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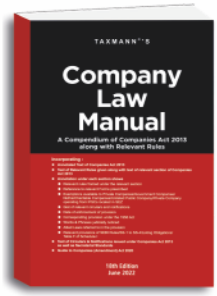
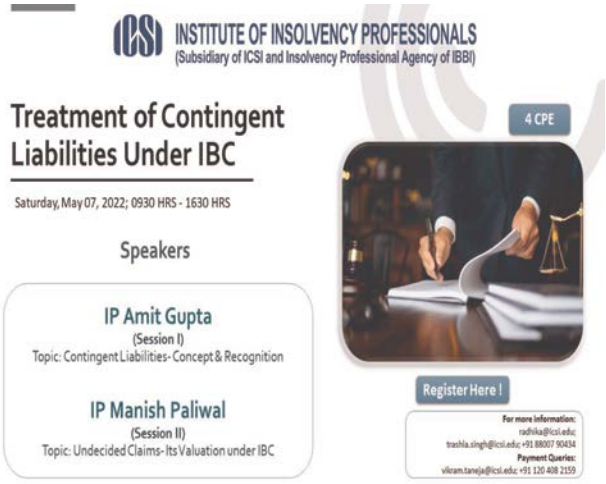


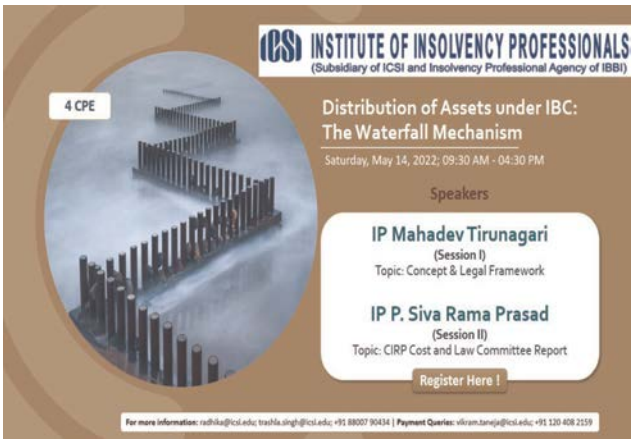
NEWS FROM THE INSTITUTE

◆ Workshop on Treatment of Contingent Liabilities under IBC on May 7, 2022



The ICSI IIP organised a workshop on Treatment of Contingent Liabilities under IBC, the same was delivered by IP Amit Gupta and IP Manish Paliwal. The objective of the workshop was bring out clarity on the concept of contingent liabilities via regulations of IBC and NCLT orders. Moreover, the respective Speakers also focused on how the undecided claims are treated under insolvency and what is the procedure of valuation.

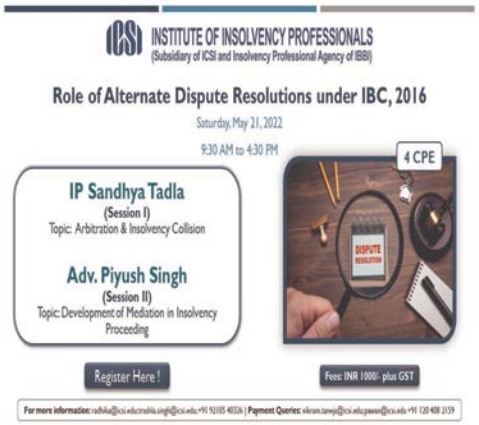
◆ Workshop on Distribution of Assets under IBC: The Waterfall Mechanism held on May 14, 2022



ICSI IIP organised a workshop on May 14, 2022 on the topic Distribution of Assets under IBC: The Waterfall Mechanism. This workshop was addressed by two speakers namely, IP Mahadev Tirunagari and IP P. Siva Rama Prasad.

The aim was to discuss the practical nuances of the subject through Insolvency Law Committee Report and UNCITRAL Legislative Guide on Insolvency. Speakers also laid emphasis on the due of workmen and rights of first charge holders during liquidation through judicial pronouncements. The session came to an end with a detailed question & answer round.

◆ Workshop on Role of Alternate Dispute Resolutions Under IBC, 2016 held on May 21, 2022



ICSI IIP organised a workshop on 21st May, 2022 on the topic Role of Alternate Dispute Resolutions under IBC, 2016. The session was divided into two parts, for the first session the sub-topic was Arbitration & Insolvency Collision taken up by IP Sandhya Tadla and for the second session the decided sub-topic was Development of Mediation in Insolvency Proceedings, delivered by Advocate Piyush Singh.

The main object of the session was to bring clarity on this grey area as the Arbitration & Conciliation is a developing sector in India and there is not much lucidity among the Insolvency Professionals on this subject.

◆ Workshop on Legislative Framework for Cross-border insolvency held on May 28, 2022

ICSI IIP organised a workshop on 28th May, 2022 on the topic Legislative Framework for Cross-border insolvency. This full day workshop was addressed by IP S. Dhanapal and IP Anil Kohli. Both the Speakers covered practical issues that arise in Cross-Border Insolvency, followed by a detailed discussion on the Report of Cross-Border Insolvency Rule/Regulations Committee (CBIRC).

In the second session Speaker discussed UCITRAL Model Law on Enterprise Group Insolvency and the Insolvency provisions related cross border followed by detailed discussions on judicial pronouncements.

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At a Glance

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cy Resolution Process (CIRP) against personal guarantor could not be rejected merely on ground that no CIRP or liquidation proceedings of principle borrower/corporate debtor was pending before NCLT - Whether on perusal of records, there was no cogent reason to entertain appeal against order passed by NCLAT and, thus, order passed by NCLAT required no interference - Held, yes (Para 1)

- **Anand Murti *v.* Soni Infratech (P.) Ltd.**
  (2022) 137 taxmann.com 444 (SC) • P122

Section 12A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Withdrawal of application - R2 was a home buyer in housing project developed by corporate debtor - Since corporate debtor had failed to complete housing project within specified time, a notice was issued by R2 asking them to refund consideration amount - Despite granting several opportunities to corporate debtor when amount in question was not refunded, R2 filed an application under section 7, which was admitted by NCLT - Since corporate debtor was ready to settle matter, NCLAT passed an interim order, thereby directing IRP not to constitute CoC - Corporate debtor submitted its settlement plan according to which corporate debtor had agreed to refund consideration amount to R2 - Corporate debtor also undertook to complete entire project and hand over possession to home buyers (who want possession) within a period of 6 months to 15 months and during said period cost of flat would not be escalated - However, despite this, NCLAT passed impugned order directing IRP to go ahead with constitution of CoC and carry forward CIRP, thereby holding that there was no settlement with all home buyers - Whether in interest of home buyers who were waiting for possession, corporate debtor was permitted to complete project as undertaken by it and, therefore, impugned order passed by NCLAT was to be quashed - Held, yes (Para 23)

- **New Delhi Municipal Council *v.* Minosha India Ltd.**
  (2022) 138 taxmann.com 73 (SC) • P125

Section 60, read with sections 14 and 238A, of the Insolvency and Bankruptcy Code, 2016 and section 11 of the Arbitration and Conciliation Act, 1996 - Adjudicating Authority for corporate persons - Adjudicating Authority - Whether under IBC, by virtue of order admitting application, be it under section 7, 9 or 10 and imposing moratorium, proceedings as are contemplated in section 14 would be tabooed - Held, yes - Whether thus, what is tabooed in section 14 when a moratorium is put into place is inter alia institution of suits or continuance of pending suits or proceedings against corporate debtor including proceeding in execution of inter alia, decree or order of an arbitration panel - Held, yes - Whether this undoubtedly does not include an application under section 11(6) of Arbitration and Conciliation Act by corporate debtor or for that matter, any other proceeding by corporate debtor against another party; at least there is no express exclusion of jurisdiction of Court or authorities to entertain any such proceedings at hands of corporate debtor - Held, yes - Whether thus, provisions do not in any manner appear to stand in way of corporate debtor instituting or proceeding with a suit or a proceeding against others - Held, yes - Whether section 60(6) excludes period during which moratorium under section 14 is in place in computing period of limitation - Held, yes - Whether present an order of moratorium under section 14, entire period of moratorium is liable to be excluded in computing period of limitation even in a suit or an application by a corporate debtor - Held, yes (Paras 24 and 25)

- **Jasani Realty (P.) Ltd. *v.* Vijay Corporation**
  (2022) 139 taxmann.com 349 (Bombay) • P129

Section 7, read with section 238, of the Insolvency and Bankruptcy Code, 2016 and section 11 of the Arbitration and Conciliation Act, 1996 - Corporate insolvency resolution process

- Initiation by financial creditor - Whether mere filing of proceedings under section 7 cannot be treated as an embargo on Court exercising jurisdiction under section 11 of Arbitration and Conciliation Act, for reason that only after an order under section 7(5) is passed by NCLT, section 7 proceedings would gain a character of proceedings in rem, which would trigger embargo precluding Court to exercise jurisdiction under Arbitration and Conciliation Act, and more particularly in view of provisions of section 238, which would override all other laws - Held, yes - Respondent extended financial assistance to corporate debtor by executing loan agreement - Corporate debtor committed default in repayment - Respondent filed an application for initiating CIRP against corporate debtor - Corporate debtor resorted to arbitration clause of loan agreement and filed application under section 11 of 1996 Act praying that an Arbitral Tribunal be appointed - It was a case of respondent that since, respondent had already set into motion proceedings before NCLT, in such situation, proceedings, which were intended to evade consequences arising under IBC was not to be entertained - Whether since CIRP as initiated by respondent under section 7 was yet to reach a stage of NCLT passing an order admitting said proceedings, Court would not be precluded from exercising its jurisdiction under section 11 of Arbitration and Conciliation Act and, thus, application filed under section 11 of said Act was to be allowed - Held, yes (Para 23)

- **Sangita Fiscal Services (P.) Ltd. *v.* Duncans Industries Ltd.**

(2022) 139 taxmann.com 351 (NCLT - Kolkata)• P132

Section 25, read with section 18, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution professional - Duties of - Corporate Insolvency Resolution Process (CIRP) was initiated against corporate debtor vide order dated 5-3-2020 and applicant was appointed as Interim Resolution Professional (IRP) and later confirmed as Resolution Professional (RP) - RP filed instant application seeking direction upon respondent No. 1 to hand over possession of tea estate to RP - It was found that State of West Bengal had leased tea estate in favour of corporate debtor for a period of thirty years commencing from June 1978, which was terminated on 26-6-2008 and not renewed as per law - Corporate Debtor abandoned tea garden in year 2019, long before admission of CIRP against corporate debtor and respondent No. 1 took possession of tea garden and had been running tea garden since 1-7-2021 - Whether since lease given to corporate debtor had not been renewed in favour of corporate debtor, it was out of question that RP could take possession of tea gardens to which corporate debtor had no ownership - Held, yes - Whether therefore, prayer of RP seeking direction upon respondent No. 1 to hand over possession of tea estate could not be granted - Held, yes (Paras 25 and 26)

- **ICICI Bank Ltd. *v.* OPTO Circuits (India) Ltd.**

(2022) 139 taxmann.com 348 (NCLAT - Chennai) • P133

Section 12A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Withdrawal of application - Appellant bank (financial creditor) had extended some credit facilities to corporate debtor - Due to default, CIRP was initiated against corporate debtor - Pursuant to one time settlement between parties CIRP was terminated - However, appellant sought revival/restoration of CIRP on failure of corporate debtor to adhere to terms of settlement - NCLT by impugned order refused to allow request made and instead granted liberty to appellant to file a fresh application - Whether appellant-financial creditor would be at liberty to seek revival/restoration of CIRP proceedings before Adjudicating Authority - Held, yes - Whether liberty given by Adjudicating Authority to appellant to file a fresh company petition was erroneous and without application of mind and without following principles of natural justice and, hence, was to be quashed and set aside - Held, yes (Paras 20, 23 and 24)

- **Hero Fincorp Ltd. *v.* Liquidator of TAG Offshore Ltd.**
  (2022) 139 taxmann.com 393 (NCLAT-New Delhi) • P136

Section 5(16), read with sections 33 and 52, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Liquidation cost - Pursuant to order of liquidation of corporate debtor, resolution professional was appointed as liquidator - Liquidator informed appellant-financial creditor, which had charge of vessel tag 22, that it had reached out to salvage company for securing two vessels, viz., tag 22 and tag 6, for their protection and preservation - Appellant filed application before NCLT seeking direction to allow it to exit from liquidation process and keep vessel tag 22 out of liquidation estate and also for including expenses incurred in securing said two vessels, as part of CIRP and liquidation expenses - NCLT by impugned order held that expenses incurred for securing vessel tag 22 could not be treated as liquidation process expenses and allowed appellant to keep vessel tag 22 out of liquidation estate under section 52 subject to clearance of proportionate CIRP costs and payment of expenses incurred by liquidator in securing vessel tag 22 - On appeal, appellant submitted that vessel was part of liquidation estate and was responsibility of liquidator, therefore, expenses for preventing any damage was upon liquidator - Whether since security interest of appellant in its charge vessel tag 22 was being realised under section 52(1)(b) and liquidator took action after receiving consent from appellant in pursuance of appellant's interest in preservation and protection of its asset tag 22, there was no error in impugned order passed by NCLT - Held, yes (Paras 18 and 20)

- **Maharashtra Industrial Development Corporation *v.* Santanu T. Ray**
  (2022) 139 taxmann.com 394 (NCLAT-New Delhi) • P141

Section 14 of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Moratorium - General - Appellant-Industrial Development Corporation allotted a plot on lease to corporate debtor for construction of factory building for two years subject to condition that it must complete 20 per cent construction within two years - Meanwhile, application under section 9 filed against corporate debtor was admitted by NCLT - Subsequently, appellant issued a notice to corporate debtor cancelling lease agreement directing license holder to vacate plot on ground that corporate debtor had violated terms of lease agreement - NCLT by impugned order held said notice as null and void and directed appellant to restrain from terminating lease agreement - Whether since moratorium was kicked in, appellant could not have taken possession of leased property by virtue of restrain under section 14(1)(d), which also prohibited appellant to cancel lease during currency of moratorium - Held, yes - Whether, however, after CIRP was over, there was no fetter on right of appellant to take proceeding for breach of terms of lease by corporate debtor - Held, yes - Whether thus, impugned order passed by NCLT was to be upheld - Held, yes (Paras 29, 30 and 32)

- **Mack Star Marketing (P.) Ltd. *v.* Ashish Chawchharia Resolution Professional of Jet Airways (India) (P.) Ltd.**
  (2022) 139 taxmann.com 395 (NCLAT-New Delhi) • P145

Section 5(13), read with section 25, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Insolvency resolution process cost - Whether mere fact that CIRP has triggered and Moratorium has been imposed does not absolve corporate debtor to pay for premises and facilities which is being enjoyed by corporate debtor during CIRP period - Held, yes - Appellant and corporate debtor entered in to a leave and license agreement dated 24-2-2011 for license of office premises - Corporate debtor failed to pay monthly rent with effect from March, 2019 to appellant - Appellant sent a notice dated 30-4-2019 to corporate debtor calling upon to make

payments under agreement, failing which corporate debtor would have to vacate licensed premises - CIRP commenced against corporate debtor with effect from 20-6-2019 - Even during CIRP, office premises remained in occupation of Resolution Professional (RP) of corporate debtor - Appellant filed application before NCLT for declaration that license fee payable was part of CIRP cost - Adjudicating Authority took view that RP was not required to handover possession till security deposit was refunded and further corporate debtor need not pay any license fee for premises from 1-6-2019 - Appellant was directed to refund security deposit to RP after deducting license fee payable from 1-3-2019 to 31-5-2019 - Whether RP had no right or entitlement to continue in premises on ground that security deposit had not yet been refunded without giving any opportunity to appellant-licensor to determine whether as to any security was refundable or not - Held, yes - Whether RP had continued in possession of premises and exposed corporate debtor for liabilities to pay license fees during CIRP period, which could be CIRP costs - Held, yes - Whether however, since resolution plan had been approved and there was no provision made for payment of leave and license fees for CIRP period as RP never accepted amount as CIRP cost, even though appellant was entitled for amount, fees would be payable to appellant during CIRP period - Held, yes (Paras 14, 15 and 16)

- **GP Global Energy (P.) Ltd. *v.* Sandeep Mahajan**

  (2022) 139 taxmann.com 396 (NCLAT-New Delhi) • P150

I. Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - CIRP was initiated against corporate debtor - Appellant-successful resolution applicant (SRA) submitted its resolution plan - Said resolution plan got approved by Committee of Creditors (CoC) and subsequently by order of NCLT - Appellant deposited a part of sum as per plan and filed application for extension of time period for implementation of resolution plan - NCLT by impugned order disposed of said application by denying any relief to appellant - Whether since appellant had already deposited 70.25 crores as required under approved resolution plan and had only claimed for extension of time for making further payment, which NCLT itself by earlier order dated 3-9-2019 had approved revised timelines to make payment, impugned order of NCLT denying relief to appellant observing that Tribunal had no powers to amend approved resolution plan was unjustified - Held, yes - Whether appellant was to be allowed to make balance payment and impugned order of NCLT was to be set aside - Held, yes (Paras 25 and 36)

II. Section 74 of the Insolvency and Bankruptcy Code, 2016 - Corporate persons' offences and penalties - Punishment for contravention of moratorium or resolution plan - CIRP was initiated against corporate debtor - Appellant-Successful Resolution Applicant (SRA) submitted its resolution plan - Said resolution plan got approved by Committee of Creditors (CoC) and subsequently by order of NCLT - Respondent No. 1 filed application against appellant under section 74 - NCLT by impugned order allowed said application and reference was made to IBBI for taking appropriate action against appellant under section 74(3) - Whether NCLT by impugned order had not recorded a prima facie satisfaction that there was any material to prove any wilful contravention of plan by appellant - Held, yes - Whether since NCLT had not even adverted to section 74(3) and had directed for making a reference to IBBI for taking appropriate action under section 74(3), such order was unsustainable - Held, yes - Whether therefore, impugned order passed by NCLT was to be set aside - Held, yes (Paras 34, 35 and 36)

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

From Chairman's Desk

Life is not a race. Life is in its process and its details. How deeply you are engaged with the details of today will determine the quality of what you create tomorrow

Dear Professional Member(s),

Hope you are all keeping good health.

As Professional members, we all keep learning new things and that is how our progression happens. We ought never to stop in this process or assume that whatever we know is the absolute because everything that we know today is not sufficient and perhaps is also bound to change tomorrow. So, what we can do in order to stay current with the times is to keep upgrading ourselves through the learning process.

The area of law concerning liability of personal guarantors to corporate debtors (PG to CD), though fairly settled now, is still witnessing developments with nuanced interpretations and construction (of the provisions) coming forth. IBC provisions, in relation to PG to CD, came effective from December 1, 2019. But, there were some definite issues which needed to be resolved before they could be implemented. In the case of *Lalit Kumar Jain* v. *Union of India (2021) 127 taxmann.com 368 (SC),* Hon'ble SC, while upholding constitutional validity of the government notification concerning PG to CD provision, had noted that s. 60(2) prescribes filing of an application for

initiating proceedings against PG with the NCLT, only in the event of an ongoing CIRP or liquidation process against CD. It *held that* "Section 60(2) prescribes that in the event of an ongoing resolution process or liquidation process against a corporate debtor, an application for resolution process or bankruptcy of the personal guarantor to the corporate debtor shall be filed with NCLT concerned seized of the resolution process or liquidation. Therefore, the Adjudicating Authority for personal guarantors will be NCLT, if a parallel resolution process or liquidation process is pending in respect of a corporate debtor for whom the guarantee is given. The same logic prevails, under section 60(3), when any insolvency or bankruptcy proceeding pending against the personal guarantor in a court or tribunal and a resolution process or liquidation is initiated against the corporate debtor. Thus if A, an individual, is the subject of a resolution process before the DRT and he has furnished a personal guarantee for a debt owed by a company B, in the event a resolution process is initiated against B in an NCLT, the provision results in transferring the proceedings going on against A in the DRT to NCLT." The Supreme Court also noted that the intent behind this notification is to ensure the clubbing of respective proceedings in the same forum *viz.* the NCLT. However, this judgment did not directly address the issue concerning NCLT's jurisdiction over PG to CD Proceeding which is initiated in absence of a CIRP against the CD.

