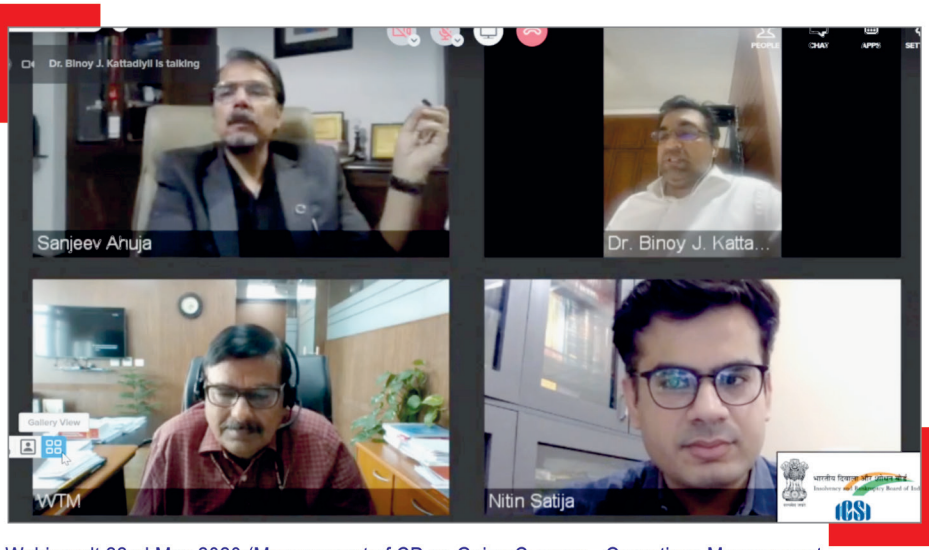
RESOLVE™

INSOLVENCY AND BANKRUPTCY JOURNAL

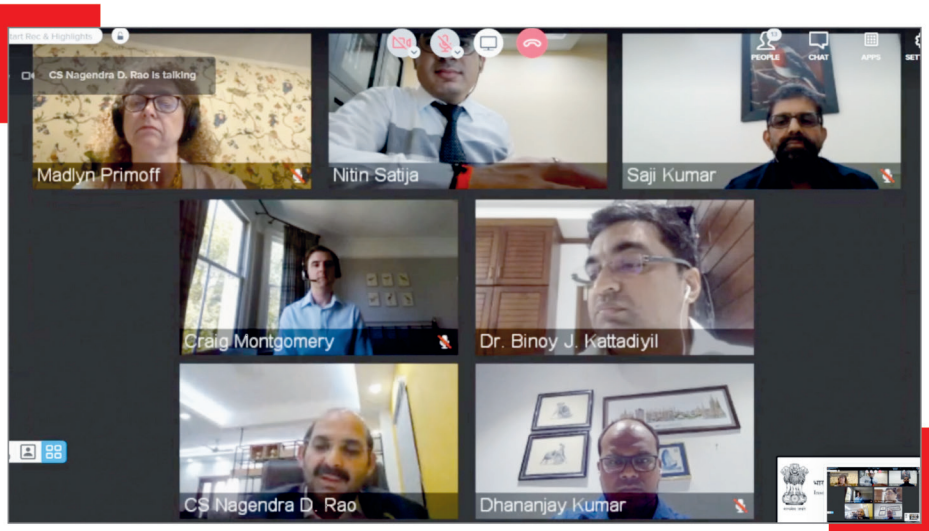
NO. 5 | PG. 1-92 | MAY 2020 | ₹ 500 (SINGLE COPY)

INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI
(Formerly known as ICSI Insolvency Professionals Agency)
'ICSI House', 3rd Floor, 22, Institutional Area,
Lodhi Road, New Delhi - 110 003

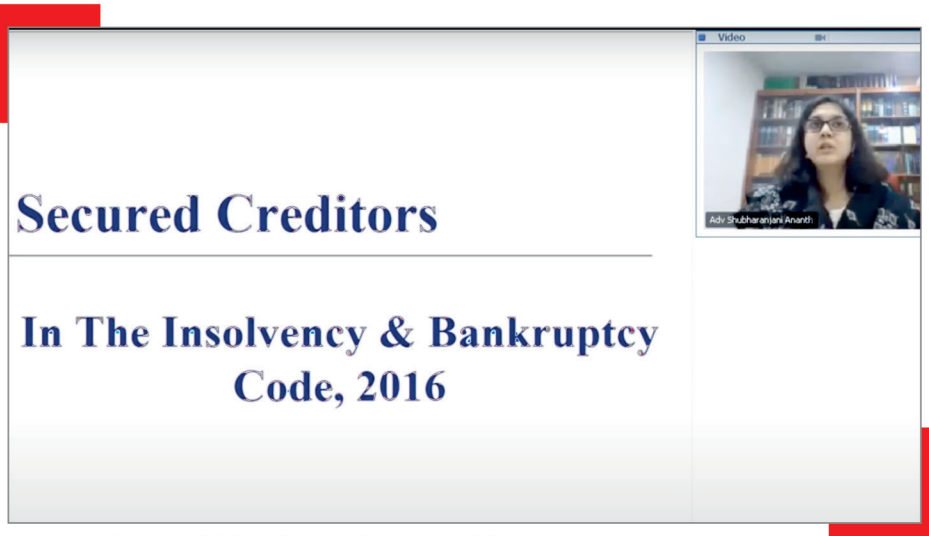
Some Webinar Events held during May Month



Webinar dt 22nd May 2020 (Management of CD as Going Concern_ Operations Management



Webinar dt 28th May 2020 on Reviewing and Challenging Avoidable Transactions under IBC



Webinar dt. 13th May 2020 on Secured Creditors in IBC

'ICSI IIP Insolvency and Bankruptcy Journal' is normally published in the first week of every month • Non- receipt of any issue should be notified within that month • Articles on subjects of interest to Insolvency Professionals are welcome • Views expressed by contributors are their own and ICSI IIP does not accept any responsibility • ICSI IIP is not in any way responsible for the result of any action taken on the basis of the advertisements published in the JOURNAL

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

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

ANNUAL SUBSCRIPTION
(JANUARY - DECEMBER 2020) : ₹ 5,500
Cheques to be drawn in favour of

For ICSI IIP Members
- **ICSI Institute of Insolvency Professionals**
'ICSI House', 3rd Floor, 22,
Institutional Area, Lodi Road,
New Delhi- 110 003.
Phones : 45341099, 45341048
E-Mail : nitin.satija@ICSI.edu

For Non-Members
- **Taxmann Publications Pvt. Ltd.**
59/32, New Rohtak Road,
New Delhi-110005
Ph. : 91-11-45562222
email : sales@taxmann.com

Mode of Citaton [2020] (IBJ)... (Pg. No.)

At a Glance

No. 5 | Pg. 1-92 | May 2020

Section 7, read with section 238A, of the Insolvency and Bankruptcy Code, 2016 and sections 14 and 18 of the Limitation Act, 1963 - Corporate insolvency resolution process - Initiation by financial creditor - Whether benefit under section 14(2) of Limitation Act cannot be given to applicant where there is no materiel on record to show that subject application was being prosecuted with due diligence in a court of First Instance or of Appeal or Revision which has no jurisdiction - Held, yes - Debt became NPA on 30-6-2014 and, thus, 'right to sue' accrued on 30-6-2014 - Limitation period of 3 years ended on 29-6-2017 - Financial Creditor relied upon an acknowledgement of debt which was dated 30-9-2017 - However, said acknowledgement was neither signed by concerned party against whom right was claimed nor by any person through whom concerned party derived its title or

liability - CIRP Application was filed on 8-11-2017- Whether acknowledgement in question would neither come to rescue of Financial Creditor nor would shift forward period of limitation - Held, yes - Whether suit for recovery based upon a cause of action even if it is within limitation, cannot in any manner impact separate and independent remedy of a winding-up proceeding and, thus, a suit for recovery is a separate and independent proceeding distinct from remedy of winding-up and, therefore, contention that period spent while pursuing DRT/SARFAESI proceedings should extend period of limitation, cannot be sustained, as intent of Court is not to give a new lease of life to debt which is already time barred - Held, yes - Whether, thus, CIRP application was barred by limitation - Held, yes (Para 22)

- ***Mohan Lal Jain, In re***

(2020) 118 taxmann.com 111 (IBBI) • P-92

Section 14, read with section 208, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - General - HDFC advanced a Rental Discounting Loan Facility of Rs. 75 crore - Rental income of Corporate Debtor (CD) was pledged to HDFC Bank for this purpose and an Escrow Account was opened in HDFC in which receivables had to be deposited and continuously maintained so long as Financial Facility was fully paid - After admission of CIR petition, during moratorium, RP sought approval from CoC to continue making payments through EMIs to HDFC - After obtaining approval from CoC, RP continued to make payments EMIs to HDFC during CIRP - Whether decision of CoC to ratify and approve payment of EMI to Financial Creditor in preference to other creditors could by no stretch of imagination come within purview of commercial wisdom of CoC and went against basic objectives of IBC - Held, yes - Whether since RP had compromised his independence and continued making payment of EMIs to FC during CIRP from assets of CD, he had contravened provision of Code and, hence, penalty was to be imposed on him - Held, yes (Para 5)

- ***State Bank of India* v. *Metenere Ltd.***

(2020) 118 taxmann.com 143 (NCL-AT)

• P-105

Section 16 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Interim resolution professional - Appointment and tenure of - NCLT by impugned order directed substitution of Insolvency Resolution Professional (IRP), who was ex-employee of appellant bank(financial creditor) on ground that such IRP was unlikely to act fairly and could not be expected to act as an independent umpire - Appellant bank assailed impugned order on ground that proposed IRP fulfils all requirements for appointment as IRP under Code and admittedly bears no disqualifications - It was found that proposed IRP had a long association of four decades with financial creditor serving under it and currently drawing pension - Thus, in view of above circumstances, though IRP was not disqualified or ineligible to act as an IRP, however, apprehension of bias expressed by corporate debtor qua appointment of proposed IRP could not be dismissed off hand - Whether therefore, impugned order being free from any legal infirmity was to be upheld - Held, yes (Paras 8 and 9)

- ***Ritu Murli Manohar Goyal* v. *SVG Fashions Ltd.***

(2020) 116 taxmann.com 888 (NCL-AT) • P-110

Section 238A, read with sections 5(21) and 9 of the Insolvency and Bankruptcy Code, 2016- Corpoarte insolvency resolution process-Limitation period - Operational Creditor had filed an application under section 9 and same was admitted by NCLT-Appellant who was a shareholder and director of Corporate Debtor challenged impugned order primarily on ground that claim was barred by limitation and initiation of Corporate Insolvency Resolution Process could not be sustained-It was found that default had occurred on 7-10-2013 and application for triggering of Corporate Insolvency Resolution Process was filed before NCLT on 20-4-2018 i.e. well after prescribed period of three years in terms of provisions of residuary clause engrafted under Article 137 of Limitation Act, 1963 - Whether application filed by Operational Creditor' under section 9 was barred by limitation-Held, yes -Whether in respect of invoices raised in year 2013 prescribed period of limitation of three years expired in year 2016 and issuance of cheques by Corporate Debtor in year 2017 would not be construed as an acknowledgement in writing within prescribed period of limitation in terms of Section

18 of Limitation Act, 1963 - Held, yes-Whether thus, operational debt in respect whereof Operational Creditor sought triggering of Corporate Insolvency Resolution Process, was neither due nor payable in law on date when such Corporate Insolvency Resolution Process was sought to be initiated by Operational Creditor-Held, yes-Whether, thus, impugned order admitting petition under Section 9 was to be set aside-Held, yes (Paras 9,12,13 &14)

Knowledge Centre 25-28

- **Practical Questions** • P-25
  - Can the claims that are not submitted or are not accepted or dealt with by the RP and afterwards the resolution plan submitted by the RP is approved, be submitted subsequently with the resolution applicant?
  - Can a lead bank or the CoC file an application for removal of the liquidator when orders for liquidation have already been passed by the AA?
  - Can the CoC shirk-off its liability to pay IRP's fees and cost on the ground that the OC who initiated the CIRP proceedings is liable to pay the same?
  - Can a liquidator in exercise of its powers u/s 35(1)(k), IBC consciously decide on the question whether or not to defend any suit against the CD?
  - Can an appellant claim benefit of section 14, Limitation Act, 1963 in respect of the period spent by him in the High Court before which it filed a writ petition against NCLT's order and which subsequently got dismissed by HC?

- **Learning Curves** • P-27
  - MoU which has not been stamped as per the Indian Stamp Act can be considered legally binding loan agreement only after fulfilling the requirement under Stamp Act.
  - Section 43 of the Code shall be invoked if, (1) there shall be transfer of property or interest from the CD to a Creditor, (2) and it must be for the benefit of such creditors in preference to the other creditors of the CD.
  - Providing NIL value to Operational Creditors would certainly not balance the interest of all stakeholders and is a ground for modifying approved resolution plan.
  - The appellant, being a tenant has no locus standi under section 47(1) of the Code to seek any direction against the Liquidator as regards undervalued sale transaction.
  - Section 47(1) of the Code enables a Creditor to file an application where undervalued transactions take place, if resolution professional has not reported it to the Adjudicating Authority.

Policy Update 85-90

- **ROLE OF RESOLUTION PROFESSIONAL/LIQUIDATOR IN RESPECT OF AVOIDANCE TRANSACTIONS** • P-85

- **SECTION 148, READ WITH SECTIONS 16, 22 AND 40 OF THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 - SPECIAL PROCEDURE FOR CERTAIN PROCESSES - CORPORATE DEBTORS HAVE TO FOLLOW SPECIAL NOTIFIED PROCEDURES WITH RESPECT TO REGISTRATION, FILING OF RETURN AND AVAILING OF INPUT TAX CREDIT DURING CORPORATE INSOLVENCY RESOLUTION PROCESS - AMENDMENT IN NOTIFICATION NO. 11/2020-CENTRAL TAX, DATED 21-3-2020** • P-88

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

From Chairman's Desk

"Our greatest weakness lies in giving up. The most certain way to succeed is always to try just one more time"

– Thomas A. Edison

Dear Professional Members,

The pandemic has impacted almost all aspect of our daily lives. The change that it has brought, and which has now set into our lives is being increasingly realized with each passing day. The fear of grave consequences of spread of this pandemic has been troubling our minds ever since the outbreak took alarming proportions. At the same time, if we look at the optimistic side of it there is also a parallel stream of thought persuading us to transform ourselves and bring a positive change in our behaviour and practices. We often feel disappointed when we examine the impact of the present crises especially with reference to our personal finances as also the national

economy. A sense of despair is a natural consequence since many of our activities that we earlier planned for the year 2020 got restricted. However, getting a clarion call from the Prime Minister, Sh. Narendra Modi to move towards making our nation an *Atmanirbhar Bharat* is nothing but turning challenging times into an opportunity. The message given by the Prime Minister and the steps put in place are certainly intended to show us the way forward to success and in a way reinforce our belief in our own strength. It reminds me of a well-known proverb that "*sometimes we have to go through the worst to get the best.*" I am quite confident that the future is going to be extremely pleasant for all of us.

The move to make India a self-reliant nation which is seminal in its nature is intended to encourage and incentivize our local manufacturers to spread their wings to ensure that our domestic requirements of products and services are not unduly dependent on imports that we have carried out in the past. The pursuit of *Atmanirbhar Bharat* has sown the seeds for a new course for a long-term development. It shall serve as a pivot on which India will emerge as a hub for manufacturing activities and also attract a lot of investments from different parts of the World.

India is also globally acknowledged as a country with tremendous potential and possibilities. We need to make the best use of it. Incentivising establishment of production facilities in the country shall be critical to our development. It is therefore, the need of the hour is to have a calibrated incentive plan, coupled with some curbs on import of cheaper produce from other countries. This shall help us in not only encouraging our local industry but will also safeguard and ensure their long-term existence. we have to ensure that our local products are cost-competitive and sustainable in the long term. It is therefore, necessary the we should incentivize innovation, research and development activities to keep India at the cutting edge of the industry. In areas wherein our indigenous capabilities do not exist or are otherwise lacking, forging alliances or partnerships with other countries (or companies) will definitely serve the purpose.

In recent years we have also seen a resurgence of protectionist voices taking center stage in different parts of the world. While there is an element of risk associated with adopting such measures, encouraging indigenous industry to develop and

demonstrate their true potential is never regarded as a measure which counters global trade. Therefore, it shall be helpful if we do it in a calibrated manner and with utmost conviction required for it. There has never been an opportune time than now to take such bold steps. There is also an ongoing process of rebalancing of world powers wherein India is being regarded as a very effective and efficient partner in establishing both peace as well as prosperity in the World.

For all of us, the time has come when we should work proactively and plan for the future!

Thank you for your support shown to us during these tough times. I reiterate my request to all of you to please stay safe and healthy.

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

Managing Director's Message

In a market economy the role of a `*valuer*' is extremely critical. In fact, development of organised professions itself is a necessary prerequisite for ensuring smooth functioning of the market economies. There are diverse purposes (under different statutes) for which we require an assessment by the *valuer*. For instance, in transactions like mergers, acquisitions, *etc.* the assessment arrived at by the valuer becomes the basis for finalisation of total consideration of the transaction. Thus, valuation is required for several transactions under the company legislation, insolvency law legislation, as well as tax law legislation. However, unlike other market-linked professions in India, such as the Company Secretaries, Chartered Accountants, Insolvency Professionals, *etc.*, which have been institutionalised and its members are subject to separate regulatory framework, the valuer's profession is not institutionalised or regulated properly which leads to several opportunities for malpractices creeping in, affecting quality-control and also inhibiting the development of profession itself. As of now, there is no standardized formula for valuing the assets of stressed

companies which are worth thousands of crores of rupees and are up for sale under the Insolvency and Bankruptcy Code (IBC). Presently, there is only an *adhoc* framework for the valuation professionals which is in place, and which is governed by the Companies Act, 2013. The Companies (Registered Valuers & Valuation) Rules, 2017 provides for a regulatory framework for a category of valuers, however, the rules are limited to the valuation services required under the Companies Act, 2013 and the IBC only, and do not provide for a comprehensive institutional framework to address the market failures.

Thus, there is definitely a need to regulate *valuers* profession through an extensive code and also laying down standards of conduct to minimise instances of commercial uncertainty. Now, as already mentioned, there is a very important role played by a valuer in the entire process of facilitating commercial transactions/contracts, and therefore, to fill the lacuna, the Government of India (Ministry of Corporate Affairs) had earlier in the month of September, 2019 constituted a Committee of Experts (CoE) with the directive to examine the need for establishing an institutional framework for regulation and development of the valuation profession in India. The Committee headed by Dr. M.S. Sahoo (Chairperson, IBBI) held several rounds of discussions which resulted in submission of a very well-researched report along with a draft bill.

The primary objectives of the draft Bill are *development and regulation of valuation profession and the market for valuation services in India*. Besides this, the Bill also seeks to protect users of such services. The Bill provides for a two-tier model for the regulatory governance of the profession. It provides *firstly* for the establishment of a National Institute of Valuers (NIV) to act as the principle regulatory body/authority, and *secondly* recognition of Valuer Professional Organisations to act as frontline regulators, which shall be primarily responsible for the development of the profession. The Bill also envisages introduction of some specialised educational courses (along-with a mandatory internship) for entry into the profession. The courses envisaged are required to be delivered by Valuers Institutes, who shall be registered with the Institute (NIV). Furthermore, the examinations for such courses shall also be conducted by the Institute itself. As an interim measure, transitory training programs and an entrance examination are

recommended for persons with prior experience in providing valuation services or those with stipulated qualifications and experience.

For regulation purposes, a robust set of entry requirements coupled with a prescribed standard of conduct and an efficient monitoring mechanism to check the compliances are the pre-requisites. As envisaged in the draft Bill, a valuation professional, to render valuation services, is required to obtain specialised certificates for registration and practise depending on the nature of assets to be valued. Once registered, a valuer will also be required to abide by multiple codes of conduct, and a non-compliance thereof shall attract levy of penalties. The implementation of the Bill will definitely help in standardising valuation services for different purposes mentioned under different legislations, and shall help in developing a market for the services as well. The benefits of establishing such a market of valuers are bound to be multi-fold for the Indian economy.

Wishing you all good health. Keep safe!

Fraudulent Transactions in Context of IBC

Anil Kumar Mittal
General Manager (Retd.)
Union Bank of India
& Insolvency Professional
Partner,
AAA Insolvency
Professionals LLP

Insolvency and Bankruptcy Code-IBC, 2016- was introduced with a prime objective of timebound insolvency resolution of firms maximizing the value of assets and balancing the interest of the stakeholders.

Maximization of Value

Duties of Resolution Professional (RP)/Liquidator include, *inter-alia,* the responsibility to get maximum value for creditors of the corporate debtor (CD).It is imperative on the part of the RP/Liquidator to have proper and fair assessment of assets of the corporate debtor.

Avoidance of Transactions

Transactions which have put Corporate Debtor's economic position at a loss need to be reversed. Section 25(2)(j) of IBC lays down responsibility of the RP to file application for avoidance of transactions in accordance with chapter-III of the Code.

