Series 2

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

Insolvency and Bankruptcy Laws Group under
Corporate Laws & Corporate Governance Committee
and
Indian Institute of Insolvency Professionals of ICAI
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

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Message

One of the significant developments in recent times is the evolution of Insolvency Professionals as a new professional opportunity with defined roles and responsibilities. The Insolvency Professionals are regulated by Insolvency and Bankruptcy Board of India as well as by the Insolvency Professional Agency.

Since maximisation of value of assets, availability of credit and balancing the interests of all the stakeholders are the major objectives of the Code, the Insolvency Professionals (IPs) in their different roles as Interim Resolution Professional/ Resolution Professional/ Bankruptcy Trustee/ Liquidator have to timely, efficiently and effectively discharge their duties under the insolvency resolution process.

Indian Institute of Insolvency Professionals of ICAI (IIIPI) which is the Insolvency Professional Agency (IPA) as formed by The Institute of Chartered Accountants of India, is taking various initiatives for developing the profession of IPs.

I am happy for the joint initiative taken by the Insolvency and Bankruptcy Laws Group under Corporate Laws & Corporate Governance Committee of ICAI and Indian Institute of Insolvency Professionals of ICAI in bringing out the second series of the publication "Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016" to help the professionals in getting clarity on the issues under the Code.

I would like to sincerely thank the Insolvency and Bankruptcy Laws Group (under CL & CGC) of ICAI under the Convenorship of CA. Nihar Niranjan Jambusaria and CA. Ranjeet Kumar Agarwal, Deputy Convenor of the Insolvency and Bankruptcy Laws Group under CL& CGC and also thank the members of the Board of IIIPI, Shri I.Y.R.Krishna Rao, Shri Biswamohan Mahapatra, Shri Ashok Haldia for this joint initiative. I would specially thank CA. Naveen N. D. Gupta, CA. Nilesh S. Vikamsey, CA. Devaraja Reddy M and CA. Dhinal A. Shah - the Directors of IIIPI, for their support in this effort.

I would like to extend my appreciation for the efforts put in by Shri Sunil Pant, CEO, IIIPI and by Ms. S. Rita and CA. Sarika Singhal of the ICAI team in bringing out this publication.

I am sure that this series of the publication also would be of great help to the professionals and other stakeholders.

Justice Anil R. Dave (Retd.)

Chairman, Indian Institute of Insolvency Professionals of ICAI

Date: 9th January, 2019

Place: New Delhi

Foreword

It has been two years now since the Insolvency and Bankruptcy Code, 2016, the new legal framework for resolving matters of insolvency was enacted and implemented in a fast pace in the debt resolution space in the country.

The Code has been amended twice during this period to address the issues arising from the functioning of the Code and time to time Regulations under the Code were also amended for smooth implementation of the Code.

Several judgements have been pronounced under the Code, which are helping in interpretation and in providing clarification on important issues.

I welcome the Insolvency and Bankruptcy Laws Group under Corporate Laws & Corporate Governance Committee (CL&CGC) and Indian Institute of Insolvency Professionals of ICAI (IIIPI) in taking this initiative of bringing out the publication "Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016" in the form of a Series to facilitate professionals in clear understanding of the provisions of the Code. The Series 1 of the publication was published earlier by the Group and now the Series 2 is being brought out by the Group.

I congratulate the entire Group and extend my sincere appreciation to CA. Nihar Niranjan Jambusaria, Convenor of the Insolvency and Bankruptcy Laws Group under CL&CGC in continuing with the efforts for initiating the second series of this publication. I extend my appreciation to CA. Ranjeet Kumar Agarwal, Deputy Convenor of the Insolvency and Bankruptcy Laws Group under CL&CGC and CA. Dhinal A Shah, Central Council Member and CA. K. Sripriya, Central Council Member - the members of the Group and CA. (Dr.) Debashis Mitra, Chairman, Corporate Laws & Corporate Governance Committee for bringing out this Series 2 of the publication.

I am sure that this Series 2 of the publication would also be immensely helpful to the members and other stakeholders.

CA. Naveen N.D. Gupta
President ICAI
Director IIIPI

Date: 9th January, 2019

Place: New Delhi

Preface

The country has already started to witness the results of the implementation of The Insolvency and Bankruptcy Code, 2016 (IBC). As per the World Bank Doing Business Report (DBR, 2019), India is at 77 Rank out of 190 countries in World Bank's Doing Business Report and India has improved its rank by 53 positions in last two years and 65 positions in last four years. The legal framework under IBC which provides for resolving insolvency, is one of the important factors that has impacted the ranking of the economy for doing business.

Further, as per the RBI Financial Stability Report, December 2018, the asset quality of banks showed an improvement with the gross non-performing assets (GNPA) ratio of Scheduled Commercial Banks declining from 11.5 per cent in March 2018 to 10.8 per cent in September 2018.

But, the implementation of the Code at such speed had been possible only because of the judgements being pronounced by Supreme Court of India, High Courts, NCLAT and NCLT benches across the country. The issues under the Code are better understood by these judicial pronouncements.

The Insolvency and Bankruptcy Laws Group under Corporate Laws & Corporate Governance Committee (CLCGC), through its various initiatives creates awareness about the Code and the professional opportunities therein.

As part of its continuous endeavour towards enrichment of knowledge, The Insolvency and Bankruptcy Laws Group jointly with Indian Institute of Insolvency Professionals of ICAI (IIIPI) had decided to bring out a publication on Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016 in the form of a series. The Series 1 of the publication was brought out by the Group earlier and now the Series 2 of the publication is being brought out.

This series of the publication also covers important Case Analysis based on the decisions by Supreme Court, High Courts, NCLAT and NCLT on issues under the Code.

We would like to thank the President of ICAI and Director IIIPI, CA. Naveen N. D. Gupta and Vice President of ICAI, CA. Prafulla Premsukh Chhajed for their continued support and encouragement in all the initiatives of the Group.

We express our sincere gratitude towards the Board of IIIPI comprising of Hon' ble Mr. Justice Anil R. Dave (Retd.), Chairman of the Board and other Directors, Shri I.Y.R Krishna Rao, Shri Biswamohan Mahapatra, Shri Ashok Haldia, CA. Nilesh S. Vikamsey, Immediate Past President, ICAI and CA. M. Devaraja Reddy, Past President, ICAI for joining in this endeavour.

We would like to thank CA. (Dr.) Debashis Mitra, Chairman, Corporate Laws & Corporate Governance Committee for his support in this initiative. We would like to sincerely thank all the Group Members for their support and would like to specially thank CA. Dhinal A Shah, Central Council Member ICAI and Director, IIIPI and CA. K. Sripriya, Central Council Member ICAI in bringing out this Series 2 of the publication.

We would like to sincerely appreciate and thank CA. Snehal Kamdar, CA. Apoorva Bookseller, CA. Prasad Dharap, CA. Devang P Sampat, CA. Siddharth Mathur, CA. Viral Doshi, CA. Tejas Jatin Parikh and CA. Ankit Sanghavi, who were involved in summarising and analysing the Cases.

We extend our appreciation to the Group Secretariat and the Committee Secretariat comprising of Ms. S. Rita, CA. Sarika Singhal and CA. Choshal Patil and to Shri Sunil Pant, CEO, IIIPI for their contribution and efforts in putting together the Case Analysis.

We sincerely believe that the members of the profession, industries and other stakeholders will find the Series 2 of the publication also very useful.

CA. Nihar Niranjan Jambusaria
Convenor
Insolvency and Bankruptcy Laws Group, CLCGC, ICAI

CA. Ranjeet Kumar Agarwal
Deputy Convenor
Insolvency and Bankruptcy Laws Group, CLCGC, ICAI

Date: 9th January, 2019

Place: New Delhi

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Chapter 1

Orders passed by Supreme Court of India

SECTION 9

CASE NO. 1

Transmission Corporation of Andhra Pradesh Limited (Appellant)

Vs.

Equipment Conductors and Cables Limited (Respondent)
Civil Appeal No. 9597 OF 2018

Date of Order : 23-10-2018

Section 9 – Application for Initiation of Corporate Insolvency Resolution Process by Operational Creditor

Facts:

The appellant is a Transmission Corporation of Andhra Pradesh Government and is successor of Andhra Pradesh State Electricity Board (for short, 'APSEB') and is in the activities relating to transmission of electricity. It had awarded certain contracts to the respondent herein for supply of goods and services.

The respondent initiated arbitration proceedings and filed as many as 82 claims before Haryana Micro and Small Enterprises Facilitation Council (hereinafter referred to as 'Arbitral Council'). These proceedings culminated into Award dated June 21, 2010. The Arbitral Council came to the conclusion that the claims made on the basis of Invoice Nos. 1-57 were barred by law of limitation and, therefore, no amount could be awarded against the said claims. In respect of Invoice Nos. 58-82, the award was passed in favour of the respondent.

Against the aforesaid award rejecting claims in respect of Invoice Nos. 1-57 as time barred, the respondent filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 before the Additional District Judge, Chandigarh. The Additional District Judge passed the order dated August 28,

2014 in the said application thereby remanding the case back to the Arbitral Council for fresh decision.

Against this order, the appellant filed the appeal before the High Court of Punjab and Haryana at Chandigarh. This appeal was allowed by the High Court by its order dated January 29, 2016 thereby setting aside the direction of the Additional District Judge remanding the matter to Arbitral Council for fresh consideration.

Against the order dated January 29, 2016 of the Punjab and Haryana High Court setting aside the order of the Additional District Judge remanding back the matter to the Arbitral Council is concerned, the appellant herein had filed an application for clarification of the said order under Section 151 of the Code of Civil Procedure, 1908. The High Court vide its order dated November 08, 2016 allowed the said Revision Petition holding that there was no award in respect of claim towards Invoice Nos. 1-57 and, therefore, it was not permissible for the respondent to seek the execution.

When the things rested at that, the respondent approached the NCLT by means of a Company Petition under Section 9 of IBC, 2016 read with Rule 6 of Insolvency and Bankruptcy (AAA) Rules, 2016. But this petition was dismissed by the NCLT vide its order dated April 09, 2018 stating that the Company Petition filed by the respondent was not maintainable as the claims which were preferred by the respondent against the appellant and on the basis of which respondent asserts that it has to receive monies from the appellant are not tenable and in any case these are not disputed claims. This assertion is based on the fact that these very claims of the respondent were subject matter of arbitration and the award was passed rejecting these claims as time barred.