Thus, the issue as to whether initiation of a CIRP against CD (or even a pending application thereof) is a pre-requisite for initiation of an insolvency process against PG to CD was amongst the most pertinent questions which vexed the judicial forums for a while. This issue got settled, when Hon'ble SC, in the case of *Mahendra Kumar Jajodia* v. *SBI (2022) 139 taxmann.com 350,* held that NCLT would have jurisdiction over such proceedings (against PG to CD), regardless of whether any CIRP or liquidation proceedings were initiated or pending against the CD before it. In *State Bank of India* v. *V. Ramakrishnan (2018) 96 taxmann.com 271/149 SCL 107 (SC),* Hon'ble Apex Court held that the moment there is a proceeding pending against CD, the proceedings initiated against PG to CD which got initiated before initiation of CIRP against the CD, shall be transferred to the NCLT, or, if the same is initiated after such CIRP commenced, the application for initiation of such proceeding against the PG shall have to

be filed only in the NCLT having jurisdiction over such CD. Thus, what got established is that a proceeding against PG to CD can be commenced independently even before initiation of a CIRP against the CD.

Thus, the established position of law is that the jurisdictional NCLT (of CD) can entertain the application for initiation of Proceedings against PG to CD u/s. 60(1), irrespective of any pending: (*i*) CIRP or liquidation proceedings against CD; or (*ii*) applications for initiation of CIRP against CD. Also, if any CIRP or liquidation proceeding is pending before the NCLT, then the proceedings against the PG to CD have to be initiated before such NCLT (s.60(2). The intent behind these provisions is to achieve clubbing of respective proceedings (against CD and the PG to CD) before the same forum (*i.e.* NCLT), and SC's final word on this issue certainly brings relief to the creditors who now have the liberty to exercise their rights against such PGs before the NCLT to derive maximum value from his/her assets even in absence of a CIRP.

Developments are happening with each passing day, and therefore, it is my appeal to all our professional members to not only keep your-self updated with such developments, but also come forward and contribute in strengthening of this IBC law regime in India.

CS ALKA KAPOOR
COO (Designate)

COO's Message

Dear Professional Member(*s*),

A Professionals' organisation, like its professional members, has to keep reinventing itself so as to match its ability with the need of the times. I am glad to be again leading ICSI IIP and working to make the organisation and its members achieve new heights in terms of fulfilling their respective objectives. I became a part of the ICSI IIP family in the year 2016 when my association with the Institute was that of being its CEO. The journey of the Institute has been full of challenges and opportunities ever since its inception. In fact, its journey would always be coterminous with that of the IBC legislation.

Recently, I saw some newspapers reporting as Government's much touted reform, the IBC, is floundering as recoveries under IBC continue to shrink further. The comments made are on the basis that recoveries by FCs under the IBC have dropped owing to pandemic which resulted in large haircuts, and a comparative chart of recovery figures till March 2020 *vis-à-vis* that of March 2021 and March 2022 is quoted as its basis. While the severe impact that Covid-19 had on the businesses (and markets across the world) is an admitted position, the suggestions that have come forth from the experts are focussed on improving capacities at the Tribunals for an expeditious admission and disposal process of IBC applications. Besides this, the need for a well-developed market for sale

of stressed assets is equally emphasised for the success of IBC. The latest data on IBC cases shows that, in January-March 2022 quarter, the realisation by FCs as a percentage of their admitted claims was only 10.21 per cent, while during the quarter ending December, 2021 it was 13.4 per cent. Also, compared to FC's admitted claims of Rs. 12,610 crore (for January-March 2022), the realisation by FCs was Rs. 1,288 crore (~10.21 per cent) which was also lower than the estimated liquidation value of assets. However, looking at the larger picture and in absolute terms, the realisation for financial creditors till end March 2022 stood at Rs. 2,25,294 crore as compared to the their liquidation value of Rs. 1,31,448 crore.

Thus, while the statistics can be moulded to suit one's case, what is beyond any pale of doubt is that fact that, but for the implementation of IBC, the earlier legal regime would have completely collapsed in dealing with the pandemic-induced stress and this would have led to a situation which would be completely out of control. At the same time, the three factors which are currently leading to low recoveries by the FCs are attributable to: (*a*) pandemic-induced slowdown; (*b*) slow admission process at NCLTs; and (*c*) wanning appetite of potential investors to acquire stressed assets in India. The reduced appetite of corporates to take over distressed assets coupled with some cases of inordinate delays being caused due to protracted legal battles before the Tribunals have resulted in poor recoveries of debts by the FCs. In other words, the longer the resolution process, more is the uncertainty that it creates for the stakeholders, resulting in low interest for the asset and consequently lower recoveries being made. The emphasis of IBC is on value maximisation of assets which is possible only if the CD can be revived as a going concern, rather than being stripped for parts and then liquidated. For this, appetite of potential investors to acquire stressed assets in India is a factor that needs to be worked on.

Considering the need to deal with insolvencies of MNCs who have their assets located abroad as well, the focus currently is on laying down a complete legal framework to deal with Cross-Border Insolvencies and Group Insolvencies. Ever since insolvency proceedings were initiated against companies like Amtek Auto, Videocon Industries, Essar Steel and Jet Airways, suggestions have been made and voices have been raised for the need

to have a cross-border insolvency law to find a legal solution to issues that traverse borders in the form of location of assets, complex procedures *et al*. Currently, the provisions under IBC governing this subject of resolution of Cross-border insolvency are contained in s. 233 & s. 234 and provide for resolution through bilateral agreements and letters of request. However, since no such-bilateral agreements have been executed yet, there is a vacuum which needs to be filled. The proposed resolution framework under IBC for Cross-border insolvency is likely to be tailored around UNCITRAL model law, with the rider that Central Government shall retain its power to intervene under exceptional circumstances. Such interventions by the CG shall be through an executive notification only, and shall not require Parliamentary intervention in the form of amendment to the legislation. While the power to intervene shall rest with the Government, however, it is likely to be exercised only as an exception than as a rule, wherein factors like inadequate protection of public interest under UNCITRAL Model Law shall guide the CG's discretion.

In the month of May, 2022, the IBBI concluded a two-day International Research Conference on the subject of Insolvency and Bankruptcy which was held at Indian Institute of Management, Ahmedabad. At the research conference, the Chairperson, IBBI *inter alia* highlighted the importance of an evidence-based research in the policy making exercise while echoing views expressed by the Secretary, MCA for the need to promote a culture of research in regulatory framework. Such conferences play a very important role in not only bringing stakeholders together, but also leading to exchange as well as flow of constructive ideas. I am sure that the professional members who attended the conference must have got benefitted from this very useful exercise.

As we move forward and equip ourselves with innovative ideas, I assure you all that we will continue to work towards expanding our legacy as valued trustees of the confidence and belief reposed in us. The activities of the Institute shall continue to grow in significance in the changing and challenging scenarios, and will always be guided by its objectives.

I would urge all the professional members to remain committed to make this legal regime a success while achieving excellence and integrity.

INTERVIEW

RAGHU BABU GUNTURU

Insolvency Professional

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

All players have gained a better understanding of insolvency and bankruptcy law. There was also a fear among promoters and management that the company would fall out of their hands in the first 2-3 years, which aided in corporate credit/ repayment discipline. The Hon'ble Supreme Court accorded IBC cases the attention and swift resolution they deserved in order to establish proper judicial precedents and steer the new framework for insolvency resolution. The government and the IBBI have taken a proactive approach to implementing new legislation, responding quickly to resolve issues and fulfil the interests of stakeholders.

2. How has your overall experience as an Insolvency Professional been since you are handling quite a number of assignments?

Four cases were resolved, and all of them were effectively implemented. Another issue is in the process of being resolved. The resolution amount for four matters was INR 289 crores, which is 180 per cent of the liquidation value. Another two companies were liquidated. I had the pleasure of administering the CIRP for Lanco Hoskote Highway Limited, an NHAI concessionaire and toll operator. This is the first NHAI concessionaire to go through the IBC resolution process. The majority of stakeholders were initially concerned about the resolution, but it turned out to be a success.

The overall experience has been fantastic. I founded Insolvency Professional Entity in 2017 with a dedicated team from the start, which has helped us better handle these tasks and we have gained a lot of experience.

Financial Creditors have become little concerned due to delays, uncertainty reg amount and date of realisation hence they started looking at other avenues for recovery. It has become very challenging where corporate debtor has no operations and no cash available for protection of assets. While some banks and financial creditors have grasped the framework and are incurring charges and fees, many FCs do not pay expenses and fees on time, which is a major source of concern for IPs. This is a major source of anxiety for IPs, and it is not a good condition.

3. In your opinion, how did Covid-19 affected the progress of Insolvency framework?

The resolution processes were hampered by Covid-19, and there were delays in operating the process, obtaining resolution applicants, and implementing the plans. There were also delays in the resolution of cases before the Hon'ble National Company Law Tribunals, and a few plans were unable to be implemented after they were approved.

4. Since, you have handled number of assignments, how has your experience been with the Promoters of the Corporate Debtors? What were the challenges faced?

With the exception of one, I have had wonderful cooperation and help from promoters. This business operates in the poultry industry. This occurred during Phase I of Covid. Promoters refused to cooperate, forcing the RP to seek directions from the Hon'ble National Company Law Tribunal and file police complaints, among other things. Funding was required to continue operations, which could only be obtained with the help of the Hon'ble National Company Law Tribunal.

5. What is your take on the implementation of Pre-packaged Insolvency Resolution Framework for Corporate MSMEs?

If Resolution Plan proposes for waivers/ concessions, other than the existing promoters are also allowed to participate

in the resolution process hence promoters are not interested in this. This framework is good however adherence to timelines is very important.

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

It appears inspection is conducted by junior resources. It was more like a checklist-based approach than an objective based approach.

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

a. The whole objective of IBC was to identify and resolve insolvency in time bound manner while we saw first two years decent progress, I think this got derailed. Time bound admission and resolution is very essential to get the optimum result out of IBC framework.

b. Deemed admission has to be brought in where application is filed by a secured financial creditor.

c. Interim Applications have to be disposed expeditiously so that process will not get delayed.

d. Provision to proceed for liquidation or dissolution without going through CIRP, where situation demands *i.e.* company does not have assets, no operations etc.,

e. While the law and precedence are very clear still lot of statutory authorities continues to raise demands for prior claims after approval of resolution plan which is an unproductive work for entire machinery and resolution applicant is put to difficulty. Government should issue directions in this regard.

f. Expenses and Fees during resolution and liquidation have to be taken care timely manner which is becoming huge pain area for IPs.

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

This area may be a bit volatile and cyclical. If the realisation to the creditors is faster and better, they would be willing to go through this process, which can create opportunities for more professionals, and professionals can be paid reasonable fees. The number of IPs has gone up; fees have come down. One should be willing to take a medium-to-long-term approach to have a satisfactory career in this domain.

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

IBBI and IPAs are playing regulatory roles. However, there is also a developmental role

these institutions have to play, particularly regarding payment of fees and hand holding during difficulties. The IPs have become soft targets while other agencies have very little accountability.

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

This is not very clear as of now. Opportunities have come down. Fees are not very remunerative *vis-à-vis* the effort, responsibility, etc. There are a lot of other promising opportunities for seasoned professionals.

Guernsey Insolvency Law

INTRODUCTION

Guernsey insolvency law has remained unchanged for many years. Guernsey updated its insolvency law with the Companies (Guernsey) Law, 2008 (Insolvency) Amendment Ordinance passed on 15th January 2020.

The proposed changed in ordinance is to create a structured, flexible, and transparent regime for company insolvency procedures in Guernsey, as is required in a modern jurisdiction. The Committee formed a working group of insolvency professionals to advise on the proposed insolvency law reform.

HISTORY

2008	The Committee formed a working group of insolvency professionals to advise on the proposed insolvency law reform.
2013	The Companies (Guernsey) Law, 2008 came into force, and was the last major revision of Guernsey's insolvency regime, including the introduction of the corporate administration process.

2014	Following input from the working group, the Committee released a consultation paper covering 40 different topics, on both personal and corporate insolvency. Responses were received from parties including lawyers, accountants, banks, the GFSC and the Commercial Bar Association.
2015	The Committee engaged Ben Rhodes, on secondment from Grant Thornton, to review the responses and consult with the respondents, and to produce a report with recommendations on the proposed changes and the order of priority
2016	A consultation response document setting out the proposals for the law reform was issued by the Committee. The first phase included a requirement for independent office holders, mandatory reporting of director misconduct, greater consultation with creditors in insolvent matters and greater power of office holders to obtain information from directors and officers and pursue recovery actions.
2017	Guernsey Insolvency Practice Statements ("GIPS") were released by the Association of Restructuring and Insolvency Experts ("ARIES") in response to the proposed reform, to assist with some of the issues highlighted, by providing voluntary best practice guidance on creditor meetings, office holder investigations, and director misconduct.
2018	A first draft of the Ordinance was issued to the ARIES Legal and Regulatory Committee and the Commercial Bar Association for technical consultation and feedback.
2019	The Committee selected an Insolvency Rules Committee ("IRC") to give consideration to future rules. The IRC was formed on an informal basis, and would be formally appointed once the Ordinance had come in to force.
2020	The Ordinance was approved by the States on 15 January 2020. It is expected to come in to force shortly, and it is intended that certain Insolvency Rules will be issued on key areas.

DECLARATION OF SOLVENCY IN MEMBER

The distinction between the solvent and insolvent is one of the significances. The ordinance introduces new amendment in which Guernsey's member voluntary winding up the declaration of solvency is to be given by director of the company. The Insolvency law of Guernsey's permit member to resolve by special resolution to wind up the company even if the company is insolvent.

Where a company is to be placed in to member voluntary liquidation the director must declare that company is able to satisfy the statutory solvency test. If they are not able to make that declaration the director can only appoint liquidators who are independent third party which shall not be connected to director or member of the company.

The liquidator will be required to report to creditor and hold the meeting of creditors. The changes are made to ensure that liquidators of insolvent companies are independent and therefore better place to investigate the cause of insolvency and action of director and to ensure that liquidators of an insolvent company communicate adequately with creditors.

POWER OF ADMINISTRATOR

Before these new amendments there was no statutory power or authority allowing a liquidator to demand the document from the directors or employee of the company or to interview the director or former director.

A liquidator can now demand from all the director, former directors , employees and those who were the employed by the company within the past 12 months (preceding the commencement of liquidation) must provide all the documents that the liquidator may require to performed its duty. The liquidator may now apply to Guernsey Court to interview an director or former director of the company.

Administrator may apply to court to distribute the asset to unsecured creditors in certain circumstances and dissolve the company following discharge of the Administration order if there is no further asset to realise or distribute without having to convert the administration into liquidation. The administration should hold a meeting of creditors and provide report to the creditor after his appointment.

TRANSACTION AT UNERVALUE

The new law has incorporated a new section 238 of the UK Insolvency Act, 1986 which provides the Guernsey Court with jurisdiction to make various order against the third party where property has been transfer to them for no consideration which is considerably less than that provided by the party.

The office holder can challenge the transactions made at the undervalue within six months of the commencement of the proceedings. The time limit is now increase to two years for the

(*i*) Transactions with related parties

(*ii*) Transactions which involve when company was insolvent

(*iii*) Where it can be demonstrated that the transaction was not entered into good faith for the purpose of carrying on the business of the company.

EXTORTIONATE CREDIT TRANSACTION

The extortionate credit transaction provision will apply to those transaction which occur within three years of the insolvency and which involve grossly exorbitant terms in relation to the provision of credit offends the principle of fair dealing.

WINDING UP OF NON GUERNSEY COMPANIES

The new amended law give the power to wind up non-Guernsey companies in instance where

- Such company has been dissolved or has ceased to carry business or is carrying on business only for the purpose of winding up its affairs.
- Such company is unable to pay it debts
- The court is of the opinion that it is just and equitable that such company should be wound up.

OTHER CHANGES

The companies which are in liquidation will be exempt from the requirement to prepare audit accounts from the time of the appointment of the liquidator. The amendment bring the Guernsey in line with UK, allowing Insolvency Committee to

make rules preventing providers of essential services such as electricity and water from making it a condition of continued supply that a company in liquidation pay all the previous invoice upfront.

INSOLVENCY RULES'

The amendment has recommended the introduction of a set of insolvency rule to govern insolvency process. There should be Insolvency Rules Committee (IRC) it can be formally be appointed once the Ordinance has come in to force. Guernsey Insolvency Practice Statement (GIPS) were released by the Association of Restructuring and Insolvency Expert (ARIES) in 2017. The issue likely to be covered are:-

- Proof of debt procedure for creditors
- Provision for creditors meetings
- Director misconduct
- Disclaimer of asset

CONCLUSION

The Guernsey insolvency regime will facilitate the effectiveness of office holders and robust regime will enhance the Guernsey reputation as safe, reliable and transparent. This changes will bring Guernsey in line of the other jurisdiction.

Position of subordination agreements *inter se* creditors under IBC

SANDHYA TADLA
Insolvency professional

1. Subordination Agreements

Commonly, a borrower may take a loan from different creditors against the same property which has been mortgaged to another creditor earlier. Subordination Agreements are the *inter se* agreements executed among the creditors, which determine the level of priority that one creditor has over the other. Accordingly, the lien on security created as per the subordination agreement is termed as the First charge(mortgage)/ the Second charge (mortgage)/Third charge (mortgage), etc. This arrangement of preference/priority amongst the creditors makes a vast difference when the borrower defaults in repayment. To recover the dues, if the first charge holder disposes of the security, the second charge holder may get only residual or nothing. Thus, it's vital to understand if the position of respective lenders under subordination agreements changes when the borrower is under insolvency.

2. Doctrine of Priority

The right to property is a constitutional right. Further, Sec.48 of the Transfer of Property Act, 1882, very clearly specifies the rights of priority. It embodies the principle of the "Doctrine of Priority". Courts use it as a basis for resolving the issues with the conflicting rights over a particular property. If two or more persons compete for the same interests, the equitable maxim "qui prior est tempore potior est jure" applies. It means that first in time prevails over others. The basis of the doctrine is the principle of natural justice - if rights are created in favour of two or more persons at different times, the person obtaining rights first will have priority over the others, unless there is a special contract.

Extract of Section 48 in The Transfer of Property Act, 1882

48. Priority of rights created by transfer.—

"Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created"

The doctrine clarifies that the claim of a first charge holder shall prevail over the claim of a second charge holder.

3. Position of secured creditors under Sec.53

Insolvency and Bankruptcy Code, 2016, has laid down the order of priority of stakeholders, for distribution of sale proceeds of assets on liquidation of the Company. As per Sec.53, the waterfall mechanism is -

(1) Insolvency resolution and Liquidation cost

   a. Secured Creditor (in case he has relinquished the security)

   b. Workmen's dues (for 24 months preceding liquidation commencement date)

(2) Wages and unpaid dues to employees (other than workmen) for 12 months preceding the liquidation commencement date

(3) Unsecured Creditors

   a. Central and State Government dues

   b. Secured Creditor for an un-realized amount following the enforcement of security interest

(4) Any remaining debts or dues

(5) Preference shareholders, if any

(6) Equity Shareholders or the Partners, as the case may be

The position of secured creditors is at two levels based on the relinquishment of its rights to security.

Under level 2 of the waterfall:

If the creditor opts to relinquish its interests in the security under the provisions of Sec.52 of IBC, then he will come under level 2 of the waterfall, sharing equal rights with workmen.

Under level 5 of the waterfall:

In case, the creditor chooses to realize the security in the manner as laid in Sec.52 of IBC, and that realization does not clear all its outstanding, for such an unrealized amount, it will come under level 5 of the waterfall, sharing equal rights with Central/ State Government dues.

From the above, it's clear that the secured creditors who relinquished their rights on security will come under the 2nd priority level, sharing equal rights with workmen. Now, the question that comes up is, what if there are subordination agreements *inter se* secured creditors. Do all of them have equal rights? Or do their rights of priority change as per subordination agreements?