Formation of Opinion on Preferential, Fraudulent and other Transactions

Section 43, 45, 50 and 66 of the code deal with Preferential, Undervalued, Extortionate and Fraudulent transactions respectively.

By Virtue of Section 17(2)(c), 17(2)(d), 18(1)(a) and 23(2) of IBC, the RP has access to the books of accounts financial statements, records and documents of the Corporate debtor kept at latter's office or with Information Utility or Govt. electronically/physically. On the basis of study of these records, the Resolution Professional (RP) needs to form an opinion about the avoidable transactions *i.e.* Preferential, Undervalued, Extortionate and Fraudulent. RP should appoint Transaction Auditor and carry out determination of avoidable transactions based on the report and the records of corporate debtor.

About formation of opinion on avoidance of transactions, Regulation 35A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 has laid down following timelines:

35A (1): RP to form an opinion on preferential, fraudulent and other transactions under sections 43, 45, 50 and 66: within 75 days of Insolvency commencement date,

35A (2): RP to make a determination on preferential, fraudulent and other transactions, under intimation to IBBI: within 115 days of commencement of insolvency,

35A (3): RP to file application before Adjudicating Authority (AA) for appropriate relief: within 135 days of commencement of insolvency.

In the matter of IDBI Bank Ltd. Vs. Jaypee Infratech Ltd. (2018) 93 taxmann.com 308 (NCLT-ALL.), the Honourable NCLT (Allahabad Bench) observed that "..... Opinion has a special meaning in law. `Opinion' must be formed after considering the relevant facts and legal provisions. `Opinion ` is not a synonym of impression, hearsay or gossip. An opinion formed without considering the relevant material and without application of mind is not `opinion' and proceedings founded on such illegal formation of opinion are *void* being without jurisdiction....."

Section 66: Fraudulent Trading or Wrongful Doing

Under section 66(1), if during the CIRP or liquidation process, it is found that any business of corporate debtor (CD) has been carried out with intent to defraud creditors of corporate debtor or for any other fraudulent purpose, the Adjudicating authority (AA) may, on application of Resolution Professional pass an order to the liable persons to make contribution to the assets of the corporate debtor.

Section 66(2) provides that on application of RP, the Adjudicating Authority may order directing a director/partner of the corporate debtor to make such contribution

to the assets of corporate debtor, as it may deem fit.

The difference between section 66(1) and 66(2) is that the former provides for liability of any person found liable for fraudulent transactions, the latter is regarding liability of contribution by Corporate debtor's directors/partners.

Due Diligence on the part of Directors/Partners

Such director/partner shall also be accountable for transactions, if it is found that director/ partner did not exercise due diligence in minimizing the potential loss to the creditors of the corporate debtor. It has been explained for the purpose of this section that a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.

Director/partner will be punished under section 66(2) for failure to carry out due diligence in minimizing potential loss, even if there is no dishonesty. Their accountability for transactions would be if they carried out business recklessly, negligently, exposing company to risk. Directors cannot plead ignorance, lack of knowledge. Question is whether director/partner applied reasonable prudence while doing business.

In the matter of IDBI Bank vs. Jaypee Infratech Ltd. (2018 93 taxmann.com 308 (NCLT-ALL.), while commenting on the issue of due diligence, the honourable NCLT (Allahabad Bench) made a conclusion that directors of corporate debtor are required to minimize potential losses but in this case, they provided benefit to related party and thus demonstrated intent to defraud creditors.

Sections 45-49 IBC: Transactions Defrauding Creditors

Sections 45 to 49 deal with undervalued transactions. Undervalued transaction is one which involves transfer of one or more assets by the corporate debtor for consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor and such transaction has not taken place in ordinary course of business.

In the matter of Anuj Jain v. Axis Bank Ltd. (2020) 114 taxmann.com 656 (SC), the Honorable Supreme Court held ".....it appears expedient to observe that the arena and scope of requisite enquiries to find if the transaction is undervalued or is intended to defraud the creditors or had been of wrongful/ fraudulent trading are entirely different. Specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied by section 45/46/47 or section 66 of the Code.....". Thus, scrutiny of transactions based on material facts may result undervalued transactions falling in the category of fraudulent transactions.

Selected Examples of Fraudulent transactions

While scrutinizing financial information to form opinion/determining nature of

transactions, following aspects of a transaction may lead to its classification as fraudulent:

(i) Continuous transfer of funds to related party for the purpose of making payment to third party therefrom without proper records/evidences may be a route for diversion of funds.

(ii) Whether there have been continuous loss booking transactions. May be that profit is realized by director/ partner through illegal channels.

(iii) Any adjustment entries with debtors/ creditors not backed by debit/ credit notes or MOUs/Agreements or vouchers.

(iv) Writing off the receivables in books. May be the consideration is realized through illegal channels for personal gains.

(v) Concealment of assets and not handing over custody to IRP/RP

(vi) Booking of expenses without documents/ vouchers/agreements.

(vii) Allowing unwarranted discounts/ concessions to debtors by taking illegal benefits.

(viii) Heavy purchases and sales in cash and siphoning off the funds.

(ix) Entries of direct payment by debtors to creditors without tripartite agreements/ acknowledgements and thus jeopardizing interest of creditors.

Such transactions should be reconciled with bank statements of the corporate debtor.

Relevant Period for Avoidable Transactions (section 46)

In the application for avoidance of a transaction, the Resolution Professional/ Liquidator shall demonstrate that

(i) Such transaction was made with any person within the period of one year preceding the insolvency commencement date; or

(ii) Such transaction was made with a related party within a period of two years preceding the insolvency commencement date.

Look back period is not restricted in case of fraudulent transactions. RP/liquidator can file application under section 66 seeking order of AA against frauds/wrongdoings done by insider/outsider any time during the CIRP/liquidation process.

Section 47 of IBC provides for disciplinary proceedings against RP/ liquidator in case it is found that after having sufficient information or opportunity to avail information of undervalued transactions, the RP/liquidator did not report such transaction to Adjudicating Authority.

Filing Separate Applications before Adjudicating authority

In the matter of Anuj Jain v. Axis Bank Ltd. (2020) 114 taxmann.com 656 (SC), where the RP moved one composite application under sections 43, 45, and 66, the honourable Supreme Court held that "....in the system of Code, the parameters and the requisite enquiries as also the

consequences in relation to these aspects are different and such difference is explicit in the related provisions....Appropriate to deal with all these aspects separately and distinctively....". Therefore, separate applications be filed under sections 43, 45, 50 and 66.

Defrauding through Voluntary Liquidation

Regulation 40(1) of IBBI (Voluntary Liquidation process) regulations, 2017 provides for filing of application by liquidator requesting suspension of process of liquidation where he is of the opinion that the liquidation is being done to defraud a person.

New Section 66(3)

A new section 66(3) has been added in the Code *vide* the Insolvency and Bankruptcy Code (Amendment) ordinance, 2020, which reads as under:

> " Notwithstanding anything contained in this section, no application shall be filed by a Resolution Professional under sub-section (2), in respect of such defaults against which initiation of Corporate Insolvency Resolution Process is suspended as per section 10A".

It would be relevant to understand in this context that in the scenario of Covid-19 pandemic, *vide* introduction of section 10A, initiation of CIRP against a corporate debtor under sections 7, 9, 10 is suspended in respect of defaults that occurred on or after 25 March, 2020 for a period of six months or such further period up to one year, as may be specified in this behalf. Insertion of section 66(3) is therefore relevant to the section 10A related context.

Section 69: (Punishment for Transactions Defrauding Creditors)

This section provides for punishment by way of imprisonment from one year to five years and fine up to Rs. 1.00 crore for the corporate debtor and its culprit officers.

Purpose of this section is very clear that the fraudsters should not be allowed to go scot free. Though the directors may have limited liability, but in case of fraudulent transactions, they have unlimited liability along with punishment.

Conclusion

The CIRP under IBC is aimed at maximization of value for creditors. In case of fraudulent transactions and wrongful doings, recoveries can be made under section 66 of IBC, from directors/partners of corporate debtor and other persons who are a party in the fraud. IBC also has sufficient provisions to impose penalty on fraudsters.

Information Utilities – Creation, relevance and future significance

T.R. Ramamurthy
Company Secretary and
Insolvency Professiona

Synopsis

In this article, the author commences with the coneptualisation of IU under the Insolvency and Bankruptcy Code, 2016 and the registration of National e-Governance Services Limited as the first IU in the country and gives an account of the services provided by it and also highlights its relevance. It is expected that in future, the significance of the IU shall be far greater than what was originally envisaged under the code and it can transform the lending scenario in the country with the dematerialisation of loan documentation.

At the outset, it may be mentioned that in none of the other jurisdictions in the world, there is existence of Information Utility of the kind that is witnessed in India. The IU has been conceptualised and operationalised in a dovetailed manner as one of the four key pillars of the new Insolvency regime by the Bankruptcy Law Reforms Committee (BLRC). Chapter V, Part IV of IBC 2016 relates to Information Utilities. This chapter has eight from sections 209 to 216. The term "Information Utility": has been defined in clause (21) of section 3 of the Code as under :

"Information Utility" means a person who is registered with the Board as an information utility under section 210.

Section 213 specifies that an information utility shall provide such services as may be specified including core services to any person if such person complies with the terms and conditions as may be specified by regulations.

The term "core services" has been defined in clause (9) of section 3 of the code as under :

"Core services" means services rendered by an information utility for –

(a) accepting electronic submission of financial information in such form and manner as may be prescribed;

(b) safe and accurate recording of financial information;

(c) authenticating and verifying the financial information submitted by a person; and

(d) providing access to information stored with the information utility to persons as may be specified.

As per section 215 of the Code, while it is mandatory for the financial creditor to submit the information to the IU, for an operational creditor, it is optional to submit such information to the IU. There is no penal provision for non submission of information by the financial creditor.

Before we proceed further, it would be advantageous to have a look at the relevant recommendations of the report of the Joint Committee on the IBC and the BLR Committee the same are reproduced hereunder (in italics) :

Relevant extracts of the Joint Committee on the IBC

The code proposes to set up information utilities to collect, collate, authenticate and disseminate financial information to facilitate insolvency, liquidation and bankruptcy proceedings under Chapter V of the Code. Clause 214 provides for obligation of information utility whereby it has been provided that every information utilization shall create and store financial information in a universally accessible format. It also provides to get the information received from various persons authenticated by all concerned parties before storing such information and provide access to the financial information stored by it to any person.

The Committee are of the opinion that there should be interoperability amongst various information utilities to facilitate

getting and accessing the Information from any of the information utility.

BLRC Report extract

The committee recognises that asymmetry of information is a critical barrier to fair negotiations or ensuring the swiftness of the oricess, The Committee recommends the creation of a regulated information utility that will make available all the relevant information to all stakeholders in resolving insolvency and bankruptcy. As per section 238 of the IBC the provisions of IBC shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

It is understood that the intention behind creation of IU for provision of information on debts of corporate persons is in consonance with the preamble to the Act which contains the terms "reorganisation and resolution in a time bound manner" so as to put the recoverable debts beyond dispute in the overall interest of the economy and the focus remains on insolvency resolution. The IU provides the credit information filed with it by the creditors which is also verified by the corporates from time to time and thus enables the Adjudicating authority to proceed with the steps envisaged under the Code and operationalise the resolution and liquidation process in accordance with the Code.

Working Group in MCA

Besides, the Information Utility has been created after a Working Group in the Ministry of Corporate Affairs submitted its report for the formulation of the rules and regulations. The Group consisted of industry experts in automation and data management apart from the legal experts. The Working Group recognised the importance to avoid being overly prescriptive. The Workng Group also recognised that the IUs have the potential to become the backbone of the Insolvency Process.

IBBI (Information Utilities) Regulations, 2017

The Insolvency and Bankruptcy Board of India has issued the IBBI (Information Utilities) Regulations, 2017 with effect from 1st April, 2017. Chapter V of these regulations relates to the core services to be provided by the Information Utility. The important points with regard to the regulations are that the IU shall provide the core services and other services as per the regulations after registration of users and will accept the information submitted by the users and give access thereto to users and all other parties, the corporate person as well as the Insolvency Professional and any person authorised to access information under any other law apart from the adjudicating authority as well as the regulator. The IU shall also provide an annual statement to the user and provide functionality to mark information as erroneous and allow correction. The users are required to furnish information in form C as per the regulations and it is worthwhile noting that details relating to the creation of security including the security interest ID as provided by CERSAI including the date of valuation of the security. The loan agreement and the repayment schedule shall be annexed

to the form C and if the submitter is the debtor the balance sheet and the cash flow statement too are annexed. It may also be relevant to note that the charge registration certificate, registration with CERSAI and the valuation report of the assets concerned are required to be annexed and these are available for information by any other user concerned thus providing the potential future litigant with a fund of information about the corporate person.

National e-Governance Services Limited

As of now, one information utility has been registered with the Insolvency and Bankruptcy Board of India *viz*. National e-Governance Services Limited as a collective action of the Public Sector Banks, Life Insurance Corporation and Insurance companies as well as CDSL and this was set up during September, 2016. Information about its establishment, operation and provision of services to the users may be accessed by anyone from its website www.nesl.co.in. It is stated that as of May 2020 more than 99% of the financial creditors in the country have electronically safely recorded information about their debts. The services provided by NESL and the charges that they levy for provision of such services to various users including financial creditors, operational creditors, insolvency professionals have all been listed in a brochure issued and available in its website for the benefit of the users. NESL has also issued a guidance to all types of users and seeks information like PAN number, Aadhar number, Board resolution *etc*. for the purposes of registration. NESL complies with the technical standards that have been established by the Technical Committee of the IBBI.

While in case of financial creditors have been brought in a substantial measure, in respect of operational creditors, it is noticed that a suggestion was given at a very early stage that linkage to the GSTN network and automatic data entry using the same software should be attempted. In other words, the Information Utility should be expanded to take data by cross linking with the accounting softwares in operation at the MSME units and also with the ERP in the large units.

It may also be stated that the liquidators need to verify the claims received from the various stakeholders in accordance with section 39 of the code and they may also resort to the data that is available in the IU and thus his job would be made easy for completion of verification of the claims. The IU holds electronic evidence and as per the statement of the Managing Director of NESL in a webinar held on 12th May, 2020, the electronic evidence in the form of record of default is admissible in any Court of Law as per legal opinions obtained by them and not only the Adjudicating Authority under IBC. The system in IU is not biased in favour of the creditor. As of now, apart from financial and operational creditors, debenture trustees and companies accepting deposits have also commenced filing such information in the IU. It is also stated that individuals are filing credit information in respect of unsecured loans being extended to the corporate persons.

Further, the record of default submitted is verified with the digital signature of

the submitter and in case the default is countered by the debtor and the debtor places his counter stating that the dues have been paid and further places his digital signature thereon, the same are verifiable in terms of the Information Technology Act and there is an audit trail whereby the person affixing his DSC can not countermand the signature. It may also be added that the details are default to be reported are contained in Part C of form C and the default information is sent three times to the registered e-mail of the Corporate entity as registered with Ministry of Corporate Affairs or to the personal e-mail identity of the guarantor director as the case may be and also followed up if not responded with a registered post acknowledgement due.

As the Insolvency Professionals are aware, as per order dated the 12th May, 2020 issued by the National Company Law Tribunal, all section 7 petitions shall henceforth annex the record of default report issued by the IU and without the same, the petitions will not be taken up. Besides, the Institute of Chartered Accountants of India have advised the Chartered Accountants to obtain information from the IU as a source of external confirmation.

Future Scenario

As per information gathered about the NESL, it is learnt that in the times to come, it is going to offer a software (IP Module) and also offer a facility of virtual data room which will in a way transform the professional work of the Insolvency Professionals who would be able to use it as a personal data product and automate the periodical reports and also help in proper storage of data. Going a step beyond its present mandate, the IU shall also take the lead in dematerialisation of the loan documentation work and make the loan documentation work complete in a much shorter time and also help the banker and borrower greatly and automate the issue of e-stamped documents and simultaneously place the information in the repository. It is expected that when introduced, the IP's and other professionals would be offered substantial training opportunities to be able to make use of such facilities and avail the intended benefits.

Registration of Charges Under Companies Act, 2013

The professionals have all been used since ages to creation of charge and registration thereof with the Registrar of Companies under the provisions of the Companies Act in its present version and earlier versions. However under the said Act, the registration as well as satisfaction of charges only are recorded as events and there is no record of default or any dispute or partial periodical repayments. The registration is mandatory only for the financial debts and not applicable to the operational debts of the corporates. The website of MCA 21 allows public search of information stored therein on payment of Rs. 100 per company inspection for a period of 3 hours and information could be viewed by anyone interested in any company borrowing and creation of security. Therefore, it is fair to assume that the present role of IUs is much greater in comparison to the records available in the MCA 21 registry. At the same time,

it would not be unfair to ask a question, whether the registration of charges in terms of Chapter VI of the Companies Act, 2013 should be discontinued at a certain stage when much greater coverage is available through the IU.

Registration under Sarfaesi Act, 2002

After the enactment of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, another registry viz. CERSAI (Central Registry of Securitisation Asset Reconstruction and Security Interest of India) which is a section 8 Company has come into existence and records security interest in assets created by Banks and financial institutions including the Non Banking financial companies. CERSAI provides information on security interest in any assets irrespective of whether they belong to corporates and non corporate entities where a financial interest has been created. This site too allows public search of security interest on payment of Rs. 10 per inspection plus goods and service tax.

Conclusion

One would have initially thought that the Information Utility for the purpose of the code would be another repository of information and in contrast to such thought, the IU has done well to establish its credentials within IBC and also traverse beyond the boundaries of IBC in matters like e-stamping, dematerialisation of loan documentation, storage of information and provision of IP module for the benefit of the Insolvency Professionals *etc*. Especially when the dematerialisation of loan documentation is achieved, it would be a great step ahead in the annals of Indian banking scenario akin to the dematerialisation of securities which offered a quantum leap of benefits to the investors. It is also a matter of satisfaction that while the substantive provisions of the Code have been challenged and constitutionality tested in Supreme Court, the procedural part in respect of the IU has so far remained outside the realm of legal challenge in any way.

Voluntary Liquidation Process under IBC : Certain Finer Aspects

Pranav Damania
Insolvency Professional

In this article, I am highlighting certain finer aspects relating to

1. Background and introduction of section 59
2. Basic Due Diligence of the corporate person before the process
3. Relevant laws for this purpose
4. Compliance under other laws
5. Other aspects
6. Activity Chart

I. Background and introduction of section 59 of IBC: Voluntary liquidation or popularly known as voluntary winding up in simple terms is known as the process where the company's legal status is achieved to be dissolved by winding down the operations of the business and distributing its assets to the stakeholders. The relevant laws pertaining to this process are contained in

(a) Section 59 of the IBC

(b) IBBI (Voluntary Liquidation Process) Regulation, 2017

(c) IBBI (Liquidation Process) Regulation, 2016

In the entire IBC Law, voluntary liquidation is the only situation where the code deals with the situation of solvency rather than insolvency. The basic conditions of solvency need to be fulfilled not only at the time of commencement but also throughout the

process. Hence the relevant laws framed to deal with solvency situation has been very simple and in a manner where the relevant players are given a cohesive role to play. The ultimate goal is to close down the company and remitting the funds back to the shareholders in a very coordinated and peaceful ways in a shortest possible timeframe. Before introduction of voluntary liquidation under IBC, it was governed under The Companies Act, 1956 and Court Rules. The distinction of members winding up and creditors winding up is done away with under the IBC. Only Corporate Person can initiate the voluntary liquidation under The IBC. However the consent of creditors are also required apart from shareholder's consent to commence the liquidation. In terms of section 59 of the IBC, only those corporate person is allowed to initiate voluntary liquidation process, which has not committed any default. Default here includes those debts that has become due and payable. Thus interest of creditors are taken due care under the IBC in a much simpler format.

The usual challenge faced in the process under The Companies Act was to obtain approval and clearance from the office of Official Liquidator. Under the IBC the Insolvency Professional who acts as a liquidator is the sole authority who completes the winding up process including liquidation of assets, payment of liability and approach the Adjudicating Authority for passing the dissolution order. Thus the approval level has been curtailed under the IBC and as the NCLT is a dedicated AA for this purpose, the dissolution process runs much faster as compared to High Court who used to be the authority passing the dissolution order under The Companies Act.

The Government has rightly brought the voluntary liquidation process under IBC, as lesser number of approval matrix has benefited the entire corporate community who wanted an easy exit option in case they decide to shut down the operations. Apart from ease of starting the business and ease of doing the business, it was also necessary to have ease of exit. Voluntary liquidation process is a classic example of how change in law has brought efficiency in the entire system. IBC has added lot of value in helping India jumping the rank in World Bank's Ease of Doing the business during last 2 years.

II. Basic Due Diligence before the start: The conditions mentioned for corporates to be eligible to start the voluntary liquidation process are

(a) Solvency of corporate person

(b) No default by corporate person

It becomes responsibility of Insolvency professional who is appointed as a liquidator to ensure that the company does not carry any lingering issues in terms of legal or any liability arising out of non-compliance. The entire process of liquidation is carried out by the liquidator who wind up the affairs of the company, distribute the assets, and settle the liability in consultation if any, with the stakeholders. The significant power is shifted in the hands of liquidator. After completely winding up the affairs, the liquidator approaches the Adjudicating Authority for final dissolution order. With the power given, it becomes responsibility of Insolvency Professional to carry out the process with utmost trust and in a shortest

possible time. The historical issues should not delay the process and it is important for liquidator to settle all the liabilities whether accounted or otherwise. Sometime the liability arising out of non-compliance are not recorded or disclosed but during the process if the liquidator comes to knowledge of these potential liability then the same need to be crystalised and settled accordingly. The diligence process should be carried out to ensure that

(*a*) The company is carrying out the process not to defraud any creditor.