Against this order, the respondent has filed appeal before the NCLAT in which impugned orders dated September 04, 2018 have been passed stating that 'Transmission Corporation of Andhra Pradesh Ltd.', the government undertaking may face trouble. Therefore, by way of last chance we grant one opportunity to respondents to settle the claim with the Appellant, failing which this Appellate Tribunal may pass appropriate order on merit.

Decision:

The NCLAT order was then challenged in Supreme Court. The Court has gone into merits and found that order of the NCLT is justified and no purpose would be served in remanding the case back to the NCLAT. The appeal was allowed and the impugned order dated September 04, 2018 passed by the NCLAT was set aside.

SECTION 238A

CASE NO. 2

B. K. Educational Services Private Limited (Appellant)

Vs.

Parag Gupta and Associates (Respondent)

Civil Appeal no. 23988 of 2017

With

Civil Appeal no.439 of 2018

Civil Appeal no.436 of 2018

Civil Appeal no.3137 of 2018

Civil Appeal no.4979 of 2018

Civil Appeal no.5819 of 2018

Civil Appeal no.7286 of 2018

Date of Order: 11-10-2018

Section 238A – Applicability of provisions of the Limitation Act, 1963

Facts:

The question raised by the appellants in these appeals is as to whether the Limitation Act, 1963 will apply to applications that are made under Section 7 and/or Section 9 of the Code on and from its commencement on 01.12.2016 till 06.06.2018.

Decision:

The question raised by the appellants in these appeals is as to whether the Limitation Act, 1963 will apply to applications that are made under Section 7 and/or Section 9 of the Code on and from its commencement on 01.12.2016 till 06.06.2018. In all these cases, the Appellate Authority has held that the Limitation Act, 1963 does not so apply. Even on the assumption that Article

137 of the Limitation Act, 1963 is attracted to such applications, in any case, such applications being filed only on or after commencement of the Code on 01.12.2016, since three years have not elapsed since this date, all these applications, in any event, could be said to be within time.

The Insolvency Law Committee Report, March 2018 has also thought about the aspect that the law is a complete Code and the fact that the intention of such a Code could not have been to give a new lease of life to debts which are time-barred.

The Limitation Act has in fact been applied from the inception of the Code, it is unnecessary to go into the arguments based on the doctrine of laches. The appeals are therefore remanded to the NCLAT to decide the appeals afresh in the light of this judgment.

EFFECT OF STATUTORY ENACTMENTS THAT HAVE COME AFTER THE HEARING OF THE CASE HAS BEEN CONCLUDED

CASE NO. 3

Bank of New York Mellon London Branch (Appellant)

Vs.

Zenith Infotech Limited (Respondent)

Civil Appeal no. 3055 of 2017

(Arising out of S.L.P. (C) No. 1587 of 2015)

Date of Order: 21-02-2017

Facts:

The only question arises for consideration in this appeal is that whether it is necessary to take note of the relevant statutory enactments and changes that have come about after the hearing of the case has been concluded?

Decision:

The first question was whether the dismissal of the application for Reference by the Registrar, Secretary and Chairman of the Board for Industrial and Financial Reconstruction (BIFR) was within the jurisdiction of the said

authorities. The second question, which was implicit if there was to be a positive answer to the first, is whether in view of the order of winding up passed by the Company Court, and affirmed by the Division Bench of the Bombay High Court, there is any further scope for registration of the Reference sought for by the respondent No. 1 company under the provisions of the SICA if the order declining registration by the aforesaid authorities is to be understood to be non-est.

The Hon'ble Supreme Court observed that, High Court was correct in concluding that the refusal of registration of the reference sought by the respondent Company by the Registrar, Secretary/Chairman of the Board for Industrial and Financial Reconstruction (BIFR) was non-est in law. The reference must, therefore, understood to be pending before the Board on the relevant date attracting the provisions of Section 252 of the Insolvency and Bankruptcy Code, 2016.

The second question arising before the High Court, namely, whether the reference before the Board stood foreclosed by the order of winding up of the respondent Company and the appointment of liquidator was answered in the negative relying on Real Value Appliances Ltd. (supra) and Rishabh Agro Industries Ltd. (supra). The core principles laid down in the said decisions of the Court, namely, that immediately on registration of a reference under Section 15 of the erstwhile SICA, the enquiry under Section 16 is deemed to have commenced and that the winding up proceedings against a company stood terminated only after orders under Section 481 of the Companies Act, 1956, are passed, will have to be noticed to adjudge the correctness of the said view of the High Court. In any event, the aforesaid question becomes redundant in view of the conclusion that the reference sought by the respondent Company must be deemed to have been pending on the date of commencement of the Insolvency and Bankruptcy Code, 2016, particularly, Section 252 thereof (effective 1.11.2016).

The appeal is disposed by holding that it would still be open to the respondent Company to seek its remedies under the provisions of Section 252 of the Code read with what is laid down in Sections 13, 14, 20 and 25.

WHETHER IBC CAN BE INVOKED WHERE ARBITRAL AWARD HAS BEEN PASSED

CASE NO. 4

K. Kishan (Appellant)

Vs.

M/s Vijay Nirman Company Pvt. Ltd. (Respondent)

Civil Appeal no. 21824 of 2017

With

Civil Appeal no. 21825 of 2017

Date of Order : 14-08-2018

Whether the Insolvency and Bankruptcy Code, 2016 can be invoked in respect of an operational debt where an Arbitral Award has been passed against the operational debtor, which has not yet been finally adjudicated upon.

Facts:

M/s Vijay Nirman Company Pvt. Ltd.(Respondent) entered into a sub-Contract Agreement with one M/s Ksheerabad Constructions Pvt. Ltd. (for short 'KCPL') on 01.02.2008 for work of 'Construction and widening of the existing two lane highway'. Besides above, a separate agreement of the same date was entered into between the said KPCL and one M/s SDM Projects Private Limited, Bangalore, as a result of which, a tripartite Memorandum of Understanding was entered.

During the course of the project, disputes and differences arose between the parties and the same were referred to an Arbitral Tribunal, which delivered its Award on 21.01.2017. One of the claims that was allowed by the said Award was in favour of the respondent for a sum of Rs.1,71,98,302/- which arises out of certain interim payment certificates. Another claim that was allowed related to higher rates of payment in which a sum of Rs.13,56,98,624/- was awarded. Three cross claims that were made by the Respondent were rejected. A Section 34 (Arbitration Act) petition challenging the said Award filed.

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

An appeal filed to the Appellate Tribunal had the same result, as according to the Appellate Tribunal, the non- obstante clause contained in Sec 238 of the Code would override the Arbitration Act, 1996. The appeal was dismissed.

Decision:

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

With regard to the submission of learned counsel for the respondent, that the amount of Rs.1.71 Crores stood admitted as was recorded in the Arbitral Award, suffice it to say that cross-claims of sums much above this amount has been turned down by the Arbitral Tribunal, which are pending in a Section 34 petition challenging the said Award. The very fact that there is a possibility that the appellant may succeed on these cross-claims is sufficient to state that the operational debt, in the present case, cannot be said to be an undisputed debt. Section 238 of the Code would apply in case there is an inconsistency between the Code and the Arbitration Act and in the present case there is no such inconsistency. On the contrary, the Award passed under the Arbitration Act together with the steps taken for its challenge would only make it clear that the operational debt, in the present case, happens to be a disputed one. The judgment of the Appellate Tribunal needs to be set aside and is therefore reversed.

Case Review: Order dated Nov 20, 2017 of NCLAT in M/s. Ksheeraabd Constructions Pvt. Ltd. (Appellant) Vs. M/s. Vijay Nirman Company Pvt. Ltd. (Respondent), Company Appeal (AT) (Insolvency) No. 167 of 2017, arising out of Order dated 29th August, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad in Company Petition (IB) No. 100/9/HDB/2017), set aside.

ARTICLE 32 OF THE CONSTITUTION

CASE NO. 5

Chitra Sharma and Others (Petitioners)

Vs.

Union of India and Others (Respondent)

Writ Petition (Civil) No 744 of 2017

With

Writ Petition (Civil) No 782 of 2017

With

WRIT PETITION (CIVIL) NO 783 OF 2017

With

SPECIAL LEAVE PETITION (CIVIL) NO 24001 OF 2017

With

WRIT PETITION (CIVIL) NO 803 OF 2017

With

WRIT PETITION (CIVIL) NO 805 OF 2017

With

SPECIAL LEAVE PETITION (CIVIL) NO 24002 OF 2017

With

WRIT PETITION (CIVIL) NO 950 OF 2017

With

WRIT PETITION (CIVIL) NO 860 OF 2017

With

SPECIAL LEAVE PETITION (CIVIL) NO 36396 OF 2017

With

SPECIAL LEAVE PETITION (CIVIL) D NO 33267 OF 2017

AND

WITH

WRIT PETITION (CIVIL) NO 511 OF 2018

Date of Order : 09-08-2018

Grievance under Article 32 was that the CIRP ignores the interests of vital stakeholders in building projects, chief among whom are individuals who have invested their wealth in pursuit of the human desire to own a home. The IBC recognized only three categories or classes namely (i) Corporate Debtors; (ii) Financial Creditors and (iii) Operational Creditors. Not being protected by the IBC, the petitioners contended that the rights conferred upon them by special enactments including the Consumer Protection Act 1986 and by RERA could not be divested. Suspension of the right to seek redressal before an adjudicatory forum under Section 14(1)(a) of IBC, 2016 would, it was asserted, leave the home buyers without a remedy. Section 238 of the IBC, 2016 gives it an overriding effect over other laws in existence.

Facts:

The National Company Law Tribunal, Allahabad (NCLT) admitted a petition filed by IDBI Bank Limited (IDBI Bank) under the IBC to initiate CIRP with respect to Jaypee Infratech Limited (JIL), upon the latter's default in repayment of dues. The NCLT *vide* its order August 09, 2017 commenced CIRP against JIL, whereby it imposed a moratorium which prohibited the institution or continuation of any suits or proceedings against JIL and an Interim Resolution Professional (IRP) was appointed.

Aggrieved by the NCLT's Order, various homebuyers who had invested their money in numerous residential projects of JIL and its parent company Jaiprakash Associates Limited (JAL) came before the Supreme Court by way of multiple Writ Petitions and Special Leave Petitions. Their main grievance was that despite being vital stakeholders they had no *locus* in the CIRP, therefore the provisions of the IBC should be declared *ultra vires*. They also wanted equal status as Financial Creditors as their claims were not covered under any of the provisions of the pre-amended IBC.