4. Views of Insolvency Law committee on Subordination agreements

These matters came up for discussion at various forums. There existed a bias on the treatment of priority of secured creditors with subordination agreements. Few opined that all secured creditors irrespective of their subordination agreements should be treated equally. A thorough analysis was required on this aspect. Considering the challenges and issues faced by various stakeholders arising from the implementation of IBC, including our topic of discussion, the Insolvency Law Committee made recommendations to the Government on the modifications to be taken to the IBC.

(*a*) *Report of Insolvency Law Committee dated 26 March 2018*

Reference was made to *ICICI Bank* v. *SIDCO Leathers Ltd. (2006) 67 SCL 383 (SC)*, wherein Supreme Court held that "Only because the dues of workmen and debts due to the secured creditors are treated *pari passu* with each other, the same by itself, in our considered view, would not lead to the conclusion that the concept of *inter se* priorities amongst the secured creditors had thereby been intended to be given a total go-by."

The Committee was of the view that it may not be prudent to take away a valuable property right vested with creditors. It is believed that it is sufficiently clear from a plain reading of section 53(1)(*b*) that it intended to rank workmen's dues equally with debts owed to secured creditors who have relinquished their security. Section 53(1)(*b*) does not talk about priority *inter se* secured creditors. Thus, valid inter-creditor/subordination agreements would continue to govern their relationship.

The Committee felt that there was no requirement for an amendment to the Code required since a plain reading of section 53 was sufficient to establish that valid inter-creditor and subordination provisions are required to be respected in the liquidation waterfall under section 53 of the Code.

(*b*) *Report of Insolvency Law Committee dated 20 February 2020*

In spite of the clarification from the ILC report dated 26 March 2018, representations were made to the Committee on the clarifications about the applicability of sec. 53(2) on inter-creditor or subordination agreements among secured creditors.

Sec.53(2) - "Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator".

To clarify the correct interpretation of Section 53(2), the Committee decided that necessary clarification may be provided by inserting an *Explanation* under section 53(2) to clarify the correct interpretation of the Section, as explained in the First ILC Report.

The suggested modification is still to be notified under Sec.53 of IBC.

5. Few interesting case laws to through more light:

(*a*) *Technology Development Board* v. *Mr. Anil Goel Company Appeal (AT)(Ins.) No. 731 of 2020, dated 5-4-2021* - NCLT

(NCLT, Ahmedabad Bench - IA No. 514 of 2019 in CP(IB) No. 04 of 2017 dated 27 February 2020)

Technology Development Board (Applicant) was Financial Creditor of Gujarat Oleo Chem Limited, Corporate Debtor under Liquidation. Applicant's pray was to direct the Respondents for even distribution of sale proceeds under sec. 53 of IBC irrespective of the *inter se* creditor agreements.

The Adjudicating Authority (AA) referred to *Sicon Limited* v. *State of Maharashtra*, III (2006) BC 304 of Bombay High Court and *ICICI Bank Ltd.* (*supra*).

AA viewed that *inter se* priorities among the secured creditors will remain valid and prevail in the distribution of assets in liquidation and hence the instant application was not maintainable.

(*b*) *Technology Development Board* v. *Mr. Anil Goel & Ors* - NCLAT

(NCLAT, Principal Bench, New Delhi - CA(AT)(Insolvency) No. 731 of 2020 dated 5 April 2021)

Technology Development Board (Applicant) not satisfied with the decision of AA, approached Appellate Tribunal.

NCLAT held that the view of AA based on *ICICI Bank* Ltd. (*supra*) - Supreme Court judgment, which was pre-IBC, is erroneous and not supported. Thus, cannot be sustained. NCLAT set aside the AA's order and directed Liquidator to treat the Secured Creditors relinquishing the security interest as one class ranking equally for distribution of assets under sec.53(1)(*b*)(*ii*) of IBC and distribute the proceeds in accordance therewith.

(*c*) *Kotak Mahindra Bank* v. *Technology Development Board* - Supreme Court

(Supreme Court of India - (Civil Appeal Diary No. 11060 of 2021 dated 29-6-2021)

Kotak Mahindra Bank (Petitioner) aggrieved by the Appellate Tribunal's order approached Supreme Court requesting permission to Appeal and stay NCLAT's order. The apex court on 29 June 2021, granted permission to file the appeal and stayed the operation of the impugned order passed by NCLAT.

The above-referred incidence of cases in the matter of Technology Development Board and Ors., makes us ponder on the relevance of interse creditor agreements under Sec. 53 of IBC.

(*d*) *Oriental Bank of Commerce (Now Punjab National Bank)* v. *Anil Anchalia & Ors* - NCLT

(NCLT, Kolkata Bench - IA(IB-C)/101(KB)2022 in CP(IB)/1406(KB)2018 dated 4 March 2022)

Oriental Bank of Commerce (Now Punjab National Bank) was the Financial Creditor(FC) of Bala Techno Industries Limited, which was under Liquidation. The Liquidator sold the assets of the CD and distributed the sale proceeds on *pro rata* basis under Sec.53 of IBC. The Financial Creditor was not happy with the basis of the distribution of sale proceeds, it being the first charge holder. Being aggrieved, the FC prayed NCLT to direct the Liquidator to entire sale proceeds of the liquidation estate to Punjab National Bank since the same has an exclusive charge on the property of the CD which has been sold by the Liquidator.

NCLT viewed that FC had an option to recover its dues under Sec. 52, but as FC opted not to realize the security, the charge on secured assets is relinquished, and secured creditors once again cannot seek priority payment as first charge holder. NCLT opined that there is no infirmity in the distribution of the assets by the Liquidator and the IA was dismissed.

(*e*) *Oriental Bank of Commerce (Now Punjab National Bank) (PNB)* v. *Anil Anchalia & Ors* - NCLAT

(NCLAT, Principal Bench, New Delhi - CA(AT)(Ins.)No.547 of 2022 dated 26 May 2022)

PNB aggrieved with the decision of NCLT approached NCLAT. The Appellate Tribunal referred to *India Resurgence ARC Pvt. Ltd.* v. *Amit Metaliks Ltd. (2021) 127 taxmann.com 610/167 SCL 223 (SC)* online SC 409 (Amit Metaliks) of Supreme Court. In this case, SC held that the dissenting creditor cannot suggest a higher amount to be paid to it with reference to the value of the security interest. It further stated that dissenting creditor is entitled to an amount under sec. 30(2)(*b*), but not beyond the receivable liquidation value proposed for the same class of creditors.

NCLAT also referred to its judgment of 6 May 2022 - *Indian Bank* v. *Charu Desai*, Erstwhile Resolution Professional & Chairman of Monitoring Committee of GB Global Ltd., wherein, a similar contention

of dissenting financial Creditor was repelled.

PNB submitted that the earlier order of NCLAT the in the Technology Development Board case was stayed by the Apex Court and the issue is *res Integra*. However, NCLAT viewed that no reliance can be placed on the said judgment as it loses its importance given the subsequent judgment of the Hon'ble Supreme Court dated 13 May 2021 in the Amit Metaliks Ltd. case (*supra*). NCLAT opined that the issue is no more *res Integra* and no error is committed by the Adjudicating Authority in rejecting the Application filed by the PNB.

This is another interesting case law, where PNB is praying for a direction to make the distribution considering the Subordination agreement, but NCLT and NCLAT denied. On a closer look, we can make out that Amit Metaliks Supreme Court case may not be appropriate to draw a conclusion related to priority due to interse creditor arrangements. The provisions of IBC are clear on the matter related to Dissenting Financial Creditor and they cannot seek beyond that. There is every possibility that Supreme Court may come up with a landmark judgment different from Amit Metaliks, on being approached by PNB.

Conclusion:

Considering the provisions of Sec.53 and the views of Insolvency Law Committee Reports, as per Sec. 53(1)(*b*) secured creditor who relinquished the security, has priority equal to workmen. The provision is in no way referring to priority levels due to subordination agreements *inter se* creditors. Further coming to Section 53(2), talks about the contractual agreements between the stakeholders with equal ranking. It does not refer to the subordinate agreements *inter se* creditors. Thus, valid inter-creditor/ subordination agreements would continue to govern their relationship

However, keeping in view the interpretational differences, an explanation of Sec.53 may be expected concerning the prevalence of priority due to subordination agreements *inter se* creditors. The clarity in provision may lessen the burden on the Tribunals and Apex Court.

Secured Creditors in Liquidation of Corporate Debtor

Secured creditors in Liquidation are in a very interesting and curious situation for many reasons. First let us see the differences in their situation from secured creditors in CIRP (Corporate Insolvency Resolution Process) -

1. In CIRP, financial creditors (including secured) would be part of the Committee of Creditors and hence a say in decision making.

2. At CIRP stage, there is no option of realizing their security separately, liquidation offers that option.

Make a decision promptly

Having said this, secured creditors should carefully decide whether to exercise their option under Liquidation of realizing their security on their own. The following points must be kept in mind -

1. The Secured creditor must communicate the decision of whether they would like to surrender their security to the liquidation estate or whether they would like to realize their security under section 52 of IBC, within 30 days from the date of commencement of liquidation. (Liquidation Regulation 21A)

   In case it is not mentioned, it will be presumed that they would surrender their security to the liquidation estate (under the same Regulation 21A). It is suggested that they should communicate this in Form D itself or otherwise.

   Also, in Gujarat NRE Coke - (2020) ibclaw.in 131 NCLT, when one creditor (Laxmi Vilas Bank) did not communicate their decision for a long time, it was presumed that they had relinquished their security interest. (text of

relevant sections from IBC and from Liquidation Regulations are given in Annexure 1)

2. Once the security is relinquished, it will be impossible to go back and seek to realize the security on their own. In *Aditya Birla Finance* v. *M Murugesan Liq of Velohar Infra* (2022) ibclaw.in 279 NCLT, Aditya Birla Finance was the only secured creditor. Bank of India was initially admitted as unsecured creditor. Band of India security was proved later, and Aitya Birla Finance was not entitled to realize assets on their own.

To help make this decision, the secured creditor should consider where they are likely to realise more money. For this purpose, the following provisions of IBC are important -

If security is relinquished, the Secured Creditor stands second in priority, after CIRP and Liquidation Costs; and ranks equal to dues of the Workmen for 2 years, as per S. 53(1)(*b*). Here, all secured creditors will rank equally. Reference may be made to Technology Development Board v. Liquidator, Gujarat Oleo Chemicals - (2021) ibclaw.in 175 NCLAT.

1. If security is realized by the creditor, he will still have to contribute to CIRP, Liquidation costs and also to dues of the workmen, but the balance will belong to the secured creditor.

2. If the creditor realizes more than their admitted claim, the surplus will have to be paid to the liquidation estate. S. 52(7)

3. If the creditor realizes less than the admitted claim, he will stand in the queue at a very low priority - after unsecured creditors, in Section 53 (1)(*e*). S. 52 (8)

4. Issues relating to EPF, gratuity etc. - Any dues in respect of PF, Gratuity and pension, will not be paid out of the liquidation estate. The liquidation estate is calculated after providing for PF, Gratuity and Pension. This means that the secured creditor realizing his security will not contribute to it, but a secured creditor surrendering the security will have to contribute. This is as the situation stands as of now. Reference may be made to *SBI Global Factors Ltd.* v. *Sana Syntex* (P.) Ltd. (2019) 102 taxmann. com 206 (NCLT - Mum.). The dues relating to EPF etc are held to be outside the ambit of S. 53.

Secured creditor therefore should evaluate these considerations. Particularly they should consider their share in the overall claim (that should be known in the CIRP process itself), compared to their share of the security. If their share of security is higher than share in claims, it makes sense to realize the security on their own.

But a secured creditor may not always be entitled to exercise this option. Here is a checklist for finding out if you are eligible for this -

1. Do you exclusively hold the security on the assets - if yes, you are eligible.

2. Do you hold at least 60% of the claim over the asset - if yes, you are eligible. *Surana Power* v. *BHEL* - (2020) ibclaw.in 176 NCLAT

3. If answer to 1 or 2 is negative, you will have to surrender the security to the liquidation estate.

4. If the assets are such that they cannot be divided, or if divided would fetch an absurdly low value for the remaining security, you may not be allowed to realize the security. Reference may be made to *ARCIL* v. *Nagarajan Liq of Cethar Ltd. and others*.

5. In *Mr. Srikanth Dwarakanath Liquidator of Surana Power Limited* v. *Bharat Heavy Electricals Limited*, (2020) 117 taxmann.com 622/160 SCL 425 (NCLAT), one creditor held a decree of DRT in his favour, and the same creditor was not willing to relinquish the charge. In this case, creditors holding 73.76% charge had relinquished the security. It was held that it would be prejudicial to hold the liquidation process for 26.24% share in value.

6. Only First charge holders can stay out of the liquidation process. *Edelweiss Asset Reconstruction Co. Ltd.* v. *Reid and Taylor* India Ltd. (2019) 111 taxmann.com 538 (NCLT-Mum.).

While voting over the resolution plan in CIRP phase itself a creditor may consider if they would get more value in CIRP (as offered by the Resolution Applicant) compared to the value they will get in liquidation, particularly considering the option of realizing security on their own.

We may also note that the business of the Corporate Debtor may still be sold as a going concern during liquidation. Unlike CIRP, the creditors do not have a vote in these matters, as it is the liquidator who calls the shots at this stage. *Liquidator of South Indian Mint and Aromatic Products Ltd.* v. *Jeganeedhi* (2022) ibclaw.in 39 NCLT - the Liquidator was permitted to sale the business as a going concern during liquidation stage. The Liquidation period was also extended.

Potential Buyer

To whom can you sale the asset that you want to realize? The only restriction is under section 29A of IBC. Which means if the liquidator is prohibited to sale the asset to a party by virtue of Section 29A, the same restriction applies to the secured creditor as well. (*State Bank of India* v. *Anuj Bajpai (liquidator)* (2020) 115 taxmann.com 15/160 SCL 44 (NCLAT-New Delhi)

Liabilities

Even you have decided and communicated to the liquidator that you would like to realize the security on your own, you will have a few liabilities -

These liabilities are defined under various sections of IBC and Liquidation Regulations. And can be summarised below-

1. If the creditor receives more than the admitted claim, the excess should be tendered to the liquidator section 52(7). This excess must be paid within 180 days from liquidation

commencement date as per Liquidation Regulation 21A2(2) (*b*). If this amount is not certain, it should be paid based on estimate by the liquidator, and the liquidator and the creditor will make this good as soon as the amount is certain.

2. Amount of CIRP should be deducted from the realization and this amount should be transferred to the liquidator 52(8)

3. Under Regulation 21A(2), the creditor proceeding to realize his security, should pay to the liquidator within 90 days of commencement of liquidation (this date in practice is taken as the date the liquidator receives the order, not the date of the order) -

   a. His contribution to CIRP and Liquidation cost.

   b. His contribution to workmen's dues.

   This time-limit is important to note. A secured creditor not relinquishing his security is liable to pay his share in these costs, calculated on the basis as if he had surrendered the security. In *Bennet property holdings* v. *biodiversity conservation* (2022) ibclaw.in 134 NCLT - it was held that share in the entire CIRP and Liquidation costs must be paid, not from the date of admission of claim.

4. *SBI* v. *Navjit Singh* (2022) 139 taxmann.com 455 NCLAT states that the creditor not relinquishing security is liable to pay fees as per Regulation 21A.

Liquidation Cost

Cost of liquidation is defined in S. 5(16). While this can be a big topic, discussion here will be restricted to the aspect of fees of the liquidator. This can become an issue over which disagreements and potential litigation may happen.

Capital gain tax liability arising out of sale of assets is not liquidation cost and should be distributed as per S. 53, as per *LML* v. *CIT* - (2020) ibclaw.in 86 NCLT Allahabad. In another case, *Shri Ram Lime* v. *Gee Ispat* (2019) ibclaw.in 02 NCLT Delhi, it was held that capital gains qualify to be operational debt.

When a business is sold as going concern during liquidation, the dues in respect of electricity supply till date of liquidation cannot be considered as liquidation cost. Bills pertaining to power consumed during liquidation will be part of liquidation cost. (*Eastern Power distribution company* v. *Maithan Alloys* - (2022) ibclaw.in 393 NCLAT (CD - Impex Metal and Ferroalloys)).

Procedure

Procedure for realizing security is stated under Regulation 37 of the Liquidation Regulations. (text is reproduced in Annexure 1)

1. Creditor to inform Liquidator the price at which he plans to realise the assets.

2. Liquidator to inform within 21 days of the above if there is a person

willing to buy the asset at a price above the price communicated above, and willing to buy the asset within 30 days from the above intimation - two conditions (price higher than what the creditor is getting, and secondly buy within 30 days of the above communication from creditor).

3. The assets will be sold to the highest bidder. If the bidder identified by the liquidator fails to buy the asset in the manner above, the creditor can realize the asset as he deems fit, but at a price not below the price communicated above.

4. The cost of identifying the buyer will be borne by the party that did not find the buyer. *i.e.* if it is sold to the buyer identified by the liquidator, the creditor shall bear the cost, and *vice versa*.

5. This Regulation is not applicable, if the creditor enforces his interest under SARFAESI (Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002), or RDBA (Recovery of Debts and Bankruptcy Act, 1993)

Practical aspects of the Process -

1. If you want to realize your security, first it is necessary to communicate with the liquidator in time, that you wish to realize the security yourself.

2. Initiate the process to take possession of your assets. This may not be an easy step. This will require discussion with the liquidator for the same, and importantly, payment of your liabilities (under S 53(1)(*a*) - CIRP and Liquidation Cost, and 53(1)(*b*)(*i*) - Workmen wages) within 90 days. Estimating them and agreeing upon them may take its time and there can be litigation. Particularly look at the liquidation cost carefully.

3. Take possession in presence of the Liquidator, conduct videography of the assets. Change security of the place as required. Ensure the assets are covered by insurance.

4. Auction the property by any suitable means, though private sale is also permitted.

5. Once we have identified the buyer, follow the procedure under Regulation 37 of communicating the price to the Liquidator, and wait to see if Liquidator can find someone who is willing to pay a higher price.

6. The asset will be sold to the highest bidder, whoever finds it. The cost of identifying the buyer will be borne by the party, which did not

find the buyer. *i.e.* if the liquidator finds it, the secured creditor bears it and *vice versa*.

If a secured creditor who has not relinquished security, fails to sell the assets, the liquidator can ask the creditor to relinquish, as per decision of NCLAT in *Dhanalaxmi bank* v. *Technofab* (2021) ibclaw.in 460 NCLAT. The question under consideration was - if secured creditor does not sell assets, can liquidator ask to relinquish; was considered. 3 years had passed from order of Liquidation, sale of assets by secured creditor was not complete yet, appellant failed to realize its security, hence the creditor was asked to handover the assets in possession back to the Liquidator.

A secured creditor in liquidation, particularly holding exclusive or near exclusive charge is in a very critical situation, and needs to take decision considering all the options and *pros* and *cons* of each. A wise decision in time can help realize better value in liquidation.

Annexure 1

Text of some provisions relating to

Secured Creditors in Liquidation of Corporate Debtor

IBC Amended up to 12/Aug/2018

52. Secured creditor in liquidation proceedings. -

(1) A secured creditor in the liquidation proceedings may-

(*a*) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or

(*b*) realise its security interest in the manner specified in this section.

(2) Where the secured creditor realises security interest under clause (*b*) of sub-section (1), he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised.

(3) Before any security interest is realised by the secured creditor under this section, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either - (*a*) by the records of such security interest maintained by an information utility; or (*b*) by such other means as may be specified by the Board.

(4) A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.

(5) If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing off the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force.

(6) The Adjudicating Authority, on the receipt of an application from a secured creditor under sub-section (5) may pass such order as may be necessary to permit a secured creditor to realise security interest in accordance with law for the time being in force.

(7) Where the enforcement of the security interest under sub-section (4) yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall- (*a*) account to the liquidator for such surplus; and (*b*) tender to the liquidator any surplus funds received from the enforcement of such secured assets.

(8) The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.

(9) Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in clause (*e*) of sub-section (1) of section 53.