(*b*) The process should not result into avoidance of any statutory or contractual liability.

Therefore before getting appointed as a Liquidator, it is necessary for the prospective liquidator to check the following key areas.

(*a*) the intention of the company opting for liquidation,

(*b*) its past conduct,

(*c*) compliance track records and

(*d*) promoter and management background.

It is also necessary that all the operational activities in terms of sales and purchase should be completed before the liquidation commencement date. After the liquidation process starts only the activities which relates to liquidation process are carried out as the company does not remain a going concern entity.

III. Relevant laws: Entire law and procedure relating to voluntary liquidation is contained in Chapter V, Section 59 of the Code. It list down the conditions, role of Registrar and Adjudicating Authority, provision of other laws and regulations and finally dissolution of company and strike off of name of company from Registrar of Companies.

The relevant rules and regulation framed by the IBBI apart from section 59 are as under

(*a*) IBBI (Voluntary Liquidation Process) Regulation, 2017

(*b*) IBBI (Liquidation Process) Regulation, 2016

(*c*) Liquidation Process under Chapter III

(*d*) Offences and penalties under Chapter VIII

Therefore it is very important that a cohesive reading of all the above laws are required to ensure that entire process is carried out in a proper way. Apart from above, the liquidator should refer the other laws as applicable to the company to ensure that due care is taken in payment of taxes and other statutory dues, filing of returns and surrender of licences.

IV. Compliances under various laws: Under CIRP, there is an express responsibility u/s. 17(2)(*e*) on the shoulder of the Insolvency Professional to comply with requirements under any law for the time being in force on behalf of the corporate debtor. Under CIRP it is also the responsibility of IP to maintain the status of the company as Going Concern. However such express provisions are not mentioned under relevant law governing voluntary liquidation process. But there is an implied responsibility on the Liquidator to ensure the relevant compliances are taken care off during the liquidation process. Following are the

illustrative list of compliances that the liquidator need to meet. Liquidator need to look at each corporate person separately for entity specific compliances.

1. Income-tax return filing and other filing applicable under The Income-tax Act, 1961.
2. TDS provision under Income-tax Act and rules.
3. GST returns under GST Act and rules thereon.
4. FEMA provision while remittance of capital to shareholders.
5. Companies Act provision to the extent applicable.

As per IBBI (Voluntary liquidation Process) Regulation, 2017, the corporate person shall from the liquidation commencement date cease to carry on its business except as far as for the beneficial winding up of its business and the corporate person shall continue to exist until it is dissolved by the order of the AA. Thus the corporate person is not supposed to carry out its normal business activities and only activity remains are those that lead to the winding up of the affairs of the company under the code and regulations. Thus the level of compliance shall be much lower as compared to those companies which are going concern. However as the company continue to exist, liquidator need to ensure the relevant filings and payment of taxes are complied. There is a possibility that while surrendering the applicable trade and commercial licenses, all the formalities mentioned while granting the licence or registration need to be completed.

V. Other Aspects: Here I would like to touch upon certain aspects which are evolving out of best practice

(a) Valuation: Unlike under CIRP, there is no specific regulation of mandatory valuation. Section 59(3)(*b*)(*ii*) state that the declaration of solvency given by majority of directors shall be accompanied with a report of valuation of assets of company if any prepared by a Registered Valuer. Declaration of solvency is to be given by majority of directors before actual commencement of liquidation process.

This lead to a belief that a valuation report is compulsory to be obtained. In practice where most of the corporate person are having only liquid assets in form of bank balance, fixed deposit, mutual fund, the requirement of valuation shall not be strictly called upon by the liquidator in lieu of the word if any used in the provision. However where the corporate person has assets other than liquid assets, it is necessary to have a valuation report from the Registered Valuer without which it will not be possible for liquidator to determine the valuation of assets as on liquidation commencement date. Hence when he would liquidate those assets, he need to ensure that it gets the best possible price or a price which is note less than the Fair Market Value of the assets. The valuation is also necessary where the assets are not sold in open market but given to the stakeholders as a part of distribution of assets as the applicable GST or

Capital Gain Tax shall be calculated on the transaction price which shall not be less than the Fair Market Value or Fair value

(*b*) Tax NOC under the Income-tax Act and GST:

Under Income-tax Act,1961, section 178 of the Act prescribes the requirement of obtaining NOC from tax department for a company under liquidation. Although there is no express requirement of such NOC under the Code unlink under The Companies Act which prescribed an express requirement of such NOC, it becomes implied requirement for liquidator to obtain NOC from the tax department. This will also help liquidator to ensure that all due care is taken in ensuring that there remains no unpaid dues to the Government as the company has sufficient liquidity and shall pay all the taxes. Therefore it becomes a mandatory requirement to obtain Income Tax NOC.

VI. Under the GST there are no specific provision to obtain NOC from GST department. Therefore it is difficult to assume a formal NOC from GST department. However the liquidator must inform the GST department about commencement of liquidation and ask the department to submit claim if any. Without any formal NOC from the department it becomes utmost important for liquidator to check whether all the past dues pertaining to GST are paid. The Liquidator shall also ensure that GST liability is duly taken care of, arising out of sale of assets during the liquidation process.

VII. Activity Chart: Following is the activity chart and model timeline for the entire liquidation process under the Code.

Model Timeline for Voluntary Liquidation Process

Sr. No	Section/ Regulation	Description of Task	Norm	Timeline (Days)
1	Section 59(3)(*c*)	Commencement of Liquidation and appointment of liquidator	LCD	0=T
2	Regulation 14	Public Announcement in Form A	Within 5 days of appointment of liquidator	T+5
3.	Section 59(4)	Company to notify ROC and Board about the resolution to liquidate the company	Within 7 days of such resolution	T+7
4.	Regulation 9	Submission of Preliminary Report to Corporate person	Within 45 days of LCD	T+45
5.	Regulations, 16, 17, 18 and 19	Submission of proof of claims	Within 30 days of LCD	T+30
6.	Regulation 29	Verification of claims	Within 30 days from the last date for receipt of claims	T+60

Sr. No	Section/ Regulation	Description of Task	Norm	Timeline (Days)
7.	Regulation 30	Preparation of list of stakeholders	Within 45 days from the last date for receipt of claims	T+75
8.	Regulations, 31 and 32	Recovery and sale of assets	No prescribed timeline	---
9.	Regulation 36	Distribution of proceeds from realization	Within six months from the receipt of the amount to the stakeholders	---
10.	Regulation 37(1)	Completion of liquidation	Within 12 months from LCD	T+365
11.	Regulation 37(2) Regulation 37(2)(*a*)	Liquidation process continuing for more than 12 Months- -Hold a meeting of contributories	Within 15 days from the end of 12 months from LCD and at the end of every succeeding 12 months till dissolution of corporate person	T+380
12.	Regulation 37(2)(*b*) and 37(3)	Present Annual Status Report with audited accounts of liquidation showing Receipt and Payments pertaining to liquidation since LCD	Within 15 days from the end of 12 months from LCD and at the end of every succeeding 12 months till dissolution of corporate person	T+380
13.	Regulation 38	Final Report to be send to Registrar and Board and to be submitted to AA along with application under section 59(7)	On completion of liquidation process	---
14.	Section 59(9)	Copy of order pass by adjudicating authority to be forwarded to ROC.	Within 14 days from date of such order to authority with which Corporate person is registered	---

Terminology

Code or IBC : The Insolvency and Bankruptcy Code

IBBI : The Insolvency and Bankruptcy Board of India NCLT : The National Company Law Tribunal

CIRP : Corporate Insolvency Resolution Process

IP : Insolvency Professional

GST : Goods and Services Tax

Corporate person : Company or LLP

LCD : Liquidation Commencement Date

"Dissenting Financial Creditors" Under Insovlency & Bankruptcy Code, 2016

Hareesh Kumar Kolichala
Chief Manager (Law),
Union Bank of India

The distinction among creditors into five categories as Secured, Unsecured, Financial, Operational and a Decree Holder has been made for the first time by the Insolvency and Bankruptcy Code, 2016 (I & B Code,2016) and such distinction is unknown till the advent of the I & B Code,2016. Insolvency resolution is the object of the I & B Code,2016 and recovery is incidence of such insolvency resolution. How each creditor is to be treated has been provided in the I & B Code,2016 and in the Supreme Court's decision in the case of Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta (2019) 111 taxmann.com 234. Interestingly, the I & B Code,2016 also envisages different treatment to the Financial Creditors which are mainly Banks for having voted against the Resolution Plan. This article highlights the position of a 'Dissenting' Financial Creditor in the scheme of the I & B CODE,2016.

Who is A 'Financial Creditor'?

Section 5 (7) of the I & B CODE,2016 defines the expression "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. A Financial Creditor is one

who lends money against the consideration of time value, i.e. money lent against the payment of interest and includes the amount of any liability in respect of any of the guarantee or indemnity. It is generally the Banks and FIs who are the financial creditors to the Corporate Debtors.

Committee of Creditors

It is the Financial Creditors alone who comprise the Committee of Creditors formed by the Interim Resolution Professional (IRP) and voting share percentage is allotted to them based on their claims as on the Insolvency Commencement Date.

Voting

The process of Insolvency Resolution commences on constitution of the Committee of Creditors which is called as Corporate Insolvency Resolution Process (CIRP) during the course of which various actions have to be taken by the Resolution Professional with the approval of the Committee of Creditors. As per Section 24(6), each creditor shall vote in accordance with the voting share assigned to him. The I & B CODE,2016 prescribed different minimum voting share for different actions for approval by the Committee. As per Section 30(4), for approval of Resolution Plan submitted by a Resolution Applicant, approval of 66% of voting share of the Committee is required and a member may vote in favour of the Resolution Plan or against it. However, if a Resolution Plan is approved by 66% of the voting share which is also approved by the Adjudicating Authority (NCLT), the same shall be binding on all stakeholders including dissenting financial creditors, i.e., the creditor who voted against it.

Who is A Dissenting Financial Creditor?

Clause 2(f) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, defines the expression "Dissenting Financial Creditor" as under:

> "dissenting financial creditors means the financial creditors who voted against the resolution plan or abstained from voting for the Resolution Plan, approved by the Committee".

Whether Dissenting Financial Creditors can be Treated Differently?

Section 30(2)(b)(ii) of the I & B CODE,2016 reads as under:

"The Resolution Professional shall examine each Resolution Plan received by him to confirm that each Resolution Plan provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section(1) of Section 53 in the event of liquidation of the corporate debtor."

Therefore, it is clear that section 30(2)(b)(ii) allowed separate treatment of a financial creditor who do not vote in favour of a Resolution Plan. This provision was included by amendment to the I & B

CODE, 2016 which came into effect from 16.8.2019 and it was the Regulation 38 of the IBBI (Insolvency and Bankruptcy) Regulations,2016 which had originally contained the following regulation:

Mandatory contents of the resolution plan.-- (1) A resolution plan shall identify specific sources of funds that will be used to pay the- (a) insolvency resolution process costs and provide that the (insolvency resolution process costs, to the extent unpaid, will be paid) in priority to any other creditor; (b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority; and (c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.

In "*Central Bank of India* v. *Resolution Professional of the Sirpur Paper Mills Ltd.* Company Appeal (AT) (Insolvency) No. 526 of 2018, the Appellate Tribunal (NCLAT) while noticing the provisions of Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016, held it to be illegal and observed as follows:

> "From the aforesaid provisions of I & B Code, 2016, it is clear that the Board (Insolvency and Bankruptcy Board of India, established under I & B CODE,2016,2016, which has been empowered to make regulations) may make regulation but it should be consistent with the I & B Code,2016 and rules made therein (by Central Government) to carry out the provisions of the I & B CODE,2016. Therefore, we hold that the provisions made by the Board cannot override the provisions of I & B Code,2016 nor it can be inconsistent with the I & B CODE,2016. Clause (b) and (c) of Regulation 38(1) being inconsistent with the provisions of I & B Code,2016 and the legislators having not made any discrimination between the same set of group such as 'Financial Creditor' or 'Operational Creditor', Board by its Regulation cannot mandate that the Resolution Plan should provide liquidation value to the 'Operational Creditors' (clause (b) of regulation 38(1)) or liquidation value to the dissenting Financial Creditors (clause (c) of regulation 38(1)). Such regulation being against Section 240(1) cannot be taken into consideration and any Resolution Plan which provides liquidation value to the 'Operational Creditor(s)' or liquidation value to the dissenting 'Financial Creditor(s)' in view of clause (b) and (c) of Regulation 38(1), without any other reason to discriminate between two set of creditors similarly situated such as 'Financial Creditors' or the 'Operational Creditors' cannot be approved being illegal. Therefore, the Appellant- 'Rajputana Properties Private Limited' cannot take plea that dissenting 'Financial Creditors' can be discriminated on the basis of Regulation 38."

NCLAT had expressed similar view in the case of *Binani Industries Ltd. v. Bank of Baroda* (2018) 99 taxmann.com 164 and in other cases.

Thereafter, the IBBI had amended the said regulation on 5.10.2018 and repealed the same In the case of *Hero Fin Corp Ltd. v. Rave Scans (P.) Ltd.* (2019) 109 taxmann.com 225. NCLAT had reiterated the same principle when the Resolution Applicant offered Hero Fin Corp Ltd. a dissenting financial creditor 32.34% of its admitted claim as it has dissented with the plan. On the other hand, Tata Capital Financial Services Ltd.' has been provided with 75.63% of its admitted claim and other 'Financial Creditors' i.e. 'Indian Overseas Bank', Bank of Baroda and Punjab National Bank had been provided with 45% of their admitted claim. The NCLAT had reiterated the same to be illegal, directed the Resolution Applicant to modify the plan to provide Hero Fin Corp Ltd.45% on par with the Banks.

The matter was carried in appeal before the Supreme Court by the *Resolution Professional Rahul Jain v. Rave Scans (P.) Ltd.* (2020) 113 taxmann.com 342 and Supreme Court set aside the order passed by the NCLAT on the ground that the Resolution Process started and the Resolution Plan was approved before the amendment of the regulation. However, Supreme Court did not discuss elaborately whether such discrimination could be made against the dissenting financial creditors or not but it is indicated that such Regulation was valid. It also appears that the Resolution Applicant had offered more amount to the Creditors (Rs.54.00 crrores in total) than the liquidation value (Rs.34.00 crores only) of the corporate debtor and hence Supreme Court approved the Plan.

After the said ruling of NCLAT, Regulation 38 was amended and the said discriminatory clause was removed by the Board, However, Parliament amended Section 30 of the I & B CODE,2016,2016 to introduce, by way of Section 30(2)(b)(ii), discriminatory clause against the dissenting financial creditors. The amendment came into effect from 16.8.2019. The said section envisaged payment to the dissenting financial creditors not less than the amount to be paid to such creditors in accordance with section 53(1) in the event of liquidation of the Corporate Debtor. The only rider is that the payment shall be made in such manner as may be specified by the Board (IBBI). Thereafter, Board has once again amended the regulations and provided for payment of the amount payable to the dissenting financial creditors in priority over the other financial creditors who had voted in favour of the resolution plan. Therefore, the import of Section 30(2)(b)(ii) and Regulation 38(1)(b) is that dissenting financial creditors can be discriminated and payments less than the financial creditors who had approved the Resolution Plan can be made but such payment should be made in priority to the financial creditors.

In the case of *K.Sasidhar v. Indian Overseas Bank* (2019) 102 taxmann.com 139 (SC), Supreme Court had held that the commercial wisdom expressed by the dissenting financial creditors was not justiciable. In this case, some of the Financial Creditor Banks had dissented to the Resolution Plan submitted by the Resolution Applicant which could garner approval of only 66.67% of the Committee whereas the dissenting financial creditors, having 33.33% voting share, voted against the proposed resolution plan. Resultantly, the proposed resolution plan was not

approved or came to be rejected for want of support of the requisite percent of financial creditors, having voting share of not less than 75% at the relevant time. NCLAT has held that the requirement of approval of resolution plan by vote of not less than 75% of voting share of financial creditors at the relevant time was mandatory and hence dismissed the appeal preferred by the Appellant. Aggrieved, the said Appellant moved Supreme Court. The Appellant argued before the Supreme Court that voting by the dissenting financial creditors suffers from the vice of being unreasonable, irrational, unintelligible and an abuse of exercise of power. The power bestowed on the financial creditors to cast their vote under section 30(4) is coupled with a duty to exercise that power with utmost care, caution and reason, keeping in mind the legislative intent and the spirit of the I & B Code,2016, fullest attempt should be made to revive the corporate debtors and not to mechanically push them to liquidation process impacting the larger public interest, especially the workers associated with the company.

However, while upholding the orders passed by the Tribunals below, Supreme Court held that neither the NCLT nor the NCLAT has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the ground that it is only an opinion of the minority financial creditors. The legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors.

Supreme Court underlined that the legislature consciously not stipulated justness of the commercial wisdom of the minority (dissenting) financial creditors as a ground-to challenge the approval of Resolution Plan. The scope of enquiry and the grounds on which the decision of "approval" of the resolution plan by the COC can be interfered with by the NCLT has been set out in section 31(1) read with section 30(2) and by the appellate tribunal (NCLAT) under section 32 read with Section 61(3) of the I & B Code,2016. No corresponding provision has been envisaged by the legislature to empower the resolution professional, the adjudicating authority (NCLT) or for that matter the appellate authority (NCLAT), to reverse the "commercial decision" of the CoC much less of the dissenting financial creditors for not supporting the proposed resolution plan.

To the argument that the dissenting financial creditors have not assigned any reason for recording their dissent and therefore, their action was vitiated, it was held by the Supreme Court that There was no provision in the I & B Code,2016 which empowered the adjudicating authority (NCLT) to oversee the justness of the approach of the dissenting financial creditors in rejecting the proposed resolution plan or to engage in judicial review thereof. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors-be it for approving, rejecting or abstaining, as the case may be. It did not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting and the opinion so expressed by voting is non-justiciable.

When the dissenting financial creditors' commercial wisdom cannot be questioned in a court of law and required to be respected, should he be discriminated at all. There is no rationale for the same.

In fact, the dissenting financial creditor's position has been made even inferior to the Operational Creditor. In the case of *IDBI Bank Ltd.* v. *Sunil Kumar Kedia, Resolution Professional, B.P. Food Products (P.) Ltd.* CP (TB) No. 209/9/NCLT/AHM/2017, the Indore Bench of the NCLT held that the Operational Creditors can claim higher of the two (i) the amount available to it, in the event of liquidation of the Corporate Debtor under section 53 or (ii) The amount that would have been paid to creditors, if the amount to be distributed under the Resolution Plan had been distributed in accordance with the order of priority in sub section (1) of Section 53. - Whereas, the Dissenting Financial Creditor can claim only the amount available to them in the event of liquidation of the Corporate Debtor under Section 53 and other option as available to the Operational Creditor is not available to the Dissenting Financial Creditor.

It was observed by the Supreme Court in the case of Committee of Creditors of Essar Steel (Supra) that, different classes of Creditors can be treated differently. It is also stated by the Supreme Court that such differential treatment can be made in the case of different class of creditors, but same class of creditors cannot be discriminated against. Interestingly, in the I & B CODE,2016, a Dissenting Financial Creditor is not placed on par with the other Financial Creditors who have voted in favour of the Resolution Plan and the same is approved.

Conclusion

It is not clear why such dissenting financial creditors should be discriminated at all. If the Resolution Plan is approved by the voting share of 66% of the COC, then such dissenting financial creditor is a minority financial creditor and it can be termed as `Oppression of minority financial creditors'. What is the object of treating a financial creditor inferiorly merely because of dissenting against a Resolution Plan? There appears to be no rationale for the same and the said treatment of minority Financial Creditors meted out by the I & B CODE,2016 is discriminatory and arbitrary. It is, therefore, against the principle enunciated by the Supreme Court in the case of Committee of Creditors of Essar Steels case wherein it was held that same class of creditors cannot be discriminated. Can dissenting financial creditors be grouped as a separate class of "Financial Creditors" and can be discriminated? If it is so, the Financial Creditors cannot vote independently and will be compelled to assess the mood of the majority of the Creditors and vote accordingly instead of making individual commercial judgment or assessment of the state of the affairs. This will instill fear in financial creditors who want to vote against the Resolution Plan but get intimidated due to fear that, in the event of Resolution Plan being approved by 66% of the voting share, they would lose substantial share of money due to them otherwise. There won't be proper exercise of commercial wisdom of the financial creditors which is not in the interest of the CIRP or a healthy practice. It is generally

the Banks which form part of the COC or Financial Creditors and such provision is detrimental to the interests of the Banks. Hence, the law should be amended to treat all Financial Creditors equally, whether voted in favour or against, of the Resolution Plan in the interest of the Banking sector.