The Supreme Court was sympathetic to the cause and interest of the homebuyers, stayed the NCLT Order *vide* its order dated September 04, 2017 (Stay Order). However, upon an application filed by IDBI Bank, the Supreme Court was apprised of the unintended consequences of the Stay Order such as the transfer of control of JIL to its promoters, who had already failed in delivering the flats and repayment of loans. The Supreme Court vacated the stay and allowed the CIRP to continue and directed the IRP to take over the management of JIL. JAL was directed not to alienate any asset

without permission of the Bench and to deposit a sum of Rs. 2000 crores before it.

Further, the Supreme Court nominated a senior counsel to represent the cause of the homebuyers in the Committee of Creditors (CoC) to ensure that homebuyers are protected. The Bench directed the Resolution Professional to finalise the Resolution Plan, but not to implement the same without leave of the Supreme Court.

Over the course of the proceedings, JAL made several applications before the Supreme Court such as seeking an extension of time to comply with the direction to deposit money before the Supreme Court, transferring concession agreements, alienating specific assets, and to participate as one of the intending bidders in the resolution plan that was being formulated by the IRP, etc. In the meantime, in light of JAL's huge debts, the Reserve Bank of India (RBI) filed an application seeking the Supreme Court's permission to initiate CIRP against it.

Several Resolution Applicants submitted Resolution Plans to the Resolution Professional for JIL, out of which four Resolution Plans that complied with the IBC were placed before the CoC for its consideration. Even JAL submitted a Resolution Plan, but, it was rejected under Section 29A of the IBC. The CoC did not approve any of the Resolution Plans that were placed before it within the statutory time frame of 270 days.

As the possibility of liquidation of JIL became real, a number of stakeholders made submissions before the Supreme Court that liquidation would not serve the interest of any of the stakeholders, especially the homebuyers, and that CIRP should be extended so that new/revised resolution plans may be considered and the best plan approved. On the other hand, JAL requested the Supreme Court to hand over management of JIL to them as they were willing to construct flats. This was opposed by all stakeholders in view of JAL's non-compliance with the Supreme Court's order to deposit even Rs.2000 crores, as well as the statutory restrictions imposed under Section 29A of the IBC.

Further to that, the status of the home buyers which had not been recognised prior to 6 June 2018 has now been expressly recognised as a result of the amendment Ordinance.

Decision:

The Supreme Court in its judgement passed significant directions, in effect

re-commencing the CIRP. In order to do justice to the interests of all the concerned stakeholders in the CIRP of JIL, and to prevent it from going into liquidation, the Supreme Court exercised its power vested under Article 142 of the Constitution and directed that the initial period of 180 days be revived with effect from August 09, 2018 (extendable by a further period of 90 days under the provisions of IBC, if required), and a new CoC be constituted in accordance with the amended provisions of the IBC to enforce the statutory status of the homebuyers as Financial Creditors.

The Supreme Court has also directed that the IRP would have the option of inviting fresh bids so that there is a wider field of choice provided to the CoC, and in this entire process JIL and JAL along with their promoters would remain ineligible to participate in the CIRP in light of the bar under Section 29A of the IBC. The Court also acceded to the request of the RBI to initiate CIRP against JAL in order to address the financial distress of JAL. The money deposited by the JAL is to be transferred to NCLT to take an appropriate decision with regard to the same.

The Supreme Court has given primacy to the IBC, and the processes and institutions under it. It has in unequivocal terms rejected JAL's proposal in light of the restriction under Section 29A of the IBC to ensure that persons responsible for insolvency of the Corporate Debtor do not participate in the resolution process as their participation would undermine the salutary object and purpose of the IBC.

The Supreme Court observed that the enactment of the IBC has created a paradigm shift in the way the entire CIRP is regulated and governed, which has led to change in the basic premise of a "debtor in possession" to a "creditor in possession". The Jaypee Case has captured the essence of the Resolution as being a market driven one, wherein primacy is given to the commercial decisions. The Supreme Court also noted that the IBC at its time of enactment did not capture and recognise the interests of the homebuyers, which have now been safeguarded by way of the Ordinance.

The Supreme Court while recognising the homebuyers as Financial Creditors, has left the question open as to whether the homebuyers are secured or unsecured creditors. An important aspect of the judgment is that the Supreme Court did not accede to payment of amounts deposited by the promoter to homebuyers on the ground that it would be a preferential payment to one class of creditors. The IBC is a legislative framework that is well-equipped to deal with the concerns of all stakeholders. Keeping that in mind, the Supreme Court has upheld the processes to be followed under it.

ARTICLE 142 OF THE CONSTITUTION

CASE NO. 6

Uttara Foods And Feeds Private Limited (Appellant)

Vs.

Mona Pharmachem (Respondent)

Civil Appeal no. 18520 of 2017

(Arising out of SLP (C) no. 26824 of 2017)

Date of Order: 13-11-2017

Facts:

In the present ruling, the Apex Court had been approached after the refusal of the National Company Law Appellate Tribunal (NCLAT) to grant it any relief, citing lack of authority to do so. It must be noted that the IBC and the Rules made thereunder only permit withdrawal.

Decision:

The Hon'ble Supreme Court was hearing an Appeal filed under Article 142 by Corporate Debtor, Uttara Foods and Feeds Private Limited, bringing to the notice of the Court its settlement with its Operational Creditor Mona Pharmachem.

For the sake of brevity, article 142 of the Constitution of India reproduced as follows:

Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

Taking note of such appeals, the Bench then observed, *"We are of the view that instead of all such orders coming to the Supreme Court as only the Supreme Court may utilize its powers under Article 142 of the Constitution of India, the relevant Rules be amended by the competent authority so as to include such inherent powers. This will obviate unnecessary appeals being filed before this Court in matters where such agreement has been reached*".

It may be noted that previously there was no provision under the Code enabling the withdrawal of the application after admission by the NCLT. Under Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the NCLT could only permit the withdrawal of an application on a request by the applicant before its admission.

Now, as per IBBI (Second Amendment) Act, 2018, w.e.f. 06.06.2018, for permitting the withdrawal of an application for initiation of the insolvency resolution process, once the application has been admitted by the NCLT, the threshold has been kept at 90% of the voting share of the CoC. (Section 12A read with Regulation 30A)

Chapter 2

Orders passed by High Courts

SECTION-14

CASE NO. 1

HIGH COURT AT ALLAHABAD

Sanjeev Shriya (Petitioner)

Vs.

State Bank of India and 6 others (Respondents)

WRIT - C No. - 30285 of 2017

Connected with

Deepak Singhania and another (Petitioner)

Vs.

State Bank of India (Respondent)

WRIT - C No. - 30033 of 2017

Date of Order: 06-09-2017

Facts:

Present ruling arises in a writ petition filed by erstwhile directors of the Corporate Debtor challenging an order of a DRT. In accordance of the order challenged, DRT permitted proceedings against the directors, while staying the proceeding against the Company (DRT Order). The High Court, in exercise of its writ jurisdiction, by the present order under analysis, however, set aside the order of the DRT and has stayed proceedings against the directors as well.

In Sanjeev Shriya v. State Bank of India & Ors., the Allahabad High Court ("Court") has held that the proceedings against a guarantor of the Corporate Debtor before a Debt Recovery Tribunal ("DRT") must be stayed considering

on-going proceedings against the Corporate Debtor before the National Company Law Tribunal.

In 2005, the petitioners, who are also directors of M/s L.M.L. Limited, Kanpur ("Company/Corporate Debtor"), executed a deed of guarantee in favour of State Bank of India ("SBI") for a loan granted by SBI to the Company/Corporate Debtor.

The said Corporate Debtor declared as 'Sick Industrial Company' by the Board for Industrial and Financial Reconstruction on 08.05.2007.

In 2017, SBI filed an application under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 before the DRT in Allahabad for the recovery of Rs. 72 Crores approx. against the Corporate Debtor as the Principal borrower and the petitioners in their capacity as guarantors.

On March 30, 2017, the DRT passed an interim order requiring the guarantors to disclose particulars of assets as specified by SBI.

Subsequently, the Corporate Debtor approached the NCLT under Section 10 of the Insolvency and Bankruptcy Code, 2016 ("Code") to initiate a Corporate Insolvency Resolution Process. The NCLT, vide its order in May 2017, admitted the application and, *among other things*, declared a moratorium on the institution or continuation of suits and/or proceedings against the Corporate Debtor.

Based on the NCLT Order, the Guarantors sought stay of the proceedings before DRT. It was contended that since the matter was pending before NCLT and NCLT had exclusive jurisdiction and further considering the moratorium in terms of the NCLT Order, proceedings before DRT apropos the guarantors should also be stayed by DRT.

In the month of June 2017, the DRT passed an order whereby it kept the proceedings against the Company in abeyance but proceeded against the petitioners as guarantors. The DRT Order was challenged in a writ petition as guarantors contended that DRT had exceeded its jurisdiction.

Issues:

The issue before the Allahabad High Court was whether a Financial Creditor could be allowed to pursue proceedings under the 1993 Act before the DRT against the guarantors, when the NCLT had already declared a moratorium under S. 14 of the Code vis-à-vis the Company.

Arguments:

The Petitioners argued that:

- the proceedings before the DRT were without jurisdiction considering the moratorium under the Code, and that provisions of the Code (Section 238) would prevail over the provisions of the 1993 Act;
- the DRT could not realistically arbitrate claims against the guarantor when the claim in relation to the debt was itself to be determined;
- the action by the DRT would be contradictory to the object of the Code, which seeks to consolidate proceedings and avoid multiple proceedings before different forums;

On the other side, the Respondents submitted that:

- the IBC does not place any restriction on proceedings against the guarantor independently, as the rights of the Respondents flow directly from the Deed of Guarantee;
- there is no edge between DRT proceedings for recovery of debt and NCLT proceedings;

In the case of Schweitzer Systemtek India Pvt. Ltd. v. Pheonix ARC Pvt. Ltd. & Ors., the criticism of the appellant was whether personal property that was given as security to the creditor-banks would fall within the scope of the moratorium under the Code. *The NCLAT referred to earlier judgments of the Tribunal and held that the moratorium under the Code is only applicable to the property of the Corporate Debtor.*

Decision:

The Court opined that two split proceedings i.e. before the DRT as well as before the NCLT, should be avoided, if possible. The Court also went on to stay the proceedings against the guarantors before the DRT. Furthermore, it was held that sufficient safeguards have been provided under the Code; and the liability of the Company has not yet crystallized against either the principal debtor or the guarantors.

