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INSOLVENCY AND BANKRUPTCY JOURNAL

NO. 3 | PG. 1-96 | MARCH 2022 | ₹ 500 (SINGLE COPY)

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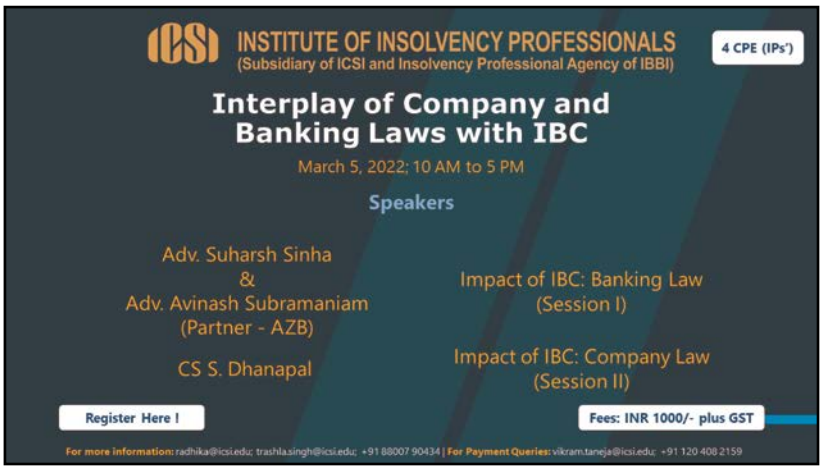

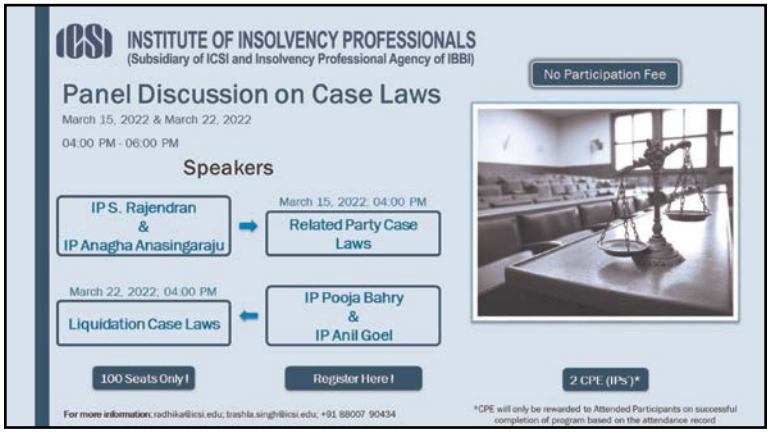

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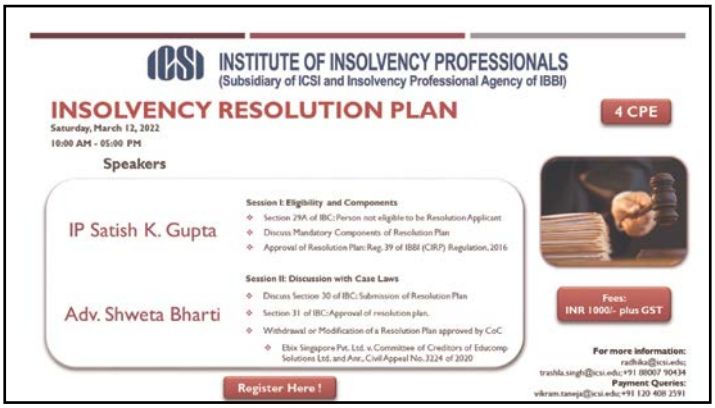

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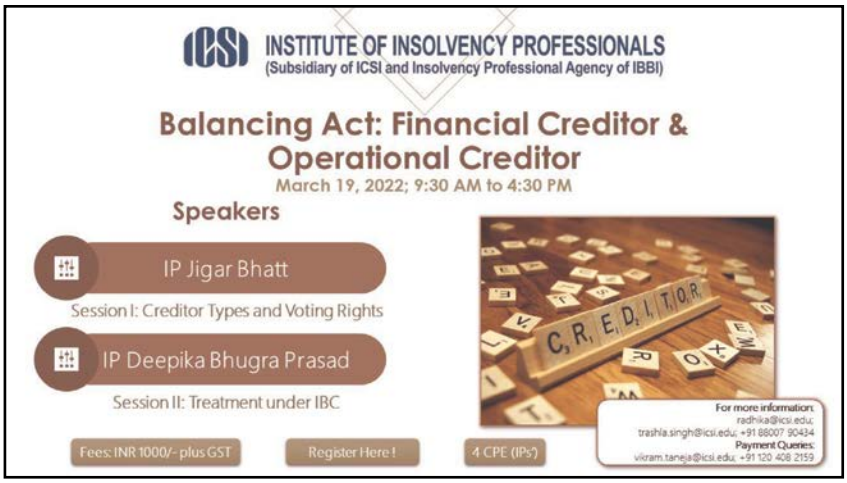

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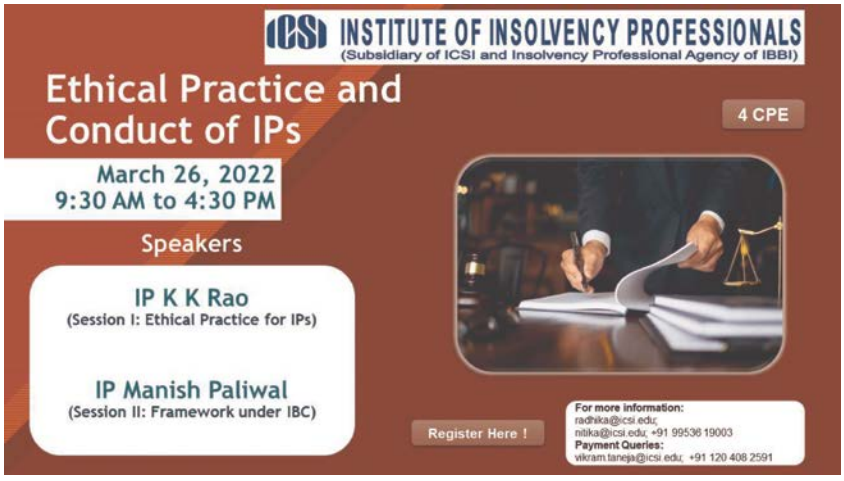

Developed and Marketed by
TAXMANN®
Printed at
TAXMANN®
Edited & Published by
Dr. Binoy J. Kattadiyil
for
ICSI Institute of Insolvency Professionals
'ICSI House', 3rd Floor, 22,
Institutional Area, Lodhi Road,
New Delhi- 110 003.
Phones : 45341099, 45341048
E-Mail : info@icsiip.com
Website : http://www.icsiip.com

Printed at
Tan Prints (India) Pvt. Ltd.
44 km. Mile Stone, National Highway, Rohtak Road, Village Rohad, Distt. Jhajjar, Haryana (India)

ANNUAL SUBSCRIPTION
(JANUARY - DECEMBER 2022) : ₹ 5,500
Cheques to be drawn in favour of

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At a Glance

No. 3 | Pg. 1-96 | March 2022

Section 12A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and Article 142 of the constitution of India - Corporate Insolvency Resolution Process - Withdrawal of application - Respondents were home buyers in housing project being developed by corporate debtor - Since corporate debtor had failed to complete housing project within specified time, a notice was issued by respondents asking them to refund consideration amount - Despite granting several opportunities to corporate debtor, when amount in question was not refunded, respondents filed instant application under section 7 - It was noted that respondents as well as other home buyers have settled dispute with corporate

debtor and a settlement had been entered into, under which, corporate debtor had agreed to refund consideration amount with applicable/ accrued interest to respondent - Corporate debtor also undertook to complete entire project and hand over possession to home buyers (who want possession), within a period of one year - Whether thus, this was a fit case to exercise powers under Article 142 and to permit respondents to withdraw CIRP proceedings which would be in larger interest of home buyers who were waiting for possession since more than eight years and thus, respondents were permitted to withdraw application filed by them under section 7 - Held, yes (Para 14)

- **Concast Steel & Power Ltd. *v.* Sarat Chatterjee & Co. (VSP) (P.) Ltd.**
  (2022) 137 taxmann.com 231 (Calcutta) • P-67

Section 35 of the Insolvency and Bankruptcy Code, 2016, read with order 22 rule 8 of Civil Procedure Code (CPC), 1908 - Corporate liquidation process - Liquidator - Powers and duties of - Whether upon a plain reading of order 22 rule 8, of CPC it is patently clear that in case of a company that goes into liquidation, suit shall not abate unless liquidator declines to pursue said suit - Held, yes - Whether where a company, having been declared insolvent by National Company Law Tribunal, had gone under liquidation and liquidator even after having assured High Court that steps would be taken for impleading himself into litigation failed to do so, such failure may amount to a lackadaisical approach of liquidator but cannot under any circumstances be seen as a positive assertion to decline to continue suit - Held, yes - Whether further, where it was evident that liquidator had been acting in suit with reference to movable suit property in question and had taken all necessary steps therein and thus, was fighting tooth and nail with regard to this litigation, mere delay in making an application for substituting his name in records of suit would not in any manner lead to an abatement of suit - Held, yes (Paras 6, 9 and 10)

- **Adriatic Sea Foods (P.) Ltd. *v.* Suresh Kumar Jain**
  (2022) 136 taxmann.com 227 (NCLAT - New Delhi) • P-71

Section 45, read with sections 43 and 46, of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Undervalued transactions - Avoidance of - Corporate debtor mortgaged its property for availing credit facilities from bank - Bank had granted a conditional no objection certificate to corporate debtor for sale of said property for at least Rs. 17.18 crores - Corporate debtor decided to sell said property - Property was sold by agreement dated 5-8-2019 for Rs. 11 crores to appellant, suspended director of corporate debtor, who paid only Rs. 25 lakhs - Adjudicating Authority on 19-9-2019 admitted application filed under section 7 to initiate CIRP against corporate debtor - Respondent-resolution professional filed an interlocutory application praying for reversing preferential transaction, undervalued transactions and vesting into assets of corporate debtor - NCLT by impugned order passed an order for cancelling sale of property and directed possession of said property to be handed over to resolution professional - Whether insolvency commencement date was 19-9-2019 and it was less than one and half month before said date that subject transaction of sale was made by corporate debtor and, therefore, transaction was within relevant period under section 46 for avoidable transaction or undervalued transaction i.e. period of one year preceding insolvency commencement date - Held, yes - Whether possession was handed over to appellant by corporate debtor at meagre payment of Rs. 25 lakhs of property for which NOC was issued by bank for sale of an amount not less than Rs. 17.86 crores, which proved that sale transaction was undervalued and, therefore, Adjudicating Authority had rightly come to conclusion that transaction was an undervalued transaction - Held, yes - Whether since entire proceedings beginning from decision to transfer property was not legally done, same was preferential transaction and undervalued transaction in

favour of appellant, which was entered only with an intent to defeat rights of creditors and, therefore, no error had been committed by Adjudicating Authority in allowing application filed by Resolution Professional under sections 43 and 45 - Held, yes (Paras 8, 10 and 14)

- **P. Eswaramoorthy, Liquidator of Senthil Papers & Boards (P.) Ltd. *v.* Deputy Commissioner of Income-tax**
  (2022) 137 taxmann.com 232 (NCLT- Chennai)
  • P-76

Section 238, read with section 60, of the Insolvency and Bankruptcy Code, 2016 and section 24 of the Prohibition of Benami Property Transactions Act, 1988 - Overriding effect of Code - Whether period of moratorium starts with initiation of CIRP and ends in two circumstances either on commencement of Liquidation or upon approval of a resolution plan - Held, yes - In instant case, liquidation period had commenced before date in which provisional attachment in respect of corporate debtor's property was made by respondent under Prohibition of Benami Property Transaction Act, which indicates that respondent had not acted in violation of moratorium - Moreover, provisional attachment made by respondent comes under statute of Prohibition of Benami Property Transaction Act, which in itself had stipulated due process with respect to attachment of property under section 7 of same - Whether thus, contention of applicant, liquidator that both being special act, Insolvency and Bankruptcy Code, should prevail over Prohibition of Benami Property Transaction Act as per general principle for construction did not hold in instant case - Held, yes - Whether however, there was nothing to stop liquidator to proceed under relevant provision to revive provisional attachment; and that, NCLT having not found any conflict between two statutes as there was no bar in selling property of corporate debtor solely on ground that corporate debtor was under Liquidation, and that Liquidator was also not barred by IBC to add said property into liquidation estate, liquidator was open to approach appropriate forum to raise attachment or any other relief as per provisions of act - Held, yes (Para 18)

- **Damodar Valley Corporation *v.* Karthik Alloys Ltd.**
  (2022) 137 taxmann.com 234 (NCLAT - New Delhi)
  • P-78

Section 14 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - Appellant supplier entered into a Power Supply agreement with corporate debtor for supply of power - On failure of corporate debtor to make payments due for power supply, appellant disconnected power supply to corporate debtor's Durgapur factory - In meanwhile a Company Petition under section 9, filed by operational creditor, was admitted, thereby initiating CIRP against corporate debtor - Interim Resolution Professional (IRP) requested appellant to restore power supply to Durgapur unit of corporate debtor which was declined - Adjudicating Authority by impugned order, directed restoration of power connection to corporate debtor - Whether as per section 14(2) of IBC, supply of essential goods or services to corporate debtor shall not be terminated or suspended or interrupted during moratorium period - Held, yes - Whether under section 14(2A), IRP/RP can ask for continuation of supply of such goods and services which are critical to protect and preserve value of corporate debtor and manage operations of such corporate debtor as a going concern - Held, yes - Whether in present case appellant had filed its claim of past dues of period prior to initiation of CIRP before Resolution Professional, which will be considered by Committee of Creditors and appropriate decision regarding settlement and payment of claim shall be done in accordance with resolution plan to be approved by Adjudicating Authority - Held, yes - Whether appellant, which is an operational creditor, or any other creditor cannot claim and be given priority in payment of its pre-CIRP debt before resolution plan is finalised and approved by Adjudicating Authority - Held, yes - Whether therefore, Adjudicating Authority had not exceed its jurisdiction

in passing impugned order by which directions had been given to appellant for re-connection of electricity supply to corporate debtor during moratorium period and also allowing waiver of security deposit - Held, yes (Paras 27, 28 and 29)

- **Jaipur Trade Expocentre (P.) Ltd. *v.* Metro Jet Airways Training (P.) Ltd.**
  (2022) 137 taxmann.com 236 (NCLAT - New Delhi) • P-82

Section 5(21) of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Operational debt - Whether where there were two divergent opinions of Tribunal with regard to issue raised i.e. whether license fee pertaining to immovable premises taken by licensee from licensor for running commercial activity i.e. Educational Institute fall within definition of 'Operational Debt', it is necessary that an authoritative pronouncement be made in this regard and matter be placed before Chairperson on administrative side for constitution of a 'Larger Bench' to resolve conflict - Held, yes (Paras 16 and 17)

- **Sikander Singh Jamuwal *v.* Vinay Talwar Resolution Professional**
  (2022) 137 taxmann.com 238 (NCLAT - New Delhi) • P-85

Section 36 of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Liquidation estate - Whether there is no conflict between provisions of Employees Provident Funds and Miscellaneous Provisions Act, 1952 (EPF & MP, Act) and IBC - Held, yes - Whether further, in terms of section 36(4)(a)(iii), 'provident fund' do not form part of assets of corporate debtor - Held, yes - Whether thus, where EPF organisation had determined an amount of Rs. 1.35 crores as dues of employees from corporate debtor against which only Rs. 78 had been provisioned for in resolution plan submitted by successful resolution applicant, successful resolution applicant was to be directed to release full provident fund and interest in terms of EPF & MP Act - Held, yes (Para 13)

- **G.L. Engineering Industries (P.) Ltd. *v.* Supreme Engineering Ltd.**
  (2022) 137 taxmann.com 240 (NCLAT - New Delhi) • P-88

Section 5(21), read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Operational debt - Appellant/operational creditor supplied steel material to respondent company - According to appellant, respondent company issued letters, wherein respondent company confirmed due amount and requested extension of time for which respondent company would pay interest at 1.92 per cent per month - Thereafter, when cheques issued by respondent company were dishonoured, appellant issued notice under section 8 for debt amount along with delayed payment charges - In reply to notice, respondent company strenuously contended that cheques relied upon by appellant had only issued as a security deposit and pertains to leave and licenese agreement, and letters submitted by appellant were forged and fabricated - It was noted that an amount pertaining to 37 invoices raised by appellant had already been paid by respondent company through NEFT, by cheque payments and also vide letters of credit - Whether mere acknowledgement of any liability would not construe an 'operational debt' as defined under section 5(21), when no sufficient evidence was produced on record to prove that amount claimed arises out of 'supply of goods and services' - Held,yes - Whether since respondent company had already paid due amount and no sufficient evidence by way of invoices or any other documents shows outstanding 'Operational Debt' as a claim in respect of provision of 'supply of goods and services', Adjudicating Authority rightly dismissed application of appellant/operational creditor - Held, yes (Paras 7 and 8)

- **Ramesh Kumar Chaudhary *v.* Anju Agarwal, Liquidator of Shree Bhawani Paper Mills Ltd.**
  (2022) 137 taxmann.com 242 (NCLAT - New Delhi) • P-92

Section 230 of the Companies Act, 2013, read with regulation 2B of IBBI (Liquidator Process) Regulations, 2016 - Compromise and arrangement - Whether section 230 read with regulation 2B of Liquidation Regulations indicates that it is liquidator who is to take a decision as to whether Scheme for Compromise or Arrangement is to be placed before Tribunal or not - Held, yes - Whether Stakeholders Consultation Committee was not any competent forum for obtaining any advice with regard to Scheme for Compromise or Arrangement submitted under section 230 - Held, yes - Whether thus, action of liquidator in placing scheme of compromise or arrangement before Stakeholders Consultation Committee was uncalled for and was not in accordance with provisions of Code and Regulations - Held, yes - Whether Scheme under section 230 ought to have consent of not less than 75 per cent of secured creditors, and an affidavit to that effect ought to accompany with Scheme - Held, yes - Whether obligation to obtain consent of 75 per cent of creditors is on person who proposes Scheme - Held, yes - Whether where Liquidation Process was initiated against corporate debtor and liquidator was appointed and a Scheme for compromise and arrangement was submitted by respondent Nos. 2 and 3 to liquidator, liquidator was required to intimate respondent Nos. 2 and 3 to obtain consent by 75 per cent of creditors and it was for respondent Nos. 2 and 3 to present scheme before creditors and impress them to give their consent - Held, yes - Whether since no opportunity was given to respondent Nos. 2 and 3 to explain and clarify their Scheme before Financial Creditors or other stakeholder for getting their consent to Scheme as liquidator hurriendly called for a meeting to reject scheme, therefore, respondent Nos. 2 and 3 were to be allowed time to submit revised Scheme along with an affidavit indicating consent of Financial Creditors as contemplated by section 230, sub-section 2(c) - Held, yes (Paras 26, 27, 29 , 33 and 36)

- **Neeraj Singal *v.* Tata Steel Ltd.**
  (2022) 137 taxmann.com 244 (NCLAT - New Delhi) • P-103

Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Corporate debtor underwent a CIRP in which a resolution plan submitted by respondent was approved by NCLT - As per said resolution plan, resolution applicant was required to subscribe 72.65 per cent equity shares of corporate debtor - Resolution applicant was also required to acquire 2.35 per cent equity shares of erstwhile promoter group including appellants at Rs. 2 per share so that resolution applicant would have 75 per cent of shareholding of corporate debtor leaving 25 per cent to public shareholding - Whether section 31(1) makes it clear that resolution plan approved by NCLT is binding on corporate debtor, its employees, members and creditors - Held, yes - Whether thus, there was no error in judgment of NCLT allowing application filed by resolution applicant seeking a direction to appellants to sell their shares to resolution applicant in compliance of resolution plan approved and appellants could not oppose said application on ground that they could not be compelled to sell their shares at Rs. 2 when market price of share was much more - Held, yes (Para 28)

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

From Chairman's Desk

Tomorrow must be created; it should not be concretised today

The process of *evolution of law* through judicial precedents is a well-known fact across all democracies. In a democracy like India wherein the last word on interpretation of a law rests with the Apex Court of the country, our eyes are always fixed upon the streams of wisdom that flow out of erudite and well-reasoned judgments by Hon'ble SC as they also bestow upon us an enlightening vision on the construction of the law. Under the IBC legal framework, in the past 5 years, there have been a catena of very important landmark judgments which have come forth regularly as an instrument giving a final shape to this law. The clarity has come not only in terms of construction of the language of IBC law, but also resolving the apparent conflict with other laws. Needless to mention that such judgments have gone a long way in upheld the solemn objective enshrined in IBC which is to maximise the value of assets of CD.

