that the CIRP has been initiated against the corporate debtor. CIRP has commenced against all the projects of the corporate debtor. CIRP encompasses all the assets of the corporate debtor including all bank accounts. The IRP has already been appointed and has taken steps by informing all concerned including banks to add the name of IRP for operation of the account. The appellant made submissions and also filed an I.A. by which resolution cum settlement proposal has been submitted by the Management with an object to carry out the construction of all the projects. (Para 21)

- The consequence of CIRP is that all assets of the corporate debtor come in the control and management of the IRP. All bank accounts are to be operated with the counter signature of the IRP. No amount from any account can be withdrawn without the counter signature and permission of the IRP. IRP under the IBC has responsibility to run the corporate debtor as a going concern. Further when promoters are ready to extend all co-operation with all its staffs and employees to the IRP, there is no reason for not to direct the IRP to proceed with construction of all the projects under the overall supervision and control of the IRP. An Interim Order dated 12-4-2022 directed not to constitute the CoC which Interim Order is continuing as on date. (Para 22)

- In the facts of the instant case and keeping in view the submissions raised by the parties, it is opined that in CIRP Process, project-wise resolution to be started as a test to find out the success of such resolution. Keeping an eye regarding construction and completion of the projects, it is opined that Interim Order dated 12-4-2022, staying the constitution of CoC be modified to the extent that CoC be constituted for the Eco Village II Project only with all financial creditors including financial creditors/banks/homebuyers. The Committee of Creditors of Eco Village II Project shall start process for resolution of Eco Village II Project. The IRP shall separate the claims received with regard to the Eco Village II Project and prepare an 'Information Memorandum' accordingly and proceed for meeting of the CoC as per the Code. It is further directed that even for Eco Village II Project, the IRP shall carry the Project and continue the project as ongoing project by taking all assistance from the ex-management, employees, workmen etc. However it is made clear that other projects apart from the Eco Village II Project shall proceed as ongoing project basis under the overall supervision of the IRP. IRP in his report stated

that with regard to the projects, there are separate accounts as per RERA Guidelines. Detail account of all the inflow and outflow with regard to each project shall be separately maintained as per the RERA Guidelines. 70 per cent of the amount received with regard to the project shall be utilized for construction purpose only with regard to the disbursement of rest 30 per cent amount, appropriate direction after receiving further status report and after hearing all concern subsequently shall be issued. (Para 23)

- The promoters of the corporate debtor has submitted that they shall arrange for interim finance to support the ongoing construction of the different projects by arranging finances as submitted in their settlement cum resolution plan. Annexure 3 to the I.A., with an object to complete the projects and clear the outstanding of all financial institutions including the financial creditors on the basis of 100 per cent ledger balance and also payment to the operational creditor. The pendency of instant proceeding shall in no manner hinder the appellant to approach the financial creditors for entering into settlement with the financial creditors. With regard to the disbursement to the financial creditors, out of 30 per cent of the amount, necessary direction after receiving the status report and receiving the progress of the projects shall be issued. (Para 24)

- In view of the foregoing discussions, following interim directions are issued:

  i. The Interim Order dated 12-4-2022 continuing as on date is modified to the extent that IRP may constitute the CoC with regard to the Project Eco Village II only.

  ii. After constitution of CoC of Eco Village II Project, the IRP shall proceed to complete the construction of the project with the assistance of the ex-management, its employees and workmen.

  iii. With regard to the Eco Village II Project, the IRP shall proceed with the completion of the project, Resolution and shall be free to prepare Information Memorandum, issue Form-G, invite Resolution Plan however no Resolution Plan be put for voting without the leave of the Court.

  iv. All receivables with regard to the Eco Village II Project, shall be kept in the separate account, earmarked account and detail accounts of inflow and outflow shall be maintained by the IRP.

  v. That all other projects of the corporate debtor apart from Eco Village II Project shall be kept as ongoing project. The construction of all other projects shall continue with

overall supervision of the IRP with the assistance of the ex-management and its employees and workmen.

