FINAL WORD ON IBC

INSTITUTE OF INSOLVENCY PROFESSIONALS
(A Wholly owned subsidiary of ICSI and registered with IBBI)

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Foreword

The process envisioned in the Insolvency and Bankruptcy Code, 2016 pertaining to Insolvency resolution resembles the inquisitorial system of law where the court is actively involved and plays a significant role in preparing evidence, questioning witnesses and finding the truth. In the Code, the National Company Law Tribunal (NCLT) plays an active role assisted by the Insolvency Professionals (IPs) and Insolvency Professional Agencies (IPAs).

Conventionally, judicial precedent is set by "case law" which helps flesh out the statutory laws. Moreover, in some cases, new substantive law comes from pronouncements where statute and precedents are silent. It is through these precedents that a newly promulgated law like the Code develops and functions. The Supreme Court, also known as the Apex Court of India is the final authority to decide on questions of law that may arise from interpretation of law or from the gaps that any law might have.

It is the Hon'ble Supreme Court that occupies a special position in law wherein it is because of the Apex Court that the Code was held constitutionally valid. It is the Apex Court where most questions of constitutional validity for various amendments and provisions of the Code are upheld. Through this publication titled …….., ICSI IIP has performed the commendable job of classifying the important and significant judgments of the Hon'ble Supreme Court on the basis of the pertinent issues tackled.

I am certain this book would prove to be helpful for both the practitioners as well as all other stakeholders. This book can definitely be of benefit for anyone requiring needs ease of access and understanding regarding the voluminous judgments passed by the Hon'ble Supreme Court.

I wish all the readers the very best in all their endeavors!

Place: New Delhi**CS Ashish Garg**
Date: 05.08.2020 President
The Institute of Company Secretaries of India

Preface

The Insolvency and Bankruptcy Code, 2016 ("Code") is the new and comprehensive insolvency law of India which seeks to consolidate the existing framework. The Code inter alia provides for Corporate Insolvency Resolution Process which involves a number of stakeholders including insolvency professionals as well as financial creditors, operational creditors, corporate debtor and its promoters, committee of creditors (CoC), liquidators. The adjudication mechanism under the Code includes Adjudicating Authority (NCLT), Appellate Authority (NCLAT), and Supreme Court being the Apex Court. The mechanism also includes orders that are passed by the Regulatory Body to direct the various stakeholders about their conduct during the Corporate Insolvency Resolution Process.

The Code has provided professionals a launching pad to deal with the insolvency/ liquidation process for individuals, firms and corporate. With a number of Amendments of the Code the process is now being sorted for a smooth implementation. Through these Amendments there have also been attempts to cover up any gaps that may have come up and been noticed through the issues being raised in the courts of law. As the Code grows, so does the role and responsibilities of the stakeholders working under it. The more a law grows in its applicability and usage, so do the questions relating to it.

Supreme Court is the Apex court of law in the country whose decisions on issues of law are deemed to be settled positions of law which would prove to be a precedent for as long as the law itself is in function. Through this publication, we have attempted to accurately look at some of such questions of law that were not answered by way of statute but found their settled positions of law through the orders passed by the Supreme Court of India.

This publication is a collective effort of team members of ICSI IIP. We are confident that the publication would be useful to professionals, aspiring Insolvency Professionals as well as other stakeholders to understand Insolvency law in India and the expectations of the Adjudicating Authorities in this regard.

Place: New Delhi**Dr. Binoy J. Kattadiyil**
Date: 05.08.2020Managing Director

ICSI Institute of Insolvency Professionals
(Subsidiary of ICSI & Registered IPA of IBBI)

About the Book

Whenever a new law comes into existence, the various stakeholders tend to take different views on issues and matters dealt with in the law. The onus of final decisions usually ends up on the judicial authorities and such opinions pave a clear way for the future. The Adjudicating Authorities that are envisioned in the Insolvency and Bankruptcy Code, 2016 (Code) are National Company Law Tribunal (NCLT) and the Appellate Authorities are the National Company Law Appellate Tribunal (NCLAT) and Supreme Court. The Supreme Court is the highest court of Law in the country and has settled a lot of questions of laws/issues in law related to insolvency in the last three years since the inception of the Code.

Since it is a relatively new statute, various questions of law and interpretation are cropped up which are generally left to the courts to decide upon. The final decision on issues relating to questions of law and interpretation of the statute range from the status of operational creditors under insolvency law to deciding the constitutional validity of the Code rests with the Supreme Court. The Supreme Court is the final and the ultimate word on these issues which are only subject to review but not subject to appeal.

Through this publication we have attempted to take a look at some of these pertinent issues answered by the Supreme Court in a clear and meticulous manner. The cases are divided according to the issue of law that they have attempted to answer and will prove to be a handy guide for all the important questions and their settled positions of law.

We are quite positive that the readers shall find this book useful and a handmade guide for quick reference.

Happy Reading!

Team ICSI IIP

About ICSI IIP

ICSI Institute of Insolvency Professionals (ICSI IIP) is a frontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI) under the Insolvency and Bankruptcy Code, 2016 (IBC). It is a company incorporated under section 8 of the Companies Act, 2013 and is a wholly owned subsidiary of the Institute of Company Secretaries of India. As a Regulator (under the IBC), ICSI IIP has been vested with different key responsibilities, inter alia including, enrolling, educating, training as well as monitoring the functioning of its professional members, laying down standards of professional conduct as well as taking disciplinary measures (as per the law) in respect of defaulting members. ICSI IIP has about 900 registered members (IPs) belonging to a very wide spectrum of professionals, like Company Secretaries, Management Professionals, Advocates, Cost Accountants and Chartered Accountants. The Governing Board of ICSI IIP consists of eminent personalities who are acting as Independent Directors and Nominee Directors of ICSI IIP.

Since its inception, ICSI IIP has carried out a number of activities as a part and in discharge of its mandate as an Insolvency Professional Agency (IPA). Such activities inter alia include, bringing out important publications like *Practical Aspects of Insolvency Law*, *Interim Resolution Professional – A Handbook*, *Pronouncements under the Insolvency and Bankruptcy*, *2016: Issue Analysis*, J*udicial/Regulatory Ruling for Stakeholders – A Handbook*, *Voluntary Liquidation : A Hand book*, organising and carrying out intensive training programmes for IPs, holding interactive sessions with different stakeholders, conducting webinars on important subjects under IBC with specific focus on practical challenges faced by the Insolvency Professionals. The activities are motivated to contribute towards Education, Training and Development of Insolvency Professionals.

ICSI IIP is also the first organisation to have come up with a monthly journal (*ICSI IIP's Insolvency and Bankruptcy Journal*) dedicated exclusively to the Insolvency and Bankruptcy Law in India (and also other relevant jurisdictions). ICSI IIP has also been issuing *Daily Learning Curves* and *Knowledge Reponere* and *Knowledge Capsules* which have been designed to keep the Insolvency Professionals abreast of legislative, judicial and regulatory developments under IBC.

Abbreviations

SC: Supreme Court

HC: High Court

NCLT: National Company Law Tribunal

NCLAT: National Company Law Appellate Tribunal

IBBI: Insolvency and Bankruptcy Board of India

IPA: Insolvency Professional Agency

ICSI IIP: ICSI Institute of Insolvency Professionals

IP: Insolvency Professional

CIRP: Corporate insolvency resolution process

IRP: Interim Resolution Professional

AR: Authorised Representative

COC: Committee of Creditors

CD: Corporate Debtor

FC: Financial Creditor

OC: Operational Creditor

IBC/Code: Insolvency and Bankruptcy Code, 2016

C.A. No. : Company Application No.

C.P. No. : Company Petition No.

M.A. No.: Miscellaneous Application No.

"The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster- Supreme Court in Swiss Ribbons v. Union of India (2019)"

List of Issues:

OVER-RIDING EFFECT OF IBC

CASE NO. 1

"The provisions of Insolvency and Bankruptcy Code, 2016 would have an over-riding effect over the Tea Act, 1953."

IN THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction
Duncans Industries Ltd.
Versus.
A. J. Agrochem
C.A. No.5120 of 2019
Date of Order: October 04, 2019

Section 238 of the Insolvency and Bankruptcy Code, 2016 (Code) - Provisions of this Code to override other laws, Section 16 (G) of the Tea Act, 1953

Brief Facts:

Respondent, Operational Creditor made an application u/s 9 of the IBC to NCLT for initiation of CIRP against Appellant, Corporate Debtor. Corporate Debtorowns and managestea gardens.

Initiation of proceedings under IBC was opposed by the Corporate Debtor solely on the ground that, asprovided under Section 16G(1)(c) of the Tea Act, once themanagement of tea unit has been taken over by the CentralGovernment, then the proceedings for winding up or appointmentof receiver cannot be initiated without the consent of the CentralGovernment.

NCLT vide its order dated 5th October, 2018 held that in view of thestatutory provisions under Section 16G of the Tea Act and as theprior consent of the Central Government has not been obtained,the proceedings under Section 9 of the IBC shall not bemaintainable.

In an appeal before NCLAT, NCLAT reversed the order of NCLT and held that the application u/s 9 of the IBC would be maintainable even without the consent of Central Government in terms of Section 16(G) of the Tea Act.

An appeal was filed in the Supreme Court by the Corporate Debtor against the order of NCLAT.

Decision:

Hon'ble Supreme Court observed that by notification issued under Section 16E of the Tea Act, the Central Government authorized the Tea Board to take over the management and control of the seven tea estates of the Corporate Debtor. However, the Corporate Debtor challenged the notification and High Court permitted the Corporate Debtor to continue with management of the tea estates. Taking over the actual management and

control by theCentral Government or by any person or body of personsauthorised by the Central Government is sine qua non beforeSection 16G of the Tea Act is made applicable. Therefore, in the given CaseSection 16G(1)(c) shall not be applicable. Further, the Insolvency and Bankruptcy Code, 2016 is a complete Code in itself.

Hon'ble Supreme Court noted its earlier decision in Case of ***Swiss Ribbons Pvt. Ltd. &Innoventive Industries Ltd. v. ICICI Bank*** and held as follows:

"Section 16G(1)(c) refers to the proceeding for winding up of such company or for the appointment of receiver in respect thereof. Therefore, as such, the proceedings under Section 9 of the IBC shall not be limited and/or restricted to winding up and/or appointment of receiver only. The winding up/liquidation of the company shall be the last resort and only on an eventuality when the corporate insolvency resolution process fails.

... the entire "corporate insolvency resolution process" as such cannot be equated with "winding up proceedings". Therefore, considering Section 238 of the IBC, which is a subsequent Act to the Tea Act, 1953, shall be applicable and the provisions of the IBC shall have an overriding effect over the Tea Act, 1953. Any other view would frustrate the object and purpose of the IBC."

Hon'ble Supreme Court vide its order dated 4th October, 2019 has clarified that the insolvency proceedings initiated under Section 7 or Section 9 by the FC or the OC respectively shall be maintainable even without obtaining Central Government's consent and dismissed the appeal.

(*In favor of Respondent)

CASE NO.2

"The Limitation Act, 1963 will apply to applications that are made under Section 7 and/or Section 9 of the Code on and from its commencement on 01.12.2016 till 06.06.2018."

IN THE SUPREME COURT OF INDIA
B.K. Educational Services Private Limited (Appellant)
Versus.
Parag Gupta and Associates (Respondents)
in
Civil Appeal No.23988 of 2917
Date of Order: October 11, 2018

Section 238A – Applicability of provisions of the Limitation Act, 1963- whether the Limitation Act, 1963 will apply to applications that are made under Section 7 and/or Section 9 of the Code on and from its commencement on 01.12.2016 till 06.06.2018.

Brief Facts:

The NCLT, in this Case, held that documents submitted by Applicants were not justifiable for the purpose of extending the limitation.

The amounts as stated by the petitioner are not legally recoverable. Although the liability sum which was given on 25 February 2015, it was at liberty to be recovered. The NCLT held that there were no need of further actions and had disposed of the application. The order was challenged by the Financial Creditor, who appealed against the NCLT order before the NCLAT.

Opposed to the NCLT order, the NCLAT held that the Limitation Act provisions were not applicable for the commencement of Corporate Insolvency Resolution Process (CIRP) under the Code and further passed the order to accept the application for initiation. Resultant upon this, the Apex Court had stayed the order of the NCLAT dated 7 November 2017. The Supreme Court held the provisions of the Limitation Act applicable for initiation of Corporate Insolvency Resolution Process.

This Case emanates from falsification of accounts of B K Educational Services which was incorporated with the Registrar of Companies, Delhi. The question raised by the appellants in these appeals is as to whether the Limitation Act, 1963 will apply to applications that are made under Section 7 and/or Section 9 of the Code on and from its commencement on 01.12.2016 till 06.06.2018.

Decision:

Hon'ble Supreme Court stated that the definition of "*Adjudicating Authority*" in Section 5(1) of the Code, together with Sections 408, 424 and 433 of the Companies Act, 2013, make it clear that proceedings before the National Company Law Tribunal arising under

the Code would be covered by the Limitation Act via Section 433 of the Companies Act from the very inception or commencement of the Code.

Hon'ble Supreme Court also mentioned that the definition of "default" in Section 3 (12) of the IBC uses the expression "due and payable" followed by the expression "and is not paid by the debtor or the corporate debtor". "Due and payable" in Section 3 (12) of the IBC, therefore, only refers to the whole or part of a debt, which when referring to the date on which it becomes "due and payable", is not in fact paid by the corporate debtor. The context of this provision, Section 3 (12) of the IBC, is therefore the actual non-payment by the corporate debtor when a debt has become due and payable. Thus, the IBC cannot be employed as a means for granting fresh lease of life to time-barred debts/dues/claims.

On the question of retrospective application, limitation being procedural in nature would ordinarily be applied retrospectively. In the present Case, these observations are apposite in view of what has been held by the Appellate Tribunal. An application that is filed in 2016 or 2017, after the Code has come into force, cannot suddenly revive a debt which is no longer due as it is time-barred.

It was concluded that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, except in those Cases where, by reason of the facts of the Case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.

The application of this Case was seen in the Supreme Court order dated 02.09.2019 in the matter of ***Vashdeo R Bhojwani V. Abhyudaya Co-Operative Bank Ltd &Anr***., wherein the Apex Court held that "*A petition under Section 7 was admitted on 05.03.2018 by the NCLT, stating that as the default continued, no period of limitation would attach and the petition would, therefore, have to be admitted*."

(**In favor of the Respondent***)**

CASE NO.3

"The date of coming into force of the IBC does not and cannot form a trigger point of limitation for applications filed under the Code*."*

IN THE SUPREME COURT OF INDIA
Sagar Sharma &Anr. (Appellant)
Versus
Phoenix Arc Pvt. Ltd. &Anr. (Respondent)
Civil Appeal No.7673 of 2019
Date of Order: September 30, 2019

Section 238A – Applicability of provisions of the Limitation Act, 1963- Limitation Act, 1963 will apply to applications that are made under Section 7 and/or Section 9 of the Code on and from its commencement on 01.12.2016 till 06.06.2018-Article 137 of Limitation Act-appeal allowed.

Brief Facts:

There was a deed of mortgage which was executed between the parties in this Case. Subsequently, an application under Section 7 of the Code was filed which was observed to not purport to be an application to enforce any mortgage liability.

It is an application made by a financial creditor stating that a default, as defined under the Code, had been made, which default amounts to Rs. 1,00,000/- (one lakh) or more which then triggers the application of the Code on settled principles that have been laid down by several judgments.

An appeal was made in the Hon'ble Supreme Court on the following statement made in the impugned order, "*13. Admittedly, 'I&B Code' has come into force since 1st December, 2016, therefore, the right to apply accrued to 1st Respondent on 1st December, 2016. Therefore, we hold that the application under Section 7 was not barred by limitation.*"

Decision:

The Hon'ble Supreme Court in held that "*the date of coming into force of the IBC does not and cannot form a trigger point of limitation for applications filed under the Code. Equally, since 'applications' are petitions which are filed under the Code, it is Article 137 of the Act which will apply to such applications.*" It is thus evident that the limitation period is calculated from the date of default irrespective of the IBC's coming into force on December 1, 2016.

The Hon'ble Apex Court also placed reliance on ***B.K. Educational Services Private Limited Versus. Parag Gupta and Associates (2018 SCC OnLine SC 1921 in paragraphs 2, 20, 38, 43, 48 & 49)***wherein it had made clear that the Insolvency and Bankruptcy Code's coming into force on 01.12.2016 is wholly irrelevant to the triggering

of any limitation period for the purposes of the Code. The appeal was allowed and the statement made in the impugned order was set aside.

***(*In favor of Appellant*)**

CASE NO.4

The commercial insolvency should be pleaded and proved at the admission stage itself as the limitation period starts from the date of default.

IN THE SUPREME COURT OF INDIA
Jignesh Shah &Anr. (Petitioners)
Versus
Union of India &Anr. (Respondent)
Writ Petition (Civil) No.455 of 2019
With
Civil Appeal No. _____ of 2019
(Arising out of Special Leave Petition (Civil) No. _____of 2019 (Diary No.13468 of 2019)
With
Transfer Petition (Civil) No.817 of 2019
With
Civil Appeal No. 7618-19 of 2019 (D. No.16521 of 2019)
With
Writ Petition (Civil) No.645 of 2019
Date of Order: September 25, 2019

Section 7 of the Insolvency and Bankruptcy code, 2016-Section 433 and 434 of the Companies Act, 1956- Section 238A – Applicability of provisions of the Limitation Act, 1963 - Article 137 of Limitation Act-appeal allowed-impugned order set aside.

Brief Facts:

A Share Purchase Agreement was executed between Multi-Commodity Exchange India Limited (MCX), MCX Stock Exchange Limited (MCX-SX) and IL&FS Financial Services Ltd.(IL&FS) on 20.08.2009. As per the said Agreement, IL&FS agreed to purchase 442 lakh equity shares of MCX-SXfrom MCX. After this Agreement, La-Fin Financial Services Pvt. Ltd. (La-Fin), a group company of MCX, gave a Letter of Undertaking to IL&FS stating that La-Fin or its appointed nominees would offer to purchase from IL&FS the shares of MCX-SX after a period of one year, but before a period of three years, from the date of investment.