With the aforesaid directions/observations, both the writ petitions are disposed of.

Putting to rest various conflicting views, the IBC (Second Amendment) Act, 2018 w.e.f 6.6.2018 has settled the issue of whether the provisions of Section 14 relating to the moratorium are to apply to the Corporate Debtor and its assets alone or to the assets of guarantors of the Corporate Debtor as well.

The amendment has categorically clarified that the assets of guarantors are outside the purview of Section 14 and no moratorium would be applicable on such assets.
The provisions of the Section 14 sub-section (1) shall not apply to —

(a) such transaction as may be notified by the Central Government in consultation with any financial regulator;

(b) a surety in a contract of guarantee to a Corporate Debtor.

Henceforth the moratorium under the Code is only applicable to the property or assets of the Corporate Debtor.

REGULATION 6 OF THE IBBI (IP) REGULATIONS

CASE NO. 2

HIGH COURT OF DELHI AT NEW DELHI

Dr. Vidya Sagar Garg (Petitioner)

Vs.

Insolvency and Bankruptcy Board of India (Respondent)

W.P. (C) 9520/2017, CM APPL. 38726-38727/2017

Date of Order: 05-02-2018

Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 seeking registration as an Insolvency Professional

Facts:

Application under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 (in short "2016 Regulation") seeking registration as an Insolvency Professional (I.P.) has been rejected on the grounds that he is not a fit and proper person under Regulation 4(g)(i) of the 2016 Regulation.

FIR bearing No.RC/219/2012, dated 3.7.2012, has been registered against the petitioner. - followed by the prosecution filing a charge sheet in the matter, on 17.02.2014.

Writ petition which is directed against the order dated 12.10.2017, passed by the Insolvency and Bankruptcy Board of India by the petitioner saying that the petitioner has no role in the alleged infraction of law, as reflected in the aforementioned FIR and/ or the charge sheet. It is also contended that an application for discharge has been filed before the concerned Trial Court. However discharge application filed by the petitioner not yet allowed by the concerned Trial Court.

Decision:

Writ petition is disposed of as the discharge application filed by the petitioner is not yet allowed by the concerned Trial Court.

Writ petition is pre-mature. The petitioner, therefore, was given liberty to approach the Hon'ble High Court, once the discharge application is disposed of by the concerned Trial Court.

Concerned Trial Court is requested to take up the application for adjudication and dispose of the same at the earliest.

WHETHER THE COMPANY COURT HAS ANY JURISDICTION TO STAY THE PROCEEDINGS FILED UNDER IBC

CASE NO. 3

HIGH COURT OF JUDICATURE AT BOMBAY

Jotun India Private Limited (Petitioner)

Vs.

PSL Limited (Corporate Debtor) Respondent Applicant (org. respondent)

Company Application No. 572 of 2017 in

Company Petition 434 of 2015 with Company Petition No. 1048 of 2015, 878 of 2015, 256 of 2016 and 392 of 2016

Date of Order: 05-01-2018

Whether the Company Court has any jurisdiction to stay the proceedings filed by a Corporate Debtor under Section 10 of Insolvency and Bankruptcy Code, 2016 ("IBC") before National Company Law Tribunal ("NCLT") even though a previously instituted company petition by a creditor may have been admitted (and therefore does not get transferred to NCLT) but where a provisional liquidator has not been appointed.

Facts:

On 10th March, 2015 Company petition were filed by petitioner against respondent applicant (org. respondent) under Sections 433 and 434 of the Companies Act, 1956, claiming an outstanding sum with interest in respect of unpaid invoices for goods supplied.

On 19th June 2015, respondent applicant made a reference to Board of Industrial and Financial Reconstruction (BIFR) under Sick Industrial Companies (Special Provisions) Act, 1985 (SICA).

On 9th March 2017, order admitting the present company petition no.434 of 2015 was passed.

On 29th May 2017 respondent applicant filed an application before NCLT, Ahmedabad under Section 10 of IBC, being C.P (IB) No. 37/10/NCLT/AHM/2017 ("IBC Application"), i.e., within the window of 180 days prescribed by the Repeal Act, for the commencement of the Corporate Insolvency Resolution Process.

On 18th July 2017, IBC Application made by respondent applicant was taken up for hearing by NCLT, Ahmedabad, and the secured creditors to whom notice of IBC Application was given, were also heard. After hearing the parties, NCLT, Ahmedabad, reserved the matter for orders and directed the same to be listed on 20th July, 2017. On the same day, Jotun India Private Limited (petitioner) herein, filed company application (lodging) no.333 of 2017 seeking the appointment of a Provisional Liquidator.

On 19th July 2017, petitioner herein, mentioned the company application (lodging) No.333 of 2017 before the High Court for the appointment of a provisional liquidator where an order was passed restraining the Hon'ble NCLT, Ahmedabad, from continuing with IBC Application and placed the company application (lodging) No.333 of 2017 to be heard on 26th July 2017. This order for convenience is hereinafter referred to as "impugned order dated 19th July 2017".

On 20th July 2017 appeal (lodging) no.280 of 2017 was filed by Corporate Debtor challenging the order dated 19th July 2017.

On 1st August 2017 order was passed by the Division Bench of this Court in the said appeal clarifying that the question whether the Learned Single Judge, acting as the Company Court, had the jurisdiction to pass the impugned order would expressly be kept open and left for determination. Upon this express liberty, Corporate Debtor withdrew the appeal.

On 15th September 2017 the present application was filed for recalling/vacating the impugned order dated 19th July 2017. This impugned order dated 19th July 2017, according to Corporate Debtor, is an order in excess of jurisdiction conferred upon a company court and hence is liable to be recalled/vacated.

The Companies Act, 2013 ("Act of 2013") was passed with the object of consolidating and amending the law of corporations in India. Before the passage of the Act, the winding-up of a Corporate Debtor on the ground of '*inability to pay debts*' was governed by the provisions of Sections 433(e) and 434 of Companies Act, 1956 ("Act of 1956"), where the relevant High Court having territorial jurisdiction over a company was the Adjudicating Authority in respect of winding-up proceedings. However, the Act of 2013 shifted the jurisdiction to adjudicate cases of winding-up due to inability to pay debts from the High Court to the National Company Law Tribunal ("NCLT") under the provisions of the Insolvency and Bankruptcy Code, 2016 ("the Code"), a law to consolidate and amend laws related to resolution of insolvency, liquidation, and bankruptcy of corporate persons.

The Central Government notified the Companies (Transfer of Pending Proceedings) Rules, 2016 ("Transfer Rules 2016") providing for, *inter alia*, transfer of pending cases of winding-up from the High Courts to the NCLT under the Code. However, only those cases in which winding-up petitions were not served as per Rule 26 of the Companies (Court) Rules, 1959 ("CC Rules") were transferable to NCLT ("Saved Petitions"), while others were to be continued to be heard and adjudicated by the High Court itself.

This resulted in a situation where certain petitions against a company were served as per Rule 26 of the CC Rules while at the same time some of the petitions were un-served against the same company and before the same High Court. However, this was clarified by way of a notification dated June 29, 2017 by inserting the third proviso to rule 5 of the Transfer Rules, 2016 which provided that if some of the winding-up petitions are admitted against

a company before the High Court as on December 15, 2016, other connected petitions against the same company shall together be heard and adjudicated by the High Court.

The issue for consideration was that, is there any bar on the NCLT to trigger insolvency resolution process on an application filed under Sections 7, 9 and 10 of the Code when a winding up petition is pending or admitted before the High Court and an official liquidator has been appointed and a winding up order is passed.

Decision:

The Hon'ble Bombay High Court held that once a petition has been served by the applicant to the respondent company as contemplated under rule 26 of the CC Rules read with rule 5 of the Transfer Rules 2016, the High Court becomes seized of the matter and the matter cannot be transferred to the NCLT.

The Transfer Rules and more specifically the second amendment specifically provide that those winding-up petitions which have been served to the respondent shall be adjudicated by the High Court only, while others shall be transferred to the NCLT. It is submitted that had the intention of the legislature been to allow initiation of fresh insolvency proceedings before the NCLT, it would have specifically provided so in the Transfer Rules.

NCLT is not a court subordinate to the High Court and hence as prohibited by the provisions of Section 41 (b) of the Specific Relief Act, 1963 no injunction can be granted by the High Court against a Corporate Debtor from institution of proceedings in NCLT.
It may also be noted that apart from there being no provision in the Companies Act, 1956 to injunct proceedings before NCLT instituted under IBC, petitioner cannot take recourse under the inherent powers of the High Court to support the impugned order.

Besides, there is an express bar contained in Section 64 (2) of IBC which prevents any court, Tribunal or Authority from granting any injunction in respect of any action taken, or to be taken, in pursuance of any power conferred on NCLT under IBC.

Further to that, as per rule 6 of the Companies (Court) Rules, 1959 and Rule 9 of the Companies (Court) Rules, 1959, a combined reading will show that the Company Court has ample powers to recall any order previously passed by it [Dr. Writers Food Products Private Limited (supra)].

The Hon'ble Supreme Court of India has held that an order may be recalled by a Court or Tribunal if there was an inherent lack of jurisdiction to pass such an order [Budhia Swain &Ors v. Gopinath Deb &Ors].

In such circumstances, there is no bar on NCLT, Ahmedabad from proceeding with IBC application. This application, therefore, has to succeed. The impugned order dated 19th July 2017 is recalled/vacated.

Chapter 3

Orders passed by National Company Law Appellate Tribunal (NCLAT)

SECTION-5

CASE NO. 1

AVON Capital, (Appellant)

Vs.

Tattva & Mittal Lifespaces Pvt. Ltd. (Respondent/ Corporate Debtor)

Company Appeal (AT) (Insolvency) 256 of 2017

Date of Order: 09-08-2018

Section 5(20) r/w 5(21) of the Insolvency and Bankruptcy Code, 2016 – whether the appellant comes within the meaning of 'Operational Creditor' & 'existence of dispute' between the 'appellant' and the 'Corporate Debtor'

Facts:

The 'Corporate Debtor' engaged the appellant to provide services in lieu of which retainer fee was chargeable; for advisory and ancillary services separate fees were chargeable on receipt of the term-sheet from the investor. The appellant was also entitled for success fee once the funds were remitted into the accounts of the appellant by the parties. Respondent submitted that merely production of invoices will not suggest that the appellant has provided services to the respondent. Dispute raised after Demand notice issued under the Code.