vi. The promoter shall infuse the funds as arranged by it in different projects which shall be treated as interim finance regarding which detail account shall be maintained by the IRP.

vii. No account of corporate debtor shall be operated without the counter signature of the IRP. All expenses and payments in different projects, shall be only with the approval of the IRP. All receivables in different projects shall be deposited in the account as per RERA Guidelines and 70 per cent of the amount shall be utilized for the construction purpose only. With regard to the disbursement of rest of the 30 per cent, appropriate direction shall be issued subsequently after receiving the status report and after hearing all concerns.

viii. The IRP shall obtain approval of the CoC which is directed to be constituted for Eco Village II Project and incur all the expenses regarding the said projects and further incur the expenses accordingly.

ix. With regard to the expenses to other projects for which no CoC has been constituted, IRP is at liberty to submit a proposal for payment of various expenses including CIRP expenses to this Tribunal.

x. The promoters of the corporate debtor shall be at liberty to bear any expenses as requested by the IRP without in any manner utilizing any of the funds of the corporate debtor.

xi. Let the IRP submit a further status report within six weeks regarding Eco Village II Project and all other projects.

xii. The parties are at liberty to file an I.A. for any direction/ clarification in the said regard.

xiii. List this Appeal on 27-7-2022. (Para 25)

CASES REFERRED TO

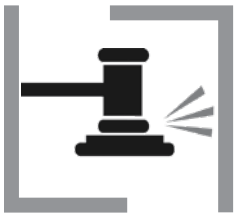
Flat Buyers Association Winter Hills-77, Gurgaon v. *Umang Realtech (P.) Ltd.* (2020) 119 taxmann.com 50 (NCLAT - New Delhi) (para 6), *Swiss Ribbon (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 14), *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 15) and *Narendra Singh* v. *Umang Realtech (P.) Ltd.* (Dairy No. 13889 of 2020,dated 11-8-2020) (para 18).

Arun Kathpalia, Sr. Adv., **Siddharth Bhatli**, **Abhijeet Sinha**, **Ms. Lashita Dhingra** and **Kshitij Wadhwa**, Advs. *for the Appellant.* **Alok Kumar**, **Ms. Somya Yadava**, **Manan**

Gambhir, **Nikhil Malhotra**, **Ms. Garima Soni**, **Ms. Nandita Jha**, **Bishwajity Dubey**, **Ms. Srideepa Bhattacharyya**, **Ms. Neha Shivhare**, **Arvind Nayar**, Sr. Adv., **Siddhant Kumar**, **Ajay Bhargaa**, **Ms. Wamika Trehan**, **Ms. Maithli Moondra**, **P. Nagesh**, **K. Datta**, Sr. Advs., **Ms. Kanika Sachdeva**, **Piyush Singh**, **Aditya Parolia**, **Ms. Aditi Sinha**, **Siddhartha Barua** and **Danish Abbasi** *for the Respondent.*

† Arising out of order passed by NCLT - New Delhi in IB-204/(ND)/2021, order dated 25-3-2022.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 140 taxmann.com 558 (NCLAT - New Delhi)



(2022) 140 taxmann.com 560 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Ranjeet Kumar Burnwal *v.* Committee of Creditors, Supriyo Kumar Chaudhuri

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

COMPANY APPEAL (AT) (INSOLVENCY) NO. 1005 OF 2021†

JUNE 3, 2022

Section 5(13) of the Insolvency and Bankruptcy Code, 2016 and section 202 of the Companies Act, 2013 and rule 17 of Companies (Meetings of Board and its Powers) Rules, 2014 - Corporate insolvency resolution process - Insolvency resolution process costs - Appellant was appointed as Executive Director of corporate debtor - NCLT ordered initiation of CIRP of corporate debtor - Resolution Professional (RP) pursuant to his appointment, terminated appointment of appellant due to some irregularities - In pursuance of same, appellant filed an application before NCLT seeking payment of leave encashment and compensation for loss of office/employment with interest - NCLT held that only leave encashment would be treated as a part of CIRP cost and rejected other compensatory claims - Whether Adjudicating Authority had rightly recorded that leave encashment amount payable to appellant would be treated as part of CIRP cost - Held, yes - Whether however, keeping in view agreement between appellant and corporate debtor and also rule 17(3) of Rules, 2014, there was no provision for payment of compensation to appellant and, hence, same was not payable - Held, yes (Para 9)