This period of three years expired in August, 2012. IL&FS communicated via a letter to La-Fin to purchase the equity shares in MCX-SX pursuant to the Letter of Undertaking. La-Fin in response replied that there was no legal or contractual obligation for it to buy back the equity shares. Correspondence for settlement continued between the parties and continued for almost 10 months.

Thereafter, a suit came to be filed by IL&FS before the Hon'ble Bombay High Court for specific performance of the said Letter of Undertaking. The date of cause of action for the suit was mentioned as 16.08.2012, the date on which La-Fin denied the obligation. The Hon'ble High Court while passing an injunction order restrained La-Fin from alienating

its assets till the pendency of the proceedings before the Hon'ble Court. It was further directed that the properties of La-Fin be attached by the Economic Offences Wing of the Mumbai Police during pendency of the suit. Appeal of La-Fin challenging the injunction order was dismissed by the Hon'ble Bombay High Court.

On 03.11.2015, statutory notice under Section 433 and 434 of the Companies Act, 1956 was issued by IL&FS against La-Fin. The notice stated that an amount of Rs. 232,50,00,000/- is recoverable from La-Fin. La-Fin replied to the notice disputing the averment that any amount due is due or payable to IL&FS. Subsequently, a winding up petition was filed by IL&FS against La-Fin in the Hon'ble Bombay High Court under Section 433(e) of the erstwhile Companies Act, 1956 for the reason that La-Fin had become commercially insolvent and was unable to pay its debt.

Thereafter coming into force of Insolvency and Bankruptcy Code, 2016, the matter was transferred to the NCLT under Section 7 of the Code with La-Fin as the Corporate Debtor and IL&FS as the Financial Creditor. The NCLT admitted the application of the Financial Creditor and aggrieved by the same, the Corporate Debtor approached the NCLAT which dismissed the appeal.

The NCLAT observed that the transaction between the Financial Creditor and the Corporate Debtor constituted a financial debt and therefore, the bar of limitation would not be applicable in the present factual matrix as the winding up petition was filed within 3 years from the date of Insolvency and Bankruptcy Code, 2016coming into force. As a result, writ petition challenging the constitutionality of certain provisions of the Insolvency and Bankruptcy Code, 2016 came to be filed before the Hon'ble Supreme Court of India. A separate writ petition was filed against the order of the NCLAT whereby winding up proceedings were initiated against the Corporate Debtor.

Decision:

Hon'ble Supreme Court observed that the introduction of Section 238A in the Insolvency and Bankruptcy Code, 2016 provides that the provisions of the Limitation Act, 1963 become applicable to all the applications made under the Code as has been decided in the Case of ***B.K. Educational Services Private Limited Versus. Parag Gupta and Associates.*** For the winding up petitions filed before the coming into force of Insolvency and Bankruptcy Code, 2016, such petitions would be converted to be applications filed under the Code.

It was observed by the Hon'ble Apex Court that if any suit for recovery is filed before the winding up petition, in such a scenario the period of limitation for the winding up suit will neither be increased nor be revived. The date for both the suits will be calculated from the date of default itself as once the time begins to run, it can only be extended in consonance with the provision of the Limitation Act and not otherwise.

Hon’ble Supreme Court further pointed out upon perusal Section 433(e) read with Section 434 of the erstwhile Companies Act, 1956, the trigger point for the purpose of limitation for filing of a winding up suit under the said Sections would be the date on which default of payment was made.

Further, it observed that the commercial insolvency should be pleaded and proved at the admission stage itself as the limitation period starts from the date of default. The Hon’ble Court remarked that bonafide of the dispute is to be adjudged for each Case individually. In light of the above observations, the Hon’ble Court disposed of the petition directing that as the winding up petition was filed after a lapse of 3 years, which is beyond the period of limitation provided under Article 137 of the Limitation Act, 1963, the same was time-barred. Therefore, the impugned order of NCLAT directing winding up was quashed and set-aside. The appeal was allowed.

(In favor of Appellant)***

CASE NO.5

"The Report of the Insolvency Law Committee itself stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred."

IN THE SUPREME COURT OF INDIA
Gaurav Hargovindbhai Dave (Appellant)
Versus
Asset Reconstruction Company (India)Ltd.&Anr.(Respondent)
Civil Appeal No. 4952 of 2019
Date of Order: September 18, 2019

Section 7 of the Insolvency and Bankruptcy code, 2016- Section 238A – Applicability of provisions of the Limitation Act, 1963 - Article 137 of Limitation Act-appeal allowed - impugned order of NCLT and NCLAT set aside.

Brief Facts:

The Respondent was declared NPA on 21.07.2011. At that point of time, the State Bank of India filed two Applications in the Debt Recovery Tribunal in 2012 in order to recover a total debt of 50 crores of rupees.

In the meanwhile, by an assignment dated 28.03.2014, the State Bank of India assigned the aforesaid debt to the other Respondent. The Debt Recovery Tribunal proceedings reached judgment on 10.06.2016, with the Tribunal holding that the O.As filed before it were not maintainable.

An independent proceeding was then begun by Respondent on 03.10.2017 being in the form of a Section 7 application filed under the Insolvency and Bankruptcy Code in order to recover the original debt together with interest which now amounted to about 124 Crores of rupees. In the Form-I that has statutorily to be annexed to the Section 7 application in Column II which was the date on which default occurred, the date of the NPA i.e. 21.07.2011 was filled up. The NCLT applied Article 62 of the Limitation Act and concluded that since the limitation period was 12 years from the date on which the money suit has become due, the aforesaid claim was filed within limitation and hence admitted the Section 7 application.

The NCLAT *vide* the impugned judgment held,that the time of limitation would begin running for the purposes of limitation only on and from 01.12.2016 which is the date on which the Insolvency and Bankruptcy Code was brought into force and consequently dismissed the appeal.

Decision:

Hon'ble Supreme Court held that what was apparent was that Article 62 was out of the way on the ground that it would only apply to suits. The present Case being "an application" which is filed under Section 7, would fall only within the residuary article 137.

Hon'ble Apex Court also held that, time, therefore, begins to run on 21.07.2011, as a result of which the application filed under Section 7 would clearly be time-barred. Reliance was also placed on ***B.K. Educational Services Private Limited Versus. Parag Gupta and Associates*** and the Report of the Insolvency Law Committee which itself stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred.

Hon'ble Supreme Court concluded that it is not for the Court to interpret, commercially or otherwise, articles of the Limitation Act when it was clear that a particular article gets attracted. It is well settled that there is no equity about limitation -judgments have stated that often time periods provided by the Limitation Act can be arbitrary in nature. The appeal was allowed.

***(*In favor of Appellant*)**

CASE NO.6

"CIRP time period extended for failure of implementation of Resolution Plan owing to non fulfilment of commitment by Resolution Applicant."

IN THE SUPREME COURT OF INDIA
Committee of Creditors of Amtek Auto Limited Through Corporation Bank
Versus.
Dinkar T. Venkatsubramanian&Ors.
Civil Appeal No. 6707 of 2019
Date of Order: September 24, 2019

Section 12- extension of time limit of CIRP Period- non fulfillment of Resolution Plan- Amendment Bill, 2019- resolution process may be permitted to be completed within 90 days from the date of the commencement of the Amendment Act- allowed.

Brief Facts:

The Corporate Insolvency Resolution Process of Amtek Auto was initiated on July 24, 2017 by the NCLT and lenders of the company had selected the resolution plans by two firms – Liberty House and Deccan Value, which later withdrew from the race. A revised plan of Liberty House was selected by the CoC on April 2, 2018 with 94.20% votes and the same was upheld by the NCLT on July 25, 2018.

Liberty House was selected as the highest bidder by the Committee of Creditors (CoC) of Amtek Auto. However, it later backed out citing some reasons, following which lenders requested for another 90 days to find a new buyer. However, the NCLAT had in August declined CoC's request for extension of the insolvency resolution process deadline and passed a liquidation order against Amtek Auto on 16th August 2019.

The contention of the Applicants was that the Corporate Debtor being a viable company should not be pushed into liquidation keeping in mind the basic tenants of the Code as well. It was also pointed out that expression of interest have already been indicated by eight other parties. Attention was also been drawn to the third proviso by virtue of the Amendment Bill, 2019 with effect from 16.08.2019, by which the resolution process may be permitted to be completed within 90 days from the date of the commencement of the Amendment Act. The said period would be available upto15th November, 2019.

It was prayed that the Resolution Professional may be permitted to invite the fresh offers within a period of 21 days as an earlier offer had been invited and considering the time limit of 15.11.2019, 21 days may be fixed instead of 30 days for submission of the offer.

Decision:

Hon'ble Supreme Court permitted the Resolution Professional to invite fresh offers within a period of 21 days. It stated, "*let steps be taken by the Resolution Professional by tomorrow i.e. by 25.09.2019 for invitation of the fresh offers in accordance with the*

rules. Within 2 weeks thereafter, the Committee of Creditors shall take a final call in the matter and the decision of the Committee of Creditors and the offers received be placed before this Court on the next date of hearing for consideration."

A portion of the above order was later recalled by the Supreme Court in its decision dated 02nd December 2019 wherein it held that the time fixed by this Court *vide* order dated 24.09.2019 would hence be extended in view of the decision of this Court in ***Committee of Creditors of Essar Steel India Limited Versus. Satish Kumar Gupta & Ors.***

(*In favor of Appellant)

CASE NO.7

"Classification between financial creditor and operational creditor neither discriminatory, nor arbitrary, nor violative of Article 14 of the constitution of India."

IN THE SUPREME COURT OF INDIA
Swiss Ribbons Pvt. Ltd. &Anr.
Versus.
Union of India & Ors.
Writ Petition (Civil) No. 99 of 2018
With
Writ Petition (Civil) No. 100 of 2018
Writ Petition (Civil) No. 115 of 2018
Writ Petition (Civil) No. 459 of 2018
Writ Petition (Civil) No. 598 of 2018
Writ Petition (Civil) No. 775 of 2018
Writ Petition (Civil) No. 822 of 2018
Writ Petition (Civil) No. 849 of 2018
Writ Petition (Civil) No. 1221 of 2018
Special Leave Petition (Civil) No. 28623 of 2018
Writ Petition (Civil) No. 37 of 2019
Date of Order: January 25, 2019

Constitutional validity of various provisions of the Insolvency and Bankruptcy Code, 2016-gave sanction to Insolvency and Bankruptcy Code, 2016 recognizing its constitutional validity-disposed of.

Brief Facts:

The petitions were filed assailing the constitutional validity of various provisions of the Insolvency and Bankruptcy Code, 2016.

The differences between Financial and Operational creditors were said to be violative of Article 14 of the Constitution of India.

Decision:

The Hon'ble Supreme Court gave a significant verdict, in the above said Case, and gave sanction to Insolvency and Bankruptcy Code, 2016 recognizing its constitutional validity.

Most FCs are secured creditors, whereas most OCs are unsecured. Nature of loan agreements with FCs is different from contracts with OCs for supplying goods or services. FCs generally lend finance on a term loan or for working capital that enables the CD to either set up and/or operate its business. On the other hand, contracts with OCs are relatable to supply of goods and services in the operation of business.

Financial contracts generally involve large sums of money. Operational contracts have dues whose quantum is generally less. In the running of a business, OCs can be many as opposed to FCs, who lend finance for the set up or working of business. FCs have specified repayment schedules, and defaults entitle them to recall a loan in totality whereas contracts with OCs do not have any such stipulations.

There is difference in dispute resolution of FCs and OCs. Contracts with OCs can and do have private arbitration clauses for dispute resolution, whereas, in loan contracts no such facility. Operational debts tend to be recurring in nature and possibility of genuine disputes in Case of operational debts is much higher when compared to financial debts. Goods supplied or services provided by OCs may be substandard or goods may not have been supplied at all. These qua operational debts are matters to be proved in arbitration or in the courts of law.

On the other hand, financial debts made to banks and financial institutions are well-documented and defaults made are easily verifiable. FCs are from the very beginning involved with assessing the viability of the CD. FCs can, therefore do, engage in restructuring of the loan as well as re-organisation of the CD's business when there is financial stress, which are things OCs do not and cannot do.

There is an intelligible differentia between the FCs and OCs which has a direct relation to the objects sought to be achieved by the Code. Classification between FCs and OCs is neither discriminatory, nor arbitrary, nor violative of Article 14.

***(*In favor of Respondent*)**

CASE NO.8

"Supreme Court directed eviction of promoters for abuse of privilege granted by the Court."

IN THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction
Punjab National Bank &Anr.
Versus.
Ajmer Singh Bhullar &Ors.
M.A. No. 873 of 2019 and CA No. 9973 OF 2018
Date of Order: August 09, 2019

Section 30 of Insolvency and Bankruptcy Code-matter for liquidation- abuse of privilege by promoters-allowed appeal.

Brief Facts:

In the matter of Punjab National Bank & Anr. V. Ajmer Singh Bhullar & Ors., Civil Appeal No. 9973 of 2018, six resolution plans were considered and rejected by the Committee of Creditors (CoC). The CoC opined under Section 30 of the Code that the matter should proceed for liquidation.

The Hon'ble Supreme Court vide its order dated 25.09.2018 recorded that a logical culmination must take place in a winding up of the corporate debtor, and also recorded that the promoter directors may not be evicted till such time that it is necessary to evict them once the winding up process actually commences. Further, the promoter directors were directed to cooperate with the Resolution Professional and not instigate any workers so far as the rest of the property is concerned.

The liquidation process had begun. A miscellaneous application was then filed by Punjab National Bank beforeHon'ble Supreme Court wherein it was informed and particularly on a reading of the Press Release dated 27th and 29th October, 2018, it was clear that contrary to the order of Supreme Court, the promoter directors were abusing the privilege granted by the Court.

Decision:

Therefore, the Hon'ble Supreme Court vide its order dated 09.08.2019 directed the respondents be evicted, with police help, if necessary, within a period of four weeks from the date of order.

***(*In favor of Appellant*)**

CASE NO.9

"Role and Powers of Resolution Professional in Resolution Plan."

IN THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction
K. Sashidhar
Versus.
Indian Overseas Bank & Ors.
C.A. No.10673 OF 2018, C.A. No.10719 of 2018,
C.A. No.10971 of 2018 and SLP (C) No.29181 of 2018
Date of Order: February 5, 2019

Section 30 of the Insolvency and Bankruptcy Code, 2016 - Submission of resolution plan

Decision:

The Hon'ble Supreme Court while deciding the Civil Appeal in the matter of K. Sashidhar v. Indian Overseas Bank & Ors. observed that the CoC is called upon to consider the resolution plan under Section 30(4) of the I&B Code **after it is verified and vetted by the resolution professional as being compliant with all the statutory requirements specified in Section 30(2).**

The enquiry by the Resolution Professional precedes the consideration of the resolution plan by the CoC. **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.**

***(*In favor of Respondent*)**

CASE NO.10

"Section 30(2)(e) does not empower the Resolution Professional to "decide" whether the resolution plan does or does not contravene the provisions of law."

IN THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction
Arcelormittal India Private Limited
Versus.
Satish Kumar Gupta & Ors.
C.A. No.9402-9405 of 2018 and C.A. No.9582 of 2018
Date of Order: October 4, 2018.

Section 29A of the Insolvency and Bankruptcy Code (IBC), 2016 - Persons not eligible to be resolution applicant, Section 30 of the IBC, 2016 - Submission of resolution plan

Brief Facts:

One of the issues in Arcelor Mittal India Private Limited V. Satish Kumar Gupta & Ors. was that the Resolution Professional found both the Resolution Applicants namely Arcelor Mittal India Private Limited and Numetal to be ineligible under Section 29A of the Insolvency and Bankruptcy Code, 2016 and therefore refused to place their resolution plan before the Committee of Creditors. The Resolution Professional rejected the Resolution Plans.

Decision:

In this regard the Hon'ble Supreme Court stated that Resolution Professional is required to examine that the resolution plan submitted by various applicants is complete in all respects, before submitting it to the Committee of Creditors**. The Resolution Professional is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it.** The fact that the Resolution Professional is also to confirm that a resolution plan does not contravene any of the provisions of law for the time-being in force, including Section 29A of the Code, only means that his prima facie opinion is to be given to the Committee of Creditors that a law has or has not been contravened. Section 30(2)(e) does not empower the ResolutionProfessional to **"decide"** whether the resolution plan does or does not contravene the provisions of law.

The Hon'ble Supreme Court also stated that the importance of the Resolution Professional is to ensure that a resolution plan is complete in all respects, and to conduct a due diligence in order to report to the Committee of Creditors whether or not it is in order. Even though it is not necessary for the Resolution Professional to give reasons while submitting a resolution plan to the Committee of Creditors, it would be in the fitness of things if he appends the due diligence report carried out by him with respect to each of the resolution plans under consideration, and to state briefly as to why it does or does not conform to the law.

***(*In favor of Appellant*)**

CASE NO.11

"In Case no Committee of Creditors was appointed as the interim resolution process did not reach that stage, the fees of interim resolution professional will be borne by the creditor who moved the application."

IN THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction
S3 Electricals and Electronics Private Limited
Versus.
Brian Lau &Anr.
C.A. No.103 OF 2018 and 835 OF 2018
Date of Order: August 05, 2019

Regulation 33 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

Brief Facts:

An appeal was preferred before the Hon'ble Supreme Court of India, impugning order dated 2nd August, 2017 issued by Hon'ble NCLAT, wherein application admitted under Section 7 of the Insolvency and Bankruptcy Code, 2016 against "S3 Electricals and Electronics Private Limited" was dismissed and Adjudicating Authority was directed to fix the fee of Interim Resolution Professional and the Corporate Debtor will pay the fees of the Interim Resolution Professional, for the period he has functioned.