53. *Distribution of assets.* – (1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within 58 such period as may be specified, namely:-

(*a*) the insolvency resolution process costs and the liquidation costs paid in full;

(*b*) the following debts which shall rank equally between and among the following: (*i*) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and (*ii*) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(*c*) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(*d*) financial debts owed to unsecured creditors;

(*e*) the following dues shall rank equally between and among the following: -

(*i*) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(*ii*) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

Regulations Amended up to 30/ Sep/2021

18. Claims by financial creditors.

(1) A person claiming to be a financial creditor of the corporate debtor shall submit proof of claim to the liquidator in electronic means in Form D of Schedule II.

(2) The existence of debt due to the financial creditor may be proved on the basis of- (*a*) the records available in an information utility, if any; or (*b*) other relevant documents which adequately establish the debt, including any or all of the following- (*i*) a financial contract supported by financial statements as evidence of the debt; (*ii*) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor; 16 (*iii*) financial statements showing that the debt has not been repaid; and (*iv*) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.

21. Proving security interest. The existence of a security interest may be proved by a secured creditor on the basis of-

(*a*) the records available in an information utility, if any;

(*b*) certificate of registration of charge issued by the Registrar of Companies; or

(*c*) proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India.

21A. Presumption of security interest.

(1) A secured creditor shall inform the liquidator of its decision to relinquish its security interest to the liquidation estate or realise its security interest, as the case may be, in Form C or Form D of Schedule II:

Provided that, where a secured creditor does not intimate its decision within thirty days from the liquidation commencement date, the assets covered

under the security interest shall be presumed to be part of the liquidation estate.

(2) Where a secured creditor proceeds to realise its security interest, it shall pay -

(a) as much towards the amount payable under clause (a) and sub-clause (i) of clause (b) of sub-section (1) of section 53, as it would have shared in case it had relinquished the security interest, to the liquidator within ninety days from the liquidation commencement date; and

(b) the excess of the realised value of the asset, which is subject to security interest, over the amount of his claims admitted, to the liquidator within one hundred and eighty days from the liquidation commencement date:

Provided that where the amount payable under this sub-regulation is not certain by the date the amount is payable under this sub-regulation, the secured creditor shall pay the amount, as estimated by the liquidator:

Provided further that any difference between the amount payable under this sub-regulation and the amount paid under the first proviso shall be made good by the secured creditor or the liquidator, as the case may be, as soon as the amount payable under this sub-regulation is certain and so informed by the liquidator.

(3) Where a secured creditor fails to comply with sub-regulation (2), the asset, which is subject to security interest, shall become part of the liquidation estate.

37. Realization of security interest by secured creditor

(1) A secured creditor who seeks to realize its security interest under section 52 shall intimate the liquidator of the price at which he proposes to realize its secured asset.

(2) The liquidator shall inform the secured creditor within twenty one days of receipt of the intimation under

sub-regulation (1) if a person is willing to buy the secured asset before the expiry of thirty days from the date of intimation under sub-regulation (1), at a price higher than the price intimated under sub-regulation (1).

(3) Where the liquidator informs the secured creditor of a person willing to buy the secured asset under sub-regulation (2), the secured creditor shall sell the asset to such person.

(4) If the liquidator does not inform the secured creditor in accordance with sub-regulation (2), or the person does not buy the secured asset in accordance with sub-regulation (2), the secured creditor may realize the secured asset in the manner it deems fit, but at least at the price intimated under sub-regulation (1).

(5) Where the secured asset is realized under sub-regulation (3), the secured creditor shall bear the cost of identification of the buyer under sub-regulation (2).

(6) Where the secured asset is realized under sub-regulation (4), the liquidator shall bear the cost incurred to identify the buyer under sub-regulation (2).

(7) The provisions of this Regulation shall not apply if the secured creditor enforces his security interest under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) or the Recovery of Debts and Bankruptcy Act, 1993 (51 of 1993).

(8) A secured creditor shall not sell or transfer an asset, which is subject to security interest, to any person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor.

(2022) 139 taxmann.com 350 (SC)

SUPREME COURT OF INDIA

Mahendra Kumar Jajodia *v.* State Bank of India

S. ABDUL NAZEER AND VIKRAM NATH, JJ.

CIVIL APPEAL NO(S). 1871-1872 OF 2022†

MAY 6, 2022

Section 62, read with sections 95 and 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate person's Adjudicating Authorities - Supreme Court, appeal to - NCLAT by impugned order had held that application filed by financial creditor under section 95(1) for initiating Corporate Insolvency Resolution Process (CIRP) against personal guarantor could not be rejected merely on ground that no CIRP or liquidation proceedings of principle borrower/corporate debtor was pending before NCLT - Whether on perusal of records, there was no cogent reason to entertain appeal against order passed by NCLAT and, thus, order passed by NCLAT required no interference - Held, yes (Para 1)

CASE REVIEW

State Bank of India v. *Mahendra Kumar Jajodia* (2022) 136 taxmann.com 371/171 SCL 232 (NCL-AT) (para 2) *affirmed.*

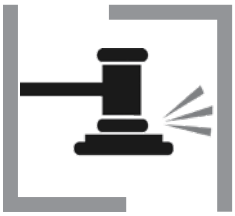
Siddharth Aggarwal, Sr. Adv., **Arijit Mazumdar**, **Shambo Nandy**, **Siddharth Shukla**, Advs. and **Abhinav Mukerji**, AOR *for the Appellant.* **Tushar Mehta**, S.G., **Sanjay Kapur**, AOR and **Ms. Megha Kumud**, Adv. *for the Respondent.*

ORDER

1. We have heard learned Solicitor General and learned senior counsel for the parties and perused the record. We do not see any cogent reason to entertain the Appeals. The judgment impugned does not warrant any interference.

2. The Appeals are dismissed.

† Arising out of *State Bank of India* v. *Mahendra Kumar Jajodia* (2002) 136 taxmann.com 371/171 SCL 232 (NCL-AT).



(2022) 137 taxmann.com 444 (SC)

SUPREME COURT OF INDIA

Anand Murti *v.* Soni Infratech (P.) Ltd.

L. NAGESWARA RAO AND B.R. GAVAI, JJ.

CIVIL APPEAL NO. 7534 OF 2021†

APRIL 27, 2022

Section 12A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Withdrawal of application - R2 was a home buyer in housing project developed by corporate debtor - Since corporate debtor had failed to complete housing project within specified time, a notice was issued by R2 asking them to refund consideration amount - Despite granting several opportunities to corporate debtor when amount in question was not refunded, R2 filed an application under section 7, which was admitted by NCLT - Since corporate debtor was ready to settle matter, NCLAT passed an interim order, thereby directing IRP not to constitute CoC - Corporate debtor submitted its settlement plan according to which corporate debtor had agreed to refund consideration amount to R2 - Corporate debtor also undertook to complete entire project and handover possession to home buyers (who want possession) within a period of 6 months to 15 months and during said period cost of flat would not be escalated - However, despite this, NCLAT passed impugned order directing IRP to go ahead with constitution of CoC and carry forward CIRP, thereby holding that there was no settlement with all home buyers - Whether in interest of home buyers who were waiting for possession, corporate debtor was permitted to complete project as undertaken by it and, therefore, impugned order passed by NCLAT was to be quashed - Held, yes (Para 23)

FACTS

- The appellant was the suspended director of the R1 corporate debtor. The R2 had booked a flat in the housing project launched by the corporate debtor. Subsequently, the R2 cancelled the booking and demanded refund of the amount of Rs. 32.27 lakh from the corporate debtor.
- On failure of the appellant in refunding the amount, the R2 filed an application under section 7 against the corporate debtor for initiation of CIRP before the NCLT. The NCLT admitted the said application and appointed an IRP. The IRP was directed to initiate the CIRP of the corporate debtor.
- The appellant being aggrieved by the NCLT's order filed an appeal before the NCLAT. The NCLAT issued notice and passed an interim order, thereby directing the IRP not to constitute CoC.

- It was submitted by the appellant before the NCLAT that he was ready and willing to settle the matter with the R2. It was further submitted by him that the project was complete almost to the extent of 70-75 per cent and that he had arranged the funds/private financier to complete the project and therefore, in interest of homebuyers - revenue CIRP should be permitted to be continued.

- In light of the submission made by the appellant, the NCLAT, directed the appellant to file proposed settlement terms/plan disclosing all material particulars with regard to completion of the housing project. Accordingly, the appellant submitted/filed the proposed settlement terms/plan. The IRP had submitted his status report, stating that most of the Allottees decided to have possession of the flats. In the meantime, the appellant settled the matter with the R2. Despite the settlement with the R2 and appellant's readiness and willingness to complete the project, the NCLAT modified the interim order and directed the IRP to go ahead with the constitution of CoC and carry forward the CIRP. The said order was passed by the NCLAT on the ground that the settlement arrived at by the appellant was only with the R2 and the settlement plan did not encompass all the allottees.

- Pursuant thereto, the appellant filed the modification application before the NCLAT. However, the NCLAT vide the impugned order, had rejected the said application for modification and passed the order as aforesaid. Being aggrieved, the appellant had approached instant Court by way of present appeal.

HELD

- The Promoter has filed an undertaking, thereby undertaking to return the money with interest at the rate of 6 per cent per annum of seven applicants, who were objecting to the Settlement Plan submitted by the appellant. He also undertook that the project will be completed stage-wise within a period of 6 months to 15 months (+/3 months) in a phased manner; that the promoter has arranged an amount of Rs. 10 crores to start the project immediately without any delay and that he will ensure that the project would be started within 15-30 days; that the cost of the flat will not be escalated and that the promoter is agreeable to honour the Builder Buyer Agreement signed by the previous management; that the promoter has given his consent to make a team of 5 persons, 2 from home-buyer's side and 2 from the management side and that the entire process will be monitored by the IRP. (Para 20)

- Taking into consideration the facts and circumstances of the present case, it will be in the interest of the home-buyers if the appellant/

promoter is permitted to complete the housing project. (Para 21)

- Taking into consideration the salient features of the undertaking given on affidavit by the Promoter and the fact that there are only seven out of the 452 home-buyers, who opposed the Settlement Plan, it will rather be in the interest of the home-buyers that the appellant/ promoter is permitted to complete the project as undertaken by him. It is pertinent to note that he has agreed that the cost of the flat will not be escalated. He has also given the timeline within which the project would be completed. Not only this, but he has also undertaken to refund the amount paid by the seven objectors, if they so desire. He has further agreed that there shall be a team of 5 persons, 2 from the home-buyer's side and 2 from the management side and that the entire process shall be monitored by the IRP. (Para 22)

- There is every possibility that if the CIRP is permitted, the cost that the home-buyers will have to pay, would be much higher, inasmuch as the offer made by the resolution applicants could be after taking into consideration the price of escalation, etc. As against this, the Promoter has filed a specific undertaking specifying therein that the cost of the flat would not be escalated and that he would honour the Builder Buyer Agreement signed by the previous management. (Para 23)

- In that view of the matter, the present appeal is allowed and the impugned order passed by the National Company Law Appellate Tribunal, is quashed and set aside; The affidavit filed by the promoter of the corporate debtor is taken on record and treated to be an undertaking given to the Court; The appellant/promoter is permitted to complete the project in accordance with the affidavit-cum-undertaking of the Promoter; The modification application before the NCLAT accordingly stands allowed.

CASE REVIEW

Anand Murti v. *Soni Infratech* (*P.*) *Ltd.* (2022) 136 taxmann.com 430 (NCLAT-New Delhi) (para 24) *reversed* (***See Annex***).

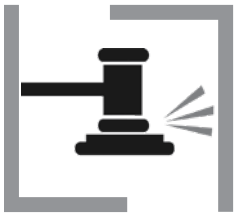
CASES REFERRED TO

Anand Murti v. *Soni Infrafech* (*P.*) *Ltd.* (Civil Appeal No. 1928 of 2020, dated 5-3-2020) (para 8).

Mani Bhushan Sinha, Adv. and **Pranab Prakash**, AOR *for the Appellant*. **Harish Malik**, Adv., **Alok Tripathi**, **Abhigya Kushwah**, AOR's, **Ms. Sunita Yadav** and **Pradeep Kumar Dubey**, Advs. *for the Respondent*.

† Arising out of order of NCLAT-New Delhi *Anand Murti* v. *Soni Infratech* (*P.*) *Ltd.* (2021) 136 taxmann.com 430.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 137 taxmann.com 444 (SC)



(2022) 138 taxmann.com 73 (SC)

SUPREME COURT OF INDIA

New Delhi Municipal Council *v.* Minosha India Ltd.

K.M. JOSEPH AND HRISHIKESH ROY, JJ.

CIVIL APPEAL NO. 3470 OF 2022†

APRIL 27, 2022

Section 60, read with sections 14 and 238A, of the Insolvency and Bankruptcy Code, 2016 and section 11 of the Arbitration and Conciliation Act, 1996 - Adjudicating Authority for corporate persons - Adjudicating Authority - Whether under IBC, by virtue of order admitting application, be it under section 7, 9 or 10 and imposing moratorium, proceedings as are contemplated in section 14 would be tabooed - Held, yes - Whether thus, what is tabooed in section 14 when a moratorium is put into place is inter alia institution of suits or continuance of pending suits or proceedings against corporate debtor including proceeding in execution of inter alia, decree or order of an arbitration panel - Held, yes - Whether this undoubtedly does not include an application under section 11(6) of Arbitration and Conciliation Act by corporate debtor or for that matter, any other proceeding by corporate debtor against another party; at least there is no express exclusion of jurisdiction of Court or authorities to entertain any such proceedings at hands of corporate debtor - Held, yes - Whether thus, provisions do not in any manner appear to stand in way of corporate debtor instituting or proceeding with a suit or a proceeding against others - Held, yes - Whether section 60(6) excludes period during which moratorium under section 14 is in place in computing period of limitation - Held, yes - Whether present an order of moratorium under section 14, entire period of moratorium is liable to be excluded in computing period of limitation even in a suit or an application by a corporate debtor - Held, yes (Paras 24 and 25)

FACTS

- Pursuant to an agreement, the appellant placed a purchase order of Rs. 16.20 crores with the respondent. The appellant, however, issued a termination notice to the respondent on account of its alleged inaction and conduct which was described as non-responsive. This led to the respondent approaching the High Court which finally culminated in a direction by the High Court to afford an opportunity of hearing to the respondent and to consider its representation.
- The appellant, however, rejected the representation. Invoking the provision in the contract providing for arbitration, the respondent addressed communication. The appellant sent its reply where it, inter alia, did not consent for either of the names suggested by the respondent and instead proposed to proceed for arbitration through the

Delhi International Arbitration Centre (DIAC). The National Company Law Tribunal (NCLT) admitted an application under section 10 and declared the moratorium. A resolution plan was approved by the NCLT.

- Subsequently, the respondent filed an application under section 11(6) of the Arbitration and Conciliation Act, 1996. By the impugned order, the High Court had allowed the application filed under section 11(6) and appointed a former Chief Justice of a High Court to be the arbitrator.

- The appellant contended that being a plea relating to limitation and since the aspect of limitation pertains to jurisdiction the mere fact that the counsel for the appellant in the High Court has consented to the order appointing the arbitrator would not stand in the way of the appellant pointing out that the application under section 11(6) of 1996 Act was clearly beyond time.

HELD

- Under the IBC, by virtue of the order admitting the application, be it under section 7, 9 or 10, and imposing moratorium, proceedings as are contemplated in section 14 would be tabooed. This undoubtedly does not include an application under section 11(6) of the 1996 Act by the corporate debtor or for that matter, any other proceeding by the corporate debtor against another party. At least there is no express exclusion of the jurisdiction of the Court or authorities to entertain any such proceeding at the hands of the corporate debtor. Under section 17, the management of the affairs of the corporate debtor is taken over by the interim resolution professional. The powers of the board of directors or the partners of the corporate debtor shall stand suspended and it would be exercised by the interim resolution professional. When the authority changes hands from the interim resolution professional to the resolution professional, the previous management continues to be excluded. The committee of creditors comes into being. Under the supervision, 'as it were', of the committee of creditors, all the matters are proceeded with. The resolution plans are received by the resolution professional and the resolution plan which is finally approved by the committee of creditors and still further at the hands of the adjudicating authority, would result in the curtains being wrung down on the moratorium under section 31(3). During this entire period, what is noteworthy is that while in law and in form, the corporate debtor continues to exist and represented by the interim resolution professional to begin with and the resolution professional thereafter, the erstwhile management of the corporate debtor is displaced. When the resolution plan is approved, a new management takes over. All this is contemplated when the CIRP is successful. Undoubtedly, if it is unsuccessful, the corporate debtor

slips into liquidation. Therefore, on the one hand, an application under section 7, 9 or 10, does bring in a period which is intended to bring a corporate debtor back to life if possible, 'a period of calm', in the words of the respondent. But this is a period during which the management of the corporate debtor is displaced, ironically, a period of turbulent churning. While it may be true that proceedings by the corporate debtor through the resolution professional is contemplated, it is not impossible to contemplate that the resolution professional for whatever reason it may be, does not discharge his duties and conduct proceedings in all matters as he should. (Para 24)

- As far as understanding the meaning of section 60(6) is concerned, there cannot be a slightest doubt that the period of moratorium is excluded even in the case of a suit or application brought by a corporate debtor, viz., in regard to the period of the moratorium. It is true that on the one hand what is tabooed in section 14 when a moratorium is put into place is inter alia the institution of suits or continuance of pending suits or proceedings against the corporate debtor including proceeding in execution of inter alia, the decree or order of an arbitration panel. So, also the provision prohibits any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Still further, the recovery of any property by an owner or lessor in the occupation of the corporate debtor is forbidden. These provisions do not in any manner appear to stand in the way of the corporate debtor instituting or proceeding with a suit or a proceeding against others. Section 60(6) on the other hand excludes the period during which the moratorium under section 14 is in place in computing the period of limitation. An ambiguity is introduced, namely the need to exclude the period of limitation for a suit or an application, at the instance of the corporate debtor when a moratorium ushered in by an order under section 14 does not pose any bar against a suit or an application at the instance of the corporate debtor. The words for which an order of moratorium has been made under this part is intended to be the point of reference or the premise for the exclusion of the time for the purpose of computing the period of limitation. Besides being the point of reference and being the sine qua non for applying section 60(6), it also specifies the period of time which will be excluded in computing of the period of limitation. In other words, present an order of moratorium under section 14, the entire period of the moratorium is liable to be excluded in computing the period of limitation even in a suit or an application by a corporate debtor. (Para 25)

- In respect of a corporate debtor if there has been an order of moratorium made in Part II, the period during which such moratorium was in place shall be excluded. 'For which an order of moratorium' cannot bear the interpretation which is sought to be placed by the appellant. The interpretation placed by the appellant is clearly against the plain meaning of the words which have been used. This Court cannot possibly sit in judgment over the wisdom of the Law Giver. The period of limitation is provided under the Limitation Act. The law giver has contemplated that when a moratorium has been put in place, the said period must be excluded. (Para 27)

- Section 60(6) of the IBC does contemplate exclusion of the entire period during which the moratorium was in force in respect of corporate debtor in regard to a proceeding as contemplated therein at the hands of the corporate debtor. (Para 28)

- In view of above, it unnecessary to go into the question relating to whether in view of the consent given by the appellant to the appointment of the arbitrator, the appellant should be debarred from raising the plea of limitation. The appeal will stand dismissed. (Para 29)

CASE REVIEW

Minosha India Ltd. v. *New Delhi Municipal Council* (2022) 137 taxmann.com 502 (Delhi) (para 29) *affirmed* (***See Annex***).

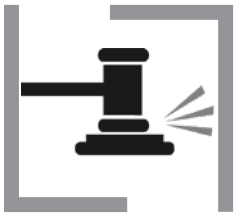
CASES REFERRED TO

Noharlal Verma v. *District Co-operative Central Bank Ltd.* (2008) 14 SCC 445 (para 4), *Reserve Bank of India* v. *Peerless General Finance and Investment Co. Ltd.* (1987) 1 SCC 424 (para 6), *Suthendran* v. *Immigration Appeal Tribunal* (1976) 3 All ER 611 (para 20), *Harbhajan Singh* v. *Press Council of India* (2002) 3 SCC 722 (para 20), *New India Assurance Co. Ltd.* v. *Nusli Neville Wadia* (2008) 3 SCC 279 (para 21) and *Tirath Singh* v. *Bachittar Singh* AIR 1955 SC 830 (para 23).