●●●

(2020) 117 taxmann.com 627 (NCL-AT)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Gradient Nirman (P.) Ltd.* v. *IFCI Ltd.

VENUGOPAL M., JUDICIAL MEMBER

V.P. SINGH AND SHREESHA MERLA, TECHNICAL MEMBER

COMPANY APPEAL (AT) (INSOLVENCY) NO. 1491 OF 2019†

MAY 22, 2020

Section 7, read with section 238A, of the Insolvency and Bankruptcy Code, 2016 and sections 14 and 18 of the Limitation Act, 1963 - Corporate insolvency resolution process - Initiation by financial creditor - Whether benefit under section 14(2) of Limitation Act cannot be given to applicant where there is no materiel on record to show that subject application was being prosecuted with due diligence in a court of First Instance or of Appeal or Revision which has no jurisdiction - Held, yes - Debt became NPA on 30-6-2014 and, thus, 'right to sue' accrued on 30-6-2014 - Limitation period of 3 years ended on 29-6-2017 - Financial Creditor relied upon an acknowledgement of debt which was dated 30-9-2017 - However, said acknowledgement was neither signed by concerned party against whom right was claimed nor by any person through whom concerned party derived its title or liability - CIRP Application was filed on 8-11-2017- Whether acknowledgement in question would neither come to rescue of Financial Creditor nor would shift forward period of limitation - Held, yes - Whether suit for recovery based upon a cause of action even if it is within limitation, cannot in any manner impact separate and independent remedy of a winding-up proceeding and, thus, a suit for recovery is a separate and independent proceeding distinct from remedy of winding-up and, therefore, contention that period spent while pursuing DRT/SARFAESI proceedings

should extend period of limitation, cannot be sustained, as intent of Court is not to give a new lease of life to debt which is already time barred - Held, yes - Whether, thus, CIRP application was barred by limitation - Held, yes (Para 22)

FACTS

- The corporate debtor was a Special Purpose Vehicle incorporated to develop end-to-end facilities to the Information Technology Sector and was sanctioned by the first respondent, IFCI, a term loan of upto Rs. 60 crore out of which an amount of Rs. 9.90 crore was disbursed. The balance loan of Rs. 50.10 crore was cancelled on-account of non payment of installments of the loan already disbursed.
- It was averred that the project could not be completed on account of reasons beyond their control, that in 2011; ED had attached 150 acres of the project land and TSIIC issued a notice for cancellation of the land allotment and resumption of SEZ and, hence, the project had come to a standstill.
- The Adjudicating Authority admitted the CIRP application observing that the corporate debtor had acknowledged the debt in writing as late as on 20-3-2018 which extended period of limitation and the challenge to the instant CP on account of limitation would fail. It was further held that the financial creditor had been able to establish that there existed a 'financial debt' and there has been 'default' on the part of the corporate debtor. Thus, the Adjudicating Authority admitted the application under section 7.
- The appellant-shareholder of the corporate debtor, and the appellant-director of the corporate debtor preferred the instant appeal.
- The appellant contended that the application under section 7 was barred by limitation, the date of default being 15-10-2013. Further, there was no "Acknowledgement of Debt" to take benefit under section 18 of the Limitation Act, 1963 and the letter dated 20-3-2018 offering OTS was beyond the limitation period of three years. Further, there was no proper authorization under which the letter was issued.

HELD

- It is observed from the letter dated 2-7-2014 that the date of default is 30-6-2014 though the date of default mentioned in Part IV of the application is 15-10-2013. In this case the 'right to sue' accrues on 30-6-2014 and 3 years limitation period ends on 29-6-2017, whereas the application was filed on 8-11-2017. (Para 15)
- Therefore, the contention that the financial creditor has also initiated proceedings under DRT and under the SARFAESI Act, 2002, and therefore this period should

be excluded, cannot be sustained. (Para 16)

- In the instant case benefit under section 14(2) cannot be given to the applicant as there is no material on record to show that the subject application was being prosecuted with due diligence in a court of First Instance or of appeal or Revision which has no jurisdiction. In a catena of judgments it has been observed that proceedings under IBC cannot be construed to be that of a recovery or a Money Suit. (Para 19)

- In the present case there is no evidence brought on record to establish that the provisions of section 18 have been complied with. A perusal of Annexure relied upon by the first respondent is neither signed by the concerned party against whom the right is claimed *nor* by any person through whom he derives his title or liability. Viewed from any angle, this statement does not construe `Acknowledgement of Debt' as mandated under section 18. While addressing this issue, the Adjudicating Authority has failed to consider that `the Acknowledgement' relied upon by the applicant and observed so in the Order, *i.e.* 20-3-2018 is beyond 3 years of the date of default. In the instant case, admittedly the date of NPA is 30-6-2014, the acknowledgement relied upon by the financial creditor is dated 30-9-2017 and hence does not come to the rescue of the respondent/ financial creditor and therefore, this does not shift forward the period of limitation. (Para 21)

- Based on the ratio laid down by the aforenoted judgments, it is to be held that suit for recovery based upon a cause of action even if it is within limitation, cannot in any manner impact the separate and independent remedy of a winding-up proceeding. A suit for recovery is a separate and independent proceeding distinct from the remedy of winding-up and, therefore, the contention of the appearing for the respondents/financial creditor that the period spent while pursuing SARFAESI Proceedings should extend the period of limitation, cannot be sustained, as the intent of the Court is not to give a new lease of life to the debt which is already time barred. The application under section 7 is barred by limitation. Hence, the appeal is to be allowed and the order passed by the Adjudicating Authority is to be set aside. (Para 22)

CASE REVIEW

IFCI Ltd. v. *Indu Techzone (P.) Ltd.* (2020) 114 taxmann.com 524 (NCLT - Hyd.) (para 22) *reversed*; *Gaurav Hargovind bhai Dave* v. *Asset Reconstructions Company (India) Ltd.* (2019) 109 taxmann.com 395/156 SCL 397 (SC) (para 22), *Jignesh Shah* v. *Union of India* (2019) 109 taxmann.com 486/156 SCL 542 (SC) (para 22) and *B.K. Education Services (P.) Ltd.* v. *Parag Gupta & Associates* (2018) 98 taxmann.com 213/150 SCL 293 (SC) (para 10) *followed*.

CASES REFERRED TO

Vishnu Kumar Agarwal v. *Parimal Enterprises Ltd.* (2019) 101 taxmann.com 464/151 SCL 555 (NCL-AT) (para 7), *Sesh Nath Singh* v. *Baidyabati Sheoraphuli Co-operative Bank Ltd.* (2020) 114 taxmann.com 282/158 SCL 211 (NCL-AT) (para 9), *Gaurav Hargovind bhai Dave* v. *Asset Reconstructions Co. (India) Ltd.* (2019) 109 taxmann.com 395/156 SCL 397 (SC) (para 10), *Jignesh Shah* v. *Union of India* (2019) 109 taxmann.com 486/156 SCL 542 (SC) (para 10), *B.K. Education Services (P.) Ltd.* v. *Parag Gupta & Associates* (2018) 98 taxmann.com 213/150 SCL 293 (SC) (para 10), *Ishrat Ali* v. *Cosmos Co-operative Bank Ltd.* (Company Appeal (AT)(Insolvency) No. 1121 of 2019, dated 12-3-2020) (para 13) and *Sampuran Singh* v. *Niranjan Kaur* (1999) 2 SCC 679 (para 21).

R.V. Yogesh and **Ms. Snigdha Singh**, Advs. *for the Appellant.* **Mithun Shashank**, **P.B.A. Srinivasan**, **Avinash Mohapatra** and **Parth D. Tandon**, Advs. *for the Respondent.*

JUDGMENT

Shreesha Merla, Technical Member - Aggrieved by the Order passed by the Adjudicating Authority (NCLT) Hyderabad Bench in CP (IB) No. 26/7/HDB/2018, the 1st Appellant, the Shareholder of the Corporate Debtor, and the 2nd Appellant, the Director of the Corporate Debtor preferred this Appeal under section 61 of the Insolvency and Bankruptcy Code, 2016. By the impugned order dated 8-11-2019, the Adjudicating Authority admitted the Application under section 7 of the Code.

2. Succinctly put, the facts relevant to the case are that the 1st Respondent/ Corporate Debtor is a Special Purpose Vehicle incorporated to develop end to end facilities to the Information Technology Sector and was sanctioned by the first respondent, M/s. IFCI LTD, a term loan of upto Rs. 60,00,00,000/-, out of which an amount of Rs. 9,90,00,000/- was disbursed by 21-5-2009 and the balance loan of Rs. 50,10,00,000/- was cancelled *vide* letter dated 31-3-2011on account of non-payment of instalments of the loan already disbursed. It is averred that the project could not be completed on account of reasons beyond their control; that in 2011 ED had attached 150 acres of the project land and TSIIC issued a notice for cancellation of the land allotment and resumption of SEZ on 24-9-2015 and hence the project had come to a standstill.

3. The Adjudicating Authority while admitting the Application observed as follows:

> "32. Keeping in view the above facts, it is clear that the Corporate Debtor has acknowledged the debt in writing as late as on 20-3-2018 and therefore provisions of section 18 of the Limitation Act will apply. As such, the provisions of Limitation Act will not come to the assistance of the Corporate Debtor in the instant proceedings and the challenge to the instant CP on account of limitation also fails.

33. On the other hand, the Financial Creditor has been able to establish that there exists a 'financial debt' and there has been 'default' on the part of the Corporate Debtor. It has been held by the Hon'ble Supreme Court in *Innoventive*

Industries Ltd. v. *ICICI Bank*, in Civil Appeal Nos. 8337-8338 of 2017, held as under that:

> " The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

34. Further, in the instant Petition, the Petitioner has proved its case by placing documentary evidence *viz.*, Copies of Facility Agreements and sanction letter, date and details of all disbursements of the facilities etc., and copies of entries in Bankers Book in accordance with the Bankers Books Evidence Act, 1891 (18 of 1891) which proves that a default has occurred for which the present Corporate Debtor was liable to pay. Thus, this Adjudicating Authority is satisfied with the submissions put forth by the Petitioner/ Financial Creditor regarding existence of `financial debt' and occurrence of `default'. Further, the Financial Creditor has fulfilled all the requirements as contemplated under IB Code in the present Company Petition and has also proposed the name of IRP after obtaining his written consent in Form-2. In view of the above, this Adjudicating Authority is inclined to admit the petition."

4. It is observed from the Order dated 2-1-2020 that this Tribunal had intended to hear the Directorate of Enforcement Telangana and allowed the Appellant to implead the Assistant Director, Directorate of Enforcement Telangana as Respondent No. 4. Subsequently they have been arrayed as the 4th Respondent and notice was issued which was also served, but none appeared on their behalf on the date of hearing. A perusal of the written submissions filed by the Enforcement Directorate (ED) before the Adjudicating Authority and enclosed herewith by the Appellant, shows that the ED prayed not to consider the property of the Corporate Developer for liquidation during Insolvency Process as the same has been attached and taken possession by them under section 8 (5) PMLA, 2002, by the PMLA Special Court.

5. Learned Counsel appearing on behalf of the Appellant contended that the Application under section 7 is barred by limitation, the date of default being 15-10-2013; there is no "Acknowledgement Of Debt" to take benefit under section 18 of the Limitation Act 1963; the letter dated 20-3-2018 offering OTS is beyond the limitation period of three years; there is no proper authorization under which the letter was issued; the first Respondent had made several claims for the same debt and that it was only on 16-12-2019 that the first Respondent had expressed its intention to withdraw from the CIRP of Respondent No. 3.

6. Learned Counsel appearing for the 1st Respondent submitted that though initially they had filed a claim in the CIRP of the

3rd Respondent that is M/s. Indu Projects Limited, the Corporate Guaranteer of the Principal Borrower, M/s. Indu Techzone Private Ltd., the said Claim was withdrawn *vide* letter dated 16-12-2019 and that the 3rd Respondent is no longer a part of the COC.

7. A perusal of the letter dated 16-12-2019, evidences that the 1st Respondent has withdrawn from the COC and therefore the contention of the Learned Counsel appearing for the Appellant that *Dr. Vishnu Kumar Agarwal* v. *Parimal Enterprises Ltd.* (2019) 101 taxmann.com 464/151 SCL 555 (NCL-AT) applies to the facts of this case, is unsustainable, as the material on record establishes that the same debt was not being pursued in two different Insolvency Proceedings.

8. Learned Counsel appearing for the Respondent vehemently contended that the loan amount was declared NPA on 30-6-2014; the recall notice was given on 2-7-2014; the Creditor took steps to initiate proceedings under DRT on 14-11-2014 and later under the SARFAESI Act, 2002 and that the Creditor is entitled for the exclusion of time period under section 14 of the Limitation Act, 1963.

9. He further submitted that the Adjudicating Authority has rightly dealt with the issue of limitation and that `Acknowledgement Of Debt' has to be seen from the `Default cum Outstanding Statement' for the period 1-4-2017 to 20-9-2017. He further contended that an offer of OTS by the 2nd Respondent proves continuity of debt and relied on the Judgment of this Tribunal in *Sesh Nath Singh* v. *Baidyabati Sheoraphuli Co-operative Bank Ltd.* (2020) 114 taxmann.com 282/158 SCL 211 (NCL-AT) and submitted that if the Financial Creditor has *bona fide*ly persecuted within limitation under the SARFAESI ACT, 2002, they are entitled for exclusion of time period under section 14 (2) of the Limitation Act, 1963.

10. After hearing both sides, we are of the view that at the outset, the issue of limitation is to be addressed to, keeping in view the ratio laid down by the Hon'ble Supreme Court in *Gaurav Hargovind bhai Dave* v. *Asset Reconstructions Co. (India) Ltd.* (2019) 109 taxmann.com 395/156 SCL 397, *Jignesh Shah* v. *Union of India* (2019) 109 taxmann.com 486/156 SCL 542 and in *B.K. Education Services (P.) Ltd.* v. *Parag Gupta & Associates* (2018) 98 taxmann.com 213/150 SCL 293.

11. In *B.K. Education Services (P.) Ltd.* (*supra*) the Hon'ble Supreme Court has laid down that Limitation Act is applicable to Applications filed under sections 7 and 9 of the Code from the inception of the Code and that Article 137 of the Limitation Act, gets attracted. The "right to sue" therefore accrues when a default occurs. If the default has occurred over 3 years prior to the date of filing of the Application, the Application would be barred under Article 137 of the Limitation Act, 1973.

12. In *Jignesh Shah* (*supra*), the Hon'ble Supreme Court taking into consideration the fact of filing of an Application under sections 433 and 434 of the Companies Act, 2013 observed as follows:

> "13. Dr. Singhvi relied upon a number of judgments in which proceedings under section 433 of the Companies Act, 1956 had been initiated after

suits for recovery had already been filed. These judgments have held that the existence of such suit cannot be construed as having either revived a period of limitation or having extended it, insofar as the winding-up proceeding was concerned. Thus, in *Hariom Firestock Ltd.* v. *Sunjal Engg. (P.) Ltd.*, a Single Judge of the Karnataka High Court, in the fact situation of a suit for recovery being filed prior to a winding-up petition being filed, opined:

"8. ... To my mind, there is a fallacy in this argument because the test that is required to be applied for purposes of ascertaining whether the debt is in existence at a particular point of time is the simple question as to whether it would have been permissible to institute a normal recovery proceeding before a civil court in respect of that debt at that point of time. Applying this test and *de hors* that fact that the suit had already been filed, the question is as to whether it would have been permissible to institute a recovery proceeding by way of a suit for enforcing that debt in the year 1995, and the answer to that question has to be in the negative. That being so, the existence of the suit cannot be construed as having either revived the period of limitation or extended it. It only means that those proceedings are pending but it does not give the party a legal right to institute any other proceedings on that basis. It is well-settled law that the limitation is extended only in certain limited situations and that the existence of a suit is not necessarily one of them. In this view of the matter, the second point will have to be answered in favour of the respondents and it will have to be held that there was no enforceable claim in the year 1995, when the present petition was instituted."

14. Likewise, a Single Judge of the Patna High Court in *Ferro Alloys Corpn. Ltd.* v. *Rajhans Steel Ltd.* also held:

"12. ... In my opinion, the contention lacks merit. Simply because a suit for realisation of the debt of the petitioner Company against Opposite Party 1 was instituted in the Calcutta High Court on its original side, such institution of the suit and the pendency thereof in that Court cannot ensure for the benefit of the present winding up proceeding. The debt having become time barred when this petition was presented in this Court, the same could not be legally recoverable through this Court by resorting to winding-up proceedings because the same cannot legally be proved under section 520 of the Act. It would have been altogether a different matter if the petitioner Company approached this Court for winding-up of Opposite Party 1 after obtaining a decree from the Calcutta High Court in Suit No. 1073 of 1987, and the decree remaining unsatisfied, as provided in clause (*b*) of sub-section (1) of Section 434. Therefore, since the debt of the petitioner Company has become time-barred and cannot be legally proved in this Court in course of the present proceedings, winding up of Opposite Party 1 cannot be ordered due to non-payment of the said debt."

Finally, the Hon'ble Supreme Court after taking into consideration the date of default observed: -

> "21. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding-up proceeding. In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an acknowledgement of liability under section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding-up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding-up proceeding.

28. A reading of the aforesaid provisions would show that the starting point of the period of limitation is when the company is unable to pay its debts, and that Section 434 is a deeming provision which refers to three situations in which a company shall be deemed to be "unable to pay its debts" under section 433(*e*). In the first situation, if a demand is made by the creditor to whom the company is indebted in a sum exceeding one lakh then due, requiring the company to pay the sum so due, and the company has for three weeks thereafter "neglected to pay the sum", or to secure or compound for it to the reasonable satisfaction of the creditor. "Neglected to pay" would arise only on default to pay the sum due, which would clearly be a fixed date depending on the facts of each case. Equally in the second situation, if execution or other process is issued on a decree or order of any court or tribunal in favour of a creditor of the company, and is returned unsatisfied in whole or in part, default on the part of the debtor company occurs. This again is clearly a fixed date depending on the facts of each case. And in the third situation, it is necessary to prove to the "satisfaction of the Tribunal" that the company is unable to pay its debts. Here again, the trigger point is the date on which default is committed, on account of which the company is unable to pay its debts. This again is a fixed date that can be proved on the facts of each case. Thus, Section 433(*e*) read with Section 434 of the Companies Act, 1956 would show that the trigger point for the purpose of limitation for filing of a winding-up petition under section 433(*e*) would be the date of default in payment of the debt in any of the three situations mentioned in Section 434." (Emphasis Supplied)

13. At this juncture, it is relevant to note that *Sesh Nath Singh* (*supra*) relied upon by the counsel for the Appellant was discussed in detail by a Larger Bench of this Tribunal in *Ishrat Ali* v. *Cosmos Cooperative Bank Ltd.* (Company Appeal (AT)(Insolvency) No. 1121 of 2019, dated 12-3-2020) (Company Appeal (AT) (Insolvency) NO. 1121 of 2019),in which the majority concurred as follows:

> "8. Similar issue fell for consideration before the Hon'ble Supreme Court in "*Gaurav Hargovind bhai Dave* v.

Asset Reconstructions Company (India) Limited - (2019) 10 SCC 572". In the said case, the Hon'ble Supreme Court has noticed that the Respondent was declared NPA on 21st July, 2011. The Bank had filed two OAs before the Debts Recovery Tribunal in 2012 to recover the total debt. Taking into consideration the facts, the Supreme Court held that the default having taken place and as the account was declared NPA on 21st July, 2011, the application under section 7 was barred by limitation.

For proper appreciation, it is better to note the facts of the judgment as follows: -

"In the present case, Respondent 2 was declared NPA on 21-7-2011. At that point of time, State Bank of India filed two OAs in the Debts Recovery Tribunal in 2012 in order to recover a total debt of 50 crores of rupees. In the meanwhile, by an assignment dated 28-3-2014, State Bank of India assigned the aforesaid debt to Respondent 1. The Debts Recovery Tribunal proceedings reached judgment on 10-6-2016, the Tribunal holding that the OAs filed before it were not maintainable for the reasons given therein.

2. As against the aforesaid judgment, Special Civil Application Nos. 10621-622 were filed before the Gujarat High Court which resulted in the High Court remanding the aforesaid matter. From this order, a special leave petition was dismissed on 27-3-2017.

3. An independent proceeding was then begun by Respondent 1 on 3-10-2017 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 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.* 21-7-2011 was filled up. The NCLT applied Article 62 of the Limitation Act which reads as follows:

"Description of suit	*Period of limitation*	*Time from which period begins to run*
62. To enforce payment of money secured by a mortgage or otherwise charged upon immovable property	Twelve years	When the money sued for becomes due."

Applying the aforesaid Article, the NCLT reached the conclusion 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, following its earlier judgments, that the time of limitation would begin running for the purposes of limitation only on and from 1-12-2016 which is the date on which the Insolvency and Bankruptcy Code was brought into force. Consequently, it dismissed the appeal.