Regulation 33 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reads as follows:-

"*33. 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 fix 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.
[Explanation.- For the purposes of this regulation, "expenses" include the fee to be paid to the interim 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 interim resolution professional.]"

Decision:

The Hon'ble Supreme Court observed 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. However, in this

Case, no Committee of Creditors was ever appointed as the interim resolution process did not reach that stage.

The Hon'ble Supreme Court held that in these circumstances, it is clear that whatever the Adjudicating Authority fixes as expenses will be borne by the creditor who moved the application.

In view of the aforesaid observation, Hon'ble Supreme Court vide its order dated 05.08.2019 set aside the impugned judgement dated 02.08.2017 issued by Hon'ble NCLAT to the extent that the expenses as fixed by the Adjudicating Authority are to be paid by the corporate debtor and allowed the appeal to this extent.

***(*In favor of Appellant*)**

CASE NO.12

"Supreme Court deleted the observations made by NCLAT against the Insolvency Professional."

IN THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction
Devendra Padamchand Jain
Versus.
State Bank of India & Ors.
C.A. No.3592 OF 2018
Date of Order: April 13, 2018

Section 30 of the Insolvency and Bankruptcy Code, 2016 - Submission of resolution plan, Section 34 of the Insolvency and Bankruptcy Code, 2016 - Appointment of liquidator and fee to be paid

Brief Facts:

The Hon'ble NCLT, Hyderabad Bench in VNR Infrastructures Limited Versus. State Bank of India & Ors (CA No 142 of 2017 in CP (IB) No. 12/10/HDB/2017) passed an order for liquidation of the Corporate Debtor and observed that the new /competent liquidator should be appointed in the interest of all the stakeholders especially employees, secured creditors, unsecured creditors, various government authorities. In the said Case, NCLT was also of the prima facie view that the existing Resolution Professional has not assisted the Adjudicating Authority to the satisfaction during various hearings held. Though the Committee of Creditors consented to propose the name of existing Resolution Professional as Liquidator, NCLT observed that in view of its observations (as stated above) , the adjudicating authority would like to appoint the liquidator after obtaining the name of liquidator from the IBBI for replacing the existing Resolution Professional.

An appeal was preferred by the then Resolution Professional against the aforesaid order with NCLAT. The main appeal of the appellant was that replacing the appellant and appointing another Insolvency Professional as Liquidator is beyond jurisdiction of NCLT. The learned counsel appearing on behalf of the appellant submitted that as per sub-section (1) of Section 34 of the Adjudicating Authority while passing the order for liquidation of the corporate debtor under section 33 is required to appoint the resolution professional as the liquidator for the purpose of resolution process under Chapter II. The Adjudicating Authority can only replace the resolution professional, for the reasons mentioned in sub-section (4) of Section 34.

Section 34 (4) of the Insolvency and Bankruptcy Code, 2016 provides that:

"The Adjudicating Authority shall by order replace the resolution professional, if—
(a) the resolution plan submitted by the resolution professional under section 30 was rejected for failure to meet the requirements mentioned in sub-section (2) of section 30; or
(b) the Board recommends the replacement of a resolution professional to the Adjudicating Authority for reasons to be recorded in writing."

Section 30(2) of the Insolvency and Bankruptcy Code, 2016 provides that:

"*The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—*
(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;
(b) provides for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;
(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;
(d) the implementation and supervision of the resolution plan;
(e) does not contravene any of the provisions of the law for the time being in force;
(f) conforms to such other requirements as may be specified by the Board."

Hon'ble NCLAT observed that the Resolution Professional was not assisting the Adjudicating Authority to its satisfaction during hearing. The Resolution Professional (appellant herein) was required to examine the Resolution Plan but had not stated that the plan submitted by him provides for all the requirements as provided under subsection (2) of Section 30.

The Hon'ble NCLAT held that the Adjudicating Authority has jurisdiction to remove the resolution professional if it is not satisfied with its functioning of the resolution professional, which amounts to non-compliance of sub-section (2) of Section 30 of the I & B Code. The appeal was dismissed.

An appeal was preferred before the Hon'ble Supreme Court against the order of NCLAT.

Decision:

The Hon'ble Supreme Court did not find any merit in the appeal and dismissed the same. However, the Hon'ble Supreme Courtdeleted the observations made in the impugned orders against the Insolvency Professional.

(*In favor of Respondent)

CASE NO. 13

"Upon commencement of the resolution process under the Code, powers of the Board of Directors of the company stand suspended and are vested in and exercised by the Resolution Professional."

IN THE SUPREME COURT OF INDIA
Vijay Kumar Jain (Appellant)
Versus
Standard Chartered Bank & Ors. (Respondent)
Civil Appeal No.8430 Of 2018
With
Writ Petition (Civil) No.1266 Of 2018

Date of Order: January 31, 2019

Sections 24, 25, 29 and 31 of the Code together with Regulations- whether the directors should be given copies of the resolution plans and other confidential documents that the COC considers during the meetings-positions of conflict between the suspended Board, who often submit resolution plans or are applicants under Section 12A, and the other participants-appeal allowed.

Brief Facts:

A director of a company in CIRP had moved the Hon'ble NCLT, Mumbai Bench, seeking the right to participate in the meetings of the COC and access all the documents and/or information including the resolutions plans being discussed in the meetings of the COC, for effective participation in the meetings.

The Hon'ble NCLT on August 1, 2018 held that the directors have the right to attend the COC meetings as per Section 24 of the Code. However, the directors could not receive information that is considered confidential by the resolution professional or the COC, including the resolution plans.

In the first appeal, the decision of the NCLT was upheld by the appellate tribunal on August 9, 2018. The director then moved the Supreme Court, challenging the decision of the appellate tribunal.

Decision:

The Hon'ble Supreme Court held that the scheme of the Code makes it clear that the directors, though not members of the COC, have a right to participate in every meeting of the COC. In addition, for effective participation as vitally interested parties in discussion on resolution plans, they have the right to receive copies of the resolution plans presented to the COC.

The Hon’ble Supreme Court also clarified that under Regulation 21(3)(iii) of the CIRP Regulations, the notice of the COC meeting, which is required to be given to the directors as well, must contain copies of all the documents relevant for matters to be discussed, including the resolution plans.

The Hon’ble Supreme Court also clarified that any concerns over breach of confidentiality may be alleviated by the resolution professional obtaining a confidentiality undertaking from the directors, which may also contain an indemnity to the resolution professional against any breach.

(*In favor of Appellant)

CASE NO. 14

"A secured creditor has the right to file a winding up petition after such secured creditor has obtained a decree from the Debts Recovery Tribunal ('DRT') and a recovery certificate based thereon."

IN THE SUPREME COURT OF INDIA
Swaraj Infrastructure Pvt. Ltd. (Appellant)
Versus.
Kotak Mahindra Bank Ltd. (Respondent)
Civil Appeal No. 1291 of 2019
With
Civil Appeal No.1292 Of 2019
(Arising Out of SLP (Civil) No.6458 of 2018)
Civil Appeal No.1294 of 2019
(Arising Out of SLP (Civil) No.6571 of 2018)
Civil Appeal No.1293 of 2019
(Arising Out of SLP (Civil) No.6597 of 2018)

Date of Order: January 29, 2019

Section 17,18,19 of Recovery of Debt Act-section 433 and 434 of Companies Act, 1956- Whether a secured creditor has a right to file a winding-up petition under Companies Act, 1956 after such secured creditor has obtained a decree from the Debt Recovery Tribunal (DRT) and a recovery certificate based thereon under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("Recovery of Debt Act") -appeal dismissed.

Brief Facts:

The Kotak Mahindra Bank had obtained a recovery certificate against Swaraj Infrastructure Pvt. Ltd. from the DRT, Mumbai, but various attempts to auction the secured assets yielded no results. In consequence, the Respondent filed a winding up petition against the Appellant which was admitted by the Bombay High Court.

Aggrieved by the admission of the winding up petition, the Appellant appealed before the Division Bench of the Bombay High Court and argued that:

(i) once a secured creditor has obtained an order from the DRT, and a recovery certificate has been issued thereupon, such secured creditor cannot file a winding up petition as the Recovery of Debts and Bankruptcy Act, 1993 (RDB Act) is a special act which vests exclusive jurisdiction in the DRT

(ii) a secured creditor can file a winding up petition after giving up its security. However, these contentions did not find favour with the Division Bench, which dismissed the appeals in question. The Appellant thus preferred the present appeal before the Supreme Court.

To decide the maintainability of a winding-up petition before the Companies Act, when a decree has been obtained from the DRT, the proceedings before the Supreme Court revolved around the two main issues – exclusive jurisdiction of the DRT and the requirement of relinquishment of securities before filing a petition for winding-up.

Decision:

The Supreme Court analyzed various provisions of the Companies Act, 1956 and the RDB Act to hold that the a winding up petition cannot be referred to as a proceeding for realization of debts and would therefore, not be covered by the language of Section 17 read with Section 18 of the RDB Act. Further, as winding up under the Companies Act is not "for recovery of debts" due to banks, the bar contained in Section 18 read with Section 24 of the RDB Act would not apply to such winding up proceedings. Therefore, the Supreme Court held that a secured creditor is not barred from initiating winding up proceeding after obtaining a recovery certificate.

The Supreme Court further observed that the Companies Act, 1956 does not require the secured creditor to relinquishing its security before filing the winding up petition. The secured creditor is required to elect on the relinquishment of its security only after the debtor is adjudged insolvent.

Although the Supreme Court dismissed the appeal, it held that a secured creditor should not "blow hot and cold" in attempting to avail more than one remedy at the same time to recover its legitimate dues.

(**In favor of Respondent***)**

"Judgment that refused to transfer the winding up proceedings pending before it was dismissed."

IN THE SUPREME COURT OF INDIA
Jaipur Metals & Electricals Employees Organisation
through General Secretary Mr. Tej Ram Meena (Appellant)
Versus.
Jaipur Metals & Electricals Ltd
Through its Managing Director & Ors (Respondents)
Civil Appeal no. 12023 of 2018
(Arising out of SLP (Civil) No 18598 of 2018)
Date of Order: December 12, 2018

Section 434- Rule 5 (in particular rule 5(2)) and 6 of Companies (Transfer of Pending Proceedings) Rules, 2016- . Rule 5(2) dealt with continuation of winding up proceedings with High Court pursuant to section 20 of the SIC Act-Section 7, 238 and 255 of IBC- appeal dismissed.

Brief Facts:

The High Court registered the Case as Company Petition No. 19/2009 on opinion of BIFR. Considering writ petition filed by workers union, the High Court directed the Official Liquidator provisionally attached to the Court, and to join in the evaluation of the value of goods and material lying in the factory premises of the company so that dues of the workmen could be paid.

Meanwhile, NCLT passed order to initiate CIRP under section 7 of IBC referring to non-obstante clause contained in Section 238 of the IBC, 2016 and conditions under section 7 of IBC being fulfilled.

The High Court, by an interim order stayed the order passed by NCLT to initiate CIRP against the Corporate Debtor. Against this order, a Special Leave Petition (SLP) was preferred in which Supreme Court dismissed the SLP as withdrawn and directed the petitioner to make submissions before the High Court in the pending company petition and allied matters.

The High Court then passed the impugned judgment in which it refused to transfer the winding up proceedings pending before it and set aside the NCLT order stating that it had been passed without jurisdiction. On this impugned judgment of High Court, Supreme Court issued notice and stayed the operation of this impugned judgment.

The issues for consideration were whether High Court was correct in refusing to transfer proceedings pending before it to NCLT considering Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 and subsequent omission of Rule 5(2) on 29.6.2017

and treating petitions that are pursuant to Section 20 of the SIC Act as being pursuant to Section 433(f) of the Companies Act, 1956, under the just and equitable provision and applying Rule 6 of the 2016 Transfer Rules.

The Supreme Court had to decide on supremacy of NCLT order passed under section 7 read with Section 238 of IBC, 2016 *vis a vis* pending proceedings before High Court.

Decision:

The real reason for omission of Rule 5(2) in the substituted Rule 5 is because it is necessary to state, on the repeal of the SIC Act, that proceedings under Section 20 of the SIC Act shall continue to be dealt with by the High Court. Since there could be no opinion by the BIFR under Section 20 of the SIC Act after 01.12.2016, when the SIC Act was repealed, it was unnecessary to continue Rule 5(2) as, on 15.12.2016, all pending proceedings under Section 20 of the SIC Act were to continue with the High Court and would continue even thereafter. This is further made clear by the amendment to Section 434, with effect from 17.08.2018, where any party to a winding up proceeding pending before a Court immediately before commencement of IBC (Amendment) Ordinance, 2018 may file an application for transfer of such proceedings, and the Court, at that stage, may, by order, transfer such proceedings to the NCLT.

The proceedings so transferred would then be dealt with by the NCLT as an application for initiation of the corporate insolvency resolution process under the Code. The High Court judgment, therefore, though incorrect in applying Rule 6 of the 2016 Transfer Rules, can still be supported on this aspect with a reference to Rule 5(2) read with Section 434 of the Companies Act, 2013, as amended, with effect from 17.08.2018.

Section 7 application of IBC, on which an order has been passed admitting such application by the NCLT, is an independent proceeding which has nothing to do with the transfer of pending winding up proceedings before the High Court.

Section 434 of the Companies Act, 2013 is substituted by the Eleventh Schedule of the Code, yet Section 434, as substituted, appears only in the Companies Act, 2013 and is part and parcel of that Act. This being so, if there is any inconsistency between Section 434 as substituted and the provisions of the IBC, 2016, the latter must prevail.

The NCLT was absolutely correct in applying Section 238 of the Code to an independent proceeding instituted by a secured financial creditor. This being the Case, it is difficult to comprehend how the High Court could have held that the proceedings before the NCLT were without jurisdiction. On this score, therefore, the High Court judgment had to be set aside. The NCLT proceedings would continue from the stage at which they have been left off. Obviously, the company petition pending before the High Court cannot be proceeded further in view of Section 238 of IBC, 2016.

(In favor of Appellant*)**

APPLICABILITY OF SECTION 14 WITH RESPECT TO PERSONAL GUARANTOR

CASE NO. 16

"Clarity on the issue relating to applicability of moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016 on the personal guarantor."

IN THE SUPREME COURT OF INDIA
State Bank of India (Appellant)
Versus.
V. Ramakrishnan (Respondent)
Civil Appeal No. 3595 of 2018
With
Civil Appeal No.4553 Of 2018

Date of Order: August 14, 2018

Section 14 of IBC- Whether the period of moratorium under section 14 of Insolvency and Bankruptcy Code is applicable to Personal Guarantor-appeal allowed.

Brief Facts:

In February 2014, M/s. Veesons Energy Systems Private Limited (Corporate Debtor) availed credit facilities from State Bank of India (Financial Creditor). Mr. V Ramakrishna, the managing director of the company signed a personal guarantee in favor of State Bank of India. As the company did not pay its debts, the assets of the company were classified as non-performing assets on July 26, 2015.

The bank initiated proceedings under The Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI) and issued notice under section 13(2) of the SARFESI, demanding the outstanding amount from the company and the personal guarantor. As the outstanding amount was not paid within statutory period of 60 days, the Bank issued a possession notice on November 18, 2016, thereby, taking symbolic possession of the secured assets of the company.

On May 20, 2017, the company filed an application under section 10 of the Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal initiating corporate insolvency resolution process against itself. The Tribunal admitted the application and passed an order of Moratorium under section 14 of the IBC. Even after declaration of moratorium, the bank proceeded against property of personal guarantor under SARFAESI Act and issued a sale notice on July 12, 2017.

The personal guarantor approached NCLT for stay of proceeding under SARFAESI Act. The Tribunal by its order dated September 18, 2018, prohibited the Bank from proceeding against the property of personal guarantor during moratorium period. An appeal was filed by the Bank before the National Company Law Appellate Tribunal, whereby the NCLAT relying upon section 60 and section 31 of the Code, held that moratorium under section 14 will apply to personal guarantor as well.

This decision was challenged before the Hon'ble Supreme Court by the State Bank of India on the ground that the moratorium period envisaged under section 14 is applicable only to corporate debtor and the Bank can henceforth proceed against the property of personal guarantor.

Decision:

The Hon'ble Supreme Court took note of the fact that Section 14 of the Code authorizes adjudicating authority to pass an order of moratorium during which there is prohibition on institution of suits or continuation of pending suits against corporate debtor, transfer of property of corporate debtor or any action to foreclose or enforce any security interest. Section 96 and 101 of the Code provide for separate provision for moratorium for personal guarantor, however, these provisions were not brought into force at the time of this order. The Apex Court opined that section 14 of the Code cannot apply to personal guarantor.

The Hon'ble Court also highlighted the different view of Allahabad High Court in ***Sanjeev Shriya v. State Bank of India,*** where the Allahabad High Court had held that when Corporate Insolvency Resolution Process ("**CIRP**") is going on against the corporate debtor, then the debt owed by the corporate debtor is not final till the resolution plan is approved, and thus, the liability of the surety would also be unclear. Hence, till the time the liability of corporate debtor is not crystallized, the guarantor's liability is not triggered.

Hon’ble Supreme Court while overruling these judgments concluded that in a contract of guarantee, the liability of surety and that of principal debtor is co-extensive and hence, the creditor can proceed against assets of either the principal debtor, or the surety, or both, in no particular sequence.

The Apex Court also took note of report of Insolvency Law Committee dated 26.03.2018 which clarified that the period of moratorium under section 14 is not applicable to personal guarantors. The court also took into consideration the Amendment Ordinance dated 06.06.2018, which amended the provision of section 14. The proviso to amended section 14 clearly states that the moratorium period envisaged in section 14 is not applicable to personal guarantor to a corporate debtor.

Hence, as the provisions of section 96 and 101 have not been brought into force, the personal guarantor is not entitled to moratorium period under the Insolvency and Bankruptcy Code.