Gourab Banerji, Sr. Adv., **Harsha Peecharra**, Adv., **Yoginder Handoo**, AOR, **Rakesh Talukdar**, **Ashwin Kataria** and **Garvit Solanki**, Advs. *for the Petitioner.* **Neeraj Kishan Kaul**, Sr. Adv., **Mahesh Agarwal**, **Ms. Sayree Basu Mullik**, **Rishabh Parikh**, **Rohan Talwar**, **Deepak Joshi**, **Raghav Agrawal**, **Ms. Aarzoo Aneja**, Advs. and **E.C. Agrawala**, AOR *for the Respondent.*

† Arising out of order of High Court of Delhi in *Minosha India Ltd.* v. *New Delhi Municipal Council* (2022) 137 taxmann.com 502.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 138 taxmann.com 73 (SC)



(2022) 139 taxmann.com 349 (Bombay)

HIGH COURT OF BOMBAY

Jasani Realty (P.) Ltd. *v.* Vijay Corporation

G.S. KULKARNI, J.

COMMERCIAL ARBITRATION APPLICATION (L) NO. 1242 OF 2022

APRIL 25, 2022

Section 7, read with section 238, of the Insolvency and Bankruptcy Code, 2016 and section 11 of the Arbitration and Conciliation Act, 1996 - Corporate insolvency resolution process - Initiation by financial creditor - Whether mere filing of proceedings under section 7 cannot be treated as an embargo on Court exercising jurisdiction under section 11 of Arbitration and Conciliation Act, for reason that only after an order under section 7(5) is passed by NCLT, section 7 proceedings would gain a character of proceedings in rem, which would trigger embargo precluding Court to exercise jurisdiction under Arbitration and Conciliation Act, and more particularly in view of provisions of section 238, which would override all other laws - Held, yes - Respondent extended financial assistance to corporate debtor by executing loan agreement - Corporate debtor committed default in repayment - Respondent filed an application for initiating CIRP against corporate debtor - Corporate debtor resorted to arbitration clause of loan agreement and filed application under section 11 of 1996 Act praying that an Arbitral Tribunal be appointed - It was a case of respondent that since, respondent had already set into motion proceedings before NCLT, in such situation, proceedings, which were intended to evade consequences arising under IBC was not to be entertained - Whether since CIRP as initiated by respondent under section 7 was yet to reach a stage of NCLT passing an order admitting said proceedings, Court would not be precluded from exercising its jurisdiction under section 11 of Arbitration and Conciliation Act and, thus, application filed under section 11 of said Act was to be allowed - Held, yes (Para 23)

FACTS

- The respondent in the usual course of its business provided financial assistance to the applicant for which a loan agreement was entered between the applicant and the respondent.
- The business scenario had undergone a change and created a negative impact during the subsistence of agreement. In such situation, another agreement was executed between the parties, under which, the date of repayment of the borrowing was extended.
- There were defaults in the part of the applicant in the payment of the loan instalments. Thus, the respondent approached the NCLT by initiating proceedings against the applicant under section 7. So

far no order had been passed by the NCLT admitting the petition as per the provisions of sub-section (5) of section 7.

- In the proceedings before the NCLT, it was the case of the applicant that both the agreements entered between the parties being interconnected, when read together, contain an arbitration agreement between the parties, as contained in clause 16.
- The applicant-corporate debtor by its Advocate's notice issued to the respondent, invoked the arbitration agreement and called upon the respondent to agree to appoint an arbitral tribunal to adjudicate the disputes and differences between the parties under the said loan agreements. As the respondent failed to agree to appoint an Arbitral Tribunal, the instant application had been filed under section 11(6) of the Arbitration and Conciliation Act, 1996 praying, that an arbitral tribunal be appointed.
- A reply affidavit had been filed on behalf of the respondent opposing the petition. At the outset, an objection was raised to the maintainability of the present application on the ground that the application was an afterthought and an attempt on the part of the applicant to dilute the prior proceedings filed by the respondent before the NCLT. It was contended that the respondent's proceedings before the NCLT pertain to the admitted liability of the applicant and as the applicant had no defence before the NCLT, the present application had been filed to escape the rigors under the IBC.
- Thus, the primary contention of the respondent was to the effect that as the liability of the applicant towards the respondent of a financial debt was clearly an admitted liability, the respondent had already set into motion, the proceedings before the NCLT under section 7. It was the respondent's contention that in such situation, the instant proceedings which was intended to evade the consequences which would arise under the IBC ought not to be entertained and thus, instant application was liable to be dismissed.

HELD

- Mere filing of the proceedings under section 7 cannot be treated as an embargo on the Court exercising jurisdiction under section 11 of the Arbitration and Conciliation Act, 1996 for the reason that only after an order under sub-section (5) of section 7 is passed by the NCLT, the section 7 proceedings would gain a character of the proceedings in rem, which would trigger the embargo precluding the Court to exercise jurisdiction under the Arbitration and Conciliation Act, 1996, and more particularly in view of the provisions of section 238 which would override all other

laws. In the facts of the instant case as the corporate insolvency resolution process as initiated by the respondent under section 7 is yet to reach a stage of the NCLT passing an order admitting the said proceedings, the Court would not be precluded from exercising its jurisdiction under section 11 of the Arbitration and Conciliation Act, 1996 when admittedly, there is an arbitration agreement between the parties and invocation of the arbitration agreement has been made, which was met with a refusal on the part of the respondent to appoint an Arbitral Tribunal. (Para 21)

- In the above circumstances, the Court would be required to allow instant application by appointing an Arbitral Tribunal for adjudication of the disputes and differences which have arisen between the parties under the agreements in question. However, a formal order appointing an Arbitral Tribunal is not required to be made as after the judgment was reserved, the parties just two days back, have settled the disputes stating that an arbitration is not warranted. (Para 23)

CASE REVIEW

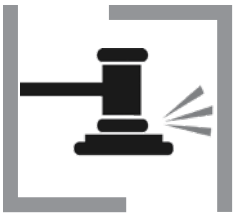
Indus Biotech (P.) Ltd. v. *Kotak India Venture (Offshore) Fund* (2021) 125 taxmann.com 393/166 SCL 129 (SC) (para 22) *followed*.

CASES REFERRED TO

Indus Biotech (P.) Ltd. v. *Kotak India Venture (Offshore) Fund* (2021) 125 taxmann.com 393/166 SCL 129 (SC) (para 9).

Dr. Birendra Saraf, Sr. Adv. and **Anshul Anjarlekar** *for the Applicant.* **Yusuf Iqbal Yusuf** *for the Respondent.*

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 139 taxmann.com 349 (Bombay)



(2022) 139 taxmann.com 351 (NCLT - Kolkata)

NATIONAL COMPANY LAW TRIBUNAL, KOLKATA BENCH

Sangita Fiscal Services (P.) Ltd. *v.* Duncans Industries Ltd.

ROHIT KAPOOR, JUDICIAL MEMBER

AND HARISH CHANDER SURI, TECHNICAL MEMBER

I.A. (IB) NO. 415/KB/2021 C.P. (IB) NO. 184/KB/2018

MAY 9, 2022

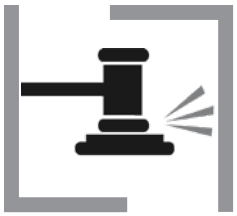
Section 25, read with section 18, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution professional - Duties of - Corporate Insolvency Resolution Process (CIRP) was initiated against corporate debtor vide order dated 5-3-2020 and applicant was appointed as Interim Resolution Professional (IRP) and later confirmed as Resolution Professional (RP) - RP filed instant application seeking direction upon respondent No. 1 to hand over possession of tea estate to RP - It was found that State of West Bengal had leased tea estate in favour of corporate debtor for a period of thirty years commencing from June 1978, which was terminated on 26-6-2008 and not renewed as per law - Corporate Debtor abandoned tea garden in year 2019, long before admission of CIRP against corporate debtor and respondent No. 1 took possession of tea garden and had been running tea garden since 1-7-2021 - Whether since lease given to corporate debtor had not been renewed in favour of corporate debtor, it was out of question that RP could take possession of tea gardens to which corporate debtor had no ownership - Held, yes - Whether therefore, prayer of RP seeking direction upon respondent No. 1 to hand over possession of tea estate could not be granted - Held, yes (Paras 25 and 26)

CASES REFERRED TO

Tata Consultancy Services v. *Vishal Ghisulal Jain, Resolution Professional of SK Wheels (P.) Ltd.* (2021) 132 taxmann.com 232/ (2022) 170 SCL 153 (SC) (para 16), *Embassy Property Developments (P.) Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56/ (2020) 157 SCL 445 (SC) (para 18), *Gujarat Urja Vikas Nigam Ltd.* v. *Amit Gupta* (2021) 125 taxmann.com 150/167 SCL 241 (SC) (para 18), *Bhanu Kumar Jain* v. *Archana Kumar* (2005) 1 SCC 787 (para 20), *Ishwar Dutt* v. *Land Acquisition Collector* (2005) 7 SCC 190 (para 20), *Shiromani Gurdwara Parbandhak Committee* v. *Mahant Harnam Singh* (2003) 11 SCC 377 (para 20) and *K.S. Varghese* v. *St. Peter's & Paul's Syrian Orthodox Church* (2017) 15 SCC 333 (para 20).

Joy Saha, Sr. Adv., **Dipankar Das** and **Ms. Sajana Nandi**, Advs. *for the Appellant.* **Jishnu Saha**, Sr. Adv., **Usha Nath Banerjee**, **Avishek Guha** and **Chitresh Saraogi**, Advs. *for the Respondent.*

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 139 taxmann.com 351 (NCLT - Kolkata)



(2022) 139 taxmann.com 348 (NCLAT - Chennai)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI

ICICI Bank Ltd. *v.* OPTO Circuits (India) Ltd.

M. VENUGOPAL, JUDICIAL MEMBER

AND KANTHI NARAHARI, TECHNICAL MEMBER

COMPANY APPEAL (AT) (CH) (INSOLVENCY) NO. 146 OF 2021†

APRIL 28, 2022

Section 12A, read with section 7, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Withdrawal of application - Appellant bank (financial creditor) had extended some credit facilities to corporate debtor - Due to default, CIRP was initiated against corporate debtor - Pursuant to one time settlement between parties CIRP was terminated - However, appellant sought revival/restoration of CIRP on failure of corporate debtor to adhere to terms of settlement - NCLT by impugned order refused to allow request made and instead granted liberty to appellant to file a fresh application - Whether appellant-financial creditor would be at liberty to seek revival/ restoration of CIRP proceedings before Adjudicating Authority - Held, yes - Whether liberty given by Adjudicating Authority to appellant to file a fresh company petition was erroneous and without application of mind and without following principles of natural justice and, hence, was to be quashed and set aside - Held, yes (Paras 20, 23 and 24)

FACTS

- The appellant bank (financial creditor) had extended some credit facilities to the corporate debtor. In view of default committed by corporate debtor an amount of Rs. 107.86 crores fell due against the corporate debtor. Pursuant to such default, the appellant bank initiated proceedings under section 7 and the NCLT, Bengaluru admitted the application filed by the appellant bank vide order dated 18-3-2020 and initiated CIRP against the corporate debtor.
- The corporate debtor challenged the above order by filing a writ petition before the High Court of Karnataka and the order admitting the above application was stayed by the High Court. During the pendency of the writ petition, on 22-4-2020, the corporate debtor approached the appellant bank with one time settlement (OTS) proposal, agreeing to pay a sum of Rs. 22.7 crores as full and final settlement, which was accepted by the appellant bank vide OTS letter dated 10-7-2020.
- Subsequently, an application under section 12A was filed by

the corporate debtor before NCLT, seeking termination of CIRP, in view of the settlement agreement signed between the parties. During the course of the hearing, the appellant bank filed a memo, thereby, seeking liberty to revive/restore the order dated 18-3-2020, in the event of failure of the corporate debtor to adhere to the terms of settlement.

- The NCLT, *vide* impugned order dated 17-8-2020, refused to allow the request made in the Memo and instead granted liberty to the appellant to file a fresh application in accordance with the provisions of the IBC.

- On appeal :

HELD

- The appellant specifically brought to the notice of the Adjudicating Authority, the decision of the Appellate Tribunal in the matter *Vivek Bansal* v. *Burda Druck India (P.) Ltd.* (2020) 118 taxmann.com 417/162 SCL 539 (NCL-AT) wherein it was held that in the event of default by the corporate debtor and not adhering to the terms of 'settlement agreement' with respect to outstanding instalments, the 'operational creditor' shall be at liberty to seek revival/restoration of the CIRP proceedings before the Adjudicating Authority.(Para 20)

- The Adjudicating Authority ought to have taken into consideration the decision of this Tribunal being the Appellate Authority as a precedent in a similarly situated facts of the case. Even otherwise the Adjudicating Authority failed to take note of the prayer made by the corporate debtor that the matter may be disposed of as settled by giving liberty to the Petitioner Bank (Appellant) to resume the CIRP in case of non-compliance of the terms of the OTS.(Para 21)

- However, the Adjudicating Authority committed grave error in giving liberty to the appellant to file fresh Company Petition instead of giving liberty to revive/resume the CIRP Proceedings in case the corporate debtor failed to adhere to comply with the terms of settlement in strict sense. Even the Adjudicating Authority failed to take note of the decision of the Appellate Tribunal being the Appellate Authority as a precedent in a similarly situated case.(Para 22)

- Thus, the resultant conclusion is that the finding of the Adjudicating Authority in the impugned order regarding the observation/liberty to file a fresh company petition by the appellant bank is erroneous and without application of mind and without following the Principles of Natural Justice and not adhering to the decision of Appellate Tribunal being the Appellate Authority, is hereby quashed and set aside. (Para 23)

- Accordingly, it is made clear that in the event of default not

adhering to the terms of 'settlement agreement' as regards the payment of the outstanding instalments, the 'financial creditor' shall be at liberty to seek revival/restoration of the CIRP proceedings before the Adjudicating Authority.(Para 24)

CASE REVIEW

Order passed by NCLT, Bengaluru Bench, Bengaluru in I.A. No. 273 of 2020 in CP (IB) No. 199/BB/2018, dated 17-8- 2020 (para 23) *reversed*.

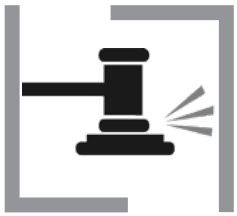
CASES REFERRED TO

Vivek Bansal v. *Burda Druck India (P.) Ltd.* (2020) 118 taxmann.com 417/162 SCL 539 (NCL-AT) (para 8).

V. Suresh, **Dev Eshwaar**, **Sivakumar** and **Suresh** Advs. *for the Appellant.* **Samarth Shreedhar**, **Navaneetha Krishnan**, **N.P. Vijaya Kumar**, Advs. and **P. Srivastava** Erstwhile R.P., *for the Respondent.*

† Arising out of order passed by NCLT, Bengaluru Bench, Bengaluru in I.A. No. 273 of 2020 in CP (IB) No. 199/BB/2018, dated 17-8-2020.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 139 taxmann.com 348 (NCLAT - Chennai)



(2022) 139 taxmann.com 393 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Hero Fincorp Ltd. *v.* Liquidator of TAG Offshore Ltd.

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

COMPANY APPEAL (AT) (INSOLVENCY) NO. 908 OF 2020†

APRIL 29, 2022

Section 5(16), read with sections 33 and 52, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Liquidation cost - Pursuant to order of liquidation of corporate debtor, resolution professional was appointed as liquidator - Liquidator informed appellant-financial creditor, which had charge of vessel tag 22, that it had reached out to salvage company for securing two vessels, viz., tag 22 and tag 6, for their protection and preservation - Appellant filed application before NCLT seeking direction to allow it to exit from liquidation process and keep vessel tag 22 out of liquidation estate and also for including expenses incurred in securing said two vessels, as part of CIRP and liquidation expenses - NCLT by impugned order held that expenses incurred for securing vessel tag 22 could not be treated as liquidation process expenses and allowed appellant to keep vessel tag 22 out of liquidation estate under section 52 subject to clearance of proportionate CIRP costs and payment of expenses incurred by liquidator in securing vessel tag 22 - On appeal, appellant submitted that vessel was part of liquidation estate and was responsibility of liquidator, therefore, expenses for preventing any damage was upon liquidator - Whether since security interest of appellant in its charge vessel tag 22 was being realised under section 52(1)(b) and liquidator took action after receiving consent from appellant in pursuance of appellant's interest in preservation and protection of its asset tag 22, there was no error in impugned order passed by NCLT - Held, yes (Paras 18 and 20)

FACTS

- Pursuant to order of liquidation of corporate debtor, resolution professional was appointed as liquidator.
- The respondent-liquidator initimated appellant-financial creditor which had charge of vessel tag 22 that two vessels namely tag 6 and tag 22 which are assets in the liquidation estate had came close to each other and may make contact which might result in potential damage.
- The liquidator also informed to the appellant that it had reached out to salvage company for securing the two vessels for their protection

and preservation and asked it to provide an estimate for the proposed job.

- The appellant further communicated its willingness to contribute funds for securing the vessels and requested for starting the job of securing the vessels.
- Salvage company submitted tax invoice and details of job undertaken by the company to the appellant.
- The appellant issued a notice to the liquidator indicating its intention to exit from liquidation process and realise its charge in vessel tag 22.
- The appellant filed application before NCLT seeking its direction to allow to exit from the liquidation process and keep vessel tag 22 out of liquidation estate and also for including the expenses incurred in securing the two vessels, tag 22 and tag 6, as part of the CIRP and liquidation expenses.
- The NCLT by impugned order held that the expenses incurred for securing the vessel tag 22 could not be treated as liquidation process expenses and the appellant should bear the entire expenses incurred by the liquidator in protecting the charge of the appellant, in addition NCLT also allowed appellant to keep its charge of tag 22 out of liquidation estate subject to clearance of proportionate CIRP cost and payment of expenses incurred by the liquidator in securing vessel tag 22.
- On appeal, appellant submitted that the responsibility for securing vessel tag 22, which was part of the liquidation estate, was the responsibility of the liquidator and, therefore, expenses for preventing any damage due to possible collision between the vessels was upon the liquidator, and hence the expenses incurred should be part of the overall liquidation process costs.