4. Mr. Aditya Parolia, learned counsel appearing on behalf of the appellant has argued that Article 137 being a residuary article would apply on the facts of this case, and as right to sue accrued only on and from 21-7-2011, three years having

elapsed since then in 2014, the Section 7 application filed in 2017 is clearly out of time. He has also referred to our judgment in *B.K. Educational Services (P.) Ltd.* v. *Parag Gupta and Associates* (*B.K. Educational Services (P) Ltd.* v. *Parag Gupta and Associates*, (2019) 11 SCC 633) in order to buttress his argument that it is Article 137 of the Limitation Act which will apply to the facts of this case.

5. Mr. Debal Banerjee, learned Senior Counsel, appearing on behalf of the respondents, countered this by stressing, in particular, para 11 of B.K. Educational Services (P.) Ltd. and reiterated the finding of the NCLT that it would be Article 62 of the Limitation Act that would be attracted to the facts of this case. He further argued that, being a commercial Code, a commercial interpretation has to be given so as to make the Code workable.

6. Having heard the learned counsel for both sides, what is apparent is that Article 62 is 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. As rightly pointed out by the learned counsel appearing on behalf of the appellant, time, therefore, begins to run on 21-7-2011, as a result of which the application filed under section 7 would clearly be time-barred. So far as Mr. Banerjee's reliance on para 11 of B.K. Educational Services (P.) Ltd., suffice it to say that 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.

7. This being the case, we fail to see how this para could possibly help the case of the respondents. Further, it is not for us to interpret, commercially or otherwise, articles of the Limitation Act when it is 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.

8. This being the case, the appeal is allowed and the judgments of the NCLT and NCLAT are set aside." (Emphasis supplied)

9. In "*Sagar Sharma* v. *Phoenix ARC Pvt. Ltd.* - Civil Appeal No. 7673 of 2019 - (2019) 10 SCC 353", the Hon'ble Supreme Court *vide* its judgment dated 30th September, 2019, referring to the decision in B.K. Educational Services Private Limited (*supra*) reminded this Appellate Tribunal that for application under section 7 of the Code, Article 137 of the Limitation Act, 1963 will apply. Article 62, which relates to deed of mortgage executed between the parties, cannot be taken into consideration for counting the period of limitation. The Hon'ble Supreme Court specifically observed that Article 141 of the Constitution of India mandates that its judgments are followed in letter and spirit. The date of coming into force of IBC Code does not and cannot form a trigger point of limitation for application filed under the Code. Equally, since "applications" are petitions, which are filed under the Code, it is Article 137 of the Limitation Act, 1963 which will apply to such applications.

10. This Appellate Tribunal also considered the same issue in "*V Hotels Limited* v. *Asset Reconstruction Company (India) Limited* -

Company Appeal (AT) (Insolvency) No. 525 of 2019" decided on 11th December, 2019, by referring to the aforesaid judgment of the Hon'ble Supreme Court observed: -

"17. In the present case, in fact the default took place much earlier. It is admitted that the debt of the Company Appeal (AT) (Insolvency) No. 1121 of 2019. The `Corporate Debtor' was declared NPA on 1st December, 2008 as has been noticed by the Adjudicating Authority.

** ** **

19. Section 13(2) of the `SARFAESI Act, 2002' reads as follows:

> "13. *Enforcement of security interest.*— (2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

20. Admittedly, the `Financial Creditor' took action under the `SARFAESI Act, 2002' in the year 2013. Therefore, the second time it become NPA in the year 2013 when action under Section 13(2) was taken." Referring to Section 18 of the Limitation Act, 1963, this Appellate Tribunal further observed: -

Company Appeal (AT) (Insolvency) No. 1121 of 2019 14 "22. The aforesaid provision makes it clear that for the purpose of filing a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has to be made in writing duly signed by the party against whom such property or right is claimed.

23. In the present case, Asset Reconstruction Company (India) Ltd.'- (`Financial Creditor') has failed to bring on record any acknowledgement in writing by the `Corporate Debtor' or its authorised person acknowledging the liability in respect of debt. The Books of Account cannot be treated as an acknowledgement of liability in respect of debt payable to the Asset Reconstruction Company (India) Ltd.'- (`Financial Creditor') signed by the `Corporate Debtor' or its authorised signatory.

24. In "*Sampuran Singh* v. *Niranjan Kaur*– (1999) 2 SCC 679", the Hon'ble Supreme Court observed that the acknowledgement, if any, has to be prior to the expiration of the prescribed period for filing the suit. In the present case, the account was declared NPA since 1st December, 2008 and therefore, the suit was filed. Thereafter, any document or acknowledgement, even after the completion of the period of limitation *i.e.* December, 2011 cannot be relied upon. Further, in absence of any record of acknowledgement, the Appellant cannot derive any advantage of Section 18 of the Limitation Act. For the said reason, we hold that the application under Section 7 is barred by limitation, the accounts Company Appeal (AT) (Insolvency) No. 1121 of 2019 15 of the `Corporate Debtor'

having declared NPA on 1st December, 2008.

11. The aforesaid decisions of the Hon'ble Supreme Court and this Appellate Tribunal make it clear that for the purpose of computing the period of limitation of application under Section 7, the date of default is 'NPA' and hence a crucial date.

12. *In Jignesh Shah and another* v. *Union of India* (2019) 10 SCC 750", the Hon'ble Supreme Court noticed the decision of the Hon'ble Patna High Court in "*Ferro Alloys Corpn. Ltd.* v. *Rajhans Steel Ltd.*", wherein the Hon'ble Patna High Court held that simply because a suit for realisation of the debt of the petitioner Company against Opposite Party 1 was instituted in the Calcutta High Court on its original side, such institution of the suit and the pendency thereof in that Court cannot ensure for the benefit of the present winding-up proceeding.

13. In the said case, Hon'ble Patna High Court further held that since the debt of the petitioner Company has become time-barred and cannot be legally proved in this Court in course of the present proceedings, winding up of Opposite Party 1 cannot be ordered due to non-payment of the said debt.

14. Appreciating the aforesaid Judgment of the Hon'ble Patna High Court, the Hon'ble Supreme Court in "*Jignesh Shah* v. *Company Appeal* (AT) (Insolvency) No. 1121 of 2019 16 Union of India and another" (*supra*) observed that the aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding-up proceeding.

Thus, while holding so, the Hon'ble Supreme Court says that the date of default is the date for the purpose of computing the period of limitation of application under Section 7. The same principle is applicable in the present case. Mere filing of a suit for recovery or a decree passed by a Court cannot be held to be deferment of default.

15. A suit for recovery of money can be filed only when there is a default of dues. Even if the decree is passed, the date of default does not shift forward to the date of decree or date of payment for execution. Decree can be executed within specified period *i.e.* 12 years. If it is executable within the period of limitation, one cannot allege that there is a default of decree or payment of dues.

16. Therefore, we hold that a Judgment or a decree passed by a Court for recovery of money by Civil Court/Debt Recovery Tribunal cannot shift forward the date of default for the purpose of computing the period for filing an application under Section 7 of the 'I&B Code'."

14. The brief point for consideration for the instant case is to see whether the Application admitted under section 7 by the Adjudicating Authority, is barred by limitation keeping in view the principle laid down in the aforenoted Judgments. In the instant case, the date of default as mentioned in part IV of the Application is 15-10-2013. It is the Respondent's case that the date of default is to be taken as 30-6-2014 as observed by the Adjudicating Authority.

15. We observe from the letter dated 2-7-2014, that the date of default is 30-6-2014 though the date of default mentioned in Part IV of the Application, is 15-10-2013. In this case the `right to sue' accrues on 30-6-2014 and 3 years limitation period ends on 29-6-2017, whereas the Application was filed on 8-11-2017.

16. Therefore, the contention of the Learned Counsel that the Financial Creditor has also initiated proceedings under DRT and under the SARFAESI Act, 2002, and therefore this period should be excluded, cannot be sustained.

17. Now, we address ourselves to the contention of the Learned Counsel for the first Respondent that the Financial Creditor is covered by Section 14 of the Limitation Act, 1963 which reads as follows:

> "Exclusion of time of proceeding *bona fide* in court without jurisdiction.- (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.
>
> (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.
>
> (3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.
>
> *Explanation* - For the purposes of this section, -
>
> (*a*) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;
>
> (*b*) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;
>
> (*c*) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."

18. While addressing this issue, the majority view of the Larger Bench in *Ishrat Ali* (*supra*) is noted as hereunder:

> "18. Section 14(2) of the Limitation Act, 1963 makes it clear that in computing the period of limitation for any application, the time during which the

applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

19. Therefore, to take advantage of Section 14(2), the Applicant must satisfy:

(*i*) That the applicant has been prosecuting with due diligence in another civil proceeding, whether in a court of first instance or of appeal or revision.

(*ii*) against the same party; and

(*iii*) for the same relief.

Company Appeal (AT) (Insolvency) No. 1121 of 2019

20. Under the SARFAESI Act, 2002, once the account is declared as NPA, the `Financial Creditor' can exercise its power under Section 13 of the SARFAESI Act, 2002 which is required to issue Demand Notice under Section 13(2) and reads as follows:

"13. Enforcement of security interest.- (1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act. (2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

Company Appeal (AT) (Insolvency) No. 1121 of 2019 (4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(*a*) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(*b*) takeover the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

(*c*) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of

which has been taken over by the secured creditor;

(*d*) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt."

21. An action taken by the `Financial Creditor' under Section 13(2) or Section 13(4) of the `SARFAESI Act, 2002' cannot be termed to be a civil proceeding before a Court of first instance or appeal or revision before an Appellate Court and the other forum. Therefore, action taken under Company Appeal (AT) (Insolvency) No. 1121 of 2019 Section 13(2) of the `SARFAESI Act, 2002' cannot be counted for the purpose of exclusion of the period of limitation under Section 14(2) of the Limitation Act, 1963.

In an application under Section 7 relief is sought for resolution of a `Corporate Debtor' or liquidation on failure. It is not a money claim or suit. Therefore, no benefit can be given to any person under Section 14(2), till it is shown that the application under Section 7 was prosecuting with due diligence in a court of first instance or of appeal or revision which has no jurisdiction.

22. The decision rendered in "*Sesh Nath Singh* v. *Baidyabati Sheoraphuli Cooperative Bank Ltd." (supra)* thereby cannot be held to be a correct law laid down by the Bench." (Emphasis Supplied)

19. In the instant case benefit under section 14 (2) cannot be given to the Applicant as there is no material on record to show that the subject Application was being prosecuted with due diligence in a court of First Instance or of Appeal or Revision which has no jurisdiction. In a catena of judgments it has been observed that proceedings under IBC cannot be construed to be that of a recovery or a Money Suit.

Having regard to the fact that the decision rendered in Sesh Nath Singh & Ors. (*supra*) was held to be not correct in law, by a majority view of a Larger Bench of this Tribunal in Ishrat Ali (*supra*), the submission of the Learned Counsel that Sesh Nath Singh (*supra*) is applicable to the facts of this case, is untenable.

20. It is the case of the first Respondent that the outstanding statement (Anx. A5) in the Books of Account should be treated as an `Acknowledgement of Debt' as stipulated in Section 18 of the Limitation Act, 1963. Section 18 provides as follows:

"The date of default can be forwarded to a future date only under section 18 of the Limitation Act, 1963, which reads as follows: -

18. Effect of acknowledegment in writing.—(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property

> or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed. (2) Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 20 Company Appeal (AT) (Insolvency) No. 57 of 2020 1872), oral evidence of its contents shall not be received. *Explanation*.—For the purposes of this section,—(*a*) an acknowledgement may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right; (*b*) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and (*c*) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

The aforesaid provision makes it clear that for the purpose of filing a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has to be made in writing duly signed by the party against whom such property or right is claimed." (Emphasis Supplied)

21. In the present case there is no evidence brought on record to establish that the provisions of Sec .18 have been complied with. A perusal of Annexure 5 relied upon by the counsel for the first respondent is neither signed by the concerned party against whom the right is claimed nor by any person through whom he derives his title or liability. Viewed from any angle, this statement does not construe `Acknowledgement Of Debt' as mandated under Sec. 18. While addressing this issue, the Adjudicating Authority has failed to consider that 'the Acknowledgement' relied upon by the Applicant and observed so in the Order, *i.e.* 20-3-2018 is beyond 3 years of the date of default. Further, in *Sampuran Singh* v. *Niranjan Kaur* (1999) 2 SCC 679, the Hon'ble Apex Court has observed that acknowledgement, if any, has to be prior to the expiration of the prescribed period for filing the suit. In this case, admittedly the date of NPA is 30-6-2014, the acknowledgement relied upon by the Financial Creditor is dated 30-9-2017 and hence does not come to the rescue of the Respondent/Financial Creditor and therefore, we are of the view that this does not shift forward the period of limitation.

22. At the cost of repetition, based on the ratio laid down by the aforenoted judgments, we are of the considered view that suit for recovery based upon a cause of action even if it is within limitation, it cannot in any manner impact the separate and independent remedy of a winding-up proceeding. A suit for recovery is a separate and independent

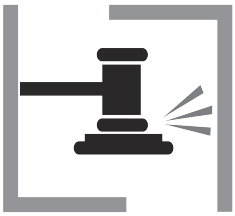
proceeding distinct from the remedy of winding-up and therefore the contention of the Learned Counsel appearing for the Respondents/Financial Creditor that the period spent while pursuing SARFAESI Proceedings should extend the period of limitation, cannot be sustained, as the intent of the Court is not to give a new lease of life to the debt which is already time barred. Placing reliance on *Gaurav Hargovind bhai Dave* (*supra*), *Jignesh Shah* (*supra*) and *B.K Education Services* (*supra*), we are of the considered opinion that this Application under Section 7 is barred by limitation. Hence, we allow this Appeal and *set aside* the Order passed by the Adjudicating Authority.

23. In effect, order(*s*), passed by the Adjudicating Authority appointing `Interim Resolution Professional', declaring moratorium, freezing of account, and all other order (*s*) passed by the Adjudicating Authority pursuant to impugned order and action, if any, taken by the `Interim Resolution Professional', including the advertisement, if any, published in the newspaper calling for Applications all such orders and actions are declared illegal and are set aside. The Application preferred by Respondent under section 7 of the `I&B Code' is dismissed. Learned Adjudicating Authority will now close the proceeding. The `Corporate Debtor' (company) is released from all the rigours of law and is allowed to function independently through its Board of Directors with immediate effect.

24. The Adjudicating Authority will fix the fee of `Interim Resolution Professional' and `corporate insolvency resolution process cost' and `M/s. Indu Techzone Pvt. Ltd.' will pay the fee of the `Interim Resolution Professional' and `Corporate Insolvency Resolution Process Cost', as may be determined.

25. The Appeal is allowed with the aforesaid observations and directions. However, in the facts and circumstances of the case, there shall be no order as to costs.

† Arising out of order passed by Adjudicating Authority (NCLT) Hyderabad Bench in *IFCI Ltd.* v. *Indu Techzone (P.) Ltd.* (2020) 114 taxmann.com 524.



(2020) 118 taxmann.com 111 (IBBI)

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Mohan Lal Jain, *In re*

DR. NAVRANG SAINI, MEMBER

NO. IBBI/DC/24/2020

MAY 30, 2020

Section 14, read with section 208, of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Moratorium - General - HDFC advanced a Rental Discounting Loan Facility of Rs. 75 crore - Rental income of Corporate Debtor (CD) was pledged to HDFC Bank for this purpose and an Escrow Account was opened in HDFC in which receivables had to be deposited and continuously maintained so long as Financial Facility was fully paid - After admission of CIR petition, during moratorium, RP sought approval from CoC to continue making payments through EMIs to HDFC - After obtaining approval from CoC, RP continued to make payments EMIs to HDFC during CIRP - Whether decision of CoC to ratify and approve payment of EMI to Financial Creditor in preference to other creditors could by no stretch of imagination come within purview of commercial wisdom of CoC and went against basic objectives of IBC - Held, yes - Whether since RP had compromised his independence and continued making payment of EMIs to FC during CIRP from assets of CD, he had contravened provision of Code and, hence, penalty was to be imposed on him - Held, yes (Para 5)

CASE REVIEW

Swiss Ribbons (P.) Ltd. v. *Union of India* (2019) 101 taxmann.com 389 (SC), *Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta* (2019) 111 taxmann.com 234 (SC), judgment dated 15.11.2017 of National Company Law Appellate Tribunal rendered in case of *Indian Overseas Bank* v. *Mr. Dinkar T. Venkatsubramaniam, Resolution Professional for Amtek Auto Ltd.*, (Para 3.1) followed.

Mohan Lal Jain, G.P. Madaan and Ashutosh K. Sharma, Advs. for the Applicant.

ORDER

1. *Background*

1.1 This Order disposes of the Show-Cause Notice (SCN) dated 14th January, 2020 issued to Mr. Mohan Lal Jain, F-2/28, Sector-15, Rohini, New Delhi, 110089, who is a Professional Member of ICSI Institute of Insolvency Professionals and an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (Board) with Registration No. IBBI/IPA-002/IP-P00006/2016-17/10006.

1.2 In exercise of its power under section 218 of the Code read with the IBBI (Inspection and Investigation) Regulations, 2017, the Board *vide* Order dated 6th August 2019

appointed an Inspecting Authority (IA) to conduct an inspection of Mr. Mohan Lal Jain, on having reasonable grounds to believe that the IP had contravened provisions of the Code, Regulations, and directions issued thereunder.

1.3 The Board on 14th January, 2020 had issued the SCN to Mr. Mohan Lal Jain, based on findings of an inspection in respect of his role as a Resolution Professional (RP) in Corporate Insolvency Resolution Process (CIRP) of Mack Soft Tech Private Limited (CD). The SCN alleged contraventions of several provisions of the Insolvency and Bankruptcy Code, 2016 (Code), the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) and the Code of Conduct under regulation 7(2) thereof. Mr. Mohan Lal Jain replied to the SCN *vide* letter dated 31st January, 2020.

1.4 The Board referred the SCN, response of Mr. Mohan Lal Jain to the SCN and other material available on record to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the Code and Regulations made thereunder. Mr. Mohan Lal Jain availed an opportunity of personal hearing before the DC on 16th March, 2020 where he reiterated the submissions made in his written reply. Thereafter, the IP made some additional submissions *vide* email dated 23rd March, 2020 in support of submissions made during the course of personal hearing.

Consideration of SCN

2. The DC has considered the SCN, the reply to SCN, oral submissions of Mr. Mohan Lal Jain during the course of personal hearing, additional submissions made by him, other material available on record and proceeds to dispose of the SCN.

Alleged Contraventions, Submissions, Analysis and Findings

3. A summary of contraventions alleged in the SCN, Mr. Mohan Lal Jain's written and oral submissions thereon and their analysis with findings of the DC are as under:

3.1 *Contravention:*

(*a*) In the matter of Mack Soft Tech Private Limited, it has been observed from the minutes of the 3rd CoC meeting dated 16th March, 2018 that the RP had sought approval from the CoC members to continue making payments through EMIs to HDFC Pvt. Ltd. ("HDFC"), one of the Financial Creditors of the CD. That after obtaining approval from CoC members, the RP continued to make payments to HDFC during CIRP which is in violation of Section 14(1)(*e*) of the Code which states that transfer and disposal of any of the assets of the CD is prohibited during the CIRP.

(*b*) As per the minutes of 10th CoC meeting dated 1st September, 2018, the claim of HDFC Ltd. as per the revised list as on 27th August, 2018 stood at Rs. 1,08,34,362/- and this decrease in value of the admitted claim of HDFC from Rs. 22,45,49,456/- to Rs. 1,08,34,362/- was because of the regular payment of EMIs from the assets of CD during CIRP which is in contravention of Section 14 (1) (*e*) of the Code.

(*c*) Moreover, it was decided in the 10th CoC meeting that HDFC may recover remaining EMIs from the Security deposit of Rs. 5,48,63,987/- available with HDFC. Therefore, the Board is

of the *prima facie* view that the RP had violated section 14 (1)(*e*), section 208 (2) (*a*) & (*e*) of the Code, Regulations 7(2)(*a*) and 7(2)(*h*) of the IP Regulation read with clauses 10 and 14 of the Code of Conduct of the said IP Regulations.

Submission:

(*a*) RP has submitted that HDFC had advanced a Rental Discounting Loan Facility of Rs. 75,00,00,000/- in the year 2012 which was being repaid by the CD from the rental income generated. It was submitted that the rental income of the CD was pledged to HDFC for this purpose and an Escrow Account was opened in HDFC Bank in which the receivables had to be deposited and continuously maintained so long as the Financial Facility was fully paid. This arrangement was as per the Facility Agreement dated 10-1-2012 entered between the CD and HDFC bank.

(*b*) He submitted that the EMIs were being recovered during the CIRP period from the rental receipts deposited in the said Escrow Account and not out of the assets of the CD available as on CIRP commencement date.

(*c*) It was submitted that HDFC Limited was the sole secured lender and the payment of EMIs was approved by 100% voting share of CoC which also consisted of unsecured financial creditors. And that voting share of unsecured lenders was 96% and they decided to continue to make payment of EMIs to HDFC Ltd. being the only secured creditor.

(*d*) During the personal hearing on 16th March, 2020, it was submitted by the counsel for the RP that the decision to continue to pay regular EMIs out of rental receipts of CD in the ordinary course of business was taken by CoC with 100% voting share even prior to his taking over of charge as RP. It was further submitted that it was a commercial decision taken by CoC in the interest of CD and that RP had no reason to challenge the decision of the CoC taken in its commercial wisdom.