If there is stay on proceedings against assets of personal guarantor during corporate insolvency resolution proceeding, then the surety may file frivolous application to safeguard their assets. The apex court has remedied this situation by clarifying that Section 14 does not intend to bar actions against assets of guarantors and that the amendment in this regard is applicable retrospectively from June 6, 2018.

***(*In favor of Appellant*)**

CASE NO. 17

"The Award passed under the Arbitration Act together with the steps taken for its challenge would only make it clear that the operational debthappens to be a disputed one."

IN THE SUPREME COURT OF INDIA
K. Kishan (Appellant)
Versus.
M/s Vijay Nirman Company Pvt. Ltd. (Respondent)
Civil Appeal no. 21824 of 2017
With
Civil Appeal no. 21825 of 2017
Date of Order: August 14, 2018

Section 9 of IBC- Section 238 of IBC- Overriding effect- Whether the Insolvency and Bankruptcy Code, 2016 can be invoked in respect of an operational debt where an Arbitral Award has been passed against the operational debtor, which has not yet been finally adjudicated upon - appeals allowed.

Brief Facts:

M/s Vijay Nirman Company Pvt. Ltd.(Respondent) entered into a sub-Contract Agreement with one M/s Ksheerabad Constructions Pvt. Ltd. (for short 'KCPL') on 01.02.2008 for work of 'Construction and widening of the existing two lane highway'.

Besides that, a separate agreement of the same date was entered into between the said KPCL and one M/s SDM Projects Private Limited, Bangalore, as a result of which, a tripartite Memorandum of Understanding was entered. During the course of the project, disputes and differences arose between the parties and the same were referred to an Arbitral Tribunal, which delivered its Award on 21.01.2017. One of the claims that was allowed by the said Award was in favour of the respondent for a sum of Rs.1,71,98,302/- which arises out of certain interim payment certificates.

Another claim that was allowed related to higher rates of payment in which a sum of Rs.13,56,98,624/- was awarded. Three cross claims that were made by the Respondent were rejected. A Section 34 petition under Arbitration Act challenging the said Award filed.

According to the NCLT, the fact that a Section 34 petition was pending was irrelevant for the reason that the claim stood admitted, and there was no stay of the Award. For these reasons, the Section 9 petition was admitted as the fact that the Award which was challenged under Section 34 specifically stated that learned counsel for the first Respondent (i.e. the Corporate Debtor) was fair enough to admit that the claimant is entitled to the said sum of Rs.1,71,98,302/-. An appeal filed to the Appellate Tribunal had the same result, as according to the Appellate Tribunal, the non- obstante clause

contained in Sec 238 of the Code would override the Arbitration Act, 1996. The appeal was dismissed by NCLAT. The same was challenged in the Supreme Court in this Appeal.

Decision:

The filing of a Section 34 petition against an Arbitral Award shows that a preexisting dispute which culminates at the first stage of the proceedings in an Award, continues even after the Award, at least till the final adjudicatory process under Sections 34 & 37 has taken place.

With regard the amount of default of Rs.1.71 Crores that stood admitted as was recorded in the Arbitral Award, the Supreme Court held that cross-claims of sums much above this amount have been turned down by the Arbitral Tribunal, which are pending in a Section 34 petition challenging the said Award.

The very fact that there is a possibility that the appellant may succeed on these cross-claims is sufficient to state that the operational debt, in the present Case, cannot be said to be an undisputed debt. Section 238 of the Code would apply in Cases where there is an inconsistency between the Code and the Arbitration Act and in the present Case there is no such inconsistency. On the contrary, the Award passed under the Arbitration Act together with the steps taken for its challenge would only make it clear that the operational debt, in the present Case, happens to be a disputed one. The judgment of the Appellate Tribunal was set aside and reversed. The appeal was allowed.

(*In favor of Appellant)

CASE NO.18

"The interpretation of "existence of dispute" was seen in the context of initiation of CIRP of corporate debtors under the Insolvency and Bankruptcy Code, 2016."

IN THE SUPREME COURT OF INDIA
Mobilox Innovations Private Limited (Appellant/Corporate Debtor)
Versus.
Kirusa Software Private Limited (Respondent/Operational Creditor)
Civil Appeal No. 9405 Of 2017
Date of Order: September 21, 2017

Section 9 read with Section 8 of the Insolvency and Bankruptcy Code, 2016 – Application for initiation of corporate Insolvency resolution process by operational creditor-so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application - a "dispute" is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6)-appeal allowed.

Brief Facts:

In terms of purchase order issued by the Appellant/Corporate Debtor the Respondent/Operational Creditor provided certain services and raised monthly invoices between December, 2013 and November, 2014. The bills so raised were payable within 30 days of receipt by the appellant.

It is pertinent to note here that a non-disclosure agreement (NDA) was executed between the parties on 26th December, 2014 with effect from 1st November, 2013. In view of non-payment of dues, a demand notice dated 23rd December, 2016 was sent by the respondent under Section 8 of the Code.

To this notice, the appellant responded that there exists serious and bona fide disputes between the parties and that nothing was payable as the respondent had been told on 30th January, 2015 that no amount would be paid to the respondent since it had breached the NDA.

The NCLT rejected the application filed under section 9 of the Code on the ground that the default payment being disputed by the Corporate Debtor and that, the operational creditor has admitted that the notice of dispute has been received, the claim made is hit by Section (9)(5)(ii)(d) of the Code. NCLT rejected the application on the grounds that Mobilox had issued a notice of dispute to the operational creditor.

NCLAT: An appeal against the order of NCLT was subsequently filed by Kirusa stating that mere dispute to the demand notice by the operational creditor does not amount to a valid ground for rejection of application under Section 9 of the IBC. The question before

the Appellate Tribunal was with respect to the clarification of meaning of "dispute" and "existence of dispute" for the purposes of application under Section 9 of the Insolvency and Bankruptcy Code.

Decision:

While interpreting Section 8 (2) (a), the Supreme Court held that, the word "and" occurring in Section 8 (2) (a) must be read as "or". According to the earlier interpretation, the Code provides that a dispute between operational creditor and corporate debtor would only be valid if a suit or an arbitration proceeding with respect to the dispute has been filed prior to the receipt of demand notice.

The Supreme Court was of the opinion that such an understanding shall lead to "great hardship" as the corporate debtor would then be able to stave off the bankruptcy process provided a dispute is already pending in a suit or arbitration proceedings".

An important point was highlighted by the Hon'ble Supreme Court stating that, if the "and" mentioned under Section 8(2)(a) is not read as "or", such persons shall be excluded from the ambit of Section 8 (2) and application of CIRP shall be easily obtained which was not the intent of the legislature.

The Hon'ble Supreme Court held that the existence of the dispute and/or suit or arbitration proceeding necessarily be "pre-existing", that is to say, it should exist prior to receipt of the Demand Notice.

The Hon'ble Supreme Court while deciding the matter scrutinized the background of IB Code. It observed that the Insolvency and Bankruptcy Bill 2015 defined "dispute" as "a bona fide suit or arbitration proceedings". However, when the Bill was passed the term "dispute" under Section 5 (6) was dropped from the definition. The Supreme Court stressed upon the interpretation that the previous jurisprudence with respect to the definition "dispute" does not apply to the current IB code.

Instead the Hon'ble Supreme Court provided a new test "plausible contention" to determine the "existence of dispute". The questions to be noted to determine existence of dispute are:

1. Whether there is an "operational debt" of more than One Lakh?
2. Whether the documentary evidence provided with the application shows the debt is due and payable and has not yet been paid?
3. Whether there is an existence of a dispute between the concerned parties or any record of pendency of suit or arbitration proceeding filed before the receipt of Demand Notice.?

The Hon'ble Supreme Court allowed the appeal by Mobilox, while interpreting the expression "existence of a dispute" under Section 8(2)(a) of the Insolvency and Bankruptcy Code. The Hon'bleSupreme Court was of the opinion that the breach of NDA

was sufficient to construe the existence of a dispute to invalidate the CIRP application filed by the operational creditor.

(*In favor of Appellant)

INTERPRETATION OF SECTION 11 OF THE CODE

CASE NO. 19

"Section 11 of the Code has a limited application which only bars a corporate debtor from initiating a petition under Section 10 of the Code in respect of whom a liquidation order has been made and it has no linkage with transfer of winding up proceedings"

IN THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction
Forech India Ltd.
Versus
Edelweiss Assets ReconstructionCo. Ltd.
With
Company Appeal (AT) (Insolvency) No. 202 of 2017, Civil Appeal No. 818 of 2018
Date of Order: January22, 2019

Section 11 of the Insolvency and Bankruptcy Code, 2016- Persons not entitled to make application

Brief Facts:

In this case, the operational creditor ("Forech India") filed an appeal before the Hon'ble Supreme Court of India to continue with winding up petition that has been filed by the said Creditor before High Court in 2014.

An appeal was preferred by the operational creditor against the admission order of the Corporate Debtor "Tecpro Systems Ltd" filed by financial creditor ("Edelweiss Asset Reconstruction") which was dismissed by the Hon'ble NCLAT vide order dated 2^{3rd} November, 2017 wherein Section 11 of the Code was referred to, and it was held that since there was no winding up order by the High Court, the financial creditor's petition would be maintainable, as a result of which the appellant's appeal has been dismissed.

Section 11 of the Code states that:

"11. Persons not entitled to make applications- The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely:-

xxx xxxxxx

(d) a corporate debtor in respect of whom a liquidation order has been made.

Explanation - For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor."

Decision:

The Hon'ble Supreme Court while declining to interfere with the ultimate order passed by the Appellate Tribunal and dismissing the appeal filed by operational creditor elucidated **Section 11** of the Code:

- This Section is of limited application and only bars a corporate debtor from initiating a petition under Section 10 of the Code in respect of whom a liquidation order has been made.

- It does not follow that until a liquidation order has been made against the corporate debtor, an Insolvency Petition may be filed under Section 7 or Section 9 as the case may be, as has been held by the Appellate Tribunal.

Accordingly, the Supreme Court affirmed that the financial creditor's application which has been admitted by the Tribunal is clearly an independent proceeding which must be decided in accordance with the provisions of the Code and granted liberty to the appellant to apply under the proviso to Section 434 of the Companies Act, to transfer the winding up proceeding pending before the High Court of Delhi to the NCLT, which can then be treated as a proceeding under Section 9 of the Code.

(In favor of Respondent)***

CERTIFICATE FROM FINANCIAL INSTITUTION NOT MANDATORY FOR SECTION 9 OF THE CODE

CASE NO.20

"In relation to application to be filed for operational debt, attaching a certificate from financial institution is not mandatory and demand notice of an unpaid operational debt can be issued by a lawyer on behalf of operational creditor."

IN THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction
Macquarie Bank Limited
Versus
Shilpi Cable Technologies Ltd
Civil Appeal No.15135 of2017
With
Civil Appeal No.15481 of 2017&Civil Appeal No.15447 of 2017
Date of Order: December15, 2017

Section 8 & 9 of the Insolvency and Bankruptcy Code, 2016- Insolvency resolution by operational creditor and application for initiation of corporate insolvency resolution process by operational creditor read with Form No. Forms 3 and 5 of IBBI (Application to Adjudicating Authority) Rules, 2016

Brief facts:

Three similar appeals raised two important questions under the Insolvency and Bankruptcy Code, 2016

- Whether, in relation to an operational debt, the provision contained in Section 9(3)(c) of the Code is mandatory;

- Whether a demand notice of an unpaid operational debt can be issued by a lawyer on behalf of the operational creditor.

As per one of the appeals, Hamera International Private Limited executed an agreement with the appellant, Macquarie Bank Limited, Singapore, on 27.7.2015, by which the appellant purchased the original supplier's right, title and interest in a supply agreement in favour of the respondent, Shilpi Cable. The respondent entered into an agreement dated 2.12.2015 for supply of goods worth US$6,321,337.11 in accordance with the terms and conditions contained in the said sales contract. On non-payment of dues after several reminders the appellant issued a statutory notice under Sections 433 and 434 of the Companies Act, 1956 and after enhancement of the Code, appellant initiated the insolvency proceedings by filing a petition under Section 9 of the Code.

NCLT vide order dated 1.6.2017, rejected the petition and held that there being non-compliance of the mandatory provision of Section 9(3)(c) of the Code. Later on, By the impugned judgment dated 17.7.2017, the NCLAT agreed with the NCLT holding that the

application would have to be dismissed for non compliance of the mandatory provision contained in Section 9(3)(c) of the Code. It further went on to hold that an advocate/lawyer cannot issue a notice under Section 8 on behalf of the operational creditor.

Section 9(3) states that

Application for initiation of corporate insolvency resolution process by operational creditor
The operational creditor shall, along with the application furnish-
(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;
(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;
(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt
(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and
(e) any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

Decision:

The Supreme Court on a conjoint reading of Sections 8 and 9 of the Code, stated that a certificate under 9(3)(c) of the Code is certainly not a "condition precedent" to triggering the insolvency process under the Code and the expression "confirming" makes it clear that this is only a piece of evidence, which only "confirms" that there is no payment of an unpaid operational debt. Further, on perusal of Form 5 under IBBI (Application to Adjudicating Authority) Rules, 2016 it shows that such accounts are not a pre-condition to trigger the Code, and that if such accounts are not available, a certificate based on such accounts cannot be given.

It was also observed that there may be situations where a foreign supplier may have a foreign banker who is not within Section 3(14) of the Code. The fact that such foreign supplier is an operational creditor is established from reading of definition of "person" contained in Section 3 (23), as including person resident outside India, together with definition of 'operational creditor' in Section 5(20). The Code cannot be construed in a discriminatory fashion so as to include only those operational creditors who are residents outside India who happen to bank with financial institutions which may be included under section 3(14) of the Code.

Accordingly, the Supreme Court stated that as the facts of these cases show, a so called condition precedent impossible of compliance cannot be put as a threshold bar to the processing of an application under Section 9 of the Code.

With regard to the second question, the Supreme Court highlighted that Section 8 of the Code speaks of an operational creditor "**delivering"** a demand notice. Delivery, therefore, would postulate that such notice could be made by an authorized agent,

otherwise the word “issued” would have been used. Further, after thorough reading of Forms 3 and 5 of IBBI (Application to Adjudicating Authority) Rules, 2016 position further becomes clear that both forms require such authorized agent to state his position with or in relation to the operational creditor. It is clear, therefore, that both the expression “authorized to act” and “position in relation to the operational creditor” go to show that an authorized agent or a lawyer acting on behalf of his client is included within the aforesaid expression.

As a result, the Supreme Court allowed the appeals and set aside NCLAT judgments on both counts.

(*In favor of appellant)

CASE NO.21

"Detailed analysis of Section 29A of the Code with regard to eligibility to be the resolution applicant of the Corporate Debtor."

IN THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction
Arcelormittal India Private Limited
Versus
Satish Kumar Gupta &Ors
Civil Appeal Nos. 9402-9405 of 2018
With
Civil Appeal No.9582 of 2018,
Civil Appeal No._____ of 2018 (Diary No.35253 of 2018),
Civil Appeal No._____ of 2018 (Diary No.33971 of2018)
Date of Order: October4, 2018

Section 29A of the Code: Persons not eligible to be resolution applicant

Brief facts:

The appeal was filed by Arcelor Mittal India Private Limited (AMIPL) to submit a resolution plan for Essar Steel India Limited ("ESIL") against NCLAT order dated 7th September, 2018.

On 2nd August, 2017, Ahmedabad Bench passed an order under Section 7 of the Code, admitting the petition against the corporate debtor ESIL. Shri Satish Kumar Gupta was appointed asthe Interim Resolution Professional and confirmed as Resolution Professional on 4.9.2017.

Consequently, advertisement was published seeking expression of interestfrom potential resolution applicants who wished to submitresolution plans for the revival of ESIL.

NumetalLimited ("Numetal")and AMIPL submitted their resolution plans, however the resolution professional found both to be ineligible under Section 29A

As far as Numetalwas concerned, one of the shareholders in the case of Numetal was Aurora Enterprises Limited (AEL), which was completely owned by RewantRuia whose father, Ravi Ruia was a promoter of ESIL. It was pertinent to further note that the account of Essar Steel was classified as a non-performing asset (an "NPA") for a period of more than 1 (one) year prior to the commencement of the insolvency resolution process of ESIL. Further, the Promoter had also issued a guarantee in favour of the creditors of Essar Steel. Therefore, Numetal was held ineligible in view of Section 29A (c) and (h) of the Code.

With regard to AMIPL, ArcelorMittal Netherlands ("AM Netherlands") was found to have been the promoter or exercised control over two companies namely, Uttam Galva Steels Limited ("Uttam Galva") and KSS Petron Limited ("KSS Petron"), whose accounts

were classified as an NPA for more than 1 (one) year prior to the commencement of the insolvency resolution process of Essar Steel.Therefore, AMIPL was held ineligible in view of Section 29A (c) of the Code.

Interlocutory applications were filed by both AMIPL &Numetal challenging the decision of Resolution Professional before Adjudicating Authority and the Adjudicating Authority vide its order dated 19th April, 2018 prima facie affirmed the ineligibilities and ***remanded the matter to committee of creditors on the ground that due procedure was not followed by the RP*** as he ought to have produced both the plans before the CoCalong with his comments of eligibility of both theresolution applicants for consideration of the CoC and to follow the provision of Section 29A(c) read withsection 30(4) for the purpose of affording theopportunity to the resolution applicants beforedeclaring them ineligible.

The CoC reiterated the ineligibility of AMIPL &Numetal with some further remarks on the eligibility and specified time was given to both the applicants to make the default good and submit the modified resolution plans.

AMIPL &Numetalfiled the appeals before the Appellate Tribunal and ***Tribunal vide an order dated 7.9.2018 held Numetal to be eligible and AMIPL to be ineligible to submit the resolution plan for ESIL.***

In sofar as Numetal was concerned, Tribunal held that

The modified resolution plan submitted on 29th March, 2018 stated that 'AEL' was not theshareholder of 'Numetal Ltd.' and all the threeshareholders aforesaid being eligible, therefore the 'Resolution Plan' submitted by'Numetal Ltd.' on 29th March, 2018 was required to beconsidered by the 'Committee of Creditors' to find outits viability, feasibility and financial matrix."