As with every month, the month of February 2022 also saw some very crucial legal developments taking place through Apex Court verdict. One such development pertains to theanswer given by Hon'ble SC to the legal question (in the case of ***M/s. Consolidated Construction Consortium Limited*** **v.** ***M/s Hitro Energy Solutions Private Limited***)concerning the

domain of various categories of claims under the IBC. To put it precisely, the court was called upon to answer as to *whether the claim for refund of an advance amount against a CD would tantamount to an 'operational debt' under IBC*, and therefore, by extension, *can such a creditor be categorised as an 'operational creditor' for the purposes of IBC*.

To answer and resolve this legal issue, the Hon'ble Court dealt with some very important definitions under IBC, including expressions like 'operational creditor' and 'operational debt' defined under section 5(21) and 5(22) respectively. In the peculiar facts and circumstances of the case, the court had to carry out an inquiry as to the question whether a recipient of goods and services (and not provider) can make a claim against the provider of services (and not receiver) as an 'operational creditor'. On a *prima facie* reading, though it may appear to be counter-intuitive to include even a receiver of goods/services as an operational creditor, however, if we adopt a purposive and contextual interpretation of the expressions, the inevitable conclusion has to be that claims made by the recipient of goods and/or services are also covered within the ambit of the expression 'operational debt'. The views on this subject were not consistent amongst the NCLTs (as well as amongst NCLAT's judgments), and therefore, this judgment by Hon'ble SC is being received as a big relief. In the facts of this case (*supra*), Hon'ble Court read the expression *'in respect of'* (u/s. 5(21)) widely and broadly and came to the conclusion that the OC was entitled to reimbursement of the advance amount (paid to CD) in its capacity as an Operational Creditor of CD. The requirement, as held in the judgment, is merely that the *claim* must have some nexus with the provision of goods and/or services, without specifying as to who is to be the supplier or the receiver. A support thereof is also found in the BLRC report which states that *an operational debt is in relation to operational requirements of an entity*. Therefore, it is clear that a debt on account of an advance payment made to a CD for supply of goods or services to be made by such CD, would also be covered within the ambit of an 'operational debt' under the IBC framework.

The advancement made by virtue of this ruling lies in the fact, that, while it is clear that an advance money paid by a home buyer is a 'financial debt' (as clarified in the case of *Pioneer Urban Land and Infrastructure Ltd.*), the nature of an advance

payment made by a recipient of goods (and/or services)is now clearly established to be an *operational debt* under IBC. This it may raise some eyebrows as to the differential treatment been given to a payment made by flat buyers and that made by purchaser of goods (and/or services), the very fact that the definition of an `operational debt' provides a connection with `goods and services' establishes the rationale clearly. The importance of this ruling can also be gauged from the fact that it circumvents unnecessary creation/conception of a separate category of creditors under the IBC, since it is not right to hold that, for a claim to arise under the IBC, goods (and/or services) can flow in one direction only. Furthermore, under Companies Act, 1956 also, the creditors having a claim for refund of advance monies supplied by them to a Company would satisfy the requirements of section 433(*e*), thereby giving a cause of action to file a petition for winding up of such company's affairs. Therefore, it is in the fitness of things that the providers of advance monies are permitted to file their claim as an operational creditors under the IBC legal framework.

Another legal issue concerning the subject of *nature of debt*, which has cropped up and is being discussed amongst different circles (the stakeholders), pertains to the need to determine the true nature of different devices/agreements that have surfaced in the recent past and which though have taken the colour of a home buyers agreement with lucrative assured returns coupled and mandatory buy back arrangement, but lack in the requirement of a financing arrangement. Infact, Hon'ble NCLAT, in the matter of *Shubha Sharma, Suspended Board of Director* v. *Mansi Brar Fernandes* (Company Appeal (AT) (Insolvency) No. 83 of 2020) was ceased of this issue precisely, and *vide* its judgment dated 17th November 2020 the Appellate Authority held the allottee to be a `speculative investor' since under the MoU executed *inter se* the parties the arrangement provided that at the end of 12 months period, CD would buy-back the apartment and refund any amounts paid together with a premium.

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

Managing Director's Message

Dear Professional Member(s),

It is always heartening to see the commitment shown by all the stakeholders in making the nation realise the solemn objective enshrined under the Insolvency and Bankruptcy Code, 2016. At the same time, having travelled this far, and having established and strengthened the IBC regime, it is important for the key stakeholders to make their best endeavours to ensure that the power of the IBC only grows. The way ahead has to focus on filling the voids that are discovered and move towards a more complex legal system as we gain more experience of having worked out this reforming legislation.

The IBC, enacted on May 28, 2016, against the backdrop of mounting number of non-performing assets (NPAs) of Banks and Financial Institutions, was envisioned to establish a consolidated legal framework to undertake insolvency resolution process of corporates, partnership firms and individuals in a manner which is time-bound. The underlying idea behind switching over from a Debtor-in-possession to

a creditor-in-control regime was also to bring in a behavioural change as far as debtor-creditor relationship is concerned. This was to ensure that there is no incentive for the management to make the corporates that they manage suffer from financial stress, while at the same time, the management (which is responsible for such state of affairs) go scot free and not owning any responsibility on the strength of the then existing legal regime which allowed a corporate to take refuge and avoid all kind of legal action for recovery of the sum. Also, under the IBC, a process is established through which financially ailing corporate entities are put through a rehabilitation process and brought back up on their feet, and in case such resolution is not possible in a given time frame, the corporate must undergo liquidation process so that the value of assets of the Corporate can be maximised.

As stated above, under IBC, the insolvency law regime in India shifted from a `debtor-in-possession' to `creditor-in-control'. The creditor-in-control model requires a professional (IP) to take over control of the corporate debtor from the erstwhile management and take all steps to run it as a going concern. This vesting of control is only for a short period (CIRP period) since the aim is to discover a resolution applicant who can take over the reign of the entity and run it successfully. The Financial Creditors who are unrelated to the management are provided with the mandate to decide on the fate of the CD since they have their skin in the game and are in the best position to decide on the future of such Corporate. Hon'ble SC had in the case of *Swiss Ribbons* v. *Union of India*, held that the core objective of IBC is to ensure revival and continuation of CD. Thus, it is abundantly clear that IBC has a larger public-welfare consideration behind it.As for the statistics collected concerning the outcome of IBC process, it has been seen that a majority of liquidations happened in those cases wherein either there was a delay in triggering the insolvency resolution process, or the process itself was prolonged. We all now acknowledge the fact that the strict timeliness laid down under the IBC are the key to achieve maximisation of value of assets. As professional members undertaking and spearheading the process, the focus has been and ought always to be on upskilling yourself. There is a definite requirement for improving the infrastructure of tribunals as well as digitisation of different stages of a Corporate Insolvency Resolution Process (CIRP).

The IBC has undoubtedly provided an effective and a potent solution to India's insolvency regime. Not only has it been successful in combating the growing threat of NPAs, but it has also benefitted the economy in a variety of ways, including improved credit culture amongst the Debtors and Creditors. However, it is a road under progress, and like any other law, IBC also has areas wherein there is a scope for further improvement and I am sure that with the support and guidance of our professional members we shall be able to accomplish them and witness remarkable improvements thereof. A perfect legal system is, I believe, like a mirage. We always work to achieve perfection only to find that there is still some journey to be undertaken which motivates us to achieve different milestones.

Wishing all of you a very successful professional career ahead!!

INTERVIEW

ROCKY RAVINDER GUPTA

Lawyer, INSOL Fellow, Accredited Mediator, an Insolvency Representative/ Professional (India) and the Managing Partner of Law Firm UNITEDJURIS.

1. I would like to start with, asking you about your views on Insolvency and Bankruptcy Code, 2016, since its inception?

Prior to the enactment of Insolvency and Bankruptcy Code (IBC), there were multiple overlapping laws dealing with financial failure, insolvencies and bankruptcies of companies and individuals in India. Legal and institutional framework, prior to IBC did not aid creditors, by way of effective and timely recovery or restructuring of defaulted assets and businesses. The previous legislation put undue hardships and strain on the Indian credit system. IBC has brought a paradigm shift in the conduct of businesses in India. It has not only given an exit option to the Entrepreneurs, but it has also changed the way of doing business in India. There has been a huge shift in the mindset of the Entrepreneurs/promoters to pay back their debt in time, to ringfence themselves from probable loss of their businesses through the initiation of insolvency proceedings for non-payment of debts. The Code offers a uniform, comprehensive insolvency legislation for all companies, partnerships, and individuals (other than financial firms).

2. We would like to know what made you take up this budding profession of an Insolvency Professional.

There is a saying in the insolvency profession globally, that an insolvency professional does not choose the insolvency profession, rather it is the other way round, the Insolvency profession chooses the Insolvency Professional. This has been true in my career as well. As a corporate Lawyer practicing in 2012, I got a chance to represent a client, he was declared NPA, and I was given the task of devising a strategy to restructure the business and that was the start of my initiation into the insolvency and restructuring profession. After IBC was enacted, I was inducted as an Insolvency Professional in 2018 and in 2021, I was designated as INSOL Fellow by INSOL International. It is my pleasure to inform you that I am the first IP to be designated as an INSOL Fellow in India. An INSOL Fellow's credibility as an expert in matters of international insolvency is recognised.

I would also like to share that, when the first lockdown was announced in 2020, we were all at home and I was attending a webinar at the behest of one of my friends Dr. Jan Adriansse. The webinar was conducted by Early Warning Europe (EWE). EWE is an EU funded program, in over 12 EU countries and the objective of the EWE is to help MSME's tide over their insolvency crisis by trained Mentors and volunteers. Early Warning Europe is a network of organizations that have successfully implemented early warning system in project backed by Government of various European Union States like Denmark, Holland, Poland, Spain, Italy, Greece, Croatia, Finland Hungary, Lithuania, Luxemburg and Slovenia.

Early Warning India was launched in association with EWE and with the support of other like-minded Professionals. In view of the current pandemic, this was the need of the hour where many businesses were facing Stress in India, especially the MSME's. In line with Early Warning Systems Global Practices, Early Warning India's objective is to provide free, impartial, and confidential counselling to companies, businesses, and individuals in distress for turning them around from their current distressed state.

3. You have an experience of over twenty-seven years as Corporate & Commercial Lawyer and Business Strategist, how has this been helpful in working on your assignments as an Insolvency Professional?

An Insolvency Professional (IP) is expected to wear many hats. IP is supposed to be a Lawyer, Accountant, Financial expert, Company Secretary, an expert in operations management all rolled into one. In my initial years of legal practice, I engaged in accounting and financial transaction laws, matters relating to Civil laws like family laws, contract laws, employment laws, company law etc. I used to appear before various District Courts and the High Courts and various Tribunals and authorities. This gave me an overview of the functioning of the legal system and helped me in my role as a business and legal strategist. Knowledge of various

substantive and procedural law has its own advantage, from an IP's perspective. As a Lawyer for Corporate Debtors and representing the creditors in various matters before the courts helped me in my role as an IP.

As an IP, it was not so difficult to manage the various stakeholders and their lawyers. I used to argue my own cases before Adjudicating Authority as a Lawyer, representing myself, as an RP, and was constantly assisted by a competent team of professionals (CA's CS, Management Consultants etc.).

It is expected of a Lawyer to solve problems and the CIRP process has many stakeholders with various issues that need to be sorted out. Most of the issues are position based and after effective and clear communications, most of the issues are sorted by engaging in discussions, the issues that are left unresolved go to the Adjudicating Authority for resolution. Challenges are always there, it is important not to get bogged by the issues and challenges, the state of mind should always be in the solution and resolution mode.

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

I would answer this question in two parts, Practical challenges as a lawyer for the corporate debtor and as an IP. As a Lawyer I have had first-hand experience dealing with the Financial Institutions at pre insolvency stage. The issue starts with the non-co-operation of the Banks at time of request for restructuring by the corporate debtor to try and take care of his cash flows. In number of cases, the Banks take many months to pass an order on restructuring, and in the meantime the corporate debtor has further slipped into red as his outflow is more than his inflow. The inefficiency of the banking sector has never been brought into the limelight and the burden of this inefficiency has to be borne by the corporate debtor in the pre-insolvency scenario. The case is similar for one time settlement schemes. The debtor is thereafter declared NPA and consequently must face all the consequences thereafter and is ultimately dragged into insolvency by the lenders. I am not talking about debtors who have laundered money, but of genuine debtors, who could have survived if the cash flows could have been rectified at the proper time.

As an IP there are more challenges to be faced by the IP from various stakeholders:

Corporate Debtor:

The challenges faced starts from taking over the company, at times false addresses are given, there are empty offices even with no furniture, no books of account and no information, whatsoever. There may be non-co-operation from the promoters or the Directors of the corporate debtors, and the delay in taking over the company adds to discomfort of the IP. It raises his stress level and of his team. You also must keep in mind that across the world, the office of IP is perceived in a negative way with extremely high stress levels.

Creditors:

First is the fee aspect. Then the remarkably high expectation of the CoC from the

RP. Then there is the issue of AR's of CoC members attending CoC meetings, who do not have the authority to take decisions, which delays the timelines. The voting also takes time as the AR's do not get their mandate in time which further delays the voting timelines.

Adjudicating Authorities:

The time is of essence in any insolvency matter. From filing of the insolvency petition to its admission, should have been a 14-day affair, however higher courts orders and their interpretations have made insolvency admissions a three month to one year process. This helps the corporate debtor to take out the value from the business in the intervening period. This also holds good for various applications filed by different stakeholders at various stages of the CIRP process. The passing of orders takes so much time that the basic idea of preserving the value in a business is demolished. The final order for approval of the resolution plan, in many cases have taken over a year to be passed and the brunt of decreasing value has been borne by the resolution applicant. In contrast a US court passed an order on a prepack within 19 hours of filing of the prepack petition. That is the speed we should be aiming at in our insolvency judicial system. Our Insolvency courts will evolve with the passage of time, and I have full confidence that with the upcoming legislative amendments in the IBC will be able to address these issues.

5. You are also an active member of INSOL; would you like to throw some light on this journey of yours?

After becoming an IP, I was wondering about my next step. I had already given my consent to function as an IRP, and I was really excited to step into the shoes of IRP. I joined INSOL International and was informed on the GIPC program of INSOL International. I became interested and signed for the program in 2019. In October 2019, the program was initiated. It was a very intensive program, with case studies and authoring papers, with constant interaction with the faculty of INSOL International and understanding the different insolvency regimes in various jurisdictions and the interplay between, the model law on cross-border insolvency, EU regulations on insolvency and various other international insolvency laws in different jurisdictions, along with the various case laws on cross border insolvencies.

In November 2019, the first module was held in London, and it was great to be in company of participants of GIPC from 16 Jurisdictions worldwide. It was a wonderful experience to be in company of mostly lawyers and a few accountants in GIPC. We developed a bond which till today is still extraordinarily strong and last week I was approached for some cross border work in insolvency by one of them.

The next stop was in March 2020 at Cape town, South Africa, for INSOL International Conference and the second round of studies and test at Cape Town, followed by 15 days of intensive court appearances in New York and London in June 2020. **Then the Lockdown happened.** Cape Town conference and court hearings were cancelled. In June 2021, the Faculty and the Management of INSOL International decided to move the course online as there

were extensive travel restrictions. So, after intensive rounds followed by 24 X 7 court appearances in five jurisdictions, Day in and Day out, due to time zone differences, I was appearing and filing in the court rooms in various jurisdictions, sometimes at 2am in the morning. Ultimately finished the program and was designated INSOL Fellow in the first week of November 2021.

6. One of the major challenges faced by IPs in this profession is fees paid to Insolvency Professionals, so what is your take on this challenge?

Fee is a major issue with the IP's in this profession. Personally, I have never been a part of any panel of a bank or a financial institution. However, it is a known fact that the Financial Institutions or the CoC do not seem to recognise the efforts that the IP has to put to keep the business as a going concern. He must manage the business, keep the operations running, look for any cash mismanagement, comply with the IBBI and IPA compliances, look after the interests of various stakeholders, try, and raise interim finance, look for prospective buyers, and do so many things at the same time, for which in a normal company, there might be many employees to execute the similar functions that the IRP/RP has to carry out.

The compensation therefore must be commensurate with the work being done by the IRP/RP. The lenders are looking to decrease their cost in a CIRP process by under cutting the fee paid to the RP and his team. The dichotomy in this whole process is that the lenders, if they had regularly conducted proper due diligence of the Corporate Debtor, they would be in a better position to recover their money, if they had stepped in at a proper time, however in most of the cases the intervention to drag the corporate debtor to insolvency is in the last stage of the business's life cycle.

Indicatively multiple factors can contribute to determination of the fee of the IP. The various factors like size of the debt, No. of branches of the corporate debtor, No. of creditors (*e.g.* a housing company may have thousands of home buyers), another indicator of fee could be remuneration, equivalent or more than the salary of the Director in the company, in which the IP has been appointed, Experience of the IP etc. These factors are only indicative and not a rule. IP's too should keep the profession in high stead and refuse unreasonably low remuneration. The regulators normally say that the market (read creditors) shall determine the remuneration. However, IBBI and the IPA's should create a reasonable matrix for determination of remuneration of the IP. This will help the IP's to focus on CIRP management. I have seen IRP/RP getting their first remuneration after two to three months of commencement of CIRP.

7. What are your views on the implementation of legislative framework for cross-border insolvency in India?

In India we are particularly good at drafting laws to meet the requirements of our country. However, when it comes to implementation and execution of the

statutes, the authorities adjudicating and other stakeholders, tend to be more bent on the concept of natural justice, the various stakeholders including lawyers and Resolution Professionals have a habit of seeking adjournments, which stretches the timelines and have an effect of neutralising the gains of legislating a statute. It is true that "Justice delayed is Justice denied." We have seen this effect of stretching the timelines in statutes specially pertaining to arbitration, insolvency etc. and its consequences.

As far as the legislative framework for cross-border insolvency is concerned, the concept of co-operation and co-ordination under the model law and the proposed Part Z of the IBC, are the catalyst for cross-border insolvency. I hope and pray that the Adjudicating Authorities, lawyers, the resolution professional, and other stakeholders, all take due care in confirming to the timelines to make the cross-border insolvency law a success. It has to be considered that in a cross-border cases, there would be foreign courts involvement as well and there could be situations in which, joint hearing by domestic and foreign courts take place and non-preparedness of any stakeholder shall not only delay the proceedings but may create negative perception for the Indian judicial process.

The Adjudicating officers need to be trained in the process of cross-border laws in various jurisdictions and trained for interaction with highly trained insolvency judges across the globe. The notion of collective proceedings and enhancing the value of the corporate debtors assets should be the principle for interaction between the courts. The protocols entered in between the insolvency practitioners (Resolution Professionals from various jurisdictions) and the protocols entered between the domestic courts and foreign courts establish the quasi-procedural law for that specific case. This also needs to be understood by lawyers and other stakeholders in the cross-border insolvency case.

8. What advice would you like to give to the upcoming Insolvency Professionals who are seeing their career in Insolvency Law?