HELD

- It is noted that the liquidator, who is responsible for preservation and protection of the assets in the liquidation estate, exchanged e-mail communications starting with an e-mail dated 2-10-2019 to both appellant/'H', under whose charges the vessels tag 22 and tag 6 were held respectively, that the two vessels have come close to each other and may come into contact leading to potential damage, whereupon vide e-mail dated 3-10-2019 the appellant communicated its unreserved willingness to contribute funding needed for securing tag 22 and also requested the liquidator to undertake the securing operation. Again, vide e-mail dated 4-10-2019, the appellant expressed its willingness to contribute 50 per cent of the funds required for securing the two vessels tag 22 and tag 6.
- Further, proportionate CIRP cost and payment of expenses incurred by the liquidator in securing m.v.

tag-22 has been ordered by the Adjudicating Authority which has to be paid by the appellant. (Para 12)

- The Adjudicating Authority has noticed that the appellant filed Commercial and Admiralty Suit before the Bombay High Court for invoking the admiralty jurisdiction and realising its security interest. (Para 13)

- Thus, the appellant had invoked Admiralty Jurisdiction under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 vide Commercial and Admiralty Suit whereupon an order for 'arrest' of the vessel was given by the Bombay High Court on 18-3-2019 and its auction/sale was ordered on 23-4-2019. The CIRP of the corporate debtor/Tag Offshore Limited was initiated vide order dated 24-4-2019 of the Adjudicating Authority, which was more than one month after the appellant had invoked the Admiralty Jurisdiction of the Bombay High Court for securing and realizing its charge in the vessel tag 22. (Para 14)

- It is also noted by us that the actions relating to protection and preservation of two vessels tag 22 and tag 6 were taken by the liquidator during the period 3rd to 5-10-2019, as is clear from the e-mails exchanged between the charge holders of two vessels, namely United Bank of India and Hero Fincorp and the liquidator and also from the tax invoice submitted by K.E. Salvage. Therefore, the action relating to securing the two vessels was taken much after the appellant had obtained order from the Bombay High Court under its Admiralty Jurisdiction on 18-3-2019 and 23-4-2019 and therefore the vessel tag 22 had become the 'asset' of the appellant. Thus, it is clear that any action taken thereafter for securing the vessel tag 22 was undertaken by the liquidator with the explicit consent of the appellant/'H' in pursuance of Hero Fincorp's interest in protecting and preserving its asset tag 22, and the action being taken for liquidation of the corporate debtor is under the provisions of the IBC. Moreover, the security interest of the appellant in its charge vessel tag 22 is being realised under section 52(1)(b). Therefore, one does not think it is relevant in this case that the liquidator's vendor K.E. Salvage should await orders of the Bombay High Court for payment of its claim from the sale proceeds of vessel tag 22. It is opined that the payment of salvaging operation should be made without awaiting the orders under the Admiralty Jurisdiction, as it is the responsibility of the appellant, on whose request the securing operation for tag 22 was undertaken by the liquidator. (Para 15)

- Regulations 16 and 18 of the Liquidation Process Regulations enjoin upon the creditors to file

their claim before the liquidator in a prescribed time period. In the instant case, the financial creditor 'H' did not file its claim before the liquidator ostensibly because it wanted to realise its security interest in the vessel tag 22. Later, after it was able to secure its charge in vessel tag 22, the appellant sent notice on 9-10-2019 to the liquidator regarding its intention to keep its charge of tag 22 out of the liquidation estate and process. The appellant obtained orders for auction/sale of vessel tag 22 on 23-4-2019, which was much before the initiation of CIRP of the corporate debtor and order for its liquidation was passed by the Adjudicating Authority on 26-9-2019. Therefore, even though the appellant gave notice for keeping its charge of the Vessel tag 22 out of the liquidation process on a later date, it had already initiated process for statutory remedy available to it as mortgagee before Bombay High Court under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 in March, 2019. (Para 16)

- It is noted that after receiving the Impugned Order on 6-2-2020, the appellant waited for almost seven months before filing the instant appeal on 17-9-2020. The appellant has already taken action in pursuance of the Impugned Order by opting out of the liquidation process and keeping vessel tag 22 out of the liquidation assets. (Para 17)

- The liquidator took action after receiving consent from the appellant for preservation and protection of vessel tag 22 during 3rd - 5-10-2019 much after the appellant had invoked Admiralty Jurisdiction of Bombay High Court to realise its security charge in vessel tag 22. Subsequently, when invoice received from K.E. Salvage Company was sent for payment to the appellant by the liquidator, the appellant went for litigation against making payment of said invoice. This action of the appellant was not logical and in accordance with the actions taken by it to realise its charge in tag 22. Therefore, there is no error in the Impugned Order regarding payment to be made by the appellant, of its proportionate share in the expenses incurred in securing vessel tag 22 along with securing vessel tag 6. (Para 18)

- Even after the salvage operation undertaken during 3rd - 5-10-2019, the appellant has not only refused to pay the cost of securing and protecting the vessel tag 22 and has engaged the liquidator in protracted litigation. The action taken by the liquidator in protecting and preserving tag 22 was for the benefit of the appellant and the litigation undertaken by the appellant caused expenditure which has ultimately cut into the value of the liquidation estate, thereby affecting the financial interest of the creditors/stakeholders. Therefore, order that the appellant shall pay

a cost of Rs. one lakh as litigation expenses to the liquidator, which shall go into the liquidation estate. Both, the proportional share of the appellant in securing the two vessels tag 22 and tag 6 and the litigation cost shall be paid by the appellant within 15 days of this judgment. (Para 19)

- In view of the discussion in above paragraphs, the appeal is found to be devoid of any merit and is, therefore, dismissed with the directions as above. (Para 20)

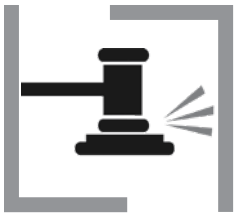
CASE REVIEW

Order of NCLT-Mumbai in M.A. No. 3656 of 2019 passed in CP No. 54/IBC/NCLT/MAH/2019, dated 6-2-2020 (para 20) *affirmed*.

Shantanu Singh, Adv. *for the Appellant*. **Amir Arsiwala**, **Dhrupad Vaghani**, **Ms. Nidhi Shah**, **Ms. Naveli Reshamwalla** and **Ajiz M**, Advs. *for the Respondent*.

† Arising out of order of NCLT-Mumbai in M.A. No. 3656 of 2019 passed in CP No. 54/IBC/NCLT/MAH/2019, dated 6-2-2022.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 139 taxmann.com 393 (NCLAT- New Delhi)



(2022) 139 taxmann.com 394 (NCLAT- New Delhi)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Maharashtra Industrial Development Corporation *v.* Santanu T. Ray

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

COMP. APP. (AT) (INS.) NO. 1004 OF 2021†

MAY 4, 2022

Section 14 of the Insolvency and Bankruptcy Code, 2016 - Corporate Insolvency Resolution Process - Moratorium - General - Appellant-Industrial Development Corporation allotted a plot on lease to corporate debtor for construction of factory building for two years subject to condition that it must complete 20 per cent construction within two years - Meanwhile, application under section 9 filed against corporate debtor was admitted by NCLT - Subsequently, appellant issued a notice to corporate debtor cancelling lease agreement directing license holder to vacate plot on ground that corporate debtor had violated terms of lease agreement - NCLT by impugned order held said notice as null and void and directed appellant to restrain from terminating lease agreement - Whether since moratorium was kicked in, appellant could not have taken possession of leased property by virtue of restrain under section 14(1)(d), which also prohibited appellant to cancel lease during currency of moratorium - Held, yes - Whether, however, after CIRP was over, there was no fetter on right of appellant to take proceeding for breach of terms of lease by corporate debtor - Held, yes - Whether thus, impugned order passed by NCLT was to be upheld - Held, yes (Paras 29, 30 and 32)

FACTS

- The appellant-Maharashtra Industrial Development Corporation allotted a Plot the corporate debtor. A lease agreement was executed between the appellant and the corporate debtor whereunder license was granted in respect of the plot for two years subject to condition that it must complete 20 per cent construction within two years. Tri-partite agreement was executed between the corporate debtor, the appellant and DHFL, whereunder the Plot was mortgaged to DHFL and loan was disbursed to the corporate debtor.
- A notice was issued by the appellant to the corporate debtor asking it to show cause as to why action as provided in clause 5(b)(i) of the agreement to lease should not be taken against it since the corporate debtor had not completed the construction work of the factory building.

- Meanwhile, corporate insolvency resolution process (CIRP) was initiated against the corporate debtor on an application filed by one of operational creditor. The appellant had issued a letter to DHFL informing that the corporate debtor had committed the breach and the appellant would be taking possession of the plot.
- The R2-ARC, assignee of the DHFL filed writ petition challenging the letter which petition was dismissed holding that lease was liable to be revoked if the corporate debtor had committed default in complying with the terms of the lease.
- Subsequently, the appellant issued a notice to the corporate debtor cancelling the lease agreement directing the license holder to vacate the plot.
- The Resolution Professional filed an application before the Adjudicating Authority praying for reliefs such as to quash and set aside the notice issued by the respondent as null and void and to restrain the respondent from taking any steps in further of the said notice to direct the respondent to restrain from terminating the lease agreement till the completion of the corporate insolvency resolution process or to take any further step to direct the respondent to extend their co-operation in concluding the corporate insolvency resolution process.
- The Adjudicating Authority heard the parties and by impugned order, set aside notice as null and void.
- The Appellant aggrieved by the impugned order had come up with instant appeal.

HELD

- The instant is a case where CIRP was initiated on 11-3-2019 and the notice dated 8-11-2019 terminating the lease agreement and notice for taking possession was issued on 8-11-2019 i.e. after the imposition of moratorium. (Para 26)
- The purpose and object of moratorium is to temporarily freeze all actions as contemplated under section 14 to enable the corporate debtor to resolve its insolvency and to revive it. Prohibition on action against the corporate debtor is only to preserve the status quo as it exists on the date of initiation of CIRP so that all claims against the corporate debtor on the date of initiation of CIRP be collated and dealt with to take steps to revive by approving appropriate resolution plan, if any, to bring it back. All the institution of suits or continuation of pending suits and proceedings against the corporate debtor are prohibited under section 14(1)(a) of the code with the object that status quo regarding corporate debtor be maintained and further proceedings against the corporate debtor be not permitted during the continuance of the CIRP to

preserve the corporate debtor from any financial assault or other proceeding to stop off its current situation for purpose of resolution. Similarly, under section 14(1)(d), recovery of any property by any owner or lessor which is occupied by the corporate debtor is prohibited. (Para 27)

- After considering the facts on the record and arguments of the parties, it was opined that in view of the fact that moratorium has kicked in with effect from 11-3-2019 due to currency of moratorium, the appellant could not have taken possession of the leased property by virtue of restrain under section 14(1)(d). Further continuation or initiation of any other proceeding under section 14(1)(a) which also prohibited the appellant to cancel the lease during currency of the moratorium. Although after CIRP is over, there is no fetter on the right of the appellant to take proceeding for breach of terms of the lease by the corporate debtor. (Para 29)

- The Adjudicating Authority by its impugned order has allowed the prayer i.e. quash the notice. The order having passed during the currency of the moratorium, no exception can be taken to the order passed by the Adjudicating Authority. The quashing of the notice does not create any fetter on the rights of the appellant to pass appropriate order for breach of terms of lease after CIRP is over. The Adjudicating Authority has also directed the appellant not to take any coercive action till the application for approval of the resolution plan to protect the status quo which was existing on the date of initiation of CIRP. As soon as the CIRP is over, the appellant shall have all powers to take appropriate action. (Para 30)

- Thus, appeal against order of NCLT is to be disposed of upholding the direction issued by the Adjudicating Authority which order has been issued only in reference to section 14 and after CIRP is over, it shall be open for the appellant to deal with the lease land which was leased to the corporate debtor in accordance with its rights as envisaged by the lease deed in event, the plot, in question, is included in the resolution plan, the resolution applicant shall not acquire any better right to the rights which were held by the corporate debtor in the lease land along with liabilities attached therein. After CIRP is over, there is no fetter in the rights of the appellant to take appropriate action in accordance with law with regard to lease land. (Para 32)

CASE REVIEW

Order of NCLT - Mumbai in M.A. No 3691 of 2019, dated 12-4-2021 (para 32) *affirmed*.

CASES REFERRED TO

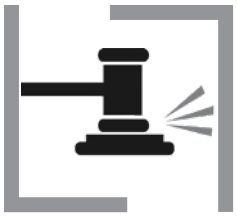
Rajendra K. Bhutta v. *Maharashtra Housing and Area Development Authority* (2020) 114 taxmann.com 655/160 SCL 95 (SC) (para 11), *Municipal Corporation of Greater Mumbai* (*MCGM*) v. *Abhilash Lal* (2019) 111 taxmann.com 405/(2020) 157 SCL 477 (SC) (para 15), *Embassy Property Developments* (*P.*) *Ltd.* v. *State of Karnataka* (2019) 112 taxmann.com 56/(2020) 157 SCL 445 (SC) (para 17), *Gujarat Urja Vikas Nigam Ltd.* v. *Amit Gupta* (2021) 125 taxmann.com 150/167 SCL 241 (SC) (para 21) and *Tata Consultancy Services Ltd.* v. *Vishal Ghisulal Jain, Resolution Professional of SK Wheels* (*P.*) *Ltd.* (2021) 132 taxmann.com 232/(2022) 170 SCL 153 (SC) (para 24).

Chetan Kapadia, **Rohan Agrawal** and **Bhavana Dubepati**, Advs. *for the Appellant.*

Udit Gupta, **Rohit Gupta**, **Rubina Khan**, **Usha Singh**, **Shahrukh Inam**, **Bishwajit Dubey**, **Ms. Srideepa Bhattacharyya** and **Ms. Neha Shivhare**, Advs. *for the Respondent.*

† Arising out of order passed by NCLT - Mumbai in MA No. 3691 of 2019, dated 12-4-2021.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 139 taxmann.com 394 (NCLAT- New Delhi)



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NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Mack Star Marketing (P.) Ltd. *v.* Ashish Chawchharia Resolution Professional of Jet Airways (India) (P.) Ltd.

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

COMPANY APPEAL (AT) (INSOLVENCY) NO. 389 OF 2021†
I.A. NO. 850 OF 2022

MAY 6, 2022

Section 5(13), read with section 25, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Insolvency resolution process cost - Whether mere fact that CIRP has triggered and Moratorium has been imposed does not absolve corporate debtor to pay for premises and facilities which is being enjoyed by corporate debtor during CIRP period - Held, yes - Appellant and corporate debtor entered in to a leave and license agreement dated 24-2-2011 for license of office premises - Corporate debtor failed to pay monthly rent with effect from March, 2019 to appellant - Appellant sent a notice dated 30-4-2019 to corporate debtor calling upon to make payments under agreement, failing which corporate debtor would have to vacate licensed premises - CIRP commenced against corporate debtor with effect from 20-6-2019 - Even during CIRP, office premises remained in occupation of Resolution Professional (RP) of corporate debtor - Appellant filed application before NCLT for declaration that license fee payable was part of CIRP cost - Adjudicating Authority took view that RP was not required to handover possession till security deposit was refunded and further corporate debtor need not pay any license fee for premises from 1-6-2019 - Appellant was directed to refund security deposit to RP after deducting license fee payable from 1-3-2019 to 31-5-2019 - Whether RP had no right or entitlement to continue in premises on ground that security deposit had not yet been refunded without giving any opportunity to appellant-licensor to determine whether as to any security was refundable or not - Held, yes - Whether RP had continued in possession of premises and exposed corporate debtor for liabilities to pay license fees during CIRP period, which could be CIRP costs - Held, yes - Whether however, since resolution plan had been approved and there was no provision made for payment of leave and license fees for CIRP period as RP never accepted amount as CIRP cost, even though appellant was entitled for amount, fees would be payable to appellant during CIRP period - Held, yes (Paras 14, 15 and 16)

FACTS

- The appellant and the corporate debtor entered into a license agreement for license of office

premises in a building owned by the appellant on 24-2-2011. A security deposit was also made by the corporate debtor to the appellant in pursuance of license agreement.

- In the year 2018, corporate debtor vacated four office units and substantial unpaid dues were set-off by the appellant from the security deposit. Balance security deposit with the appellant of the corporate debtor was Rs. 1.35 crores. Monthly fees for two units that was retained by corporate debtor was Rs. 28.51 lakhs. On 28-2-2019, the appellant wrote to corporate debtor that all future monthly fees payable by the corporate debtor be deposited in the ICICI Bank account and all future communications with the appellant must be addressed to the e-mail address of the appellant's Managing Director.

- The corporate debtor did not deposit the monthly license fees in the months of March and April, 2019. On 30-4-2019, the appellant issued a notice to the corporate debtor giving an opportunity to the corporate debtor to pay monthly fees within 30 days. It was further mentioned that if deposit is not made, the appellant will have the right to terminate the leave and license agreement and the corporate debtor shall be required to immediately vacate all the office space.

- After the notice dated 30-4-2019, corporate debtor neither paid the monthly license fees nor vacated the premises. On 20-6-2019, the Corporate Insolvency Resolution Process (CIRP) was commenced against the corporate debtor. A letter dated 28-11-2019 was issued to the Resolution Professional of the corporate debtor by the appellant, praying for vacation of premises by 31-12-2019. It was mentioned that dues and arrears of the premises are outstanding. The Resolution Professional was called upon to ensure that premises are vacated by 31-12-2019.

- On 5-1-2020, another letter was written by the appellant to Insolvency Resolution Professional (IRP) asking the IRP to confirm on or prior to 15-1-2019 that the monthly fees payable to appellant for the relevant period form a part of the CIRP costs and be paid once the proceeds under the Resolution Plan or under the Liquidation Process are distributed in terms of the IBC. The letter dated 5-1-2020 was not replied.

- The appellant filed an application before the Adjudicating Authority praying to declare that the monthly fees payable to the applicant under the service agreements for the relevant period shall form part of the IRP Costs in terms of the IBC, permit and allow the applicant to file its claims with the respondent/ liquidator for payment of the monthly fees for the relevant period under the service agreements; direct the respondent/liquidator to

treat any claims of the applicant relating to monthly fees for the relevant period under the service agreements as IRP costs, ad-interim/ interim reliefs in terms of the above and such further and other reliefs as this Tribunal may deem fit in the facts and circumstances of the present case and in the interest of justice.

- A reply was filed by the Resolution Professional (RP) contending that the corporate debtor was entitled to continue in the occupation of the licensed premises until the receipt of the entire security deposit. Referring to notice dated 30-4-2019, it was pleaded that notice being in the nature of notice of eviction and no further payment having been paid by the corporate debtor, the license agreement stood automatically terminated on 31-5-2019. No further license fee was payable to the applicant in terms of clause 21.3 of the agreement. Reliance was also placed on letter dated 17-8-2019 written by the RP to the appellant seeking for refund of security deposit.

- The Adjudicating Authority took the view that under clause 21.3 of leave and license agreement, the respondent was not required to handover the possession till the security deposit was refunded and further the corporate debtor need not to pay any license fee for the premises from 1-6-2019. It was held that applicant is not entitled to any payment with respect to license fee after 31-5-2019. The applicant i.e. appellant was directed to refund the security deposit to the respondent after deducting the license fee payable from 1-3-2019 to 31-5-2019.

- On appeal:

HELD

- In the present case, it is clear that at no point of time, the respondent RP handed over possession of the premises to the appellant or asked the appellant to take possession of the premises. Clause 21.3 is relied only for the purpose of justifying continuation of the respondent in the premises during the CIRP period and thereafter according to the case of the respondent itself, the security amount which is security deposit is related to premises in question before the commencement of CIRP was Rs. 1.35 crores. In the reply filed in this appeal, the respondent has further stated that if the rent from 1-3-2019 to 31-5-2019 is deducted, the security with the appellant shall be Rs. 82.89 lakhs. (Para 13)

- Admittedly, the monthly rent of the premises is Rs. 28 lakhs and odd. No amount has been paid towards the license fee after March, 2019 on the ground that security amount of Rs. 82 lakhs and odd is payable by the appellant. The respondent is continuing in the premises occupying the same for last more than three years whereas

the security lying with the appellant at best is avail to cover the license fee for about three months only. The appellant's case in the I.A filed before the Adjudicating Authority was that the occupation of the premises by corporate debtor is continuing, hence, the monthly license fee be treated as CIRP costs. The Adjudicating Authority has rejected the application relying only on the submission of the respondent that under clause 21.3 till the security deposit is refunded, the respondent is entitled to continue in possession. The Adjudicating Authority has committed error in ignoring clauses 21.1 and 21.3. The licensor under the agreement is entitled to deduct the amount as provided in clause 21.3. Thus, refund of security can be effectuated only after licensor determines the amounts which are to be deducted, which deduction can be finalised only after licensor receives the possession of the premises and find out what amount may be incurred by the licensor to repay and damages costs to the licensed premises. The submission raised on behalf of the respondent is placing the cart before the horse. The respondent has no right or entitlement to continue in the premises on the ground that security deposit has not yet been refunded without giving any opportunity to the licensor to determine whether as to any security is refundable or not. When clauses 21.1, 21.2 and 21.3 are read conjointly, it is clear that the licensee is under obligation to handover the possession within 30 days of the date of termination and licensor has time of 30 days thereafter to refund the security deposit. When the licensee has not handed over possession, there is no occasion to determine whether any amount is to be given back to the licensee or not. (Para 14)

- Present is a case where the Resolution Professional has continued in the possession of the premises and exposed the corporate debtor for liabilities to pay license fees during the CIRP period which could be CIRP costs. The mere fact that CIRP has triggered and Moratorium has been imposed does not absolve the corporate debtor to pay for premises and facilities which is being enjoyed by the corporate debtor during the CIRP period. Sufficient ground has been made out by the appellant in this application to treat the license fees of the premises to be treated as CIRP costs. The Adjudicating Authority erroneously relying on clause 21.3 alone has justified the continuance of occupation of the respondent in the premises. The Adjudicating Authority directed for refund of security without any direction to the respondent to handover the possession of the premises. The premises which was in occupation of the corporate debtor is a commercial premises and the appellant have been deprived for the use of the premises for

long period without any justifiable reason. (Para 15)

- It has been informed by the parties at Bar that the Resolution Plan with regard to corporate debtor has been approved by the Adjudicating Authority by order dated 22-6-2021. By approval of the Resolution Plan, the CIRP period has come to an end and after 21-6-2021 still the premises are in occupation of the monitoring professional. It is not the case of the respondent that any amount towards the license or damages have been paid or determined. On a pointed query, the respondent submitted that no amount towards any payment to the leave and license fees of the premises have been contemplated in the Resolution Plan. Thus, Resolution Plan does not deal with any entitlement to the appellant. Resolution Plan having been approved with no provision for making any payment to the appellant since the Resolution Professional never accepted the amount as CIRP costs which was also approved by the Adjudicating Authority on 18-3-2021 by the impugned order erroneously. Thus, it is viewed that no direction in this appeal can be given for payment of leave and license fees to the appellant during the CIRP period even though the appellant was entitled for determination that monthly fees payable to the appellant under the service agreement should have been treated as part of the CIRP costs. Thus, instant appeal is disposed of with directions that (i) The impugned order dated 18-3-2021 is set aside. (ii) It is held that no monthly fees shall be payable to the appellant during the CIRP period. (iii) The respondent is directed to handover the vacant possession of the premises within 15 days. (iv) The appellant is at liberty to take appropriate steps for its claim of license fees subsequent to 22-6-2021 (end of the CIRP period). (Para 16)

CASE REVIEW

Order passed by the National Company Law Tribunal Mumbai Bench, Court No. I in I.A. No. 453/MB/2020 in C.P.(IB) No. 2205/MB/2019 dated 18-3-2021(para 16) *reversed*.

