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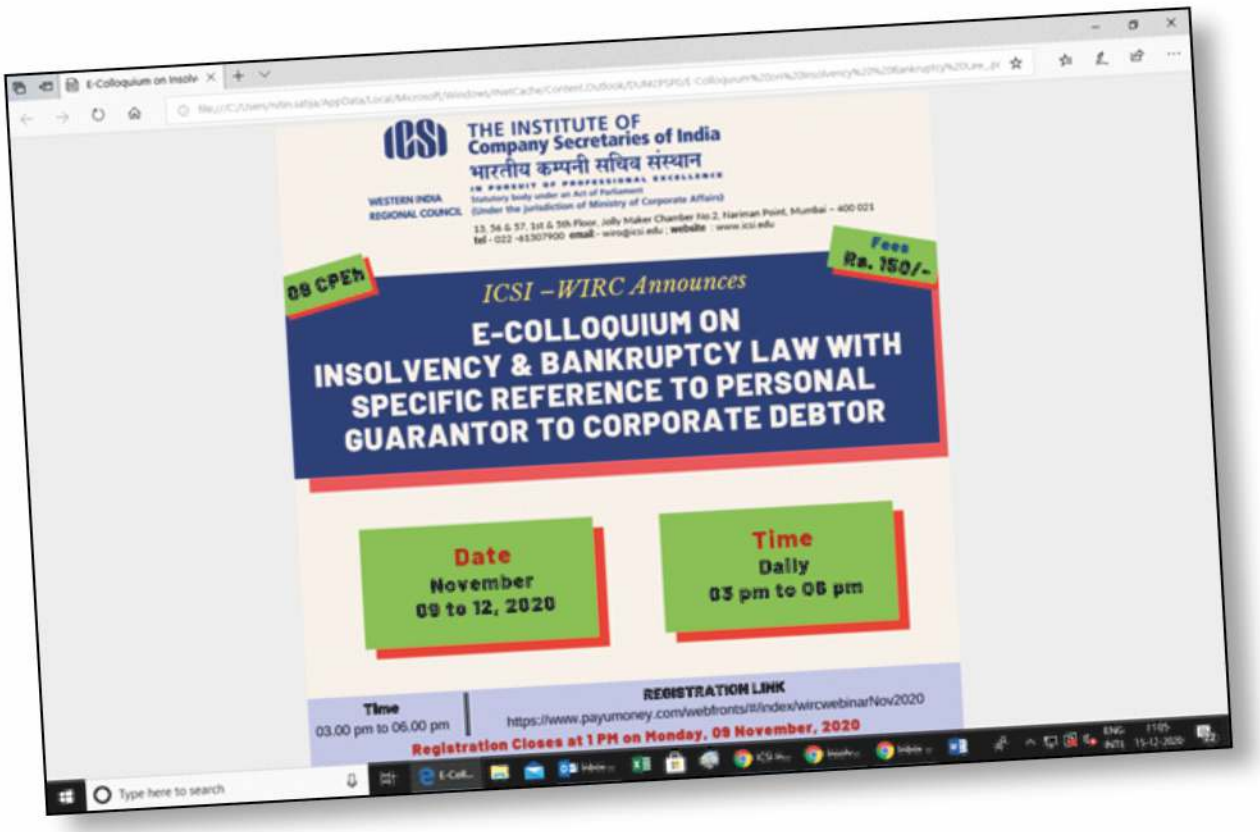
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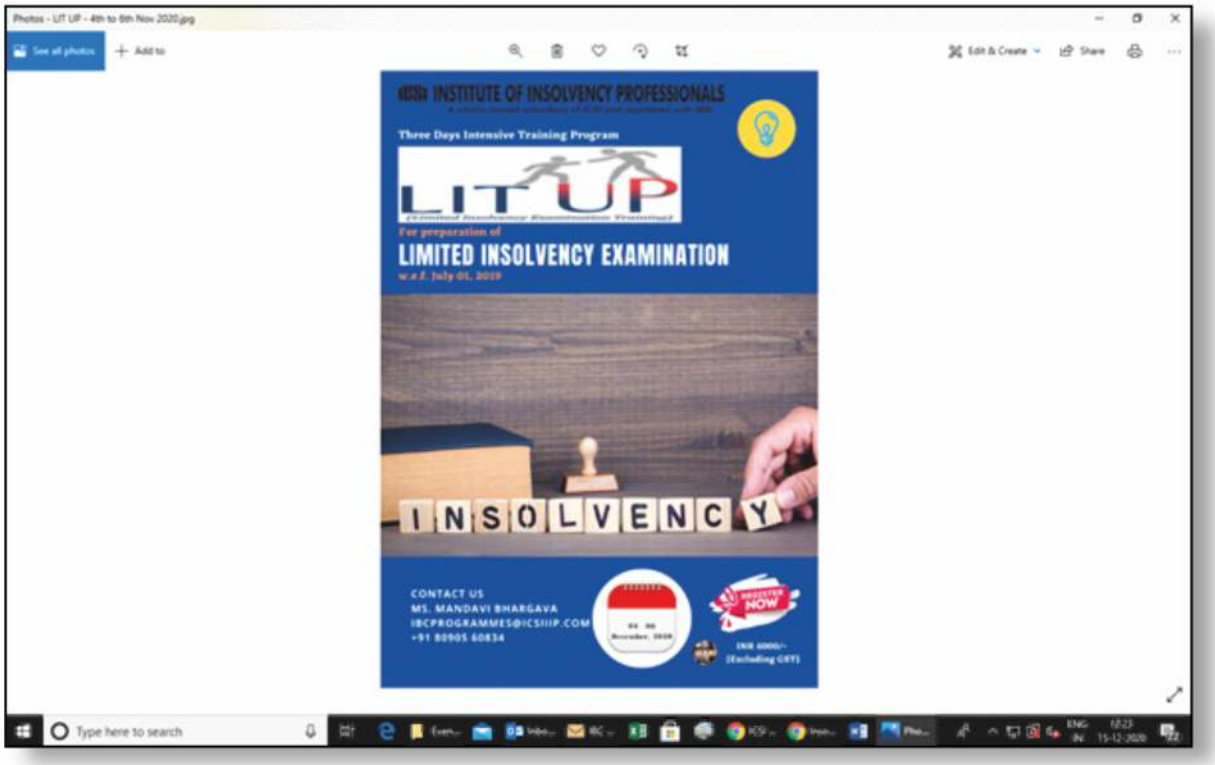
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At a Glance

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section 220 of the Insolvency and Bankruptcy Code, 2016, read with regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 and regulation 12A of the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 - Corporate insolvency resolution process - Resolution professional - Appointment of - Regulation 7A was introduced in IP Regulations and by insertion of regulation 7A it became necessary for IPs to obtain a valid Authorisation For Assignment (AFA) before taking up assignments as an IP with effect from 1-1-2020 - For purpose of giving effect to regulation 7A, regulation 12A was inserted in Model Bye-Laws IPA Regulations - Petitioner was an insolvency professional who was enrolled with Insolvency Professional Agency (IPA) - He challenged constitutional validity of regulation 7A and regulation 12A - Whether criteria stipulated in regulation 7A and regulation 12A for eligibility of

IP are not unreasonable or arbitrary but appear to be germane for deciding eligibility of an IP for AFA - Held, yes - Whether since such measures are intended to regulate profession and not to deprive a person of right to practice profession, they are not violative of articles 14, 19 and 21 of Constitution - Held, yes - Whether thus, regulations 7A and 12A are not arbitrary and unconstitutional - Held, yes - Whether writ petition filed by petitioner challenging said Regulations was to be dismissed - Held, yes [Paras 14, 16 & 17]

- **Venus Recruiters (P.) Ltd. v. Union of India**

  [2020] 121 taxmann.com 346 (Delhi) • P-388

section 43 of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Preferential transactions and relevant time - Whether purpose of avoidance of preferential transactions is clearly for benefit of creditors of corporate debtor - Held, yes - Whether after a Resolution Plan is approved, no benefit would come to creditors - Held, yes - Whether once CIRP process itself comes to an end, an application for avoidance of preferantial transactions cannot survive or be adjudicated - Held, yes - Whether after a Resolution Plan is approved, corporate debtor comes under control of new management/Resolution Applicant and RP's mandate ends and RP cannot indirectly seek to give a benefit by pursuing an application for avoidance of preferantial transactions - Held, yes - Whether if CoC or RP takes a view that there are transactions which are objectionable in nature, order in respect thereof would have to be passed prior to approval of Resolution Plan - Held, yes - Whether unless provision is made in final Resolution Plan, NCLT also has no jurisdiction to entertain and decide avoidance applications in respect of a corporate debtor which is now under a new management - Held, yes - Whether NCLT ought not be permitted to adjudicate preferential nature of transaction under a contract which stands terminated after approval of Resolution Plan - Held, yes [Paras 88 to 93]

- **Nitesh Kumar Sinha, In re**

  (2021) 123 Taxmann.com 80 (IBBI)

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section 208 of the Insolvency and Bankruptcy Code, 2016, read with regulations 7(2)(a), 7(2)(h) and 7A, of the IBBI (Insolvency professionals) Regulations, 2016 - Insolvency professionals - Functions and obligations of - Whether regulation 7A requires for any Insolvency Professional (IP) to have Authorisation for Assignment (AFA) before undertaking any assignment after 31-12-2019 - Held, yes - Whether without AFA, an IP is not eligible to undertake assignments or conduct various processes thereof as it is an essential condition for undertaking any assignment by an IP - Held, yes - Whether further, section 208 also casts an obligation to abide by code of conduct and comply with all requirements and terms and conditions specified in bye laws of insolvency professional agency of which he is a member - Held, yes - Whether where IP had accepted assignment as IRP without holding a valid AFA in matter of Terrence Alloys Private Limited, he is said to have contravened code of conduct under section 208(2)(a) and (e) of Code and regulations 7A and 7(2)(a) and (h) of IP Regulations - Held, yes - Whether however, since disciplinary action had already been taken against said IP for undertaking assignment as Interim Resolution Professional after 31-12-2019 without holding a valid AFA in matter of Terrence Alloys Private Limited, show cause notice was to be disposed without any direction against him - Held, yes [Paras 4.2, 4.5, 4.8 and 5]

GUIDELINES ON JOINT LENDERS FORUM (JLF) AND CORRECTIVE ACTION PLAN (CAP) - TIMELINES FOR STRESSED ASSETS RESOLUTION
CIRCULAR DBR.BP.BC.NO.67/21.04.048/2016-17, DATED 5-5-2017

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- **INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INFORMATION UTILITIES) (AMENDMENT) REGULATIONS, 2020 - AMENDMENT IN REGULATION 2 AND INSERTION OF REGULATION 21A**
NOTIFICATION NO. IBBI/2020-21/GN/REG065, DATED 13-11-2020

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- **INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) (FIFTH AMENDMENT) REGULATIONS, 2020 - AMENDMENT IN REGULATIONS 13 AND 39; INSERTION OF REGULATION 2A**
NOTIFICATION NO. IBBI/2020-21/GN/REG066, DATED 13-11-2020

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

From Chairman's Desk

A problem is a chance for your to do your best

Dear Professional Members,

The World around us is changing gradually. *Technology* and *innovation,* which are the hallmark of our present day world, are now the biggest facilitators for success of any business. What we thought as an invention yesterday, is not so today. The pace of *innovation* and change is fast, and the competition to succeed in the market adds to business challenges. While the presence of forces like *innovation* and *competition* are considered conducive to a growing market economy (being necessary part of the process of *constructive destruction),* what is necessary is that companies which fail to adapt to the changing circumstances are allowed an opportunity to be in the race by either a new and suitable management taking over organisation, or else, is given the freedom to exit through liquidation of assets, so that the resources can be put to their optimum use. The decision that cannot be sustained in these circumstances is to maintain a

status *quo vis-a-vis* the entity's state of affairs thereby allowing the problem to fester. There is now an accepted position that the chance of revival of an entity has an inverse relationship with the time taken in its revival process. A financially insolvent entity is therefore often considered synonymous with a melting ice which looses its intrinsic value if not rescued on time. Therefore, sooner the steps are taken for its revival, more the chances are.

The IBC legislation, which is in force for nearly 4 years now, has not only taken us to new heights and achievements *vis-a-vis* India's ranking in World Bank's Doing Business Report, but, the speed with which the legislation was implemented (by the Regulator), accepted and endorsed (by different stakeholders), and the inherent flexibility that the legislation has shown while dealing with emerging economic circumstances, are some of the factors which strengthens one's belief that we are on the path to success. Here, I wish to also highlight and underscore the major reasons for success of IBC which is a landmark legislation in the history of legislative reforms in India in the Insolvency and Bankruptcy law space. The objectives of the Code, as reiterated time and again by Dr. M.S. Sahoo, Chairperson, IBBI, is three-fold. *First*, rescue firms in distress, which essentially means, that the intent is to allow revival of businesses wherever feasible (subject to commercial wisdom of creditors' committee), thereby making the process of recovery of creditors' dues only incidental under the Code; *Second*, maximisation of value of assets of the firm; *third, promote entrepreneurship, availability of credit and balance the interests of stakeholders.* With these objectives, IBC enables the stakeholders to rescue the life of a company in distress, and in the process maximises the value of assets which is required to be shared in an equitable manner.

IBC has also displayed its dynamic nature which is a necessary attribute of an efficient economic law. It has not only evolved with time, but has also adjusted to the emerging market realities. As is said about the Constitution of India which is the supreme law of the nation, IBC is not a legislation which is cast in stone, and thus, amendments have been made to the provisions of the Code so as to deal with the difficulties encountered while implementing the provisions of the Code, and also in view of changing economic environment. But the primary objective of the Code remains unaltered which is to rescue lives of companies.

The flexibility of the Code has also helped the nation deal with the present predicament which is on account of the spread of Covid-19. The pandamic is not only a health concern, but is also an economic concern for the whole world. The proportions of the present economic downturn (on account of the pandamic) are comparable to those of the Great Depression. The IMF's estimates about the global economy are worrying adding to the element of uncertainty about future. Left to choose between *life* and *livelihood,* Governments across the world realised that to save life of its subjects, they need to safeguard the life of firms as well. An accommodative stance was thus taken by different economies to prevent corporates and individuals from being forced into insolvency. At the same time, economic measures (in the form of a huge economic package) were announced by the Central Government calling upon the citizens to work towards making a "*self-reliant India*". Substantial progress has been made in this direction, and I am sure that with a firm resolve we shall succeed in not only dealing with the present critical circumstances, but shall also take the nation onto the path of glory! I also believe that **nothing stays forever – neither success nor failure, and the only thing that is constant in life is "change"**. We have to accept the changes and challenges of life and be mentally focused, strong and determined.

Wishing you all good health, and the very best for all your endeavours!

With Regards,

P.K. Malhotra, ILS (Retd.)

Dr. Binoy J. Kattadiyil
Managing Director
ICSI Institute of Insolvency Professionals

Managing Director's Message

Transparency is the new objectivity

... David Weinberger

The path which the IBC has paved for the corporates is that of *financial prudence*. *Financial prudence* here entails not only setting-up of mechanisms to ensure financial planning, but also *transparency* in the matters of disclosures thereof. A corporate works in a context wherein there are different stakeholders, who, while working in furtherance of their own respective interests, also, at times, work at cross-purposes with each other, and sometimes with the company too. Therefore, rules guiding proper conduct of the stakeholders need to be in place, to be followed and enforced by authorities. While dealing with the challenges posed by the pandamic, what has come to be realised is that while saving our lives and livelihood is important, the need to save the life of corporates is also important during these testing times. But, the corporates being the engine drivers of growth, it is imperative that they are run in a proper and effective manner.

With the implementation of the IBC, the message that has been sent loud and clear that the nation shall no more bear

the brunt of misdeeds committed by managements operating the corporates. The Society cannot be expected to take on itself the burden of illegitimate actions taken (and the irregularities committed) by the management of an insolvency entity. IBC has thus rightly established a legal framework wherein the intent is to *nip in the bud,* and not *kick the can down the road* or allow the problem to fester.

The present economic scenario occasioned by Covid 19 pandemic is putting the entire IBC framework to a very difficult test, however, with the willingness and agility shown by the Government (and other stakeholders), the problem has been managed to some extent. While Covid 19 has certainly impacted nation's growth process by making corporates susceptible to financial stress, the journey of insolvency reforms has to continue unabated. The solemn objective of IBC being to firmly establish a system wherein corporates apart from exercising their right of *ease of doing business,* also realise their responsibility to run their businesses transparently and efficiently. This only ensures that a proper solution is adopted to deal with cases of any financial or economic stress. The Government, under the last amendment introduced into the IBC, made it clear that no corporate shall be made to undergo the CIRP for any default of payment which is on account of the impact of the pandamic. The provisions of sections 7, 9 and 10 were suspended to safeguard the interests of corporates experiencing distress due to the pandemic, as also in view of the realisation that since the stress is global, it is highly unlikely that there shall be a feasible resolution plan for the rehabilitation of CD.

The IBC, as an economic instrument, has been very successful in laying down the legal framework for revival of corporate entities. The policy undoubtedly is to revive the entity, and not merely to recover by sale of assets. Liquidation is thus only a recourse of last resort in the entire process.

The Government and the IBBI has been at pains to underline the entire economic cycle of an entity, and in that context demonstrate the role IBC is meant to play. In any emerging market economy wherein there is a freedom of entry, new corporates shall enter into the system every day. While many of them shall fail, some of them shall also evolve into successful enterprises. The entities which become unviable need to be allowed to fail so that their resources can be put to an efficient

use, while those who default due to factors other than business or economic failure are given an opportunity to be rescued, subject to commercial wisdom of the Financial Creditors. The Code enables maximisation of value of assets of the CD by requiring the creditors to make a collective attempt to revive the CD so as to improve utilisation of the resources. However, in case, revival is not possible (or is not otherwise expedient in the view of CoC), the Code releases resources for other efficient uses. The ultimate intent is to have maximum value for the assets of CD. While early initiation of the process prevents any erosion of value of assets, an early and time bound conclusion of the process ensures that the resources are put to their best possible use.

While the insolvency resolution process *vis-à-vis* Corporate entities is now fairly established, the law pertaining to the Personal Guarantors seems to be the next big development in the fast-paced growth of the Insolvency Regime in India. With the law already in force (law on initiation of Insolvency Resolution Process *vis-a-vis* Personal Guarantors was notified in December 2019), there are some questions surrounding the implementation of the insolvency laws against personal guarantors. In a recent matter before Hon'ble DRT-II Bench (Chennai) while hearing an application filed by a Korean Banking company (KEB Hana Bank) against a Personal Guarantor, the tribunal admitted the application based on the report submitted by the appointed Resolution Professional under section 99 of the IBC. With some IBC provisions (sections 7, 9 and 10) being suspended presently, creditors are looking to pursue their legal remedy against the personal guarantors to recover their financial dues owed by the Corporates by invoking Personal Guarantees issued by the Directors, Promoters and others. One of the crucial questions concerning insolvency process against PG to CD is, can a financial creditor file simultaneous actions against the Personal Guarantor as well as the Corporate Debtor.

I wish to thank you all for encouraging us in all our initiatives which are directed to serve our members in the best possible way!

Warm Regards,

Dr. Binoy J. Kattadiyil

Insolvency & Bankruptcy Code, 2016 Genesis & Development

Parthiv Parikh
Insolvency Proffessional and Partner

Genesis:

After receiving assent by both the houses of Parliament, the Insolvency and Bankruptcy Code (IBC) received presidential assent in May 2016. It was made effective on 1 December, 2016. Everyone involved has been surprised with the speed and commitment with which the Code has progressed in the past 36 months.

As per Reserve Bank of India (RBI) data on domestic operations, aggregate gross NPA of Public Sector Banks (PSBs) stand at Rs. 7,10,109 crores as on 31.3.2019. The primary reasons for this spurt were aggressive lending practices, wilful default / loan frauds in some cases, and economic slowdown. Further, Asset Quality Review (AQR) initiated in 2015 for clean and fully provisioned bank balance-sheets revealed high incidence of NPAs. This was the result of Government's 4R's strategy of recognition, resolution, recapitalization and reforms.

The earlier legislations including the SARFAESI Act, 2002, RDDB Act, 1993 were even though make stringent were failing to achieve the recovery from the NPA and were getting soared at the doors of the Court for number of years with debtor still in control of the defaulter company.

With SIC (Special Provisions) Act, 1985 failing to achieve any resolution and had become a tool in the hands of the debtor to halt every other legal proceeding. This was in this back-drop, a time bound law was needed with much more focus on resolution. This was for the first time in India which put in place a regime of "creditors in control" which created a massive chaos in the defaulter community who sensed the early signals of losing control over their empire built over the piles of NPA.

As per the Economic Survey released January 31st, 2020 the "Insolvency and Bankruptcy Code (IBC) has improved resolution processes in India compared to the earlier measures." The proceedings resulted in recovery of 42.5% of the amount involved as compared to 14.5% under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act (SARFAESI).

Development:

The journey of the development of the IBC,2016 has been landmark one wherein a short span of around three years, there have been three amendments to the Code itself. The Regulator, IBBI, has been keen in addressing and creasing out all the procedural bottlenecks faced by the stakeholders. The Government is conspicuous of the further hurdles including the infrastructure and the manpower of the Tribunals to take the increasing burden. The Apex Court has delivered a number of judgments settling down various issues one of the most important among those has been holding the IBC to be well within the four corners of the Constitution.