It was further submitted that the payment of EMIs was a routine business transaction undertaken by the RP in order to keep the CD as a going concern and not a transfer of asset. Furthermore, the payments were made in the interest of the CD so as to reduce the burden of higher interest and penalty.

Analysis:

The provision on 'Moratorium' envisages prohibition on institution of suits by or against the CD, transfer, alienation or disposal of any of the assets or legal right or beneficial interest of the CD, action to foreclose, recover or enforce any security interest created by CD in respect of his property. The moratorium period is analogous to the insolvency resolution process period.

To summarize, the moratorium under the Code refers to the period wherein no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, can be instituted or continued against the CD.

The main point to be examined in the present case is whether payment of EMI's

to a Financial Creditor made during the period of moratorium in CIRP is in violation of Section 14(1) (*b*) of the Code.

It has also been observed that the SCN has alleged contravention of section 14(1)(*e*) of the Code against the RP, however, it has been submitted by the RP that clause (1) (*e*) in Section 14 of the Code does not exist which is correct. Thus, it appears that the inclusion of contravention of clause (1) (*e*) in the SCN is a typographical mistake. In this matter the correct clause shall be clause (1)(*b*) of section 14 and the same shall be referred accordingly.

In the present case, it has been observed that the RP continued to make payments to HDFC after obtaining approval of CoC members during CIRP which is in violation of the provisions on moratorium contained in the Code and imposed by the AA *vide* order dated 11th August, 2017.

It has been submitted by the RP that the decision to continue to make payment of regular EMIs out of rental receipts of CD in the ordinary course of business was taken by CoC with 100% voting share before he took charge as RP and was a part of CoC's commercial decision taken in the interests of CD.

It is pertinent to mention that Mr. Sundaresh Bhat was appointed by the Adjudicating Authority as an IRP. He was confirmed as RP by the CoC in the meeting held on 19th September 2017. However, the CoC in its second meeting held on 8th January, 2018 decided to replace Mr. Sundaresh Bhat and appointed Mr. Mohan Lal Jain as RP who took over the charge on 7th February, 2018.

It was further submitted by the RP that payment of EMIs was a routine business transaction undertaken by him in order to keep the CD as a going concern and thus, cannot be regarded as a transfer of asset.

Before proceeding to decide whether payment of EMI's to a Financial Creditor made during the period of moratorium in CIRP is in violation of Section 14(1) (*b*) of the Code, it is important to understand the relevant terms and conditions of the Facility Agreement/Escrow Account Agreement entered by the CD with HDFC (Financial Creditor/FC), the meaning of Asset and Financial Asset, and whether Security Deposit falls under the definition of the term `Financial Asset'.

It has been observed that the CD has entered into a facility agreement dated 10th January, 2012 with the FC. In the main body of the agreement, it has been mentioned as under:

> "*Open a Separate Escrow Account:*
>
> The Borrower open and maintain a separate current account bearing No. with the HDFC Limited at Lakdikapool (hereinafter referred to the "BANK")."

Schedule - II appended to the agreement provides:

> "*Schedule - II: Interest Rate and Repayment Specific:*
>
> *The repayment of the Financial Facility will be done in the following manner:*

The term of the Loan is 84 months.

The Loan will be repaid by way of equated monthly instalments (EMI's) equivalent to Rs. 1,37,46,120/- through the tenure of the Loan.

MTSPL will open an escrow account and designated account for this facility with a Bank acceptable to HDFC. Disbursements will be deposited in the designated account and MSTPL will inform its tenants to draw all cheques in favour of MSTPL escrow account No. 00210350003946 and ensure that all receivables by way of rental accruals are deposited in escrow account only. The residual amount in the escrow account would be transferred into the designated account of MSTPL for its use."

Schedule - I of the agreement contains special conditions for rental discounting. It provides that "In addition to the general conditions as stipulated in Facility Agreement, following special conditions shall be applicable to the Financial Facility. ..."

"Clause - 4. SECURITY AND REPAYMENT SPECIFIC COVENANTS"

(*a*) The Borrower agrees that the Financial Facility shall be secured by exclusive security interest on the receivables in such mode and manner as deemed fit and desired by the Lender.

(*b*) ** ** **

(*c*) The Borrower agrees that the Receivables shall be exclusive property of the Lender for the purpose of secured repayment of the Financial Facility and as such the Borrower will not make any further borrowing on the Strength of the Receivables as being Borrower's Property.

(*d*) ** ** **

(*e*) The Borrower agrees that the receivables will directly be received in an escrow account and as such undertakes to open an Escrow account with such Bank as approved by the Lender with 7 days of execution of this agreement.

(*f*) The parties agree that HDFC Bank will be appointed and be acting as Escrow agent in terms of the Escrow Agreement to be executed in line as part of the Special Condition.

(*g*) The Parties further agree that the receipt and distribution of the Receivables under the Escrow arrangement shall be in accordance to the payment waterfall as detailed hereunder and furthermore particularly detailed in the Escrow Agreement.

(*h*) ** ** **

(*i*) .... the Escrow Account"

As per the Escrow Account Agreement dated 11th January 2012, executed between the CD and HDFC Bank, it has been agreed, *inter-alia*, that the CD shall open and maintain an escrow Account with HDFC. The relevant clause of the Escrow Agreement states:

"...(B) One of the terms of the agreement of the Loan is that, for the benefit of the Lender, the Borrower shall establish/open an Escrow Account with the Escrow Bank. Immediately before or after first disbursement.....

(C) The Borrower has agreed that, the payments to be collected/received by the Borrower from the lessee/ allottee of various units/properties built and sold or leased on the property, shall be credited to the said Escrow account and the Lender shall adjust all the amounts to be paid by the borrower to the Lender under the Loan agreement from time to time, out of the amounts credited in the

said Escrow account, and permit the transfer in the designated account of the borrower opened with the Escrow Bank, the amount over and above the EMI amount of the facility, out of the remaining balance in the said Escrow Account after such adjustment as agreed hereunder…"

To understand the terms "Financial Asset" and "Asset", the Indian Accounting Standard (Ind AS) 32 and 38 issued by the Central Government are relevant which provides as under:

Ind AS-32 has defined the term `Financial Asset' as below:

A financial asset is any asset that is:

(*a*) cash;

(*b*) an equity instrument of another entity;

(*c*) a contractual right: (*i*) to receive cash or another financial asset from another entity; or (*ii*) to exchange financial assets or financial liabilities with another entity under conditions that are potentially favourable to the entity; or

(*d*) a contract that will or may be settled in the entity's own equity instruments and is: (*i*) a non-derivative for which the entity is or may be obliged to receive a variable number of the entity's own equity instruments; or (*ii*) a derivative that will or may be settled other than by the exchange of a fixed amount of cash or another financial asset for a fixed number of the entity's own equity instruments. For this purpose the entity's own equity instruments do not include puttable financial instruments classified as equity instruments in accordance with paragraphs 16A and 16B, instruments that impose on the entity an obligation to deliver to another party a pro rata share of the net assets of the entity only on liquidation and are classified as equity instruments in accordance with paragraphs 16C and 16D, or instruments that are contracts for the future receipt or delivery of the entity's own equity instruments.

Ind AS 38 has defined the term `Asset' as below:

An asset is a resource:

(*a*) controlled by an entity as a result of past events; and

(*b*) from which future economic benefits are expected to flow to the entity;

Thus, applying the above definitions to the facts of the present case, it can be observed that the amount credited to the said Escrow account will fall within the definition of the term `Asset' and in view of the fact that moratorium was already imposed by the Hon'ble Adjudicating Authority, the said asset or for that matter any asset of CD couldn't have been used or adjusted for the payment of EMIs in any manner whatsoever.

Security Deposit:

A security deposit is money that is given to a landlord, lender, or seller of a home or apartment as proof of intent to move-in and care for the domicile. Security deposits can be either be refundable or non-refundable, depending on the terms of the transaction. A security deposit is intended as a measure of security for the recipient and can also be used to pay for damages or lost property.

A refundable Security Deposit given by an entity represents its contractual right to receive cash from the holder of the deposit, hence it falls under the definition of the term 'Financial Asset' in accordance with Ind AS 32. In the present matter, it has been categorically observed from the minutes of the 3rd CoC meeting held on 16th March, 2018 that RP placed a note for ratification and approval of payments of EMIs towards term loan to HDFC which is also one of the members of CoC. It was decided in the said meeting to approve and ratify the payment of EMIs towards Term Loan to HDFC amounting to Rs. 2,74,92,240.00 for the months of January 2018 and February 2018. The minutes of 3rd CoC meeting further manifests that RP sought approval of the CoC for authorizing HDFC to continue to recover the future EMI payments from the surplus funds available in the bank account of the CD.

In the minutes of 5th CoC meeting held on 4th May, 2018, (Item A (5)) it has been mentioned that -

> "The claim of HDFC Ltd is revised to Rs. 6,12,18,158.00 after adjusting the two EMIs paid after the last update ".

From the Agenda of the 10th CoC meeting held on 1st September, 2018, it has been observed that Item No. A (5) provides as under:

> "...In response, every member of the CoC agreed with the suggestion made by Mr. Rajan Tandon that HDFC Ltd. may recover EMIs from the Security Deposit available with them and in case of any difference of the amount arises, then the same shall be paid from the account of the Corporate Debtor.... "

Moreover, as evident from the List of Claims updated in the month of March, April, June and August, 2018, Fixed deposit of Rs. 5,48,63,987.00 available with the HDFC was used to recover the EMIs payable to the financial creditor.

Thus, it can unequivocally be observed from the revised list of constitution of creditors as on 27th August 2018, that CoC has approved the regular payment of EMIs to the Financial Creditor- HDFC during CIRP, which has reduced the amount claimed by HDFC from Rs. 22,45,49,456.00 to Rs. 1,08,34,362.00.

As per the obligations imposed by section 208(2)(*a*) of the Code, it is the duty of the RP to take reasonable care and diligence while performing his duties. However, the RP not only failed to bring to the notice of the CoC the embargo imposed on the transfer of the assets of the CD during CIRP under section 14 of the Code but also allowed the moratorium to be violated continuously by letting the EMIs to be deducted out of the cash flows/rental income of the CD. This indicates RP's casualness and negligence in performing his duty as RP and his misunderstanding of law.

The argument advanced by the counsel of the RP that no funds were ever used from the Cash & Bank balance of the CD for repayment of EMIs to HDFC is not tenable and is incorrect. It is evident from a bare perusal of the minutes of 1st, 2nd, 3rd, 5th and 10th CoC meeting and from the list of creditors updated in the month of March 2018 till August 2018, that, payment of EMIs has regularly been made from the assets of the CD to HDFC. The rental income which was first deposited

by the tenants in current account of the CD and then deposited (by the CD) in Escrow Account was evidently the Asset (cash) of the CD as per Ind AS 32. (Cash is a financial asset).

So much so, that in the 10th CoC meeting dated 1st September, 2018, it has been observed that RP along with the members of the CoC agreed that HDFC Ltd. may recover EMIs from the Security Deposit available with them and in case any difference of the amount arises, then the same shall be paid from the account of the CD. In addition to this, it was contended by the counsel for the RP that the EMIs to the FC were paid by virtue of the operation of the Facility Agreement and Escrow Account Agreement and that the amount in the Escrow Account even though in the name of CD, were being held in trust for HDFC and the CD was acting as a 'Custodian' only.

As per Facility Agreement, Lender has the right to recover EMI's from the Credit Balance lying in Escrow Account without any reference to or recourse to the borrower. However, as per the minutes of the 4th COC meeting, rental income of CD was credited in Current Account and then transferred to Escrow Account. Thus, in such a situation, borrower was not in a position to recover directly from the Current Account during CIRP (as the agreement was to recover from Escrow Account). This also indicates that the submission made by RP that the rental income was getting credited in FC's Escrow Account is not correct.

Further, during the personal hearing, it was submitted by the counsel for the RP that as per the Facility Agreement, it was covenanted that the amount lying to the credit of the escrow account shall not be treated as the asset of the CD in the event of Bankruptcy/Liquidation and that such amount shall inure to the benefit of the lender.

In this regard, it can be observed that Chapter IV of Part III of the Code contains provisions relating to Bankruptcy in relation to individuals and not corporates. A CD has to go through CIRP before it can go into liquidation. There is a difference between 'commencement of CIRP' and 'Bankruptcy/Liquidation' and these terms are not similar or interchangeable. During CIRP, CD functions as a going concern and is not considered as 'bankrupt or undergoing liquidation' because it is only in case of no revival during CIRP that insolvency process culminates into liquidation. Therefore, the provision contained in the Facility Agreement shall not be applicable to the present case since it envisages the stage of liquidation or bankruptcy. Therefore, the said arguments are untenable and are implausible.

Furthermore, the contention of the counsel of the RP, that the payment of EMIs was made as per the Facility agreement and thus, the same is not violative of section 14 of IBC, is not tenable in view of the objectives of the Code. IBC is an exhaustive code dealing with the Insolvency Law and therefore, in the event of an inconsistency between a covenant and IBC, it is evident that the latter would prevail.

It can thus be concluded that the argument of the RP cannot be accepted as it would vitiate the very purpose for which the Code was formulated. Furthermore, a contrary approach as suggested by

the RP, if taken, would result in making the whole exercise of CIRP biased and troublesome for certain creditors.

The RP in his written submissions, has submitted that the payment of EMI was a routine business transaction in order to keep the CD as a going concern and also that the said payments were made in normal course of business. However, it has been observed that repayment of loan by way of EMIs to the FCs is clearly a financing activity which cannot be regarded as "ordinary course of business of the CD" or even necessary to keep the CD as a going concern.

In this regard, Accounting Standard-3 is relevant, wherein a provision for Cash Flow Statement classifies cash flows during the period as operating, investing and financing activities. In this, Operating activities are the principal revenue-producing activities of the enterprise and other activities that are not investing or financing activities whereas, Financing activities are activities that result in changes in the size and composition of the owners'capital (including preference share capital in the case of a company) and borrowings of the enterprise.

Examples of cash flows arising from financing activities are:

(*a*) cash proceeds from issuing shares or other similar instruments;

(*b*) cash proceeds from issuing debentures, loans, notes, bonds, and other short or long-term borrowings; and

(*c*) cash repayments of amounts borrowed.

In the present case, from a bare perusal of the Cash Flow Statement shown in the minutes of 1st CoC meeting and from the nature of business carried on by the CD, the, Repayment of loan by making EMI payments to HDFC is clearly a financing activity and cannot be said to be in the ordinary course of business of the CD to maintain it as a going concern.

Section 238 of the Code states that "The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

Thus, the provisions of the Code shall prevail over any other provision or law, contrary or inconsistent with any of its provisions. The Hon'ble Supreme Court also had occasion to consider the importance of section 238 of the Code in the case of *Innoventive Industries Ltd.* v. *ICICI Bank* and in *Pr. Commissioner of Income-tax* v. *Monnet Ispat and Energy Ltd.*, whereby it was held that in view of section 238 of the Code, the provisions in the Code will override anything inconsistent contained in any other enactment. Hence, it can be concluded that the Code is a complete code in itself and the provisions of this code override all other laws.

In view of this section, it is amply clear that the Code overrides the *inter-se* commercial and contractual covenants which are in conflict with the Code and therefore, the FC and the CD cannot, by virtue of a clause in the Facility Agreement, take the assets of the CD out of the purview of CIRP and violate the provisions of moratorium contained in section 14 of the Code on account of approval granted by the members of CoC. Thus, provisions of the Code shall supersede and prevail over the said clause in the Facility agreement, to the extent of any inconsistency between the two.

Further, certain duties are also cast upon the RP under the provisions of the Code. Section 25 of the Code provides that the RP shall preserve and protect the assets of the CD and must take immediate custody and control of all the assets of the CD. It has to be understood that conduct and performance of a RP have a substantial bearing on the survival of an ailing entity. He, therefore, is expected to function with a strong sense of urgency and with utmost care and diligence. In the present case, it appears that the IP (after he took over as RP on 08th January, 2018) never informed the CoC that repayment of loan (EMIs) cannot be made during moratorium even though the matter regarding payment of EMI's was discussed in one or other way in 3rd, 5th and 10th CoC meetings. However, in the 4th CoC meeting Mr. Udayraj Patwardhan from the team of RP informed the committee that the Bank accounts should be operated as per the instructions of RP in accordance with the provisions of the Code and that any prior escrow arrangement may not be obligatory during the CIRP process.

The contention of the RP that the payment of EMIs was approved by 100% voting share of CoC which also consisted of unsecured FCs (whereas HDFCs voting share was 9.8% at the time of CIRP commencement) is not sustainable because CoC cannot take a decision beyond the express provisions of the Code since it is a principle of law that what cannot be done directly, cannot be done indirectly. Thus, any action approved by the CoC must strictly adhere to the provisions of the Code and the rules and regulations made thereunder. Even though, in the present case, the decision to continue to make payment of EMIs was taken by CoC, however, the RP should have considered if it is within the prerogative of the CoC to take such a decision in contravention of the provisions of the Code. It has also been observed that CoC has also not recorded any reason for taking such a decision (beyond the provisions of law) which is not permitted by law.

The power bestowed on CoC is coupled with a duty to exercise that power with utmost care, caution and reason, keeping in mind the legislative intent and spirit of the Code. The CoC while exercising their commercial wisdom to arrive at a business decision must necessarily take into account the key features of the Code.

The Supreme Court in *Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta* (*2019*) reinstated the existence of certain intrinsic assumptions relating to the CoC on which the principle of 'commercial wisdom' has been recognised. The assumptions are: that the CoC has taken into account the fact that the corporate debtor needs to maintain itself as a going concern during the insolvency resolution process; that it needs to maximize the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. Therefore, the Supreme Court has been categorical that the discretion given to the CoC in taking commercial decisions about a corporate debtor comes with its boundaries. Exceeding the limits would defy the very objective of the Code.

These assumptions cannot be misinterpreted to be taken as absolute, and over and above the basic objectives and inherent checks and balances within the Code,

which govern this principle in the first place.

Thus, the Hon'ble Court held that when the CoC exercises its commercial wisdom to arrive at a business decision to revive the CD, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors.

In the present case, the decision of the CoC goes against the grain of the intrinsic limitations enshrined within the Code, which the Hon'ble Supreme Court has reiterated in cases such as Swiss Ribbons and Essar Steel.

It is for this reason, the decision of the CoC to ratify and approve the payment of EMI to FC in preference to other Creditors, and also to authorise HDFC Limited to continue to recover the future EMI payments from the surplus funds available in the Bank Account of the CD, can by no stretch of imagination comes within the purview of commercial wisdom of CoC and goes against the basic objectives of the IBC.

It is a matter of common knowledge, that the CD is prohibited from alienating in any manner any of the assets upon declaration of memorandum and therefore, once the claim of FC has been admitted, the RP cannot make the repayment of Loan to FC out of the earnings/assets of the CD during CIRP. The resolution process will be rendered meaningless if the assets of the CD are allowed to be disintegrated during the process. The resolution process aims at bringing back the CD on the rails of recovery and rehabilitation. The purpose of the moratorium include keeping the assets of CD together during CIRP, facilitating orderly completion of the processes envisaged during CIRP and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default. Moratorium also prohibits initiation and continuation of legal proceedings, including debt enforcement action and ensures a stand-still period during which creditors cannot resort to individual enforcement action which may frustrate the very object of the CIRP.

While considering the present case, the DC has placed reliance on para 5 of the judgment dated 15-11-2017 of Hon'ble National Company Law Appellate Tribunal rendered in the case of *Indian Overseas Bank* v. *Mr. Dinkar T. Venkatsubramaniam, Resolution Professional for Amtek Auto Ltd.*, which is reproduced below:

> "Having heard learned counsel for the Appellant, we do not accept the submissions made on behalf of the Appellant in view of the fact that after admission of an application under section 7 of the 'I & B Code', once moratorium has been declared it is not open to any person including 'Financial Creditors' and the appellant bank to recover any amount from the account of the 'Corporate Debtor', nor it can appropriate any amount towards its own dues".

Thus, once the moratorium is in force, the financial creditor including the bank has to prefer its claim before the RP, which is considered along with other claims as per law.

Findings:

Upon commencement of CIRP, IP is duty bound to take over all the assets of the CD which includes financials of the CD. During CIRP, receipt of rent is an income

and the CD has a legal right to receive the same.

If a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the Rule is that if this was not so, the statutory provision might as well not have been enacted. Section 14 of the Code, therefore, by necessary implication, prohibits this power from being exercised in any manner other than the manner set out in the said provision of the Code.

There cannot be an exceptional or special treatment to any corporate entity in any CIRP. While reinforcing the rule of law, every company is to be given the same level playing field, irrespective of its size or the influence of people behind them. Under the existing laws, once CIRP is initiated against a CD and a moratorium is imposed, the provisions of IBC take precedence over all other laws of the country.

Once CIRP commences, all the FCs whose claims have been admitted have to wait for the completion of the process. There is a distinction between pre-CIRP and post-CIRP circumstances. The CoC and the RP in the said matter failed to appreciate the essence and purpose of declaration of moratorium under section 14 of the Code.

Ratification of action regarding payment of 7 EMI's to HDFC by CoC which is *prima facie* illegal, cannot make the said action legal since the CoC has no jurisdiction to take such a decision.