In sofar as AMIPL is concerned, Tribunal held that

Since, AM Netherlands was found to have been the promoter or exercised control over two companies namely, Uttam Galva and KSS Petron, whose accounts were classified as an NPA, the stigma attached to it can be cleared by payment of alloverdue amounts with interest thereon and charges. Therefore, three days were given for payment of the entire overdue amount.

Decision:

The Supreme Court of India vide order dated 4.10.2018 firstly, interpreted Section 29A focusing on sub-clauses (c), (f), (i) and (j) thereof, depending both on the text and the context in which the provision was enacted and

Firstly, the opening lines of Section 29A states that *"A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person"*

- This is a typical instance of a "see through provision", so that one is able to arrive at persons who are actually in "control", whether jointly, or in concert, with other persons.

- The expression **"acting jointly"** in the opening sentence of Section 29A cannot be confused with "joint venture agreements", All that is to be seen by the expression "acting jointly" is whether certain persons have got together and are acting "jointly" in the sense of acting together.

- The other important phrase is "**in concert",** the Code adopts definitions from the SEBI Act, 1992 and consequently the definition of **'acting in concert'** from the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994. It includes any understanding, even if it is informal, and even if it is to indirectly cooperate to exercise control over a target company.

  The Court held that whether a person is or is not acting in concert would depend upon the facts of each case.

Secondly, sub clause (c) of Section 29A states that

(c) ***at the time of submission of the resolution plan*** *has an account, or an account of a corporate debtor under the* ***management or control of such person or of whom such person is a promoter****, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:*

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to nonperforming asset accounts before submission of resolution plan:

[Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I.- For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed, prior to the insolvency commencement date.

Explanation II.— For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;

- It is clear from the opening words that the stage of ineligibility attaches when the resolution plan is submitted by a resolution applicant.

- Now, the ineligibility to submit a resolution plan attaches if any person, as is referred to in the opening lines, *either itself has an account, or is a promoter of, or in the management or control of,* a corporate debtor which has an account, which account has been classified as a non-performing asset, for a period of at least one year from the date of such classification till the date of commencement of the corporate insolvency resolution process.

  For the purpose of applying this sub-section, any one of three things (**Management, control or promoter**), which are disjunctive, needs to be established. ***The corporate debtor may be under the management of the person referred to in Section 29A, the corporate debtor may be a person under the control of such person, or the corporate debtor may be a person of whom such person is a promoter.***

  The **Management** of coporate debtor would ordinarily vest in a Board of Directors and would include, in accord with the definitions of "manager", "managing director" and "officer" in Sections 2(53), 2(54) and 2(59) respectively of the Companies Act, 2013, the persons mentioned therein.

  Section 2(27) of the Companies Act, 2013 defines **control**, which includes the right to appoint a majority of the directors of a company and the person who directly or indirectly, can positively influence, in any manner, management or policy decisions. Mere power to block special resolutions of a company cannot amount to control.

  Section 2(69) of the Companies Act, 2013 defines **promoter**, which includes a person who is named in a prospectus or identified by the company in an annual return as a promoter or person who has control over the affairs of the company directly or indirectly or who in fact advises, directs or instructs the Board to act.

  Thus, position in law is clear. Any person who wishes to submit a resolution plan acting jointly or in concert with other persons, any of whom may either manage, control or be a promoter of a corporate debtor classified as a non-performing asset in the period abovementioned, must first pay off the debt of the said corporate debtor classified as a non-performing asset in order to become eligible under Section 29A(c).

Section 29A(c) is a see-through provision, great care must be taken to ensure that persons who are in charge of the corporate debtor for whom such resolution plan is made, do not come back in some other form to regain control of the company without first paying off its debts.

Thirdly, sub clause (g) of Section 29A states that

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code:

Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction

The Code has bifurcated sub clauses (c) and (g) of Section 29A. If a person has been a promoter, or in the management, or control, of a corporate debtor in which a PUFE has taken place, and in respect of which an order has been made by the Adjudicating Authority under the Code, such person is ineligible This ineligibility cannot be cured by paying off the debts of the corporate debtor.

Therefore, it is only such persons who do not fall foul of sub-clause (g), who are eligible to submit resolution plans under sub-clause (c) of Section 29A, if they happen to be persons who were in the erstwhile management or control of the corporate debtor.

Fourthly, sub clause (f) of Section 29A states that

is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets.

The Supreme Court stated that if any of the persons mentioned in section 29A is prohibited by SEBI from either trading in securities or accessing the securities market, ineligibility of the person submitting the resolution plan attaches.

Fifthly, sub clause (i) of Section 29A states that

is subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India.

If a person situate abroad is subject to any disability which corresponds to sub-clause (f), such person also gets interdicted.

If a person is prohibited by a regulator of the securities market in a foreign country from trading in securities or accessing the securities market, the disability under sub-clause (i) would then attach.

A prohibitory sanction by an authority situate outside India for political reasons is not covered by sub-clause.

Thus, the Hon’ble Supreme Court of India rejected both the resolution applicants pursuant to ineligibility under Section 29A(c) as on a relevant date and accordingly dismissed the appeal and gave an opportunity to pay off the NPAs of their related corporate debtors within a period of two weeks from the date of receipt of the judgment in accordance with the proviso to section 29A(c). If such payments are made within the aforesaid period, both resolution applicants can resubmit their resolution plans to the Committee of Creditors, who are then allowed a period of 8 weeks from the date if the judgement, to accept, by the requisite majority, the best amongst the plans submitted,

including the resolution plan submitted by Vedanta. In the event that no plan is found worthy of acceptance by the requisite majority of the Committee of Creditors, the corporate debtor shall go into liquidation.

***(*In favor of respondents*)**

CASE NO.22

"Right to be heard, *one of the principles of natural justice* shall be given to every party before passing an order by serving proper notice of appeal before the NCLAT"

IN THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction
Jai Balaji Industries Limited
Versus
State Bank of India & Ors.
With
Civil Appeal No. 1929 of 2019
Date of Order: March 08, 2019

Rule 48 & 52 of NCLAT Rules, 2016- Issuance of notice of an appeal or petition or interlocutory application to be served to the other side.

Brief Facts:

In this case, Jai Balaji Industries Limited, Corporate Debtor ("appellant") filed an appeal before the Hon'ble Supreme Court of India against NCLATorder dated 8th February, 2019 directing NCLT to admit the application filed by State Bank of India ("Respondent") under Section 7 of the Code.

It was argued by the appellant that the decision of NCLAT, the Appellant Tribunal was against the principles of naturaljustice as the appellant hasneither been served with notice of appeal before the NCLAT nor been given ahearing before the passing of order. It was further submitted that ***the order passed by the NCLAT is contrary to law as it failed to comply with the procedure laid down under the NCLAT Rules, 2016.***

Rule 48(1) of NCLAT Rules, 2016 provides that where notice of an appeal or petition or interlocutory application is issued by the Appellate Tribunal, copies of the same, the affidavit in support thereof and if so ordered by the Appellate Tribunal the copy of other documents filed therewith, if any, shall be served along with the notice on the other side.

The NCLAT passed order without hearing the appellant, erroneously noting that it has heard all the parties.

On the contrary, the respondents contested that the advance copy of the appeal paperbook filedby them in NCLAT was duly delivered by post at theregistered office of the appellant, despite this, the appellant did not appear before NCLAT.

Decision:

The Supreme Court stated that advance copy of appeal served on the appellant cannot be treated as service of notice as stipulated underRule 48 of the NCLAT Rules (as

mentioned earlier), since the rule specifically ***stipulates service of notice on the other side, pursuant to issuance of notice by the NCLAT in the appeal,*** *regardless of supply of advance copy of appeal prior to the issuance of notice by NCLAT.*

Moreover, in the Judicial Section of the registry of the NCLAT no record of completion of service of notice including the payment of processing fees by the respondent was found in records by the Supreme Court as stipulated under Rule 52 of the NCLAT Rules which states as

Rule 52 Entries regarding service of notice or process:

The Judicial Section of the Registry shall record in the column in the order sheet 'Notes of the Registry', the details regarding completion of service of notice on the respondents, such as date of issue of notice, date of service, date of return of notice, if unserved, steps taken for issuing fresh notice and date of completion of services etc.

Accordingly, Supreme Court held that, it was abundantly clear that no notice was served upon the appellant before the NCLAT as stipulated under the rules, and the right of the appellant to be heard was violated. Consequently, the appeal was allowed by setting aside the order of NCLAT and the matter was referred back to NCLAT with a direction to dispose ofthe matter as expeditiously as possible after affording anopportunity of hearing to the parties.

(*In favor of appellant)

CASE NO.23

"Section 238 of the code, the non-obstante clause of IBC will prevail over the non-obstante clause of the Maharashtra Act."

IN THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction
M/s. Innoventive Industries Ltd. (Appellant)
Versus
ICICI Bank &Anr. (Respondent)
Civil Appeal Nos. 8337-8338 Of 2017
Date of Order: August 31, 2017

Section 238 of the Insolvency & Bankruptcy Code, 2016- Non-obstante clause

Brief Facts:

An application was filed before the Mumbai Bench of National Company Law Tribunal byICICI Bank against Innoventive Industries Ltd. ("Innoventive") to initiate CIRP against Innoventive.

Innoventive's main contention was that no debt was legally due since all liabilities of Innoventive andremedies for enforcement were temporarilysuspended for 2 years pursuant to notifications issuedunder the Maharashtra Relief Undertaking (Special Provisions Act), 1958 ("Maharashtra Act").

The NCLT on 17 January 2017 held that the IBC would prevail against the Maharashtra Act in view ofthe non-obstante clause in Section 238 of the IBC. It held that the Parliamentary statute would prevailover the State statute and hence Innoventive had defaulted in making payments and accordingly theapplication was admitted and a moratorium was declared.

An appeal was filed before the NCLAT against the above order, wherein NCLAT upheld the order of NCLTand fromthere an appeal was filed before the Supreme Court.

The main contentions before Supreme Court were as follow:

- Whether the appeal was maintainable as it had been filed by the erstwhile directors of Innoventiveafter an insolvency professional was appointed to manage the company?
- Whether there was any repugnancy in fact between the IBC and the Maharashtra Act?
- Whether the non-obstante Clause contained in Section 238 of the IBC of the Parliamentary enactmentunder IBC will prevail over the non-obstante Clause contained in Section 4 of the Maharashtra Act?

Decision:

The court held that once an insolvency professional is appointed in respect of a company, the erstwhile directors cannotfile any appeal on behalf of such company.

The term default has been given wide interpretation in the IBC. Even non-payment of disputed debtwould be a default so long as it is “due”.

Further held that the Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under theCode.

The non-obstante clause of IBC will prevail over the non-obstante clause of the Maharashtra Act.

Hon’ble Supreme Court was of the view that the Tribunal and the Appellate Tribunal were right inadmitting the application filed by the financial creditor ICICI BankLtd. Therefore, the appeals were dismissed.

(*In favor of appellant)

CASE NO.24

"Commercial decision of the CoC is not justiciable. The NCLT and the NCLAT have no jurisdiction and authority to analyse or evaluate the commercial decisions taken by the committee of creditors (CoC)."

IN THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction
K. Sashidhar
Versus
Indian Overseas Bank &Ors.
Civil Appeal No. 10673 of 2018
With
C.A. No.10719 of 2018, C.A. No.10971 of 2018
and SLP(C) No.29181 of 2018
Date of Order: February 5, 2019

Section 30 of the Insolvency and Bankruptcy Code, 2016 (Code)- Submission of Resolution PlanRegulation 25 and 39 of the IBBI (Insolvency Resolution Process for Corporate Persons), Regulations, 2016

Brief Facts:

In this case, appeals arisen from the orders of NCLAT recording rejection of the resolution plans Kamineni Steel & Power India Pvt. Ltd. (for short "KS & PIPL") and Innoventive Industries Ltd. (for short "IIL") and thereby directing initiation of liquidation process against two companies under Insolvency and Bankruptcy Code.

As regards to Corporate Debtor (KS&PIPL), it was submitted that for the financial creditor who chose not to participate in the voting, the votes and the majority be counted without their vote. In that eventuality, the percentage of financial creditors who chose to participate and who approved of the resolution plan would work out to 78.63% and therefore, it can be assumed that the resolution plan has been approved by the CoC. The NCLT, Hyderabad Bench allowed the petition filed by the Corporate Debtor and approved the Resolution Plan. Aggrieved by the said decision appeal was filed to NCLAT questioning the authority of NCLT, Hyderabad bench, to approve the resolution plan, despite the fact that the same did not receive approval of not less than 75% voting share of financial creditors.

As regards to the Corporate Debtor (IIL), financial creditors holding 66.57% voting shares voted in favour of approving the resolution plan whereas the dissenting financial creditors, having 33.43% voting share, voted against the proposed resolution plan. Resultantly, the NCLT directed initiation of liquidation proceeding against the corporate debtor. Aggrieved by the decision an appeal was filed to NCLAT.

The NCLAT affirmed the order passed by NCLT recording rejection of the resolution plan concerning IIL. As regards to the KS&PIPL, the NCLAT reversed the decision of

the NCLT which had approved its resolution plan and instead remanded the proceedings to NCLT, Hyderabad Bench for initiation of liquidation process.

Decision:

The Hon'ble Supreme Court while deciding the matter observed that Regulation 25 and 39 of the IBBI (Insolvency Resolution Process for Corporate Persons), Regulations, 2016 must be read in light of Section 30(4) of the Insolvency and Bankruptcy Code, 2016, concerning the process of approval of a resolution plan. For that, the "percentage of voting share of the financial creditors" approving vis a vis dissenting– is required to be reckoned. It is not on the basis of members present and voting as such. At any rate, the approving votes must fulfill the threshold percent of voting share of the FCs. It is not possible to countenance any other construction or interpretation.

The Hon'ble Supreme Court opined that the legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. The legislature consciously has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority.

As a result, Supreme Court held that NCLAT had justly concluded in the impugned decision that the resolution plan of the concerned corporate debtor(s) had not been approved by requisite percent of voting share of the financial creditors; and in absence of any alternative resolution plan presented within the statutory period of 270 days, the inevitable sequel was to initiate liquidation process under Section 33 of the Code.

(*In favor of Respondent)

CASE NO.25

"Suggestion to Competent Authority for amendment in Insolvency and Bankruptcy Code."

IN THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction
Uttara Foods and Feeds Private Limited
Versus
Mona Pharmachem
C.A. No. 18520 of 2017
and SLP(C) No. 26824 of 2017
Date of Order: November 13, 2017

Section 12A of the Insolvency and Bankruptcy Code, 2016 (Code)- Withdrawal of application admitted under section 7, 9 or 10, Regulation 30A(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Rule 8 of IBBI (Application to Adjudicating Authority) Rules, 2016

Brief Facts:

In this case both the parties settled the matter amicably between themselves. The issue was, whether the Adjudicating Authority may permit withdrawal of application after admission of Insolvency petition.

In an earlier order the Supreme Court had observed that in view of Rule 8 of the I & B (Application to Adjudicating Authority) Rules, 2016, the National Company Law Appellate Tribunal prima facie could not avail of the inherent powers recognised by Rule 11 of the National Law Appellate Tribunal Rules, 2016 to allow a compromise to take effect after admission of the insolvency petition.

Decision:

Hence the Hon'ble Supreme Court opined that instead of all such orders coming to the Supreme Court as only the Supreme Court may utilise its powers under Article 142 of the Constitution of India, **the relevant Rules be amended by the competent authority so as to include such inherent powers**. This will obviate unnecessary appeals being filed before this Court in matters where such agreement has been reached. Further, settlement between both the parties was allowed.

Thereafter, Section 12A was inserted by the Insolvency and Bankruptcy Code (Amendment Act), 2018 and Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 was substituted vide IBBI notification dated 25thJuly, 2019. Section 12A of the Insolvency and Bankrupcty Code, 2016 provides that "*the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified."*

Regulation 30A(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that:

"*An application for withdrawal under section 12A may be made to the Adjudicating Authority-*

(a) before the constitution of the committee, by the applicant through the interim resolution professional;
(b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:

Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation."

Although the Insolvency and Bankruptcy Code did not provide for withdrawal of proceedings after a matter is admitted, the Supreme Court permitted the parties to settle the matter even though it had been admitted in the NCLT.

(*In favor of Appellant)

CASE NO. 26

"Supreme Court requested High Courtnot to enter into the debate pertaining to the validity of the Insolvency and Bankruptcy Code, 2016 or the constitutional validity of the National Company Law Tribunal."

IN THE SUPREME COURT OF INDIA
Shivam Water Treaters Pvt. Ltd.
Versus
Union of India Secretary to Govt. Ministry of Corporate Affairs & Ors.
Petition(s) for Special Leave to Appeal (C) No(s).1740/2018
Date of Order: January 25, 2018

Article 32 of the Constitution-Validity or the constitutionality of the Insolvency and Bankruptcy Code, 2016

Brief Facts:

This case arisen out of impugned final judgment and order dated 15-01-2018 passed by the High Court of Gujarat at Ahmedabad).

Decision:

The Hon'ble Supreme Court held that:

"*we are only inclined to request the High Court to address the relief limited to any action taken by the respondents or any order passed by the National Company Law Tribunal. Barring this, the High Court should not address any other relief sought in the prayer clause. The High Court is requested not to enter into the debate pertaining to the validity of the Insolvency and Bankruptcy Code, 2016 or the constitutional validity of the National Company Law Tribunal.*

The Hon'ble Supreme Court further stated that the order does not debar the petitioner to challenge the validity of composition of the National Company Law Tribunal and the validity or the constitutionality of the Insolvency and Bankruptcy Code, 2016 before Supreme Court under Article 32 of the Constitution.

The special leave petition was disposed off accordingly.