Jayant Bhushan, Sr. Adv., **Abhijeet Sinha**, **Aditya Shukla**, **Prakshal Jain**, **Ms. Angelika Awasthi** and **Ms. Shivani Rawat**, Advs. *for the Appellant*. **Dhiraj Kumar Totala**, **Ms. Tanya Chib**, **Ms. Trisha Sarkar** and **Rohan Rajadhyaksha**, Advs. *for the Respondent*.

† Arising out of order passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court No. I in I.A. No. 453/MB/2020 in C.P. (IB) No. 2205/MB/2019, dated 18-3-2021.

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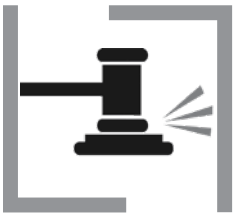

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

GP Global Energy (P.) Ltd. *v.* Sandeep Mahajan

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

COMPANY APPEAL (AT) (INSOLVENCY) NOS. 954 AND 1011 OF 2021†

MAY 6, 2022

I. Section 31, read with section 60, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Resolution plan - Approval of - CIRP was initiated against corporate debtor - Appellant-successful resolution applicant (SRA) submitted its resolution plan - Said resolution plan got approved by Committee of Creditors (CoC) and subsequently by order of NCLT - Appellant deposited a part of sum as per plan and filed application for extension of time period for implementation of resolution plan - NCLT by impugned order disposed of said application by denying any relief to appellant - Whether since appellant had already deposited 70.25 crores as required under approved resolution plan and had only claimed for extension of time for making further payment, which NCLT itself by earlier order dated 3-9-2019 had approved revised timelines to make payment, impugned order of NCLT denying relief to appellant observing that Tribunal had no powers to amend approved resolution plan was unjustified - Held, yes - Whether appellant was to be allowed to make balance payment and impugned order of NCLT was to be set aside - Held, yes (Paras 25 and 36)

II. Section 74 of the Insolvency and Bankruptcy Code, 2016 - Corporate persons' offences and penalties - Punishment for contravention of moratorium or resolution plan - CIRP was initiated against corporate debtor - Appellant-Successful Resolution Applicant (SRA) submitted its resolution plan - Said resolution plan got approved by Committee of Creditors (CoC) and subsequently by order of NCLT - Respondent No. 1 filed application against appellant under section 74 - NCLT by impugned order allowed said application and reference was made to IBBI for taking appropriate action against appellant under section 74(3) - Whether NCLT by impugned order had not recorded a prima facie satisfaction that there was any material to prove any wilful contravention of plan by appellant - Held, yes - Whether since NCLT had not even adverted to section 74(3) and had directed for making a reference to IBBI for taking appropriate action under section 74(3), such order was unsustainable - Held, yes - Whether therefore, impugned order passed by NCLT was to be set aside - Held, yes (Paras 34, 35 and 36)

FACTS

- CIRP was initiated against corporate debtor on an application filed by financial creditor under section 7.
- The appellant-successful resolution applicant submitted its resolution plan dated 19-10-2018 offering total financial plan which was approved by Committee of Creditors on 27-12-2018.
- By order dated 30-5-2019, application filed under section 31 by resolution professional for approval of resolution plan was allowed.
- The first meeting of respondent No. 2-monitoring committee was held on 6-6-2019 where it was noticed that 5 crores had been credited in account of corporate debtor.
- The appellant informed respondent No. 1-monitoring professional that an amount of Rs. 3.55 crores payable to corporate debtor in terms of approved plan should be paid by 9-6-2019.
- The appellant paid Rs. 10.55 crores to the corporate debtor by 10-6-2019.
- The appellant requested monitoring committee to undertake detailed analysis and assessment of plan of corporate debtor which was declined by the monitoring committee observing that first SRA should deposit the substantial amount as required under plan then only they could undertake visits.
- The appellant filed an application making various prayers to allow SRA to have physical inspection of the plant and machinery of corporate debtor.
- The respondent No. 1 filed an application against appellant under section 74. The parties decided to mutually settle issues and as pre-requisites appellant made another additional payment.
- NCLT by order dated 3-9-2019 held that visits to the plant might be allowed to the officials and authorised representatives of lending banks for processing the sanctioning of funds to the appellant.
- The appellant filed an application for extension of time period for implementation of resolution plan.
- The Monitoring Committee met on 29-8-2019 and Monitoring Committee in consultation with the lenders regarding revised time lines for payment agreed that CoC would not object on behalf of the CoC before NCLT as per decision on 29-8-2019 proposing revised time line for payment.
- NCLT by order dated 3-12-2019 noticed the terms as decided on 29-8-2019 and that the condition has been completed by the successful resolution applicant. NCLT directed appellant to file an affidavit undertaking to deposit the balance amount by specifying last date, in pursuance of said

direction an affidavit was filed by appellant on 6-12-2019.

- The monitoring professional demanded balance amount along with interest by e-mail dated 3-7-2021, appellant filed an undertaking on 2-8-2021 to make balance payment.
- The appellant filed an undertaking on 2-8-2021 to make the balance payment.
- NCLT by impugned order dated 1-11-2021 disposed of applications filed by appellant denying any relief to the appellant as regards permission to have physical inspection of the plant and machinery of the corporate debtor; and to make payment in a revised time schedule and to extend the time period for implementation of the resolution plan thirty days beyond the date when the respondents were able to satisfy the lending bank. Further, application filed by monitoring professional was allowed and reference was made to the IBBI for taking appropriate actions against the appellant under section 74(3).
- On appeal:

HELD

- After approval of the resolution plan on 30-5-2019, appellant by 10-6-2019 has made payment of INR 10.55 crores. The Monitoring Committee has met in the month of June, 2019 itself on several occasion to consider steps towards implementation of the plan. In the meeting of the Monitoring Committee dated 6-6-2019, the request made by representative of the successful resolution applicant to undertake visit of the plant for four days was noticed and not acceded to with observation that first the appellant should deposit the substantial amount as required under the resolution plan and only then they can do undertake the necessary visit. (Para 14)
- It is also relevant to notice that the appellant made request to the Monitoring Committee to permit the appellant to make payment in a revised time schedule. The Monitoring Committee held its meeting on 29-8-2019, in which revised schedule for payment of the amount was decided and the lenders recorded their no objection. The Adjudicating Authority passed an order dated 3-9-2019 which order records the decision of the Monitoring Committee taken on 29-8-2019. (Para 16)
- The said order clearly indicate that the Adjudicating Authority itself accepted the decision of the Monitoring Committee to grant revised schedule to the SRA to remit the amounts. It was noticed by the Adjudicating Authority that in pursuance of Minutes of 29-8-2019, second condition has been complied by the SRA. Revised payment plan when got approval by the Adjudicating Authority, the case of respondent No. 1 that

appellant having failed to make payment within 30 days of approval, the plan did not survive any further, is not correct. (Para 17)

- There were several issues regarding implementation of the plan which came to be noticed in the Monitoring Committee meeting dated 7-10-2019. (Para 18)

- The minutes of said meeting also record that 'it was also discussed and agreed that considering the various processes and compliances to be made, MP may consider to move an application before AA for seeking additional time for implementation of Resolution Plan.' Respondent No. 1 did not file application for extension of time as was contemplated in the meeting dated 7-10-2019. The above decision of the Monitoring Committee indicate that there were genuine issues with regard to implementation of the plan for which Monitoring Professional was requested to file application for extension of time but the Monitoring Professional did not choose to file an application for the reasons best known to him. (Para 19)

- After approval of the resolution plan, Monitoring Committee under the statutory scheme is to function for process of implementation of resolution plan and has not to act as any adversary body to the resolution applicant. If there were any genuine roadblocks found in the implementation of the plan, Monitoring Committee as well as monitoring professional is to use their good offices to sort out the difficulties and not to create roadblocks themselves in successful resolution of the corporate debtor. The C.A. had to be filed by the appellant since no application was filed by respondent No. 1 for extension of time. In C.A., the appellant pleaded that they came to know that there were certain issues with regard to title of some piece of land and possession of another piece of land. Several other issues were also mentioned and pleaded. (Para 20)

- In the impugned order dated 1-11-2021 the Adjudicating Authority has referred to its order dated 23-1-2019 passed in C.A. which was filed by the appellant to forgo/ dispense with the condition of the submission of bank guarantee till adjudication of the plan by the Tribunal. Resolution plan was approved on 27-12-2018 by the Committee of Creditors. Letter of intent was issued on 3-1-2019 to the appellant. The CoC asked the appellant for bank guarantee of 25 per cent of the amount. The Adjudicating Authority has noticed that by order dated 23-1-2019 application of the appellant was dismissed with cost of Rs. 50,000 but failed to notice that said order was challenged before instant Appellate Tribunal by filing an appeal. (Para 21)

- The consequence of the aforesaid order by Appellate Tribunal was that the Adjudicating Authority was to consider the plan without giving bank guarantee prior to approval of resolution plan. The Adjudicating Authority ought to have noticed that against the order dated 23-1-2019, the appeal was subsequently disposed of by Appellate Tribunal on 24-4-2019 noticing that plan approval application has already been heard on 2-4-2019 and judgment reserved. In view of the above, the order dated 23-1-2019 had lost its relevance and observation of the Adjudicating Authority that SRA has been continuously engaging the CoC in litigation wasting the time of insolvency resolution, was uncalled for. Further, the orders passed by the Adjudicating Authority as well as Appellate Tribunal were prior to plan approval and independent to aforesaid proceeding, the C.A. was to be considered by the Adjudicating Authority. (Para 22)

- Further, the Adjudicating Authority only noticed that appellant has deposited an amount of INR 10.55 crore. All subsequent events including deposit of amount INR 70.25 crore by the appellant which were brought before the Adjudicating Authority by filing additional affidavits were not even noticed by the Adjudicating Authority. In this context the affidavit filed by the SRA dated 2-8-2021 which was filed in C.A. is referred to, where details of payment of INR 70.25 crores as well as possession of 7.34 acres of land has been specifically mentioned. (Para 23)

- The Adjudicating Authority has not even noticed its own order dated 3-9-2019 by which revised timeline were approved as was agreed by the Monitoring Committee on 29-8-2019. (Para 24)

- The Adjudicating Authority has observed that 'it is beyond the powers of Appellate Tribunal to make amendments to the approved resolution plan'. The above observation of the Tribunal was not appropriate in context of the prayers which have been made in C.A.. The appellant was not claiming any modification of the resolution plan and the appellant was only claiming for extension of time for making payments which the Adjudicating Authority itself by order dated 3-9-2019, has already approved the revised timelines to make payments. When the Adjudicating Authority has itself granted revised timelines, the observation that Tribunal has no powers to amend the approved resolution plan is not justified and uncalled for. (Para 25)

- The Appellate Tribunal rejected the submission that the Adjudicating Authority has no jurisdiction to extend the time for complying the financial obligations in the resolution plan. Appellate Tribunal ultimately after considering all facts and

circumstances allowed the appeal and granted 30 days' time to the appellant to make the payment of the balance amount. (Para 26)

- The observations about behaviour as demonstrated by SRA so far that of non-seriousness towards the laws and that it defaulted on its obligations is also made without considering all facts and circumstances. The Adjudicating Authority not even was aware of the payments of INR 70.25 crores which have been made till 8-11-2019, when the application was rejected on 1-11-2021, whereunder the orders of the Adjudicating Authority itself the payments were made by the appellant. (Para 27)

- It is opined that the Adjudicating Authority has rejected both the C.As. without considering any of the grievances and issues raised by the appellant in those applications. The order dated 1-11-2021 is thus unsustainable and deserves to be set aside. It is noticed that the appellant as recorded by Appellate Tribunal in order dated 7-12-2021, has offered to deposit balance amount of Rs. 165.31 crores before 27-12-2021 but before aforesaid dated an I.A. was filed by the appellant when appellant came to know about the report of the Sub-Divisional Officer dated 21-12-2021 that there is encroachment on the immovable property. The appellant submitted that they are ready to deposit the entire balance amount of Rs. 165.31 crores within any time allowed by Appellate Tribunal to finally implement the resolution plan. (Para 28)

- The decision of the Monitoring Committee has been verbatim quoted in order dated 3-9-2019, in which order revised timelines for payments of amount as agreed by Monitoring Committee were accepted by the Adjudicating Authority. Thus, it is clear that extension of timelines for payment as was permitted on 3-9-2019 was on the payment of interest at the rate of 11 per cent per annum. There is no denial that appellant has not been able to make the payment within the time as provided in the resolution plan or as revised by the Adjudicating Authority by order dated 3-9-2019. Thus, appellant by themselves having undertaken to make payment of interest at the rate of 11 per cent per annum, they cannot now deny. However, there is one fact which needs to be noticed. It is noticed that after order dated 3-9-2019 in the Minutes of Monitoring Committee dated 7-10-2019 certain issues concerning SRA were discussed and substance having been found in the issues raised, the Monitoring Committee decided that respondent No. 1-monitoring professional may consider to file an application for extension of time before the Adjudicating Authority but respondent No. 1 did not file any application and application for extension of time was filed by

the appellant on 29-10-2021. The application, in which the appellant has prayed for extension of time remained pending from 29-10-2019 to till passing of order dated 1-11-2021. The fact that application could not be decided by the Adjudicating Authority for a long period of two years, the appellant cannot be saddled with interest liability of the aforesaid period. The appellant shall be liable to pay interest at the rate of 11 per cent per annum on the balance amount from 30-5-2019 i.e. the date on which plan was approved by the Adjudicating Authority till 28-10-2019 and thereafter with effect from 2-11-2021 till the payment is made by the appellant. The appellant themselves shall calculate the interest liability at the rate of 11 per cent simple interest for the aforesaid two periods and deposit the amount in the account of the corporate debtor as hereinafter directed. (Para 30)

- In the impugned order dated 1-11-2021 passed by the Adjudicating Authority on C.A. filed by the respondent No. 1 on 7-7-2019 first prayer direction is sought against the appellant under section 74(3) read with section 235A. In the entire application there is not even pleading that appellant has even prima facie knowingly and wilfully contravened any provision of plan within the meaning of section 74. Section 74 provides for punishment for contravention of resolution plan. (Para 32)

- For offence under section 74(3), there is to be pleading that SRA or any person knowingly or wilfully contravened any of the terms of the resolution plan. In entire application neither any pleadings nor averments have been made that SRA has wilfully and knowingly contravened the terms of resolution plan. (Para 33)

- The Adjudicating Authority in its order dated 1-11-2019 has not even recorded a prima facie satisfaction that there is any material to prove any wilful contravention of the plan by the successful resolution applicant. The applicant's averment in application is that even after lapse of 30 days from the date of approval of the plan appellant has failed to adhere to the terms of the resolution plan. (Para 34)

- The Adjudicating Authority has not even adverted to section 74(3) and had directed for making a reference to IBBI for taking appropriate action under section 74(3), which order is unsustainable. (Para 35)

- Adjudicating Authority has further directed for forfeiture of the amount of Rs. 10.55 crores. The Adjudicating Authority in the entire order has not even noticed that appellant has deposited Rs. 70.25 crores till 8-11-2019. The Adjudicating Authority has not even referred to its earlier order dated 3-9-2019 by which the Adjudicating Authority has approved the revised timelines for payment. The Adjudicating

Authority has noticed its order dated 23-1-2019 with regard to which we have already dealt in the foregoing paragraphs. Further, in view of discussions and conclusions while considering order dated 1-11-2021 passed in C.A., the order dated 1-11-2019 passed in C.A. becomes unsustainable. Thus, the company appeal is allowed. The impugned order dated 1-11-2021 is set aside. The appellant is allowed time till 30-5-2021 to deposit the balance amount of Rs. 165.31 crores in the account of the corporate debtor. Along with the deposit of aforesaid amount of Rs. 165.31 crores, the appellant shall also deposit the interest on the balance amount with effect from 30-5-2019 till 28-10-2019 and interest from 2-11-2021 till the date of payment at the rate of 11 per cent per annum simple interest. Monitoring Committee and the respondent No. 1 shall handover the physical possession of all movable properties and vacant possession of all immovable properties property including land, within two weeks from the date of payment. (Para 36)

CASE REVIEW

Orders of (NCLT - New Delhi) in CA No. 2357/2019 and CA No. 1170/2019 and CA No. 1246/2019 in CP. (IB) No. 46 (PB/2018), dated 1-11-2021 (para 36) *reversed*.

CASES REFERRED TO

Tricounty Premier Hearing Service Inc. v. *State Bank of India* (Company Appeal (AT) (Ins.) No. 1038 of 2021, dated 20-1-2022) (para 25) and *Ebix Singapore* (*P.*) *Ltd.* v. *Committee of Creditor of Educomp Solutions* (*P.*) *Ltd.* (2021) 130 taxmann.com 208 (SC) (para 25).

Virendra Ganda, Sr. Adv., **Raghav Kakkar** and **Ayandeb Mitra**, Advs. *for the Appellant.* **Arun Kathpalia**, Sr. Adv., **Abhishek Anand**, **Pathik Choudhury**, **Dinkar Singh**, **Gagan Garg** and **Rohit Singh**, Advs. *for the Respondent.*

† Arising out of orders passed by NCLT New Delhi in C.A. No. 2357/2019 and C.A. No. 1170/2019 and C.A. No. 1246/2019 in C.P. (IB)-46 (PB)/2018, dated 1-11-2021.

FOR FULL TEXT OF THE JUDGMENT SEE
(2022) 139 taxmann.com 396 (NCLAT- New Delhi)

Disciplinary Actions taken by IBBI during the FY 2021-22

The Disciplinary Committee of IBBI passed various orders since the inception of the Insolvency and Bankruptcy Code. These orders are reasoned and contain detailed contraventions against IP, submissions made by IP, legal provisions as well as analysis and findings of the Disciplinary Committee. The role of Insolvency Professionals is also discussed in detail in these orders. The following table shows the orders passed by IBBI during the FY 2021-22 wherein disciplinary action was taken against the Insolvency Professional.

Date of Order DD/MM/YY	*Case No.*	*Brief Findings*	*Action taken by IBBI*
08/07/2021	IBBI/ DC/72/2021	The IP accepted the claim of a creditor (say 'Mr. X') as financial creditor. Then he erred to reclassifying the status of Mr. X from 'Financial' to 'Operational Creditor'. The Adjudicating Authority *vide* its order declared Mr. X as financial creditor. Despite the order of Adjudicating Authority, the IP allowed voting on agenda for not considering Mr. X as financial creditor. The	Directed the IP to not seek or accept any process or assignment or render any services under the Code for a period of one year from the date of coming into force of the Order.