Since its coming into force of the provisions of CIRP with effect from 1 December, 2016, **3911 CIRPs** have commenced by the end of June 2020 out which:

- 250 have ended in approval of resolution plans.
- 380 have been closed on appeal or review or settled;
- 218 have been withdrawn.
- 955 have ended in orders for Liquidation. Importantly 690 out of 952 were earlier with BIFR and or defunct. The economic value in most of these CDs had already eroded before they were admitted into CIRP.
- Balance are still under CIR Process.

Till June 2020, realisation by FCs under resolution plans in comparison to liquidation value is 183.59%, while the realisation by them in comparison to their claims is 44.70%.

A brief snapshot of the sectoral wise CIRP has been provided on the subsequent presentation.

Sectoral Distribution of CIRP's as on June 30, 2020

Sectors	Nos. of CIRP cases		
	Closed	Ongoing	Total
Manufacturing	765	830	1595
Food, Beverages & Tobacco Products	87	117	204
Chemicals & Chemicals Products	78	80	158
Electrical Machinery & Apparatus	65	50	115
Fabricated Metal Products	44	45	89
Machinery & Equipment	87	90	177
Textiles, Leather & Apparel products	143	131	274
Wood, Rubber, Plastic & Paper products	76	115	191
Basic Metals	128	148	277
Others	56	54	110
Real Estate, Renting & Business Activities	352	425	777
Real Estate Activities	64	122	186
Computer & Related activities	49	65	114
Research & Development	3	2	5
Other Business Activities	236	236	472
Construction	168	253	421
Wholesale & Retail Trade	181	209	390
Hotels & Restaurants	43	46	89
Electricity & Others	38	82	120
Transport, Storage & Communications	65	52	117
Others	191	211	402
Total	1803	2108	3911

***Note*: The distribution is based on the CIN of CD's and as per National Industrial Classification (NIC 2004).**

Source: IBBI Newsletter for April – June 2020.

FILING OF APPLICATION UNDER THE INSOLVENCY & BANKRUPTCY CODE, 2016 & DUTIES OF THE RP AND THE COC IN THE CIR PROCESS?

Pre-requisites for Filling of Application:

- Pre-requisites for filing an application by Financial Creditor:
  - There should be a financial debt-meaning debt against the time value of money.
  - There should be a default with respect to the debt. Does classification as NPA is quintessential?
  - The amount of debt shall be more than INR One Crore only. The debt and default may be at the instance of other financial creditor.
  - Form I is the prescribed form to be filed with the NCLT.

Other important Aspects

- Consideration of limitation period

While filing an application under section 7 of the IBC, 2016, the Creditor shall be conscious about the provisions of the Limitation Act,1963. Section 238A of the Code made it specifically cleared that the NCLT and NCLAT shall be bounded by the provisions of the law of the limitation and thus it cannot take any shelter under the over-riding section 238 of the Code.

- Caveat Application- Manage the stay Order

Many times it has been observed a notorious corporate debtor make every possible attempt to stall down the admission of CIRP Application. These attempts also include taking stay order from the High Courts to debar the NCLT from taking cognizance of the matter. It is highly recommended that if you apprehend such a stay order, then the banks should file a caveat application in the respective High Court to make sure that the High Court does not pass any order without hearing the banks.

- Application impressed by RBI 12/2 Circular

By virtue of judgment rendered by the apex court in the matter of Dharani Sugars, any application filed by virtue of RBI 12/2 Circular shall be bad in law and shall be rejected. Thus, it is important to make sure that the banks do not file an application solely by virtue of that circular however, if the banks record it otherwise necessary also, there is no bar in filing any such application.

Duties of Committee of Creditors

Confirmation of IRP as RP or replacement with another IP as RP

Section 22(2). The committee of creditors, may, in the first meeting, by a majority vote of not less than 66 per cent of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

Confirmation of IRP as RP or replacement with another IP as RP by 66% of voting share

Section 22(3). Where the committee of creditors resolves under sub-section (2)

(b) to replace the interim resolution professional, it shall file an

application before the Adjudicating Authority for the appointment of the proposed resolution professional [along with a written consent from the proposed resolution professional in the specified form]

File application with the AA for replacement of IRP with proposed RP

Cost of Interim Resolution Professional

Regulation 33 of IBBI (CIRP) Regulations, 2016 - Costs of the interim resolution professional.

(*1*) The applicant shall fix the expenses to be incurred on or by the interim resolution professional.

(*2*) The Adjudicating Authority shall fix expenses where the applicant has not fixed expenses under sub-regulation (1).

(*3*) The applicant shall bear the expenses which shall be reimbursed by the committee to the extent it ratifies.

(*4*) The amount of expenses ratified by the committee shall be treated as insolvency resolution process costs.

In the matter of S3 *Electricals & Electronics (P). Ltd, v. Brian Lay* [2020] 118 taxmann.com 473/162 SCL 609 the Supreme Court confirmed that:-

"A bare reading of regulation 33(3) indicates that the applicant is to bear expenses incurred by the RP, which shall then be reimbursed by the Committee of Creditors to the extent such expenses are ratified."

"it is clear that whatever the Adjudicating Authority fixes as expenses will be borne by the creditor who moved the application."

Quorum of the meeting and Reduction of notice period for holding CoC meeting

Regulation 22: Quorum of the meeting read with section 24(8)

(1) A meeting of the committee shall be quorate if members of the committee representing at least thirty-three percent of the voting rights are present either in person or by video conferencing or other audio and visual means:

Provided that the committee may modify the percentage of voting rights required for quorum in respect of any future meetings of the committee.

CoC may modify percentage of voting rights required for quorum by 51% voting share.

Regulation 19(2) read with sections 24 and 25(2)*(f)*

Reduction of notice period for holding CoC meeting by 51% of voting share.

Specifying criteria for prospective Resolution Applicants

Section 25(2)(h) read with regulation 36A(4)(a)

The Resolution Professional shall:

"(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans."

Specifying criteria for prospective Resolution Applicants by 51% of voting share.

Replacement of resolution professional by committee of creditors

Section 27 Replacement of resolution professional by committee of creditors. -

The committee of creditors may, at a meeting, by a vote of sixty-six per cent of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form.

Replacement of RP by 66% of voting share.

Resolution process cost

Regulation 34

The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.

[*Explanation*. - For the purposes of this regulation, "expenses" include the fee to be paid to the resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional.

Fixing of expenses of RP by 51% of voting share

The committee shall evaluate the resolution plans (strictly as per EM Section 30(4) reads with regulation 39(3)].

Regulation 39(3). The committee shall evaluate the resolution plans received under sub-regulation (1) strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit:

Provided that the committee shall record its deliberations on the feasibility and viability of the resolution plans.

Section 30(4). The committee of creditors may approve a resolution plan by a vote of not less than 66 per cent of voting share of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, **including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board.**

Evaluation (strictly as per EM) and approval of Resolution Plan with modifications (if any), with reasons recorded for approval or rejection by 66% of voting share.

Hon'ble NCLAT in *Rajputana Properties (P.) Ltd. v. Ultra Tech Cement Ltd.* [2019] 108 taxmann.com 88 opined that:

"CoC should record reasons (in short) while approving or rejecting one or another resolution plan". It further went on to say that the views of suspended Board of Directors, operational creditors and resolution applicants are to be taken into

consideration by CoC before approving or rejecting a resolution plan and stated that the same shall be recorded. Furthermore, NCLAT in Bhaskara Agro Agencies v. *Super Agri Seeds (P.) Ltd.* (CA (AT) (Insolvancy) No. 380 of 2018, dated 23-7-2018) stated, ***"So far as the viability or feasibility of***

'Resolution Plan' is concerned, the AA or the Appellate Tribunal cannot sit in appeal over the decision of the CoC. They are the experts to find out the viability and the

feasibility of a plan and the matrix. As the aforesaid factors are technical in nature which can be determined by experts like the 'Financial Creditors'*, we are not inclined to sit in appeal over the decision of the CoC to find out whether one or other 'Resolution Plan' is viable and feasible or not.*

Therefore, the intention of the legislature while introducing IBC is to empower the CoC to take a business decision upon the resolution plan for acceptance or rejection, as the case may be and it is only when the CoC accepts the Resolution Plan; the same is placed before Adjudicating Authority. In other words, the Adjudicating Authority has no authority or jurisdiction to intervene when CoC rejects the Resolution Plan.

In the matter of *Standard Chartered Bank and State Bank of India* v *Essar Steel India Ltd.*, dated 8.3.2019

In the above-mentioned order Hon'ble NCLT Ahmedabad Bench settled the legal position of Resolution professional that the Resolution professional has not conferred with such power to adjudicate the claim submitted by the creditors. He is required only to collate the information, verify the claims as per the provisions of I & B Code and to update such information in the list of creditors and thereafter, **place it before the CoC for its consideration.**

Primary Duties of IRP/RP

The Interim Resolution Professional (IRP), appointed by Hon'ble NCLT, on appointment shall conduct the Corporate Insolvency Resolution Process including but not limited to:

(i) The IRP shall make a public announcement in Form A and invite claims from all the creditors within 3 days from the date of his appointment.

(ii) The IRP shall verify every claim, as on the insolvency commencement date,

(iii) maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims.

The IRP shall file a report certifying constitution of the committee to the Adjudicating Authority within two days of the verification of claims and hold first meeting of CoC.

Section 17 - Management of affairs of the CD, exercise the powers of the Board of Directors of the CD, etc.

From the date of appointment of the interim resolution professional/Resolution Professional shall,—

(a) Manage the affairs of the Corporate Debtor;

(b) Exercised the powers of the Board of directors or the partners of the corporate debtor

(d) **Instruct the financial institutions maintaining accounts of the corporate debtor in relation to such accounts and furnish all information relating to the corporate debtor available with them.**

Section 18(1)*(d)* & *(f)*

Monitor the assets of CD, manage its operations, take control and custody of its assets.

The IRP/RP shall:

"*(d)* monitor the assets of the corporate debtor and manage its operations.

(f) take control and custody of any asset over which the corporate debtor,"

Evaluation and approval of Resolution Plan

The Resolution Professional (RP) appointed by the Committee of Creditors (CoC), in its first meeting, invite Resolution Applicants (RAs) for the submission of Expression of Interest.

The Resolution Professional shall:

(a) specify the criteria for prospective resolution applicants, as approved by the committee.

(b) state the ineligibility norms under section 29A.

(c) provide such basic information about the corporate debtor.

The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant comply with all the requirement specified in the invitation for expression of interest.

The Resolution Professional is duty bound to check that the resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets and shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations.

Section 20(1) & 20(2)*(e)*

Protect and preserve the value of property of the CD and manage its operations as a going concern

The IRP/RP shall:

(1) make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

(2) Issue instruction to personnel of the CD for keeping it as a going concern.

(e) take all such actions as are necessary to keep the corporate debtor as a going concern.

Section 21(10) Make financial information available to CoC within seven days of such requisition under section 21(9)

(9) The resolution professional require to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process to the CoC.

(10) The resolution professional shall make available any financial information so required by the committee of

creditors under sub-section (9) within a period of seven days of such requisition.

Section 25(2)(b) Represent and act on behalf of the CD

The IRP/RP Shall:

(b) Represent and act on behalf of the CD with third parties, exercise rights for the benefit of CD in judicial, quasi-judicial and arbitration proceedings

(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.

●●●

RECENT AMENDMENTS TO THE INSOLVENCY AND BANKRUPTCY CODE, 2016 AND REGULATIONS FRAMED THEREUNDER

Major Amendments:

Time Limit for Completion of CIRP

- In Section 12(3) of IBC, 2016, proviso was added.
- CIRP shall mandatorily be completed within 330 days from the insolvency commencement date which includes any extension of period of CIRP granted u/s 12 of IBC, 2016 & time taken in legal proceedings.
- Another proviso was also added that provided where the CIRP is pending and has not been completed within 330 days, it shall be completed within 90 days from commencement of the Insolvency & Bankruptcy Code (Amendment) Act, 2019 *i.e.* within 90 days from 16th Aug, 2019.

Implications

- This amendment will instil discipline among various stakeholders to adhere to the timelines.

Discourage the practice by the corporate debtor of filing appeals revision and writ petitions to delay the CIRP.

Rights & Duties of Authorized Representative of Financial Creditors

- In section 25A(3) of IBC, 2016, sub-section (3A) was added that the authorized representative shall cast his vote on behalf of the Financial Creditor he represents in accordance with the decision taken by a vote of more than 50% of voting share of the Financial Creditor he represents, who have cast their vote.
- Further, it is clarified that the amended voting process will not be applicable for taking a decision on withdrawal of Resolution Application u/s 12A and voting process in such cases will be as originally provided under the Code wherein each individual financial creditor will vote individually.
- This shortcoming was felt in the one

of the case where the NCLT, New Delhi Bench in the case of *IDBI Bank Ltd. v. Jaypee Infratech Ltd.*, held that CoC shall comprise of all financial creditors and must be construed as one and cannot be segmented class wise, particularly for the purpose of computation of voting share. Also, it was held that voting share is mandatory in nature and not directory.

Implication

- This amendment will smoothen decision making process in cases where debenture holders, home buyers or depositors form majority of CoC.

SUBMISSION OF RESOLUTION PLAN

- In **section 30** of IBC, 2016, in sub-section (2), clause *(b)*, it was substituted that Resolution Plan should provide for payment of debts of the Operational Creditor in such manner as may be specified by the Board and it shall not be less than:

The amount to be paid to them in event of liquidation u/s 53 of IBC, 2016 or amount to be paid to them, if amount distributed under the Resolution Plan had been distributed in accordance with order of priority under section 53 (1) whichever is higher.

- Also, the Resolution Plan should provide for payment of debts of the Financial Creditor who do not vote in favor of the Resolution Plan in such manner as specified by the Board and it shall not be less than the amount to be paid to such creditors in accordance with section 53 (1) in event of liquidation.
- Amendment clarifies by way of inserting a new explanation that the distribution shall be fair and equitable to such Creditors.

This explanation is in line with the Apex Court ruling in the matter of *Swiss Ribbons (P.) Ltd. v. Union of India* (2019) 101 taxmann.com 389/152 SCL 365 which says that the distribution shall be fair and equitable.

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vote in favor of the Resolution Plan in such manner as specified by the Board and it shall not be less than the amount to be paid to such creditors in accordance with section 53 (1) in event of liquidation.

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This explanation is in line with the Apex Court ruling in the matter of *Swiss Ribbons (P.) Ltd. (Supra)* which says that the distribution shall be fair and equitable.

APPROVAL OF RESOLUTION PLAN- BINDING ON GOVERNMENT AGENCIES

- In **section 31** of IBC, 2016, there was insertion of words. The Resolution Plan shall be binding on the Central Govt, any State Govt. or local authority to whom debt in respect of payment of dues arising under any law, such as authorities to whom statutory dues are owed were added.

This amendment aims to capture the spirit that once the resolution plan is approved, it is binding on all stakeholders. It will reduce delays and bring about closure of various tax proceeding that are pending.

DEFINITIONS- INCLUSIVENESS TO THE TERM OF RESOLUTION PLAN

- In section 5 of IBC, 2016 in clause 26, explanation was added that Resolution Plan may include provisions for restructuring of the corporate debtor, including by way of merger, amalgamation and demerger.
- This new explanation can be seen as legitimizing existing practices being used to arrive at a commercial resolution.

TIME BOUND DISPOSAL OF APPLICATION FILED BY FINANCIAL CREDITORS

- In section 7 (4) of IBC, 2016 proviso was inserted that if the Adjudicating Authority has not ascertained the existence of default and passed an order under section 7(5) within such time (14 days), it shall record its reasons in writing for the same.
- This amendment will prevent inordinate delays in admission and introduce judicial discipline.

INITIATION OF LIQUIDATION-PREROGATIVE OF THE CoC

- In **section 33** of IBC, 2016, *Explanation* was added that CoC may take the decision to liquidate the corporate debtor any time after constitution of CoC u/s 21 of IBC, 2016 and before confirmation of a Resolution Plan, including any time before preparation of IM.

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AMENDMENTS TO IBBI (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS, 2016 & AMENDMENTS TO IBBI (LIQUIDATION PROCESS) REGULATIONS, 2016

Salient Amendments:

Withdrawal of Application at Different Stages of CIRP

- The amendments in regulation 30A, specify the process for withdrawal of applications u/s 12A before constitution of committee of creditors (CoC), after constitution of CoC but before issue of invitation for expression of interest (EOI), and after issue of invitation for expression of interest (along with reasons justifying withdrawal after issue of EOI).

- Application for withdrawal is made before constitution of CoC, IRP shall submit the same within 3 days of its receipt.

- Application for withdrawal is made after constitution of CoC, CoC shall consider the application within 7 days of its receipt.

Application for withdrawal u/s 12A is approved the applicant shall deposit an amount, towards the actual expenses incurred till the date of approval by the Adjudicating Authority, as determined by the interim resolution professional or resolution professional, as the case may be, within three days of such approval, in the bank account of the Corporate Debtor.

MEETING LIQUIDATON COST

- After Regulation 39A, **Regulation 39B** was added.

The amendments require that while approving a resolution plan or deciding to liquidate the corporate debtor, the CoC may make a best estimate of the amount required to meet the liquidation costs, in consultation with the resolution professional. CoC shall make a best estimate of the value of the liquid assets available to meet the liquidation costs

ASSESSMENT OF SALE AS A GOING CONCERN

- After Regulation 39B, **Regulation 39C** was added.

- The amendments require that CoC may recommend sale of the corporate debtor or sale of business of the corporate debtor as a going concern.

- Where the CoC recommends sale as a going concern, it shall identify and group the assets and liabilities, which according to its commercial considerations, ought to be sold as a going concern.

FEE OF LIQUIDATOR

- After Regulation 39C, **Regulation 39D** was added.

- The amendments require that the CoC may in consultation with the RP, fix the fee payable to the liquidator, if an order for liquidation is passed by the Adjudicating Authority.

APPROVAL OF RESOLUTION PLAN

- In Regulation 39 (3), proviso was added that CoC shall record its deliberations on feasibility and viability of the Resolution Plans.

Contributions to Liquidation Costs

- After Regulation 2, Regulation 2A was added.
- The amendments require *the financial creditors, who are financial institutions*, to contribute towards the liquidation cost, where the corporate debtor does not have adequate liquid resources to complete liquidation, in proportion to the financial debts owed to them by the corporate debtor, in case the CoC did not approve a plan for such contribution during corporate insolvency resolution process. However, such contribution along with interest at bank rate thereon shall form part of liquidation cost, which is paid in priority.
- The contribution shall be deposited in a designated escrow account to be opened and maintained in a scheduled bank within 7 days of passing of liquidation order.

COMPROMISE OR ARRANGEMENT

- After Regulation 2A, **Regulation 2B** was added.
- The amendments require that where a compromise or arrangement is proposed, it shall be completed within ninety days of the order of liquidation. The time taken on compromise or arrangement, not exceeding ninety days, shall not be included in the liquidation period.
- Any cost incurred by the liquidator in relation to compromise or arrangement shall be borne by the corporate debtor, where such compromise or arrangement is sanctioned by the Tribunal under sub-section (6) of section 230.
- Provided that such cost shall be borne by the parties who proposed compromise or arrangement, where such compromise or arrangement is not sanctioned by the Tribunal under sub-section (6) of section 230.
- As stated in *S C Sekaran* **v.** *Amit Gupta* [2019] 103 taxmann.com 222/152 SCL 536 (NCL-AT), it was held that it was open for the Adjudicating Authority to override the objections raised if a scheme of compromise or arrangement is beneficial for revival of the corporate debtor.

LIQUIDATOR'S FEE

- The amendment required that the fee payable to the liquidator shall be in accordance with the decision taken by the committee of creditors under regulation 39D of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- In case the fee is not decided by the CoC, the liquidator shall be entitled to a fee:

(a) At the same rate as the resolution professional was entitled to during the CIRP, for the period of compromise or arrangement under

section 230 of the Companies Act, 2013 (18 of 2013); and

(b) As a percentage of the amount realized net of other liquidation costs, and of the amount distributed, for the balance period of liquidation.

- The liquidator will be entitled to receive half of the fee payable on realization only after such realized amount is distributed.

PRESUMPTION OF SECURITY INTEREST

- After Regulation 21, Regulation 21A was added.
- A secured creditor shall inform the liquidator of its decision to relinquish its security interest to the liquidation estate or realize 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.
- Where a secured creditor proceeds to realize its security interest, it shall pay as much towards the amount payable under section 53, as it would have shared in case it had relinquished the security interest."

STAKEHOLDERS' CONSULTATION COMMITTEE (SCC)

- The amendments provide for constitution of a SCC within sixty days from the liquidation commencement date having representation from secured financial creditors, unsecured financial creditors, workmen and employees, government, other operational creditors, and shareholder/partners to advice the liquidator on matters relating to sale.
- However, the advice of this committee is not binding on the liquidator. Provided that where the liquidator takes a decision different from the advice given by the consultation committee, he shall record the reasons for the same in writing.

SALE AS A GOING CONCERN

- The amendments specify the process for:

  (a) sale of corporate debtor as going concern, and

  (b) sale of business of corporate debtor as going concern under liquidation.

- These also provide that where a corporate debtor is sold as a going concern, the liquidation process shall be closed without dissolution of the corporate debtor. The liquidator shall identify and group the assets and liabilities to be sold as a going concern, in consultation with consultation committee.

COMPLETION OF LIQUIDATION

In Regulation 44, the amendments require completion of liquidation process within one year (earlier two years) of its commencement, notwithstanding pendency

of applications for avoidance transactions. Where the sale is attempted, liquidation process may take additional period upto 90 days under compromise.