(*In favor of Respondent)

CASE NO.27

"Adjudicating Authority has the power to determine whether the resolution plan is violative of the provisions of any law, including Section 29A of the Code."

IN THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction
Arcelormittal India Private Limited
Versus
Satish Kumar Gupta & Ors.
C.A. No.9402-9405 of 2018 and C.A. No.9582 of 2018
Date of Order: October 4, 2018.

Section 29A of the Insolvency and Bankruptcy Code, 2016 - Persons not eligible to be resolution applicant.

Brief facts:

The Hon'ble Supreme Court while deciding the civil appeal in the matter of Arcelor Mittal India Private Limited v. Satish Kumar Gupta and Others observed that the **disapproval of the Committee of Creditors on the ground that the resolution plan violates the provisions of any law, including the ground that a resolution plan is ineligible under Section 29A, is not final. The Adjudicating Authority, acting quasi-judicially, can determine whether the resolution plan is violative of the provisions of any law, including Section 29A of the Code,** after hearing arguments from the resolution applicant as well as the Committee of Creditors, after which an appeal can be preferred from the decision of the Adjudicating Authority to the Appellate Authority under Section 61.

If, on the other hand, a resolution plan has been approved by the Committee of Creditors, and has passed muster before the Adjudicating Authority, this determination can be challenged before the Appellate Authority under Section 61, and may further be challenged before the Supreme Court under Section 62, if there is a question of law arising out of such order.

Section 60(5) of the Insolvency and Bankruptcy Code, 2016 provides that:
"notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of-

(a) any application or proceeding by or against the corporate debtor or corporate person;
(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and
(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor.

Decision

The Hon'ble Supreme Court stated that Section 60(5), when it speaks of the NCLT having jurisdiction to entertain or dispose of any application or proceeding by or against

the corporate debtor or corporate person, does not invest the NCLT with the jurisdiction to interfere at an applicant's behest at a stage before the quasi-judicial determination made by the Adjudicating Authority. The non-obstante clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings.

(In favor of Respondent)***

"The Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors. Once, a resolution plan is approved by the CoC, the statutory mandate on the Adjudicating Authority under Section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of sub-sections (2) and (4) of Section 30 thereof **"**

IN THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction
Maharasthra Seamless Limited
Versus
Padmanabhan Venkatesh &Ors.
C.A. No.4242 of 2019, C.A. Nos.4967-4968 of 2019
Date of Order: January 22, 2020.

Section 30 of the Insolvency and Bankruptcy Code (IBC), 2016 - Submission of resolution plan, Section 31 of the IBC, 2016 - Approval of resolution plan, Section 12 A of the IBC, 2016 - Withdrawal of application admitted under section 7, 9 or 10.

Brief Facts:

In the caseappeal arisen from the orders of NCLAT wherein Maharashtra Seamless Ltd, Successful Resolution Applicant was directed to modify the resolution Plan on the ground that it was below the liquidation value and that it did not maintain parity between operational creditors and financial creditors. The Resolution Applicant also sought withdrawal under Section 12A citing financial difficulties.

The appellant argued that the NCLAT has exceeded its jurisdiction in directing matching of liquidation value in the resolution plan. The resolution plan should be left to the commercial wisdom of Committee of Creditors and there is no requirement that resolution plan should match the maximized asset value of the corporate debtor.

Decision:

The Hon'ble Supreme Court relied on its judgment in case of Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta wherein it was held that:

"54……*There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency*

resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of.If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal."

The Hon'ble Supreme Court held that:
"No provision in the Code or Regulations has been brought to our notice under which the bid of any Resolution Applicant has to match liquidation value arrived at in the manner provided in Clause 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

... It appears to us that the object behind prescribing such valuation process is to assist the CoC to take decision on a resolution plan properly. Once, a resolution plan is approved by the CoC, the statutory mandate on the Adjudicating Authority under Section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of sub-sections (2) and (4) of Section 30 thereof. We, per se, do not find any breach of the said provisions in the order of the Adjudicating Authority in approving the resolution plan. "

Additionally, the apex court also added that the Resolution Applicant cannot withdraw from proceedings in the manner they have approached court. The exit route prescribed in Section 12-A is not applicable to Resolution Applicant.

Hon'ble Supreme Court dissolved the interim orders and disposed off connected applications vide judgment dated 22.01.2020.

(*In favor of Appellant)

CASE NO.29

"Supreme Court cancelled the registration of Amrapali Group of Companies under RERA for siphoning off funds of homebuyers and appointed NBCC to complete projects ."

IN THE SUPREME COURT OF INDIA
Civil Original/Appellate Jurisdiction
Writ Petition (C) No.940/2017
Bikram Chatterji&Ors
Versus
Union of India & Ors

Writ Petition (C) No.947/2017, WP (C) No.971/2017, WP (C) No.942/2017, SLP (C) No.1879/2018, WP (C) No.1041/2017, WP (C) No..1018/2017, WP (C) No.1116/2017, WP (C) No.1144/2017, WP (C) No.1156/2017, WP (C) No.1206/2017, WP (C) No.8/2018, WP (C) No.1242/2017, WP (C) No.58/2018, WP (C) No.21/2018, WP (C) No.52/2018, WP (C) No.91/2018, WP (C) No.56/2018, WP (C) No.57/2018, WP (C) No.74/2018, WP (C) No.134/2018, WP (C) No.131/2018, WP (C) No.160/2018, WP (C) No.164/2018, WP (C) No.182/2018, WP (C) No.199/2018, WP (C) No.226/2018, WP (C) No.245/2018, WP (C) No.281/2018, WP (C) No.306/2018, WP (C) No.298/2018, WP (C) No.246/2018, WP (C) No.267/2018, WP (C) No.288/2018, WP (C) No.460/2018, WP (C) No.353/2018, WP (C) No.378/2018, WP (C) No.742/2018, WP (C) No.829/2018, SMC (CRL.) No.4/2018 and WP (C) No.1397/2018

Date of Order: July 23, 2019

Section 7 and 53 of Insolvency and Bankruptcy Code, 2016, section 8 and 11 of the Real Estate Regulation and Development Act, 2016, sections 13 and 14 of the U.P. Industrial Area Development Act, 1976

Brief Facts:

Bank of Baroda and several other banks filed a petition before NCLT under section 7 of the Code for triggering Corporate Insolvency Resolution process in the matter of Amrapali Silicon City Private Limited. NCLT appointed the Interim Resolution Professional and declared moratorium.

Various Homebuyers filed writ petition under Article 32 seeking construction and possession of 4200 flats booked in Amrapali Group.

Keeping in view the predominant interest of homebuyers, Hon'ble Supreme Court vide its earlier orders directed the Amrapali Group

- to complete the projects, finish the work as assured and requested the IRP not to proceed further.
- to deposit an amount of Rs. 250 crores in the escrow account

These orders were not complied by the Amrapali Group. An admission was also made by the Group that there was diversion of more than 2,765 crores of rupees from six projects to other projects. In such circumstances, the Hon'ble Supreme Court directed the

individual bank accounts of directors of all the 40 group companies be frozen and ordered attachment of the properties in the individual names of directors and also put put a restriction on the alienation of the properties in the names of individual Directors etc. Further, the earlier order permitting Amrapali Group to complete the project was also recalled.

Since, various documents were placed on record indicating the transfer/diversion of funds by the Amrapali Group, the Hon'ble Supreme Court appointed forensic auditors to audit into the matter.

Brief Submissions on behalf of Homebuyers

- The Noida and Greater Noida authorities have been liberal, and did not take any stringent action against Amrapali Group. The dues of Noida and Greater Noida authorities cannot be treated at par with the dues of homebuyers.
- Even though Amrapali was defaulting in payment of lease rents, authorities continued to allot further plots to them. The authorities have failed to monitor progress of project and protect the interest of public.
- Banks have also failed to monitor utilisation of the borrowed funds and they acted as mute spectators to the diversion of funds by Amrapali Group of Companies, its Directors and officials.
- Banks do not even have effective mortgages because NOCs by the Authorities clearly state that they would become effective only when Amrapali makes up to date payment of the premium and advance annual lease rent.
- The Authorities are liable to issue Occupation Certificate despite the fact that the land dues of the Authorities are not paid by Amrapali Group.

Brief Submissions on behalf of Authority

- Homebuyers are not secured creditors and they have no right over secured creditors.
- The Authorities have first charge including those created in favour of banks and financial institutions
- Public trust doctrine is not attracted to the facts in the instant case as there is no breach of trust.
- No completion certificate shall be issued till the time dues of Authority have been paid.

Brief Submissions on behalf of bank

- The bank had deployed suitable methods to monitor utilization of funds and no diversion was permitted by them.
- The Mortgage Deed executed between the Bank and Amrapali Group is valid and the bank has charge over the project.
- The homebuyers are not secured creditors, they have no right, title or interest or lien on the basis of allotment from flat buyer agreement.

SC's Observations:

The Hon'ble Supreme Court after considering submissions of all the parties and forensic audit report observed as under

- No accounts were prepared by the Company w.e.f. the years 2015-2018 and money withdrawn was diverted during the said period.
- The Directors diverted the money of homebuyers by creation of dummy companies in the names of peons and boys of office, realizing professional fees, creating bogus bills, selling flats at undervalue price, payment of excessive brokerage etc.
- The money of homebuyers was siphoned off to J.P Morgan in violation of FEMA and FDI norms. Large numbers of assets were created with the help of money of homebuyers.
- The Statutory Auditor failed in duty and was part of fraudulent activities as found in the Forensic Report.
- Bogus allotments of flats were made by Amrapali Group/ Directors
- Huge money was collected from buyers and comparable to the investment made in the project, there was no necessity to obtain loan from banks. The money so obtained was not used in the projects and was diverted to unapproved uses such as for the creation of personal assets of Directors, creation of assets in closely held companies by the Directors along with their partners and relatives, for personal expenses of Directors, to give advances without carrying interest for several years. There was non monitoring by the bankers. The money laundering was resorted to by Amrapali Group/ Directors.
- The mortgage deeds in favour of the banks were not permissible due to non-payment of dues of the Noida and Greater Noida Authorities. The Noida and Greater Noida Authorities issued conditional NOCs to create mortgages subject to payment of dues which were not paid. They issued such NOCs in collusion with builders.
- It was incumbent upon the bankers also to obtain clear unconditional NOCs. which were not obtained and to ensure that the dues were paid to Noida and Greater Noida authorities. They permitted diversion of money immediately after sanctioning of the loan and also in day to day transactions of Amrapali group of companies.
- The Noida and Greater Noida Authorities in collusion with leaseholders failed to take action concerning nonpayment of dues and illegally permitted the group to sub lease the land without payment of dues.
- The Public Trust Doctrine is applicable upon the Authorities. It was the duty of the Authorities to take affirmative action for effective management of the Lease Deeds granted in favor of the Amrapali Group.
- Fraud was played upon the buyers in connivance of the officials of Noida and greater Noida Authorities and that of banks.

Decision:

The registration of Amrapali Group of Companies under RERA shall stand cancelled;

The various lease deeds granted in favor of Amrapali Group of Companies by Noida and Greater Noida Authorities for projects in question stand cancelled and rights henceforth, to vest in Court Receiver;

Noida and Greater Noida Authorities shall have no right to sell the flats of the home buyers or the land leased out for the realization of their dues. Their dues shall have to be recovered from the sale of other properties which have been attached. The direction holds good for the recovery of the dues of the various Banks also;

NBCC is appointed to complete the various projects and hand over the possession to the buyers. The percentage of commission of NBCC is fixed at 8 percent;

The home buyers are directed to deposit the outstanding amount under the Agreement entered with the promoters within 3 months;

Enforcement Directorate and concerned authorities are directed to investigate and fix liability on persons responsible for such violation and submit the progress report in the Court. Police shall also submit the report of the investigation made by them so far.

The Institute of Chartered Accountants of India is directed to initiate the appropriate disciplinary action against Mr. Anil Mittal, CA for his conduct as reflected in various transactions and the findings recorded in the order and his overall conduct as found on Forensic Audit.

Various Companies/ Directors and other incumbents in whose hands money of the home buyers is available as per the report of Forensic Auditors are directed to deposit the same in the Court within one month.

Concerned Ministry of Central Government, as well as the State Government and the Secretary of Housing and Urban Development, are directed to ensure that appropriate action is taken as against leaseholders concerning such similar projects at Noida and Greater Noida and other places in various States, where projects have not been completed. They are further directed to ensure that projects are completed in a time-bound manner as contemplated in RERA and home buyers are not defrauded.

Shri R. Venkataramani, learned Senior Advocate is appointed as the Court Receiver. The right of the lessee shall vest in the Court Receiver and he shall execute through authorized person on his behalf, the tripartite agreement and do all other acts as may be necessary and also to ensure that title is passed on to home buyers and possession is handed over to them.

Noida and Greater Noida are also directed to execute the tripartite agreement within one month concerning the projects where homebuyers are residing and issue completion certificate notwithstanding that the dues are to be recovered under this order by the sale of the other attached properties. Registered conveyance deed shall also be executed in favour of homebuyers.

***(*In favor of homebuyers*)**

CASE NO.30

"Multiple Applications taken up with different facts and observations taken for each of the applications."

IN THE SUPREME COURT OF INDIA
Civil OriginalJurisdiction
Bikram Chatterji&Ors
Versus
Union of India &Ors
Writ Petition [C] No.940 of 2017
Date of Order: June 10, 2020

Section 53 of the Insolvency and Bankruptcy Code, 2016-Distribution of assets

Brief Facts:

These Interlocutory applications arose out of order of Hon'ble Supreme Court dated 23rd July, 2019, the brief of same is given above.

In *I.A. No.49238 of 2020,*the issue for consideration before Hon'ble Supreme Court was whether NBCC, who was appointed to complete various projects of Amrapali Group can be sued in any other Court/Commission.

NBCC submitted that various home buyers are approaching different courts in different jurisdictions across the country, making NBCC a party. The complaints/petitions are filed against NBCC seeking reliefs, such as refund of amounts that home buyers have paid to the Amrapali Group or to grant possession of flats, etc. The NBCC is forced to defend itself in different Courts being a party to the said petitions.

Decision:

Hon'ble Supreme Court held that

"*NBCC is asked by this Court to complete the incomplete projects. It is not liable for any legal action. In view of the order that has been passed by this Court, the* ***NBCC is immune from any such actions, and we request the Courts/ Consumer Redressal Commission and other authorities not to permit impleadment of NBCC as respondent and not to issue summons to NBCC as they are doing the work under the supervision of this Court and are not answerable to any other court, tribunal, authorities. They are granted immunity to be sued in any other court or commission, and they are answerable to this Court only in the pending proceedings.*** *Thus, they cannot be dragged in the litigation filed by existing home buyers, previous contractors, co-developers, landowners, banks, financial institutions, other lenders and creditors, and any Government authorities before any other Court/ Commission or Authority."*

The Hon'ble Supreme Court further made it clear that NBCC is not responsible for attending to queries made by the home buyers. They have to report the progress to the learned Receiver, and requested the learned Receiver to put progress reports of projects on the blog/website.

The application was disposed with aforementioned directions and observations.

Brief Facts:

An Interlocutory application*No.29350 of 2020,*was filed by Royalgolf Link City Projects Private Limited for modification of order dated 11.9.2019, by which the Hon'ble Supreme Court directed Royalgolf Link City Projects Private Limited to repay Rs. 48.52 Crores which was received from Amrapali Group along with 12% interest and the attachment of 30 villas was to continue unless otherwise ordered.

The Royalgolf Link City Projects Private Limited, after construction, was to give 30 villas to the Amrapali Ultra Homes as per the Agreement entered into between them. A sum of Rs.48.52 crores was received as the principal amount by Royalgolf Link City Projects Private Limited. On behalf of Royalgolf Link City Projects Private Limited it was submitted that it has deposited Rs. 48.52 Crores, but it has extreme hardship in depositing 12% interest. The reasons being slow down of construction due to lack of funds, no credit offers, no payment by existing buyers, drop of average yearly collection, refusal by banks for further disbursement of loans to homebuyers, cancellation of units by buyers, RERA order for refunds of 6 units along with interest etc. Further, the Hon'ble Supreme Court vide its judgement dated 23.7.2019, directed various entities to deposit the amount with the Registry and did not direct payment of any interest, but in the case of the applicant, interest has been ordered to be paid.

Decision:

The Hon'ble Supreme Court held that
7…… *As it was the money of home buyers, which was diverted, they must have a refund of their money with a reasonable rate of interest. We find the hardships, which are pointed out, are all commercial one and the Royalgolf Link City Projects Private Limited is bound to disgorge the advantage it received out of huge money of Rs.48.52 crores, which remained with it for a substantial period; otherwise, it would tantamount to unjust enrichment. It cannot be taken as a ground that in the judgment/ order dated 23.7.2019, the interest was not imposed on other entities. It has been imposed on the facts and circumstances of the case on the Royalgolf Link City Projects Private Limited."*

Royalgolf Link City Projects Private Limited was directed to deposit the interest within six weeks and the application was dismissed.

Brief Facts:

*IA No.141062 of 2019 and IA No.155624 of 2019*were filed by Noida and Greater Noida Authorities respectively for issuance of direction for return of unused FAR.

The Hon'ble Supreme Court vide its earlier order dated 23.07.2019 observed that Amrapali Group siphoned off the money received from homebuyers inconnivance of the

officials of Noida and greater Noida Authorities and that of banks. The Hon'ble Supreme Court cancelled various lease deeds granted in favour of Amrapali Group of Companies by Noida and Greater Noida Authorities and vested the rights in Court Receiver. It was further held that **Noida and Greater Noida Authorities shall have no right to sell the flats of the home buyers or the land leased out for the realization of their dues. Their dues shall have to be recovered from the sale of other properties which have been attached.**

On behalf of Authorities it was submitted that all the flats that can be constructed within the permitted FAR are neither under construction nor sold. There remains unused FAR, as vacant land to which builder was entitled. If FAR is ordered to be returned to the Noida Authority, to some extent, the outstanding land dues can be recovered.