Decision:

The dispute raised on imaginary facts and circumstances while replying to the demand notice cannot be treated to be an 'existence of dispute' for rejecting the application under Section 9. In absence of any evidence relating to pre-existence dispute i.e. prior to issuance of notice dated 14th January, 2017 under Section 8(1) of the I&B Code, it was held that there was no dispute in existence. Further, in view of letter of engagement and terms and condition of engagement it was held that the appellant comes within the

meaning of 'Operational Creditor' as defined under Section 5. There being a 'debt' due to the appellant and in absence of any evidence of payment, impugned order dated 11th July, 2017 passed in C.P. No. 37/I&BP/NCLT/MB/MAH/2017 was set aside and remitted the case to the Adjudicating Authority, Mumbai Bench to admit the application and pass appropriate order in presence of the parties. It will be open to the respondent to settle the claim before admission of the application under Section 9.

Case Review: Order dated 11th July, 2017 by NCLT, Mumbai Bench, Mumbai in Case No. CP No. 37/I&BP NCLT/MB/MAH/2017 set aside.

CASE NO. 2

Export Import Bank of India (Appellant)

Vs.

Resolution Professional

JEKPL Private Limited (Respondent)

Company Appeal (AT) (Insolvency) No. 304 of 2017

with

Export Import Bank of India (Appellant)

Vs.

Resolution Professional

JEKPL Private Limited (Respondent)

Company Appeal (AT) (Insolvency) No. 16 of 2018

And

Axis Bank Limited (Appellant)

Vs.

Edu Smart Services Private Limited (Respondent)

DBS Bank Limited (Respondent)

Company Appeal (AT) (Insolvency) No. 302 of 2017

Date of Order: 14-08-2018

Section 5(7) r/w 5(8)(h) of the Insolvency and Bankruptcy Code, 2016

Facts:

Two appeals preferred by 'Export Import Bank of India' (hereinafter referred

to as 'EXIM Bank') relates to Corporate Insolvency Resolution Process initiated against 'JEKPL Private Limited', whereas appeal preferred by 'Axis Bank Limited' relates to Corporate Insolvency Resolution Process against 'Edu Smart Services Private Limited'.

The JEKPL Pvt. Ltd. filed an application under Section 10 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') for initiation of Corporate Insolvency Resolution Process against itself. It was admitted by the Adjudicating Authority (National Company Law Tribunal), Allahabad Bench and the IRP was replaced.

Pursuant to the advertisement, the creditors including 'Financial Creditors' and 'Operational Creditors' filed their respective claim including EXIM Bank. However, the EXIM Bank was not treated to be the 'Financial Creditor'.

EXIM Bank filed an application under Section 60 (5) of the Code, before the Adjudicating Authority for direction to the Resolution Professional to treat its claim as 'Financial Debt' and to include the EXIM Bank in the 'Committee of Creditors' with voting share proportionate to its amount of claim. It was alleged that the Resolution Professional through its email dated 04.08.2017 communicated decision rejecting claim of EXIM Bank as a 'Financial Creditor' without calling for any explanation including the objections/comments from it.

Case of the EXIM Bank is that it disbursed Dollar Loan to the tune of US$ 50 Million to a Netherland based company, namely, Jubilant Energy N.V., ('JENV' for short) (Principal Borrower) by its Letter dated 13.04.2011 as modified by letter dated 18.05.2011 for which 'Corporate Guarantee' was executed by the Jubilant Enpro Private Limited ('JEPL' for short) on 01.08.2011 in favour of the EXIM Bank. Contractual obligation of 'JEPL' (Corporate Guarantor) was further secured by the execution of 'Corporate Guarantor Guarantee' with 'Counter Corporate Guarantee' by JEKPL (Corporate Debtor) on 01.08.2011 in favour of the EXIM Bank.

The Exim Bank invoked its Counter Corporate Guarantee on 30.03.2017 which led to the present dispute and its claim to treat it as a Financial Creditor has not been accepted by the Resolution professional.

The EXIM Bank declared the amount of loan advanced to Principal Borrower (JENV, Netherlands) as Non-Performing Asset (NPA) on 17.05.2016.

Therefore, the EXIM Bank recalled the loan facilities advanced to JENV by letter dated 30.03.2017. Consequently, it had invoked its 'Corporate Guarantee' as well as the 'Counter Corporate Guarantee' against the JEPL and JEKPL by its letters dated 30.03.2017. Thus, according to EXIM Bank Principal Borrower having defaulted and the liability of Corporate Guarantee as 'Counter Corporate Guarantee' being joint and co-extensive with Principal Borrower, the EXIM Bank comes within the meaning of 'Financial Creditor' of JEKPL (Corporate Debtor), in terms of Section 5(7) r/w Section 5(8)(h) of I&B Code.

The Adjudicating Authority by the impugned order dated 27.11.2017 taking into consideration the objection raised by the 'Resolution Professional' and the 'Committee of Creditors', affirmed the decision of the Resolution Professional and rejected the claim of EXIM Bank.

The main question of law under consideration was whether the EXIM Bank, which has been provided with 'Counter Corporate Guarantee' by JEKPL (Corporate Debtor) comes within the meaning of 'Financial Creditor

Decision:

In the present ruling Hon'ble NCLAT decided that a claim whether matured or unmatured ought to be admitted by resolution professional in terms of definitions u/s Sections 3(6) and 3(11) of the Code. It has further stated that maturity of claim or default of claim or invocation of guarantee for claiming the amount has no nexus with filing of claim.

It is not necessary that all the claims as are submitted by the Creditors should be a claim matured on the date of initiation of Resolution Process/admission, even in respect of debt, which is due in future on its maturity, the 'Financial Creditor' or 'Operational Creditor' or 'Secured Creditor' or 'Unsecured Creditor' can file such claim.

Therefore, the definition of 'Claim' as defined under Section 3(6) is to be read along with Section 13 read with Section 15 of the 'I&B Code.

The only thing which is to be ascertained is whether the person who claimed to be 'Financial Creditor', whether debt owed to him come within the meaning of 'Financial Debt' as defined under Section 5(8) of the 'I&B Code.

The Hon'ble Nation Company Law Appellant Tribunal also drew attention on the definition of the claim as defined under the IB Code 2016.

Admittedly, JEKPL has given the 'Counter-Indemnity Obligation' by way of Guarantee (Counter Guarantee) and thereby it falls within clause (h) of Section 5(8). Such 'Counter-Indemnity Obligation' in respect of Counter Guarantee has been given by JEKPL as the EXIM Bank disbursed the debt against the consideration for the time value of money in favour of the Principal Borrower (JENV).

In view of the said provision it was held that EXIM Bank come within the meaning of 'Financial Creditor' as defined under Section 5(7) r/w Section 5(8) of the I&B Code, 2016.

In view of finding aforesaid, the claim of EXIM Bank having been wrongly rejected by the Adjudicating Authority by impugned order dated 27.11.2017 in CA No. 159/2017 in CP No.24/ALD/2017, the said order is set aside.

SECTION-7

CASE NO. 3

Jagmohan Bajaj (Appellant)

(one of the shareholders of Respondent No. 1 - 'Shivam Fragnances Pvt. Ltd.' (Corporate Debtor)

Vs.

Shivam Fragrances Private Limited (Respondents/ Corporate Debtor)

Amiga Informatics Pvt. Ltd. (Financial Creditor)

Company Appeal (AT) (Insolvency) 428 of 2018

Date of Order: 14-08-2018

Section 7 of the Insolvency and Bankruptcy Code, 2016 – Application for Initiation of Corporate Insolvency Resolution Process by Financial Creditor and Section 241 and 242 of the Companies Act, 2013

Facts:

The 'Financial Creditor' granted financial assistance of Rs.1.02 Crores in the form of a loan to the 'Corporate Debtor' in the year 2016. The said amount was repayable with interest calculated @1.5% per month. On failure to pay loan, Financial Creditor took recourse to arbitration in terms of agreement executed inter-se the Financial Creditor and the Corporate Debtor on 24.09.2016. The arbitral proceedings culminated in passing of award

favouring the Financial Creditor. There was no compliance with the terms of arbitral award and the Corporate Debtor continued with the default. Hence, resulting in CIRP by Financial Creditor.

The Corporate Debtor did not dispute the existence of arbitral award in favour of the Financial Creditor but pleaded that the Corporate Debtor was prevented from effecting transfer of its property to satisfy the award due to internal dispute of the Directors which were under adjudication before National Company Law Tribunal, New Delhi Bench and an interim direction had been passed therein to maintain status quo.

Decision:

The Appellant has neither disputed the factum of owing debt to the 'Financial Creditor' nor assailed the order of admission of petition under Section 7 of I&B Code on the ground that the debt was not payable. Admittedly, Appellant is one of the Shareholders of Respondent No.1 – 'Shivam Fragrances Pvt. Ltd.' (Corporate Debtor) and seeks to question the legality of initiation of Corporate Insolvency Resolution Process at the hands of Financial Creditor on the sole ground of there being an inter-se dispute amongst the Directors of Corporate Debtor.

Triggering of Insolvency Resolution Process cannot be defeated by taking resort to pendency of internal dispute between Directors of Corporate Debtor on allegations of oppression and mismanagement. The statutory right of a Financial Creditor satisfying the requirements of Section 7 of the I&B Code to trigger Insolvency Resolution Process cannot be made subservient to adjudication of an application under Section 241 and 242 of the Companies Act, 2013.

Appeal is frivolous and the Appellant has encroached upon the precious time of this Appellate Tribunal on flimsy grounds. It lacks merit. Admission is accordingly refused and appeal is dismissed. Appellant is saddled with costs of Rs.1 lakh (Rupees One Lakh Only), which shall be deposited with the Registrar, NCLAT within 15 days.

Case Review: Order dated 11th June, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench in Company Petition No. (IB) 553 (ND)/2017 upheld.

CASE NO. 4

Ajay Chaturvedi (Appellant/ Shareholder of Corporate Debtor)

Vs.