Insolvency is one of the most demanding career options for a professional. It is certainly one of the most challenging and rewarding. Insolvency practitioners can find themselves stepping into the shoes of a CEO in terms of running businesses, negotiating deals, investigating and/or advising on the viability of a business and its restructuring. The work of the insolvency practitioner affects the lives of people in the real world, prospects and livelihoods of creditors, debtors, employees etc. are at stake. Insolvency is about managing people and situations at businesses and need innovative solutions. Even in cases, where there is no option for the business to survive, imagination and determination by the RP/IRP is still required to preserve as much of the value in the business as possible, or as a last resort to get the maximum price for its assets. An IP needs to have a positive approach to the rescue of businesses.

I would also like to add that an IP should not only restrict himself to only formal insolvency procedures. In these times, when pandemic

has hit the economy extremely hard and many businesses are on the verge of closure, there is an opportunity for transforming yourself as a Turn Around Professional and help the stressed companies in their pre-insolvency stage. You have all the skills and qualification to turn around or rescue a business and bring it back to its normal state.

In case you are starting your insolvency practice or as an IP, make sure that you are up to date with the current financial and corporate laws. You have a positive bent of mind, and you are not afraid of challenges. Create a reliable and dependable team of experts, on whom you will have to rely on for conducting rescue within or outside the scope of IBC. Please remember that lot of lives are at stake, and unless you do your job properly, with responsibility and reasonable care, children and families may be affected.

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

Globally Insolvency professionals are highly regulated by regulatory authority or other agencies. India is also following in the same footsteps. This profession needs proper regulation as the insolvency professional, as soon as he is appointed as an IRP/RP, steps into the shoes of a Chief Executive Officer of that company. He has access to all the financial and operational functions of the company. The insolvency professional regulator (IBBI and IPA in the Indian context) serves as a means of checks and balances towards the actions of the RP/IRP as an appointee. The checks and balances by the regulator should be strict to the extent of checking and stopping any sort of illegality or fraud on part of the RP/IRP.

Having said that I would also like to reiterate that IRP/RP has to wear many hats and to keep the business as a going concern. He has to take decisions fast and if those decisions have been taken in good faith and/or for the interest of maximisation of the value of the business, albeit not conforming to some regulations, should be dealt with softly and not burdened with heavy penalties. I would also like to add that all the responsibilities in a CIRP process fall on head of the RP/IRP. It would be better, if some sort of statutory or regulatory provisions on the conduct of various stakeholders are also legislated and the responsibilities assigned, to free the RP/IRP to conduct the CIRP free from stress.

10. Where do you see Insolvency and Bankruptcy Code and yourself as an IP in the upcoming years?

IBC is an incredibly young piece of legislation which has had too many surgeries (amendments) in its short tenure of little over five years. The code is evolving, and along with the code the thought process of the various stakeholders associated with the code, including lawyers, accountants, Adjudicating Authorities, creditors etc. is also evolving. This paradigm shift in the thought process will play a key role in the coming years for the code to be mature enough to stand the test of time.

All said and done, this specific piece of legislation is a welcome step in ease of doing business in India and very importantly this legislation provides an exit option to various stakeholders and to devise their business and legal strategies around IBC.

As far as my vision for the future as an IP, I had stopped taking any further assignments as an RP/IRP since 2020. This was a deliberate decision as my vision is to focus more on the advisory roles. However, I am open to take an appointment as an RP/IRP in cross border insolvency matters as and when I am approached.

Insight!

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* v. *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 & Anr* v. *M/s. Soni Infratech Private Limited & Ors,* 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.

Forensic Audit Transactions: Quandary of CoC 'Wisdom'

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63 Moons Technologies Ltd. v. Administrator of Dewan Housing Finance Corporation Ltd. (2022) 134 taxmann.com 334 (NCL-AT)

In background of series of NBFC falling and failing the RBI was forced to take over the beleaguered sector by superseding the board and appointing administrators. Starting from ILFS, Lakshmi Vilas bank and recent one DHFL.

Financial Service Providers (FSP) have been brought under separate category for insolvency under Insolvency and Bankruptcy Code, 2016 ('IBC/Code'). Due to stupendous success of Code in resolving the debt-ridden companies and therefore the Central government by notification have brought the FSP under Code. If the FSP meets the minimum criteria of Rs. 500 Crores for NBFC then the insolvency initiation can be filed by RBI.

FACTUAL BACKGROUND

RBI had, by notification dated 20th November, 2019, superseded the Board of Directors of Dewan Housing Finance Corporation Limited (DHFL) and appointed administrator to manage the affairs of DHFL. That by order dated 3rd December, 2019 DHFL was admitted into insolvency. The total default admitted by DHFL, is to the tune of Rs. 90,000 crores approximately. Claims worth approximately Rs. 82,247 crores have been filed with Administrator during Corporate Insolvency Resolution Process (CIRP). Resolution Plan of Piramal Capital & Housing Finance Limited (Resolution Applicant) came to be approved by CoC and thereafter objections were filed by various stakeholders wherein one of the objection was with respect to treatment of avoidance transactions by the Resolution Applicant.

On the basis of report submitted by M/s. Grant Thornton, nine applications were filed before Hon'ble Adjudicating Authority under sections 43 to 51 and 66 of the Insolvency and Bankruptcy Code, 2016 ('IB Code') for adjudication. The recovery

estimated from such avoidance applications amounted to Rs. 45,050 crores. As per the resolution plan any benefit arising from such avoidance transaction application shall go to Resolution Applicant as the amount recoverable from such applications is appropriated by the Resolution Applicant to stakeholders of the Corporate Debtor while considering Resolution Plan.

In the Resolution Plan CoC consciously decided that money realised through these avoidance transactions would accrue to the members of the CoC and at the same time they have also consciously decided after lot of deliberations, negotiations that the monies realised if any under section 66 of IBC *i.e.* Fraudulent Transactions, CoC has ascribed the value of Rs. 1 and if any positive money recovery the same would go to the Resolution Applicant/ future Corporate Debtor.

ISSUES UNDER CONSIDERATION

- Whether the stipulation in DHFL's Resolution Plan of recoveries from various transactions in ensuring to the benefit of Resolution Applicant amounted to illegality or whether a Successful Resolution Applicant can appropriate recoveries from avoidance applications filed under section 66 of the Code?
- Whether the same was within the commercial domain of the CoC?
- Further, if it was illegality, could it be saved by any majority strength within the CoC voting in favour of the Resolution Plan or is it the domain of Adjudicating Authority?

COMMERCIAL WISDOM OF CoC *V.* INTEREST OF STAKEHOLDERS

In the present matter CoC gives the proceeds of avoidance transaction to the Resolution Applicant in exchange for the higher upfront amount. For this sole purpose of benefitting Resolution Applicant, Request for Resolution Plan ('RFRP') was amended thrice by CoC to appropriate the recovery from avoidance transactions in favour of Resolution Applicant. The opinion expressed by the CoC after due deliberations in the meetings through voting, as per voting shares, is the collective business decision and that the decision of the CoC's 'commercial wisdom' is non-justiciable, except on limited grounds as are available for challenge under section 30(2) or section 61(3) of the IBC.

Here the functioning of CoC is empowered by commercial wisdom which has been poured by precedents of Hon'ble Supreme Court judgments in catena of cases. The scheme of code is such that Adjudicating Authority is having supervisory jurisdiction and limited judicial review in accordance with section 30(2) of the IB Code, 2016 against the plan approved by CoC. As per the *Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Ltd.* (2021) 130 taxmann.com 208 (SC) judgment, CoC approved Resolution Plans will be governed by the Contract Act and common law principles governing contracts. Therefore, CoC's wisdom has been given paramount status without any judicial intervention for ensuring completion of the processes within the timelines prescribed under IBC. There is

no such parameter to curtail or define commercial wisdom of CoC as it must only have affairs including to Corporate Debtor's resolution plan taking into consideration interest of stakeholders which has not happened as per submissions made by objectors. That it is interesting to note that when valuation of such avoidance applications was done, valuers ascribed ***Nil*** value to such applications creating a conundrum as to benefit of Resolution Applicant to take over the applications.

LEARNING FROM INTERNATIONAL PRACTICE

Treatment of avoidance transactions is still in grey and such issue is required to be decided by apex court. There are various guides from international practice which can be taken as reference for understanding treatment of avoidance transactions.

'UNCITRAL' United Nations Commission on International Trade Law	Avoidance provisions can be important to an insolvency law not only because the policy upon which they are based is sound, but also because they may result in recovery of assets or their value for the benefit of creditors generally and because provisions of this nature help to create a code of fair commercial conduct that is part of appropriate standards for the governance of commercial entities.
Legislative Guide or Insolvency Law	The UNCITRAL Legislative Guide on Insolvency Law and their accompanying commentary that, in particular, state that the most common approach is to treat the assets or value recovered through avoidance as part of the estate on the basis that the principal justification of avoidance proceedings is to return value or assets to the estate for the benefit of all creditors, rather than to provide a benefit to individual creditors. Other approaches may however be found in domestic insolvency laws.
The Report of Bankruptcy Law Reforms Committee November, 2015	Some jurisdictions set such recoveries aside for payment to the secured creditors. Given the extent of equity financing in India, all recoveries from such transactions will become the property of the trust and will be distributed as described within the waterfall of liabilities.
Insolvency Law Committee Reports, 2020	In most cases it may be better suited to distribute recoveries amongst the creditors of the Corporate Debtor. It was recommended that instead of providing anything prescriptive in this regard, the decision on treatment of recoveries may be left the Adjudicating Authority.

It is suggested by the committee that Adjudicating Authority must decide whether the recoveries that vest with the Corporate Debtor should be applied for the benefit of the creditors of the Corporate Debtor, the Successful Resolution Applicant or the Stakeholders. The report itself avoids any straight-jacket-formula for distribution of recovery from avoidance applications. Even the foreign courts have given positive affirmation by evincing that the creditor of the Corporate Debtor are sole beneficiaries.

DECISION OF HON'BLE NCLAT AND IMPACT OF VENUS JUDGMNET (***Venus Recruiters (P.) Ltd. v. Union of India (2020) 121 taxmann.com 346 (Delhi)***) The venus judgment at Para 73 clearly states that the benefit

is not meant for the Corporate Debtor in its new avatar, after the approval of the Resolution Plan. The judgment also observed that the benefit of avoidance transactions is neither in favour of Resolution Applicant nor Corporate Debtor. The judgment is passed by a constitutional bench and therefore cannot be avoided by tribunals before adjudication. It is not the case that Venus judgment only provide that property or sum recovered under avoidance applications should form part of the Resolution Plan and that the Resolution Plan considers such amounts and benefits. It does not deal with how these assets are to be dealt with, which is provided only in the Resolution Plan.

For the fixed deposit holders The Hon'ble Appellate tribunal in *Vinay Kumar Mittal* v. *Dewan Housing Finance Corporation Ltd.* (2022) 134 taxmann.com 333 (NCL-AT) held that the outcome of avoidance application shall be made part of the judgment wherein Hon'ble NCLAT has held that IB Code will override RBI Act or NHB Act. In view of the above, Hon'ble Appellate tribunal held that DHFL depositors who are also creditors are rightful beneficiaries of all the monies that has been siphoned off by the promoter directors of the Corporate Debtor. The court also went on to held that such activities as adopted by Resolution Applicant often dis-advantage creditors, especially small investors. However, with all such observations, Hon'ble NCLAT remanded back the matter to CoC after giving analysis of commercial wisdom as well treatment of avoidance transactions under IB Code.

ANALYSIS

It is yet to be known the intention of Resolution Applicant to continue such avoidance applications when independent valuers have ascribed value of ***Nil*** to such applications. The benefit Resolution Applicant is deriving from such applications despite knowing the rate of disposal of forensic applications throughout NCLT benches is uncanny. The law is flexible on whether the creditors or the resolution applicant should enjoy the benefits of the avoidance applications subject to the provisions of the resolution plan. Some of the questions remains unanswered and require regulatory and legislative guidance to achieve the spirit of the Code. Therefore, it is vital to address such issues to make such treatment of avoidance transactions black and white.

It will be interesting to see that the view taken by the NCLAT is confirmed by the Hon'ble Apex Court[1] or the decision of CoC of giving the benefit of avoidance applications given to Resolution Applicant is confirmed. Since, the appeal has been preferred the outcome of the matter, same shall bring clarity on the subject of assigning the benefit of avoidance applications to the Resolution Applicant.

1. https://economictimes.indiatimes.com/industry/services/property-/-construction/piramal-group-plans-to-move-supreme-court-challenging-nclat-order-on-dhfl/articleshow/89176945.cms?from=mdr

(2022) 136 taxmann.com 55 (SC)

SUPREME COURT OF INDIA

Amit Katyal v. Meera Ahuja

M.R. SHAH AND B.V. NAGARATHNA, JJ.

CIVIL APPEAL NO. 3778 OF 2020†

MARCH 3, 2022

Section 12A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 and Article 142 of the constitution of India - Corporate Insolvency Resolution Process - Withdrawal of application - Respondents were home buyers in housing project being developed by corporate debtor - Since corporate debtor had failed to complete housing project within specified time, a notice was issued by respondents asking them to refund consideration amount - Despite granting several opportunities to corporate debtor, when amount in question was not refunded, respondents filed instant application under section 7 - It was noted that respondents as well as other home buyers have settled dispute with corporate debtor and a settlement had been entered into, under which, corporate debtor had agreed to refund consideration amount with applicable/ accrued interest to respondent - Corporate debtor also undertook to complete entire project and hand over possession to home buyers (who want possession), within a period of one year - Whether thus, this was a fit case to exercise powers under Article 142 and to permit respondents to withdraw CIRP proceedings which would be in larger interest of home buyers who were waiting for possession since more than eight years and thus, respondents were permitted to withdraw application filed by them under section 7 - Held, yes (Para 14)

FACTS

- The Corporate debtor had come out with a Gurgaon based housing project. The corporate debtor

could not complete the project even after a period of eight years. Therefore, respondents who were the home buyers preferred section 7 application before the Adjudicating Authority/NCLT seeking initiation of CIRP against corporate debtor. The respondent sought refund of an amount of Rs. 6.93 crore due to an inordinate delay in the completion of the project and failure to handover possession within the stipulated time.

- The NCLT admitted said application and appointed the Interim Resolution Professional and declared a moratorium. The corporate debtor challenged the order of admission of section 7 application before the NCLAT. The NCLAT had dismissed the appeal against order of NCLT.

HELD

- The respondents now have filed an interlocutory application praying for permitting them to withdraw the CIRP proceedings initiated by them against corporate debtor by submitting, *inter alia*, that the corporate debtor has agreed to pay to the home buyers consideration amount and they do not propose to thereafter proceed further with the insolvency proceedings. Similarly, 82 (79+3) home buyers out of the total 128 home buyers, who are also represented before instant Court, have stated that they are satisfied with the undertaking given by the corporate debtor before instant Court recorded in the joint statement regarding the proposed settlement plan, under which the corporate debtor have undertaken to complete the project within a period of one year and to hand over the possession to them. Thus, out of 128 home buyers of 176 units, 82 home buyers + respondents have agreed to the settlement and agreed to withdraw the CIRP proceedings and/or have no objection if the CIRP proceedings initiated by home buyers are permitted to be withdrawn. (Para 5.1)

- In the present case although the CoC was constituted on 23-11-2020, there has been a stay of CIRP proceedings on 3-12-2020 (within ten days) and no proceedings have taken place before the CoC. It is to be noted that the CoC comprises 91 members, of which 70 per cent are the members of the Flat Buyers Association who are willing for the CIRP proceedings being set aside, subject to the corporate debtor company honouring its undertaking as per the settlement plan dated 3-2-2022. (Para 8)

- Therefore, in the peculiar facts and circumstances of the case, where out of 128 home buyers, 82 home buyers will get the possession within a period of one year, as undertaken by the corporate debtor, coupled with the fact that original applicants have also settled the dispute with the appellant/corporate debtor, we are of the opinion that this is a fit case to exercise the powers under article 142 of the Constitution of India read with rule 11 of the

NCLT Rules, 2016 and to permit the original applicants to withdraw the CIRP proceedings. Thus, the same shall be in the larger interest of the home buyers who are waiting for the possession since more than eight years. (Para 9)

- If the corporate debtor and the majority of the home buyers are not permitted to close the CIRP proceedings, it would have a drastic consequence on the home buyers of real estate project. If the CIRP proceedings are continued, there would be a moratorium under section 14 and there would be stay of all pending proceedings and which would bar institution of fresh proceedings against the builder, including proceedings by home buyers for compensation due to delayed possession or refund. If the CIRP is successfully completed, the home buyers like all other creditors are subjected to the pay outs provided in the resolution plan approved by the CoC. Most often, resolution plans provide for high percentage of haircuts in the claims, thereby significantly reducing the claims of creditors. Unlike other financial creditors like banks and financial institutions, the effect of such haircuts in claims for refund or delayed possession may be harsh and unjust on home buyers.

- On the other hand, if the CIRP fails, then the builder-company has to go into liquidation as per section 33. The home buyers being unsecured creditors of the builder company stand to lose all their monies that are either hard earned and saved or borrowed at high rate of interest, for no fault of theirs. (Para 10)

- Even the legislative intent behind the amendments to the IBC is to secure, protect and balance the interests of all home buyers. The interest of home buyers is protected by restricting their ability to initiate CIRP against the builder only if 100 or 10 per cent of the total allottees choose to do so, all the same conferring upon them the status of a financial creditors to enable them to participate in the CoC in a representative capacity. Being alive to the problem of a single home buyer derailing the entire project by filing an insolvency application under section 7, the legislature has introduced the threshold of at least 100 home buyers or 10 per cent of the total home buyers of the same project to jointly file an application under section 7 for commencement of CIRP against the builder company. (Para 11)

- In the present case, out of the total 128 home buyers of 176 units, 82 home buyers are against the insolvency proceedings and the home buyers have also settled their dispute with the corporate debtor. Even the object and purpose of the IBC is not to kill the company and stop/stall the project, but to ensure that the business of the company runs as a going concern. (Para 12)

- In view of the aforesaid facts and circumstances, more particularly

when the withdrawal of the CIRP proceedings initiated by the corporate debtor is allowable by the NCLT in exercise of its powers under rule 11 of the NCLT Rules, 2016 and in the peculiar facts and circumstances of the case, instead of relegating the original applicants to approach the NCLT/ Adjudicating Authority by moving an application under section 12A of the IBC, this is a fit case to exercise powers under article 142 of the Constitution of India as the settlement arrived at between the home buyers and the corporate debtor-company shall be in the larger interest of the home buyers and under the settlement and as undertaken by the corporate debtor, out of 128 home buyers, 82 home buyers are likely to get possession within a period of one year, for which they are waiting since last more than eight years after they have invested their hard earned money. This shall be in furtherance of the object and purpose of IBC. (Para 13)

- As agreed, respondents shall be paid consideration amount, out of the amount deposited by the appellant. Respondents are permitted to withdraw the application filed by them under section 7 pending before the NCLT. Consequently, all the orders passed by the NCLT, including appointment of IRP and constitution of CoC are hereby quashed and set aside. Consequently, the impugned judgment and order passed by the NCLAT also stands quashed and set aside. (Para 14)

CASE REVIEW

Amit Katyal v. *Mrs. Meera Ahuja* (2021) 123 taxmann.com 62/163 SCL 549 (NCLAT - New Delhi) (para 14) *reversed*.

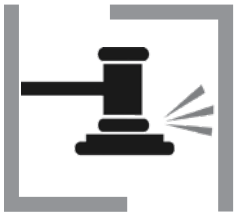
CASES REFERRED TO

Amit Katyal v. *Mrs. Meera Ahuja* (2021) 123 taxmann.com 62/163 SCL 549 (NCLAT - New Delhi) (para 1A), *Swiss Ribbons (P.) Ltd.* v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 4.2), *Kamal K. Singh* v. *Dinesh Gupta* (Civil Appeal No. 4993 of 2021, dated 25-8-2021) (para 4.2) and *Brilliant Alloys (P.) Ltd.* v. *S. Rajagopal* 2018 SCC Online SC 3154 (para 7).