FACTS

- The appellant was promoted and appointed as Executive Director (Works) of the corporate debtor on 21-3-2016 and his tenure as Executive Director (Works) was renewed and he was reappointed as Executive Director (Works) with effect from 13-2-2019 and he was also entitled to payment of bonus, leave encashment and gratuity.
- The petition filed by the State Bank of India as financial creditor against corporate debtor was admitted and the Corporate Insolvency Resolution Process (CIRP) commenced on 7-2-2022 and an Interim Resolution Professional (IRP) was appointed.
- After initiation of the CIRP, the Resolution Professional (RP) intimated that he, on behalf of the company had terminated the appointment of the appellant as Executive Director (Works) due to some irregularities.
- The appellant agree to have received his remuneration till 30-4-

2020 but did not receive the leave encashment of Rs. 5.67 lakhs and the gratuity to be calculated as per the Gratuity Act. Further, he also claimed for compensation for loss of his office as Executive Director and interest on outstanding dues. The appellant also claimed that his termination of employment was arbitrary and unfair

- The Adjudicating Authority directed that leave encashment amount payable to the applicant shall be treated as part of CIRP cost and rejected other compensatory claims.

- On appeal :

HELD

- (*i*) Admittedly, the gratuity amount of Rs. 8.03 lakhs has been paid, during the pendency of the I.A before the Adjudicating Authority.

  (*ii*) Leave Encashment of Rs. 5.67 lakhs has been admitted to be payable and since being Director he has been treated as related party and therefore, the Adjudicating Authority has rightly recorded that leave encashment amount payable to the applicant shall be treated as part of CIRP cost and as the Resolution Plan finalized by CoC the approval is pending before the Adjudicating Authority, once approved, the leave encashment will be considered in accordance with law.

  (*iii*) It is viewed that the compensation amount of Rs. 25.68 lakhs claimed by the appellant is not payable in terms of the agreement dated 13-2-2019.

  (*iv*) Further, reliance is also placed on the terms of sub-rule (3) of rule 17 of Companies (Meetings of Board and its Powers) Rules, 2014 which state that no payment shall be made to the managing director or whole time director or manager of the company by way of compensation for the loss of office or as consideration for retirement from office (other than notice pay and statutory payments in accordance with the terms of appointment of such director or manager, as applicable) or in connection with such loss or retirement if the company is in default in redemption of debentures or payment of interest thereon.

  (*v*) Keeping in view the aforenoted rules and the agreement dated 13-2-2019, it is held that there is no provision for payment of compensation to the appellant.

  (*vi*) Further, it is observed that even the stipulated one month notice period has been complied with and admittedly the salary payment of Rs. 2.14

lakhs has also been paid. Since, payment has been settled in accordance with law, the payment of any further interest does not arise. (Para 9)

- For the aforenoted reasons there is no merit in this Appeal. Hence, this Appeal fails and is accordingly dismissed. (Para 10)

CASE REVIEW

Order passed by NCLT, Kolkata Bench, in I.A. No. 41 (KB)/2021 in Company Petition (IB) No. 1214/KB/2018), dated 26-7-2021 (para 10) *affirmed.*

CASES REFERRED TO

CADS Software India (P.) Ltd. v. *KK Jagdish* (Company Appeal (AT) No. 320 of 2018, dated 7-5-2019) (para 7).