RESERVE PRICE

- Where an auction fails at the reserve price, the liquidator may reduce the reserve price by up to 25% (earlier 75%) of such value to conduct subsequent auction. And where an auction fails at reduced price as stated above, the reserve price in subsequent auctions may be further reduced by not more than 10% at a time.
- The amendment has removed the concept of valuation under liquidation which should not be more than 6 months old.

Salient Amendments:

Withdrawal of Application at Different Stages of CIRP

- The amendments in regulation 30A, specify the process for withdrawal of applications u/s 12A before constitution of committee of creditors (CoC), after constitution of CoC but before issue of invitation for expression of interest (EOI), and after issue of invitation for expression of interest (along with reasons justifying withdrawal after issue of EOI).
- Application for withdrawal is made before constitution of CoC, IRP shall submit the same within 3 days of its receipt.
- Application for withdrawal is made after constitution of CoC, CoC shall consider the application within 7 days of its receipt.

Recent Landmark Judgments and their Impact

Commercial Wisdom of the CoC is Supreme and un-challengeable

It had remained a matter of great concern for all the CIRP process and CoC members thereof while approving or rejecting a Resolution Plan.

The Apex Court in the matter of *K. Sashidhar* **v.** *Indian Overseas Bank* [2019] 102 taxmann.com 139/152 SCL 312 had categorically stated that the rejection of the dissenting creditors shall not be examined by the NCLT and NCLAT and the only limited enquiry that the Tribunals can make are in respect of the mandatory contents of the Resolution Plan as provided under section 30(2) read with section 31(1) of the Code. The commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. Their lordhships further observed, "*the resolution professional is not required to express his opinion on matters within the domain of the financial creditor(s), to approve or reject the resolution plan, under section 30(4) of the I&B Code.*"

The judgment has been recently cited while approving the Resolution Plan of **Dighi Port Ltd**. where the Mumbai Bench of the NCLT did not interfere with the decision of the CoC while approving the Resolution Plan of H2 over the Resolution Plan of H1.

However, the Bench further observed that the rights of other party cannot be unilaterally curtailed by virtue of the Resolution Plan.

CIRP can be initiated Directly against the guarantor without Principal Borrower

It is not necessary to initiate corporate insolvency resolution process against the principal borrower before initiating corporate insolvency resolution process against the corporate guarantors.

Without initiating any corporate insolvency resolution process against the principal borrower, it is always open to the financial creditor to initiate corporate insolvency resolution process under section 7 against the corporate guarantors, as the creditor is also the financial creditor *qua* corporate guarantors.

There is no bar for filing simultaneously two applications under section 7 against the principal borrower as well as the corporate guarantor(s), but once for same set of claim application by financial creditor is admitted, second application by the same financial creditor for same set of claim and default cannot be admitted against the other corporate debtor [the corporate guarantor(s) or the principal borrower]. Further, no application can be filed by the financial creditor against two or more corporate debtors on the ground of joint liability, till it is shown that the `corporate debtors' combined are joint venture company.

NCLAT: *Dr. Vishnu Kumar Agarwal* v. *Piramal Enterprises Ltd.* (2019) 101 taxmann.com 464/151 SCL 555

Law of Limitation for Filing Section 7 Application

The Banks as FC while instituting application u/s 7 of the I & B Code, 2016 shall make sure that the application is not barred by limitation period as prescribed under the Limitation Act,1963.

Jignesh Shah v. *Union of India*. (2019) 109 taxmann.com 486/156 SCL 542 (SC)

In other judgment of *Sagar Sharma* v. *Phoenix Arc (P.) Ltd.* [2019] 110 taxmann.com 50/156 SCL 707 (SC), the Hon'ble Apex Court has held even in the case of mortgaged property, article 137 of the Limitation Law is applicable which prescribes a period of three years rather than article 62 of the law of the limitation.

Preferential Rights of the Employee Welfare Funds Over Secured Creditor.

During the liquidation, it is generally understood that the claim of the secured creditors shall get superiority over other debts of whatsoever nature.

However, in the judgment delivered by the Hon'ble NCLAT in the matter of *State Bank of India* v. *Moser Baer Karamchari Union*. [2019] 108 taxmann.com 251 has held section 53 when read with section 36 of the IBC, 2016 make it amply clear that the sums due to any workman or employee from the provident fund, pension fund and gratuity fund shall not form part of waterfall distribution as prescribed under section 53 of the Code.

Exemption from Publishing of Invitation in case of MSME

A pertinent question raised before the NCLT and the NCLAT was if in the case of MSME, is CoC and RP required to follow the process of section 25(2)*(h)* and issue

EOI and invite Interest of other Resolution Applicants if the promoters themselves comes with a compliant Resolution Plan.

The NCLT and NCLAT held that in case of MSME considering that the provisions of section 29A are not attracted to the promoters, the CoC may defer the long process of issuing IM, EOI and can approve the Resolution Plan submitted by the promoters themselves. (**Bafna Pharmaceuticals**)

Right of Enforcement Directorate to attach the assets of the Corporate Debtor

In the matter of *JSW Steel Ltd. v. Mahender Kumar Khandelwal* [2019] 117 taxmann.com 624, the Hon'ble NCLAT has held the claim of the ED as also clarified by the Amendment Act of 2019 are operational debt with respect to which it shall have filed its claim. The matter is posted for final order on 18th November, 2019 but with the aforesaid observation it has been held that the ED cannot attach the properties of the CD under PMLA Act,2002. However, this judgment apparently seems to be contradicting with ruling of Hon'ble High Court at New Delhi in the matter of "*the Deputy Director Directorate of Enforcement* v. *Axis Bank.*"

Treatment of Claim where the Amount is Pending in Appeal/review?

It also happens that claim precluded by a Court/Tribunal have been challenged in appeal or review petition has been filed either by the creditors or Corporate Debtor before initiation of the CIRP which got abeyed by virtue of moratorium. Now, the question arises with which amount the same shall be admitted by the IRP/RP.

In the matter of *Asset Reconstruction Co. India Ltd.* v. *Gopal Krishna Raju*, NCLT, Chennai dated 18th June, 2019, directed RP to collate applicant's claim (as per the recovery certificate) making such claim subject to outcome of the review petition pending disposal before Hon'ble DRT.

However, in case of *Peter Jhonson John* (Employe) v. *KEC International Ltd.* [2019] 109 taxmann.com 500/156 SCL 16 (NCL-AT) has stated that if a particular decree of a particular debt is pending in the court of law is called pre-existing dispute and claim pertaining to this should not be accepted until it becomes crystalized.

Now, the question may arise, what should be the treatment in case of claim pertaining to the decretal amount?

This decretal amount is nothing but crystalized debt and it should be admitted by IRP/RP as the case may be; if there is a default.

Ref. Case: NCLT Chennai Bench on 10th April, 2019 in the matter of *Cortica MFg* v. *Victory Electricals Ltd.*

What is the Treatment of Claims towards Bank Guarantee?

In this regard, it is pertinent to mention that the Hon'ble National Company Law Appellate Tribunal in the matter of *Export Import Bank of India* v. *Resolution Professional, JEKPL (P.) Ltd.* [2018] 97 taxmann.com 194 (NCL-AT), has held that if a counter corporate guarantee is given by the Corporate Debtor, against which a loan is disbursed by the creditor to the principal borrower, then the claim of the creditor who disbursed such loan, would fall under the definition of "financial debt".

Further, in the same case, the Resolution Professional was directed to accept the claim under corporate guarantee, irrespective of whether it was invoked or not.

Treatment of Claims towards un-invoked Corporate Guarantee?

It is a regular banking practice to take a third-party guarantee while granting loan to the principal borrower. The pertinent question now arises is that what would be the treatment of the claim filed towards such Corporate Guarantee which has not been invoked till the date of CIRP admission and more particularly the principal borrower has not defaulted.

In the matter of *Edelweiss Asset Reconstruction Co. Ltd. v. Orrisa Manganese & Minerals Ltd.* [2019] 106 taxmann.com 18/154 SCL 18 (NCL-AT), the RP rejected such a claim. The NCLT and NCLAT upholds the rejection of the claim by the RP.

Resolution Plan Shall be for Resolution and not for Sale

The resolution plan should be planned for insolvency resolution of the corporate debtor as a going concern and not for addition of value with intent to sell the corporate debtor. The purpose to take up the company with intent to sell the corporate debtor is against the basic object of the Code.

The resolution plan should be planned for insolvency resolution of the corporate debtor as a going concern and not for addition of value with intent to sell the corporate debtor. The purpose to take up the company with intent to sell the corporate debtor is against the basic object of the Code.

Adjudicating Authority rightly observed that the resolution plan should be planned for insolvency resolution of the corporate debtor as a going concern and not for addition of value with intent to sell the corporate debtor.

With Regards,

Parthiv Parikh,

Insolvency Professional

Registration No: IBBI/IPA-002/IP-N00369/2017-2018/11063

(2020) 121 taxmann.com 69 (Madras)

HIGH COURT OF MADRAS

CA V.Venkata Sivakumar *v.* Insolvency and Bankruptcy Board of India (IBBI)

A.P. SAHI, CJ.
AND SENTHILKUMAR RAMAMOORTHY, J.

W.P.NO.13229 OF 2020

NOVEMBER 3, 2020

Section 220 of the Insolvency and Bankruptcy Code, 2016, read with regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 and regulation 12A of the IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 - Corporate insolvency resolution process - Resolution professional - Appointment of - Regulation 7A was introduced in IP Regulations and by insertion of regulation 7A it became necessary for IPs to obtain a valid Authorisation For Assignment (AFA) before taking up assignments as an IP with effect from 1-1-2020 - For purpose of giving effect to regulation 7A, regulation 12A was inserted in Model Bye-Laws IPA Regulations - Petitioner was an insolvency professional who was enrolled with Insolvency Professional Agency (IPA) - He challenged constitutional validity of regulation 7A and regulation 12A - Whether criteria stipulated in regulation 7A and regulation 12A for eligibility of IP are not unreasonable or arbitrary but appear to be germane for deciding eligibility of an IP for AFA - Held, yes - Whether since such measures are intended to regulate profession and not to deprive a person of right to practice profession, they are not violative of articles 14, 19 and 21 of Constitution - Held, yes - Whether thus,

regulations 7A and 12A are not arbitrary and unconstitutional - Held, yes - Whether writ petition filed by petitioner challenging said Regulations was to be dismissed - Held, yes (Paras 14, 16 & 17)

FACTS

- Petitioner was a practicing chartered accountant who was a member of Institute of Chartered Accountants of India.
- He was also an Insolvency Professional (IP) under the IP Regulations for which he was enrolled as a professional member of Indian Institute of Insolvency Professionals of the ICAI (IIIPI), which is an Insolvency Professional Agency (IPA).
- The petitioner challenged the constitutional validity of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 by which it became necessary for IPs to obtain a valid Authorization for Assignment (AFA) before taking up assignments as an IP with effect from 1-1-2020 and Bye-Law 12A of the Insolvency and Bankruptcy Board of India (IBBI) (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 (Model Bye-Laws IPA Regulations which was inserted in the Model Bye-Laws IPA Regulations by Notification No. IBBI/2019-20/GN/REG 043, dated 23-7-2019) and as a consequence of the insertion of regulation 12A in the Model Bye-Law IPA Regulations, the power to issue or renew an AFA has been conferred on an IPA.
- The petitioner stated that he applied for an AFA in terms of regulation 7A of the IP Regulations on 31-12-2019 and his application was rejected on 14/2020, *inter alia*, on the ground that he had not paid the requisite fee as per regulation 7(2)(*ca*).

HELD

- The first question that arises for consideration is with regard to the power to frame the impugned regulations and bye-laws, and whether there is excessive delegation. On perusal of the IP Regulations, it is clear that the said regulations were framed under the power conferred by sections 196, 207 and 208 read with section 240 of the IBC. In an earlier judgment, namely, *V. Venkata Sivakumar* v. *IBBI*, 2020-4-L.W. 161, this Court rejected a challenge by the Petitioner herein to regulation 7(2)(*ca*) of the IP Regulations as regards the power of the IBBI to charge a fee from IPs by using the annual turnover as a measure, including the allegation that there was excessive delegation. In instant case, in addition to regulation 7A of the IP Regulations, regulation 12A of the Model Bye-Laws IPA Regulations is under challenge. On perusal of the Model Bye-Laws IPA Regulations, it is found that the said regulations were framed by the IBBI under the power conferred by sections 196, 203 and 205 read with section 240 of the IBC. Section 196 of the IBC deals with the powers and functions of the IBBI and sub-section

(2) thereof expressly empowers the IBBI to frame model bye-laws to be adopted by an IPA.

- Section 205 of the IBC deals with the power of the IPA to frame bye-laws in accordance with the model bye-laws. On examining the said sections of the IBC, the undoubted position that emerges is that the IBBI is empowered to frame regulation 7A of the IP Regulations and regulation 12A of the Model Bye-Laws IPA Regulations. In turn, the IPAs, including the second Respondent, are empowered to frame bye-laws in consonance with the model bye-laws. Given the fact that the IBBI has framed the Model Bye-Laws IPA Regulations and IPAs, such as the IIIPI, have framed bye-laws in consonance with the model bye-laws, it cannot be said that there is excessive delegation. Indeed, section 205 of the IBC expressly stipulates that, subject to the provisions of the IBC and rules and regulations thereunder, after obtaining the approval of the IBBI, an IPA should frame bye-laws that are consistent with the model bye-laws framed by the IBBI. Moreover, as regards the criteria for accepting or rejecting an application for an AFA, regulation 12A(2) of the Model Bye-Laws IPA Regulations stipulates the criteria. Therefore, it certainly cannot be said that principles or norms have not been laid down in respect of the exercise of power by IPAs. [Para 11]
- The primary ground on which the regulations are assailed is that it subjects registered IPs to the added requirement of obtaining an AFA from the IPA. Therefore, the question arises as to whether the imposition of the AFA requirement violates the aforesaid provisions of the Constitution. Chartered Accountants are subject to the regulatory and disciplinary control of the Institute of Chartered Accountants of India. In the exercise of audit functions, they are also subject to the supervisory control of the National Financial Reporting Authority under section 132 of the Companies Act, 2013 (CA 2013) and, in the event of the commission of or abetment of fraud, they may be removed by the NCLT even *suo motu* under section 140(5) of CA, 2013. [Para 12]
- Therefore, the existence of more than one authority with regulatory or disciplinary control over a professional is *per se* not a ground to hold that the impugned regulations are unconstitutional. In the specific context of IPs, the registration of an enrolled professional member as an IP and the cancellation of such registration are within the domain of the IBBI, whereas the grant of or cancellation of membership and the issuance, renewal and cancellation of an AFA are within the domain of the IPA, which functions under the supervisory control of the IBBI. Indeed, we note that paragraph 4.4.3 of the BLRC Report recommended such a two-tiered regulatory structure. Hence, the challange on this basis is untenable. [Para 12]

- IPs perform a distinct function in insolvency resolution and liquidation under the IBC and the regulations framed thereunder. Therefore, they indubitably constitute a distinct class. On examining the impugned regulations, it is found that the said regulations treat all IPs alike. Indeed, section 196(2)(*c*) of the IBC stipulates expressly that the conditions of membership of an IP should be non-discriminatory. To put it differently, all IPs are required to enrol as professional members of an IPA, register themselves with the IBBI and also obtain an AFA from the IPA concerned before accepting assignments, with effect from 1-1-2020, and, thereafter, on an annual basis. In every case, such AFA is required to be obtained from the appropriate IPA in which such IP is enrolled as a professional member. The admitted position is that there are only three IPAs in India, and the petitioner has admittedly obtained membership from the IIIPI. Accordingly, as per regulation 12A of the Model Bye-Laws IPA Regulations, he is required to apply for and obtain the AFA from the IIIPI. [Para 13]

- Upon submission of such application, the IPA is required to examine as to whether the IP concerned is eligible for an AFA as per the criteria stipulated in regulation 12A(2). The criteria are, *inter alia*, that such person should be registered with the IBBI as an IP; he should be a fit and proper person in terms of the *Explanation* to regulation 4(*g*) of the IP Regulations; he should not be debarred by any direction or order of the Agency or the Board; he should not have attained the age of seventy years; there should be no disciplinary proceedings pending against him before the Agency or the Board; and he should have complied with requirements with regard to the payment of fees to the IPA and the IBBI, filings and disclosures, continuous professional education and other requirements as stipulated in the IBC, regulations, circulars, directions and guidelines of the IPA and the IBBI. One does not find anything *ex facie* arbitrary about the specified criteria. The petitioner focused on the fact that circulars, directions or guidelines do not constitute law. Although it may be correct that non-statutory circulars/ directions and guidelines do not constitute law, these expressions are used in *juxtaposition* to compliance with the requirements of the IBC and regulations and, therefore, should be construed as extending to only relevant and material requirement (for purposes of obtaining an AFA) that are contained in the circulars, directions and guidelines issued by the IBBI or the IPA. Thus, the said criteria are clearly not unreasonable or arbitrary but appear to be germane for deciding the eligibility of an IP for such AFA. These measures are intended to regulate the profession and not to deprive a person of the right to practice the profession. Hence, articles 14, 19 and 21 are not violated. [Para 14]

- A right of appeal is purely statutory and therefore a person is required to comply with the statutory conditions in connection with the filing of an appeal unless such condition is struck down as unconstitutional. While it is contended that section 5 of the Limitation Act would be applicable and that an application to condone the delay would be maintainable, it is found that section 238A of the IBC only applies to proceedings before the Adjudicating Authority under the IBC and to proceedings under the IBC before the NCLT, NCLAT, DRT and DRAT. Therefore, section 238A of the IBC does not apply in this situation. However, the time limit under regulation 12A(7) of the Model Bye-Laws IPA Regulations clearly runs from the date of receipt of the order, and the petitioner would be entitled to reckon limitation from 16-7-2020 if that were indeed the date of receipt of the order of rejection as alleged. More importantly, in contrast to a withdrawal of registration or loss of professional membership as an IP, the rejection of the application for an AFA is not final and apart from the appellate remedy, it is always open to the IP concerned to remedy the non-compliance, as cited in the order of rejection, and re-apply. For all the reasons set out above, it is concluded that regulation 12A is not unconstitutional. Nonetheless, it is opined that the time limit prescribed in regulation 12A(7) maybe revisited by the IBBI by considering an appropriate amendment either providing for a larger time limit or by conferring power to condone delay for sufficient cause. [Para 15]

- Thus, the petitioner has failed to make out a case to decide the impugned regulations as unconstitutional. However, this decision will not preclude the petitioner from prosecuting the pending appeal in respect of the rejection of his application for AFA or from submitting a fresh application for an AFA upon remedying the stated defects in the order of rejection provided he retains his professional membership and registration as an IP. [Para 16]

- In the result, the writ petition fails and the same is dismissed. [Para 17]

CASE REVIEW

Anant Mills Co. Ltd. v. *State of Haryana* [1975] 2 SCC 175; *Seth Nand Lal* v. *State of Haryana* [1980] (Supp.) SCC 574; *Ganga Bai* v. *Vijay Kumar* [1974] 2 SCC 393; *Shyam Kishore* v. *Municipal Corporation of Delhi* [1993] 1 SCC 22; *T. Chitty Babu* v. *Union of India* [2020-4-LW 123] and *N. Madhavan* v. *Union of India* [MANU/TN/3756/2020] (para 15) *followed*.

CASES REFERRED TO

Maneka Gandhi v. *Union of India* AIR 1978 SC 597 (para 5), *Union of India* v. *P.K. Roy* AIR 1968 SC 850 (para 6), *Air India* v. *Nargesh Meerza* AIR 1981 SC 1829 (para 6), *Anjan Kumar* v. *Union of India* AIR 2006 SC 1177 (para 7), *Kalinga Mining Corpn.* v.

Union of India [2013] 5 SCC 252 (para 9), *V. Venkata Sivakumar* v. *IBBI* 2020-4-LW 161 (para 11), *N. Sampath Ganesh* v. *Union of India* 2020 SCC Online Bom. 782 (para 12), *Mahipal Singh Rana* v. *State of Uttar Pradesh* [2016] 8 SCC 335 (para 12), *Anant Mills Co. Ltd.* v. *Municipal Corpn. of City of Ahmedabad* [1975] 2 SCC 175 (para 15), *Seth Nand Lal* v. *State of Haryana* [1980] Suppl. SCC 574 (para 15), *Ganga Bai* v. *Vijay Kumar* [1974] 2 SCC 393 (para 15), *Shyam Kishore* v. *Municipal Corporation of Delhi* [1993] 1 SCC 22 (para 15), *T. Chitty Babu* v. *Union of India* 2020-4-LW 123 (para 15) and *N. Madhavan* v. *Union of India* [MANU/TN/3756/2020] (para 15).

CA. V. Venkata Sivakumar *for the Petitioner.*
R. Sankaranarayanan, ASGI and **C.V. Ramachandramoorthy** *for the Respondent.*

ORDER

Senthilkumar Ramamoorthy, J. - In this writ petition, the Petitioner challenges the constitutional validity of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (the IP Regulations) read with Bye-Law 12A of the Insolvency and Bankruptcy Board of India (IBBI) (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 (Model Bye-Laws IPA Regulations).