Ms. Sheena Taqui, **Dhvanit Chopra**, **Akansha Saini**, **Shiv Vinayak Gupta**, Advs. and **Mrs. Bina Gupta**, AOR *for the Appellant*. **Nakul Dewan**, Sr. Adv., **Kapil Shankla**, Adv., **Shyam D. Nandan**, AOR, **Ms. Meghna Shankla**, **Ms. Radhika Gupta**, Advs., **Hrishikesh Baruah**, **Archit Upadhayay**, **Randhir Kumar Ojha**, AORs, **K. V. Viswanathan**, Sr. Adv., **Bhargavi Kannan**, **Pracheta Kar**, **Rahul Sangwan**, **Amartya Sharan**, Advs. **Siddhant Buxy**, **Amarjeet Singh**, AORs, **Shiv Kumar Pandey**, **Chandrashekhar A. Chakalabbi**, **Awanish Kumar**, **Anshul Rai**, **Abhinav Garg**, **D. Girish Kumar**, **Kumar Vinayakam Gupta** and **Batra Shubham Parveen**, Advs. *for the Respondent*.

† Arising out of *Amit Katyal* v. *Mrs. Meera Ahuja* (2021) 123 taxmann.com 62/163 SCL 549 (NCLAT - New Delhi).

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 136 taxmann.com 55 (SC)



(2022) 137 taxmann.com 231 (Calcutta)

HIGH COURT OF CALCUTTA

Concast Steel & Power Ltd. *v.* Sarat Chatterjee & Co. (VSP) (P.) Ltd.

SHEKHAR B. SARAF, J.

I.A. G.A. NOS. 7 & 8 OF 2021 C.S. NO. 77 OF 2013

MARCH 8, 2022

Section 35 of the Insolvency and Bankruptcy Code, 2016, read with order 22 rule 8 of Civil Procedure Code (CPC), 1908 - Corporate liquidation process - Liquidator - Powers and duties of - Whether upon a plain reading of order 22 rule 8, of CPC it is patently clear that in case of a company that goes into liquidation, suit shall not abate unless liquidator declines to pursue said suit - Held, yes - Whether where a company, having been declared insolvent by National Company Law Tribunal, had gone under liquidation and liquidator even after having assured High Court that steps would be taken for impleading himself into litigation failed to do so, such failure may amount to a lackadaisical approach of liquidator but cannot under any circumstances be seen as a positive assertion to decline to continue suit - Held, yes - Whether further, where it was evident that liquidator had been acting in suit with reference to movable suit property in question and had taken all necessary steps therein and thus, was fighting tooth and nail with regard to this litigation, mere delay in making an application for substituting his name in records of suit would not in any manner lead to an abatement of suit - Held, yes (Paras 6, 9 and 10)

FACTS

- The original suit was filed by one DS. In the said suit the then plaintiff had sought to claim relief, *inter alia*, in respect of 11, 074.09 metric tonnes of met coke lying as Visakhapatnam (Goods). Later it was amalgamated in one of the companies which was a party to the suit. Subsequently, diverse orders had been passed in the suit from time-to-time by competent courts and a special officer was appointed to deal with property, which was the subject matter in the original suit.
- The amalgamated company had gone into liquidation by an order, dated 26-9-2018, passed by the National Company Law Tribunal, Kolkata Bench. In the meeting held by the Special Officer, appointed as receiver by the court, on 19-10-2020, and 13-1-2021, the applicant/defendant no. 2, company in liquidation, informed the special officer that his client went into liquidation and therefore the company will not be able to share any costs for the suits and proceedings since they do not have

the funds to do so. The liquidator was present and took part in the said meeting and supported the submission made by the company in liquidation. Thereafter, in the meeting held on 17-9-2021, the company in liquidation submitted that the special officer does not have any jurisdiction or power to decide on the issue of whether he can proceed with the sale process in view of the fact that the plaintiff company had been ordered to go into liquidation. In the above meeting the special officer had decided to proceed with the sale and for such purpose had fixed a meeting on 5-10-2021, on a virtual platform for discussing the sale notice and the terms and conditions for sale.

- The applicant/defendant No. 2 emphasized on order 22 rule 8 and contended that the liquidator had declined or neglected to pursue the litigation. So, in light of the same, the suit stands abated. He had further submitted that as the suit had abated, the sale of the ten thousand metric tons of Met Coke should be stayed and his client should be given possession of the same.

- The liquidator however submitted that he was always acting in the suit as would be evident from the appearance of the liquidator before the special officer appointed by this Court with regard to the sale of ten thousand metric tons of Met Coke and also appeared in the Court before the Single Bench and also the Division Bench in this matter. He has, however, submitted that in spite of having assured the Court that an application would be made for addition of the liquidator the same had been made belatedly. He submitted that in the present case the suit had not abated as there was no direction from the Court and no notice was given to the liquidator with regard to the abatement of the same.

HELD

- From order 22 rule 8, it is patently clear that in case of a company that goes into liquidation, the suit shall not abate unless the liquidator declines to pursue the said suit. The other conditions prescribed in rule 1 with regard to security for costs and the procedure enumerated in rule 8 clause 2 are not relevant for the present lis. What is to be noted in the present case is that the liquidator was appearing before the receiver with regard to the sale of ten thousand metric tons of Met Coke and had also appeared before the Court, that is, the Single Bench and Division Bench of the Calcutta High Court, with regard to the sale of the coke. Undoubtedly, the liquidator even after having assured the High Court that steps would be taken for impleading himself into the litigation failed to do so. Such failure may amount to a lackadaisical approach of the liquidator but cannot under

any circumstances be seen as a positive assertion to decline to continue the suit. Impleading the liquidator is a mere technical requirement and nothing more. One must keep in mind that a company that goes into liquidation may at any point of time be able to come out of liquidation and the abatement that takes place would be apropos the liquidator only and not the company. In fact, the next rule, that is, rule 9 under order 22, clearly allows the liquidator and/or the company to apply for setting aside of the abatement or the dismissal of the suit under conditions provided in the said rule. (Para 6)

- In the instant case there has been no order of the Court seeking an explanation from the liquidator or any order of Court seeking a security for the costs incurred by the defendants. Furthermore, it is very apparent that the liquidator has been acting in the suit with reference to the movable suit property in question and has taken all necessary steps therein. Under these circumstances, the Court cannot come to a conclusion that the liquidator has declined to continue the suit. On the contrary, it is crystal clear that the liquidator is fighting tooth and nail with regard to this litigation and a mere delay in making an application for substituting his name in the records of the suit would not in any manner lead to an abatement of the suit. In fact, it is viewed that the liquidator has never stopped acting in the suit but has continued diligently to act in the suit for the protection of the goods in the suit which the plaintiff claims to have title on. The very fact of the presence of the liquidator in the meetings held by the receiver indicate a constant endeavour to protect the interest of the plaintiff in this case. (Para 9)

- Hence, application seeking abatement of the suit is dismissed and that seeking amendment of the plaint to bring the liquidator on record is allowed. Accordingly, the receiver is directed to proceed with the sale of the ten thousand metric tons of coke in accordance with the guidelines and directions provided for. (Para 10)

- With the above directions these applications are disposed of. (Para 11)

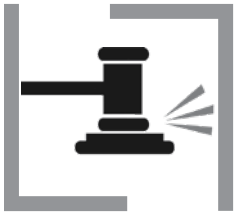
CASES REFERRED TO

Lachu v. *Mohan Lal* AIR 1936 Lah 83 (para 3), *Velji Sivji* v. *Mathuradas Haridas* AIR 1948 Bom. 47 (para 3), *Ishar* v. *Mst. Soma Devi* AIR 1959 Punj. & Har. 295 (para 3), *Swadeshi Cotton Mills Co. Ltd.* v. *Government of U.P* (1975) 4 SCC 378 (para 3), *State of West Bengal* v. *National Builders* (1994) 1 SCC 235 (para 3), *Perumon Bhagvathy Devaswom* v. *Bhargavi Amma* (2008) 8 SCC 321 (para 3), *Entertainment Network (India) Ltd.* v. *Super Cassette Industries Ltd.* (2008) 13 SCC 30 (para 3), *Balwant*

Singh v. *Jagdish Singh* (2010) 8 SCC 685 (para 3), *Khunni Lal* v. *Rameshwar* AIR 1922 All. 361 (para 4) and *L.C. Quinn* v. *Leathem* 1901 AC 495 (para 6).

Utpal Bose, Sr. Adv. **Rupak Ghosh**, **Chayan Gupta** and **Rajesh Upadhyay**, Advs. *for the Petitioner.* **Reetobroto Mitra**, **Pradip Kr. Sarawagi**, Advs. **S.N. Mitra**, Sr. Adv. **D.N. Sharma**, **Ms. Sananda Mukhopadhyay** and **S.R. Saha**, Advs. *for the Respondent.*

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 137 taxmann.com 231 (Calcutta)



(2022) 136 taxmann.com 227 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Adriatic Sea Foods (P.) Ltd. *v.* Suresh Kumar Jain

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

COMPANY APPEAL (AT) (INSOLVENCY) NO. 1057 OF 2021†

MARCH 16, 2022

Section 45, read with sections 43 and 46, of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Undervalued transactions - Avoidance of - Corporate debtor mortgaged its property for availing credit facilities from bank - Bank had granted a conditional no objection certificate to corporate debtor for sale of said property for at least Rs. 17.18 crores - Corporate debtor decided to sell said property - Property was sold by agreement, dated 5-8-2019 for Rs. 11 crores to appellant, suspended director of corporate debtor, who paid only Rs. 25 lakhs - Adjudicating Authority on 19-9-2019 admitted application filed under section 7 to initiate CIRP against corporate debtor - Respondent-resolution professional filed an interlocutory application praying for reversing preferential transaction, undervalued transactions and vesting into assets of corporate debtor - NCLT by impugned order passed an order for cancelling sale of property and directed possession of said property to be handed over to resolution professional - Whether insolvency commencement date was 19-9-2019 and it was less than one and half month before said date that subject transaction of sale was made by corporate debtor and, therefore, transaction was within relevant period under section 46 for avoidable transaction or undervalued transaction i.e. period of one year preceding insolvency commencement date - Held, yes - Whether possession was handed over to appellant by corporate debtor at meagre payment of Rs. 25 lakhs of property for which NOC was issued by bank for sale of an amount not less than Rs. 17.86 crores, which proved that sale transaction was undervalued and, therefore, Adjudicating Authority had rightly come to conclusion that transaction was an undervalued transaction - Held, yes - Whether since entire proceedings beginning from decision to transfer property was not legally done, same was preferential transaction and undervalued transaction in favour of appellant, which was entered only with an intent to defeat rights of creditors and, therefore, no error had been committed by Adjudicating Authority in allowing application filed by Resolution Professional under sections 43 and 45 - Held, yes (Paras 8, 10 and 14)

FACTS

- The corporate debtor mortgaged an industrial area plant to Yes Bank for availing credit facilities.

- The Yes Bank had granted a conditional No Objection Certificate (NOC) to the corporate debtor for sale of the said property for at least Rs. 17.86 crores.
- By a resolution passed by the board of directors of the corporate debtor, dated 15-4-2019, a decision was taken by the corporate debtor to sell the plant.
- The property was sold to appellant, suspended directors of corporate debtor by agreement, dated 5-8-2019.
- Adjudicating Authority on 19-9-2019 admitted application filed under section 7 by bank to initiate CIRP against corporate debtor.
- There were several transactions made by the corporate debtor within the relevant period which came to be examined under the transaction audit conducted by transactional auditor after initiation of insolvency process.
- The transactional auditor submitted a report where reference of several preferential and undervalued transactions was enumerated.
- The Resolution Professional filed an interlocutory application being praying for reversing the preferential transactions, undervalued transactions and vesting into the assets of the corporate debtor.
- The said application was opposed by the suspended board of directors of corporate debtor.
- The Adjudicating Authority by impugned order passed an order for cancelling the sale of subject plant and directed the possession of the said plant to be handed over to the Resolution Professional.
- On appeal, the appellant submitted that appellant had obtained possession of the said plant by a registered agreement for assignment cum transfer of lease cum sale, dated 5-8-2019 which registered document could not have been cancelled by the Adjudicating Authority by the impugned order and that appellant was *bona fide* purchaser who could not have been deprived possession of the property validly obtained.

HELD

- The application was filed by the Resolution Professional praying for an order under sections 43 and 45 regarding preferential transaction and undervalued transaction done by the corporate debtor. (Para 7)
- Under section 46 relevant period for avoidable transaction or undervalued transaction is period of one year preceding the insolvency commencement date. The transaction in question being of 5-8-2019, is within the period as contemplated under section 46. Insolvency commencement date is 19-9-2019 and it was less than one and half month before the said date that this transaction was made by the corporate debtor. The Adjudicating Authority noted the transaction audit report and submissions made by the appellant.

It was noted by the Adjudicating Authority that 'no objection' granted by Yes Bank for sale of the property, was at least Rs. 17.86 crores. When the mortagee bank has issued conditional NOC for Rs. 17.86 crores transaction of the property, at the amount of Rs. 11 crores is undervalued transaction and there is no error in the decision of the Adjudicating Authority holding the transaction as undervalued transaction. (Para 8)

- One more aspect needs to be noticed in this context is that although consideration of the agreement for assignment cum transfer of lease-cum-sale, dated 5-8-2019 mentioned Rs. 11 crores but total amount paid by the appellant in the account of the corporate debtor was Rs. 0.63 crore and the entire possession of the property was handed over by directors of the corporate debtor on receipt of only Rs. 0.63 crore, which speak for itself. The appellant never paid the balance amount of consideration amount apart from payment of Rs. 0.63 crore. (Para 9)

- There is one more reason due to which the transaction, dated 5-8-2019 has to be held to be undervalued. The agreement for assignment cum transfer of lease-cum-sale mentions the consideration of Rs. 11 crores. The purchaser/assignee already paid Rs. 25 lakhs and has agreed to pay Rs. 10,75,00,000 to Yes Bank but Rs. 10,75,00,000 which contains heading 'Payment Schedule' there is no period mentioned for payment of Rs. 10,75,00,000. The transaction was entered for Rs. 11 crores on payment of only Rs. 25 lakhs itself. Thus, total consideration paid was 1/44 of the transaction of the sale consideration. However, in the agreement it was mentioned that on receipt of demand cum NOC from Yes Bank the repayment by purchaser directly to loan account in of seller/assignor in Yes Bank thereafter peaceful possession of the plot shall be handed over whereas the appellant's case is that after execution of the agreement the possession of the plant was handed over, which indicates that whole transaction was entered only on payment of Rs. 25 lakhs. The possession was handed over to the appellant by the corporate debtor at meagre payment of Rs. 25 lakhs of property for which NOC was issued by the Yes Bank for sale of an amount of not less than Rs. 17.86 crores, which proves that the transaction, dated 5-4-2019 was undervalued transaction and the Adjudicating Authority had rightly come to the conclusion that transaction is an undervalued transaction. (Para 10)

- However, handing over the possession by the directors of the corporate debtor to the appellant before even payment indicates the nature of transaction which transaction was preferential transaction as well as undervalued transaction. Transaction was a transaction to defeat the rights of the creditor of the corporate debtor. (Para 11)

- The appellant had laid emphasis that Adjudicating Authority has passed an order for cancelling the registered agreement which was not within the domain of the Adjudicating Authority. In the application filed by the Resolution Professional it was pleaded that since the buyer failed to pay the consideration in full, hence the sale was treated to be cancelled and called off and advance amount was forfeited and necessary entry was passed in the books of account which clearly mean that the books of account of the Yes Bank where sale was treated to be cancelled. Under section 45 sub-section (1), the Resolution Professional can make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction. Where an application under section 45(1) is allowed the effect of the order has to be treated to be in accordance with section 45(1). The use of expression used in the impugned order is that 'as a consequent to the cancellation of the sale of the Mumbai Plant, it is directed that the possession of the Mumbai Plant be handed over the Resolution Professional', the Adjudicating Authority itself has not directed for cancellation of the sale rather cancellation of sale deed was inferred on account of non-payment of balance consideration and entry made by the Bank in its books of account. Direction in the impugned order is only to hand over the possession of the plant to the Resolution Professional which is consequential action on account of reversal of the transaction. The order passed by the Adjudicating Authority thus cannot be said to be beyond section 45(1). However, when transaction is treated to be void it loses all its legal effect and submissions of appellant that since application for declaring the transaction void being application pending no direction could have been issued by the Adjudicating Authority as has been issued in the impugned order cannot be accepted. The factum of pendency of application under section 25 read with section 60(5) is not subject application for declaration of sale deed as *null* and *void* have no bearing on application filed under sections 43 and 45, thus, pendency of Interlocutory application has no bearing on disposal of the application. Another submission of the appellant is that Interlocutory Application which was filed by the appellant seeking direction to restrain the Resolution Professional from taking control of the property remain pending has also no bearing on the order passed in Interlocutory Application. The application is to be held to have become infructuous in view of the directions issued in Interlocutory application. (Para 12)

- The submission of the appellant that appellant has not been heard in the application filed by the Resolution Professional. Suffice it to say that appellant was well aware of the proceeding and he himself has filed an application seeking direction to

restrain the Resolution Professional from taking control of the property which cannot be said that he was not aware of the issue which were before the Adjudicating Authority. The respondent in his reply before the Court has stated that appellant was heard by Adjudicating Authority on 30-9-2021 which is apparent from the proceedings, dated 30-9-2021 which proceedings has been brought on record. More so it was action of the suspended directors of the corporate debtor which was in question and all suspended directors of the corporate debtor who entered into preferential transactions and undervalued transaction were heard. Appellant who claimed to be assignee of rights by corporate debtor can have no better case than the corporate debtor themselves who have assigned the rights of the appellant. Corporate debtor who entered into preferential transactions and undervalued transactions have been issued notice and heard, the submission of the appellant that order is vitiated on account of violation of principles of natural justice cannot be accepted. (Para 13)

- Respondent has also brought on record relevant materials to indicate that both 'N' and 'K' who claimed to have passed resolution for transferring the plants on 15-4-2019 were ceased to be directors with effect from 12-9-2018, hence, the entire proceedings beginning from decision to transfer of the property was not legally done and preferential transaction and undervalued transaction in favour of the appellant was only with a intent to defeat the rights of the creditors and no error have been committed by the Adjudicating Authority in allowing the application filed by the Resolution Professional under sections 43 and 45. There is no good ground to interfere with the order passed by the Adjudicating Authority, dated 4-10-2021. The appeal lacks merit and is dismissed, accordingly. (Para 14)

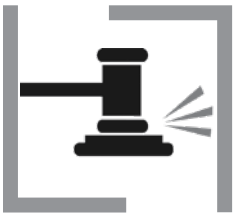
CASE REVIEW

Suresh Kumar Jain (RP) of MK Overseas (P.) Ltd. v. *Shakeel Ahma d* (2022) 135 taxmann.com 376 (NCLT - New Delhi) (para 14) *affirmed* (***See Annex***).