Iswar Mohapatra, Adv. *for the Appellant.* **Ishwar Mohapatra**, Adv. *for the Appellant.* **Ojasa Arya**, **Shubham Raj**, **Sabarni Mukherjee**, **Palzer Mokhtan** and **Ms. Swati Dalmia** *for the Respondent.*

† Arising out of order passed by National Company Law Tribunal, Kolkata Bench, in I.A. No. 41/(KB)/2021 in Company Petition (IB) No. 1214/KB/2018, dated 26-7-2021.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 140 taxmann.com 560 (NCLAT- New Delhi)

IBBI Suspended the Registration of an Insolvency Professional for a period of three years

Observations of the Disciplinary Committee of IBBI

◆ **Non-cooperation with Inspecting Authority (IA)**

Inspecting Authority issued notice of inspection under regulation 4 (1) of the Inspection Regulations to the Insolvency Professional (IP) to inform that IA would be undertaking inspection in respect of assignments handled by him and that documents may be mailed to the IA. The IP instead of responding to the notice as mandated under section 218(3) of the Code r/w regulation 4(4) and 4(7) of the Inspection Regulations submitted that the inspection notice was misleading/defective/vitiated notice/ communication and termed the same as non -est/ *void ab initio*. The IP did not share requisite documents to the IA.

The IP is duty bound to provide the requisition documents in Section 218(3) of the Code read with Regulation 4(4), 4(5) and 4(7) of Inspection Regulations. Accordingly, the conduct and response of IP was construed as evasive.

◆ **Non-appointment of Registered Valuer**

No registered valuer was appointed by the IP during CIRP. The IP stated that 'the assets of the Corporate Debtor are untraceable as informed by the CoC members to the RP. Moreover, none of the CoC members are willing to contribute towards CIRP cost, hence no Registered Valuers could have been engaged.'

The obligation of appointment of registered valuers under regulation 27 of the CIRP Regulations is on the RP and not the CoC. However, after appointment, IP did not appoint two registered valuers within 7 days of his appointment. The DC also found that IP has not exhibited any intention by taking some concrete steps that can instill some degree of confidence in the earnestness of the IP. It is plain for anyone willing to see that IP has not done anything to show that he intended to complete the CIRP with required diligence. The logic about non availability of funds being main reason for non-appointment of valuers does not appear to be tenable. In such a situation, IP could have apprised the AA for not pursuing the CIRP as CD has no assets and instead recommendation for liquidation needed to be considered. Continuing with the assignment without following the due processes establishes, wilful contravention of procedures provided in the Code. Thus, the DC opined that there was a violation of section 208(2)(*a*) of the Code and Regulation 27 of the CIRP Regulations.

◆ **Violation of Timelines**

The period of 330 days provided in the proviso to Section 12 of the Code was over in the matter. However, no extension application was filed by the IP to AA.

The DC noted that IP tried to mislead the IA submitting in his reply that the application for extension u/s 12(2) of the Code can be filed only if instructed to do so by CoC by a resolution passed with 66% of the votes. IP should have moved agenda in COC for consideration and voting for filing application before AA for seeking extension of CIRP period.

◆ **Improper notice of CoC Meetings**

Notice of CoC meeting sent by IP did not contain mandatory details like (*i*) list of matters to be discussed at the meeting, (*ii*) list of issues to be voted, etc. Accordingly, the IP violated section 208(2)(*a*) and 208(2)(*e*) of the Code read with Regulation 21(3) and (4) of the CIRP Regulations.

◆ **Non-maintenance of list of creditors in terms of regulation 13 of CIRP Regulations**

The DC observed from the report certifying constitution of CoC filed before AA by the IP that he had maintained only name of creditor, profile of creditor and amount of operational debt and have failed to include the amount claimed by the creditors, amount of claim admitted and security interest, if any. The DC observed that the IP failed to adhere his obligations and compromised with the explicit provisions of the Code and regulations provided therein. Accordingly, The DC was of the view that since the list was not maintained as provided in the CIRP Regulations, there was violation of Section 208(2)(*a*) of the Code and Regulation 13(1) of the CIRP Regulations.