JM Financial Asset Reconstruction Co. Ltd. & Anr. (Respondents/ Financial Creditor)

Company Appeal (AT) (Insolvency) No. 320 of 2018

Date of Order: 29-11-2018

Section 7 of the Insolvency and Bankruptcy Code, 2016

Facts:

The Appeal has been preferred by Mr. Ajay Chaturvedi, Shareholder of 'Yes Power & Infrastructure Ltd.'-('Corporate Debtor') against the order dated 11th May, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai, whereby and where under, the application under Section 7 of the 'Insolvency and Bankruptcy Code, 2016 ('I&B Code' for short) preferred by the Respondent JM Financial Asset Reconstruction Company Ltd.'- ('Financial Creditor') has been admitted.

The main plea taken by the counsel for the Appellant is that in spite of the order passed by the Adjudicating Authority no 'substituted service' has been made by the Respondent- 'JM Financial Asset Reconstruction Company Ltd.'- ('Financial Creditor') and they sent the notice by Speed Post, which was never received by the Appellant. Therefore, according to Appellant, the admission order dated 11th May, 2018 is bad having been passed ex parte by misleading the Adjudicating Authority.

Learned counsel for the Appellant submitted that there was no provision for filing an application under Section 7 of the 'I&B Code' against the 'Corporate Guarantor' except against the 'Personal Guarantor'. However, in view of the definition of 'Financial Creditor' as defined in Section 5(7) read with Section 5(8) of the 'I&B Code', the submission was not accepted.

Clause (i) of sub-section (8) of Section 5 shows that any liability in respect of any 'guarantee' or 'indemnity' for any of the items referred to in sub-clauses (a) to (h) comes within the meaning of 'Financial Debt'. The 'Corporate Debtor' having given 'guarantee' on behalf of the principal borrower for the items referred to in sub-clause (a), guarantor company will also come within

the meaning of 'Corporate Debtor' qua the 'Financial Creditor' in whose favour the guarantee has been given.

Decision:

In so far as the service of notice of admission is concerned, even if it is accepted that it was not served, Adjudicating Authority said that they are not inclined to remit the case on such ground as it will be mere formality, as admittedly debt is payable by the 'Corporate Debtor' and the 'Corporate Debtor' defaulted to pay. It is not the case of the Appellant that if the notice would have been served before admission of the application under Section 7, the 'Corporate Debtor' would have cleared the debt amount. In view of the aforesaid facts and findings, no relief was granted. In absence of any merit, the appeal was dismissed

CASE NO. 5

M/s Asset Advisory Services India Pvt. Ltd. (Appellant/ Financial Creditor)

Vs.

M/s VSS Projects Pvt. Ltd., (Respondents/ Corporate Debtor)

Company Appeal (AT) (Insolvency) No. 227 of 2017

Date of Order: 18-09-2018

Section 7 read with Sections 65 of the Insolvency and Bankruptcy Code, 2016 – Application for Initiation of Corporate Insolvency Resolution Process by Financial Creditor

Facts:

The Adjudicating Authority dismissed the case on two grounds i.e. existence of dispute and malicious intent.

Learned counsel appearing on behalf of the Appellant submitted that the Adjudicating Authority cannot dismiss an application under Section 7 under I&B Code on the ground of existence of dispute. It was further submitted that question of malicious intent to file application cannot be a ground to reject an application under Section 7, except for the ground as mentioned in Section 65 of the I&B Code, which has not been pleaded by the Respondent nor held by the Adjudicating Authority.

Learned counsel appearing on behalf of the Respondent submitted that the application was preferred by the Appellant as a 'Financial Creditor' whereas factual matrix prima facie reveals that the Appellant is a 'Operational Creditor' and was under legal obligation to issue notice under Section 8(1) of the I&B Code, but no such notice was issued. It was also submitted that the Company has not granted 'any loan security facility' and therefore cannot be treated to be a 'Financial Creditor'.

It is not in dispute that the Appellant had extended a "short loan of Rs.25 Crore to the Corporate Debtor and in pursuant to which a promissory note was issued by the Corporate Debtor to repay the loan on or before 30th June, 2016 together with interest @24% p.a. payable in advance monthly instalments. Aforesaid fact has also been noticed by the Adjudicating Authority. In view of such admitted position, NCLAT hold that the Appellant comes within the meaning of 'Financial Creditor', as defined in Section 5(7) of the I&B code, which is also accepted by the Adjudicating Authority at Para 9 and quoted above.

In that view of the fact that the Appellant is a 'Financial Creditor', the question of issuance of any demand notice under Section 8(1) of the Code, does not arise, it being not applicable for filing application under Section 7 of the Code.

Decision:

The Learned Justice considered the decision by the Hon'ble Supreme Court in "Innoventive Industries Ltd. Vs. ICICI Bank and Ors." – (2018)1 SCC 407, has observed as follows :-

> *"28. When it comes to a Financial Creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any Financial Creditor of the Corporate Debtor - it need not be a debt owed to the applicant Financial Creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a Financial Creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the Corporate Debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3),*

the applicant is to dispatch a copy of the application filed with the Adjudicating Authority by registered post or speed post to the registered office of the Corporate Debtor. The speed, within which the Adjudicating Authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the Financial Creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the Adjudicating Authority is to be satisfied that a default has occurred, that the Corporate Debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. 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."

In the current case, the Appellant had given loan and a debt due to the Appellant has not been repaid and there is a default on the part of the Corporate Debtor, the Adjudicating Authority was wrong in holding that the application was not maintainable due to existence of dispute (pendency of a suit) and that no notice under Section 8(1) was issued or that the application was filed by the Appellant with malicious intent.

Accordingly, the impugned order was set aside and the case was remitted back to the Adjudicating Authority for admission of the application filed by the Appellant under Section 7, the Form 1 being complete. However, before the admission of the application, it will be open to the Respondent to settle the claim with the Appellant to enable the Appellant to withdraw the application. The appeal is allowed with aforesaid observations and directions. No costs.

Case Review: Order dated 8th September 2018, passed by NCLT, Hyderabad Bench, in M/s. Asset Advisory Services India Pvt. Ltd. Versus M/s. VSS Projects Pvt. Ltd. (CP(IB) No.96/7/HDB/2017), set aside and remit back to Adjudicating Authority.

CASE NO. 6

Indian Overseas Bank (Appellant)

Vs.

Mr Dinkar T. Venkatsubramaniam (Respondent)

(Resolution Professional for

Amtek Auto Ltd)

Company Appeal (AT) (Insolvency) 267 of 2017

Date of Order: 15-11-2017

Section 7 of the Insolvency and Bankruptcy Code, 2016 – Application for Initiation of Corporate Insolvency Resolution Process by Financial Creditor

Facts:

The only question arises for consideration in this appeal is whether the Financial Creditor is liable to transfer any amount to the Corporate Debtor before appropriating it towards own dues?

Decision:

As per Section 17 (1) (d) of the 'I&B Code', the financial institutions maintaining the accounts of the 'Corporate Debtor' have to act on the instructions of the 'Interim Resolution Professional' in relation to such accounts and furnish all information relating to the 'Corporate Debtor' available with them to the 'Interim Resolution Professional'. The Appellant is one of the 'Financial Creditor' of the 'Corporate Debtor'.

The 'Corporate Debtor' is maintaining an account with the Appellant. In view of initiation of 'Corporate Insolvency Resolution Process', the 'Interim Resolution Professional' by letter requested the Appellant to transfer the amount through RTGS to the bank account of the 'Corporate Debtor' maintained with the Corporation Bank.

It appears that in spite of reminder to the Appellant, amount has not been transferred. The Appellant opposed the application and stated that the amount available in the current account of the 'Corporate Debtor' is neither a security interest nor an asset of the 'Corporate Debtor' and therefore, it is not liable to release the amount to the 'Corporate Debtor' and the amount

available in the said current account is to be appropriated towards the dues payable to the Appellant. The stand taken by the Appellant having been rejected by the Adjudicating Authority and the Appellant having been directed to transfer the amount to the bank account of the 'Corporate Debtor', present appeal has been preferred.

Also, Learned counsel for the Appellant has taken similar plea as was taken before the Adjudicating Authority, but as per Section 7, 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.

If the Appellant come within the definition of 'Financial Creditor' as defined in Section 5(7), it is always open to the Appellant to file its claim before the 'Interim Resolution Professional' for getting the amount back.

No merit was found in this appeal and it is disposed of with the observation that the Appellant will transfer the amount to the Corporation Bank Account of the Corporate Debtor.

CASE NO. 7

O.A.A Ananthpadmanaban Chettiar (Appellant)

Vs.

Sri. Mahalakshmi Textiles (Respondents)

Company Appeal (AT)(Insolvency) No.520 of 2018

Date of Order: 05-09-2018

Section 7 of the Insolvency and Bankruptcy Code, 2016 – Initiation of Corporate Insolvency Resolution Process by Financial Creditor

Facts:

The only question arises for consideration in this appeal is what comes under the purview of Financial Creditor under Section 5(7) read with Section 5(8) of the 'I & B Code'?

Decision:

In Section 5(7) read with Section 5(8) of the 'I & B Code '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 and "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money.

In this proceeding, Learned Counsel appearing on behalf of the Appellant submitted that the Respondent does not come within the meaning of 'Financial Creditor'. Also reliance has been placed on 'Memorandum of Understanding' which states that the Second Part (Converter) agreed to pay a sum of Rs. 45,00,000/- to the 'Corporate Debtor' as an Interest Free Advance in the manner as mentioned. From the plain reading of 'Memorandum of Understanding', it is evident that loan was completely Interest free and, therefore, the Respondent cannot be treated to be a 'Financial Creditor'.

The 'Agreement for Conversion' shows that the said arrangement made to make the 'Corporate Debtor' a 'Start-up' w.e.f. 9th August, 2006. The Respondent (Converter) in its term is entitled to receive and take delivery of the yarn by making their own arrangements for transport to any of their destinations. All those provisions show that there is 'disbursement' of money by the Respondent for which the 'consideration is time value of money' which the Respondent is entitled to receiving the yarn as a Converter.

In view of the aforesaid specific provision, it is held that the Respondent comes within the meaning of 'Financial Creditor' and the Adjudicating Authority has rightly admitted the application under Section 7, the learned counsel for the Appellant submitted that pursuant to agreement dated 3rd August, 2006, a letter of exchange for appointment of Arbitrator of Respondent was issued on 5th February, 2008, but such ground cannot be taken in defeating an application under Section 7, though it is permissible to take such ground to get an application, under Section 9 of the 'I&B Code' rejected.