2. The Petitioner is a practicing chartered accountant who is a member of the Institute of Chartered Accountants of India. In addition, he is an insolvency professional (IP) under the IP Regulations. In order to qualify as an I P, as required, he is enrolled as a professional member of the Indian Institute of Insolvency Professionals of the ICAI (IIIPI), which is an Insolvency Professional Agency(IPA). The IIIPI is a not-for-profit company incorporated under section 8 of the Companies Act, 2013 and functions in terms of Regulation 12(2) of the IP Regulations. The Petitioner is also registered as an IP by the Insolvency and Bankruptcy Board of India (the IBBI) under the IP Regulations. By Notification No. IBBI/2019- 20/GN/REG045, dated 23-7-2019, Regulation 7A was introduced in the IP Regulations. The said regulation 7A deals with authorisation for assignment (AFA) and reads as under:

"IBBI (INSOLVENCY PROFESSIONALS) REGULATIONS, 2016

7A. *Authorisation for assignment.* — An insolvency professional shall not accept or undertake an assignment after 31st December, 2019 unless he holds a valid authorization for assignment on the date of such acceptance or commencement of such assignment, as the case may be:

Provided that provisions of this regulation shall not apply to an assignment which an insolvency professional is undertaking as on-

(*a*) 31st December, 2019; or

(*b*) the date of expiry of his authorization for assignment."

Thus, upon the insertion of regulation 7A in the IP Regulations, it became necessary for IPs to obtain a valid AFA before taking up assignments as an IP with effect from 1-1-2020. For purposes of giving effect to regulation 7A, regulation 12A was inserted in the Model Bye-Laws IPA Regulations by Notification No. IBBI/2019-20/GN/REG043,

dated 23-7-2019. The said Regulation 12A thereof deals with AFA and reads as under:

"12A *Authorisation for Assignment.*— (1) The Agency, on an application by its professional member, may issue or renew an authorization for assignment.

(2) A professional member shall be eligible to obtain an authorization for assignment, if he-

(a) is registered with the Board as an insolvency professional;

(b) is a fit and proper person in terms of the Explanation to clause *(g)* of regulation 4 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016;

(c) is not in employment;

(d) is not debarred by any direction or order of the Agency or the Board;

(e) has not attained the age of seventy years;

(f) has no disciplinary proceeding pending against him before the Agency or the Board;

(g) complies with requirements, as on the date of application, with respect to-

(i) payment of fee to the Agency and the Board;

(ii) filings and disclosures to the Agency and the Board;

(iii) continuous professional education; and

(iv) other requirements, as stipulated under the Code, regulations, circulars, directions or guidelines issued by the Agency and the Board, from time to time.

(3) An application for issue or renewal of an authorization for assignment shall be in such form, manner and with such fee, as may be provided by the Agency:

Provided that an application for renewal of an authorization for assignment shall be made any time before the date of expiry of the authorization, but not earlier than forty-five days before the date of expiry of the authorization.

(4) The Agency shall consider the application in accordance with the bye-laws and either issue or renew, as the case may be, an authorization for assignment to the professional member in Form B or reject the application with a reasoned order.

(5) If the authorization for assignment is not issued, renewed or rejected by the Agency within fifteen days of the date of receipt of application, the authorisation shall be deemed to have

been issued or renewed, as the case may be, by the Agency.

(6) An authorisation for assignment issued or renewed by the Agency shall be valid for a period of one year from the date of its issuance or renewal, as the case may be, or till the date on which the professional member attains the age of seventy years, whichever is earlier.

(7) An applicant aggrieved of an order of rejection of his application by the Agency may appeal to the Membership Committee within seven days from the date of receipt of the order:

Provided that, where an application for issue of authorisation for assignment has been rejected by an insolvency professional agency, on and from the date of commencement of the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2020, the applicant aggrieved of an order of rejection may appeal to the Membership Committee within thirty days from the date of receipt of order.

(8) The Membership Committee shall pass an order disposing of the appeal by a reasoned order, within fifteen days of the date of receipt of the appeal."

As a consequence of the insertion of regulation 12A in the Model Bye-Law IPA regulations, the power to issue or renew an AFA has been conferred on an IPA. The criteria for grant of an AFA are specified in regulation 12A(2). As per regulation 12A(6), such AFA or its renewal shall be valid for one year or till the date on which the professional member concerned attains the age of seventy years, whichever is earlier. An appeal is provided for against the decision of the IPA to the Membership Committee thereof within seven days from the date of receipt of the order. A proviso was inserted therein by an amendment to extend this period to 30 days for applications that were rejected between 28-3-2020 and 30-9-2020.

3. As stated earlier, the aforesaid regulation 7A of the IP regulations and regulation 12A of the Model Bye-Laws IPA regulations are under challenge in this writ petition. The Petitioner states that he applied for an AFA in terms of regulation 7A of the IP Regulations on 31-12-2019 and his application was rejected

on 14-1-2020, *inter alia*, on the ground that he had not paid the requisite fee as per Regulation 7(2)(*ca*). In spite of providing proof of payment and the acknowledgment dated 28-4-2019, in that connection, his application was rejected. In addition, the order of rejection cited a few instances of non-filling up of Corporate Insolvency Resolution Process (CIRP) forms in respect of a few assignments, which had been completed one year ago. According to the Petitioner, the CIRP forms could not be filled-up because the forms contain about 120 columns, which is unnecessary because the Petitioner functioned as an interim resolution professional for only about three days. The Petitioner further states that the rejection of the application for AFA was communicated to him on 16-7-2020 when the third Respondent informed the Registry of the National Company Law Tribunal at Chennai that the Petitioner was not authorized to act as an IP. The appeal filed by the Petitioner to the Membership Committee of IIIPI is still pending. Meanwhile, a show-cause notice was issued by the first Respondent to call upon the Petitioner to show cause as to why action should not be taken against him for accepting an assignment without a valid AFA. A second application for AFA was also filed and rejected in the meantime. The present writ petition has been filed in these facts and circumstances.

4. We heard Mr. V. Venkata Sivakumar, the Petitioner, as a party-in-person, and Mr. R. Sankaranarayanan, the learned Additional Solicitor General of India, assisted by Mr. C.V. Ramachandramoorthy for the first Respondent.

5. The first contention of the party-in-person is that the impugned regulations are contrary to article 14 of the Constitution of India. In order to substantiate this contention, Mr. Venkata Sivakumar pointed out that he possesses all the necessary qualifications to practice as an I P. Therefore, upon application, he was enrolled as a professional member by the IIIPI (the second Respondent), *i.e.* the IPA, and registered as an IP by the IBBI under the IP Regulations. Once a person is registered as an IP, he cannot be called upon to continually obtain an AFA on an ongoing annual basis. By drawing the analogy of advocates, Mr. Venkata Sivakumar contended that the requirement of obtaining an AFA is akin to requiring an

advocate, who has enrolled with the Bar Council of India, to nonetheless obtain an authorization on an annual basis in order to accept briefs from a client. By relying upon the judgment of the Hon'ble Supreme Court in *Maneka Gandhi* v. *Union of India* AIR 1978 SC 597, he contended that the principle of reasonableness is an essential element of equality and non-arbitrariness. In the present case, neither regulation 7A of the IP regulations nor regulation 12A of the Model Bye-Laws IPA Regulations are reasonable.

6. His second contention is that his right to carry on the profession of an IP has been adversely impacted by the impugned regulations which deprive him of the opportunity of accepting assignments as an IP without an AFA notwithstanding the fact that he is a registered IP. Consequently, Article 19 and 21 are violated. According to Mr. Venkata Sivakumar, this is also a case of sub-delegation by a delegate which is contrary to the principle of *delegatus non-potest delegare*. This contention is advanced on the basis that the IBBI framed both the IP Regulations and the Model Bye-Laws IPA Regulations and the latter, in turn, empowers IPAs, such as the IIIPI, to frame bye-laws in respect of the grant of an AFA. In order to buttress this contention, he relied on the judgments of the Supreme Court in *Union of India* v. *P.K. Roy* AIR 1968 SC 850 *(P.K. Roy) and Air India* v. *Nargesh Meerza* AIR 1981 SC 1829 (Nargesh Meerza), wherein it was held that delegation of power without substantial control by the principal is invalid.

7. The third contention of Mr. Venkata Sivakumar is that regulation 12A(7) stipulates a seven day time limit for filing an appeal before the Membership Committee. This time limit is so short as to render the right of appeal as illusory. On this issue, he also points out that there is no provision to condone delay. In addition, the criteria prescribed under regulation 12A(2) are unreasonable, vague and arbitrary, particularly the requirement, in Regulation 12A(2)(*g*)(*iv*), that the IP should comply with other requirements, as stipulated in the circulars, directions or guidelines issued by the Agency and the Board from time to time. He contended that circulars, guidelines and directions do not constitute law by relying upon judgments

such as *Anjan Kumar* v. *Union of India* AIR 2006 SC 1177. For all these reasons, he submits that the impugned regulations are liable to be declared as invalid.

8. The learned ASGI made submissions in response and to the contrary. His first contention is that regulation 7A was framed by the IBBI pursuant to powers conferred by sections 196, 207, 208 and 240 of the Insolvency and Bankruptcy Code, 2016 (`the IBC'). As per section 196 of the IBC, the IBBI is empowered to specify minimum eligibility requirements for registration of IPAs and IPs and to specify, by regulations, standards for the functioning of IPAs and IPs. Similarly, under section 208(2)(*e*), the IP is required to perform functions in such manner and subject to such conditions as may be prescribed. Therefore, there can be no doubt as regards the power of the IBBI to frame regulation 7A. With regard to the object and purpose of the insertion of Regulation 7A, he invited the attention of the Court to the Report of the Bankruptcy Law Reforms Committee (`the BLRC Report'). In particular, he referred to paragraphs 4.4.1 and 4.4.3 of the aforesaid Report wherein it is stated that IPs play a significant role in insolvency resolution. Therefore, it is necessary for the regulator to set minimum standards for selection, licensing, appointment, functioning and conduct and also to design entry barriers by way of licensing, registration, certification and accreditation requirements. According to Mr. Sankaranarayanan, regulation 7A of the IP Regulations and regulation 12A of the Model Bye-law IPA Regulations were introduced for this purpose. IPs, who are enrolled as professional members with an IPA, are required to apply for registration with the IBBI, in terms of the IP Regulations, after satisfying entry requirements in that regard. At present, there are three IPAs that were established by the Institute of Chartered Accountants of India (the ICAI), the Institute of Company Secretaries of India and the Institute of Cost Accountants of India. As regards the Petitioner, he enrolled as a professional member of the IIIPI, which is an IPA established by the ICAI. Therefore, for purposes of obtaining the AFA, he is required to apply to the said IPA. The Model Bye-Laws IPA Regulations were framed under powers conferred by sections 196, 203 and 205 r/w section 240 of the IBC. Once

again, the power to frame the regulations is clearly traceable to the parent statute. None of the criteria for being eligible to obtain an AFA under regulation 12A(2) can be said to be unreasonable or arbitrary. On the contrary, the prescription is germane for purposes of ensuring high standards among IPs.

9. As regards the appellate remedy under regulation 12A(7), Mr. Sankaranarayanan contended that an appeal is a purely statutory remedy and therefore has to be exercised in accordance with the conditions prescribed by statute. Without prejudice, he submitted that section 238A of the IBC specifies that the Limitation Act, 1963 ('the Limitation Act') is applicable to proceedings under the IBC. Therefore, an application under section 5 of the Limitation Act may be filed to condone the delay in filing the appeal under regulation 12A(7). Mr. Sankaranarayanan also pointed out that the IBBI has framed Grievances and Complaint Handling Procedures 2018 and that, therefore, it is possible to redress grievances and iron out wrinkles and creases by following the procedures specified therein. In support of the contention that an institutional hearing by the IPA should not be interfered with, he relied upon the Judgment of the Hon'ble Supreme Court in *Kalinga Mining Corpn.* v. *Union of India* [2013] 5 SCC 252 and, in particular, paragraph 71 thereof. For all these reasons, he submits that the writ petition is liable to be dismissed.

10. We considered the oral and written submissions of the party-in-person and the learned Additional Solicitor General of India and examined the materials on record.

11. The first question that arises for consideration is with regard to the power to frame the impugned regulations and bye-laws, and whether there is excessive delegation. On perusal of the IP Regulations, it is clear that the said regulations were framed under the power conferred by sections 196, 207 and 208 read with section 240 of the IBC. In an earlier judgment, namely, *V. Venkata Sivakumar* v. *IBBI* 2020-4-L.W. 161, this Court rejected a challenge by the Petitioner herein to regulation 7(2)*(ca)* of the IP Regulations as regards the power of the IBBI to charge a fee from IPs by using the annual turnover as a measure, including the allegation that there was excessive

delegation. In this case, in addition to regulation 7A of the IP Regulations, Regulation 12A of the Model Bye-Laws IPA Regulations is under challenge. On perusal of the Model Bye-Laws IPA Regulations, we find that the said regulations were framed by the IBBI under the power conferred by sections 196, 203 and 205 read with section 240 of the IBC. section 196 of the IBC deals with the powers and functions of the IBBI and sub-section (2) thereof expressly empowers the IBBI to frame model bye-laws to be adopted by an IPA. The relevant clauses of Section 196(2) are as under:

"(2) The Board may make model bye-laws to be adopted by insolvency professional agencies which may provide for—

(*a*) the minimum standards of professional competence of the members of insolvency professional agencies;

(c) requirements for enrolment of persons as members of insolvency professional agencies which shall be non-discriminatory.

Explanation: For the purposes of this clause, the term "non-discriminatory" means lack of discrimination on the grounds of religion, caste, gender or place of birth and such other grounds as may be specified;

(*d*) the manner of granting membership;

(*l*) the procedure for enrolment of persons as members of insolvency professional agency;

(*n*) the manner of monitoring and reviewing the working of insolvency professionals who are members;"

Section 205 of the IBC deals with the power of the IPA to frame bye-laws in accordance with the model bye-laws. On examining the said sections of the IBC, the undoubted position that emerges is that the IBBI is empowered to frame regulation 7A of the IP Regulations and regulation 12A of the Model Bye-Laws IPA Regulations. In turn, the IPAs, including the second Respondent, are empowered to frame bye-laws in consonance with the model bye-laws. Given the fact that the IBBI has framed the Model Bye-Laws IPA Regulations and IPAs, such as the IIIPI, have framed bye-laws in consonance with the model bye-laws, it cannot be said that there is excessive delegation. Indeed, section 205 of the IBC expressly stipulates that, subject to the provisions of the IBC and rules and regulations thereunder, after obtaining the approval of the IBBI, an IPA should frame bye-laws that are consistent with the model bye-laws framed by the IBBI. Moreover, as regards the criteria for accepting or rejecting an application for an AFA, regulation 12A(2) of the Model Bye-Laws IPA Regulations stipulates the criteria. Therefore, it certainly cannot be

said that principles or norms have not been laid down in respect of the exercise of power by IPAs. Hence, the delegation of power is not in derogation of principles laid down in judgments such as P.K. Roy and Nargesh Meerza.

12. This leads to the next question as to whether the impugned regulations violate Articles 14, 19 and 21 of the Constitution of India. The primary ground on which the regulations are assailed is that it subjects registered IPs to the added requirement of obtaining an AFA from the IPA. Therefore, the question arises as to whether the imposition of the AFA requirement violates the aforesaid provisions of the Constitution. Chartered Accountants are subject to the regulatory and disciplinary control of the Institute of Chartered Accountants of India. In the exercise of audit functions, they are also subject to the supervisory control of the National Financial Reporting Authority under section 132 of the Companies Act, 2013 (`CA 2013') and, in the event of the commission of or abetment of fraud, they may be removed by the NCLT even *suo motu* under section 140(5) of CA, 2013. Upon challenge, including on the ground of being subject to the regulatory control of multiple authorities, a Division Bench of the Bombay High Court in *N. Sampath Ganesh* v. *Union of India* 2020 SCC Online Bom. 782, upheld the validity of Section 140(5) of CA 2013. Similarly, in contempt jurisdiction, the exercise of control by the court over the right of advocates to appear in court was upheld in cases such as *Mahipal Singh Rana* v. *State of Uttar Pradesh* [2016] 8 SCC 335. Therefore, the existence of more than one authority with regulatory or disciplinary control over a professional is *per se* not a ground to hold that the impugned regulations are unconstitutional. In the specific context of IPs, the registration of an enrolled professional member as an IP and the cancellation of such registration are within the domain of the IBBI, whereas the grant of or cancellation of membership and the issuance, renewal and cancellation of an AFA are within the domain of the IPA, which functions under the supervisory control of the IBBI. Indeed, we note that paragraph 4.4.3 of the BLRC Report recommended such a two-tiered regulatory structure. Hence, we conclude that the challenge on this basis is untenable.

13. Whether the equality clause is violated by the impugned regulations is, however, a separate matter to be examined. IPs perform a distinct function in insolvency resolution and liquidation under the IBC and the regulations framed thereunder. Therefore, they indubitably constitute a distinct class. On examining the impugned regulations, we find that the said regulations treat all IPs alike. Indeed, section 196(2)(*c*) of the IBC stipulates expressly that the conditions of membership of an IP should be non-discriminatory. To put it differently, all IPs are required to enrol as professional members of an IPA, register themselves with the IBBI and also obtain an AFA from the IPA concerned before accepting assignments, with effect from 1-1-2020, and, thereafter, on an annual basis. In every case, such AFA is required to be obtained from the appropriate IPA in which such IP is enrolled as a professional member. The admitted position is that there are only three IPAs in India, and the Petitioner has admittedly obtained

membership from the IIIPI. Accordingly, as per regulation 12A of the Model Bye-Laws IPA Regulations, he is required to apply for and obtain the AFA from the IIIPI.

14. Upon submission of such application, the IPA is required to examine as to whether the IP concerned is eligible for an AFA as per the criteria stipulated in regulation 12A(2). The criteria are, *inter alia*, that such person should be registered with the IBBI as an IP; he should be a fit and proper person in terms of the *Explanation* to regulation 4(*g*) of the IP Regulations; he should not be debarred by any direction or order of the Agency or the Board; he should not have attained the age of seventy years; there should be no disciplinary proceedings pending against him before the Agency or the Board; and he should have complied with requirements with regard to the payment of fees to the IPA and the IBBI, filings and disclosures, continuous professional education and other requirements as stipulated in the IBC, regulations, circulars, directions and guidelines of the IPA and the IBBI. We do not find anything *ex facie* arbitrary about the specified criteria. Mr. Venkata Sivakumar focused on the fact that circulars, directions or guidelines do not constitute law. Although it may be correct that non-statutory circulars/directions and guidelines do not constitute law, these expressions are used in juxtaposition to compliance with the requirements of the IBC and regulations and, therefore, should be construed as extending to only relevant and material requirements (for purposes of obtaining an AFA) that are contained in the circulars, directions and guidelines issued by the IBBI or the IPA. Thus, the said criteria are clearly not unreasonable or arbitrary but appear to be germane for deciding the eligibility of an IP for such AFA. In our view, these measures are intended to regulate the profession and not to deprive a person of the right to practice the profession. Hence, we conclude that articles 14, 19 and 21 are not violated.

15. Mr. Venkata Sivakumar had contended that the time limit of 7 days for filing an appeal against the rejection of an application by the IPA is arbitrary and unreasonable. On this issue, as held in cases such as *Anant Mills Co. Ltd* v. *Municipal Corpn. of City of Ahmedabad* [1975] 2 SCC 175; *Seth Nand Lal* v. *State of Haryana* [1980] Suppl. SCC 574; *Ganga Bai* v. *Vijay Kumar* [1974] 2 SCC 393; *Shyam Kishore* v. *Municipal Corporation of Delhi* [1993] 1 SCC 22; and by this Court in *T. Chitty Babu* v. *Union of India* [2020-4-LW 123] and *N. Madhavan* v. *Union of India* [MANU/TN/3756/2020], the settled legal position is that a right of appeal is purely statutory and therefore a person is required to comply with the statutory conditions in connection with the filing of an appeal unless such condition is struck down as unconstitutional. While the learned ASGI contended that section 5 of the Limitation Act would be applicable and that an application to condone the delay would be maintainable, we find that section 238A of the IBC only applies to proceedings before the Adjudicating Authority under the IBC and to proceedings under the IBC before the NCLT, NCLAT, DRT and DRAT. Therefore, section 238A of the IBC does not apply in this situation. However, the time limit under regulation 12A(7) of the

Model Bye-Laws IPA Regulations clearly runs from the date of receipt of the order, and the Petitioner would be entitled to reckon limitation from 16-7-2020 if that were indeed the date of receipt of the order of rejection as alleged. More importantly, in contrast to a withdrawal of registration or loss of professional membership as an IP, the rejection of the application for an AFA is not final and apart from the appellate remedy, it is always open to the IP concerned to remedy the non-compliance, as cited in the order of rejection, and re-apply. For all the reasons set out above, we conclude that regulation 12A is not unconstitutional. Nonetheless, we are of the view that the time limit prescribed in regulation 12A(7) may be revisited by the IBBI by considering an appropriate amendment either providing for a larger time limit or by conferring power to condone delay for sufficient cause.

16. In light of the aforesaid discussion and analysis, we find that the Petitioner has failed to make out a case to declare the impugned regulations as unconstitutional. Needless to say, this decision will not preclude the Petitioner from prosecuting the pending appeal in respect of the rejection of his application for AFA or from submitting a fresh application for an AFA upon remedying the stated defects in the order of rejection provided he retains his professional membership and registration as an IP.

17. In the result, the writ petition fails and the same is dismissed. No costs.

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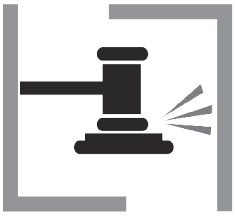


(2020) 121 taxmann.com 346 (Delhi)

HIGH COURT OF DELHI

Venus Recruiters (P.) Ltd. *v.* Union of India

PRATHIBA M. SINGH, J.