Receiver pointed out that the sale of FAR is necessary to complete the projects and fetch money for incomplete projects left by builders. Further, buyers have paid the dues of Authorities as a component of the price for flats. Thus, the dues payable to the Authorities cannot be recovered from the home buyers or the projects in question.

Decision:

Hon'ble Supreme Court noted that the diversion of money was permitted not only by Noida and Greater Noida Authorities but also by the bankers and other financial institutions. The concerned authorities did not take timely action, and the financial institutions resulted in projects being stalled, and now it has become tough to complete the projects. Financial institutions/ Banks are not coming forward to fund the incomplete projects, and the buyers who borrowed the money from the banks have not been able to obtain possession of the flats booked by them due to the non-completion of the projects. On the other hand, the liability to pay the interest on the amount of loan, which they had taken, is fastened upon them, and they have been duped by diverting money by the builders.

In view of the aforesaid, the Hon'ble Supreme court decided that **Home buyers should have first charge on FAR as they had deposited the money which had been diverted. The Court permitted Receiver to sell FAR and utilize money to complete various projects.**

The Hon'ble Supreme Court further held that

"In case any surplus amount of money remains after completion of the projects, appropriate orders can be passed to release the amount to Noida and Greater Noida Authorities after completion of projects, if the dues are not satisfied by the sale of the property of Amrapali Group o f Companies, which has been attached pursuant to the orders of this Court."

The Hon'ble Supreme Court rejected the prayer of Authorities.

Brief Facts:

An Interlocutory Application No. 166987 of 2019 was filed by Vansh Consultants Private Limited, seeking deletion of its name from the Forensic Audit Report (paragraph 60(17)

of the judgment of Hon'ble Supreme dated 23.7.2019), wherein the applicant has been mentioned as debtor of Rs. 9.75 crores.

The applicant submitted that it has invested Rs. 10 crore with Amrapali Leisure Valley Private bonafide. The amount of Rs. 10 crore was not reflected in the opening balance of the Amrapali Leisure Valley Private Limited. An amount of Rs. 8 crores received by the applicant from Amrapali Leisure Valley Private Limited has not been reconciled against the payment of Rs.10 crores paid by the applicant. The applicant company does not owe any loan to the Amrapali Group of Companies or the home buyers. It is entitled to receive money from Amrapali Leisure Valley Private Limited.

The Forensic Auditor submitted that the debit entries were made in the accounts of Amrapali Leisure Valley Private Limited but the facts could not be explained. The agreement entered between Vansh Consultants Private Limited and Amrapali Leisure Valley Private Limited is dubious. As per the agreement the amount of Rs. 10 crore was to be returned in a year and an interest of Rs. 10 crore was to be paid in next two years. i.e 100% rate of interest. Forensic Auditor pointed out that it is case of money laundering. There was no money in bank account of Vansh Consultants Private Limited, it came in bank account in order to route it to Amrapali Leisure Valley Private Limited.

Decision:

The Hon'ble Supreme Court held that:

"*Considering the material on record, deficiencies pointed out by Forensic Auditor and the books of accounts of Amrapali Leisure Valley Private Limited, the entries made therein, there is nothing to doubt the correctness of the report of the Forensic Auditors, who made detailed enquiries. The Directors were heard during Forensic Audit, and we find that no case is made out to delete the name of the applicant from the report of Forensic Audit as reflected in the judgment and order passed by this Court, and we find no ground to doubt the correctness of the report.*"

In bereft of any merits, the applications were dismissed.

Brief Facts:

It was submitted before Hon'ble Supreme Court that a direction may be issued to RBI to keep its circulars/guidelines relating to NPA in abeyance and permit all banking and financial institutions, etc. to disburse loans to home buyers of Amrapali Group notwithstanding the status of accounts as NPA.

Decision:

The Hon'ble Supreme Court directed banks and financial institutions to release loans to home buyers, whose loans have been sanctioned, notwithstanding the fact that their accounts are declared as NPAs at present rate fixed by RBI. Further, the loans may be released as per the stage of construction and long term restructuring of the loans may be done so that construction is completed and buyers are able to repay the loan.

Brief Facts:

*An Interlocutory Application No. 49139 of 2020*wasfiled by Ace Group of Companies, who have obtained the plots from Noida and Greater Noida Authorities for waiver of interest component in payment of Land dues of Authorities and extension of payment schedule towards lease rent and payment.

Decision:

The Hon'ble Supreme Court observed that the interest of 15% per annum with half-yearly compounding and penal interest charges by the Authorities is exorbitant in comparison to present lending rate. Real Estate Sector is in recession, the projects are standstill since 8-10 years. There is failure to comply with the homebuyers whose money has been invested in the partially constructed structure and partial dues have been paid to Authorities.

Considering the above, the Hon'ble Supreme directed Noida and Greater Noida Authorities to do restructuring of the repayment schedule and fixed rate of interest of 8% per annum on the outstanding premium and other dues to be realized.

(Different Applications decided in favour of different parties)***

CASE NO.31

"Supreme Court upheld constitutional validity of amendments made to IBC clarifying status of allottees/homebuyers as financial creditors."

IN THE SUPREME COURT OF INDIA
Civil Original/Appellate Jurisdiction
Pioneer Urban Land and Infrastructure Limited &Anr.
Versus
Union of India &Ors.
Writ Petition (Civil) No. 43 OF 2019

Date of Order: August09, 2019

Explanation to Section 5(8)(f) of the Insolvency and Bankruptcy Code, 2016, Section 21(6A)(b) and 25A of the Insolvency and Bankruptcy Code, 2016, Section 88 of Real Estate (Regulation and Development) Act, 2016 and Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India.

Brief Facts:

Various writ petitions were filed before hon'ble Supreme Court challenging the constitutional validity of amendments made to the Insolvency and Bankruptcy Code, 2016. The amendments so made deem allottees of real estate projects to be "financial creditors" so that they may trigger the Code, under Section 7 thereof, against the real estate developer. In addition, being financial creditors, they are entitled to be represented in the Committee of Creditors by authorised representatives.

Following were the major grounds of challenging the constitutional validity of amendments:

- the classification of homebuyers as financial creditors is an unreasonable classification and is discriminatory in as much as it treats unequal equally, and equals unequally, thus having no intelligible differentia and thus the said amendment is violative of Article 14 of the Constitution;
- homebuyers are protected under RERA and Consumer Protection Act. RERA is a special Act as opposed to the Code, which is a general Act and ought, therefore, to prevail;
- homebuyers do not possess a single characteristic/features of the Financial Creditors as laid down in Swiss Ribbons v. Union of India (2019) 4 SCC 17;

Decision:

The explanation was added by the Amendment Act only to clarify doubts that had arisen as to whether home buyers/allottees were subsumed within Section 5(8)(f). The explanation added to Section 5(8)(f) of the Code by the Amendment Act does not in fact enlarge the scope of the original Section as home buyers/allottees would be subsumed within Section 5(8)(f) as it originally stood.

Raison d'être (Most important reason) for the Insolvency Code (Second Amendment) Act of 2018:

> The Insolvency Law Committee found, as a matter of fact, that delay in completion of flats/apartments has become a common phenomenon, and that amounts raised from home buyers contributes significantly to the financing of the construction of such flats/apartments.
>
> It was important, therefore, to clarify that home buyers are treated as financial creditors so that they can trigger the Code under section 7 and have their rightful place on the Committee of Creditors when it comes to making important decisions as to the future of the building construction company, which is the execution of the real estate project in which such home buyers are ultimately to be housed.

RERA Vs. IBC: Section 88 of RERA provides that the provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force. No similar provision is provided in the Code. It is a difficult to accede to arguments that RERA is a special enactment which deals with real estate development projects and must, therefore, be given precedence over the Code, which is only a general enactment dealing with insolvency generally. From the introduction of the explanation to Section 5(8)(f) of the Code which came into force on 6th June, 2018, it is clear that Parliament was aware of RERA, and applied some of its definition provisions so that they could apply when the Code is to be interpreted. It is clear that both tests (as above) are satisfied, namely, that the Code as amended, must be given precedence over RERA. Even by a process of harmonious construction, RERA and the Code must be held to co-exist, and, in the event of a clash, RERA must give way to the Code. RERA, therefore, cannot be held to be a special statute which, in the case of a conflict, would override the general statute, the Code.

The allottees of flats/apartments have concurrent remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.

The Amendment Act to the Code does not infringe Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India.

(*In favor of Respondents)

CASE NO.32

"Classification between Financial Creditor And Operational Creditor Neither Discriminatory, Nor Arbitrary, Nor Violative of Article 14 of The Constitution of India. Also upheld the constitutional validity of the Insolvency and Bankruptcy Code. "

IN THE SUPREME COURT OF INDIA
Civil Original/Appellate Jurisdiction
Swiss Ribbons Pvt. Ltd. &Anr. (Petitioner)
Versus
Union of India & Ors. (Respondent)
Writ Petition (Civil) No. 99 Of 2018
With
Writ Petition (Civil) No. 100 Of 2018
Writ Petition (Civil) No. 115 Of 2018
Writ Petition (Civil) No. 459 Of 2018
Writ Petition (Civil) No. 598 Of 2018
Writ Petition (Civil) No. 775 Of 2018
Writ Petition (Civil) No. 822 Of 2018
Writ Petition (Civil) No. 849 Of 2018
Writ Petition (Civil) No. 1221 Of 2018
Special Leave Petition (Civil) No. 28623 Of 2018
Writ Petition (Civil) No. 37 Of 2019
Date of Order: January 25th, 2019

Sec 12(A), 29A, 53 of the Insolvency & Bankruptcy Code, 2016, Regulation 30A of IBBI (CIRP) Regulation, 2016

Brief facts:

The petitions assailed the constitutional validity of variousprovisions of the Insolvency and Bankruptcy Code, 2016.

A challenge was raised that the selection committee of members had more technical members as compared to judicial members and was in contravention to the law laid down by the Supreme Court in Madras Bar Association v. UOI and Madras Bar Association v. UOI.

Another challenge was made on the basis that as the NCLAT was substituting the jurisdiction of the High Courts, the constitution of NCLAT bench only at Delhi and not at every jurisdiction where there was a High Court was violative of the law laid down by the Court in Madras Bar Association v. UOI

Further, it was challenged that the classification between 'financial creditors' and 'operational creditors' under the IBC was arbitrary, discriminatory and violative of Article 14 of the Constitution of India.

The provision of Section 12A is the fact that ninety per cent of the committee of creditors has to allow withdrawal was also challenged.

Decision:

The court held that *financial creditors are clearly differentiated from operational creditors* and therefore, there is an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.It said: "A perusal of the definition of financial creditor and financial debt makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, and 'operational debt' would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority."Most FCs are secured creditors, whereas most OCs are unsecured.

Hon'ble court held that Regulation 30A(1) of the CIRP Regulations is not mandatory but is directory for the simple reason that on the facts of a given case, an application for withdrawal may be allowed in exceptional caseseven after issue of invitation for expression of interest under Regulation 36A. Further, it was also a clear proposition that under Section 60 of the Code, the committee of creditors do not have the last say on the same. If the committee of creditors arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT, and thereafter, the NCLAT can always set aside such decision under Section 60 of the Code. Hence, this provision also passed the constitutional muster.

The court held that the Insolvency Resolution Professional has only administrative and no adjudicatory powers.

On constitutional validity of Sec 29 A of the Code, the court held that "Even the categories of persons who are ineligible under Section 29A, which includes persons who are malfeasant, or persons who have fallen foul of the law in some way, and persons who are unable to pay their debts in the grace period allowed, are further, by this proviso, interdicted from purchasing assets of the corporate debtor whose debts they have either wilfully not paid or have been unable to pay. The legislative purpose which permeates Section 29A continues to permeate the Section when it applies not merely to resolution applicants, but to liquidation also. Consequently, this plea is also rejected."

While challenging Section 53, in the event of liquidation, operational creditors are at the lowest stage of receiving anything as they rank below all other creditors, including other unsecured creditors who happen to be financial creditors The court said: "It will be seen that the reason for differentiating between financial debts, which are secured, and operational debts, which are unsecured, is in the relative importance of the two types of debts when it comes to the object sought to be achieved by the Insolvency Code. We have already seen that repayment of financial debts infuses capital into the economy

inasmuch as banks and financial institutions are able, with the money that has been paid back, to further lend such money to other entrepreneurs for their businesses. This rationale creates an intelligible differentia between financial debts and operational debts, which are unsecured, which is directly related to the object sought to be achieved by the Code. In any case, workmen's dues, which are also unsecured debts, have traditionally been placed above most other debts. Thus, it can be seen that unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute in question, Article 14 does not get infracted."

Hon'ble Supreme Court concluded that *"The defaulter's paradise islost. In its place, the economy's rightful position has been regained."*

With aforesaid observations, the petitions were disposed of.

Hon'ble Supreme Court held that, "*The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster*"

(*In favor of Respondent)

CASE NO.33

"In the light of IBC, the Court decided upon the protection of rights of home buyers which were not protected under IBC initially."

IN THE SUPREME COURT OF INDIA
Civil Original Jurisdiction
Chitra Sharma And Ors
Versus
Union of India And Ors
Writ Petition (Civil) No 744 Of 2017
With
Writ Petition (Civil) No 782 Of 2017
Writ Petition (Civil) No 783 Of 2017
Special Leave Petition (Civil) No 24001 Of 2017
Writ Petition (Civil) No 803 Of 2017
Writ Petition (Civil) No 805 Of 2017
Special Leave Petition (Civil) No 24002 Of 2017
Writ Petition (Civil) No 950 Of 2017
Writ Petition (Civil) No 860 Of 2017
Special Leave Petition (Civil) No 36396 Of 2017
Special Leave Petition (Civil) D No 33267 Of 2017
Writ Petition (Civil) No 511 Of 2018
Date of Order: August 09, 2018

Section 29(A) and Sec 33(1) of Insolvency and Bankruptcy Code, 2016. Regulation 9(A) of IBBI (Corporate Insolvency Resolution Process) Regulations, 2016.

Brief Facts

IDBI Bank Limited instituted a petition under Section 7 of the Insolvency and Bankruptcy Code 2016 against JIL before the National Company Law Tribunal at its Bench at Allahabad.NCLT initiated the CIRP in respect of JIL and an order of moratorium was issued under Section 14.The total financial debt due to the financial creditors on the date of the commencement of corporate insolvency (9 August 2017) stood at Rs 9,984.70 crores.

These proceedings were initiated under Article 32 of the Constitution for protecting the interests of home buyers in projects floated by Jaypee Infratech Limited (JIL). JIL is a special purpose vehicle created by its holding company, Jaiprakash Associates Limited (JAL) for the Yamuna Expressway Agreement for which the finance was obtained from a consortium of banks, IDBI Bank being the lead bank, against a partial mortgage of lands acquired in the NOIDA-Agra sector and a pledge of 51% of the shareholding held by

JAL. A housing plan was envisaged for the construction of real estate projects in two locations of the land acquired.

On 16 August 2017, Regulation 9(a) was inserted to include claims by other creditors and a press note was released by the Board clarifying that home buyers could fill in Form-F as they could not be treated at par with financial and operational creditors.

When the petition was instituted, homebuyers had no locus standi in the CIRP. Because of liquidation, the disposal of assets would not redress their grievances. The Court issued a notice on 4 September 2017 for the proceedings before the NCLT at Allahabad to remain stayed against which IDBI Bank Limited filed an application for vacation. The Attorney General submitted before this Court that the order of stay would result in a consequence where the control of JIL would be restored to the erstwhile management affecting the rights of creditors and consumers as well.

Hon'ble Supreme Court modified this order on 11 September 2017 and permitted the IRP to take over management of JIL and to proceed to formulate an interim resolution plan within a stipulated period. The IRP was directed to ensure that necessary provisions were made to protect the interests of the home buyer and a senior counsel was nominated by the court to participate in the meetings of CoC.

On 30 November 2017 the Court directed that the home buyers may approach the amicus curiae appointed in the case. The amicus curiae was to open a web portal on which details of the home buyers would be uploaded.

On 10 January 2018, RBI moved an Interlocutory Application before the Court seeking leave to move the NCLT against JAL under the provisions of the IBC. While observing that the application filed by the RBI would be considered at a later stage, the Court issued directions to JAL to file details of its housing projects on affidavit. The amicus curiae was permitted to open a separate web portalreflecting the details of the home buyers of JAL.

Section 33(1) of the IBC postulates that liquidation follows upon the rejection of a resolution plan. During the course of the hearing, there has been a unanimity of opinion that the liquidation of JIL will not sub-serve the interests of the home buyers. The home buyers have made valuable investments by contributing hard earnedmonies in the hope of obtaining a roof over their heads.

All the counsel for the home buyers earnestly appealed to the Court to exercise its jurisdiction to ensure complete justice to the home buyers instead of leavingthem to the mercy of a liquidation process.

The Insolvency and Bankruptcy (Amendment) Ordinance, 2018 which came into force on 6 June 2018, the homebuyers came to be recognized as financial creditors

Decision:

The Court held that the Corporate Insolvency Resolution Process should be revived and Council of Creditors reconstituted as per the amended provisions to include the home buyers.

The court held that it would be open to the IRP to invite fresh bids except that of JAL which is barred under Section 29A. Recourse to the power under Article 142 was allowed at that stage for the limited purpose of recommencing the resolution process afresh from the stage of appointment of IRP by extending the period which has been prescribed for the completion of the resolution process.

In the light of IBC, the Court had to decide upon the protection of rights of home buyers which were not protected under IBC initially. However, by the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 which came into force on 6 June 2018, the homebuyers came to be recognized as financial creditors. Due to the amendment, amounts raised from allottees under real estate projects are statutorily regarded as financial debts.

Such allottees were brought within the purview of the definition of ‘financial creditors’. Section 7 of the IBC creates a statutory right in favor of financial creditors to initiate the corporate resolution process. Being financial creditors under the IBC, allottees in real estate projects necessarily constitute a part of the CoC as per Section 21.