The I & B Code having come into force from May, 2016, it was held that the application under Section 7 is well within the time in terms of Article 137 of the Limitation Act, 1963 and is not barred by limitation.

So, no merit was found in the appeal and accordingly is dismissed. No Cost

CASE NO. 8

Pravinbhai Raninga (Appellant)

Vs.

The Kotak Resources (Respondent 1)

M/s Raninga Ispat Private Limited (Respondent 2)

Company Appeal (AT) (Insolvency) 140 of 2018

Date of Order: 29-08-2018

Section 7 – Application for Initiation of Corporate Insolvency Resolution Process by Financial Creditor

Facts:

The only question arises for consideration in this appeal is whether the material evidences produced by the respondent are sufficient to record satisfaction of default or not?

Decision:

The Appellant has challenged the order passed by the Adjudicating Authority (NCLT) Ahmedabad Bench. Learned Senior Counsel for the Appellant submitted that the Corporate Debtor made payment to Navis Multi trade Private Limited (referred as 'Navis') for purchase of Iron Ore. 'Navis' could not arrange to supply Iron Ore to 'Corporate Debtor'. Therefore, Navis returned back the amounts to the 'Corporate Debtor'. Normally the Adjudicating Authority is not required to go into the claim or counter claim made by the parties except to find out whether the record is complete or not and whether there is a debt and default committed by the Corporate Debtor. The speed, within which the Adjudicating Authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the Financial Creditor, is important.

It is at the stage of Section 7(5), where the Adjudicating Authority is to be satisfied that a default has occurred, that the Corporate Debtor is entitled to point out that a default has not occurred in the sense that the debt, which may also include a disputed claim, is not due. 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. It is open to the Corporate Debtor or its Directors to point out that the debt is not payable by Corporate Debtor in law and also and/or in fact.

In view of record of repayment by Corporate Debtor, it was held that the appellant has made out a case that the default has not occurred in the sense that the debt, which also includes a disputed claim, is not due and is not payable by Corporate Debtor to the Respondent in law as also in fact. For the reasons recorded above, the impugned order passed by the Adjudicating Authority (NCLT) Ahmedabad Bench was set side. The appeal is allowed with observations and directions.

Case Review: Order dated 21st February 2017 passed by NCLT, Ahmedabad Bench, in Pravinbhai Raninga Vs. The Kotak Resources and M/s Raninga Ispat Private Ltd (C.P.(IB) No.200/7/NCLT/AHM/2017), set aside.

SECTION-9

CASE NO. 9

M/s. Subasri Realty Private Limited (Appellant)

Vs.

Mr. N. Subramanian & Anr. (Respondents)

Company Appeal (AT) (Insolvency) 290 of 2017

Date of Order: 16-07-2018

Section 9 read with Sections 5, 7 & 8 of the Insolvency and Bankruptcy Code, 2016 – Application for Initiation of Corporate Insolvency Resolution Process by Operational Creditor & existence of dispute' and the claim also is barred by limitation and there is delay and laches; therefore, the application was not maintainable

Facts:

Application preferred by Mr. N. Subramanian- ('Operational Creditor') under Section 9 of the Insolvency and Bankruptcy Code, 2016 - Grounds of Appeal

- 'existence of dispute' and the claim also is barred by limitation and there is delay and laches; therefore, the application was not maintainable. Admittedly, the Respondent- ('Operational Creditor') was an employee of 'M/s. Aruna Hotels Limited'- ('Corporate Debtor'). He claimed arrears in salary from 1998 till his retirement in 2013.

'Employees Provident Fund Organisation', Chennai by letter dated 13th April, 2016 intimated the 'Corporate Debtor' that the claim of the Respondent- ('Operational Creditor') has already been settled.

The Respondent- stated that the salary is due since 1998 which was not paid but delay of raising claim of arrears of salary for the period 1998 to 2016 has not been explained.

Decision:

In the present case Appellate Authority found that there is an 'existence of dispute' about arrears of salary and the Respondent has also failed to explain the delay in making claim of arrears alleged to be done since 1998 to 2016 (delay of about 18 years), it was held that the application under Section 9 preferred by the Respondent was not maintainable.

Adjudicating Authority order appointing '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, 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 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 rigour of law and is allowed to function independently through its Board of Directors. Adjudicating Authority will fix the fee of 'Resolution Professional', and the 'Corporate Debtor' will pay the fees of the 'Interim Resolution Professional', for the period he has functioned.

Case Review: Order dated order dated 17th November, 2017 passed by the Adjudicating Authority in CP/597/(IB)/CB/2017 set aside.

CASE NO. 10

International Road Dynamics South Asia Private Limited (Appellant)

Vs.

Reliance Infrastructure Limited (Respondent)

Company Appeal (AT) (Insolvency) 72 of 2017

International Road Dynamics South Asia Private Limited (Appellant)

Vs.

D.A. Toll Road Private Limited (Respondent)

and Company Appeal (AT) (Insolvency) 77 of 2017

Date of Order: 01.08.2017

Section 9 of the Insolvency and Bankruptcy Code, 2016 – Application for Initiation of Corporate Insolvency Resolution Process by Operational Creditor.

As both the appeals have been preferred by the appellant - International Road Dynamics South Asia Private Limited, National Company Law Appellate Tribunal (NCLAT) heard it together and disposed of by common judgment.

Facts:

The following questions arose in this appeal which have been decided by NCLAT with reference to Section 9 of the Insolvency and Bankruptcy Code, 2016:

- Whether existence of arbitration clause in agreement can be ground to reject application under Section 9.
- Whether application can be rejected on the ground that the Corporate Debtor is solvent.
- If a delay beyond period prescribed under Limitation Act is not explained whether CIRP process can be initiated.

- Whether different claims arising out of different agreements or work orders, having different amounts and different dates of default, can be clubbed together for alleged default of debt.
- Whether reconciliation statement between creditor and debtor company included a note that certain payments are put on hold can be considered as doubtful and disputed.

Decision:

In case of Reliance Infrastructure Limited (Corporate Debtor)

NCLT held that the Operational Creditor (Appellant) can initiate arbitration proceedings and the facts of the case do not warrant to invoke Section 9 of the Insolvency and Bankruptcy Code, 2016 and hence appeal has been preferred before NCLAT.

The counsel for appellant submitted the following:

— There is no dispute in existence.

— Arbitration clause in agreement or that the Corporate Debtor is solvent, application cannot be rejected.

The counsel for respondent (Corporate Debtor) submitted the following:

— There are existing disputes and application under Section 9 is not complete. Claim with regard to three different projects arising out of three different agreements have been mingled together to show outstanding dues without explaining the date of default. Accordingly, some of the claims are time barred.

NCLAT decided the matter in this case as follows:

1. Alternative remedy of arbitration' cannot be a ground to reject an application under Section 9 and no application under Section 9 can be rejected on the ground that 'Corporate Debtor' is solvent.
2. Different claim(s) arising out of different agreements or work order, having different amount and different dates of default, cannot be clubbed together for alleged default of debt, the cause of action is being separate. For the said reasons, NCLAT held that the joint application preferred by appellant under Section 9 is defective, as distinct from incomplete and hence appeal was not maintainable.

3. In absence of any document showing dispute raised prior to issuance of Section 8 notice, NCLAT did not decide on this issue.

4. NCLAT did not give specific finding on the question as to whether Limitation Act, 1963 is applicable or not in filing application for Corporate Insolvency Resolution Process under the I&B Code, but observe that claimant (Appellant) is required to explain the delay and laches of more than four years.

In case of D A Toll Road Private Limited (Corporate Debtor)

The NCLT noticed that the 'Corporate Debtor' - DA Toll Pvt. Ltd. was making part payment from time to time in respect to invoices of the creditors; in the process of which last payment was made on 26-09-2013. Ever since, no further payment was made by the 'Corporate Debtor' towards alleged claimed amount of Rs. 65,22,971 which alleged to be outstanding. NCLT noticed that cause of action took place on 26-9-2013 and a reconciliation between creditor and Corporate Debtor was made on 13-8-2015 stating that outstanding amount due to creditor was Rs. 25.04 lakhs and beneath said reconciliation statement, a note was entered by an employee of debtor company stating that bills on hold would come to Rs. 40.19 lakhs and said bills were not brought forward into books of debtor company to show that total amount due was Rs. 65.23 lakhs. As a result, NCLT held that there is a dispute of claim and some part of such claim is hit by limitation, it needs elaborate enquiry and not permitted under I&B Code, 2016.

NCLAT decided that both the Appeals stand disposed off with the observations as made above.

CASE NO. 11

Mr. Suresh Padmanabhan & Anr. (Appellant)

Vs.

Tata Steel Ltd. & Ors. (Respondents)

Company Appeal (AT) (Insolvency) No. 29 of 2018

Date of Order: 4-10-2018

Section 9 read with Sections 5, 7 & 8 of the Insolvency and Bankruptcy Code, 2016 – Application for Initiation of Corporate Insolvency Resolution Process by Operational Creditor

Facts:

The Adjudicating Authority (NCLT) Kolkata Bench, Kolkata by impugned Order dated 22.12.2017, rejected the application on one of the ground that the matter has not been referred within 180 days from the date of abatement of reference in terms of sub-clause (b) of Section 4 of the 'Sick Industrial Companies (Special Provisions) Repeal Act, 2003' ('SICA Repeal Act, 2003' for short) as substituted by the 'Eighth Schedule' of the 'I&B Code'.

Another application was filed under Section 9 by Mr. Suresh Narayan Singh, as an Authorised Representative of 284 workers of 'Tayo Rolls Limited'-('Corporate Debtor') which was initially rejected but later by the learned Appellant Authority was remitted back to Adjudicating Authority with observations and directions to admit the case.

Decision:

On plain reading of the provision aforesaid and decision of Appellate Tribunal, it is clear that 180 days' time period provided in sub-clause (b) of Section 4 of the 'SICA Repeal Act, 2003' (by Eighth Schedule) relates to reference if made to the National Company Law Tribunal (Adjudicating Authority) to treat application under Section 10 of the 'I&B Code' without payment of fees. It does not mean that the 'Corporate Applicant' cannot file an independent application under Section 10 of the 'I&B Code' even after 180 days of abatement of the reference under the 'SICA Repeal Act, 2003' on payment of requisite fee. The impugned order therefore cannot be upheld. The Learned Appellant Authority in view of the decision in ***"Mr. Suresh Narayan Singh"***, a Corporate Insolvency Resolution Process is required to be initiated but not under Section 10 of the Code but to follow the decision and direction given in the order passed in the matter of **"Mr. Suresh Narayan Singh".**

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

CASE NO. 12

G. M. Lingaraju (Appellant)

Vs.