◆ **Contravention with regard to control and custody of the CD**

IP did not take control and custody of the assets of the CD and "did not preserve and protect them" as they were with a COC member. Accordingly, there was violation of Section 25 (1) and Section 25 (2) of the Code. Further, as IP did not take reasonable care and diligence while performing his duties of taking control and custody of assets of the CD, there was also violation of Section 208(2)(*a*) of the Code.

◆ **Contravention with regard to non-filing of PUFE applications**

The IP appointed a professional to conduct forensic audit. On perusal of the forensic audit report it was evident that there were transactions which could be under the provisions of Sections 43, 45, 50 and 66 of the Code. An application should have been made to the AA under sections 43, 45, 50 and 66 of the Code. However, as this was not done, therefore, the DC was of the view that IP violated sections 43, 45, 50 and 66 of the Code.

Order

The Disciplinary Committee of IBBI noted that the IP conducted the entire CIRP of the CD in a brazen manner without having due regard the provisions of the Code and the regulations made thereunder. Accordingly, the DC found that the actions of IP were in violation section 12(1), section 12(2), section 25(1), section 25(2)(*a*), section 25(2) (*d*), section 208(2)(*a*), 208(2) (*e*) of the Code, Regulation 13(1), Regulation 21(3) and (4), Regulation 27, Regulation 35A of the CIRP Regulations, Regulation 4(4), Regulation 4(7) of Inspection Regulation, Regulation 7(2)(*a*) and 7(2)(*h*) of IP Regulations read with clauses 2, 3, 5, 12, 13, 18, 19 of the Code of Conduct specified thereunder.

In view of the aforesaid, Disciplinary Committee of IBBI suspended the registration of the IP for a period of 3 years.

Source: https://www.ibbi.gov.in/orders/ibbi

FAQs on Information Memorandum

During the Corporate Insolvency Resolution Process, when a Resolution Professional is appointed, he has to perform various duties as per Section 25 of the Code including the preparation of Information Memorandum. IM is a document prepared by Resolution Professional which provides details of corporate debtor to assist Resolution Applicant to formulate resolution plan.

1. What is the definition of Information memorandum as per the Insolvency and Bankruptcy Code, 2016? What details the Information memorandum shall cover?

As per Section 5(10) of the Code, "Information Memorandum" means a memorandum prepared by resolution professional under sub-section (1) of Section 29;

And as per Section 29(1) of the Code, the resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.

As per Regulation 36(2) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations"), the information memorandum shall contain the following details of the corporate debtor-

(*a*) assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values

(*b*) the latest annual financial statements

(*c*) audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application

(*d*) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims

(*e*) particulars of a debt due from or to the corporate debtor with respect to related parties

(*f*) details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party

(*g*) the names and addresses of the members or partners holding at least one per cent stake in the corporate debtor along with the size of stake;

(*h*) details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;

(*i*) the number of workers and employees and liabilities of the corporate debtor towards them;

(*j*) other information, which the resolution professional deems relevant to the committee.

2. Can the Interim Resolution professional prepare Information memorandum?

As per Section 25 of the Code, it is the duty of the resolution professional to prepare the information memorandum. However, the cases where the interim resolution professional is working as deemed resolution professional, he shall carry out all the functions which are supposed to be of the Resolution professional.

3. What is the purpose of preparation of Information memorandum?

The purpose of an Information Memorandum is that resolution plan may be prepared based on it. It is specified in the provision relating to preparation of Resolution Plan.

As per Section 30(1) of the Code, a resolution applicant may submit a resolution plan *(along with an affidavit stating that he is eligible under section 29A)* to the resolution professional prepared on the basis of the information memorandum.

4. What is the time limit for preparation and submission of information memorandum?

As per Regulation 36(1) of CIRP Regulations, The Resolution professional shall submit the information memorandum in electronic form to each member of the committee within 2 weeks of his appointment, but not later than 54th day from the insolvency commencement date, whichever is earlier.