Whatever may be the resource, (here rental income) the amount due to one creditor cannot be made to him at the expense of other creditors as the same is in violation of the moratorium declared u/s 14 of the Code.

In this matter, the RP has made payment of EMIs to the FC during CIRP from the assets of the CD and that too in preference to other creditors, although Section 14 of the Code prohibits transfer and disposal of any of the assets of the CD during the CIRP period. Accordingly, in the present case, the IP has acted in contravention of Section 14, Section 208(2)(*a*) and (*e*) of the Code and Regulation 7(2)(*a*) and 7(2)(*h*) of the IP Regulations, read with clauses 10 and 14 of the Code of Conduct as given in the First Schedule of the IP Regulations.

The DC has taken note of the order dated 05 March, 2019 of the Hon'ble Supreme Court in the matter of *Mecon FZE* v. *Quinn Logistics India Pvt Ltd*. (Civil Appeal No. 9547 of 2018) *vide* which the insolvency proceedings has been terminated. Hence it does not make any sense to ask for recovery of the amount paid to the FC by way of EMIs. However, since this is gross violation of the moratorium which aims to keep the CD alive, leakage of resources through clandestine to select creditors not only risks the life of the company but disturbs the balance amongst stakeholders, In addition to being contravention of Section 14 of the Code, it also impinges the solemn objective of the Code namely resolution of corporate person, maximization of value of assets and balancing the interest of all the stakeholders.

4. *Conclusion:*

4.1 The role of RP is vital to the efficient operation of the insolvency and bankruptcy

resolution process. An IP exercises the powers of the Board of Directors of the firm under resolution, manages its operations as a going concern, and complies with applicable laws on behalf of the firm. He conducts the entire insolvency resolution process: he is the fulcrum of the process and the link between the Adjudicating Authority and stakeholders - debtor, creditors - financial as well as operational, and resolution applicants. The process culminates in a resolution plan that maximises the value of assets of the firm. The IP must apprise the members of the COC about the correct position of Law.

4.2 The Code casts strenuous responsibilities on an IRP/IP to run the affairs of the firm in distress as a going concern and to maximize the value of the assets. As the key objective of the Code is maximization of the value of the assets, one needs to keep the assets of CD together during the CIRP and facilitate orderly completion of the processes envisaged during the insolvency resolution process and therefore, ensuring that the company may continue as a going concern while the creditors take a view on resolution of default.

4.3 IP organises all information relating to the assets, finances and operations of the firm, receives and collates the claims, prepares information memorandum, and provides access to relevant information, so that there is complete symmetry of information among the entitled stakeholders, while maintaining confidentiality. He thus addresses the market failure arising from information asymmetry. The resolution balances the interests of the stakeholders. This requires the services of a third person who does not side with any stakeholder and has no conflict of interests. The law casts this duty on the IP and makes several provisions to ensure his integrity, objectivity, independence and impartiality. It also requires him to be a fit and proper person. Given the responsibilities, an IP requires the highest level of professional excellence.

4.4 In this matter, the DC observes that Mr. Mohan Lal Jain, displayed a casual and negligent approach during the conduct of CIRP. When a CD is admitted into CIRP, the Code shifts the control of a CD to creditors represented by a CoC for resolving its insolvency. The CoC holds the key to the fate of the CD and its stakeholders. Thus, several actions under the Code require approval of the CoC. On the other hand, the IP must maintain absolute independence in discharge of his statutory duties under the Code. In the present matter, the RP compromised his independence and continued making payment of EMIs to the FC during CIRP from the assets of the CD.

4.5 Thus, Mr. Mohan Lal Jain, has displayed utter misunderstanding of the provisions of the Code and Regulations made thereunder. He has, therefore, contravened provisions of:

(*a*) Sections 14(1)(*b*) and Section 208 (2) (*a*) & (*e*) of the Code,

(*b*) Regulation 7(2)(*a*) and 7(2)(*h*) of the IBBI (Insolvency Professionals) Regulations, 2016 read with clause 10 and 14 of the Code of Conduct under the said Regulations.

5. *Order*

5.1 Adherence to provisions of the code is the first and foremost duty of an IP. It is incumbent upon IPs to build and safeguard the reputation of the profession which

should enjoy the trust of the society and inspire confidence of all the stakeholders.

5.2 In view of the above, the DC, in exercise of the powers conferred under section 220 of the Code read with sub-regulations (7) and (8) of Regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016 and Regulation 13 of IBBI (Inspection and Investigation) Regulations, 2017, disposes of the SCN with the following directions:

5.2.1 The DC hereby imposes on Mr. Mohan Lal Jain a penalty equal to twenty five per cent of the fee he has received in this process. This twenty-five per cent works out as Rs. 34,22,500/- (Thirty-Four Lakh Twenty-Two Thousand and Five Hundred only) (*i.e.* Rs. 1,36,90,000/- X 25% = Rs. 34,22,500/-) and directs him to deposit the penalty amount by a crossed demand draft payable in favour of the 'Insolvency and Bankruptcy Board of India' within 45 days from the date of issue of this order. The Board in turn shall deposit the penalty amount in the Consolidated Fund of India.

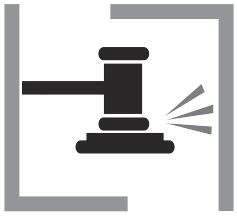
5.2.2 Mr. Mohan Lal Jain shall not accept any new assignment as an IP till he deposits the penalty amount of Rs. 34,22,500/- (Thirty-Four Lakh Twenty-Two Thousand and Five Hundred only) with the Board and produces evidence to the Board of such deposit.

5.3 This Order shall come into force on expiry of 30 days from the date of its issue.

5.4 A copy of this order shall be forwarded to the ICSI Institute of Insolvency Professional where Mr. Mohan Lal Jain, is enrolled as a member.

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

5.6 Accordingly, the show cause notice is disposed of.



(2020) 118 taxmann.com 143 (NCL-AT)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

State Bank of India v. Metenere Ltd.

BANSI LAL BHAT, JUDICIAL MEMBER
V.P. SINGH AND SHREESHA MERLA, TECHNICAL MEMBER
COMPANY APPEAL (AT) (INSOLVENCY) NO. 76 OF 2020
MAY 22, 2020

Section 16 of the Insolvency and Bankruptcy Code, 2016 - Corporate insolvency resolution process - Interim resolution professional - Appointment and tenure of - NCLT by impugned order directed substitution of Insolvency Resolution Professional (IRP), who was ex-employee of appellant bank (financial creditor) on ground that such IRP was unlikely to act fairly and could not be expected to act as an independent umpire - Appellant bank assailed impugned order on ground

that proposed IRP fulfils all requirements for appointment as IRP under Code and admittedly bears no disqualifications - It was found that proposed IRP had a long association of four decades with financial creditor serving under it and currently drawing pension - Thus, in view of above circumstances, though IRP was not disqualified or ineligible to act as an IRP, however, apprehension of bias expressed by corporate debtor qua appointment of proposed IRP could not be dismissed off hand - Whether therefore, impugned order being free from any legal infirmity was to be upheld - Held, yes (Paras 8 and 9)

CASE REVIEW

State Bank of India v. *Metenere Ltd.* (2020) 113 taxmann.com 379 (NCLT - New Delhi) (Para 9) - Affirmed.

Ramji Srinivasan, Sr. Adv. **Ankur Mittal, U.C. Mittal, Ms. Meera Murali, Ms. Jasveen Kaur** and **Rishab Kapoor**, Advs. for the Appellant. **Arun Kathpalia**, Sr. Adv. **Arvind Kumar Gupta, M.K. Pandey, Mrs. Purti Marwaha Gupta, Mrs. Heena George, Ms. Areela Sanjay Massey, Ms. Adya Shree Dutta, D.N. Sharma** and **T.R.B. Shivakumar,** Advs. for the Respondent.

JUDGMENT

Bansi Lal Bhat, Judicial Member - Appellant - 'State Bank of India' is the 'Financial Creditor' who sought initiation of 'Corporate insolvency Resolution Process' by filing an application under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") before the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench which, on taking note of the objection raised by the 'Corporate Debtor' - 'M/s. Metenere Limited' regarding the name of proposed 'Interim Resolution Professional'- Mr. Shailesh Verma passed impugned order dated 4th January, 2020 directing the Appellant- 'Financial Creditor' to perform its statutorily mandatory obligation by substituting the name of the 'Resolution Professional' to act as an 'Interim Resolution Professional' in place of Mr. Shailesh Verma as it was of the view that Mr. Shailesh Verma having worked with the State Bank of India for 39 years before his retirement in 2016, there was an apprehension of bias and Mr. Shailesh Verma was unlikely to act fairly and could not be expected to act as an Independent Umpire. Aggrieved thereof, Appellant- 'Financial Creditor' has preferred instant appeal assailing the impugned order on the ground that the proposed 'Interim Resolution Professional' Mr. Shailesh Verma fulfils the requirement for appointment as 'Interim Resolution Professional'/'Resolution Professional' under the 'I&B Code' and admittedly bears no disqualification.

2. It is contended on behalf of the Appellant that the 'I&B Code' and the Regulations framed thereunder do not attach any disqualification to an ex-employee of a 'Financial Creditor' from being appointed as an 'Interim Resolution Professional'. It is further submitted that the 'Interim Resolution Professional' is not required to act as an 'Independent Umpire' between the 'Financial Creditor' and the ex-management of the 'Corporate Debtor' or decide any conflicting issues between them. It is further submitted that the 'Resolution Professional' has no adjudicatory powers and only acts as a facilitator

in the `Corporate Insolvency Resolution Process' as all major decisions are taken only with the approval of the `Committee of Creditors'. It is further submitted that the `Financial Creditor' also plays part only to the extent of its voting share as a member of `Committee of Creditors' and not beyond that. Therefore, merely because the proposed `Interim Resolution Professional' happens to be an ex-employee of the `Financial Creditor' cannot be a ground to allege bias against him. Lastly, it is contended that the proposed `Interim Resolution Professional' is not on any panel of the Appellant Bank or handling any portfolios and has no role in decision making committee of the Appellant Bank.

3. Per contra, it is submitted on behalf of the Respondent- `Corporate Debtor' that Mr. Shailesh Verma was in employment with the Appellant for over 39 years and retired as the Chief General Manager in 2016. He is drawing pension from the Appellant- `Financial Creditor' which falls within the definition of `salary' under the Income-tax Act, 1961. It is submitted that in view of the same, Mr. Shailesh Verma is an `interested person' being an ex-employee and on the payroll of `Financial Creditor', thus rendered ineligible under the `I&B Code' to act as an `Interim Resolution Professional'. It is further submitted that mere apprehension of bias is sufficient ground of apprehension of biasness of the proposed `Interim Resolution Professional' towards the Appellant.

4. The sole question arising for determination in this appeal is whether an ex-employee of the `Financial Creditor' having rendered services in the past, should not be permitted to act as `Interim Resolution Professional' at the instance of such `Financial Creditor', regard being had to the nature of duties to be performed by the `Interim Resolution Professional' and the `Resolution Professional'.

5. It is not in controversy that Mr. Shailesh Verma proposed as `Interim Resolution Professional' by the `State Bank of India' is an ex-employee of the `Financial Creditor' having served the organisation for 39 years in the past and retired as the Chief General Manager in 2016. Merely, because Mr. Shailesh Verma continues to draw pension for services rendered in past does not clothe him with the status of an `interested person'. The fact that Mr. Shailesh Verma is drawing pension from `Financial Creditor's organisation does not clothe him with the status of an employee on the payroll of `Financial Creditor'. Pension is paid for the services rendered to the employer in the past and it is a benefit earned for such past services under the relevant Service Rules. The pensioner is entitled to such benefit as a privilege under the Service Rules and not as a boon from the ex-employer. It is significant to refer to Regulation 3 (1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which reads as under:

> "(1) An insolvency professional shall be eligible to be appointed as a resolution professional for a corporate insolvency resolution process of a corporate debtor if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, are independent of the corporate debtor."

6. The Regulation clearly provides that an Insolvency Professional shall be eligible for appointment as a 'Resolution Professional' for the 'Corporate Insolvency Resolution Process' of a 'Corporate Debtor' if he or his partners and directors of the Insolvency Professional Entity are independent of the 'Corporate Debtor'. Admittedly, Mr. Shailesh Verma is a qualified Insolvency Professional and neither he nor any of his associates is alleged to be connected with the 'Corporate Debtor' in a manner rendering him ineligible to act as a 'Resolution Professional'. Provision engrafted in Section 17(1) of the Income-tax Act, 1961 bringing pension within the ambit of 'salary' cannot be interpreted to render a pensioner of a 'Financial Creditor' under the statutory framework ineligible as an 'interested person' being in employment of the 'Financial Creditor' as the definition of 'salary' under the Income-tax Act, 1961 is designed only for the purposes of computing of income to determine tax liability. The argument advanced on behalf of the 'Corporate Debtor' in this Court to portray Mr. Shailesh Verma as an 'interested person' drawing salary within the meaning of Income-tax Act, 1961 defies logic and same has to be repelled.

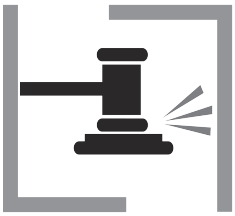
7. This Appellate Tribunal had an occasion to consider ineligibility or disqualification for appointment as 'Interim Resolution Professional' or 'Resolution Professional'. Taking note of the relevant provisions of law in "*State Bank of India* v. *Ram Dev International Ltd.* (Through Resolution Professional)- Company Appeal (AT) (Insolvency) No. 302 of 2018" decided on 16th July, 2018, this Appellate Tribunal observed that merely because a 'Resolution Professional' is empanelled as an Advocate or Company Secretary or Chartered Accountant with the 'Financial Creditor' cannot be a ground to reject the proposal of his appointment unless there is any disciplinary proceeding pending against him or it is shown that the person is an interested person being an employee or on the payroll of the 'Financial Creditor'. Admittedly, no disciplinary proceedings are pending against Mr. Shailesh Verma and he is not on aforestated panel or engaged as a retainer by the 'Financial Creditor'. He had a long relationship with the 'Financial Creditor', spanning around four decades, before demitting office as the Chief General Manger in 2016 but currently he is merely a pensioner drawing pension as a benefit earned for the past services in terms of the relevant Service Rules which he is getting independent of the benevolence of the ex-employer *i.e.* the Appellant - 'Financial Creditor'. But it cannot be denied that the Appellant restricted its choice to propose Mr. Shailesh Verma as 'Interim Resolution Professional' obviously having regard to past loyalty and the long services rendered by the later. This conclusion is further reinforced by filing of instant appeal by the 'Financial Creditor' who is upset with the impugned order directing the Appellant-'Financial Creditor' to substitute the name of 'Interim Resolution Professional' in place of Mr. Shailesh Verma. This has to be viewed in the context of apprehension of bias raised by the Respondent-'Corporate Debtor' for the apprehension of bias necessarily rests on The perception of Respondent-'Corporate Debtor'. It is profitable to refer to the following observations of the Hon'ble Apex Court in "*Ranjit Thakur* v. *Union of India* (1987) 4 SCC 611":

> "17. As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the judge is not to look at his own mind and ask himself, however, honestly, "Am I Biased?"; but to look at the mind of the party before him"

8. The fact that the proposed `Resolution Professional' Mr. Shailesh Verma had a long association of around four decades with the `Financial Creditor' serving under it and currently drawing pension coupled with the fact that the `Interim Resolution Professional' is supposed to collate all the claims submitted by Creditors, though not empowered to determine the claims besides other duties as embedded in Section 18 of the `I&B Code' raised an apprehension in the mind of Respondent- `Corporate Debtor' that Mr. Shailesh Verma as the proposed `Interim Resolution Professional' was unlikely to act fairly justifying the action of the Adjudicating Authority in passing the impugned order to substitute him by another Insolvency Professional. Observations of the Adjudicating Authority in the impugned order with regard to `Interim Resolution Professional' to act as an Independent Umpire must be understood in the context of the `Interim Resolution Professional' acting fairly *qua* the discharge of his statutory duties irrespective of the fact that he is not competent to admit or reject a claim.

9. In the given set of circumstances, we are of the considered opinion that the apprehension of bias expressed by the `Corporate Debtor' *qua* the appointment of Mr. Shailesh Verma as proposed `Interim Resolution Professional' at the instance of the Appellant-'Financial Creditor' cannot be dismissed off hand and the Adjudicating Authority was perfectly justified in seeking substitution of Mr. Shailesh Verma to ensure that the `Corporate Insolvency Resolution Process' was conducted in a fair and unbiased manner. This is notwithstanding the fact that Mr. Shailesh Verma was not disqualified or ineligible to act as an `Interim Resolution Professional'. Viewed thus, we find no legal flaw in the impugned order which is free from any legal infirmity and has to be upheld. It goes without saying that the Appellant- `Financial Creditor' should not have been aggrieved of the impugned order as the same did not cause any prejudice to it.

10. There being no merit in the appeal, the same is dismissed.



(2020) 116 taxmann.com 888 (NCL-AT)

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Ritu Murli Manohar Goyal* v. *SVG Fashions Ltd.

BANSI LAL BHAT, JUDICIAL MEMBER
V.P. SINGH AND SHREESHA MERLA, TECHNICAL MEMBER
COMPANY APPEAL (AT) (INSOLVENCY) NO. 1340 OF 2019
MAY 22, 2020

Section 238A, read with sections 5(21) and 9 of the Insolvency and Bankruptcy Code, 2016- Corpoarte insolvency resolution process-Limitation period - Operational Creditor had filed an application under section 9 and same was admitted by NCLT-Appellant who was a shareholder and director of Corporate Debtor challenged impugned order primarily on ground that claim was barred by limitation and initiation of Corporate Insolvency Resolution Process could not be sustained-It was found that default had occurred on 7-10-2013 and application for triggering of Corporate Insolvency Resolution Process was filed before NCLT on 20-4-2018 *i.e.* well after prescribed period of three years in terms of provisions of residuary clause engrafted under Article 137 of Limitation Act, 1963 - Whether application filed by Operational Creditor' under section 9 was barred by limitation-Held, yes -Whether in respect of invoices raised in year 2013 prescribed period of limitation of three years expired in year 2016 and issuance of cheques by Corporate Debtor in year 2017 would not be construed as an acknowledgement in writing within prescribed period of limitation in terms of Section 18 of Limitation Act, 1963 - Held, yes-Whether thus, operational debt in respect whereof Operational Creditor sought triggering of Corporate Insolvency Resolution Process, was neither due nor payable in law on date when such Corporate Insolvency Resolution Process was sought to be initiated by Operational Creditor-Held, yes-Whether, thus, impugned order admitting petition under Section 9 was to be set aside-Held, yes (Paras 9,12,13 &14)

Case Review

SVG Fashions Ltd. v. Arpita Filaments (P.) Ltd. (2020) 115 taxmann.com 423 (See Annex.)(Para14) set side

Keith Varghese, Adv. *for the Appellant.*
Rakesh Kumar, **Ankit Sharma** and **Sumit Kansal**, Advs. *for the Respondent.*

JUDGMENT

Bansi Lal Bhat, Judicial Member - Application of Respondent No.1- 'M/s. SVG Fashions Ltd.' ('Operational Creditor') under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) came to be admitted at the hands of the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad in terms

of the order dated 26th September, 2019 impugned in the instant appeal preferred by `Ritu Murli Manohar Goyal', one of the Shareholders and Director of the `Corporate Debtor'- `M/s. Arpita Filaments Private Limited' primarily on the ground that the claim was barred by limitation and initiation of the `Corporate Insolvency Resolution Process' could not be sustained.

2. The broad features of the case may be briefly adverted to. `M/s. SVG Fashions Ltd.' (`Operational Creditor') asserted before the Adjudicating Authority that it was engaged in the business of supply of various fabrics and had been doing business with the `Corporate Debtor' since the year 2013 regularly supplying various fabrics in respect whereof bills were raised from time to time which were cleared by the `Corporate Debtor' without raising any dispute in regard to the quality of the products supplied by the `Operational Creditor'. However, since August, 2013, the `Corporate Debtor' started making irregular payments and the bills were not cleared in time. As the `Operational Creditor' raised issue regarding payments with the `Corporate Debtor', in the year 2015, the `Corporate Debtor' issued signed cheques as security, but since no payment was forthcoming, `Operational Creditor' was constrained to issue Demand Notice under Section 8 of the `I&B Code' calling upon the `Corporate Debtor' to pay aggregate amount of Rs. 43,96,593/- towards bills raised from 11th August, 2013 to 2nd September, 2013 amounting to Rs. 21,08,821/- plus interest of Rs. 22,87,772/-. Demand Notice dated 19th March, 2018 was duly delivered at the registered office of the `Corporate Debtor' but the `Corporate Debtor' chose not to reply the same, thereby prompting the `Operational Creditor' to approach the Adjudicating Authority for triggering of `Corporate Insolvency Resolution Process'.