W.P.(C) NO. 8705 OF 2019
CM APPL. NO. 36026 OF 2019

NOVEMBER 26, 2020

Section 43 of the Insolvency and Bankruptcy Code, 2016 - Corporate liquidation process - Preferential transactions and relevant time - Whether purpose of avoidance of preferential transactions is clearly for benefit of creditors of corporate debtor - Held, yes - Whether after a Resolution Plan is approved, no benefit would come to creditors - Held, yes - Whether once CIRP process itself comes to an end, an application for avoidance of preferantial transactions cannot survive or be adjudicated - Held, yes - Whether after a Resolution Plan is approved, corporate debtor comes under control of new management/Resolution Applicant and RP's mandate ends and RP cannot indirectly seek to give a benefit by pursuing an application for avoidance of preferantial transactions - Held, yes - Whether if CoC or RP takes a view

that there are transactions which are objectionable in nature, order in respect thereof would have to be passed prior to approval of Resolution Plan - Held, yes - Whether unless provision is made in final Resolution Plan, NCLT also has no jurisdiction to entertain and decide avoidance applications in respect of a corporate debtor which is now under a new management - Held, yes - Whether NCLT ought not be permitted to adjudicate preferential nature of transaction under a contract which stands terminated after approval of Resolution Plan - Held, yes (Paras 88 to 93)

FACTS

- The 'corporate debtor' BSL was the subject of Corporate Insolvency Resolution Process before the NCLT, initiated by the State Bank of India by a petition.
- On the same date when the CIRP was initiated, the NCLT appointed an 'IRP' for the corporate debtor. The Committee of Creditors was thereafter constituted, CoC confirmed IRP as 'RP' for the corporate debtor. Later on, the CoC approved the Resolution Plan proposed successful Resolution Applicant TSL and the said plan was filed by the RP to seek approval before the NCLT.
- Thereafter, the RP filed an avoidance application being under sections 25(2)(*j*), 43 to 51 and section 66. In the said application, various transactions were enumerated as 'suspect transactions' with related parties. The said avoidance application was a result of a Forensic Audit Report, submitted by a Forensic Consultant. The prayer made in the application was that the Tribunal should take on record the Forensic Consultant's report and pass appropriate directions in respect of the suspect transactions which included excess payments to Manpower companies/Contractors. The Petitioner was one manpower contractor.
- Almost five weeks after filing of the said avoidance application, the NCLT approved the Resolution Plan proposed by TSL. The said Resolution Plan had found favour with the CoC and accordingly, the NCLT passed various orders and directions. Insofar as the pending avoidance application in respect of the suspected transactions was concerned, there was no separate order passed by the NCLT. The application filed by the RP in relation to the suspected transactions was neither heard nor decided on merits.
- As the Resolution Plan was finally closed, the new management took over the corporate debtor. The NCLT passed an order in the avoidance application, which was field prior to the approval of the Resolution Plan.
- NCLT's order approving the Resolution Plan, was upheld by 'NCLAT'. However, later on, the NCLT impleaded the petitioner as a party in company application and

issued notice to it on the basis of a fresh memo of parties filed by the former RP. It is the said order impleading and issuing notice to the petitioner, which was being challenged in the instant petition.

HELD

- A perusal of the chronology of events would show that the avoidance application in this case was filed after the CoC had approved the Resolution Plan and almost at the very end of the submissions on the Resolution Plan being heard by the NCLT. The NCLT did not pass any orders on the avoidance application at the time of approval of the Resolution Plan. The order approving the Resolution Plan expressly disposed of some specific applications. However, it merely had one sentence at the end stating that 'all other applications are also disposed of'. Thus, the avoidance application was not separately considered or ruled on by the NCLT. The first preliminary objection taken by the Respondents is that any order passed by the NCLT under section 60 and section 61 is appealable to the NCLAT. Thus, this Court ought not to entertain this writ petition due to an existence remedy.

- There is no doubt that as per section 60, the NCLT/Adjudicating Authority has the jurisdiction to deal with all applications and petitions *"in relation to insolvency resolution and liquidation for corporate persons"*. In this case, the issue is whether the proceedings in question were in relation to insolvency resolution or not. The insolvency resolution process had already come to an end with the approval of the Resolution Plan by the NCLT on 15th May, 2018. The NCLT chose to exercise jurisdiction post the approval of the Resolution Plan. Under the Scheme of the IBC, as set out above, the jurisdiction of the NCLT is limited to insolvency resolution and liquidation. After the approval of the Resolution Plan and the new management taking over the corporate debtor, no proceedings remain pending before the NCLT, except issues relating to the Resolution Plan itself, as permitted under section 60. [Para 68]

- Certainty and timeliness is the hallmark of the Insolvency and Bankruptcy Code, 2016. The Supreme Court in *Innoventive Industries Ltd. v. ICICI Bank* [2017] 84 taxmann.com 320/143 SCL 625 observed that one of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. Any continuation of the jurisdiction of the NCLT beyond what is permitted under the IBC would be contrary to its very ethos. There is a fundamental issue of jurisdiction that has been raised by the Petitioner as to whether after the approval of the Resolution Plan, the NCLT can exercise jurisdiction in respect of an

avoidance application. The answer is in the negative. Since the plea of the Petitioner is that the NCLT lacks jurisdiction the present writ petition is maintainable before this Court. [Para 69]

- An avoidance application for any preferential transaction is meant to give some benefit to the creditors of the corporate debtor. The benefit is not meant for the corporate debtor in its new *avatar*, after the approval of the Resolution Plan. This is clear from a perusal of section 44 of the IBC, which sets out the kind of orders which can be passed by the NCLT in case of preferential transactions. The benefit of these orders would be for the corporate debtor, prior to approval of the Resolution Plan. Any property transferred or sum acquired in an order passed in respect of a preferential transaction would have to form part of the final Resolution Plan. The Resolution Plan would have to take into consideration such amounts and benefits which can be given to the corporate debtor for the benefit of the CoC. The benefit of an avoidance application is not meant for the company, after the Resolution Plan is considered by the CoC and approved by the NCLT. [Para 70]

- While the IBC itself does not fix any time limits for filing of avoidance applications in respect of any transactions, the 2016 CIRP Regulations in Chapter X clearly stipulate the structure and methodology for dealing with objectionable transactions. Under Regulation 35A, as amended with effect from 3rd July, 2018, a specific timeline has been provided, by which the RP has to form an opinion if the corporate debtor has been subjected to any of the objectionable transactions. The time limit prescribed earlier was 105 days from the insolvency commencement date, which has now been reduced to the 75th day from the insolvency commencement date. However, what is significant is the fact that under Regulation 39, the RP has to submit, along with the Resolution Plans, details of all the objectionable transactions including preferential transactions. [Para 71]

- A conjoint analysis of sections 43 and 44 read with the applicable Regulations clearly shows that the assessment by the RP of the objectionable transactions including preferential transactions cannot be an unending process. The examination has to commence on the insolvency commencement date. The RP has to form an opinion by the 105th day (pre-amendment) and 75th day (post-amendment). If the RP comes to the conclusion that the corporate debtor has been subject to preferential transactions, the determination has to be made by the 115th day. The RP also has to apply to the NCLT for appropriate relief on or before the 135th day. [Para 72]

- The prescribing of the above timelines has a purpose. The said purpose is that the RP includes these details in the Resolution Plan submitted under section 30 to the NCLT. These details ought to be available before the NCLT at the time of approval of the Resolution Plan under section 31. The argument that avoidance applications relating to preferential and other transactions can, therefore, survive beyond the conclusion of the CIRP is contrary to the Scheme of the Code. [Para 73]

- Moreover, an RP cannot continue to file applications in an indefinite manner even after the approval of a Resolution Plan under section 31. The role of a RP is finite in nature. He or she cannot continue to act on behalf of the corporate debtor once the Plan is approved and the new management takes over. To continue a RP indefinitely even beyond the approval of the Resolution Plan would be contrary to the purpose and intent behind appointment of a RP. The Resolution Professional (RP), as the name itself suggests has to be a person who would enable the resolution. The role of the RP is not adjudicatory but administrative in nature. Thus, the RP cannot continue beyond an order under section 31 of the IBC, as the CIRP comes to an end with a successful Resolution Plan having been approved. This is however subject to any clause in the Resolution Plan to the contrary, permitting the RP to function for any specific purpose beyond the approval of the Resolution Plan. In the present case, no such clause has been shown to exist. [Para 74]

- The Supreme Court of India in *Committee of Creditors of Essar Steel India Ltd.* (*infra*) has held that the detailed provisions of the IBC, read with the 2016 Regulations make it clear that the RP is a person who is to manage the affairs of the corporate debtor as a going concern from the stage of admission of an application under section 7, 9 or 10 till a Resolution Plan is approved by the NCLT of the RP is not adjudicatory but administrative...." [Para 75]

- According to section 23, the RP conducts the CIRP and manages the operations of the corporate debtor `during the corporate insolvency resolution process period'. [Para 76]

- There is a START line and FINISH line for the Resolution process. section 23 clearly stipulates that the role of the RP is to `manage' the affairs of the corporate debtor `during' the resolution process and NOT thereafter. In fact, until the enactment of the proviso to section 23, which was introduced with effect from 28-12-2019, the RP's mandate concluded with the CIRP. The proviso introduced, firstly in 2018 and thereafter in 2020, merely extended the mandate of the RP till the approval of the Resolution Plan under section 31(1)

or appointment of liquidator under section 34. This itself makes it amply clear that the RP's authority is limited in nature and in any event, cannot extend beyond the order passed under section 31. Thus, there is an outer limit for the functioning of the RP under the proviso to section 23(1). The continuation of a RP or filing of an application for the purpose of prosecuting an avoidance application as a *'Former RP'* is beyond the contemplation of the IBC. The RP ceases to be one after an order under section 31 is passed. The RP does not have any connection whatsoever with "the new Management which takes over the erstwhile corporate debtor, after the approval of the Resolution Plan. Any other interpretation could lead to a situation where an RP could be a *`Former RP'* for years together without any definite end date. Under section 23, the CIRP period is a specific period and cannot be read as a perpetual period or an indefinite period. The wording of the proviso in fact makes it further clear that the CIRP process in fact comes to an end immediately upon the RP submitting the Plan itself. [Para 77]

- The IBC was meant to cure the fallacies and shortcomings in the previous legislations wherein winding-up of companies consumed years together leading to erosion of their assets and businesses. The wording of section 23 clearly lays down the mandate for the RP. The same cannot be extended beyond the contemplation in the statute. After the Resolution Plan is approved and the new management takes over, the manner in which the affairs of the company are to be run is the sole prerogative of the new management. In the statutory scheme, the RP cannot continue to act on behalf of the Company under the title of *'Former RP'*. That would be violative of the legislative intention and the statutory prescription. [Para 78]

- A perusal of section 30(4) also makes it adequately clear that the CIRP period has to be completed within the time period specified under section 12(3). Thus, the IBC does not contemplate the continuation of the RP beyond the CIRP period. [Para 79]

- The above interpretation is also in line with the overall object and purpose of the IBC. The IRP/RP are persons, who are assigned specific roles under the IBC. They are meant to provide a smooth transition for the corporate debtor during an insolvency period till the resolution process is over. Their continuation beyond the closure of the resolution process would in effect mean an interference in the conduct and management of the company, which is now having its own independent Board, managerial personnel, etc. The RP's role cannot continue once the Resolution Plan is approved and the successful Resolution Applicant

takes charge of the corporate debtor. [Para 80]

- Regulation 39 requires details of the objectionable transactions to be placed by the RP before the NCLT. Form H is merely a format prescribed to provide the said details. The application in respect of such transactions would obviously be pending on the date when the Resolution Plan is submitted by the RP. The details of the transactions would be contained in Form H, would be filled by RP and submitted by the RP before the NCLT. However, Form H cannot be read to mean that they can remain pending after the order under section 31. [Para 82]

- The manner in which it is sought to be interpreted by the Petitioner and by the Respondents is in stark contrast. The Respondents rely heavily on this provision to argue that avoidance applications would not affect the CIRP. This is because under the scheme of the IBC, insofar as avoidance applications are concerned, the RP has to collect the details, form an opinion, make a determination and submit the same to the NCLT within the prescribed timelines. This is independent of various other steps which are part of the CIRP. The activities in respect of objectionable transactions, which the RP has to conduct, would run parallelly with the other steps of the CIRP. However, finally, the RP would submit all the details to the NCLT along with the Resolution Plans. That is the purpose of the provision. The provision cannot be interpreted in a manner so as to say that the applications can survive the CIRP itself. Section 26 also cannot be read in a manner so as to mean that an application for avoidance of transactions under section 25(2)(*j*) can survive after the CIRP process. Once the CIRP process itself comes to an end, an application for avoidance of transactions cannot be adjudicated. The purpose of avoidance of transactions is clearly for the benefit of the creditors of the corporate debtor. No benefit would come to the creditors after the Plan is approved. Thus, Form H cannot come to the aid of avoidance applications to remain pending beyond the CIRP process. [Para 84]

- Thus, the Resolution Applicant whose Resolution Plan is approved itself cannot file an avoidance application. The purpose is clear from this itself *i.e.,* that the avoidance applications are neither for the benefit of the Resolution Applicants nor for the company after the resolution is complete. It is for the benefit of the corporate debtor and the CoC of the Corporate debtor. The RP whose mandate has ended cannot indirectly seek to give a benefit to the corporate debtor, who is now under the control of the new management/ Resolution Applicant, by pursuing such an application. The ultimate purpose is that any benefit from a preferential transaction should be given to the corporate debtor

prior to the submission of bids and not thereafter. [Para 86]

- If an avoidance application for preferential transactions is permitted to be adjudicated beyond the period after the Resolution Plan is approved, in effect, the NCLT would be stepping into the shoes of the new management to decide what is good or bad for the Company. Once the Plan is approved and the new management takes over, it is completely up to the new management to decide whether to continue a transaction or agreement or not. Thus, if the CoC or the RP are of the view that there are any transactions which are objectionable in nature, the order in respect thereof would have to be passed prior to the approval of the Resolution Plan. [Para 88]

- In the present petition, this Court is concerned with a corporate debtor, in respect of which the Resolution Plan was approved by the NCLT and an application is sought to be filed by the RP as former RP through its counsel. The RP cannot wear the hat of the *'Former RP'* and pursue an avoidance application in respect of preferential transactions after the hat of the corporate debtor has changed and it no longer remains a corporate debtor. This would be wholly impermissible in law as the mandate of the RP has come to an end. The NCLT also has no jurisdiction to entertain and decide avoidance applications, in respect of a corporate debtor which is now under a new management unless provision is made in the final Resolution Plan. [Para 89]

- A far-fetched argument was made by the Former RP that the former RP is willing to step down and the application can be pursued by some governmental authority such as the SFIO or the MCA. The vesting of such power with authorities that are alien to the CIRP process would be contrary to the IBC, which contemplates supervision by an Adjudicating Authority like the NCLT, duly assisted by an RP, only during the CIRP and not beyond that. [Para 90]

- The fact that the new management can take a decision in respect of any agreement which is deemed to be not beneficial to it also supports the interpretation that after the Plan is approved, the company is completely in the hands of the new management and neither the NCLT nor the RP has any right or power in respect of the said company. As can be seen in the present case, the corporate debtor in its new *avatar* has terminated the agreement with the Petitioner. [Para 91]

- The parties would have to be therefore left to their civil and other remedies in terms of the contract between them. The NCLT ought not to be permitted to now adjudicate the preferential nature of the transaction under a contract

which now stands terminated, after the approval of the Resolution Plan. [Para 92]

- The above discussion is only in the context of Resolution processes and would however not apply in case of liquidation proceedings. In the case of a liquidation process, the situation may be different inasmuch as the liquidator may be able to take over and prosecute applications for avoidance of objectionable transactions. The benefit of orders passed in respect of such transactions may be passed on to the corporate debtor which may assist in liquidating the company at the final stage. However, that is not the case in the present petition. [Para 93]

- In view of the above findings, the order of the NCLT impleading the Petitioner and any consequential orders are liable to be set aside. The proceedings *qua* the Petitioner before the NCLT under the Avoidance application are accordingly quashed. [Para 94]

CASES REFERRED TO

State Bank of India v. *Bhushan Steel Ltd.* [2018] 90 taxmann.com 194 (NCLT - New Delhi) (para 4), *Innoventive Industries Ltd.* v. *ICICI Bank* [2017] 84 taxmann.com 320/143 SCL 625 (SC) (para 16), *S.P. Jain* v. *Kalinga Tubes Ltd.* AIR 1965 SC 1535 (para 26), *Pioneer Urban Land & Infrastructure Ltd.* v. *UOI* [2019] 8 SCC 416 (para 28), *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* [2019] 111 taxmann.com 234 (SC) (para 29) and *IOCL* v. *UOI* [W.P. (C) No. 13775 of 2019, dated 23-12-2019] (para 31).

Kapil Sibal, Sr. Adv., **Ms. Misha Rohatgi**, **Ms. Anusha Nagarajan** and **Ms. Aarushi Tiku**, Advs. *for the Appellant.* **Anurag Ahluwalia**, GSC, **Abhigyan Siddhant**, Adv., **Dr. Sunil Kumar**, **Vijayendra Pratap Singh**, **Aman Sharma**, **Samarth K. Luthra**, Advs. **Abhinav Vasisht**, Sr. Adv., **Manmeet Singh** and **Anugrah Robin Frey**, Advs. *for the Respondent.*

JUDGMENT

1. This judgment has been pronounced through video conferencing.

2. The present writ petition has been filed by the Petitioner seeking issuance of a writ declaring the proceedings pending before the National Company Law Tribunal (Principal Bench) New Delhi (hereinafter, 'NCLT') in C.A.No. 284(PB)/2018 in C.P.No. IB(201) PB/2017 as void and *non est*.

3. The question that has arisen is whether under the Insolvency and Bankruptcy Code, 2016 (hereinafter, 'IBC'), an application filed under section 43 for avoidance of preferential transactions can survive beyond the conclusion of the resolution process and the role of the RP in filing/pursuing such applications. The jurisdiction of the NCLT to hear applications under section 43 after the approval of the Resolution Plan, is thus under challenge.

Brief Background

4. The brief background of this case is that Respondent No. 3 *i.e.* M/s Bhushan Steel Ltd. (now known as Tata Steel BSL Ltd.) (hereinafter, 'Corporate Debtor') was the subject of Corporate Insolvency Resolution Process (hereinafter, 'CIRP') before the NCLT, initiated by the State Bank of India by a petition being titled *State Bank of India* v. *Bhushan Steel Ltd.* [2018] 90 taxmann.com 194 (NCLT - New Delhi).

5. On the same date when the CIRP was initiated, the NCLT appointed Mr. Vijay Kumar Iyer *i.e.* Respondent No. 4 as an Interim Resolution Professional (hereinafter, 'IRP') for the Corporate Debtor. A public announcement was made in accordance with Section 15 of the IBC, inviting submissions of claims against the Corporate Debtor. The Committee of Creditors (hereinafter 'CoC') was thereafter constituted and its first meeting was held on 24th August, 2017, when the IRP was also confirmed as the Resolution Professional (hereinafter, 'RP') for the Corporate Debtor.

6. On 20th March, 2018, the CoC approved the Resolution Plan proposed by Respondent No. 2 *i.e.* Tata Steel Ltd. (hereinafter, 'successful Resolution Applicant') and the said Plan was filed by the RP to seek approval before the NCLT on 28th March, 2018.

7. Thereafter on 9th April, 2018, the RP filed an avoidance application being CA No. 284(PB) of 2018 under section 25(2)(*j*), sections 43 to 51 and section 66 of the IBC. In the said application, various transactions were enumerated as 'suspect transactions' with related parties. The said avoidance application was a result of a Forensic Audit Report, submitted by a Forensic Consultant, which was attached to the application as well. The prayer in the application was as under:

> "In view of the foregoing, it is most humbly prayed that this Hon'ble Tribunal may be pleased to:
>
> (*a*) take on record the Forensic Consultant's report and pass appropriate directions in accordance with the Code in respect of the suspect transactions; and
>
> (*b*) pass any other order(s) which this Hon'ble Tribunal may deem fit in the facts and circumstances of the case in the interest of equity, justice and good conscience."

8. The following were the suspect transactions allegedly entered into by the Corporate Debtor:

(i) Potential excess payment of lease rent to Vistrat Real Estate Pvt. Ltd.

(ii) Preferential credit to various international customersand long outstanding receivables

to entities such as Shree Steel Djibouti FZCO and Shree Global Steel FZE;

(iii) Excess payments to Manpower companies/Contractors;

(iv) Uncontracted payment of interest on advance to Peak Minerals and Mining Private Ltd. for cancelled sale-and-lease back transactions.

9. The Petitioner - *Venus Recruiters Pvt. Ltd.* (hereinafter, 'Venus Recruiters') is stated to be one such manpower contractor, as mentioned in (*iii*) above.

10. Almost five weeks after filing of the said avoidance application, the NCLT approved the Resolution Plan proposed by Tata Steel Ltd., *vide* a detailed judgment dated 15th May, 2018. The said Resolution Plan had found favour with the CoC and accordingly, the NCLT passed various orders and directions on the said date. Insofar as the pending avoidance application in respect of the suspect transactions was concerned, there was no separate order passed by the NCLT. The final order contained one line *i.e.* "all other applications are also disposed off". In effect, therefore, the application filed by the RP in relation to the suspect transactions was neither heard nor decided on merits.