5. Can the Information memorandum be placed in the CoC meetings directly?

From the language of Regulation 36(1) of CIRP Regulations (*as stated above*), it may be presumed that the Information memorandum is required to be circulated to all the members electronically only that too after taking the confidentiality undertaking.

6. Who has the right to receive the Information memorandum?

The information memorandum is to be submitted to Resolution applicants and members of the committee of creditors.

As per Section 29(2), the resolution professional shall provide the information to the resolution applicants, provided that they undertakes-

(*a*) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;

(*b*) to protect any intellectual property of the corporate debtor it may have access to; and

(*c*) not to share relevant information with third parties unless clauses (*a*) and (*b*) of this sub-section are complied with.

Further, as per Regulation 36(4) of CIRP Regulations, the resolution professional shall share the information memorandum after receiving an undertaking from a member of the committee to the effect that such member or resolution applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of Section 29.

7. Which CIRP form is required to be filed by the resolution professional on submission of Information memorandum?

As per Regulation 40(B) of CIRP Regulations, Form CIRP-3 is required to be filed within 7 days of issue of information memorandum to the members of Committee of creditors.

Further, if the information memorandum is not issued within 51 days from the date of from the date of issue of information memorandum, CIRP-7 will be required to be filed within 3 days of such date and the filing will be continued every 30 days till the completion of issuance of IM.

Moreover, filing of forms after due date shall be accompanied by a fee of five hundred rupees per Form for each calendar month of delay.

8. What assistance may be sought from the creditors of the corporate debtor in preparation of information memorandum?

As per Regulation 4(3) of CIRP Regulations, the creditor shall provide to the interim resolution professional or resolution professional, as the case may be, the information in respect of assets and liabilities of the corporate debtor from the last valuation report, stock statement, receivables statement, inspection reports of properties, audit report, stock audit report, title search report, technical officers report, bank account statement and such other information which shall assist the interim resolution professional or the resolution professional in preparing the information memorandum, getting valuation determined and in conducting the corporate insolvency resolution process.

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Regulatory updates

- IBBI *vide* its circular No. EXAM-13016/1/2022-IBBI dt. 6th June 2022 notified on frequency of attempt in an LIE or valuation examination, as the case may be, for every candidate, shall be determined after taking into account a cooling off period of 2 months between each consecutive attempts of such candidate, thereby making a total of 6 attempts in a period of 12 months. These requirements shall get implemented after expiry of a period of 3 months from the date of this circular. (The detailed circular can be accessed at https://

  ibbi.gov.in//uploads/legalframwork/70e2aab0609ab7df2b7acd4ab795c444.pdf)

UK Debt Relief: Individuals

Individuals in the UK have an array of debt relief solutions to choose from. Bankruptcy is just one Debt Solution. An individual may choose one of the following:

- Debt Management Plans
- Payday Loan Help
- Individual Voluntary Arrangements
- Protected Trust Deeds
- Bankruptcy/Sequestration
- Debt Relief Order
- Administration Orders

Individual Voluntary Arrangements

An Individual Voluntary Arrangement (IVA) is an agreement with your creditors to pay all or part of your debts. You agree to make regular payments to an insolvency practitioner, who will divide this money between your creditors. An IVA can give you more control of your assets than bankruptcy.

Bankruptcy/Sequestration

Bankruptcy is a form of Insolvency and is ***the most severe consequence of debt so should never be entered into lightly.*** For some people, however, it may be the most appropriate Debt Solution. It can be the best way to repay what you can of your debt, write off the rest - and make a new beginning. There are many factors to consider when deciding whether to go Bankrupt and the process can often be unclear. Many people believe that if you are a homeowner you will automatically lose your house or have to sell. **Many people in negative equity get to keep their houses** after going through bankruptcy and also retain all reasonable assets, such as cars etc.

Debt Relief Orders

A Debt Relief order, or DRO is a form of Insolvency for people who don't see a way out of debt, but who have relatively low debt and asset amounts. This solution is sometimes referred to as mini Bankruptcy as there are many similarities between the two options. A Debt Relief Order is typically over a period of one year, after which the remaining debt is written off by creditors. Similarly to Bankruptcy, creditors are unable to take action against you, add anything to the debt amount or contact you during the Ordered term, usually 12 months.