The court allowed RBI in terms of its application to this Court to direct the banks to initiate corporate insolvency resolution proceedings againstJAL under the IBC.

With aforesaid observation, the proceedings were disposed off.

***(*In favor of Respondent*)**

CASE NO.34

"The effect of Section 14(1)(a) is that the arbitration that has been instituted after the aforesaid moratorium is *non est* in law."

IN THE SUPREME COURT OF INDIA
Alchemist Asset Reconstruction Company Ltd (Petitioner/ Financial Creditor)
Vs.
Hotel Gaudavan Pvt. Ltd. (Respondent/ Corporate Debtor)
Civil Appeal No. 16929 of 2017
(Arising out of S.L.P. (C) No. 18195/2017)
Date of Order: October 23, 2017

Section 14-Moratorium- application-appeal allowed.

Brief Facts:

The Corporate Debtor was sanctioned term loan by SBI, and the repayment for the same was defaulted continuously, despite of the fact that the opportunity was given to the Corporate Debtor to regularize the account by means of restructuring the loan. Considering the default being for Rs. 33.93 crores inclusive of interests, SBI invoked the provision under the SARFAESI Act for recovery of the loan. The initial petition was challenged successfully by the Corporate Debtor with DRT and DRAT.

SBI further in 2014, had absolutely assigned all the rights, title and interest in the financial assistance granted by him to the company, in favor of Alchemist Asset Reconstruction Company Ltd. (Alchemist ARC)

Though initially rejected by the DRT and DRAT, a fresh notice issued under the SARFAESI Act was allowed by the High Court when appealed to by Financial Creditor. Taking into the consideration the records produced by the Learned Counsel for the Financial Creditor that the Corporate Debtor is heavily indebted not only to it but also to other secured and unsecured creditors, confirmed that there is clear case for initiation of the Insolvency Resolution Process as contemplated under IBC for the benefit of all the stake holders. An opportunity of being heard was given to the Corporate debtor, to which the corporate debtor has filed objections with an intention to get the petition rejected by Tribunal.

However, based on the facts presented and considering the decision given in various cases in the similar matter, the Adjudicating Authority (National Company law Tribunal), Special Bench, New Delhi admitted the application, passed order of moratorium and appointed an 'Interim Resolution Professional' with certain directions.

Corporate Debtor filed Writ Petition before the Hon'ble High Court of Rajasthan challenging the order passed, to which the Hon'ble High Court refused to look into the merits of the order and left it open to be examined by the Appellate Tribunal.

Thereafter, the Corporate Debtor along with another shareholder moved before the Hon'ble Supreme Court in SLP(C) No.12606-12707 of 2017 against different orders passed by Adjudicating Authority which were also dismissed on 26th April, 2017 The 'Corporate Debtor' thereafter moved before the Arbitral Tribunal and against such action the 'Insolvency Resolution Professional' moved before the Adjudicating Authority which decided the matter against the 'Corporate Debtor' on 31st May, 2017.

The Interim Professional Filed Contempt Petition against the Directors for non-compliance with the order of the Adjudication Authority which was passed on 29th July 2017.

The 'Corporate Debtor' had filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 wherein certain orders were passed against which the Appellant (s) preferred the appeal before the District Judge, Jaisalmer, who admitted the appeal, issued notice to the Respondents and passed interim orders.

Decision:

Against the said order, the Financial Creditor moved before Hon'ble Supreme Court in Civil Appeal No. 16929 of 2017 arising out of S.L.P. (C) No. 18195/2017 which was in favor of the Financial Creditor.

Hon'ble Supreme court set aside the order of the District Judge and further stated that the effect of Section 14 (1) (a) is that the arbitration that has been instituted after the aforesaid moratorium is *non est* in law.

Further, ongoing Criminal proceeding under F.I.R. No.0605 which was taken in a desperate attempt to see that IRP does not continue with the proceedings under the Insolvency Code which are strictly time bound was quashed.

As a result, the appeal was allowed and the steps that have to be taken under the Insolvency Code will continue unimpeded by any order of any other Court.

(*In favor of Appellant)

CASE NO.35

"Classification between Financial Creditor and Operational Creditor Neither Discriminatory, Nor Arbitrary, Nor Violative of Article 14 of The Constitution of India."

IN THE SUPREME COURT OF INDIA
Civil Original/Appellate Jurisdiction
Swiss Ribbons Pvt. Ltd. &Anr. (Petitioner)
Versus
Union of India & Ors. (Respondent)
Writ Petition (Civil) No. 99 Of 2018
With
Writ Petition (Civil) No. 100 Of 2018
Writ Petition (Civil) No. 115 Of 2018
Writ Petition (Civil) No. 459 Of 2018
Writ Petition (Civil) No. 598 Of 2018
Writ Petition (Civil) No. 775 Of 2018
Writ Petition (Civil) No. 822 Of 2018
Writ Petition (Civil) No. 849 Of 2018
Writ Petition (Civil) No. 1221 Of 2018
Special Leave Petition (Civil) No. 28623 Of 2018
Writ Petition (Civil) No. 37 Of 2019
Date of Order: January 25th, 2019

Section 12(A), Section 29A, Section 53 of the Insolvency & Bankruptcy Code, 2016, and Regulation 30A of IBBI (CIRP) Regulation, 2016

Brief facts:

The petitions assailed the constitutional validity of variousprovisions of the Insolvency and Bankruptcy Code, 2016.

A challenge was raised that the selection committee of members had more technical members as compared to judicial members and was in contravention to the law laid down by the Supreme Court in ***Madras Bar Association v. UOI and Madras Bar Association v. UOI.***

Another challenge was made on the basis that as the NCLAT was substituting the jurisdiction of the High Courts, the constitution of NCLAT bench only at Delhi and not at every jurisdiction where there was a High Court was violative of the law laid down by the Court in ***Madras Bar Association v. UOI***

Further, it was challenged that the classification between 'financial creditors' and 'operational creditors' under the IBC was arbitrary, discriminatory and violative of Article 14 of the Constitution of India.

The provision of Section 12A is the fact that ninety per cent of the committee of creditors has to allow withdrawal was also challenged.

Decision:

On the subject of interpretation and constitutional validity of Section 12A, Hon'ble Supreme Court held that Regulation 30A(1) of the CIRP Regulations is not mandatory but is directory for the simple reason that on the facts of a given case, an application for withdrawal may be allowed in exceptional cases even after issue of invitation for expression of interest under Regulation 36A.

Hon'ble Apex Court also held that after admission of creditor's petition under section 7 to 9 of the Code, the proceeding before the Adjudicating Authority is a proceeding *in rem*. Therefore, a party can directly approach NCLT for withdrawal or settlement at any stage if the CoC is not constituted which will be decided by the NCLT after hearing all the concerned parties.

That withdrawal requires approval of CoC by 90% of voting power is in the domain of the legislative policy. The CoC does not have the last word on the subject; if CoC arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT can always set aside such decision under section 60 of the Code.

Hon'ble Supreme Court concluded that *"The defaulter's paradise islost. In its place, the economy's rightful position has been regained."*

With aforesaid observations, the petitions were disposed of.

(*In favor of Respondent)

CASE NO.36

"Regulation 30A has to be read along with the main provision Sec. 12A which contains no such stipulation"

IN THE SUPREME COURT OF INDIA
Brilliant Alloys Private Limited (Petitioner)
Versus
Mr. S. Rajagopal &Ors. (**Respondent)**
Petition(s) for Special Leave to Appeal (C) No(s). 31557/2018
(Arising out of impugned final judgment and order dated 01-11-2018in MA No. 536/2018 passed by the National Company Law Tribunal,Divisional Bench, Chennai)

Date of Order: December 14, 2018

Regulation 30A of IBBI (Corporate Insolvency Resolution Process) Regulation, 2016 and Section 12A of IBC, 2016

Brief Facts:

An ordinance was promulgated on June 6, 2018 and the hindrance in a withdrawal of application after the acceptance by the Adjudicating Authority was cured by inserting Section 12A to IBC and to complement the change in the Code a Regulation 30A was inserted w.e.f. 04-07-2018 wherein it was provided that withdrawal of an Application admitted under Sections 7, 9 or 10 of the Code by the Hon'ble Adjudicating Authority can be filed before the issue of invitation for expression of interest under Regulation 36A.

In a matter namely Mr. Vimal Chandrunwal Vs. Brilliant Alloys Private Limited in MA/536/2018 in CP/582/IB/CB/2017 wherein the settlement of all the claims was entered into, after publication of Expression of Interest, the Hon'ble NCLT, Division Bench Chennai was of the opinion that the Tribunal cannot pass an order under Section 60(5) of the Code ignoring the conditional clause in the Regulation 30A of IBBI (CIRP) Regulations to submit Applications u/s12A of the Code before issue of invitation for expression of Interest, hence the application was dismissed.

Subsequent to the dismissal, a Special Leave Petition was filed before the Hon'ble Supreme court.

Decision:

Hon'ble Supreme Court held that the Regulation 30A which states that withdrawal cannot be permitted after issue of invitation for expression of interest, has to be read along with

the main provision of Section 12A which contains no such stipulation and hence such stipulation can only be construed as directory depending upon the facts of each case.
(*In favor of Petitioner)

CASE NO.37

"Trade Union is an operational creditor under the Insolvency and Bankruptcy Code, 2016."

IN THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction
Jk Jute Mill Mazdoor Morcha (Appellant)
Versus
JuggilalKamlapat Jute Mills Company Ltd. Through Its Director & Ors. (Respondents)
Civil Appeal No.20978 Of 2017
Date of Order: April 30, 2019

Section 3 (23), Section 5 (20) and Section 5 (21) of Insolvency and Bankruptcy Code, 2016.

Brief Facts:

The Respondent No 1 company was closed down in March 2014, leaving behind outstanding dues of its workers.Accordingly, a demand notice was issued by the appellant trade union (Appellant) on behalf of around three thousand workers under Section 8 of the IBC.

Thereafter, a petition was filed by the Appellant before the National Company Law Tribunal (NCLT) under Section 9 of the IBC. The NCLT and thereafter the National Company Law Appellate Tribunal (NCLAT) dismissed the said petition inter alia on the ground that a trade union is not covered as an operational creditor under applicable law.

Hence, an appeal was preferred before Hon'ble Supreme Court of India.

Decision:

The Supreme Court concluded that it is was evident that a trade union is an entity established and governed by the Trade Unions Act, 1926 and would therefore fall within the aforesaid definition of 'person' and as such, may be an operational creditor.

Hon'ble Supreme Court of India held that a trade union is an operational creditor for the purpose of initiating the Corporate Insolvency Resolution Process (CIRP) under theInsolvency and Bankruptcy Code, 2016 (IBC).

(*In favor of Appellant)

CONSTITUTIONAL VALIDITY OF RBI CIRCULAR AND SECTION 35AA, 35AB OF BANKING REGULATION ACT, 1949

CASE No. 38

"The regulatory powers of RBI as stated under Section 35AA, 35AB of Banking Regulation Act, 1949 are constitutionally valid, however the circular issued by RBI on 12th February, 2018 *(for resolution of stressed assets)*is *ultra vires* as a whole.

IN THE SUPREME COURT OF INDIA
Civil Original/Appellate Jurisdiction
Dharani Sugars and Chemicals Ltd
Versus
Union of India & Ors
Transferred case (Civil) No. 66 of 2018
in
Transferred petition (Civil) No. 1399 of 2018
Date of Order: April2, 2019

Section 35A, 35AA, 35AB of Banking Regulation Act, 1949- Powers of RBI to give directions to financial institutions, RBI circular dated 12th February, 2018- Resolution of Stressed Assets

Brief Facts:

Several petitions and transferred cases were filed before the Hon'ble Supreme Court of India raising questions as to constitutional validity of Sections 35AA and 35ABof the Banking Regulation Act, 1949 ["Banking Regulation Act"] and the circular issued by the Reserve Bank of India ("RBI") on12.02.2018 promulgating a revised framework for resolution of stressed assets by exercising the powers conferred under these sections.

As per the RBI Circular dated 12.02.2018, unless a restructuring process in respect of debts with anaggregate exposure of over INR 2000 Crore is fully implemented onor before 195 days from the reference date or date of first default, thelenders will have to file applications as financial creditors under theInsolvency and Bankruptcy Code, 2016 ("Insolvency Code").

The sources of power for issuance of the aforesaid circular have been stated to be Section 35A of the Banking Regulation Act read with the Central Government's circular date 05.05.2017, Sections 35AA and 35AB of the said Act, and Section 45L of the Reserve Bank of India Act, 1934 ["RBI Act"]

Various counsels representing different sectors such as power, telecom, steel, infrastructure, sports infrastructure, sugar, fertiliser, shipyard, etc. highlighted the difficulties faced as a result ofGovernment policies and other reasons for financial stress in all thesesectors, which have nothing to do with the efficiency of managementof companies operating in these sectors.It was argued that without looking into each individual sector's problems and attempting to solve them, the RBI circular applies down the board to good and bad alike, which is violative of Article 14 of the Constitution of

India. It was argued that RBI circular is both arbitrary and ultra vires of the Banking Regulation Act & the RBI Actand Sections 35AA and 35AB of Banking Regulation Act, being manifestly arbitrary provisions, are violative of Article 14 of the Constitution of India. Further, they are also arbitrary on the ground of excessive delegation of power in absence of any guidelines.

Decision:

Constitutional Validity of Section 35AA, 35AB of Banking Regulation Act

The relevant sections read as under:

35A Power of the Reserve Bank to give directions —

(1) Where the Reserve Bank is satisfied that—

(a) in the public interest; orin the interest of banking policy; or

(b) to prevent the affairs of any banking company being conducted in a manner detrimental to the interests of the depositors or in a manner prejudicial to the interests of the banking company; or

(c) to secure the proper management of any banking company generally,

it is necessary to issue directions to banking companies generally or to any banking company in particular, it may, from time to time, issue such directions as it deems fit, and the banking companies or the banking company, as the case may be, shall be bound to comply with such directions.

(2) The Reserve Bank may, on representation made to it or on its own motion, modify or cancel any direction issued under sub-section (1), and in so modifying or cancelling any direction may impose such conditions as it thinks fit, subject to which the modification or cancellation shall have effect.

***35AA.** The Central Government may, by order, authorise the Reserve Bank to issue directions to any banking company or banking companies to initiate insolvency resolution process in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016.*

Explanation.—For the purposes of this section, "default" has the same meaning assigned to it in clause (12) of section 3 of the Insolvency and Bankruptcy Code, 2016.

***35AB. (1)** Without prejudice to the provisions of section 35A, the Reserve Bank may, from time to time, issue directions to any banking company or banking companies for resolution of stressed assets.*

(2) The Reserve Bank may specify one or more authorities or committees with such members as the Reserve Bank may appoint or approve for appointment to advise any banking company or banking companies on resolution of stressed assets."

As per the Supreme Court of India, the provisions are not excessive in any way nor do they suffer from want of any guidingprinciple. These are in the nature of amendments which confer regulatory powers upon theRBI to carry out its functions under the Act. Under Section 35A, vast powers are given to issue necessary directions to banking companies. It is clear, therefore, that these provisions which give the RBI certain regulatory powers cannot be said to be manifestly arbitrary.

And as regards guidelines for exercise of powers, such guidance can be obtained not only from the Statement of Objects and reasons and the Preamble to the Act, but also from its provisions. Sections 22, 25, 29, 30, and 31 give guidance as to how the RBI is to exercise these powers under the newly added provisions. There is no lack of guidance for the RBI to exercise the powers delegated to it by these provisions.

Accordingly, sections 35AA and 35AB are constitutionally valid.

(In favor of respondents*)**

Constitutional validity of RBI circular dated 12th February, 2018

Section 35AA makes it clear that the Central Government may, by order, authorise the RBI to issue directions to any banking company or banking companies when it comes to initiating the insolvency resolution process under the provisions of the Insolvency Code. The first thing to be noted is that without such authorisation, the RBI would have no such power.

Accordingly, prior to the enactment of Section35AA, it may have been possible to say that when it comes to the RBIissuing directions to a banking company to initiate insolvencyresolution process under the Insolvency Code, it could have issuedsuch directions under Sections 21 and 35A. But after Section 35AA,it may do so only within the four corners of Section 35AA.

It is clear that the RBI can onlydirect banking institutions to move under the Insolvency Code if twoconditions precedent are specified, namely,

i. that there is a CentralGovernment authorization to do so; and
ii. that it should be inrespect of specific defaults.

It was held that, the scheme of sections 35A, 35AA, and 35AB is as follows:

i. When it comes to issuing directions to initiate the insolvency resolution process under theCode, section 35AA is the only source of power.
ii. When it comes to issuing directions in respect of stressed assets, which directions aredirections other than resolving this problem under the Code, such power falls within section35A read with section 35AB.

Further, it was highlighted by the Supreme Court that Section 35AA enables the Central Government to authorise the RBI to issue such directionsin respect of **"a default".** Therefore, what is important is that it is a particular default of a particular debtor that is

the subject matter of section 35AA. **Any directions which are in respect of debtors generally would be ultra vires section 35AA.**

This is also the understanding of the Central Government when it issued the notification dated 05.05.2017, which authorised the RBI to issue such directions only in respect of "a default" under the Code.

However, the impugned circular issued by RBI was in respect of debtors in general not for a particular default.

Further, it was highlighted by the Supreme Court of India thatthe impugnedcircular applies to banking and non-banking institutions alikeasbanking and non-banking institutions are often in a joint lenders'forum which jointly lend sums of money to debtors.Such non-bankingfinancial institutions are, therefore, inseparable from bankinginstitutions insofar as the application of the impugned circular is concerned.

Therefore, the impugned circular was declared as *ultra vires* as a whole, and be declared to be of no effect in law. as a result, all cases in which debtors have been proceeded against by financial creditors under section 7 of the insolvency code, only because of the operation of the impugned circular will be proceedings which, being faulted at the very inception, are declared to be *non-est*.

***(*In favor of appellants*)**

MOTTO

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