11. On 18th May, 2018, the Resolution Plan was finally closed and the new management took over the Corporate Debtor. On 24th July, 2018, the NCLT passed an order in the avoidance application, C.A. No. 284/2018, which was filed prior to the approval of the Resolution Plan to the following effect:

"*CA-284(PB)/2018*

CA-284(PB)/2018 has been filed by RP on 9-4-2018 prior to the approval of the Resolution Plan.

Let notice be issued to the entities and the company as per the list provided by the Ld. for the R.P. Let the reply if any be filed before the next date of hearing. Let all the pending applications come up together on 9-8-2018.

CA-593(PB)/2018

Ld. counsel for the applicant Vistratpal Real Estate Pvt. Ltd. requests for withdrawal of the application. Ld. counsel for the applicant submits that he wants to withdraw the application and to proceed as per law in that regard. The request for withdrawal of CA-593(PB)/2018 is accepted. The application is disposed of accordingly.

Let the pleadings in other applications be complete on or before the next date of hearing with a copy in advance to the other side.

For further consideration on 9-8-2018."

12. NCLT's order dated 15th May,

2018, approving the Resolution Plan, was thereafter upheld by the National Company Law Appellate Tribunal (hereinafter, 'NCLAT') *vide* judgment dated 10th August, 2018. However, on 25th October, 2018, the NCLT impleaded the Petitioner as a party in CA No. 284(PB)/2018 and issued notice to it on the basis of a fresh memo of parties filed by the former RP. It is the said order impleading and issuing notice to the Petitioner, which is being challenged in the present petition.

Submissions

13. Mr. Kapil Sibal, ld. Senior Counsel appearing for the Petitioner raises a legal issue as to the jurisdiction of the NCLT. His submission is that under the scheme of the IBC, once the CIRP has reached finality, the Resolution Professional (RP) becomes *functus officio* and can no longer file or pursue any application on behalf of the company. He refers to various provisions of the IBC to submit that the RP merely conducts and manages the operations of the Corporate Debtor, during the CIRP process and not beyond.

14. Ld. Sr. counsel further submits that in terms of Section 60 of the IBC, jurisdiction of NCLT cannot extend beyond the approval of the Resolution Plan. The NCLT, having disposed of all the pending applications when it delivered the judgment on 15th May 2018, and the new management having come in control of the erstwhile Corporate Debtor, at this stage, the order issuing notice in an application filed prior to the acceptance of the Resolution Plan is completely void.

15. Ld. Sr. counsel relies on Section 30(2)(*a*) of the IBC to argue that the Resolution Plan has to necessarily provide for payment of costs of the insolvency resolution process and under section 5(13) of the IBC, such costs include the fee which is payable to any person acting as the RP. It is submitted that this indicates that the RP has no role beyond the CIRP process itself.

16. It is further submitted that there are strict timelines provided under the IBC. Reliance is placed on the Preamble of IBC which emphasizes that the purpose of the Code is to conclude the insolvency proceedings in a time bound manner. Reliance is also placed on the judgment of *Innoventive Industries Ltd. v. ICICI Bank* [2017] 84 taxmann.com 320/143 SCL 625 (SC), passed by the Supreme Court. The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter, "2016 CIRP Regulations") are referred to, to argue that there are specific timelines which are prescribed for the purpose of the RP to determine whether any transaction was preferential, undervalued, fraudulent or extortionate and also to file an application before the

NCLT, both within the prescribed 180-day period. Accordingly, it is submitted that avoidance of any such transactions ought to be undertaken before conclusion of the CIRP. The said preferential transactions would also form part of the Resolution Plan, which is submitted to the CoC.

17. Ld. Sr. counsel submits that the question as to whether the transaction was a suspect transaction or a third-party related transaction and whether any financial benefits were earned from the said transaction ought to have been gone into, prior to finalisation of the Resolution Plan. From the facts, it is highlighted that the Forensic Audit Report was submitted to the RP on 3rd April, 2018 and the avoidance application was filed before the NCLT on 9th April, 2018. However, till the time when the final Resolution Plan was approved on 15th May, 2018, no orders were passed on this application.

18. Mr. Sibal further submits that the role of the RP as set out in Section 25 of the IBC is to collect all the assets and distribute them to the lenders/creditors after the value of the assets is crystallized. Since the resolution itself is based on the assets of the company, even in respect of avoidance transactions, the monetary value cannot go to anyone else except the CoC once a new management has taken over. Once approval is granted by the NCLT to the Resolution Plan submitted by the RP, then all the records relating to the CIRP are transferred to the Insolvency and Bankruptcy Board of India (hereinafter 'Board/IBBI').

19. Ld. Sr. counsel urges that under the IBC, any company in heavy debt can either go into a resolution process or can be liquidated if the resolution process fails. A liquidator can investigate the financial affairs of the Corporate Debtor to determine a preferential or undervalued transaction under section 35(*l*) of the IBC. However, Section 43 does not apply in such a situation. Moreover, it is submitted that Section 25(2)(*j*) applies only in respect of Chapter III *i.e.* the liquidation process. It does not apply in respect of the resolution process. Section 43 deals with both the liquidator and the resolution professional, however, Section 25(2)(*j*) only relates to liquidation.

20. It is further emphasized that avoidance applications cannot be filed by the Company or by the Resolution Applicant but only by the CoC or the RP, prior to the Resolution Plan being approved.

21. The difference between a statutory remedy under sections 43 and 44 of the IBC and a civil remedy is highlighted. It is argued that once the new management comes into control of the Company post the approval of the Resolution Plan, the Company is free to avail of

its civil law remedies in respect of any new transaction that the new management is overviewing.

22. Ld. Sr. counsel submits that once the Resolution Plan is approved, the CoC itself is bound up, as all the dues of CoC are paid and a No Dues Certificate is submitted. Once the No Dues Certificate is submitted, no further proceedings can be taken up by CoC. The CoC being a final arbiter of the Resolution Plan and the same being a commercial decision, if the CoC chooses not to pursue any particular transaction, the RP ought not to be allowed to pursue the same.

23. Mr. V. P. Singh, ld. counsel appearing for Respondent No. 3 *i.e.* Tata Steel BSL Ltd. (formerly Bhushan Steel Ltd./Corporate Debtor) submits that the Petitioner is related to the erstwhile promoters of the Company. He submits that the transaction in respect of which the present petition had been filed is not the only transaction. There were various suspect transactions involving the erstwhile Corporate Debtor *qua* which the avoidance application was filed and other entities have raised their issues before the NCLT itself. He further submits that despite receiving the notice in the avoidance proceedings in April, 2018, the Petitioner has approached this Court only in 2019 and thus it would not be entitled for discretionary jurisdiction to be exercised in its favour.

24. He further submits that the intention of the IBC is to delink the CIRP proceedings from avoidance transactions inasmuch as the adjudication of such transactions could take much longer than timelines fixed in the adjudicatory process. He further submits that after the introduction of section 26 in the IBC, it is clear that the power of the RP is independent of the CIRP proceedings.

25. Mr. V.P. Singh, ld. counsel further relied on the Discussion Paper on *Corporate Liquidation Process along* with Draft Regulations published by IBBI, dated 27th April, 2019 (hereinafter `IBBI Discussion Paper 2019'), which according to him records that the IRP/RP functions for old creditors of the company. He submits that the IBBI Discussion Paper, 2019 is clear to the effect that applications in respect of vulnerable transactions etc. meet tough resistance and litigation goes on for a long period. It is for this reason that section 26 clarifies that filing of avoidance application shall not affect the proceedings of the CIRP.

26. Reliance is placed on the judgment of the Supreme Court in *S.P. Jain* v. *Kalinga Tubes Ltd.* [AIR 1965 SC 1535] to submit that while dealing with a petition under section 397 of the Companies Act, 1956 it was held that an application which deserves to be adjudicated in the interest of the company ought to be permitted to proceed further,

on the basis of the facts as they were when the application was made.

27. Mr. Singh further submits that in the present case, the total debt of the company was Rs. 59,501/- crores. However, the Resolution Plan was only for Rs. 35,200/- crores. Accordingly, ld. counsel submits that whatever further recoveries are made through vulnerable transactions, the same should also go to the creditors.

28. It is further argued by ld. counsel that as per section 3(37) of the IBC, the meanings of expressions as per the Indian Contract Act, 1872 can be relied upon for the purpose of interpreting the IBC. Insofar as the question as to how the IBC should be looked at and interpreted is concerned, reference is made to the judgment of *Pioneer Urban Land & Infrastructure Ltd.* v. *UOI* [2019] 8 SCC 416, to urge that a creative interpretation should be given to legislation which is beneficial in nature. In the said case, while dealing with the constitutional validity of Section 5(8)(*f*) of the IBC, as amended in 2018, the Supreme Court held that home buyers were to be considered financial creditors as the IBC ought to be interpreted in a manner, such that the object of the statute is achieved.

29. Similarly, reliance is placed on the decision in *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* [2019] 111 taxmann.com 234 (SC), wherein the Supreme Court recently held that although timelines would be an important factor in the CIRP proceedings, the word 'mandatorily' was struck down from section 12 as being violative of article 19(1)(*g*) of the Constitution. The Court, therefore, read down the provision to interpret it in line with the object of the statute.

30. Ld. counsel submits that there were two instances of vulnerable transactions entered into by the erstwhile promoters of Respondent No. 3 involving an onerous employment contract and an onerous rent contract, wherein the premises of Vistrat Real Estate Pvt. Ltd. ("Vistrat") were shown as the office space of Respondent No. 3, with extremely high rent. The NCLT ruled that Vistrat and the Corporate Debtor were associated parties. This finding was upheld by NCLAT.

31. He further relies upon the judgment of this Court in *IOCL* v. *UOI* [W.P.(C) No. 13775 of 2019, dated 23-12-2019] wherein a ld. Division Bench of this Court has held that there is a statutory appeal provided under section 61 of the IBC and thus in the presence of an efficacious alternative remedy, a writ petition would not be maintainable. Finally, ld. counsel submits that the RP is a professional who is supervised by the NCLT. The entire resolution process is regulated by the NCLT. Thus, the Petitioner is capable of

defending itself before the NCLT and there are sufficient due process protections. Ld. counsel submits that the delay in this case was due to the fact that related parties did not disclose the relevant information. He relies upon pages 66, 71 and 540 of the paperbook.

32. Mr. Anurag Ahluwalia, ld. CGSC appearing for Union of India/IBBI submits that Sections 25 & 26 of the IBC are to be read together. He submits that a perusal of Regulation 39(4) along with Form H of the 2016 CIRP Regulations clearly shows that the avoidance application could be filed/be pending when the Resolution Plan is submitted by the RP. He also relies upon clause 4.2 of the Report of the Insolvency Law Committee (ILC), constituted by the Ministry of Corporate Affairs dated 20th February, 2020 (hereinafter, "ILC Report"), as per which the said Committee was of the opinion that an avoidance application may continue even beyond the closure of the resolution proceedings.

33. It is his further submission that the NCLT could not have disposed of the entire petition, without dealing with the avoidance application. The application does not come to an end and the timelines to adjudicate on the avoidance transactions can in fact be extended. On a query from the Court, Mr. Ahluwalia submits on instructions that any amount, which may be recovered through the avoidance application, would be bound to be treated in terms of any clause in the Resolution Plan and if there is no such clause dealing with the recovered amount, the NCLT would decide as to how the amount would be dealt with.

34. Mr. Abhinav Vasisht, ld. Sr. counsel appearing for the former RP submits that there are three categories of entities/persons which can file avoidance applications *i.e.* the Resolution Professional, the Liquidator and the Creditors. He submits that the question is whether the NCLT becomes *functus officio* after the Resolution Plan is accepted. There is no doubt that the RP has to file an application in respect of suspect transactions before the Resolution Plan is approved but it is not necessary that the same has to be decided prior to the approval of the Resolution Plan. The RP, after arriving at a conclusion that a particular transaction is a preferential transaction has to approach the NCLT. Such transactions can be declared as void and the NCLT can reverse the effect of the transaction, meaning thereby that any monetary benefit given to any related party can be reversed. If the RP or the Liquidator does not declare the transaction as undervalued, any member/ creditor can approach the NCLT.

35. He further submits that under section 26 of the IBC, there is no fixed time limit for deciding an avoidance application. In this case, the allegation is that the Petitioner has been paid 10% extra for supply

of manpower, which has caused loss to the company and in effect, there was diversion of the company's funds. Ld. Sr. counsel submits that the NCLT can upon receiving such an application restore the position as existed prior to the transaction. The provisions apply only in respect of extortionate credit transactions and not *bona fide* transactions. He submits that the application in this case was filed prior to the Resolution Plan being approved. However, notice was issued in the application on 24th July, 2018 after the RP's services were terminated on 18th May, 2018. Thus, the important stage is the stage of filing of the application and not the date of approval of Resolution Plan. The NCLT has very wide powers under sections 43 and 44 of the IBC and thus depending upon the situation, it can pass appropriate orders. There is no time limit which has been prescribed for exercise of the powers under section 45, though the IBC in general has very strict timelines. The IBC is a complete, self-contained scheme. Once the decision is taken by the NCLT, an appeal would lie to the NCLAT under section 61 and thereafter to the Supreme Court under section 62.

36. Ld. Sr. counsel further relies upon section 26 read with sections 43, 44, 45, 47 and 50 of the IBC as well as Regulation 39(4) read with Form-H of the Schedule of the 2016 CIRP Regulations. His submission was that a conjoint reading of all these provisions shows that insofar as avoidance applications are concerned, they can always survive even beyond the order of the NCLT accepting the Resolution Plan. He submitted that there are various kinds of avoidance applications and it is not always possible for the NCLT to decide whether these transactions are preferential, undervalued, extortionate and/or fraudulent transactions within the strict timelines provided in the IBC for the CIRP process. He urged that such applications can continue to remain pending even on the date when the Resolution Plan is submitted and therefore, by implication can always remain pending even after the Resolution Plan is accepted by the NCLT.

37. It was further submitted that in the present case, the Resolution Plan which was approved by the NCLT, specific provision has been made in respect of pending applications relating to preferential transactions. However, even if the Resolution Plan is quiet in respect of preferential or other transactions, the benefit ought to go to the Company as the application ought to be adjudicated by NCLT.

38. Ld. Sr. counsel submits that the applications which were disposed of on 15th May, 2018 were only those which were related to the Resolution Plan itself and not the avoidance application in respect of preferential transactions. He submits that since

the avoidance application was taken up on 24th July, 2018 and notice was issued itself shows that the NCLT was conscious of the pending application in respect of preferential transactions.

39. His further submission is that in respect of such avoidance applications, there are various options which can be exercised once they are adjudicated by the NCLT *i.e.* under section 44 of IBC, if the transactions are held to be preferential, benefits of the transaction can be given either to the erstwhile Corporate Debtor itself or to the Financial Creditor. It can also be shared in part by the new management and the creditors. He submitted that the wisdom of the CoC is sacrosanct on the said issue and in the present case, it has been dealt with in the final Resolution Plan which was approved by the NCLT.

40. He further submits that the said Resolution Plan also deals with other statutory amounts which may be received by the Company or any other loans and other receivables etc. including tax deductions, tax refunds, etc. Such amounts are always dealt with in a miscellaneous section in the Resolution Plan and these would also form a part of the preferential transactions or directed to be adjusted therefrom by the NCLT.

41. Reliance is also placed by him on the IBBI Discussion Paper and the ILC Report, to argue that in the case of both resolution and liquidation processes, the said two documents clearly support the plea that the applications can and would survive even beyond acceptance of the Resolution Plan.

42. Finally, Mr. Vashisht, ld. Sr. counsel argued that writ jurisdiction is not maintainable since, firstly, the IBC is a complete Code by itself and even if there is an erroneous order passed by the NCLT, the appropriate forum would be the NCLAT and not writ jurisdiction and secondly the NCLT has not passed an erroneous order and accordingly, the writ is not liable to be entertained.

43. Mr. Frey, ld. counsel submits that even if the RP becomes *functus officio* post the approval of the Resolution Plan and it was to be concluded that the RP cannot prosecute the avoidance application, then any agency of the government such as the Serious Fraud Investigation Office ("SFIO") or the Ministry of Corporate Affairs ("MCA") can prosecute the avoidance application but it cannot be allowed to fail or remain unprosecuted.

44. Mr. Sibal, in rejoinder submits that reopening of the resolution process in this manner would have enormous adverse implications. According to him, Section 26 merely means that the avoidance application would not affect the resolution process and it cannot be read to mean that the avoidance application

could continue after the resolution process concludes. Mr. Sibal further refutes the Respondent's submission based on the IBBI Discussion Paper. He submits that this would have no application in the present case, as it deals with liquidation and not the resolution process.

Analysis and Findings:

(*a*) Structure of the IBC 2016 and Role of Resolution Professionals

45. The jurisdiction of the NCLT to decide an application pursued by a former RP of a Corporate Debtor, after the conclusion of the CIRP process, is under challenge in the present petition.

46. The questions raised in this petition call for an interpretation of some of the provisions of the IBC - especially the role of Resolution Professionals ("RPs"). Under the IBC a CIRP can be initiated under sections 6 to 11 by various persons including financial creditors, operational creditors, and corporate applicants. Section 11 provides as to who is not entitled to initiate a CIRP. The time limit for completion of the resolution process is contained in section 12. A perusal of section 12 shows that the CIRP has to be completed within 180 days from the date of admission of the application and any application made to the Adjudicating Authority/NCLT for extension of the same has to be approved by the CoC by a vote of 66% of the voting shares. If such an application for extension is received, the NCLT can extend the period by a further period of not exceeding ninety days. Only one extension is permissible, as per the first proviso to section 12(3) of the IBC. A mandatory outer limit of 330 days from the insolvency commencement date is prescribed for the completion of the CIRP under the second proviso to section 12(3) w.e.f. 16th August 2019.

47. Upon an application for initiation of CIRP being admitted, the NCLT declares a moratorium under sections 13 and 14 of the IBC. It also makes a public announcement of the initiation of the CIRP and calls for submission of claims under section 15. Upon the declaration being made under section 13, the moratorium period would immediately set in.

48. Under section 13(1)(*c*), an IRP is then appointed by the NCLT in the manner as specified under section 16. The IRP, who is appointed, shall take charge on the insolvency commencement date and shall continue till the appointment of a RP under section 22. The IRP then manages the affairs of the Corporate Debtor in terms of section 17 and the duties of the IRP are provided in section 18. The primary function of the IRP is to collect information, take control and custody of assets and to manage the operations of the Corporate Debtor as a going concern. To this end, various powers and duties of the IRP are stipulated in sections 17, 18 and 20.

49. The purpose of resolution/liquidation processes is for the benefit of creditors. A Committee of Creditors (CoC) is then constituted by the IRP which shall include all financial creditors of the Corporate Debtor. Upon being constituted, the CoC shall meet within 7 days and can either appoint the IRP as the RP or replace the IRP with a new RP under section 22. The RP would then be in charge of the conduct and management of the CIRP process during the CIRP period. The proviso to section 23 makes it clear that the RP shall continue to manage the operations even after the expiry of the CIRP period, until an order under section 31(1) approving the Resolution Plan is passed by the NCLT or an order under section 34 appointing a liquidator is passed. The duties of the RP are set out in section 25 and one such action which the RP can take is the filing of applications for avoidance of transactions in accordance with Chapter III, if any. The RP can be replaced by the CoC under section 27. The RP cannot take any actions without the approval of the CoC as per section 28.

50. In accordance with section 30, a Resolution Applicant *i.e.* a third party who may be interested in making an offer for resolution of the debts of the company can submit a Resolution Plan to the RP on the basis of the information received from the RP under section 29. The said Resolution Plan is then examined by the RP, who shall present the same to the CoC. The CoC can then approve the Resolution Plan after considering its feasibility and viability or it can reject the same. If the CoC approves the Resolution Plan, the same is submitted by the RP before the NCLT for its approval.

51. Under section 31, if the NCLT is satisfied with the Resolution Plan, it shall approve the same which shall be binding on the Corporate Debtor, all its employees, members, creditors, Central and State Governments, including all local authorities to whom dues may be owed, and all other stakeholders and guarantors. The NCLT has to also satisfy itself that the Resolution Plan has sufficient provisions for its implementation. Once a Resolution Plan is approved, the moratorium order under section 14 shall cease to have effect and the RP shall forward all the records relating to the CIRP and the Resolution Plan to the Board to be recorded on its database. Thus, the role of a RP comes to an end here.

(*b*) Applications for Avoidance Transactions

52. The IBC contemplates various transactions which could be found to be objectionable/unacceptable and may require to be either reversed or compensated for, in some manner in order to ensure that the insolvency/liquidation process is fair to the creditors.

Such transactions are of various categories namely -

- preferential transactions,
- undervalued transactions,
- transactions defrauding creditors, and
- extortionate credit transactions.

All transactions are dealt with under Chapter III related to liquidation processes.

53. As per section 43, if the RP is of the opinion that any preferential transaction has taken place, by which the Corporate Debtor has given any benefit to a related party, two years prior to the insolvency commencement date or a preference to an unrelated party one year prior to the said date, he can move an application with the NCLT for avoidance of the same. If the NCLT is of the view that the transaction was a preferential transaction, it can pass various types of orders as set out in section 44, in effect neutralising the transaction. Such an order could include the reversal of the transaction, sale of any property given under the transaction, amounts being paid in respect of benefits received and such like orders. Sections 43 and 44 of the IBC read as under:

"43. *Preferential transactions and relevant time.* -

(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

(2) A corporate debtor shall be deemed to have given a preference, if-

(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and

(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

(3) For the purposes of sub-section (2), a preference shall not include the following transfers-

(*a*) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;

(*b*) any transfer creating a security interest in property acquired by the corporate debtor to the extent that —

(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property; and

(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

Explanation. - For the purpose of sub-section (3) of this section, "new value" means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) A preference shall be deemed to be given at a relevant time, if -

(*a*) It is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

(*b*) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.