Date of Order DD/MM/YY	Case No.	Brief Findings	Action taken by IBBI
		same was approved. Then in the next meeting the other CoC members ousted Mr. X from the CoC, as he was the only CoC member holding them back from successfully passing a withdrawal of CIRP resolution under section 12A of the Code. The resolution for withdrawal was passed with 100% voting share. Thus, the IP disregarded the order of the Adjudicating Authority.	
22/07/2021	IBBI/ DC/74/2021	◆ The IP included expression of interest after the last date and therefore contravened regulation 36A of the CIRP Regulations, Regulation 7(2) (*h*) of IP Regulations and clauses 1,2,3, 12, 13 and 14 of the Code of Conduct. ◆ One of the prospective resolution applicant (PRA) was also looking after compliance of TDS and GST requirements of Corporate Debtor. The IP did not terminate the services of professional immediately when he submitted his resolution plan and became a PRA. ◆ The IP did not take reasonable care and exercise diligence while making the disclosures as per IBBI Circular No. IP/005/2018, dated 16-1-2018.	Directed the IP to: ◆ not seek or accept any process or assignment or render any services under the Code for a period of twelve months from the date of coming into force of the Order; ◆ pay a penalty equal to the fee paid to concerned professional.
09/08/2021	IBBI/ DC/75/2021	The invoice of fee charged by IP was in the name of partnership firm where she was partner and the same was credited to the account of partnership firm rather than her own bank account despite the clarification provided in the Circular dated 16th January, 2018.	Directed the IP to undergo pre-registration educational course and pay penalty equal to ten percent of the fee received.

Date of Order DD/MM/YY	Case No.	Brief Findings	Action taken by IBBI
27/08/2021	IBBI/ DC/76/2021	◆ The IP did not submit the documents sought by Inspecting Authority. ◆ The AA issued directives to follow principle in Nikhil Mehta's judgment. In Nikhil Mehta & Sons (HUF)'s case, the AA observed that: 'We are of the view that in the case of Real Estate (Commercial & Residential) comprising 100 per cent voting share in CoC the aforesaid provision must be read to mean that a resolution would be deemed to be passed if it is voted by highest number of financial creditors in the class of Real Estate (Commercial & Residential). It would make the court workable and would also advance the object of this progressive legislation rather than defeating it." In the 2nd CoC meeting IP followed principles laid down in Nikhil Mehta's judgment. However, in the 3rd CoC meeting, wherein resolution for replacement of IP was placed the IP applied principle of voting threshold of 66%. Total votes in favour of resolution was 54.61% and the resolution was noted as defeated. ◆ The IP did not mention name of the CD, the place, if any, time and the date on which the meeting of CoC was scheduled, resulting in contravention of regulation 20(2) of the CIRP Regulations and section 208(2)(a) of the Code.	Directed the IP to not seek or accept any process or assignment or render any services under the Code for a period of six months from the date of coming into force of the Order.

Date of Order DD/MM/YY	Case No.	Brief Findings	Action taken by IBBI
09/12/2021	IBBI/ DC/80/2021	The IP outsourced his primary duty in engaging an independent professional for verification of claims, despite the clarification provided by IBBI in the Circular No. IP/003/2018, dated 3rd January, 2018. Further, he included the expense of Rs. 85,000/- incurred in verification of claims separately in the CIRP cost which is in contravention of provisions of section 18(1)(*g*) of the Code read with regulation 13(1) of the CIRP Regulations and section 208(2)(*a*) and (*e*) of the Code.	Directed the IP to pay a penalty equal to the fee paid to professional engaged for verification of claims.
29/12/2021	IBBI/ DC/81/2021	◆ The IP stated in his progress report filed before the AA that the suspended director of the CD had been receiving rent and paying loan instalments to Bank, the FC, during the period of moratorium. IP also admitted in his reply that he deliberately failed to follow the provisions on moratorium by allowing payment of instalments to Bank by the suspended director of CD. The IP knowingly failed to observe the provisions on moratorium under section 14 of the Code. ◆ The IP unnecessarily delayed the CIRP by not verifying the claim submitted by only one OC and submitting the progress report with the AA almost two and half months after the last date of receipt of claims. ◆ The IP failed to constitute the CoC with only one OC even after receipt of its claim. Further, he failed to file a report certifying constitution of CoC in accordance with Regulation 17 of the CIRP regulations. ◆ It is imperative upon an IP, who does not get c-ooperation from the	Cancelled the registration of IP and debarred him from seeking fresh registration as an insolvency professional or providing any service under the Code for a period of one year

Date of Order DD/MM/YY	Case No.	Brief Findings	Action taken by IBBI
		suspended board of directors, to actively bring the fact thereof to the notice of the AA. However, the IP failed to take any further steps against the suspended board of directors to take the CIRP forward in a timely manner. ◆ The IP failed to submit disclosures of item wise insolvency resolution process cost to IBBI	
14/03/2022	IBBI/ DC/83/2022	The IP withdrew the fees without the approval of the CoC. Therefore, the IP contravened Section 208(2)(*a*) and (*e*) of the Code, regulation 34 of the CIRP Regulations and regulation 7(2)(*a*) and (*h*) of the IP Regulations and clause 26 of the Code of Conduct of IP Regulations.	IP shall not seek or accept any process or assignment or render any services under the Code for a period of one year.
31/03/2022	IBBI/ DC/85/2022	◆ In the first CoC meeting an agenda was approved to pay the remuneration of Rs. 14,57,192.86/- to a firm for services rendered for filing application under section 7 of the Code on behalf of the Financial Creditor, for initiating CIRP with respect to the CD. Regulation 33(3) of the CIRP Regulations does not include any of the expenses that might have been incurred by the applicant before commencement of CIRP. Further, IBBI clarified vide June 2018 circular in para 8(c) that any fee or other expense incurred before the commencement of CIRP	◆ IP shall arrange to get the pre-CIRP cost of Rs. 14,57,193/ credited in the account of the CD within 30 days from and the amount will form part of the liquidation estate. ◆ IP shall not undertake any assignments for a period of one year

Date of Order DD/MM/YY	Case No.	Brief Findings	Action taken by IBBI
		shall not be included in the IRPC. Hence, cost incurred towards filing of CIRP is not a part of the IRPC and IP should not have put up the same before the CoC as it was in contravention of the provisions of the Code, regulations and circular as stated above. ◆ It is the duty of IP to appoint professionals, as may be necessary, but one of the members of CoC appointed professionals (firms). IP continued the engagement of firms. ◆ The IP engaged multiple professional agencies for similar task. This leads to rise in the stress of the CD.	

FAQs on Disciplinary Mechanism by Insolvency Professional Agencies (IPAs)

1. What are the governing provisions of the disciplinary mechanism of the ICSI IIP?

The IBC provides for a two-tier regulatory regime for the Insolvency Professionals (IPs), the Insolvency and Bankruptcy Board of India (IBBI) and the IPAs. Apart from IBBI, the IPAs also regulate IPs as its members in accordance with Insolvency and Bankruptcy Code, 2016 read with regulations and rules made thereunder. IPAs formulate and codify the procedures to deal with disciplinary matters, which ensure proper conduct on the part of the members of IPAs and to deal with the cases of violation of Code as well as rules and regulations framed thereunder.

The Disciplinary Mechanism of IPAs is governed by the Bye-Laws (consistent with the Model Bye Laws contained in the schedule to IBBI (Model Bye Laws and Governing Board of IPA) Regulations, 2016) and Disciplinary Policy adopted by them.

Section 196(2)(*p*) of the Code provides that IBBI may make model bye-laws to be adopted by Insolvency Professional Agencies which may provide for, *inter alia*, the manner of conducting disciplinary proceedings against its members and imposing penalties.

Section 205 of the Code mandates every Insolvency Professional Agency to make bye-laws which are consistent with the model bye-laws specified by IBBI.

Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of IPA) Regulations, 2016 mandates every Insolvency Professional Agency to have a Governing Board and frame Bye-Laws to regulate its procedure.

ICSI IIP has framed its own Bye-Laws namely "Bye-Laws of ICSI Institute of Insolvency Professionals" which are drawn from the IBBI Model Bye-Laws Regulations.

In terms of the ICSI IIP Bye-Laws, it is necessary to formulate a Disciplinary Policy and constitute a Disciplinary Committee to deal with cases of violation of the Code as well as the rules and regulations framed thereunder by the professional members enrolled with ICSI IIP.

2. How the disciplinary proceedings are initiated against the professional member in ICSI IIP?

An IPA may initiate disciplinary proceedings against its professional member:

- based on a reference made by the Grievances Redressal Committee
- based on a reference made by the Monitoring Committee
- based on a complaint received in prescribed format alleging professional or other misconduct
- following the direction given by IBBI or any court of law; or
- *suo motu*, based on any information that is backed by evidence/ information indicating *mala-fide* action by the professional member and such reasoning to be recorded in writing for launch of a complaint in the prescribed format.

Broadly,

(1) Any professional member, any person who has engaged the services of the concerned professional member, or any other person as may be provided by the Governing Board of the IPA may file grievance with the IPA with which the IP is enrolled in accordance with the Grievance redressal policy of the IPA.

The grievance redressal committee after examining, may either dismiss, initiate mediation or refer the matter to the disciplinary committee.

(2) If the monitoring committee is of the considered opinion that a professional member's conduct is not satisfactory (non-submission of required information/ submission of incomplete information/submission of incorrect information etc.), they may direct the secretariat of the agency for the initiation of disciplinary proceedings by issuance of show cause notice.

(3) Further, disciplinary proceedings may also be initiated on the directions of IBBI or any court of law, *suo motu* by the agency etc.

(4) On consideration of documents available on record and after affording an opportunity of hearing to the complainant and the professional member, where, the Disciplinary Committee holds that the professional member is not guilty of professional or other misconduct, the Committee shall dispose of the show-cause notice by recording reasons in writing within thirty days of passing such order and may also impose cost on the complainant, if the Committee is of the opinion that the complaint was frivolous.

(5) On consideration of documents available on record and after affording an opportunity of hearing to the complainant and the professional member, where, the Committee holds that the professional member is guilty of professional or other misconduct, it may pass any one or more of the following orders:

- Reprimand
- imposition of monetary penalty*
- suspension of the IP for a certain period of time
- expulsion of IP
- reference of the matter to the IBBI;
- the amount of restitution or compensation that may be enforced by IBBI
- directions relating to costs
- cancellation of authorisation for assignment
- any other order, as the Committee may deem fit

* The imposition of penalties by the IPAs is governed by IBBI circular dated 28th July, 2021 read with their Model Bye-Laws.

(6) The Committee may pass an order for expulsion of a professional member if it has found that the professional member has committed -

a. an offence under any law for the time being in force, punishable with imprisonment for a term exceeding six months;

b. a gross violation of the Code, rules, regulations and guidelines issued there under, bye-laws or directions given by the Governing Board which renders him not a fit and proper person to continue acting as an insolvency professional.

(7) The Committee shall send, free of charge, to the professional member, complainant and IBBI, a certified copy of the final order. Further, any order passed by the Committee under this Part shall be placed on the website of ICSI IIP within seven days from the passing of the order.

(8) The Committee shall endeavor to dispose off the show-cause notice within a period of six months from the receipt of complaint, information, reference or direction, as the case may be. While disposing off any show-cause notice under this Part, the Committee shall follow its own procedure and shall be guided by the principles of natural justice.

3. What are the provisions of appeal against the orders of Disciplinary Committee of ICSI IIP?

As per the disciplinary policy of Insolvency Professional Agencies,

- Any person aggrieved by an order passed by the Committee may prefer to make an appeal before the Appellate Panel within thirty days from the receipt of the copy of such order.

- The Appellate Panel may call for the records of any case and may -

  a. confirm, modify or *set aside* the order passed by the Committee;

  b. impose any penalty or set aside, reduce or enhance the penalty imposed by the Committee;

  c. remit the case to the Committee for such further enquiry as the Appellate Panel considers proper in the circumstances of the case; or

  d. pass such other order(*s*) as the Appellate Panel deems fit.

- The Appellate Panel shall follow its own procedure while deciding the appeal and shall be guided by the principles of natural justice.

4. How many disciplinary cases have been dealt by ICSI IIP till date and what are the common violations observed by the committee?

Details		
Total cases	Referred from Grievance Redressal Committee	5
	Based on monitoring of professional members	11
	Directions given by the Board or any court of law	4
	Suo motu, based on any information received by it	15
	Total	35
Disposed off		33
Pending		2

Following are some common violations observed by the Disciplinary Committees of IPAs:

- Acceptance of assignment without getting authorization for assignment (AFA) *i.e.* non-compliance of Regulation 7A of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016
- Delay in statutory timelines.
- Misrepresentation of facts in the minutes of meetings of committee of creditors.
- Not adhering to the duties of RP as envisaged under the Code
- Non-Ratification of fees in CoC meetings
- Non-filing of proper forms/disclosures to IPA.
- Non-appointment of registered valuers.
- Appointment of related party for work related to assignment.
- Non-compliance of code of conduct for IPs.

Regulatory updates

- IBBI vide its circular No. IBBI/CIRP/3/2022 dt. 23rd May 2022 notified concerning review of all circulars in place. The circulars which are no longer required on account of being already provided in IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 or IBBI (Insolvency Professionals) Regulations, 2016 as the case may be, have been rescinded.

  The circular dt. 23rd May 2022 can be accessed @ https://ibbi.gov.in/uploads/legalframwork/e2f51931db6d2895b10df3d69021f8ae.pdf.

- IBBI vide its circular No. IBBI/CIRP/3/2022 dt. 6th May 2022 notified concerning withdrawal of its circular dt. 26th August, 2019 regarding applicability of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 notified on 25th July, 2019.

  The circular dt. 23rd May 2022 can be accessed @ https://ibbi.gov.in//uploads/legalframwork/b6c7706eeb134271106c3c0cb56a1e27.pdf

Austrian Insolvency Law

INTRODUCTION

Austria has implemented radical changes to its insolvency law and introduced a new restructuring proceeding with self-administration in its newly adopted Insolvency Code (Insolvenzordnung, or "IO"). One of the main features of the new type of insolvency proceeding is that the insolvent company largely remains in control of its business, but under the supervision of a restructuring administrator.

The Austrian Insolvency Act states that the directors of a company are obliged to apply for the opening of insolvency proceedings in cases of illiquidity or over-indebtedness. The "new" Austrian Insolvency Act ("IO"), which came into force on 1 July 2010, favours the going-concern principle of an insolvent company. The Austrian Insolvency Act states that the directors of a company are obliged to apply for the opening of insolvency proceedings in cases of illiquidity or over-indebtedness.

GROUP INSOLVENCY IN AUSTRIA

A mere joining of forces such as in the formation of a cartel does not create a group of companies: an element of unified control is

lacking. On the other hand, the existence of unified control does not always mean that there is a group. A small supplier may be completely dependent on a large company and may therefore be controlled *de facto* by it, but this is not usually considered to be a group. Obviously, shareholder ship is an important feature and majority shareholdings ('subsidiaries') are usually considered to be included in the group of the majority shareholder.

There is no concept of a group insolvency in Austria; each entity must be assessed individually and - if necessary - insolvency proceedings must be opened over the assets of each respective entity; usually also different administrators are appointed. Following the EIR (EU Insolvency Regulations), rules on cooperation within group insolvencies have also been included in the Insolvency Code.

There is a completely new detailed legal framework on the cooperation and coordination of cross-border insolvency proceedings over the estate of members of a group of companies. Among other things, insolvency practitioners are granted the right to be heard in foreign insolvency proceedings, to request a stay of any measures under certain conditions and to apply for the opening of group coordination proceedings.

Any court competent for the insolvency proceedings of a group member may open group coordination proceedings upon the request of an insolvency practitioner. The court appoints an independent group coordinator who may propose a group coordination plan and request a stay of national insolvency proceedings for up to six months. If national insolvency practitioners do not comply with the coordinator's recommendations, they must explain their reasons to the coordinator and the persons/bodies according to the respective national insolvency law.

Since the 2017 amendment, the Austrian Insolvency Code incorporates the provisions of Council Regulations 848/2015. These Regulations provide for increased coordination of insolvency proceedings for the various group entities.

The regulation states:

> The courts of different Member States may cooperate by coordinating the appointment of insolvency practitioners. In that context, they may appoint a single insolvency practitioner for several insolvency proceedings concerning the same debtor or for different members of a group of companies, provided that this is compatible with the rules applicable to each of the proceedings, in particular with any requirements concerning the qualification and licensing of the insolvency practitioner.

Where insolvency proceedings have been opened for several companies of the same group, there should be proper cooperation between the actors involved in those proceedings. The various insolvency practitioners and the courts involved should therefore be under a similar obligation to cooperate and communicate with each other as those involved in main and secondary insolvency proceedings relating to the same debtor. Cooperation between the insolvency practitioners should not run counter to the interests of the creditors in each of the proceedings, and such

cooperation should be aimed at finding a solution that would leverage synergies across the group.

The introduction of rules on the insolvency proceedings of groups of companies should not limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the center of main interests of those companies is located in a single Member State. In such cases, the court should also be able to appoint, if appropriate, the same insolvency practitioner in all proceedings concerned, provided that this is not incompatible with the rules applicable to them.

With a view to further improving the coordination of the insolvency proceedings of members of a group of companies, and to allow for a coordinated restructuring of the group, this Regulation should introduce procedural rules on the coordination of the insolvency proceedings of members of a group of companies. Such coordination should strive to ensure the efficiency of the coordination, whilst at the same time respecting each group member's separate legal personality.

An insolvency practitioner appointed in insolvency proceedings opened in relation to a member of a group of companies should be able to request the opening of group coordination proceedings. However, where the law applicable to the insolvency so requires, that insolvency practitioner should obtain the necessary authorization before making such a request. The request should specify the essential elements of the coordination, in particular an outline of the coordination plan, a proposal as to whom should be appointed as coordinator and an outline of the estimated costs of the coordination.

In order to ensure the voluntary nature of group coordination proceedings, the insolvency practitioners involved should be able to object to their participation in the proceedings within a specified time period. In order to allow the insolvency practitioners involved to take an informed decision on participation in the group coordination proceedings, they should be informed at an early stage of the essential elements of the coordination. However, any insolvency practitioner who initially objects to inclusion in the group coordination proceedings should be able to subsequently request to participate in them. In such a case, the coordinator should take a decision on the admissibility of the request. All insolvency practitioners, including the requesting insolvency practitioner, should be informed of the coordinator's decision and should have the opportunity of challenging that decision before the court which has opened the group coordination proceedings.

Group coordination proceedings should always strive to facilitate the effective administration of the insolvency proceedings of the group members, and to have a generally positive impact for the creditors. This Regulation should therefore ensure that the court with which a request for group coordination proceedings has been filed makes an assessment of those criteria prior to opening group coordination proceedings.

The advantages of group coordination proceedings should not be outweighed by the costs of those proceedings. Therefore,

it is necessary to ensure that the costs of the coordination, and the share of those costs that each group member will bear, are adequate, proportionate and reasonable, and are determined in accordance with the national law of the Member State in which group coordination proceedings have been opened. The insolvency practitioners involved should also have the possibility of controlling those costs from an early stage of the proceedings. Where the national law so requires, controlling costs from an early stage of proceedings could involve the insolvency practitioner seeking the approval of a court or creditors' committee.

For members of a group of companies which are not participating in group coordination proceedings, this Regulation should also provide for an alternative mechanism to achieve a coordinated restructuring of the group. An insolvency practitioner appointed in proceedings relating to a member of a group of companies should have standing to request a stay of any measure related to the realization of the assets in the proceedings opened with respect to other members of the group which are not subject to group coordination proceedings. It should only be possible to request such a stay if a restructuring plan is presented for the members of the group concerned, if the plan is to the benefit of the creditors in the proceedings in respect of which the stay is requested, and if the stay is necessary to ensure that the plan can be properly implemented.

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