Administrative Orders

An Administration Order, or Admin Order is a Debt Solution offered by the courts. This type of plan is only available if you have a debt or fine with the courts, in the form of a CCJ (County Court Judgment) or a HCJ (High Court Judgment). In a plan with the courts they will administer you court fines as well as other debts, up to the value of £ 5,000.

There is no minimum payment amount, but if you can't clear the debt within 5 years, you may be able to get the remaining debt written off with a 'Composition Order'.

The agreement is made directly with your local court and sets in place a regular amount to pay with them. They take the payments and deal with your creditors for you, ensuring interest and charges are stopped. As the solution is offered by the courts, they decide what the payments are with you and if you qualify for any discount/debt write off.

Protected Trust Deeds

A PTD (Protected Trust Deed) is the Scottish equivalent to an IVA (Individual Voluntary Arrangement).

PTDs are typically over 36 months (3 years) which is much shorter than the UK equivalent IVA. As a form of insolvency, if agreed, creditors have to stop interest and charges, contact with you and at the end of the term, the remaining debt will be written off. Protected Trust Deeds are usually over a fixed period and at fixed monthly payments, which makes them ideal for people with fixed or steady incomes and expenses, able to commit for what is typically 3 years.

A Protected Trust Deed is legally binding and failure to maintain payments can fail the agreement and may lead you open to Sequestration (Bankruptcy). Any

discounts that had been agreed would also be made invalid and the full balances plus interest may be due.

- Part 10 of the Enterprise Act 2002 talks about Insolvency. In particular, provisions 256 to 269 talk of bankruptcy for individuals.[1]
- Schedule 3 to the Insolvency Act 2000 talks about Individual Voluntary Arrangements[2]

DEBT RELIEF ORDERS VIS-À-VIS FRESH START PROCESS

A Debt Relief Order (DRO) is synonymous to the Fresh Start Process to be commenced in India. The aim of a DRO is discharge. It is necessary to provide social insurance, entrepreneurship, reduce costs of Insolvency Proceedings and to create a systemised form of debt waiver. The point of consideration for a DRO is that there aren't enough safeguards in place.

UK has adopted the DRO model in 2009, wherein the government in partnership with debt advisors apply to get a waiver for their debt comprising of qualifying debts as given under the Insolvency Act 1986 (Amended in 2002).

Benefits of a DRO:

- A debt relief order can be a low-cost alternative to bankruptcy
- You don't pay anything towards your debts for 12 months. After that they'll be written off
- Your creditors can't pursue you for your debts during the 12 month period
- Although a DRO is a formal debt solution, you don't need to appear in court

Risks of a DRO

- A DRO is only available if you owe less than £ 20,000 and live in England, Wales or Northern Ireland
- You'll need to pay the Insolvency Service a one-off fee of £ 90. If you qualify, our specialist team can help you apply
- You can't apply if you're a homeowner
- A DRO will appear on a public register and will affect your credit report negatively

DROs vs. Fresh Start Process

DRO (UK)	FRESH START PROCESS (INDIA)
Qualifying debts only include debts that are for a liquidated sum payable either immediately or at some certain future time, are not excluded debts (such as education loans) and are not secured loans	In India, A list of qualifying debts as well as excluded debts is also provided under the Code by way of Section 79(19) and 79(15) respectively.