Salim A. Inamdar, **Akhil Kumar Gola**, **Sanat Tokas**, **Modassir Husain Khan** and **Vedanta Varma**, Advs. *for the Appellant.* **Anoop Prakash Awasthi**, Adv. and **Suresh Kumar Jain**, RP *for the Respondent.*

† Arising out of order of NCLT, New Delhi in *Suresh Kumar Jain (RP) of MK Overseas (P.) Ltd.* v. *Shakeel Ahmad* (2022) 135 taxmann.com 376.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 136 taxmann.com 227 (NCLAT- New Delhi)



(2022) 137 taxmann.com 232 (NCLT- Chennai)

NATIONAL COMPANY LAW TRIBUNAL, CHENNAI BENCH

P. Eswaramoorthy, Liquidator of Senthil Papers & Boards (P.) Ltd. *v.* Deputy Commissioner of Income-tax

S. RAMATHILAGAM, JUDICIAL MEMBER AND
ANIL KUMAR B, TECHNICAL MEMBER

MA NOS. 1372 & 1373 OF 2019 AND 69 OF 2020 MA/1130/CAA/2019
CP/612 (IB)/2017

MARCH 29, 2022

Section 238, read with section 60, of the Insolvency and Bankruptcy Code, 2016 and section 24 of the Prohibition of Benami Property Transactions Act, 1988 - Overriding effect of Code - Whether period of moratorium starts with initiation of CIRP and ends in two circumstances either on commencement of Liquidation or upon approval of a resolution plan - Held, yes - In instant case, liquidation period had commenced before date in which provisional attachment in respect of corporate debtor's property was made by respondent under Prohibition of Benami Property Transaction Act, which indicates that respondent had not acted in violation of moratorium - Moreover, provisional attachment made by respondent comes under statute of Prohibition of Benami Property Transaction Act, which in itself had stipulated due process with respect to attachment of property under section 7 of same - Whether thus, contention of applicant, liquidator that both being special act, Insolvency and Bankruptcy Code, should prevail over Prohibition of Benami Property Transaction Act as per general principle for construction did not hold in instant case - Held, yes - Whether however, there was nothing to stop liquidator to proceed under relevant provision to revive provisional attachment; and that, NCLT having not found any conflict between two statutes as there was no bar in selling property of corporate debtor solely on ground that corporate debtor was under Liquidation, and that Liquidator was also not barred by IBC to add said property into liquidation estate, liquidator was open to approach appropriate forum to raise attachment or any other relief as per provisions of act - Held, yes (Para 18)

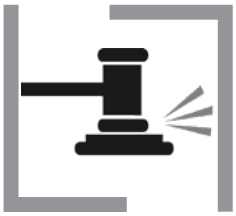
CASES REFERRED TO

Embassy Property Developments (P.) Ltd. v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC) (para 11), *Raj Kumar Rathan* v. *Dy. Director, Enforcement Directorate* (2020) 117 taxmann.com 297 (NCLT - Hyd.) (para 11), *Directorate of Enforcement* v. *Manoj Kumar Agarwal* (2021) 126 taxmann.com 210/126 SCL 433 (NCLT - New Delhi) (para 12), *Manish Kumar* v. *Union of India* (2021) 123 taxmann.com 343 (SC) (para 13), *Solidaire India Ltd.* v. *Fairgrowth Financial Services (P.) Ltd.* (2001) 30 SCL 59 (SC) (para 14), *Gujarat Urja*

Vikas Nigam Ltd. v. *Amit Gupta* (2021) 125 taxmann.com 150/167 SCL 241 (SC) (para 15) and *Tata Consultancy Services Ltd.* v. *Vishal Ghisulal Jain, RP of SK Wheels (P.) Ltd.* (2021) 132 taxmann.com 232/(2022) 170 SCL 153 (SC) (para 15)

B. Dhanaraj, Adv. *for the Appellant.* **R. Shankaranarayanan**, ASGI and **Raj Jabhakh**, Adv. *for the Respondent.*

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 137 taxmann.com 232 (NCLT- Chennai)



(2022) 137 taxmann.com 234 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Damodar Valley Corporation *v.* Karthik Alloys Ltd.

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

COMPANY APPEAL (AT) (INSOLVENCY) NO. 13 OF 2021†

MARCH 14, 2022

Section 14 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - Appellant supplier entered into a Power Supply agreement with corporate debtor for supply of power - On failure of corporate debtor to make payments due for power supply, appellant disconnected power supply to corporate debtor's Durgapur factory - In meanwhile a Company Petition under section 9, filed by operational creditor, was admitted, thereby initiating CIRP against corporate debtor - Interim Resolution Professional (IRP) requested appellant to restore power supply to Durgapur unit of corporate debtor which was declined - Adjudicating Authority by impugned order, directed restoration of power connection to corporate debtor - Whether as per section 14(2) of IBC, supply of essential goods or services to corporate debtor shall not be terminated or suspended or interrupted during moratorium period - Held, yes - Whether under section 14(2A), IRP/RP can ask for continuation of supply of such goods and services which are critical to protect and preserve value of corporate debtor and manage operations of such corporate debtor as a going concern - Held, yes - Whether in present case appellant had filed its claim of past dues of period prior to initiation of CIRP before Resolution Professional, which will be considered by Committee of Creditors and appropriate decision regarding settlement and payment of claim shall be done in accordance with resolution plan to be approved by Adjudicating Authority - Held, yes - Whether appellant, which is an operational creditor, or any other creditor cannot claim and be given priority in payment of its pre-CIRP debt before resolution plan is finalised and approved by Adjudicating Authority- Held, yes - Whether therefore, Adjudicating Authority had not exceed its jurisdiction in passing impugned order by which directions had been given to appellant for re-connection of electricity supply to corporate debtor during moratorium period and also allowing waiver of security deposit - Held, yes (Paras 27, 28 and 29)

FACTS

- The appellant (DVC) and respondent No. 1/KAL entered into a Power Supply agreement, dated 1-1-1997 to provide power supply to respondent No. 1/corporate debtor for a contract demand of

10,000 KVA. The corporate debtor failed to make payments due for power supply and the accumulated dues became a large amount, whereupon the appellant pursuant to notices sent for payment of dues, disconnected the power supply to corporate debtor's Durgapur factory.

- A Company Petition under section 9, filed by the Operational Creditor, was admitted, thereby initiating CIRP against the corporate debtor. Later the Interim Resolution Professional (IRP) requested DVC to restore power supply to the Durgapur unit of the corporate debtor stating that as power supply was a basic requirement for running the factory of the corporate debtor, it was a part of essential goods and services covered under regulation 32 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 (CIRP Regulations), and therefore it should be re-connected/ restored.
- In reply to this letter of the IRP, appellant replied that regulation 32 of the CIRP Regulations' do not apply in the present case and hence it could not re-connect the electricity supply and requested the IRP to withdraw its letter.
- The appellant has further stated that it had filed its claim in the prescribed form under regulation 7 of the CIRP Regulations, 2016, which was accepted by IRP. He has also stated that the IRP had moved an interlocutory application in the company petition before the Adjudicating Authority seeking directions to the appellant to restore electricity connection at the Durgapur plant of the corporate debtor.
- In reply to this interlocutory application, the appellant had questioned the 'going concern' status of the corporate debtor and urged that rehabilitation of the corporate debtor should not be at the cost of another commercial entity, the appellant, which is contrary to the real intent of the IBC.
- The Adjudicating Authority by the impugned order, directed restoration of power connection to the corporate debtor for getting a better resolution plan and ordered for re-connection of power supply of the Durgapur factory of corporate debtor within 15 days on deposit of current electricity dues from the date of initiation of CIRP without payment of past dues and any security deposit from the corporate debtor as it is only re-connection of dis-connected connection.
- On appeal by appellant to NCLAT:

HELD

- It is clear from the pleadings made by the Resolution Professional and relief sought that when the electricity connection was dis-connected the Durgapur unit was being run using

diesel generator. The RP has sought reconnection of electricity supply on the basis of section 14(2) of IBC. (Para 19)

- From the provisions in section 14(2) of IBC it is found that supply of essential goods or services to the corporate debtor shall not be terminated or suspended or interrupted during moratorium period. The essential goods and supplies have been defined and explained through an illustration in regulation 32 of the CIRP Regulations wherein it is clarified that essential goods and services referred to in section 14(2) shall be considered essential supplies only to the extent they are not a direct input to the output produced or supplied by the corporate debtor. Moreover, under section 14(2A) the IRP/RP can ask for continuation of the supply of such goods and services which are critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern. (Para 22)

- Admittedly the dis-connection of the electricity supply to the Durgapur unit took place on 14-9-2019. According to clause 4.6.1 of the Power Supply Agreement, deemed termination of the agreement could happen only after 180 days from the date of dis-connection. Thus deemed termination could have taken place on or after 12-3-2020 *i.e.* 180 days after the date of dis-connection. The order for initiation of CIRP was passed on 17-12-2019 and moratorium was imposed under section 14 from the same date. Thus the deemed termination of the Power Supply Agreement to the Durgapur unit of the corporate debtor which could not take place by 17-12-2019, could not happen during the moratorium period, by virtue of protection provided under section 14(2).The IRP has claimed reconnection of electricity supply as the same was essential supply during the moratorium period and the Power Supply Agreement had not been terminated. It is also noted that the IRP has asked for re-connection of the electricity supply so that a 'better' resolution plan can be obtained in the resolution of the CD which is the intent of the IBC. (Para 23)

- It is noted that DVC has filed its claim of past dues of period prior to initiation of CIRP before the Resolution Professional, which will be considered by the Committee of Creditors and appropriate decision regarding settlement and payment of the claim shall be done in accordance with the resolution plan to be approved by the Adjudicating Authority. In such a situation it is not that the payment of past dues of the pre-CIRP period have to be paid by the corporate debtor when the resolution of the corporate debtor is in process. (Para 27)

- In the present case the corporate

debtor is under insolvency resolution and the settlement of past debts of financial and operational creditors will be considered under resolution plan or liquidation, as the case may be. Hence DVC, which is an operational creditor, or any other creditor cannot claim and be given priority in payment of its pre-CIRP debt before the resolution plan is finalised and approved by the Adjudicating Authority. (Para 28)

- It is therefore viewed that in passing the Impugned order by which directions have been given to DVC for re-connection of the electricity supply to the corporate debtor during the moratorium period and also allowing waiver of security deposit, the Adjudicating Authority has not exceed its jurisdiction under the IBC. Therefore, there is no need to interfere with the impugned order. As is provided in the IBC, the electricity dues in the CIRP period shall be paid by the corporate debtor whereas the settlement and payment of pre-CIRP dues shall be done *qua* the finally approved resolution plan, or in liquidation, as may be the case. (Para 29)

CASE REVIEW

Anneel Saraogi v. *Karthik Alloys Ltd.* (2022) 137 taxmann.com 233 (NCLT - Mum.) (para 29) *affirmed* (***See Annex***)

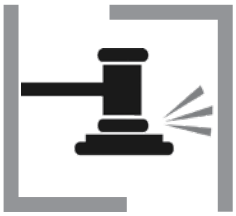
CASES REFERRED TO

Embassy Property Development (P.) Ltd. v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC) (para 11), *Telangana State Southern Power Distribution Co. Ltd.* v. *Srigdhaa Beverages* (2020) 6 SCC 478 (para 11), *State of U.P.* v. *Ramsukhi Devi* (2005) 9 SCC 733 (para 11), *Gujarat Urja Vikas Nigam Ltd.* v. *Amit Gupta* (2021) 125 taxmann.com 150/167 SCL 241 (SC) (para 11), *Uttarakhand Power Corporation Ltd.* v. *ANG Industries Ltd.* (2018) 95 taxmann.com 361 (NCLAT - New Delhi) (para 14) and *Damodar Valley Corpn.* v. *Cosmic Ferro Alloys Ltd.* (2021) 133 taxmann.com 156 (NCLAT-New Delhi) (para 25).

Ms. Maninder Acharya, Sr. Adv., **Ms. Madhumita Bhattacharjee**, **Viplav Acharya**, **Sai Shashank** and **Ms. Srija Choudhury**, Advs. *for the Appellant.* **Vishesh K. Srivastava**, **Mayur Khandeparkar**, **Ranit Basu**, **Nikhil Wage**, **Maitri Malde** and **Rhea Verma**, Advs. *for the Respondent.*

† Arising out of order passed by NCLT, Mumbai in *Anneel Saraogi* v. *Karthik Alloys Ltd.* (2022) 137 taxmann.com 233.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 137 taxmann.com 234 (NCLAT- New Delhi)



(2022) 137 taxmann.com 236 (NCLAT-New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

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

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

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

MARCH 7, 2022

Section 5(21) of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Operational debt - Whether where there were two divergent opinions of Tribunal with regard to issue raised i.e. whether license fee pertaining to immovable premises taken by licensee from licensor for running commercial activity i.e. Educational Institute fall within definition of 'Operational Debt', it is necessary that an authoritative pronouncement be made in this regard and matter be placed before Chairperson on administrative side for constitution of a 'Larger Bench' to resolve conflict - Held, yes (Paras 16 and 17)

FACTS

- The appellant/operational creditor entered into a 'Licence Agreement' with the respondent/corporate debtor and corporate debtor took the premises of appellant for the purpose of running an Educational Establishment at the licence fee of Rs. 4 Lacs per month. License was granted for an initial period of 5 years. The appellant who was a Licensor received part payment made by the corporate debtor towards outstanding License Fee. Cheque amounting Rs. 20 Lacs was handed over to the appellant by the corporate debtor towards part payment which on presentation was dishonoured. Another Cheque amounting to Rs. 20 Lacs was handed over to the appellant by the corporate debtor which too was dishonoured.
- When despite several reminders and e-mails, the corporate debtor did not clear outstanding payment towards License Fee, a Demand Notice under section 8 was issued by the appellant to the corporate debtor claiming an outstanding dues of Rs. 1.31 crore. The Notice under section 8 was delivered and was received by the corporate debtor but no reply to demand notice was sent by the corporate debtor. The appellant filed an application under section 9.
- The Adjudicating Authority after noticing that claim of the appellant

arises out of a License Agreement under which respondent had right to use immovable property, held that the claim arising out of grant of licence to use immovable property did not fall in the category of goods and services.

HELD

- The agreement clearly proves that immovable property was taken on license by the corporate debtor for payment of license fee of Rs. 4 Lacs per month. The premises were obtained by the corporate debtor for commercial purposes for running an Educational Institute. The application was filed by the appellant due to outstanding dues arising out of license agreement. Apart from the part payment for license fee for few months, the corporate debtor defaulted in making the payment of license fee. Two cheques which were issued 20 Lacs each by the corporate debtor were dishonoured. The Adjudicating Authority in its order had stated that since the appellant has allowed the corporate debtor to use its immovable property to carry out business, it does not fall in the category of goods and services including employment. (Para 9)

- The definition of "Operational Debt" is contained in section 5(21). When the corporate debtor has taken on license the immovable premises of the appellant for the use of premises for commercial purposes i.e. for running educational institutes the license of the premises by appellant to corporate debtor is clearly included in the expression "provision of services". (Para 10)

- The claim of the appellant under section 9 arising out of liability which fell on the corporate debtor to make the payment of license fee as agreement when the license fee having not been paid it was clearly "debt" which was in default. (Para 11)

- The appellant has relied on judgment of this Tribunal in Anup Sushil Dubey v. National Agricultural Co-operative Marketing Federation of India Ltd. (2021) 123 taxmann.com 70/163 SCL 74 (NCL-AT) where the Tribunal held that subject to lease rental arising out of use of operational cold storage unit is operational debt. (Para 14)

- The corporate debtor has placed reliance on the judgment of Tribunal in the matter of *M. Ravindranath Reddy* v. *G. Kishan* (2020) 113 taxmann.com 526 (NCL-AT) this Tribunal wherein Application for recovery of alleged enhanced lease rent, held not to fall within the meaning of 'Operational Debt' in terms of section 5(21). (Para 15)

- There were two divergent opinions of Tribunal with regard to the issues which had been raised *i.e.* whether License Fee pertaining to immovable premises taken by licensee from licensor for running commercial activity *i.e.* Educational

Institute fall within the definition of 'Operational Debt'. (Para 16)

- Thus, matter needs to be placed before the Chairperson on administrative side for constitution of a 'Larger Bench' to resolve the conflict. (Para 17)

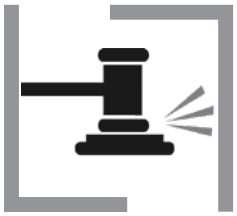
CASES REFERRED TO

Pramod Yadav v. *Divine Infracon (P.) Ltd.* (2018) 97 taxmann.com 258 (NCLT - New Delhi) (para 4), *Mobilox Innovations (P.) Ltd.* v. *Kirusa Software (P.) Ltd.* (2017) 85 taxmann.com 292/144 SCL 37 (SC) (para 12), *Anup Sushil Dubey* v. *National Agricultural Co-operative Marketing Federation of India Ltd.* (2021) 123 taxmann.com 70/163 SCL 74 (NCL-AT) (para 14) and *M. Ravindranath Reddy* v. *G. Kishan* (2020) 113 taxmann.com 526 (NCL-AT) (para 15).

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

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

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 137 taxmann.com 236 (NCLAT- New Delhi)



(2022) 137 taxmann.com 238 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Sikander Singh Jamuwal *v.* Vinay Talwar Resolution Professional

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

COMPANY APPEAL (AT) (INS) NO. 483 OF 2019†

MARCH 11, 2022

Section 36 of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Liquidation estate - Whether there is no conflict between provisions of Employees Provident Funds and Miscellaneous Provisions Act, 1952 (EPF & MP, Act) and IBC - Held, yes - Whether further, in terms of section 36(4)(a)(iii), 'provident fund' do not form part of assets of corporate debtor - Held, yes - Whether thus, where EPF organisation had determined an amount of Rs. 1.35 crore as dues of employees from corporate debtor against which only Rs. 78 had been provisioned for in resolution plan submitted by successful resolution applicant, successful resolution applicant was to be directed to release full provident fund and interest in terms of EPF & MP Act - Held, yes (Para 13)

FACTS

- The appellant was an 'ex-employee of the Corporate debtor company and he had a total outstanding dues of Rs. 12.49 lacs.'
- It was the grievance of the employee that the appelant and workman were the backbone of the corporate debtor in CIRP who stood by corporate debtor by not resigning even when their rightful dues and salaries were not being paid/irregularly paid from the year 2012 which was much prior to CIRP. It was also their grievance that the Resolution Plan had not considered the full Provident Fund (PF) dues (1,35,06,391 full dues -(minus) considered in the Resolution Plan Rs. 78,00,000) 'Provident Fund' (PF) dues of the employees which corporate debtor in CIRP was supposed to remit to the PF Authority under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 for the default period from 1-10-2012 to 31-3-2018 as assessed and communicated by the Assistant Provident Fund Commissioner.
- It had also been submitted that the 'financial creditors' (21.6 per cent) have been paid much more than the 'Operational Creditors' (12.67 per cent). It was also their grievance that they have not been paid the gratuity amount as required under

the 'Payment of the Gratuity Act, 1952'.

- The appellant had alleged that there was a disparity in releasing the percentage of payment between the dues of financial creditor and rightful due of employees and workmen. The plan was discriminatory and non-payment of PF dues amounts to violation of the provisions of EPF and MP Act, 1952.
- In view of the above, the appellant prays for setting aside the impugned order passed by the Adjudicating Authority whereby it approved the said resolution plan.

HELD

- It is found that resolution plan fails to consider the payment of provident fund dues as computed by the Assistant Provident Fund Commissioner. The amount so computed is Rs. 1.35, crore whereas the provisions has been made for Rs. 78 lacs only.
- PF Act stated that the resolution applicant is also liable to pay the contribution and other sums due from the employer under any provisions of this act as the case may be in respect of the period up to the date of such transfer.
- All this requires that the explicit provisions of the above said PF Act needs to be complied with. This aspect is justiciable as a duty has been casted on the Resolution Professional/Adjudicating Authority/ on this Tribunal. This is not a commercial wisdom as compliance of law is a must. The aspect of parity for payment of Finance Creditors and Operational creditors are not being looked into by instant Tribunal as it is a commercial wisdom of CoC.
- Since no provisions of the EPF & MP Act is in conflict with any of the provisions of the I&B Code, the applicability of even section 238 of the IBC does not arise. PF dues are not the assets of the corporate debtor as amply made clear by the provisions of section 36(4)(a)(iii).
- Hence, the successful resolution applicant is directed to release full provident fund dues in terms of the provisions of the Employees Provident Funds and Miscellaneous Provident Fund Act, 1952 immediately by releasing the balance amount of (Rs. 1,35,06,391 full dues - (minus) considered in the Resolution Plan Rs. 78,00,000). The impugned order, dated 2-4-2019 approving the 'Resolution Plan' stands modified to the extent above. (Para 13)

CASE REVIEW

Vinay Talwar Resolution Professional v. *Applied Electro Magnetics (P.) Ltd.* (2022) 137 taxmann.com 237 (NCLT - New Delhi) (para 13) *modified* (***see annex***).