44. *Orders in case of preferential transactions*. -

(1) The Adjudicating Authority, may, on an application made by the resolution professional or liquidator under sub-section (1) of section 43, by an order:

(*a*) require any property transferred in connection with the giving of the preference to be vested in the corporate debtor;

(*b*) require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money so transferred;

(*c*) release or discharge (in whole or in part) of any security interest created by the corporate debtor;

(*d*) require any person to pay such sums in respect of benefits received by him from the corporate debtor, such sums to the liquidator or the resolution professional, as the Adjudicating Authority may direct;

(*e*) direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part) by the giving of the preference, to be under such new or revived financial debts or operational debts to that person as the Adjudicating Authority deems appropriate;

(*f*) direct for providing security or charge on any property for the discharge of any financial debt or operational debt under the order, and such security or charge to have the same priority as a security or charge released or discharged wholly or in part by the giving of the preference; and

(*g*) direct for providing the extent to which any person whose property is so vested in the corporate debtor, or on whom financial debts or operational debts are imposed by the order, are to be proved in the liquidation or the corporate insolvency resolution process for financial debts or operational debts which arose from, or were released or discharged wholly or in part by the giving of the preference:

Provided that an order under this section shall not -

(*a*) affect any interest in property which was acquired from a person other than the corporate debtor or any interest derived from such interest and was acquired in good faith and for value;

(*b*) require a person, who received a benefit from the preferential transaction in good faith and for value to pay a sum to the liquidator or the resolution professional.

Explanation-I: For the purpose of this section, it is clarified that where a person, who has acquired an interest in property from another person other than the corporate debtor, or who has received a benefit from the preference or such another person to whom the corporate debtor gave the preference,—

(*i*) had sufficient information of the initiation or commencement of insolvency resolution process of the corporate debtor;

(*ii*) is a related party,

it shall be presumed that the interest was acquired, or the benefit was

received otherwise than in good faith unless the contrary is shown.

Explanation-II. - A person shall be deemed to have sufficient information or opportunity to avail such information if a public announcement regarding the corporate insolvency resolution process has been made under section 13."

54. Similar is the situation in respect of undervalued transactions, transactions defrauding creditors and extortionate credit transactions. In the present case however, this Court is only concerned with preferential transactions.

55. A perusal of section 43, would show that not all transactions with related or unrelated parties would fall within this category. The same is limited by time. In relation to a related party, the transaction would be preferential if it has taken place two years before the insolvency commencement date and if it has put such party in a beneficial position as against other creditors, sureties or guarantors. In case of an unrelated party, the period is one year.

56. The question that has arisen is whether an application for avoidance of a preferential transaction, though filed prior to the Resolution Plan being approved, can be heard and adjudicated by the NCLT, at the instance of the RP, after the approval of the Resolution Plan.

57. There are three dimensions to this question:

i. Whether a RP can continue to act beyond the approval of the Resolution Plan?

ii. Whether an avoidance application can be heard and adjudicated after the approval of the Resolution Plan?

iii. Who would get the benefit of an adjudication of the avoidance application after the approval of the Resolution Plan?

(*c*) Chronology of Events

58. In the present case, the alleged preferential transaction was a manpower resource agreement entered into between the Petitioner - Venus Recruiters and the erstwhile Corporate Debtor - M/s Bhushan Steel Ltd. (BSL). The said agreement was entered into on 3rd October, 2009. The application for initiation of CIRP was admitted by the NCLT on 26th July, 2017. The IRP was also appointed and a call for submissions was made. On 20th March, 2018, the CoC approved the Resolution Plan, proposed by Tata Steel Ltd. The approved Resolution Plan was filed by the RP under section 31 before the NCLT on 28th March, 2018.

59. A Forensic Audit Report of the Forensic Counsultant (Deloitte Touche Tohmatsu India LLP) was submitted to the RP on 3rd April, 2018 *i.e.* after the Resolution Plan was approved by the CoC. In the said report, an allegation was

made that 10% service charge paid to the Petitioner in lieu of the manpower supplied "could have been preferential in nature". On the strength of this report, the RP filed an application under sections 25(2)(*j*), 43 to 51 and 66 of IBC for avoidance of this, as well as, other suspect transactions on 9th April, 2018 before the NCLT.

60. The submissions before the NCLT on the Resolution Plan commenced on 5th April, 2018 and judgment was reserved by the NCLT on 11th April, 2018. Thus, it was only two days before the judgment was being reserved by the NCLT that the avoidance application was filed by the RP.

61. On 15th May, 2018, the NCLT passed the final order approving the Resolution Plan and closing was achieved on 18th May, 2018 *i.e.* the 297th day after initiation of the CIRP.

62. The avoidance application filed on 9th April 2018, was taken up for the first time on 24th July, 2018, by the NCLT. A fresh memo of parties was filed in the application by the counsel claiming to be appointed by the 'Former RP' on 14th August, 2018. Notice was issued in the avoidance application to the non-applicants. The Petitioner was thereafter impleaded and notice was issued to it on 25th October, 2018, upon an application by the RP. The said order, impleading the Petitioner, is challenged before this Court, on the ground that the entire proceedings are without jurisdiction.

63. This Court had entertained the writ petition as there were fundamental issues of jurisdiction which were raised by the Petitioner. *Vide* order dated 23rd August, 2019, parties were directed to seek an adjournment before the NCLT. The said order continues till date.

64. The matter was part-heard, when court hearings had been suspended due to the lockdown caused by pandemic. Thereafter, the matter was reheard in September, 2020. In the meantime, on 26th March, 2020, the erstwhile Corporate Debtor, now managed by Tata Steel Ltd - *i.e.* Tata Steel BSL Ltd. informed the Petitioner that the contract between them expired on 31st March, 2020 and would not be renewed.

65. It is in this background that the prayer of the Petitioner for quashing of the proceedings is being considered. The relief prayed for in the writ petition is as under:

> "(a) Issue a Writ, order or direction of CERTIORARI or any other writ order or direction of like nature, declaring the proceedings of CA No. 284 (PB) of 2018 in CP No. IB(201)PB/2017 pending before the Ld. Adjudicating Authority being the Hon'ble National Company Law Tribunal, Principal Bench, New Delhi against the Petitioner,

as void and non est, and consequentially quash the said proceedings.

(b) Pass such other or further order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

(*d*) Findings and Conclusions

66. A perusal of the chronology of events would show that the avoidance application in this case was filed after the CoC had approved the Resolution Plan and almost at the very end of the submissions on the Resolution Plan being heard by the NCLT. The NCLT did not pass any orders on the avoidance application at the time of approval of the Resolution Plan. The order dated 15th May, 2018 approving the Resolution Plan expressly disposed of some specific applications:

(a) C.A. No. 244(PB)/2018 under sections 30 and 31 of the IBC for approval of the Resolution Plan was allowed.

(b) C.A. No. 186(PB)/2018 filed by Larsen & Toubro Ltd. was dismissed with costs.

(c) C.A. No. 217(PB)/2018 filed by Bhushan Employees was also dismissed with costs.

(d) C.A. No. 176(PB)/2018 filed by RP under section 19(2) of IBC was disposed of with a direction to the Ex-Management to cooperate in all respects in the implementation of the Resolution Plan.

However, it merely had one sentence at the end stating that "all other applications are also disposed of". Thus, the avoidance application being C.A. No. 284(PB)/2018 was not separately considered or ruled on by the NCLT.

67. The first preliminary objection taken by the Respondents is that any order passed by the NCLT under section 60 and section 61 is appealable to the NCLAT. Thus, this Court ought not to entertain this writ petition due to an existence of an alternate remedy.

68. There is no doubt that as per section 60 of the IBC, the NCLT/Adjudicating Authority has the jurisdiction to deal with all applications and petitions "in relation to insolvency resolution and liquidation for corporate persons". In this case, the issue is whether the proceedings in question were in relation to insolvency resolution or not. The insolvency resolution process had already come to an end with the approval of the Resolution Plan by the NCLT on 15th May, 2018. The NCLT chose to exercise jurisdiction post the approval of the Resolution Plan. Under the Scheme of the IBC, as set out above, the jurisdiction of the NCLT is limited to insolvency resolution and liquidation. After the approval of the Resolution Plan and the new management taking over the Corporate Debtor, no proceedings remain pending before the NCLT, except issues relating to the Resolution Plan itself, as permitted under section 60.

69. Certainty and timeliness is the hallmark of the Insolvency and Bankruptcy Code, 2016. The Supreme Court in *M/s Innoventive Industries* (*supra*) observed that one of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. Any continuation of the jurisdiction of the NCLT beyond what is permitted under the IBC would be contrary to its very ethos. There is a fundamental issue of jurisdiction that has been raised by the Petitioner as to whether after the approval of the Resolution Plan, the NCLT can exercise jurisdiction in respect of an avoidance application. In the opinion of this Court, the answer is in the negative. Since the plea of the Petitioner is that the NCLT lacks jurisdiction the present writ petition is maintainable before this Court.

70. An avoidance application for any preferential transaction is meant to give some benefit to the creditors of the Corporate Debtor. The benefit is not meant for the Corporate Debtor in its new avatar, after the approval of the Resolution Plan. This is clear from a perusal of section 44 of the IBC, which sets out the kind of orders which can be passed by the NCLT in case of preferential transactions. The benefit of these orders would be for the Corporate Debtor, prior to approval of the Resolution Plan. Any property transferred or sum acquired in an order passed in respect of a preferential transaction would have to form part of the final Resolution Plan. The Resolution Plan would have to take into consideration such amounts and benefits which can be given to the Corporate Debtor for the benefit of the CoC. The benefit of an avoidance application is not meant for the company, after the Resolution Plan is considered by the CoC and approved by the NCLT.

71. The Court has analysed the Code and the applicable Regulations. While the IBC itself does not fix any time limits for filing of avoidance applications in respect of any transactions, the 2016 CIRP Regulations in Chapter X clearly stipulate the structure and methodology for dealing with objectionable transactions. Under Regulation 35A, as amended with effect from 3rd July, 2018, a specific timeline has been provided, by which the RP has to form an opinion if the Corporate Debtor has been subjected to any of the objectionable transactions. The time limit prescribed earlier was 105 days from the insolvency commencement date, which has now been reduced to the 75th day from the insolvency commencement date. However, what is significant is the fact that under Regulation 39, the RP has to submit, along with the Resolution Plans, details of all the objectionable transactions including preferential transactions.

Regulation 35A and Regulation 39(2) are set out below:

"Regulation: 35A. Preferential and other transactions.

(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under section 43, 45, 50 or 66.

(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under section 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date, under intimation to the Board.

(3) Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date.

Regulation: 39. Approval of resolution plan

** ** **

(2) The resolution professional shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him:-

(*a*) preferential transactions under section 43;

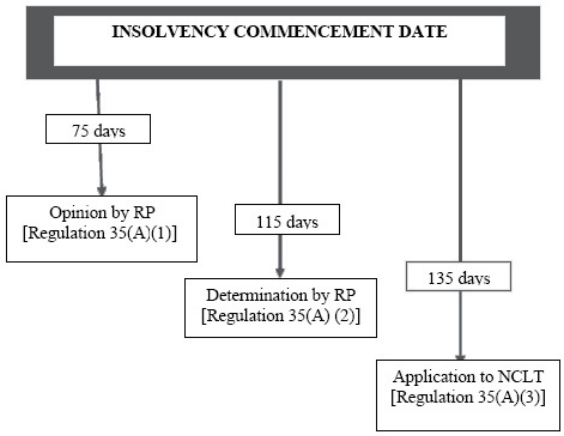
(*b*) undervalued transactions under section 45;

(*c*) extortionate credit transactions under section 50; and

(*d*) fraudulent transactions under section 66, and the orders, if any, of the adjudicating authority in respect of such transactions."

72. A conjoint analysis of sections 43 and 44 read with the applicable Regulations clearly shows that the assessment by the RP of the objectionable transactions including preferential transactions cannot be an unending process. The examination has to commence on the insolvency commencement date. The RP has to form an opinion by the 105th day (pre-amendment) and 75th day (post-amendment). If the RP comes to the conclusion that the Corporate Debtor has been subject to preferential transactions, the determination has to be made by the 115th day. The RP also has to apply to the NCLT for appropriate relief on or before the 135th day. Thus, the timeline in respect of

objectionable transactions including preferential transactions, in a Resolution process, is as follows:



73. The prescribing of the above timelines has a purpose. The said purpose is that the RP includes these details in the Resolution Plan submitted under section 30 to the NCLT. These details ought to be available before the NCLT at the time of approval of the Resolution Plan under section 31. The argument that avoidance applications relating to preferential and other transactions can therefore survive beyond the conclusion of the CIRP is contrary to the Scheme of the Code.

74. Moreover, an RP cannot continue to file applications in an indefinite manner even after the approval of a Resolution Plan under section 31. The role of a RP is finite in nature. He or she cannot continue to act on behalf of the Corporate Debtor once the Plan is approved and the new management takes over. To continue a RP indefinitely even beyond the approval of the Resolution Plan would be contrary to the purpose and intent behind appointment of a RP. The Resolution Professional (RP), as the name itself suggests has to be a person who would enable the resolution. The role of the RP is not adjudicatory but administrative in nature. Thus, the RP cannot continue beyond an order under section 31 of the IBC, as the CIRP comes to an end with a successful Resolution Plan having been approved. This is however subject to any clause in the Resolution Plan to the contrary, permitting the RP to function for any specific purpose beyond the approval of the Resolution Plan. In the present case, no such clause has been shown to exist.

75. The Supreme Court of India in *Committee of Creditors of Essar Steel India Ltd.* (*supra*) has held that the detailed provisions of the IBC read with the 2016 Regulations make it clear that the RP is a person who is to manage the affairs of the Corporate Debtor as a going concern from the stage of admission of an application under section 7, 9 or 10 of the Code till a Resolution Plan is approved by the NCLT. The relevant extract of the decision is as under:

> "27. The detailed provisions that have been stated hereinabove make it clear that the resolution professional is a person who is not only to manage the affairs of the corporate debtor as a going concern from the stage

of admission of an application under section 7, 9 or 10 of the Code till a resolution plan is approved by the Adjudicating Authority, but is also a key person who is to appoint and convene meetings of the Committee of Creditors, so that they may decide upon resolution plans that are submitted in accordance with the detailed information given to resolution applicants by the resolution professional. Another very important function of the resolution professional is to collect, collate and finally admit claims of all creditors, which must then be examined for payment, in full or in part or not at all, by the resolution applicant and be finally negotiated and decided by the Committee of Creditors. In fact, in *ArcelorMital India* (*supra*), this Court referred to the role of the resolution professional under the Code and the aforesaid Regulations, making it clear that the said role is not adjudicatory but administrative,....."

76. According to section 23 of the IBC, the RP conducts the CIRP and manages the operations of the Corporate Debtor "during the corporate insolvency resolution process period". Section 23 reads as under:

"23. *Resolution professional to conduct corporate insolvency resolution process.* -

(1) Subject to section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period:

Provided that the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period, until an order approving the resolution plan under sub-section (1) of section 31 or appointing a liquidator under section 34 is passed by the Adjudicating Authority.

(2) The resolution professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional under this Chapter.

(3) In case of any appointment of a resolution professional under sub-section (4) of section 22, the interim resolution professional shall provide all the information, documents and records pertaining to the corporate debtor in his possession and knowledge to the resolution professional."

77. There is a START line and FINISH line for the Resolution process. Section 23 clearly stipulates that the role of the RP is to 'manage'

the affairs of the Corporate Debtor `during' the resolution process and NOT thereafter. In fact, until the enactment of the proviso to section 23, which was introduced with effect from 28th December, 2019, the RP's mandate concluded with the CIRP. The proviso introduced, firstly in 2018 and thereafter in 2020, merely extended the mandate of the RP till the approval of the Resolution Plan under section 31(1) or appointment of liquidator under section 34. This itself makes it amply clear that the RP's authority is limited in nature and in any event, cannot extend beyond the order passed under section 31. Thus, there is an outer limit for the functioning of the RP under the proviso to section 23(1). The continuation of a RP or filing of an application for the purpose of prosecuting an avoidance application as a `Former RP' is beyond the contemplation of the IBC. The RP ceases to be one after an order under section 31 is passed. The RP does not have any connection whatsoever with the new Management which takes over the erstwhile Corporate Debtor, after the approval of the Resolution Plan. Any other interpretation could lead to a situation where an RP could be a `Former RP' for years together without any definite end date. Under section 23, the CIRP period is a specific period and cannot be read as a perpetual period or an indefinite period. The wording of the proviso in fact makes it further clear that the CIRP process in fact comes to an end immediately upon the RP submitting the Plan itself.

78. The IBC was meant to cure the fallacies and shortcomings in the previous legislations wherein winding-up of companies consumed years together leading to erosion of their assets and businesses. The wording of section 23 clearly lays down the mandate for the RP. The same cannot be extended beyond the contemplation in the statute. After the Resolution Plan is approved and the new management takes over, the manner in which the affairs of the company are to be run is the sole prerogative of the new management. In the statutory scheme, the RP cannot continue to act on behalf of the Company under the title of `Former RP'. That would be violative of the legislative intention and the statutory prescription.

79. A perusal of section 30(4) also makes it adequately clear that the CIRP period has to be completed within the time period specified under section 12(3). Thus, the IBC does not contemplate the continuation of the RP beyond the CIRP period.

80. The above interpretation is also in line with the overall object and purpose of the IBC. The IRP/RP are persons, who are assigned specific roles under the IBC. They are meant to provide a smooth transition for the Corporate Debtor during an insolvency period till the

resolution process is over. Their continuation beyond the closure of the resolution process would in effect mean an interference in the conduct and management of the company, which is now having its own independent Board, managerial personnel, etc. The RP's role cannot continue once the Resolution Plan is approved and the successful Resolution Applicant takes charge of the Corporate Debtor.

81. Mr. Ahluwalia, ld. CGSC for the Union of India has placed reliance on Form H of the CIRP Regulations, which is filed by the RP at the time of submitting the Resolution Plan to the NCLT. It is the submission of ld. CGSC that the avoidance applications could be pending at the stage when the RP files the Plan. He relies on the language in point No. 15 in Form H *i.e.* the 'Compliance Certificate' which reads as under:

"15. Provide details of section 66 or avoidance application filed/ pending.

Sl. No	Type of Transaction	Date of filing with Adjudicating Authority	Date of Order of the Authority	Brief of the Order
1.	Preferential transactions under section 43			
2.	Undervalued transactions under section 45			
3.	Extortionate credit transactions under section 50			
4.	Fraudulent transactions under section 66			

82. Though at first blush, Mr. Ahluwalia's submission may appear attractive, a closer analysis reveals that Form H seeks to achieve what is mandated in the Regulations. Regulation 39 requires details of the objectionable transactions to be placed by the RP before the NCLT. Form H is merely a format prescribed to provide the said details. The application in respect of such transactions would obviously be pending on the date when the Resolution Plan is submitted by the RP. The details of the transactions would be contained in Form H, would be filled by RP and submitted by the RP before the NCLT. However, Form H cannot be read to mean that they can remain pending after the order under section 31.

83. Finally coming to section 26 of the Code. The said provision reads as under:

> "26. Application for avoidance of transactions not to affect proceedings - The filing of an avoidance application under clause (*j*) of sub-section (2) of section 25 by the resolution professional shall not affect the proceedings of the corporate insolvency resolution process"

84. The manner in which it is sought to be interpreted by the Petitioner and by the Respondents is in stark contrast. The Respondents rely heavily on this provision to argue that avoidance applications would not affect the CIRP. This is because under the scheme of the IBC, insofar as avoidance applications are concerned, the RP has to collect the details, form an opinion, make a determination and submit the same to the NCLT within the prescribed timelines. This is independent of the various other steps which are part of the CIRP. The activities in respect of objectionable transactions, which the RP has to conduct, would run parallelly with the other steps of the CIRP. However, finally, the RP would submit all the details to the NCLT along with the Resolution Plans. That is the purpose of the provision. The provision cannot be interpreted in a manner so as to say that the applications can survive the CIRP itself. Section 26 of the IBC also cannot be read in a manner so as to mean that an application for avoidance of transactions under section 25(2)(*j*) can survive after the CIRP process. Once the CIRP process itself comes to an end, an application for avoidance of transactions cannot be adjudicated. The purpose of avoidance of transactions is clearly for the benefit of the creditors of the Corporate Debtor. No benefit would come to the creditors after the Plan is approved. Thus, Form H cannot come to the aid of avoidance applications to remain pending beyond the CIRP process.

85. Clause 2.4 of Chapter III of the ILC Report, dated 20th February, 2020 is relied upon to urge that a Resolution Applicant ought not to be permitted to file an avoidance application and the crux of this recommendation would, in effect, mean that the benefit for any of the avoidance applications cannot be given to the Resolution Applicant. However, a closer look at the ILC Report shows that as per clause 2.4 the successful Resolution Applicant cannot be permitted to file such avoidance applications, as the same was not factored into the bid. The relevant extract reads as under:

> "2.4. The Committee also considered if the successful resolution applicant should be permitted to file such applications. However, it was agreed that this would possibly result in the resolution applicant being entitled to a return that was not factored in at the time of

submitting their bid. Therefore, the Committee decided that the resolution applicant should not be permitted to file applications against improper trading or applications to avoid transactions"

86. Thus, the Resolution Applicant whose Resolution Plan is approved itself cannot file an avoidance application. The purpose is clear from this itself *i.e.,* that the avoidance applications are neither for the benefit of the Resolution Applicants nor for the company after the resolution is complete. It is for the benefit of the Corporate Debtor and the CoC of the Corporate Debtor. The RP whose mandate has ended cannot indirectly seek to give a benefit to the Corporate Debtor, who is now under the control of the new management/ Resolution Applicant, by pursuing such an application. The ultimate purpose is that any benefit from a preferential transaction should be given to the Corporate Debtor prior to the submission of bids and not thereafter.