DRO (UK)	FRESH START PROCESS (INDIA)
In UK, the cooling off period between two applications for DROs is 6 years	In India it is of a year only.
In UK, the order for DRO can only be given in a year and a period of 12 months moratorium is imposed on the debtor but only on his qualifying debts as opposed to his all his debts.	The same practice is said to be followed in India under the Code.
In UK, to be eligible for a DRO, you must meet these criteria: ◆ you owe £ 20,000 or less ◆ you have less than £ 50 to spend each month, after paying tax, national insurance and normal household expenses ◆ you've lived or worked in England or Wales in the last 3 years ◆ your assets aren't worth more than £ 1000 in total ◆ you've not had a DRO in the last 6 years	In India, Section 80 states the eligibility criteria of a debtor for applying to Fresh Start Process: "*80. (1) A debtor, who is unable to pay his debt and fulfils the conditions specified in sub-section (2) , shall be entitled to make an application for a fresh start for discharge of his qualifying debt under this Chapter.* *(2) A debtor may apply, either personally or through a resolution professional, for a fresh start under this Chapter in respect of his qualifying debts to the Adjudicating Authority if —* *(a) the gross annual income of the debtor does not exceed sixty thousand rupees;* *(b) the aggregate value of the assets of the debtor does not exceed twenty thousand rupees;* *(c) the aggregate value of the qualifying debts does not exceed thirty-five thousand rupees;* *(d) he is not an undischarged bankrupt;* *(e) he does not own a dwelling unit, irrespective of whether it is encumbered or not;* *(f) a fresh start process, insolvency resolution process or bankruptcy process is not subsisting against him; and* *(g) no previous fresh start order under this Chapter has been made in relation to him in the preceding twelve months of the date of the application for fresh start."*

DRO (UK)	FRESH START PROCESS (INDIA)
If the debtor himself cannot file for a DRO, they can appoint a Debt Advisor for the same. The Debt Advisor will help complete the application and explain what information must be included. They will then send it to the official receiver.	In India, as per Section 82 of the Code, the application will be filed by the debtor himself or take help of a Resolution Professional. *Note: The concept of a Debt Advisor is said to be introduced in the Indian Code which will be a group of professionals different from the Resolution Professionals which will help the debtors file for fresh start.*
The application is sent to the official receiver who will review the petition and verify the financial information provided by the debtor.	The application is examined by the Resolution Professional as under section 83.
The DRO will usually last for 12 months. The official receiver will: tell that the DRO has been made and explain the restrictions and duties that it imposes on you. tell that the creditors listed in the DRO that it has been made, and that they can't ask to repay your debt to them.	A moratorium is imposed for 180 days till the disposal of the application. In these 180 days the creditors cannot initiate any proceedings against the debtor with regard to their claims, however, Section 86 grants the power to creditors to raise objections to any qualifying debt that the debtor has filed for.
DRO is added to the Individual Insolvency Register - it's removed 3 months after the DRO ends.	As per Section 92(5), the discharge order of the debtor will be forwarded to IBBI to be recorded in a register that is to be maintained by them. The names of the debtor, unlike in UK, will not automatically be added on admission of the application.
While DRO is in place debtor will have to follow some 'restrictions'. This means debtor cannot: ◆ borrow more than £ 500 without telling the lender about your DRO - whether you're borrowing on your own or with someone else ◆ act as a director of a company ◆ create, manage or promote a company without the court's permission ◆ manage a business with a different name without telling anyone you do business with about your DRO ◆ apply for an overdraft without telling your bank or building society about your DRO ◆ write cheques that are likely to bounce It's a criminal offence to break the restrictions - you may be prosecuted if you do so.	Section 85(3) of the Code places restrictions on the debtor during the period of moratorium.

DRO (UK)	FRESH START PROCESS (INDIA)
The UK mechanism provides for a cooling off period of 6 years between two fresh start applications.	There is no cooling off mechanism, however, the same mechanism as under the UK Code is said to be included.

Part 9 of the England and Wales Insolvency Rules, 2016 talk of the procedure to be followed for debt relief orders.[3]

Part 7A of the Insolvency Act, 1986 has provisions for debt relief orders.[4]

1. https://www.legislation.gov.uk/ukpga/2002/40/contents
2. https://www.legislation.gov.uk/ukpga/2000/39/schedule/3
3. http://www.legislation.gov.uk/uksi/2016/1024/part/9/made
4. https://www.legislation.gov.uk/ukpga/1986/45/part/7A

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