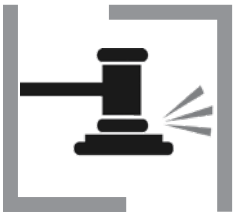
CASES REFERRED TO

Swiss Ribbon (P.) Ltd. v. *Union of India* (2019) 101 taxmann.com 389/152 SCL 365 (SC) (para 9), *K. Shashidhar* v. *IndianOverseas Bank* (2019) 102 taxmann.com 139/152 SCL 312 (SC) (para 10), *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC) (para 10), *Tourism Finance Corpn. of India Ltd.* v. *Rainbow Papers Ltd.* (2020) 120 taxmann.com 265 (NCLAT - New Delhi) (para 13) and *State of Jharkhand* v. *Jiterdra Kumar Srivastava* (2013) 12 SCC 210 (para 13).

Shantanu Awasthi and **Shikhar Mittal**, Advs. *for the Appellant*. **Abhishek Anand**, **Sahil Bhatia**, **Manish Kaushik**, **Anubhav Gupta** and **Ajit Singh Joher**, Advs. *for the Respondent*.

† Arising out of order of NCLT, New Delhi in *Vinay Talwar Resolution Professional* v. *Applied Electro Magnetics (P.) Ltd.* (2022) 137 taxmann.com 237.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 137 taxmann.com 238 (NCLAT- New Delhi)



(2022) 137 taxmann.com 240 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

G.L. Engineering Industries (P.) Ltd. *v.* Supreme Engineering Ltd.

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

COMPANY APPEAL (AT) (INSOLVENCY) NO. 431 OF 2021†

MARCH 2, 2022

Section 5(21), read with section 9, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Operational debt - Appellant/ operational creditor supplied steel material to respondent company - According to appellant, respondent company issued letters, wherein respondent company confirmed due amount and requested extension of time for which respondent company would pay interest at 1.92 per cent per month - Thereafter, when cheques issued by respondent company were dishonoured, appellant issued notice under section 8 for debt amount along with delayed payment charges - In reply to notice, respondent company strenuously contended that cheques relied upon by appellant had only issued as a security deposit and pertains to leave and licenese agreement, and letters submitted by appellant were forged and fabricated - It was noted that an amount pertaining to 37 invoices raised by appellant had already been paid by respondent company through NEFT, by cheque payments and also vide letters of credit - Whether mere acknowledgement of any liability would not construe an 'operational debt' as defined under section 5(21), when no sufficient evidence was produced on record to prove that amount claimed arises out of 'supply of goods and services' - Held, yes - Whether since respondent company had already paid due amount and no sufficient evidence by way of invoices or any other documents shows outstanding 'Operational Debt' as a claim in respect of provision of 'supply of goods and services', Adjudicating Authority rightly dismissed application of appellant/ operational creditor - Held, yes (Paras 7 and 8)

FACTS

- The appellant/operational creditor had supplied steel material to the respondent company both on high sea basis and domestic since October, 2013 and payments were made according to mutually agreed terms which was payment against delivery payment charges.
- The appellant - operational creditor submitted that during the period, the respondent company issued several cheques to operational creditor and requested them to not deposit any of them.

- Thereafter, as the date of three months had lapsed, the cheques were returned and fresh cheques were issued by the respondent company.
- The appellant-operational creditor claimed that the respondent company furnished *vide* letters, dated 15-5-2019 and 30-5-2019, wherein respondent-company confirmed a liability in favour of appellant and another cheques were issued for this moment but with a condition that in case the deposit of the cheques was requested to be delayed , the respondent company would pay interest at 1.92 per cent per month till the date or realization.
- Subsequently, both the cheques were dishonoured on the ground of insufficient funds.
- Thereafter, appellant issued notice under section 138 of the Negotiable Instrument Act,1881 but no response was received.
- Thereafter, appellant issued notice under section 8 for a debt amount along with delayed payment charges at 1.92 per cent.
- In response to the section 8 notice, the respondent contended that the letters, dated 1-7-2019 and 30-5-2019 were forged and fabricated.
- The Respondent company claimed it was never agreed to pay the delayed amount and that two cheques on which appellant had relied were actually issued only as a 'Security Deposit' and pertains to leave and license agreement to the appellant , keeping in view of the old business relations between the parties, but not towards any specific payment.
- However, appellant never produced the invoices against which the amount was 'due and payable'.
- The Adjudicating Authority by impugned order dismissed the application filed by the appellant on ground that there was nothing on record which shows any outstanding 'Operational debt' and , the payment sought against the 37 invoices submitted by appellant had already been paid by three modes NEFT, by cheque payments and also with *vide* letter is of credit.
- On appeal:

HELD

- It is opined that mere acknowledgement of amount in these two letters (even though denied by the respondent), does not amount to establishing an 'Operational Debt' as defined under section 5(21). The Statements of Account filed by the Respondent Company in support of their case that out of the 37 invoices raised by the Appellant amounting to Rs. 8,74,54,968/-, the respondent has paid a sum of Rs. 9,50,93,520/-. The Statement shows that these amounts were paid by NEFT, by cheque payments and also *vide* Letters of Credit. Hence, it is considered view that the amounts

pertaining to 37 invoices have been paid by the respondent. The same amounts reflect in Part IV of Form 5 of the Application claiming Rs. 4,16,48,466/- and Rs. 7,76,706/-. The delayed payment charges sought to be paid by the appellant are not supported by any agreement executed between the parties, based on which the appellant could have exercised their rights to claim these amounts towards delayed charges. The interest charged towards penalty does not find a mention in any of the 37 invoices which are on record. The Journal Entries not supported by any other additional evidence cannot be 'solely' relied upon to prove that the amount claimed arises out of 'supply of goods and services' to fall within the ambit of the definition of 'Operational Debt' as defined under section 5(21). Further it is inclined to observe that the dishonour of the two cheques is a subject matter of the NI Act, 1881 and recovery of those amounts under the NI Act, 1881 cannot be said to be paid towards the supply of goods and services, specifically in the light of the absence of any such agreement or invoices to that effect. (Para 7)

- The appellant has already initiated steps under section 138/141 of the NI Act, 1881 . The issue in this case is not whether there is an 'Admission of debt' or 'existence of dispute' but whether in the absence of any sufficient evidence on record that the amounts claimed are 'in respect of the provision of goods and services including employment or a debt in respect of (payment) of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority' as defined under section 5(21). Hence, it is opined that mere Admission of any liability would not construe an 'Operational Debt' as envisaged under section 5(21). There is no sufficient evidence on record to prove that any kind of 'Operational Debt' is 'due and payable'. Therefore, no substantial grounds is found to interfere with the well-considered Order of the Adjudicating Authority. (Para 8)

CASE REVIEW

GL Engineering Industries (P.) Ltd. v. *Supreme Engineering Ltd.* (2022) 137 taxmann.com 239 (NCLT - Mum.) (para 8) *affirmed* (***See Annex***).

APS Forex Services (P.) Ltd v. *Shakti International Fashion Linkers* (2020) 114 taxmann.com 367/159 SCL 1 (SC) (para 8) *distinguished*.

CASES REFERRED TO

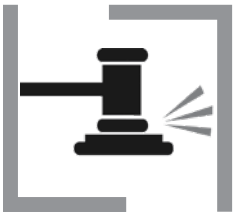
APS Forcer Services (P.) Ltd. v. *Shakti International Fashion Linkers* (2020) 114 taxmann.com 367/159 SCL 1 (SC) (para 2), *Global Infonet Distribution (P.) Ltd.* v. *Tespa Infotech (P.) Ltd.* (Company Appeal (AT) (Insolvency) No. 185 of 2019) (para 2), *A2 Interiors Products (P.) Ltd.* v.

Ahluwalia Contracts India Ltd. (CP (IB) No. 2135/ND/2019) (para 2), *Duke Sporge & Iron* v. *Laxmi Foils* (Company Appeal (AT) (Insolvency) No. 950 of 2019) (para 2), *Neerej Jain* v. *Cloudwalker Streaming Technologies (P.) Ltd.* (2020) 114 taxmann.com 589 (NCL-AT) (para 2) and *Sudhi Sachdev* v. *Appl Industries Ltd.* (2019) 102 taxmann.com 199 (NCL-AT) (para 2).

Abhijeet Sinha, **Ms. Neeha Nagpal** and **Udbhav Nanda**, Advs. *for the Appellant.* **Ms. Meenakshi Arora**, Sr. Adv. **Mohit D. Ram**, **Ms. Aditi Hambarde** and **Vipul Patel**, Advs. *for the Respondent.*

† Arising out of order of NCLT, Mumbai in *GL Engineering Industries (P.) Ltd.* v. *Supreme Engineering Ltd.* (2022) 137 taxmann.com 239.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 137 taxmann.com 240 (NCLAT- New Delhi)



(2022) 137 taxmann.com 242 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Ramesh Kumar Chaudhary *v.* Anju Agarwal, Liquidator of Shree Bhawani Paper Mills Ltd.

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

COMPANY APPEAL (AT) (INSOLVENCY) NO. 957 OF 2021†

MARCH 15, 2022

Section 230 of the Companies Act, 2013, read with regulation 2B of IBBI (Liquidator Process) Regulations, 2016 - Compromise and arrangement - Whether section 230 read with regulation 2B of Liquidation Regulations indicates that it is liquidator who is to take a decision as to whether Scheme for Compromise or Arrangement is to be placed before Tribunal or not - Held, yes - Whether Stakeholders Consultation Committee was not any competent forum for obtaining any advice with regard to Scheme for Compromise or Arrangement submitted under section 230 - Held, yes - Whether thus, action of liquidator in placing scheme of compromise or arrangement before Stakeholders Consultation Committee was uncalled for and was not in accordance with provisions of Code and Regulations - Held, yes - Whether Scheme under section 230 ought to have consent of not less than 75 per cent of secured creditors, and an affidavit to that effect ought to accompany with Scheme - Held, yes - Whether obligation to obtain consent of 75 per cent of creditors is on person who proposes Scheme - Held, yes - Whether where Liquidation Process was initiated against corporate debtor and liquidator was appointed and a Scheme for compromise and arrangement was submitted by respondent Nos. 2 and 3 to liquidator, liquidator was required to intimate respondent Nos. 2 and 3 to obtain consent by 75 per cent of creditors and it was for respondent Nos. 2 and 3 to present scheme before creditors and impress them to give their consent - Held, yes - Whether since no opportunity was given to respondent Nos. 2 and 3 to explain and clarify their Scheme before Financial Creditors or other stakeholder for getting their consent to Scheme as liquidator hurriedly called for a meeting to reject scheme, therefore, respondent Nos. 2 and 3 were to be allowed time to submit revised Scheme along with an affidavit indicating consent of Financial Creditors as contemplated by section 230, sub-section 2(c) - Held, yes (Paras 26, 27, 29 , 33 and 36)

FACTS

- The Liquidation Process was initiated against the corporate debtor by order dated 7-7-2021 passed by the Adjudicating Authority. The Ex-Managing Director of the Corporate

Debtor BVT died on 12-7-2021. On 18-9-2021, MT, wife of late BVT, wrote to Liquidator informing that her husband BVT was the largest shareholder of the corporate debtor holding 14.6 per cent shares and as per his Will she had inherited all his shares and had now become the largest shareholder of the Company.

- The liquidator was requested to appoint MT as member of the Stakeholders Consultation Committee (SCC). Liquidator informed MT that BVT was holding 12.97 percent of shares in individual capacity and holding 1.63 percent of shares as HUF, hence, the largest shareholder was OPG holding 13.48 percent of shares who had been included in the Stakeholders Consultation Committee.

- On 25-9-2021, the liquidator issued e-auction notice. On 30-9-2021, Respondent No. 2 sent an e-mail to the liquidator communicating that members of shareholder of the corporate debtor is proposing a Scheme of Compromise or Arrangement under section 230 of the Companies Act, 2013, hence, she was requested to withdraw e-auction Sale Notice as published in the newspapers on 25-9-2021. It was also communicated that the corporate debtor is a Medium Enterprise under the provisions of Micro, Small & Medium Enterprises Development Act, 2016 and the respondent No. 2 was eligible to submit the Scheme for the resolution of insolvency.

- On 4-10-2021, a Scheme of Compromise or Arrangement under section 230 was submitted to the liquidator. The liquidator provisionally declared the respondent Nos. 2 and 3 ineligible to submit scheme however later respondent Nos. 2 and 3 were declared eligible under section 29A. The liquidator further informed that she had called meeting of the Stakeholders Consultation Committee on 22-10-2021 for deliberations on the Scheme. Meeting of the Stakeholders Consultation Committee took place on 22-10-2021 where the Liquidator informed about the eligibility of the respondent Nos. 2 and 3 to propose a Scheme of Compromise or Arrangement. Liquidator sought views/vote of the members present on the Scheme. According to the minutes, 59.66 per cent voted against the Scheme and it was recorded in the minutes that in terms of section 230(6), an approval of 75 per cent in value of the creditors was required. Hence, on the basis of the voting, liquidator declared that the Scheme had not been approved by the creditors during the Stakeholders Consultation Committee meeting.

- After that the liquidator sought permission of the Stakeholders Consultation Committee members to call respondent No. 2 for presentation and took vote and according to minutes, 91.35 per cent voted against the presentation of the Scheme by respondent

No. 2. It was further resolved by the Stakeholders Consultation Committee that e-auction for 25-10-2021 be continued. The liquidator informed that only one person had given Expression of Interest along with EMD. As per the aforesaid decision in meeting of 22-10-2021, Liquidator proceeded with the e-auction and the appellant was the only bidder whose bid was accepted by the Liquidator. He had given a bid of Rs. 45.30 crores.

- The Adjudicating Authority after hearing the applicants *i.e.* respondent Nos. 2 and 3 as well as the Liquidator, on 1-11-2021, the Adjudicating Authority permitted the applicants- respondent Nos. 2 and 3 to file the Scheme with the Liquidator on or before 8-11-2021 by placing all relevant information on record to enable the liquidator to assess the eligibility of the applicants in terms of section 29A of the IBC and to consider whether an application for directions under section 230(1) of the Companies Act, 2013 should be filed before the Tribunal/Adjudicating Authority for appropriate directions. The Adjudicating Authority further directed that no further steps in regard to the auction shall be taken without leave of Adjudicating Authority.

- On appeal by appellant who was Successful Bidder the Tribunal entertained the appeal on 23-11-2021 and passed an interim order staying the order dated 1-11-2021.

- On appeal to the NCLAT:

HELD

- Liquidation Regulations 2016 were amended by inserting regulation 2B with effect from 6-1-2020. (Para 7)

- By insertion of regulation 2B of the Liquidation Regulation, the statutory Scheme is clear that within 90 days of the order of the liquidation the Scheme of compromise or arrangement be completed. Further, by virtue of sub-regulation (2) of regulation 2B, the period of 90 days is not to be included in the liquidation period. This Tribunal in several judgments has emphasised that before taking steps to sell the assets of the corporate debtor, the Liquidator is to take steps in terms of section 230. (Para 8)

- In the instant case, the appellant has given much emphasis on the fact that Scheme of Compromise or Arrangement was filed one day before expiry of 90 days. The present is a case where a Scheme for Compromise or Arrangement by respondent Nos. 2 and 3 was filed well before 90 days and on 30-9-2021, respondent No. 2 has already intimated the Liquidator that they are submitting a Scheme for Compromise or Arrangement and further steps pursuant to auction notice dated 25-9-2021 be not taken. The mere fact that it was filed one day before expiry of 90 days in no way attaches any ineligibility in consideration of the Scheme. (Para 10)

- The sequence of the events as noted above indicates that after submission of the Scheme on 4-10-2021, at no point of time there was proper consideration of the Scheme submitted by the respondent Nos. 2 and 3. On 14-10-2021, the Liquidator declared respondent Nos. 2 and 3 ineligible to submit a Scheme which decision was reversed by Liquidator herself on 21-10-2021 holding that respondent Nos. 2 and 3 are eligible. After holding the respondent Nos. 2 and 3 eligible there was no impediment in consideration of the Scheme by the liquidator. The only consideration of the Scheme, as is the case of the liquidator, is that the Scheme was considered in Stakeholders Consultation Committee on 22-10-2021 and was not accepted. Hence, the liquidator treated herself absolved from consideration of the Scheme any further and proceeded with the e-auction on 25-10-2021 of the assets of the corporate debtor. The minutes of the Stakeholders Consultation Committee have been brought on the record. Part-2 of the Minutes is with regard to the 'Matters Discussed'. (Para 11)

- First the purpose and object of the Stakeholders Consultation Committee is noticed. Regulation 31A deals with Stakeholders' Consultation Committee. (Para 12)

- The Stakeholders Consultation Committee is only to advise the Liquidator on the matters relating to sale under regulation 32. Sub-regulations (9) and (10) are also relevant. (Para 13)

- Sub-regulation (9) of Regulation 31A provides that the advice of the Stakeholders Consultation Committee shall be taken by a vote of not less than sixty-six per cent and further sub-regulation (10) states that said advice is not binding on the Liquidator. The action of the Liquidator in placing the Scheme of Compromise or Arrangement before the Stakeholders Consultation Committee was uncalled for and is not in accordance with the provisions of the Code and the Regulations. Section 230 read with Regulation 2B of the Liquidation Regulations indicates that it is the Liquidator who is to take a decision as to whether Scheme for Compromise or Arrangement is to be placed before the Tribunal by an Application or not. When sub-regulation (1) of Regulation 31 specifically refers to advice of Stakeholders Consultation Committee on the matters relating to sale under section 32, the Stakeholders Consultation Committee was not any competent forum for obtaining any advice with regard to Scheme for Compromise or Arrangement submitted under section 230. (Para 14)

- Apart from the above, it needs to be noticed that the minutes of the Stakeholders Consultation Committee dated 22-10-2021 to find out the decision taken by the Stakeholders Consultation

Committee and the liquidator. After taking views and votes of all members present in the Stakeholders Consultation Committee, it is recorded in the minutes that 59.66 per cent voted against the Scheme. (Para 15)

- Section 230(6) of the Companies Act, 2013 has been relied by the liquidator for holding that the Scheme has not been approved by the Creditors. (Para 16)

- Section 230 (6) refers to a meeting held in pursuance of sub-section (1) *i.e.* in pursuance of meeting directed by the Tribunal on an Application filed by the liquidator. In the present case, no meeting was convened under section 230(1), hence, there is no applicability of section 230(6). Reliance on section 230(6) was wholly out of place and was uncalled for. The above holding that the Scheme of Compromise or Arrangement submitted by the respondent Nos. 2 and 3 has not been approved by the Creditors during the Stakeholders Consultation Committee meeting, referring to section 230(6) indicates misconception of the whole statutory procedure by the liquidator. Further, it has already been noticed that under sub-regulation (9) of regulation 31A, the advice of Stakeholders Consultation Committee is to be taken by a vote of not less than 66 per cent. Thus, the advice of Stakeholders Consultation Committee with regard to the Scheme was not 66 per cent. (Para 17)

- When an advice of rejection of the Scheme is not by 66 per cent, there was no question of following the said advice of the Stakeholders Consultation Committee by the liquidator and act of liquidator in relying on the said advice amounts to abdication of her own duty to consider the Scheme and shield herself on misconception of law rejecting the Scheme submitted by respondent Nos. 2 and 3. (Para 18)

- At this stage, one more aspect needs to be noticed with regard to which there appear to be misconception in the mind of liquidator and Stakeholders Consultation Committee. What is mandated by sub-regulation (9) of regulation 31A is that Stakeholders Consultation Committee shall advice the Liquidator by a vote of not less than sixty-six per cent of the representative of the Consultation Committee, present and voting. Thus, percentage has to be computed on the members of the Stakeholders Consultation Committee present and voting and not from value of claims of the Financial Creditor. When one looks into the regulation 31A (2) which provides composition of the Consultation Committee, it is clear that the number of representatives have been provided in Column-3. The percentage of voting computed by the Liquidator is not on the basis of votes of members present in the

voting rather on the value of the claim. This is wholly contrary to the statutory Scheme under regulation 31A(9). (Para 19)