87. Mr. V.P. Singh, ld. counsel had sought to rely on the IBBI Discussion Paper 2019. However, the said Discussion Paper primarily deals with liquidation proceedings and not resolution proceedings.

88. Moreover, if an avoidance application for preferential transactions is permitted to be adjudicated beyond the period after the Resolution Plan is approved, in effect, the NCLT would be stepping into the shoes of the new management to decide what is good or bad for the Company. Once the Plan is approved and the new management takes over, it is completely up to the new management to decide whether to continue a transaction or agreement or not. Thus, if the CoC or the RP are of the view that there are any transactions which are objectionable in nature, the order in respect thereof would have to be passed prior to the approval of the Resolution Plan.

89. In the present petition, this Court is concerned with a Corporate Debtor, in respect of which the Resolution Plan was approved by the NCLT and an application is sought to be filed by the RP as former RP through its counsel. The RP cannot wear the hat of the 'Former RP' and pursue an avoidance application in respect of preferential transactions after the hat of the Corporate Debtor has changed and it no longer remains a Corporate Debtor. This would be wholly impermissible in law as the mandate of the RP has come to an end. The NCLT also has no jurisdiction to entertain and decide avoidance applications, in respect of a Corporate Debtor which is now under a new management unless provision is made in the final Resolution Plan.

90. A far-fetched argument was made by the ld. counsels for the Former

RP that the former RP is willing to step down and the application can be pursued by some governmental authority such as the SFIO or the MCA. The vesting of such power with authorities that are alien to the CIRP process would be contrary to the IBC, which contemplates supervision by an Adjudicating Authority like the NCLT, duly assisted by an RP, only during the CIRP and not beyond that.

91. The fact that the new management can take a decision in respect of any agreement which is deemed to be not beneficial to it also supports the interpretation that after the Plan is approved, the company is completely in the hands of the new management and neither the NCLT nor the RP has any right or power in respect of the said company. As can be seen in the present case, the Corporate Debtor in its new avatar has terminated the agreement with the Petitioner.

92. The parties would have to be therefore left to their civil and other remedies in terms of the contract between them. The NCLT ought not to be permitted to now adjudicate the preferential nature of the transaction under a contract which now stands terminated, after the approval of the Resolution Plan.

93. The above discussion is only in the context of Resolution processes and would however not apply in case of liquidation proceedings. In the case of a liquidation process, the situation may be different inasmuch as the liquidator may be able to take over and prosecute applications for avoidance of objectionable transactions. The benefit of orders passed in respect of such transactions may be passed on to the Corporate Debtor which may assist in liquidating the company at the final stage. However, that is not the case in the present petition.

94. In view of the above findings, the order of the NCLT impleading the Petitioner and any consequential orders are liable to be set aside. The proceedings *qua* the Petitioner before the NCLT under the Avoidance application are accordingly quashed.

95. The present petition is allowed, in the above terms. All pending applications are disposed of.

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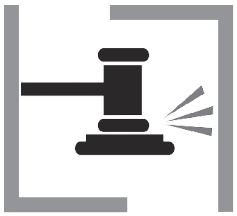

[2021] 123 taxmann.com 80 (IBBI)

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Nitesh Kumar Sinha, *In re*

DR. MUKULITA VIJAYAWARGIYA, WHOLE TIME MEMBER

NO. IBBI/DC/45/2020

NOVEMBER 24, 2020

Section 208 of the Insolvency and Bankruptcy Code, 2016, read with regulations 7(2)(a), 7(2)(h) and 7A, of the IBBI (Insolvency professionals) Regulations, 2016 - Insolvency professionals - Functions and obligations of - Whether regulation 7A requires for any Insolvency Professional (IP) to have Authorisation for Assignment (AFA) before undertaking any assignment after 31-12-2019 - Held, yes - Whether without AFA, an IP is not eligible to undertake assignments or conduct various processes thereof as it is an essential condition for undertaking any assignment by an IP - Held, yes - Whether further, section 208 also casts an obligation to abide by code of conduct and comply with all requirements and terms and conditions specified in bye laws of insolvency professional agency of which he is a member - Held, yes - Whether where IP had accepted assignment as IRP without holding a valid AFA in matter of Terrence Alloys Private Limited, he is said to have contravened code of conduct under section 208(2)(a) and (e) of Code and regulations 7A and 7(2)(a) and (h) of IP Regulations - Held, yes - Whether however, since disciplinary action had already been taken against said IP for undertaking assignment as Interim Resolution Professional after 31-12-2019 without holding a valid AFA in matter of Terrence Alloys Private Limited, show cause notice was to be disposed without any direction against him - Held, yes (Paras 4.2, 4.5, 4.8 and 5)

ORDER

In the matter of Mr. Nitesh Kumar Sinha, Insolvency Professional (IP) under Regulation 11 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016

This Order disposes of the Show Cause Notice (SCN) No. IBBI/IP/MON/2020/20 dated 28th August, 2020 issued to Mr. Nitesh Kumar Sinha, 8A UG CS, Ansal Corporate Suites, Ansal Plaza, Sector-1, Vaishali, Ghaziabad, UP - 201010, who is a Professional Member of the ICSI Institute of Insolvency Professionals (IPA) and an IP registered with the Insolvency and Bankruptcy Board of India (IBBI) with Registration No. IBBI/IPA-002/IP-N00280/2017-2018/10838.

1.1 The IBBI had issued the SCN to Mr. Nitesh Kumar Sinha on 28th August, 2020 for accepting the assignment as Interim Resolution Professional in the Corporate Insolvency Resolution Process of Terrence Alloys Private Limited after 31st December, 2019 without holding a valid Authorisation for Assignment (AFA) issued to him by his IPA.

1.2 Mr. Sinha submitted his reply to the SCN *vide* email dated 6th September, 2020 to the SCN. The IBBI referred the SCN, response of Mr. Sinha to the SCN and other material available on record to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the Code and Regulations made thereunder. Mr. Sinha availed an opportunity of personal hearing before the DC on 9th September 2020.

Show Cause Notice

2. The SCN issued by IBBI alleged contraventions of section 208(2)(*a*) and 208(2)(*e*) of the Insolvency and Bankruptcy Code, 2016 (Code), regulations 7(2)(*a*), 7(2)(*h*) and 7A of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with clauses 1, 2, 11, 12 and 14 of the Code of Conduct contained in the First Schedule of the IP Regulations for accepting the assignment of the Interim Resolution Professional in the Corporate Insolvency Resolution Process (CIRP) of Terrence Alloys Private Limited after 31st December, 2019 for which public announcement was made on 11th February 2020 without holding a valid AFA from the IPA;

Written and oral submissions by Mr. Nitesh Kumar Sinha

3. Mr. Sinha's submissions made in his written reply and in the course of personal hearing are summarized as follows:

3.1 Mr. Sinha in his reply submitted as follows:

(i) Mr. Sinha, during personal hearing, submitted that he was under *bona fide* belief that AFA was not required as he had given his consent on 7th August, 2019 for appointment as Interim Resolution professional in this matter and therefore, his case is covered under proviso to Regulation 7A of the IP Regulations.

(ii) IPA had also issued the show cause notice dated 24th July, 2020 to Mr. Sinha and had passed an order on 7th September, 2020 wherein warning had been issued to Mr. Sinha to be extremely careful and diligent and that he should act strictly as per law and similar action should not be repeated. Further, the IPA had directed that Mr. Sinha shall not accept any new assignment without obtaining Authorisation for Assignment.

Analysis and Findings

4. The DC after taking into consideration the SCN, the reply to SCN, the oral and written submission of Mr. Nitesh Kumar Sinha and also the provisions of the Code, rules and the regulations made thereunder finds as follows.

4.1 The DC notes that the provisions of the Code and regulations are spelt out in a plain and unambiguous language. Regulation 7A of IP regulations requires for any IP to have AFA before undertaking any assignment after 31st December, 2019. Regulation 7A reads as follows:

> "7A. An insolvency professional shall not accept or undertake an assignment after 31st December, 2019 unless he holds a valid authorisation for assignment on the date of such acceptance or commencement of such assignment, as the case may be:

Provided that provisions of this regulation shall not apply to an assignment which an insolvency professional is undertaking as on-

(a) 31st December, 2019; or

(b) the date of expiry of his authorisation for assignment."

4.2 Thus, it is clear from the said Regulation that one of the essential conditions for undertaking any assignment by an IP is that he should have a valid AFA which is issued by the IPA with which he is enrolled. In other words, without AFA, an IP is not eligible to undertake assignments or conduct various processes thereof. Regulation 7A was inserted in the IP Regulations *vide* notification dated 23rd July, 2019, much before 31st December, 2019. Adequate time was given to the professionals to obtain AFA from respective IPAs.

4.3 Regulation 12A of the Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 read as under:

"12A. Authorization for Assignment.

The Agency, on an application of its professional member, may issue or renew an authorization for assignment."

4.4 The Bye-Laws of ICSI Institute of Insolvency Professionals defines in para 4(1)*(aa)* the expression "Authorisation for Assignment" as an authorisation to undertake an assignment, issued by an insolvency professional agency to an insolvency professional, who is its professional member, in accordance with its bye-laws regulation. An application for grant of AFA can be made to the IPA under para 12A of said bye laws.

4.5 Further, Section 208 of the Code also casts an obligation to abide by the code of conduct and comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member. Section 208(2) provides as follows:

"208. Functions and obligations of insolvency professionals.-

(2) Every insolvency professional shall abide by the following code of conduct: -

(*a*) to take reasonable care and diligence while performing his duties;

(*b*) to comply with all requirements and terms and conditions specified in the bye laws of the insolvency professional agency of which he is a member; and

(*c*) to perform his functions in such manner and subject to such conditions as may be specified."

4.6 The DC further notes that the certificate of registration granted to an IP is subject to the condition that he should follow at all times the provisions of the Code and Regulations and the bye-laws of Insolvency Professional Agency of which the IP is a member and also follow the Code of Conduct specified in the First Schedule to the IP Regulations. In this regard, clauses (*a*) and (*h*) of regulation 7 (2) of the IP Regulations provide as follows:

"7. Certificate of registration.

(2) The registration shall be subject to the conditions that the insolvency professional shall -

(*a*) at all times abide by the Code, rules, regulations, and guidelines thereunder and the bye-laws of the insolvency professional agency with which he is enrolled;

(*h*) abide by the Code of Conduct specified in the First Schedule to these Regulations;"

4.7 The credibility of the processes under the Code hinges upon the conduct and competence of the IRP/RP during the process. Section 208(2) of the Code provides that every IP shall take reasonable care and diligence while performing his duties and to perform his functions in such manner and subject to such conditions as may be specified. Further, the Code of Conduct specified in the First Schedule of the IP regulations enumerates a list of code of conduct for insolvency professionals including maintaining of integrity and professional competence for rendering professional service, representation of correct facts and correcting misapprehension, not to conceal material information and not to act with *mala fide* or with negligence.

4.8 In the present matter it is observed that, Mr. Sinha had provided his acceptance to NCLT, Delhi under rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to accept the assignment as Interim Resolution Professional in the Corporate Insolvency Resolution Process of Terrence Alloys Private Limited on 7th August, 2019 which was prior to the cut-off date, *i.e.*, 31st December, 2019. It is noted that the amendment to the IP Regulations incorporating the provision relating to requirement of AFA to conduct the CIRP was notified on 23rd July, 2019. Mr. Sinha gave his consent/acceptance to the NCLT, Delhi on 7th August, 2019 which was after the said amendment, however, the said amendment came into force on 1st January, 2020, accordingly to which an insolvency professional shall not accept or undertake an assignment after 31st December, 2019 unless he holds a valid AFA. Mr. Sinha after giving consent knew that in all probabilities he would be appointed as an IRP in the matter, therefore, Mr. Sinha should have applied for and obtained AFA even if the consent was given on 7th August, 2019. As per section 208(2)(*e*) of the Code, every IP is under an obligation to comply with all requirements and terms and conditions specified in the byelaws of the insolvency professional agency of which he is a member.

4.9 The DC finds that an order has been passed against Mr. Sinha on 7th September, 2020 by the Disciplinary Committee of IPA for accepting assignment as IRP after 31st December, 2019 without holding a valid AFA in the matter of Terrence Alloys Private Limited, and wherein warning has been issued to Mr. Sinha to be extremely careful and diligent and that he should act strictly as per law and similar action should not be repeated.

ORDER

5. In view of the fact that ICSI Institute of Insolvency Professionals has already given warning to Mr. Nitesh Kumar Sinha

for undertaking assignment as Interim Resolution Professional after 31-12-2019 without holding a valid AFA in the matter of Terrence Alloys Private Limited, the DC, in exercise of the powers conferred under Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, disposes of the SCN without any direction against Mr. Nitesh Kumar Sinha.

5.1 A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professionals where Mr. Nitesh Kumar Sinha is enrolled as a member.

5.2 A copy of this Order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, New Delhi, for information.

6. Accordingly, the show cause notice is disposed of.

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Practical Questions

Q.1. Can a creditor file its claim against both CD and Guarantor in their respective CIRP proceedings?

Ans. Yes.

(NCLAT judgment dt 24th Nov 2020, passed in *State Bank of India v. Athena Energy ventures (P.) Ltd. (2021)123 taxmann.com 82)*

Q.2. Can an RP insist or foist itself on the CoC for his continuation?

Ans. No.

(NCLAT judgment dt. 23rd November 2020 passed in *Diwan Chand Arya v. Government of Sikkim (2021)123 taxmann.com 68)*

Q.3. Can issues related to "oppression" and "mismanagement" be addressed in CIRP proceedings?

Ans. No.

(NCLAT judgment dt. 18th November 2019 passed in *Ms. Ratna Singh v. Theme Export Pvt. Ltd. (2021)123 taxmann.com 72)*

Q.4. Can an order for transfer of winding-up proceedings from Company Court to NCLT be passed at the instance of a creditor who is not a party to the proceedings?

Ans. Yes.

(SC judgment dt. 19th November 2019 passed in *Kaledonia Jute and Fibres Pvt. Ltd. v. Axis Nirman and Industries Ltd. (2020)121 taxmann.com 228)*

Q.5. Can the contingency amount reserved in a Resolution Plan which is a subject matter of commercial wisdom of CoC be held to be open to judicial review u/s 61(3), IBC?

Ans. No.

(NCLAT judgment dt. 2nd November 2020 passed in *IIFCL Mutual Fund v. Committee of Creditors of GVR Infra (2021)123 taxmann.com 90)*

Learning Curves

- **After approval of the Resolution Plan by the Adjudicating Authority, the Successful Resolution Applicant cannot be faced with undecided claims.**

(NCLAT Order dt. 10th November 2020 passed in the matter of *Dy Commissioner of Customs DEEC (Monitoring Cell) v. Vandana Garg (2021) 123 taxmann.com 84)*

- **Penal action under section 65 can be taken only when the provision of the Code has been invoked fraudulently with malicious intent.**

(NCLAT Order dt. 9th November 2020 passed in the matter of *Amit Katyal v. Mrs. Meera Ahuja (2021)123 taxmann.com 62)*

- **Lease of immovable property cannot be considered as a supply of goods or rendering of any services, and thus, cannot fall within the definition of "Operational Debt".**

(NCLAT Order dt. 5th November 2020 passed in the matter of *Mr. Sanjeev Kumar v. Aithent Technologies (P.) Ltd. (2021)123 taxmann.com 88)*

- **CoC's Commercial wisdom regarding replacement of the Resolution Professional does not fall within the limited scope of judicial review and is not justiciable.**

(NCLAT Order dt. 3rd November 2020 passed in the matter of *Naveen Kumar Jain v. Committee of Creditors of K.D.K Enterprises Pvt. Ltd. (2021)123 taxmann.com 55)*

- **In case of deadlock in the CoC, IBBI can be approached to decide the quantum of fee for IRP.**

(NCLAT Order dt. 29th October 2020 passed in the matter of *Gulshan Gaba v. Surinder Juneja (2021)123 taxmann.com 53)*

FRAMEWORK FOR REVITALISING DISTRESSED ASSETS IN THE ECONOMY - GUIDELINES ON JOINT LENDERS FORUM (JLF) AND CORRECTIVE ACTION PLAN (CAP) - TIMELINES FOR STRESSED ASSETS RESOLUTION

CIRCULAR DBR.BP.BC.NO.67/21.04.048/2016-17, DATED 5-5-2017

Please refer to the circular DBOD.BP.BC. No.97/21.04.132/2013-14 dated February 26, 2014 on "Framework for Revitalising Distressed Assets in the Economy - Guidelines on Joint Lenders' Forum (JLF) and Corrective Action Plan (CAP)" and subsequent circulars/ amendments in this regard.

2. The Framework aims at early identification of stressed assets and timely implementation of a corrective action plan (CAP) to preserve the economic value of stressed assets. In order to ensure that the CAP is finalised and formulated in an expeditious manner, the Framework specifies various timelines within which lenders have to decide and implement the CAP. The Framework also contains disincentives, in the form of asset classification and accelerated provisioning where lenders fail to adhere to the provisions of the Framework. Despite this, delays have been observed in finalising and implementation of the CAP,

leading to delays in resolution of stressed assets in the banking system.

3. It is hereby clarified that the CAP can also include resolution by way of Flexible Structuring of Project Loans, Change in Ownership under Strategic Debt Restructuring, Scheme for Sustainable Structuring of Stressed Assets (S4A), etc.

4. In this context, it is reiterated that lenders must scrupulously adhere to the timelines prescribed in the Framework for finalising and implementing the CAP. To facilitate timely decision making, it has been decided that, henceforth, the decisions agreed upon by a minimum of 60 per cent of creditors by value and 50 per cent of creditors by number in the JLF would be considered as the basis for deciding the CAP, and will be binding on all lenders, subject to the exit (by substitution) option available in the Framework. Lenders shall ensure that their representatives in the JLF are equipped with appropriate mandates, and that decisions taken at the JLF are implemented by the lenders within the timelines.

5. It shall be noted that

(*i*) the stand of the participating banks while voting on the final proposal before the JLF shall be unambiguous and unconditional;

(*ii*) any bank which does not support the majority decision on the CAP may exit subject to substitution within the stipulated time line, failing which it shall abide the decision of the JLF;

(*iii*) the bank shall implement the JLF decision without any additional conditionalities; and

(*iv*) the Boards shall empower their executives to implement the JLF decision without requiring further approval from the Board.

6. Any non-adherence to these instructions and timelines specified under the Framework shall attract monetary penalties on the concerned banks under the provisions of the Banking Regulation Act, 1949.

7. This circular is issued in exercise of the powers conferred by Sections 21, 35A and 35AB of the Banking Regulation Act, 1949.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INFORMATION UTILITIES) (AMENDMENT) REGULATIONS, 2020 - AMENDMENT IN REGULATION 2 AND INSERTION OF REGULATION 21A

NOTIFICATION NO. IBBI/2020-21/GN/REG065, DATED 13-11-2020

In exercise of the powers conferred by section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations further to amend the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, namely:—

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Information Utilities) (Amendment) Regulations, 2020.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, (hereinafter referred to as the principal regulations), in regulation 2, in sub-regulation (1), after clause (*d*), the following clause shall be inserted, namely:—

'(*da*) "financial information" means any public announcement made under the Code, for the purposes of sub-clause (*f*) of clause (13) of section 3;'.

3. In the principal regulations, after regulation 21, the following regulation shall be inserted, namely:—

"21A. *Dissemination of public announcement.*—An information utility shall disseminate every public announcement it receives or has access to, on the date of its receipt or access, as the case may be, to its registered users, who are creditors of the corporate debtor undergoing insolvency proceeding under the Code.".

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) (FIFTH AMENDMENT) REGULATIONS, 2020 - AMENDMENT IN REGULATIONS 13 AND 39; INSERTION OF REGULATION 2A

NOTIFICATION NO. IBBI/2020-21/GN/REG066, DATED 13-11-2020

In exercise of the powers conferred by clause (*t*) of sub-section (1) of section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations further to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, namely:—

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as the principal regulations), after regulation 2, the following regulation shall be inserted, namely:—

"2A. *Record or evidence of default by financial creditor.*—For the purposes of clause (*a*) of sub-section (3) of section 7 of the Code, the financial creditor may furnish any of the following record or evidence of default, namely:—

(a) certified copy of entries in the relevant account in the bankers' book as defined in clause (3) of section 2 of the Bankers' Books Evidence Act, 1891 (18 of 1891);

(b) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, where the period of appeal against such order has expired.".

3. In the principal regulations, in regulation 13, in sub-regulation (2), after clause (*c*), the following clause shall be inserted, namely: —

"(*ca*) filed on the electronic platform of the Board for dissemination on its website:

Provided that this clause shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020;".

4. In the principal regulations, in regulation 39, after sub-regulation (5), the following sub-regulation shall be inserted, namely: —

"(5A) The resolution professional shall, within fifteen days of the order of the Adjudicating Authority approving a resolution plan, intimate each claimant, the principle or formulae, as the case may be, for payment of debts under such resolution plan:

Provided that this sub-regulation shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020;"

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