3. The `Corporate Debtor', while denying its liability qua claim of operational debt, raised the plea before the Adjudicating Authority that six cheques had been found missing from its cheque book and it had issued letters to `Surat National Co. op. Bank Ltd.' requesting to stop payment. The Adjudicating Authority directed the `Corporate Debtor' to place on record the original letters addressed to the Bank. It is noticed in paragraph 18 of the impugned order that the original date of issuance of a letter dated 1st January, 2008 has been struck off and replaced by 4th March, 2017. The comparison made by the Adjudicating Authority raised suspicion about genuineness of such letters. That apart, `Corporate Debtor' failed to produce credible proof in regard to missing of cheques and subsequent issuance of letters of stoppage of payments to the Bank. Thus, the Adjudicating Authority arrived at the conclusion that the `Corporate Debtor' had committed default in respect of the operational debt arising out of supply of goods by the `Operational Creditor' and had fabricated the aforesaid plea raised to defeat triggering of `Corporate Insolvency Resolution Process' at the instance of `Operational Creditor'.

4. Learned counsel for the Appellant submitted that the date of default mentioned in the application is 7th October, 2013 while the application was filed on 20th April, 2018 and in view of Article 137 of the Limitation Act, the application filed by the `Operational Creditor' was time

barred. Per contra, learned counsel for the 'Operational Creditor' submitted that the cheques were issued in acknowledgement of the debt within the period of limitation and the cheques having been dishonoured, 'Corporate Insolvency Resolution Process' was initiated after issuance of Demand Notice within the prescribed period of limitation. It is further submitted on behalf of the 'Operational Creditor' that the 'Corporate Debtor' had denied the very transaction of supply of goods as also issuance of cheques by falsely claiming that the cheques had been lost and the same plea was found to be without substance. It is further submitted that the 'Corporate Debtor' had neither complied with the Demand Notice nor raised any dispute in regard to supply or quality of goods as the Demand Notice was not at all responded to by the 'Corporate Debtor'.

5. Having heard learned counsel for the parties and fathomed through the records, we find that the appeal bears merit for the reasons we would be adverting to.

6. It is the settled proposition of law that an application under Section 9 of the 'I&B Code' is governed by Article 137 of the Limitation Act, 1963, which is reproduced hereunder:

Part II-OTHER APPLICATION			
	Description of application	Period of Limitation	Time from which
137.	Any other application for which no period of limitation is provided elsewhere in this division.	Three years	period begins to run When the right to apply accrues

The period prescribed under this Article being three years, the 'Operational Creditor' is required to satisfy the Adjudicating Authority that the 'Corporate Insolvency Resolution Process' is sought to be initiated by filing application within the prescribed period of three years.

7. Form 3 is the Demand Notice issued by the 'Operational Creditor' which is at Page 119 of the Appeal paper book. Its perusal brings to fore that the total amount of debt on account of goods supplied by the 'Operational Creditor' to the 'Corporate Debtor' under various invoices has been calculated at Rs. 42,67,640/- in respect whereof the 'Corporate Debtor' is stated to have issued six cheques dated 5th December, 2017 for an aggregate amount of Rs. 5,37,206/- towards part payment which were dishonoured when presented by the 'Operational Creditor' for encashment before the Bank.

8. It is manifestly clear that the six cheques claimed to have been issued by the 'Corporate Debtor' towards part payment of the liability arising out of outstanding operational debt were issued on 5th December, 2017 as per admission of the 'Operational Creditor', this fact having been incorporated in Form 3 i.e., the Demand Notice dated 22nd December, 2017. In so far as liability arising out of operational debt is concerned, the invoices raised in regard to the outstanding operational debt covers the period from 11th August, 2013 to 2nd September, 2013. This fact is clearly emerging from paragraph 3 of Form 5 i.e., the application filed by the 'Operational Creditor' before the Adjudicating Authority for triggering of 'Corporate Insolvency Resolution Process' (at Page 39 of the Appeal paper book).

9. The 'Operational Creditor' while placing these facts before the Adjudicating Authority has clearly described the date of default as 7th October, 2013 (Page 46 of the Appeal paper book). The 'Operational Creditor' cannot escape from the factual assertion incorporated in Demand Notice and the application filed before the Adjudicating Authority. A combined reading of the Demand Notice and the application filed for triggering of 'Corporate Insolvency Resolution Process' at the instance of 'Operational Creditor' clearly establishes that the default had occurred on 7th October, 2013 and the application for triggering of 'Corporate Insolvency Resolution Process' under Section 9 of the 'I&B Code' was filed before the Adjudicating Authority on 20th April, 2018 i.e. well after the prescribed period of three years in terms of provisions of residuary clause engrafted under Article 137 of the Limitation Act, 1963. Viewed thus, there can be no hesitation in holding that the application filed by the 'Operational Creditor' under Section 9 of the 'I&B Code' was barred by limitation.

10. The next question arising for attention is whether issuance of six cheques by the 'Corporate Debtor' towards the part payments of the outstanding operational debt would amount to an acknowledgement of debt thereby giving fresh lease of life to the claim of 'Operational Creditor' qua such operational debt. On this issue, it would be appropriate to notice that the general principle embodied in Section 3 of the Limitation Act, 1963 providing that every suit, appeal or application filed after the prescribed period of limitation shall be dismissed irrespective of the fact that limitation has not been set up as a defence is subject to the provisions contained in Sections 4 to 24 (inclusive) of the Limitation Act, 1963. These Sections carve out exceptions by providing exclusion and extension on various grounds enumerated therein.

11. Section 18 of the Limitation Act, 1963 deals with "effect of acknowledgement in writing". It is reproduced as under:

"18. *Effect of acknowledgement in writing.*— (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

(2) Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.—For the purposes of this section,—

(*a*) an acknowledgement may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right,

(*b*) the word "signed" means signed either personally or by an agent duly authorised in this behalf, and

(*c*) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right."

12. A bare look at the provision engrafted in this Section brings it to fore that an acknowledgement of liability in respect of a right made in writing by a person against whom such right is claimed shall have the effect of computation of fresh period of limitation from the time of signing of such acknowledgement provided such acknowledgement of liability has been made before the expiration of the prescribed period of limitation for a suit or application in respect of such right. The provision is in the nature of extension of period of limitation having the effect of the period of limitation being reckoned afresh from the date of such acknowledgement in writing being signed by the person of incidence. However, such acknowledgement will take effect only if the liability in respect of such right is acknowledged in writing and signed by the person of incidence before the expiration of the prescribed period of limitation for such suit or application in respect of such right. Applying the dictum of this provision in the facts and circumstances of instant case, it is manifestly clear that in respect of the invoices raised in the year 2013 the prescribed period of limitation being three years in terms of Article 137 of the Limitation Act, 1963 expired in the year 2016 and the issuance of cheques by the 'Corporate Debtor' in the year 2017 being well beyond the prescribed period of three years would not be construed as an acknowledgement in writing within the prescribed period of limitation in terms of Section 18 of the Limitation Act, 1963. The situation would have been different if such cheques issued by the 'Corporate Debtor' towards the part payment of the operational debt had been issued prior to 7th October, 2016 as the date of default occurred on 7th October, 2013 which fact is admitted by the 'Operational Creditor' in Form 5 (Page 46 of the Appeal paper book).

13. In this factual background and on the very basis of what was placed by the 'Operational Creditor' before the Adjudicating Authority, issuance of six cheques dated 5th December, 2017 by the 'Corporate Debtor' towards part payment of the operational debt in respect of invoices with last one raised on 2nd September, 2013 cannot be termed as an acknowledgement of debt within the ambit of Section 18 of the Limitation Act, 1963. The inescapable conclusion is that the operational debt in respect whereof the 'Operational Creditor' sought triggering of 'Corporate Insolvency Resolution Process', was neither due nor payable in law on the date when such 'Corporate Insolvency Resolution Process' was sought to be initiated by the 'Operational Creditor'.

14. We accordingly, uphold the contention raised in this Appeal that application under Section 9 was hit by limitation. That being so, the impugned order admitting the petition under Section 9 of the 'I&B Code' at the instance of the 'Operational Creditor' cannot be sustained. The appeal is allowed and the impugned order is set aside.

15. In effect, order (s), passed by the Adjudicating Authority appointing `Interim Resolution Professional', declaring moratorium, freezing of account, and all other order (s) passed by the Adjudicating Authority pursuant to impugned order and action, if any, taken by the `Interim Resolution Professional', including the advertisement, if any, published in the newspaper calling for applications, all such orders and actions are declared illegal and are set aside. The application preferred under Section 9 of the `I&B Code' is dismissed. Learned Adjudicating Authority will now close the proceeding. The `Corporate Debtor' (company) is released from all the rigours of law and is allowed to function independently through its Board of Directors from immediate effect.

16. The Adjudicating Authority will fix the fee of the `Interim Resolution Professional', and the `Corporate Debtor' will pay the fees of the `Resolution Professional', for the period he has functioned.

The appeal is allowed with aforesaid observations. However, in the facts and circumstances of the case, there shall be no order as to cost.

Practical Questions

Q.1. Can the claims that are not submitted or are not accepted or dealt with by the RP and afterwards the resolution plan submitted by the RP is approved, be submitted subsequently with the resolution applicant?

Ans No.

(NCLAT judgment dt. 24th January 2020 passed in *Santosh Wasantrao Walokar v. Vijay Kumar V. Iyer* (2020) 118 taxmann.com 151)

Q.2 Can a lead bank or the CoC file an application for removal of the liquidator when orders for liquidation have already been passed by the AA?

Ans No, in such a case, the CoC stands only in the capacity of claimant.

(NCLAT judgment dt. 21st January 2020 passed in *Punjab National Bank v. Kiran Shah, Liquidator of ORG Informatics Ltd.* (2020) 117 taxmann.com 427)

Q.3. Can the CoC shirk-off its liability to pay IRP's fees and cost on the ground that the OC who initiated the CIRP proceedings is liable to pay the same?

Ans No.

(NCLAT judgment dt. 10th January 2020 passed in Committee of Creditors, *Smartec Build Systems (P.) Ltd. v. B. Santosh Babu* (2020) 118 taxmann.com 146)

Q.4. Can a liquidator in exercise of its powers u/s 35(1)(k), IBC consciously decide on the question whether or not to defend any suit against the CD?

Ans Yes.

(NCLAT judgment dt. 24th February 2020 passed in Reliance India Power Fund, *Reliance Capital* v. *Mr. Raj Kumar Ralhan* (2020) 118 taxmann.com 150)

Q.5. Can an appellant claim benefit of section 14, Limitation Act, 1963 in respect of the period spent by him in the High Court before which it filed a writ petition against NCLT's order and which subsequently got dismissed by HC?

Ans No.

(NCLAT judgment dt. 30th January 2020 passed in the matter of *Radhika Mehra* v. *Vaayu Infrastructure LLP* (2020) 117 taxmann.com 715)

Learning Curves

- **MoU which has not been stamped as per the Indian Stamp Act can be considered legally binding loan agreement only after fulfilling the requirement under Stamp Act.**

NCLT, Chennai order dt. 18th January 2018 passed in *A Senthil Kumar v. IRP of Paragon Steels (P.) Ltd.* (2018) 90 taxmann.com 99

- **Section 43 of the Code shall be invoked if, (1) there shall be transfer of property or interest from the CD to a Creditor, (2) and it must be for the benefit of such creditors in preference to the other creditors of the CD.**

NCLT, Chennai order dt. 4th July 2019 passed in the matter of *S.V Rajkumar RP. v. Orchid Health Care (P) Ltd.*(2019) 109 taxmann.com 356

- **Providing NIL value to Operational Creditors would certainly not balance the interest of all stakeholders and is a ground for modifying approved resolution plan.**

NCLAT order dt. 14th February 2020 in *Hammond Power Solutions (P) Ltd. v. Sanjit Kumar Nayak RP* (2020) 116 taxmann.com 136

- **The appellant, being a tenant has no *locus standi* under section 47(1) of the Code to seek any direction against the Liquidator as regards undervalued sale transaction.**

  NCLAT order dt. 3rd March 2020 passed in the matter of *D&I Taxcon Services (P.) Ltd. v. Vinod Kumar Kothari*, (2020) 118 taxmann.com 50

- **Section 47(1) of the Code enables a Creditor to file an application where undervalued transactions take place, if resolution professional has not reported it to the Adjudicating Authority.**

  NCLT, Ahmedabad Bench order dt. 6th November 2017 passed in the matter of *M.S Vitol S.A. v. Asian Natural Resources (I) Ltd.*(2017) 88 taxmann.com 33

ROLE OF RESOLUTION PROFESSIONAL/ LIQUIDATOR IN RESPECT OF AVOIDANCE TRANSACTIONS

CIRCULAR NO. FACILITATION / 001 / 2020, DATED 8-5-2020

Sections 25 and 35 of the Insolvency and Bankruptcy Code, 2016 (Code) enumerate the duties of a Resolution Professional (RP) and a Liquidator, respectively. These duties include certain actions in respect of avoidance transactions (preferential transactions, undervalued transactions, extortionate transactions, and fraudulent trading). Sections 43, 45, 50 and 66 of the Code mandate the RP and the Liquidator to file applications with the Adjudicating Authority (AA) seeking appropriate reliefs and directions permissible under the Code. Section 47 of the Code, *inter alia,* provides that the AA shall require the Insolvency and Bankruptcy Board of India (Board) to initiate a disciplinary action against the RP or the Liquidator, as the case may be, where he has not reported undervalued transactions to the AA.

2. Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 requires the RP to form an opinion whether the corporate debtor (CD) has been subjected to any avoidance transaction on or before the 75th day of the insolvency commencement date (ICD). Where he is of the opinion that the CD has been subjected to any transactions covered under the aforesaid sections, he shall make a determination, on or before the 115th day of the ICD, under intimation to the Board. Further, he shall apply to the AA for appropriate relief on or before the 135th day of the ICD. These

provisions aim to claw back the value lost through avoidance transactions, in sync with objective of maximisation of value of the assets of the CD.

3. The Code, read with Regulations, has demarcated responsibilities of an insolvency professional in corporate insolvency resolution process (CIRP) and liquidation process. To enable the insolvency professional and the committee of creditors (CoC) to have a complete and clear understanding of their roles and responsibilities in a CIRP, the Board, on 1st March, 2019, issued an indicative charter of their responsibilities, prepared in consultation with the three Insolvency Professional Agencies. Since the CoC does not exist in the liquidation process, the Liquidator has independent and exclusive duties. The emerging jurisprudence is bringing further clarity about their roles in corporate insolvency proceedings.

4. The AA has disposed of a few applications relating avoidance transactions. Some matters have travelled up to the Supreme Court. The observations in the following two matters provide guidance to the insolvency professional and stakeholders as well.:

(*i*) *Ram Ratan Kanoongo* v. *Sunil Kathuria* (2019) 105 taxmann.com 328 (NCLT-Mum.)

Since certain transactions appeared to be fraudulent or preferential in nature during the CIRP of Saana Syntex Pvt. Ltd. (CD), the RP filed an application Under Section 19, 45 & 66 of the Insolvency and Bankruptcy Code, 2016. . The CD could not be revived and, therefore, liquidation commenced. The AA observed that if there is a syphoning off funds of the CD, it is important that the same be brought back for the completion of liquidation proceedings. It held:

"Sections 43 & 45 start with the phrase "Where the liquidator or the RP ", hence it can be understood that the avoidance or preferential or undervalued transactions can be handled even at the stage of Liquidation.".

(*ii*) *Anuj Jain Ltd. v. Axis Bank Ltd. Etc.* (2020) 114 taxmann.com 656 (SC)

In this landmark judgement, the Supreme Court clarified the duties and responsibilities of the RP in respect of avoidance transactions. It held that the RP shall—

(*i*) sift through all transactions relating to the property/interest of the CD back words from the ICD and up to the preceding two years;

(*ii*) identify persons involved in the transactions and put them in two categories: (*a*) related party under section 5(24), and (*b*) remaining persons;

(*iii*) identify which of the said transactions of preceding two years, the beneficiary is a related party of the CD and in which the beneficiary is not a related party. The sub-set relating to unrelated parties shall be trimmed to include only the transactions preceding one year from the ICD;

(*iv*) examine every transaction in each of these sub-sets to find out whether

(*a*) the transaction is of transfer of property of the CD or its interest in it; and (*b*) beneficiary involved in the transaction stands in the capacity of creditor/surety/guarantor;

(*v*) scrutinise the shortlisted transactions to find, if the transfer is for or on account of antecedent financial debt/operational debt/other liability of the CD;

(*vi*) examine the scanned and scrutinised transactions to find, if the transfer has the effect of putting such creditor/ surety/guarantor in beneficial position, than it would have been in the event of distribution of assets under section 53. If answer is in the affirmative, the transaction shall be deemed to be of preferential, provided it does not fall within the exclusion under section 43(3); and then

(*vii*) apply to the AA for necessary orders, after carrying out the aforesaid volumetric and gravimetric analysis of the transactions.

The Supreme Court observed that the parameters and the requisite enquiries as also the consequences in relation to different types of avoidance transactions are different. It clarified that once transactions are held as preferential; it is not necessary to examine whether these are undervalued and/or fraudulent. In preferential transaction, the question of intent is not involved and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving preference at a relevant time, while undervalued transaction requires different enquiry under sections 45 and 46 where the AA is required to examine the intent, if such transactions were to defraud the creditors.

5. This communication is issued for the sole purpose of educating the IPs and other stakeholders of corporate insolvency resolution and liquidation processes. A stakeholder must refer to the Code and the Rules/Regulations and relevant case laws or seek professional advice if he intends to take any action or decision in any matter under the Code.

•••

SECTION 148, READ WITH SECTIONS 16, 22 AND 40 OF THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 - SPECIAL PROCEDURE FOR CERTAIN PROCESSES - CORPORATE DEBTORS HAVE TO FOLLOW SPECIAL NOTIFIED PROCEDURES WITH RESPECT TO REGISTRATION, FILING OF RETURN AND AVAILING OF INPUT TAX CREDIT DURING CORPORATE INSOLVENCY RESOLUTION PROCESS - AMENDMENT IN NOTIFICATION NO. 11/2020-CENTRAL TAX , DATED 21-3-2020

NOTIFICATION NO. 39/2020–CENTRAL TAX (G.S.R. 273(E)/F.NO. CBEC-20/06/04/2020-GST), DATED 5-5-2020

In exercise of the powers conferred by section 148 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Government, on the recommendations of the Council, hereby makes the following amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.11/2020- Central Tax, dated the 21st March, 2020, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (*i*), vide number G.S.R. 194(E), dated the 21st March, 2020, namely:—

In the said notification

(*i*) in the first paragraph, the following proviso shall be inserted, namely:

"**Provided** that the said class of persons shall not include those corporate debtors who have furnished the statements under section 37 and the returns under section 39 of the said Act for all the tax periods prior to the appointment of IRP/RP.";

(*ii*) for the paragraph 2, with effect from the 21st March, 2020, the following paragraph shall be substituted, namely:-

"2. *Registration*.— The said class of persons shall, with effect from the date of appointment of IRP / RP, be treated as a distinct person of the corporate debtor, and shall be liable to take a new registration (hereinafter referred to as the new registration)in each of the States or Union territories where the corporate debtor was registered earlier, within thirty days of the appointment of the IRP/RP or by 30th June, 2020, whichever is later:.".

ORDER FORM

SPECIAL OFFER

ICSI IIP MEMBERS

On Special Rates Mentioned as under

	Price : ₹
☐ **ICSI IIP (In Print Journal) -** Insolvency and Bankruptcy Journal (Resolve)	5500/-
☐ **Combo - Insolvency & Bankruptcy Code Module** + **Company & SEBI Laws Module** (With Indian Acts & Rules as complimentary)	10,500*/-
☐ **Company & SEBI Laws Module**	5590*/-
☐ **Insolvency & Bankruptcy Code Module**	5000*/-

*GST @18% extra

Pay by Cheque:

Please send your cheque/demand draft in favour of **Taxmann Publications Private Limited** at:
Taxmann, 59/32, New Rohtak Road, New Delhi-110005

Pay by NEFT:

Make payment by NEFT in favour of following account details and send us the remittance details at sales@taxmann.com:

Name of the Account	**Taxmann Publications Pvt. Ltd.**
Account Number	**4611673257**
Name of the Bank	**Kotak Mahindra Bank**
Address	**D-10, No. 1 and 2, Local Shopping Centre Vasant Vihar, D Block, New Delhi-110057**
IFSC Code:	**KKBK0000182**
MICR Code:	**110485013**
SWIFT Code:	**KKBKINBB**
GSTIN of Taxmann Publications Pvt. Ltd.	**07AAACT2774P1ZT**

Contact Details

Name ..... Designation .....

Name of the Firm/Organization .....

GSTIN .....

Flat/Door No. ..... Street/Road No. .....

City: ..... State: ..... Pin code: ☐☐☐☐☐☐

Email: ..... Phone/Mobile No. ☐☐☐ ☐☐☐☐☐☐☐☐☐☐

PLEASE FILL ALL THE FIELDS TO ACTIVATE YOUR SUBSCRIPTION

For more details call **011-45562222** or give a missed call at **91-8688939939** | e-mail : **sales@taxmann.com**

INSTITUTE OF INSOLVENCY PROFESSIONALS
A wholly owned subsidiary of ICSI and registered with IBBI
(Formerly known as ICSI Insolvency Professionals Agency)

'ICSI House', 3rd Floor, 22, Institutional Area,
Lodhi Road, New Delhi - 110 003