- From the above discussion, it is clear that the meeting of the Stakeholders Consultation Committee and its minutes is not in accordance with the statutory Scheme nor it can be held that Stakeholders Consultation Committee had given any advice to reject the Scheme. Consequently, the Liquidator's decision to reject the Scheme submitted by the respondent Nos. 2 and 3 based on such advice also falls on ground. Hence, it is concluded that there was neither any consideration of the Scheme nor there any valid reason for rejecting the Scheme by the Liquidator and consequential action after rejection of the Scheme to proceed with the auction is also unsustainable since the decision to proceed with auction was consequent to rejection of the Scheme submitted by respondent Nos. 2 and 3 which also held to be contrary to the statutory Scheme and statutory requirements. (Para 20)

- During the submissions as well as in the meeting of the Stakeholders Consultation Committee, reliance has been placed by the appellants as well as the Liquidator on section 230(2)(c). The appellant submits that any scheme for corporate debt restructuring is to be consented by not less than 75 per cent of the secured creditors and unless there is consent of 75 per cent of secured creditors, no Application for compromise or arrangement can be entertained by the Liquidator. He submits that fulfilment of requirement under section 230(2)(c) is a condition precedent for consideration of any scheme or to make arrangement. The respondent Nos. 2 and 3 submitted that section 230(2)(c) *i.e.* requirement of not less than 75 per cent of the consent of the corporate debtor is not a condition precedent. (Para 21)

- Section 230(2)(c) uses expression 'any scheme of corporate debt restructuring consented to by not less than seventy-five per cent of the secured creditors in value'. Sub-clause (c) of sub-section (2) of section 230 is attracted when there is a scheme of corporate debt restructuring. The expression used in sub-clause (c) is 'corporate debt restructuring'. Debt restructuring is well known concept. Debt given by a lender can be restructured by the lender by any scheme issued by the lender or Reserve Bank of India or Central Government. Debt restructuring scheme which are issued by the Reserve Bank of India or Central Government from time to time are to mitigate the hardship of the borrowers. (Para 23)

- When lend ers restructure the debt *i.e.* permit the borrower to make the payment debt in different time schedule or different instalment as per any Scheme, the said will be debt restructuring. The

statutory scheme required consent by not less than 75 per cent of the secured creditors for such debt restructuring which indicate that debt restructuring is to be consented by specific majority of secured creditors and it is secured creditors who are generally banks and the financial institution who can restructure the debt. (Para 26)

- The submission of the appellant is acceptable that the Scheme proposed by respondent Nos. 2 and 3 is an arrangement by respondents, wherein alternations have been proposed in the terms of the loan and lesser amount have been proposed to be paid for settling the claim, which is restructuring of corporate debt. Hence, the Scheme under section 230 submitted by respondent Nos. 2 and 3 ought to have consent of not less than 75 per cent of the Secured Creditors, and an affidavit to that effect ought to accompany with the Scheme. (Para 27)

- Obligation to obtain the consent of 75 per cent of the Creditors is on the person who proposes the Scheme. When the Scheme was submitted by respondent Nos. 2 and 3 to the Liquidator, the Liquidator was required to intimate the respondent Nos. 2 and 3 to obtain consent by 75 per cent of creditors and it was for respondent Nos. 2 and 3 to present the Scheme before Creditors and impress them to give their consent. The Liquidator in the present case, after holding respondent Nos. 2 and 3 to be eligible to submit the Scheme on 21-10-2021, placed the Scheme before Stakeholder Consultation Committee on the next day, that is, 22-10-2021 and refused respondent Nos. 2 and 3 to present and clarify the Scheme before the Stakeholder Consultation Committee. The procedure adopted by the Liquidator for getting the Scheme rejected by Stakeholder Consultation Committee was not a proper procedure. Respondent No. 2 after receiving the e-mail from Liquidator on 21-10-2021 that the Liquidator has changed her opinion and held respondent Nos. 2 and 3 eligible to submit Scheme on the same day, that is, 21-10-2021, respondent No. 2 sent an e-mail to Liquidator requesting to give reasonable opportunity to clarify the Scheme before Members of the Stakeholder Consultation Committee. (Para 28)

- As noted above no opportunity was given to respondent Nos. 2 and 3 to explain and clarify their Scheme before Financial Creditors and Members of Stakeholder Consultation Committee on 22-10-2021, on which date the meeting was convened by the Liquidator. The Liquidator first put the Agenda consideration of the Scheme submitted by respondent Nos. 2 and 3 and when it was disapproved, the Liquidator submitted another proposal before the Committee as to whether the respondent Nos. 2

and 3 be permitted to present their Scheme before the Stakeholder Consultation Committee, which obviously got rejected since Scheme had already been disapproved by the Stakeholder Consultation Committee, prior to this item being taken for consideration. It was incumbent to the Liquidator to first put the resolution before the Stakeholder Consultation Committee as to whether respondent Nos. 2 and 3 be permitted to present and clarify their Scheme, which was not done to the prejudice of respondent Nos. 2 and 3. The persons, who submitted the Scheme that is respondent Nos. 2 and 3 could not get any opportunity to present their Scheme before the Financial Creditors and obtain their consent. The Liquidator after declaring the respondent Nos. 2 and 3 eligible on 21-10-2021, got the Scheme disapproved on the next day in the meeting dated 22-10-2021 without giving any opportunity to respondent Nos. 2 and 3 to appear before Stakeholder Consultation Committee or to approach the Financial Creditors for getting their consent to the Scheme. Prior to 21-10-2021, respondent Nos. 2 and 3 had no opportunity to approach the Financial Creditors for their consent, since the Liquidator has declared respondent Nos. 2 and 3 ineligible to submit the Scheme under section 29A of the Code. The person submitting Scheme under section 230, sub-section (1) is entitled to place the Scheme before Financial Creditors and make efforts to obtain their consent, which was denied to respondent Nos. 2 and 3, in the present case, due to the course adopted by the Liquidator. Thus, it is viewed that respondent Nos. 2 and 3 are entitled to an opportunity to place and explain their revised Scheme before Financial Creditors and it is for the Financial Creditors to consider the Scheme for purposes of giving consent as contemplated by section 230, sub-section (2) (c) of the Companies Act. The appellant has submitted that Scheme submitted after the order of the Adjudicating Authority proposes a higher amount as compared to one which was offered by appellant in auction held on 25-10-2021. (Para 29)

- One more aspect is noticed with regard to claim of the respondent Nos. 2 and 3 that MT, wife of late BVT, was the largest stakeholder and was entitled to participate in the Stakeholders Consultation Committee meeting. The relevant e-mails with regard to claims submitted by MT has been brought on the record by the appellant himself in the Appeal. On 18-9-2021, MT, wife of late BVT, has informed the Liquidator about the death of Chairman and to include her as the largest shareholder. (Para 30)

- The aforesaid claim was rejected by the Liquidator on 20-9-2021. (Para 31)

- From e-mail which was sent by the Liquidator itself, it is clear that Late BVT was holding 12.97 per cent of shares and holding 1.63 per cent shares as HUF. When these two figures are added, the figure comes to 14.50 per cent which was more than 13.48 per cent, whom the Liquidator has permitted in the meeting of the Stakeholders Consultation Committee. It is further relevant to notice that after rejection of the claim on 20-9-2021 another e-mail was sent by MT where she stated that she in her personal capacity holds 0.83 per cent share and added to the individual shares inherited by her of 12.97 per cent, her total holding excluding HUF adds to 13.70 per cent which is higher than OPG holding 13.48 per cent. It is relevant to note that after rejection of the claim of MT, she filed an application before the Adjudicating Authority and Adjudicating Authority has accepted the claim of MT. It is further relevant to notice that the claim of MT was filed as shareholder which was rejected by the Liquidator on the ground of delay *vide* e-mail dated 22-9-2021 against which order was filed which has been decided by the Adjudicating Authority on 15-11-2021 condoning the delay in submission of the claim and Liquidator was directed to adjudicate the claim on merits. (Para 32)

- It is noticed that the respondent No. 2 after he was informed by the Liquidator on 21-10-2021 that respondent No. 2 is eligible to submit a Scheme of Compromise or Arrangement, respondent No. 2 requested the Liquidator that he be permitted to explain the Scheme. Stakeholders Consultation Committee minutes dated 22-10-2021 has already been extracted above which indicates that the Liquidator first put the Scheme before the members of the Stakeholders Consultation Committee for their views and votes and after it was rejected, she obtained the opinion of the Stakeholders Consultation Committee as to whether respondent No. 2 be called for presentation and she took vote on the said issue. The aforesaid conduct of liquidator indicates that liquidator herself never wanted to give any opportunity to the respondent No. 2 to appear before the Stakeholders Consultation Committee and to explain his Scheme. Had liquidator wanted to give any opportunity and she wanted to obtain advice of the Stakeholders Consultation Committee on the above, she ought to have put the item before Stakeholders Consultation Committee first to consider before putting their Scheme for consideration. The hurried calling for the meeting on 22-10-2021, when she decided on 21-10-2021 that respondent Nos. 2 and 3 are eligible, then not providing opportunity to respondent Nos. 2 and 3 to explain the Scheme before the Financial Creditors or other stakeholders indicate that

the liquidator never wanted the Scheme to be considered and she took all steps to get the Scheme rejected so that she may proceed with the auction which she has already fixed for 25-10-2021. Further conduct of the liquidator after passing of the interim order by this Court on 23-11-2021 to proceed to issue Sale Certificate, disbursing the amount is also not an appropriate action when the Appeal was entertained by this Tribunal and was under consideration and the liquidator was represented by a counsel, even on the first day, the liquidator could have asked for clarification and further direction for permitting the liquidator to proceed with the finalisation of the sale and distribution of assets, delivery of possession of the assets to Successful Bidder, which was not done. (Para 33)

- The Successful Bidder is in Appeal and his Appeal has not been allowed, only an interim order has been passed on 23-11-2021 staying the order dated 1-11-2021. It is order dated 1-11-2021 was an interim order passed by the Adjudicating Authority and the application is still pending before the Adjudicating Authority. There was no such great hurry in proceeding to issue Sale Certificate, disburse the amount and handover the assets of the corporate debtor when application was pending as well as this Appeal pending before this Tribunal. (Para 34)

- The interim order dated 23-11-2021 has put the order dated 1-11-2021 inoperative but the order dated 1-11-2021 was not quashed, it was appropriate for the Liquidator to obtain any clarification from the Adjudicating Authority or by this Tribunal for proceeding further to complete the process which was put in question before the Adjudicating Authority as well as before this Appellate Tribunal in Appeal. (Para 35)

- In result of foregoing discussion, this Appeal is disposed of in following manner:

  (*i*) The order dated 1-11-2021 passed by the Adjudicating Authority is affirmed. In consequence to affirmation of the order dated 1-11-2021 of the Adjudicating Authority, interim order passed in this Appeal dated 23-11-2021 stands discharged and all actions taken subsequent to the interim order dated 23-11-2021 stands vacated.

  (*ii*) Respondent Nos. 2 and 3 are allowed one month's time from this date to submit the revised Scheme along with an affidavit indicating the consent of Financial Creditors as contemplated by section 230, sub-section 2(*c*), if any.

  (*iii*) In event, respondent Nos. 2 and 3 are able to obtain the requisite consent of the Financial Creditors, such

Scheme submitted before the Liquidator shall be filed before the Adjudicating Authority for taking further proceedings as per section 230 of the Companies Act.

(*iv*) The Adjudicating Authority may finally decide the appeal and also pass such consequential orders as may be necessary in the facts of the present case. The parties may act in accordance with the order of the Adjudicating Authority in the proceedings. (Para 36)

CASE REVIEW

Shree Bhawani Paper Mills Ltd., In re (2022) 137 taxmann.com 241 (NCLT - All.) (para 36) *affirmed* (***See Annex***).

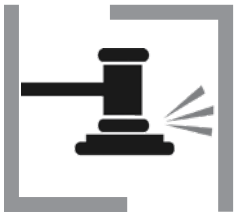
CASES REFERRED TO

S.C. Sekaran v. *Amit Gupta* (2019) 103 taxmann.com 222/152 SCL 536 (NCLAT - New Delhi) (para 8), *Y. Shivram Prasad* v. *S. Dhanpal* (2019) 104 taxmann.com 377/153 SCL 294 (NCLAT - New Delhi) (para 9), *CIT* v. *Punjab Stainless Steel Industries* (2015) 229 Taxman 423/(2014) 46 taxmann.com 68/364 ITR 144 (SC) (para 25) and *Shree Chamundi Mopeds Ltd.* v. *Church or South India Association* (1992) 3 SCC 1 (para 34).

Arun Kathpalia, Sr. Adv. and **Anuj Tiwari**, Adv. *for the Appellant.* **Abhishek Anand**, **Samriddh Bindal**, Advs., **Tarun Gulati**, Sr. Adv., **Pulkit Deora**, **Harsh Gurbani** and **Kumar Sambhav**, Advs. *for the Respondent.*

† Arising out of order passed by NCLT, Allahabad Bench in *Shree Bhawani Paper Mills Ltd.*, In re (2022) 137 taxmann.com 241.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 137 taxmann.com 242 (NCLAT- New Delhi)



(2022) 137 taxmann.com 244 (NCLAT - New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Neeraj Singal *v.* Tata Steel Ltd.

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

COMPANY APPEAL (AT) (INSOLVENCY) NO. 988 OF 2021†

MARCH 7, 2022

Section 31 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - Corporate debtor underwent a CIRP in which a resolution plan submitted by respondent was approved by NCLT - As per said resolution plan, resolution applicant was required to subscribe 72.65 per cent equity shares of corporate debtor - Resolution applicant was also required to acquire 2.35 per cent equity shares of erstwhile promoter group including appellants at Rs. 2 per share so that resolution applicant would have 75 per cent of shareholding of corporate debtor leaving 25 per cent to public shareholding - Whether section 31(1) makes it clear that resolution plan approved by NCLT is binding on corporate debtor, its employees, members and creditors - Held, yes - Whether thus, there was no error in judgment of NCLT allowing application filed by resolution applicant seeking a direction to appellants to sell their shares to resolution applicant in compliance of resolution plan approved and appellants could not oppose said application on ground that they could not be compelled to sell their shares at Rs. 2 when market price of share was much more - Held, yes (Para 28)

FACTS

- 'Bhushan Steel' *i.e.* corporate debtor owed a debt of Rs. 59 thousand crores to its creditors. On an application filed by State Bank of India, Corporate Insolvency Resolution Process (CIRP) was initiated against corporate debtor.
- The resolution plan submitted by R1-Tata Steel was approved by the Adjudicating Authority. Tata Steel implemented the plan by making payment to the creditors and appointing necessary managerial officials.
- Bamnipal Steel a subsidiary of Tata Steel wrote to the promoters including the appellants to transfer all of their unpaid equity shares of the Company held by them to Bamnipal Steel for consideration at the rate of INR 2/- per share. Details of dematerialized account were also set out in the letter. The appellants did not reply to letter nor sold their shares as requested.
- A letter was written by Bhushan Steel to National Stock Exchange (NSE) and Bombay Stock Exchange

informing that pursuant to the approval of the Resolution Plan by the Adjudicating Authority, the same was being implemented and requesting National Stock Exchange of India Limited as well as to Bombay Stock Exchange Limited for Re-classification under regulation 31A, sub-clause (5) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (hereinafter referred to as 'Regulation 2015). Regulation 2015 came to be amended by Amendment Regulation dated 2018 (dated 31-5-2018) with effect from 1-6-2018. National Stock Exchange and Bombay Stock Exchange communicated their approval for Re-classification of Promoter under Regulation 2015 and the appellants were re-classified.

- Tata Steel filed an application to NCLT seeking direction to promoters of corporate debtor to transfer 2.35 per cent equity shares of the Bhushan Steel held by them in favour of Bamnipal Steels in compliance of resolution plan approved. After hearing the parties, the Adjudicating Authority passed order allowing the application while holding that promoters have to sell their shares to the Bamnipal steels at the rate of INR 2/- per share. Aggrieved by the said order of the Adjudicating Authority, instant appeal had been filed by erstwhile promoters of the Bhushan Steel.

- The appellant submits that Adjudicating Authority by issuing the impugned direction had virtually modified the approved Resolution Plan. It is submitted that as per Resolution Plan, Annexure-5 Para-3, the Tata Steel Ltd. was obliged to subscribe to 89,70,44,238 equity shares of the Company at face value of INR 2/- per share, whereas Tata Steel Ltd. has subscribed only 794,428,986 equity shares of the Company at a face value of INR 2/- and has written to the appellants to sell their equity shares held by Existing Promoter Group i.e. 256,53,813 at the rate of INR 2/- per share, which was not permissible. It is submitted that eventuality of purchasing of equity shares of Existing Promoter Group was to arise only when SEBI does not allow the erstwhile Existing Promoter Group shareholding to be counted towards public shareholding. In the present case, a letter has already been written to National Stock Exchange and Bombay Stock Exchange for re-classification under regulation 31A of Regulation 2015. When approval was granted by SEBI for re-classification there was no restraint in treating the erstwhile Promoter Group share into public shareholding. The appellants could very well continue with its public shareholding, which could not be compelled to be sold to Tata Steel as had been directed in the impugned order. The appellants being public shareholders were entitled to retain the subject shareholding and respondent was attempting to create a wrongful impression that the present appeal had been filed with an intent to avail higher sale price of the subject shareholding.

- It was a case of respondent that all acts taken by respondent were in accordance with the Resolution Plan and Option 2 was elected by the Respondent since Option 1 on the relevant date was not permissible, there being a specific prohibition from treating the re-classified Promoter shareholding towards minimum public shareholding i.e. 25 per cent. Option 1 thus was not permissible and was statutorily prohibited, hence opting for contingency plan as provided in the Resolution Plan was perfectly in accordance with Plan and no exception can be taken by the Appellants. The Appellants, who are erstwhile Promoter and who are responsible for insolvency of the Corporate Debtor cannot be allowed to continue their shareholding in the Bhushan Steel, now undertaken by the Tata Steel in defiance of Resolution Plan.

HELD

- It is noted that purchase of erstwhile Promoters equity shareholding in Bhushan Steel is an integral part of the approved Resolution Plan. The mode and manner of acquiring shares of erstwhile Promoter is provided in the approved Resolution Plan. The Resolution Applicant implemented the entire Resolution Plan by taking all necessary steps required to be taken under the Plan. Entire outstanding financial debt was discharged. Tata Steel made financial payment of INR 35,232.57 crores to the financial creditors and towards the equity of the corporate debtor. On closing day, the resolution applicant subscribed 72.65 per cent equity shares of the corporate debtor as per the Resolution Plan. Tata Steel/Bamnipal Steel had to hold 75 per cent equity shares of the corporate debtor on the closing day. Hence, in addition to subscription of 72.65 per cent equity shares, the remaining 2.35 per cent equity shares held by the erstwhile promoters including the appellants, which were to be sold by the appellants at INR 2/- per share. Bamnipal Steel had issued a letter to appellants calling upon promoters to sell equity shares by them, which letter was neither replied nor shares were sold. It is submitted that the appellant after dismissal of their appeal by this Tribunal against order had filed Civil Appeal before the Supreme Court, where they have taken a ground that the shareholding of the appellant cannot be compulsory acquired at a sum of INR 2/- per share. Transfer of shares cannot be forcefully acquired. (Para 8)

- Resolution Plan provides two structures (methods) for allotment of equity shares to the Resolution Applicant. As per first structure (method) Resolution Applicant has to subscribe 75 per cent of equity shares that is 89,70,44,238. The Existing Promoter Group equity share is 2.14 per cent that is 256,53,813 was to be in rest 25 per cent shareholding. The first structure was to take place in event erstwhile Existing Promoter Group shareholding is not counted

towards promoter shareholding for the purposes of Regulation 2015. The Securities Contracts (Regulation) Rules, 1957, rule 19A provided that "Every listed company other than public sector company shall maintain public shareholding of at least twenty five per cent. The Bhushan Steel being listed company, it was obliged to maintain public shareholding of at least 25 per cent. (Para 13)

- Regulation clearly prohibit public shareholding of Promoter pursuant to re-classification to be counted towards achieving compliance with minimum public shareholding requirement under rule 19A. Thus, shareholding of 2.14 per cent, which was held by erstwhile promoter group, even if they were treated as public shareholding cannot be counted towards 25 per cent shareholding, which is statutory requirement to be maintained. Thus, Structure one, on the date when Plan was approved ok did not permit subscribing of 75 per cent shareholding by the Tata Steels. It was due to above reasons that the structure two, which was contained in the Resolution Plan was adopted. Under the structuure-2, Tata Steel was required to subscribe 794,428,986 equity shares at the face value of INR 2/-, which Tata Steel did and further the Resolution Plan contemplated. 'Further, the Resolution Applicant on the Closing Date, purchase, and the Existing Promoter Group shall be bound to sell, all the shares held by Existing Promoter Group *i.e.* 256,53,813 equity shares for consideration of Rs. 2 (Indian Rupees two only) per share'. Bamnipal Steel proceeded to act under structure two and wrote to erstwhile Promoter Group to sell their shares at the rate of INR 2/-. (Para 14)

- The Tata Steel thus itself opted Structure two and wrote to the appellants to sell their shares at the rate of INR 2/- per share, as per Resolution Plan, which letter was neither replied nor the appellants sold their equity shares. Bhushan Steel instead writing to National Stock Exchange that it shall ensure the process of re-classification, actually wrote letters to both National Stock Exchange and Bombay Stock Exchange to re-classify the Promoters shareholding. It is submitted that on the date of approval granted, will be considered the closing date and it is on 25-6-2018 that applicability of structures provided in Resolution Plan has to be examined. It is submitted that on 26-5-2018, the prohibition contained in regulation 31A, sub-clause (7)(b) was not applicable since the Regulation 2015 was amended by regulation 2018 with effect from 1-6-2018, by which sub-regulation (9) was added making it clear that sub-regulation (7) shall not apply, if re-classification of existing Promoter or Promoter Group of the Company as per the Resolution Plan approved under section 31. (Para 15)

- The amended Regulation dated 31-5-2018 made in 2015 Regulation

were only prospective in nature and shall be applicable with effect from 1-6-2018 when Notification was gazetted, which notification was not applicable on 15-5-2018 or 18-5-2018. The prohibition contained in regulation 31A, sub-regulation 7(b) was very much in existence on the day when Resolution Plan was approved. (Para 16)

- Thus, in event the relief and concessions regarding dispensation from regulation 31A(7)(b) was allowed by the Adjudicating Authority, the structure one as contained in the Resolution Plan would have been implemented. But Adjudicating Authority having not allowed the dispensation, the prohibition contained in regulation 31A(7)(b) of Regulation 2015, continued which prohibited the Resolution Applicant to adopt the structure one mentioned in the Resolution Plan. There is no error in the action of Respondents in proceeding to opt to acquire the equity shares of the Promoter Group by asking them to sell the equity shares at the rate of INR 2/- after subscribing 72.65 per cent of equity shares, so that after purchase of the equity shares of Existing Promoter Group, the Respondent may have 75 per cent of shareholding leaving 25 per cent to the public shareholding. (Para 18)

- When respondent acted on Regulation 2015, which contains prohibition of shareholding of existing Promoter Group to be counted for achieving minimum 25 per cent of public shareholding, action of respondent not to proceed under structure one can neither be said to be contrary to Resolution Plan or any statutory provisions, rather the said action is inconsonance of the statutory provisions as existed at the relevant date that is 15-5-2018 and 18-5-2018. As noted above, the reliefs and concessions asked for dispensation of rigour under section 31A(7)(b) was denied by the Adjudicating Authority, there was no occasion to wait for any decision of SEBI, when Regulation also clearly makes prohibition in the above regard. On 18-5-2018, when structure two was adopted by respondent, it cannot be imagined that in future the rigour of section 31A(7)(b) shall be relaxed when acquisition is in pursuance of resolution plan. The letters issued by National Stock Exchange and Bombay Stock Exchange on 25-6-2018 were clearly in accord with amended Regulation, that is regulation 31A sub-clause (9). The wholesome reading of para 3 of annexure 5 indicate that existing Promoter Group could have retained their equity shares only if they fall within the group of public shareholding of 25 per cent, which was impermissible as structure two was adopted by subscribing to 72.65 per cent shares and to acquire 2.35 per cent equity shares of existing Promoter Group to make their shareholding by 75 per cent, which was specifically provided for in para 3 of Resolution Plan itself, which we have quoted above at paragraph 12 of this judgment.

Thus, the request sent to appellants on 18-5-2018 to sell their shares at the rate of INR 2/- was as per the Resolution Plan, which cannot be said to be in any way contrary to the Resolution Plan. (Para 21)

- What is being agitated by the appellants before the Adjudicating Authority while opposing the application filed under section 60 sub-section (5) is that they cannot be compelled to sell their shares at the rate of INR 2/- per equity share and they are entitled to keep their shares with them without selling it. When the Resolution Plan clearly contemplated that in event structure two was followed by respondent to oblige the appellant to sell their equity shares at the rate of INR 2/- and specific number of shares that is 256,53,813 as mentioned in the plan itself, the appellants cannot refuse to follow the aforesaid portion of the resolution plan. As per section 31, sub-section (1), after approval of the Resolution Plan, same is binding on corporate debtor, its employees, members, creditors. (Para 25)

- Resolution Plan as per section 30(2)(e) has to be in accordance with law for the time being in force. section 30(2) sub-clause (e) mandates - "does not contravene any of the provisions of the law for the time being in force". The implementation of the Resolution Plan has to be thus in accordance with the existing law. Thus, the implementation of resolution plan by following structure two was fully permissible and no exception can be taken by the appellants when they are asked to sell their equity shares as per plan itself. There is error in the judgment of the Adjudicating Authority allowing the application filed by respondent while holding that erstwhile Promoters have to sell their shares to the Tata Steel at the rate of INR 2/- per share. (Para 28)

CASE REVIEW

Tata Steel Ltd. v. *Neeraj Singal* (2022) 137 taxmann.com 243 (NCLT - New Delhi) (para 29) *reversed* (***See annex***).

CASES REFERRED TO

Neeraj Singal v. *Bhushan Steel Ltd.* (Company Appeal (AT) (Insolvency) No. 221 of 2018, dated 10-8-2018) (para 2).

Kapil Sibal, **Niranjan Reddy**, Sr. Advs., **Sahil** and **Ms. Aarushi Tiku**, Adv. *for the Appellant.* **Ramji Srinivasan**, Sr. Adv., **Ms. Anindita Roy**, **Ms. Simran Bhat**, **Ms. Rajshree Chaudhary** and **Ms. Vatsala Rai**, Advs. *for the Respondent.*

† Arising out of order of NCLT, New Delhi in *Tata Steel Ltd.* v. *Neeraj Singal* (2022) 137 taxmann.com 243 .

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 137 taxmann.com 244 (NCLAT- New Delhi)

Code of conduct for Insolvency Professionals

Insolvency Code of Ethics (UK Laws)

The Code of Ethics was produced by the Joint Insolvency Committee and has been adopted in substantially similar terms by all of the bodies recognized under the relevant legislation in England and Wales, Scotland and Ireland to grant licenses to insolvency practitioners. The Code is stated to apply to all the Insolvency Practitioners.

Scope

- Insolvency practitioners shall ensure that the Code is applied at all times in relation to the conduct of an insolvency appointment or circumstances which might lead to an insolvency appointment.
- Insolvency practitioners shall follow the fundamental principles, apply the conceptual framework and specific requirements of the Code in all their professional and business activities whether carried out with or without reward and in other circumstances where to fail to do so would bring discredit to the insolvency profession.

- Insolvency practitioners shall be guided not merely by the terms but also by the spirit of the Code.
- Although, an insolvency appointment will be personal to the insolvency practitioner rather than their firm or employing organisation, insolvency practitioners shall ensure that work for which they are responsible, which is undertaken by members of the insolvency team on their behalf, is carried out in accordance with the requirements of this Code.

Fundamental Principles

There are five fundamental principles of ethics for insolvency practitioners:

(*a*) Integrity - to be straightforward and honest in all professional and business relationships.

(*b*) Objectivity - not to compromise professional or business judgments because of bias, conflict of interest or undue influence of others.

(*c*) Professional Competence and Due Care - to:

i. Attain and maintain professional knowledge and skill at the level required to ensure that a client or employing organisation receives competent professional service, based on current technical and professional standards and relevant legislation; and

ii. Act diligently and in accordance with applicable technical and professional standards.

(*d*) Confidentiality - to respect the confidentiality of information acquired as a result of professional and business relationships.

(*e*) Professional Behaviour - to comply with relevant laws and regulations and avoid any conduct that the insolvency practitioner knows or should know might discredit the profession.

An Insolvency practitioner is required to comply with each of the fundamental principles.

Threats to compliance with the fundamental principles

The environment insolvency practitioners work in and the relationships they form can expose them to threats to the fundamental principles. Following are the threats to compliance with the fundamental principles:

(*a*) Self-interest threat - the threat that a financial or other interests of the firm, an individual within the firm or a close or immediate family member of an individual within the firm will inappropriately influence the insolvency practitioner's judgment or behaviour;

(*b*) Self-review threat - the threat that the insolvency practitioner will not appropriately evaluate the results of a previous judgment made or service performed by an individual within the firm, on which the insolvency practitioner will rely when forming a judgment as part of providing a current service;

(*c*) Advocacy threat - the threat that an individual within the firm will promote a position or opinion to the point that the insolvency practitioner's objectivity is compromised;

(*d*) Familiarity threat - the threat that due to a long or close relationship, an individual within the firm will be too sympathetic or antagonistic to the interests of others or too accepting of their work; and

(*e*) Intimidation threat - the threat that an insolvency practitioner will be deterred from acting objectively because of actual or perceived pressures, including attempts to exercise undue influence over the insolvency practitioner.

Identifying Threats

The insolvency practitioner shall identify threats to compliance with the fundamental principles.

Evaluating Threats

When the insolvency practitioner identifies a threat to compliance with the fundamental principles, the insolvency practitioner shall evaluate whether such a threat is at an acceptable level.

Addressing Threats

If the insolvency practitioner determines that the identified threats to compliance with the fundamental principles are not at an acceptable level, the insolvency practitioner shall address the threats by eliminating them or reducing them to an acceptable level. The insolvency practitioner shall do so by:

(*a*) eliminating the circumstances, including interests or relationships, that are creating the threats;

(*b*) applying safeguards, where available and capable of being applied, to reduce the threats to an acceptable level; or

(*c*) declining or ending the insolvency appointment.

Safeguards

Safeguards are actions, individually or in combination, that the insolvency practitioner takes that effectively reduce threats to compliance with the fundamental principles to an acceptable level.

Safeguards vary depending on the facts and circumstances. Examples of actions that in certain circumstances might be safeguards to address threats include:

- Assigning additional time and qualified personnel to required tasks when an insolvency appointment has been accepted might address a self-interest threat.
- Having an appropriate reviewer who was not a member of the team review the work performed or advise as necessary might address a self-review threat.
- Involving another insolvency practitioner to perform or re-perform part of the engagement might address self-interest, self-review, advocacy, familiarity or intimidation threats.

- Disclosing any referral fees or commission arrangements received for recommending services or products might address a self-interest threat.

The insolvency practitioner shall form an overall conclusion about whether the actions that the insolvency practitioner takes, or intends to take, to address the threats created will eliminate those threats or reduce them to an acceptable level. In forming the overall conclusion, the insolvency practitioner shall:

(*a*) review any significant judgments made or conclusions reached; and

(*b*) use the reasonable and informed third party test.

Reference: Insolvency Code of Ethics, UK

FAQs on appointment of Registered Valuers

1. What are the provisions relating to valuation during CIRP process under the Insolvency and Bankruptcy Code of India?

As per Regulation 27 IBBI (Insolvency Resolution process for corporate persons) Regulations, 2016, the resolution professional shall within 7 days of his appointment but not later than 47th day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with Regulation 35.

As per Regulation 35 of IBBI (Insolvency Resolution process for corporate persons) Regulations, 2016,Fair value and liquidation value shall be determined in the following manner:-

(*a*) the two registered valuers appointed under regulation 27 shall submit to the resolution professional an estimate of the fair value and of the liquidation value computed inaccordance with internationally accepted valuation standards, after physical verificationof the inventory and fixed assets of the corporate debtor;

(*b*) if in the opinion of the resolution professional, the two estimates of a value are significantly different, he may appoint another registered valuer who shall submit anestimate of the value computed in the same manner; and

(*c*) the average of the two closest estimates of a value shall be considered the fair value or the liquidation value, as the case may be.

2. What are the provisions relating to valuation during Liquidation process under the Insolvency and Bankruptcy Code of India?

As per Regulation 35 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

(1) Where the valuation has been conducted under regulation 35 of CIRP Regulations, the liquidator shall consider the average of the estimates of the values arrived under those provisions for the purposes of valuations under these regulations.

(2) In cases not covered under sub-regulation (1) or where the liquidator is of theopinion that fresh valuation is required under the circumstances, he shall within seven days of the liquidation commencement date, appoint two registered valuers to determine the realisable value of the assets or businesses under clauses (*a*) to (*f*) of regulation 32 of the corporate debtor:

(3) The Registered Valuers appointed under sub-regulation (2) shall independently submit to the liquidator the estimates of realisable value of the assets or businesses, as the case may be, computed in accordance with the Companies (Registered Valuers and Valuation) Rules, 2017, after physical verification of the assets of the corporate debtor.

(4) The average of two estimates received under sub-regulation (3) shall be taken as thevalue of the assets or businesses.

3. What are the provisions relating to valuation during Voluntary Liquidation process under the Insolvency and Bankruptcy Code of India?

As per Section 59 of the Code, a corporate person who intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation proceedings subject to the fulfilment of certain conditions.

A declaration of solvency from majority of the directors of the company verified by an affidavit shall be submitted which shall be accompanied with audited financial statements and record of business operations of the company for the previous two years or for the period since its incorporation, whichever is later and a report of the valuation of the assets of the company, if any prepared by a registered valuer.

4. Who shall be appointed as the registered valuer under the Code?

As per IBBI circular dated 17th October, 2018, every valuation required under the Code or any of the regulations made thereunder is required to be conducted by a 'registered valuer', that is, a valuer registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017. It is hereby directed that with effect from 1st February, 2019, no insolvency professional shall appoint aperson other than a registered valuer to conduct any

valuation under the Code or any of the regulations made thereunder.

5. What is the eligibility criteria for appointment of registered valuers under the Code?

As per Regulation 27 of IBBI (CIRP) Regulations, 2016 & Regulation 35 of IBBI (Liquidation) Regulations, 2016:

The following persons shall not be appointed as Registered Valuers, namely: -

a. a relative of the resolution professional/Liquidator;

b. a related party of the corporate debtor;

c. an auditor of the corporate debtor at any time during the period of five years preceding theinsolvency commencement date;

d. a partner or director of the insolvency professional entity of which the resolution professional/liquidator is a partner or director.

6. Whether approval of CoC is required for appointment of registered valuers?

As per Section 20 of the Code, the interim resolution professional shall have the authority to appoint accountants, legal or other professionals as may be necessary.

However, As per Regulation 34 of IBBI (Insolvency Resolution process for corporate persons) Regulations, 2016, the committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.

Expenses include fees to be paid to Resolution Professional, fees to be paid to insolvency professional entity, if any , fees to be paid to professionals, if any and other expenses to be incurred by the Resolution Professional.

Accordingly, there is no need to take approval for the appointment of resolution professional, however the fees paid to them need to be approved by the committee of creditors.

7. Whether for each class of assets single valuer be appointed?

As per Regulation 27 of the IBBI (CIRP) Regulations, 2016, for each class of assets separate registered valuers shall be appointed.

Policy/Regulatory update

On 29th March, 2022, IBBI notified the amendment made to Insolvency and Bankruptcy Board of India (Online delivery of educational course and continuing professional education by insolvency professional agencies and registered valuers organisations) Guidelines, 2020 thereby extending validity of Insolvency and Bankruptcy Board of India (Online Delivery of Educational Course and Continuing Professional Education by Insolvency Professional Agencies and Registered Valuers Organisations) Guidelines, 2020 till 30th September, 2022.

Group Insolvency Regime in Japan

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

There are no specific provisions that lay out the procedure for insolvency of group companies. There is no specific legal provision on co-operation between stakeholders or insolvency practitioners. In most cases, the court appoints the same trustee if the companies share a parent subsidiary relationship. The companies are also under the same jurisdiction of the court. In 2000, Japan enacted the Law of Recognition and Assistance for Foreign Insolvency Proceedings (LRAFIP) which adopted almost all the provisions of the UNCITRAL Model Law on Cross-Border Insolvency, and abolished the notorious territorialism contained in Japanese insolvency laws for so many years. Since the LRAFIP became effective in 2002.

Two case studies to understand the practical applicability of such procedures and laws is as under:

KANEBO CASE

- The Kanebo groups has engaged in several businesses including cosmetics, food, medicine, natural and chemical textiles, appliances and others. The group consisted of 55 domestic subsidiaries and 8 affiliated companies. In addition to these subsidiaries, there were 30 subsidiaries and affiliated companies in Brazil, China, France, Germany, Indonesia, Italy, Mexico, the UK, and the US.
- The IRCJ helped to re-structure debt owed to about 100 financial creditors by 35 domestic Kanebo companies, including the parent company, out of 59 domestic affiliated companies. Regarding the remaining 24 affiliated companies, there was no need to help because they were solvent or debts owed to creditors outside the Kanebo group were immaterial.
- As for the 35 companies helped by the IRCJ (Industrial Revitalisation Corporation of Japan), the debts were so complexly tied up that it was not realistic to single them out. There were downstream, upstream and cross-guarantees between group companies. There were also inter-group debts.
- The brand name of Kanebo was well-established for more than a century in Japan and also widely recognised overseas. Management of the parent company controlled subsidies directly or indirectly. After the public announcement of the IRCJ's assistance to Kanebo, the parent company guaranteed all debts owed by subsidiaries to external creditors, subject to the condition that all financial creditors whose debts were to be impaired by the proposed debt restructuring plan consent to the plan. After intensive negotiations, unanimous consent to the plan was obtained. Partial debt forgiveness on a prorated basis, and other debt restructuring were consummated according to the plan.
- Except for selected viable cosmetics wholesalers that could continue their businesses in Europe and the US, most foreign subsidiaries were sold or closed because they were mostly engaged in non-core businesses with no synergies with the intended core business after debt restructuring. When the number of shares was enough to control the subsidiaries, they were sold to buyers by auction.
- If the affiliated company was a joint venture with a foreign partner, the stock owned by Kanebo was sold to the partner at a price settled by negotiation based on a valuation made by professional advisers. Fortunately, most foreign subsidiaries and their affiliated companies were solvent and able to pay their debts in full.

- Although a few affiliated companies located in China were insolvent, the parent Kanebo had to pay the affiliated companies' debts in full and supply additional money before leaving the country for fear that liquidation costs might exceed the unpaid debts. For these reasons, there was no need to file insolvency or out-of-court workout proceeding in foreign countries.

THE DAIEI CASE

- Daiei was a giant retailers operating more than 250 general merchandise stores, supermarkets and discount stores. The IRCJ helped 12 companies out of 115 affiliated companies which belonged to the Daiei group.
- The group companies owed debts to more than 100 financial institutions which were not related to the group. The IRCJ helped only subsidiaries with excessive debts owed to unrelated creditors and controlled by Daiei. The parent Daiei also guaranteed the subsidiaries' debts and restructured these debts in a similar manner to Kanebo.
- Daiei had two subsidiaries in the US and three subsidiaries in China. These foreign subsidiaries were solvent and there was no need to help. Daiei sold these foreign subsidiaries according to the accepted reorganisation plan that had been drafted with the assistance of the IRCJ, and paid their debts in full using the money received from the sale of the companies.

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