Gurudatt Sugars Marketing Private Limited & Anr. (Operational Creditor/Respondent)

Company Appeal (AT) (Insolvency) No. 385 of 2018

Date of Order: 10.09.2018

Section 9 read with Sections 5, 7 & 8 of the Insolvency and Bankruptcy Code, 2016 – Application for Initiation of Corporate Insolvency Resolution Process by Operational Creditor

Facts:

The question arises for consideration in this appeal is on what does "existence of dispute" mean for the purpose of determination of a petition under Section 9 of the 'I & B Code'?

Decision:

Learned counsel appearing on behalf of the appellant submitted that there is an ‘existence of dispute’. Further, it is also informed that the admitted dues had already been paid to the respondent pursuant to settlement with the ‘Operational Creditor’.

Taking into consideration the fact that there is an ‘existence of dispute’ prior to issuance of demand notice, it was held, that the petition under Section 9 was not maintainable. The impugned order dated 15th June, 2018 is accordingly set aside. The Appeal was allowed with observations and directions.

Case Review: Order dated 15thJune, 2018 passed by NCLT, Bengaluru Bench, *set aside*.

CASE NO. 13

Era Infra Engineering Ltd. (Appellant/ Corporate Debtor)

Vs.

Prideco Commercial Projects Pvt. Ltd. (Respondent)

Company Appeal (AT) (Insolvency) 31 of 2017

Date of Order: 03-05-2017

Section 9 read with Section 8 of the Insolvency and Bankruptcy Code, 2016 – Application for Initiation of Corporate Insolvency Resolution Process by Operational Creditor

Facts:

The only question which arises for consideration in this appeal is whether an Operational Creditor can initiate Corporate Insolvency Resolution against the Corporate Debtor without delivering a demand notice in Form 3 of unpaid operational debtor or a copy of an invoice in Form 4 demanding payment of the amount involved in the default to the Corporate Debtor?

In sub-section (1) of Section 8 of the 'I & B Code', though the word "may" has been used, but in the context of Section 8 and Section 9 reading as a whole, an 'Operational Creditor,' on occurrence of a default, is required to deliver a notice of demand of unpaid debt or get copy of the invoice demanding payment of the defaulted amount to be served on the Corporate Debtor. The Corporate Debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) of Section 8 bring to the notice of the Operational Creditor that debt under question is in dispute or acceptable.

After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of Section 8, if the Operational Creditor does not receive payment from the Corporate Debtor or notice of the dispute under sub-section (2) of Section 8, the Operational Creditor may file an application before the Adjudicating Authority for initiating a Corporate Insolvency Resolution Process.

Decision:

In the present ruling, Hon’ble NCLAT decided that since no notice was

issued by the Operational Creditor under Section 8 of the I & B Code,2016, Demand notice by Operational Creditor stipulated under Rule 5 in Form 3 has not been served. Therefore, in absence of expiry period of tenure of 10 days, there was no question of preferring an application under Section 9 of I & B Code, 2016.

The NCLAT stated that Adjudicating Authority had failed to notice the aforesaid facts and mandatory provisions of the laws stated above.

The NCLAT set aside the order passed by the Adjudicating Authority and the application preferred by the Operational Creditor under Section 9 of the I & B Code, 2016 was dismissed being incomplete. The NCLAT also held that the orders, interim arrangements etc. are vacated, moratorium declared earlier is quashed, appointment of Interim Resolution Professional is quashed and all actions taken by the IRP are declared illegal.

The Appeal is allowed with the aforesaid observations.

Case Review: Order dated 12th April, 2017 passed by NCLT, Principal Bench, New Delhi in Insolvency Petition No 26 (ND) of 2017, set aside.

CASE NO. 14

Sudhi Sachdev (Appellant - Promoter)

Vs.

APPL Industries Limited (Respondent -Operational Creditor)

Company Appeal At (Insolvency) No. 623 of 2018

Date of Order: 13-11-2018

Section 9 of the Insolvency and Bankruptcy Code, 2016

Facts :

An appeal has been preferred by 'Sudhi Sachdev', Promoter of 'M/s Auto Décor Pvt. Ltd.' (Corporate Debtor) against order dated 2nd August, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench whereby application under Section 9 of I&B Code preferred by Respondent – 'APPL Industries Ltd.' (Operational Creditor) has been admitted and order of moratorium has been passed.

Learned counsel appearing on behalf of the Appellant submits that there was an existence of dispute in view of the fact that the Respondent has instituted

cases under Section 138/441 of Negotiable Instruments Act, 1881, which are pending in the Court of Metropolitan Magistrate, Gurgaon. During the proceeding, the Corporate Debtor has paid Rs.31,85,525/-, reducing the outstanding balance to Rs.34,25,251/-. The last payment was made on 18th March, 2016. Therefore, in view of the pendency of such case, application under Section 9 of I&B Code is not maintainable.

Question of law before Hon'ble NCLAT:

Whether application filed u/s 9 of the IBC is maintainable during the pendency of the proceedings under Section 138 of the Negotiable Instruments Act, 1881?

Decision:

In the present case, it is not in dispute that there is a debt payable to the Operational Creditor and default on the part of the Corporate Debtor.

The pendency of the case under Section 138/441 of the Negotiable Instruments Act, 1881, even if accepted as recovery proceeding, it cannot be held to be a dispute pending before a court of law. Thereby Hon'ble NCLAT held that the pendency of the case under Section 138/441 of Negotiable Instruments Act, 1881 actually amounts to admission of debt and not an existence of dispute. Hon'ble NCLAT found no merit in the appeal and the appeal was accordingly dismissed.

Existing provision under IBC 2016:

A CIRP of a Corporate Debtor can be initiated by its Operational Creditor on occurrence of a 'payment default' (of operational debt), by filing an application before the relevant National Company Law Tribunal (NCLT) under Section 9 of the IBC. Before making the application, the Operational Creditor must first issue a demand notice or copy of invoice (demanding payment of operational debt) to the Corporate Debtor under Section 8(1) of the IBC 2016.

The Corporate Debtor has 10 (ten) days to either pay or bring to the notice of the Operational Creditor the "existence of a dispute and the record of the pendency of a suit or arbitration proceeding filed before the receipt of" such Demand Notice (Section 8 (2) of IBC) (Notice of Dispute).

In case the Corporate Debtor has issued a Notice of Dispute, the CIRP application of the Operational Creditor is required to be rejected by the NCLT.

It may be noted that the term "dispute" is defined in Section 5(6) of the IBC as "dispute includes a suit or arbitration proceedings relating to: (a) the existence of the amount of debt; (b) quality of goods or service; or (c) the breach of a representation or warranty"

It is pertinent to note that the entire scheme relating to CIRP applications filed by Operational Creditors and holds that what is important is that the existence of the dispute and/or the suit or arbitration proceeding must be "pre-existing" i.e. it must exist before the receipt of the demand notice.

In one of the Landmark decisions passed by Hon'ble Supreme Court, it was held that when examining/checking an application under Section 9, Hon'ble Tribunal will have to govern the following questions:

Whether there is an "operational debt" as defined, exceeding Rs. 1,00,000/-?

Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?

Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding on the dispute filed before the receipt of the Demand Notice?

Even if one of the conditions mentioned above is found to be deficient, the NCLT must reject the application.

CASE NO. 15

Jaya Patel (Appellant- Director of the Corporate Debtor)

Vs.

Gas Jeans Pvt. Ltd. & Ors. (Respondents/ Operational Creditor)

Company Appeal (AT) (Insolvency) No.308 of 2018

Date of Order: 08-10-2018

Section 9 of the Insolvency and Bankruptcy Code, 2016

Facts:

Application under Section 433-434 of the Companies Act, 1956 of the Respondent 'Gas Jeans Pvt. Ltd.' was pending before Hon'ble Bombay High Court for winding up of 'Vama Apparels India Pvt. Ltd – Corporate Debtor',

pertaining to a debt of Rs.21,63,359/-. The case was transferred pursuant to Rule 5 of the Companies (Transfer of pending proceedings) Rule, 2016 before National Company Law Tribunal, Mumbai Bench (Adjudicating Authority). The Respondent therein filed Form-5 r/w Rule 6 to treat the same as application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short 'I&B Code) for initiation of Corporate Insolvency Resolution Process against 'Vama Apparels India Pvt. Ltd.'. By impugned order dated 17th May, 2018, the Adjudicating Authority admitted the application, passed order of moratorium and appointed Interim Resolution Professional. The Appellant – Director of the Corporate Debtor has challenged the aforesaid order dated 17th May, 2018 on the ground that notice under Section 8(1) was issued on the same date when Form-5 under Rule 9 was filed as also there is an existence of dispute.

Decision:

An application under Section 9 in Form-5 can be filed only after completion of ten days and if the matter has not been settled. Any application under Section 9 preferred before the completion of 10 days cannot be entertained and admitted by the Adjudicating Authority. Application under Section 9, therefore, being not maintainable on the date the application under Section 9 was filed, the impugned order dated 17th May, 2018 cannot be sustained. The order passed by the Adjudicating Authority was thus set aside.

Case Review: Order dated 17th May, 2018 passed by NCLT, in Gas Jeans Pvt. Ltd., set aside.

CASE NO. 16

Anil Nanda (Appellant)

Vs

Hari Kishan Sharma & Ors (Respondents)

Company Appeal (AT) (Insolvency) No. 167 of 2018

Date of Order: 29-11-2018

Section 9 of the Insolvency and Bankruptcy Code, 2016

Facts:

The Appellant- 'Mr. Anil Nanda', Shareholder of 'M/s. AKME Projects Limited'- ('Corporate Debtor') has challenged the order dated 17th April,

2018 passed by the Adjudicating Authority (National Company Law Tribunal), Court-II, New Delhi, whereby and where under, the application preferred by the Respondent- 'Mr. Hari Kishan Sharma'- ('Operational Creditor') under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('I&B Code' for short) has been admitted, order of 'Moratorium' has been passed and 'Interim Resolution Professional' has been appointed.

Learned counsel appearing on behalf of the Appellant submitted that there is an existence of dispute. Apart from that disagreed with the interest claimed from the due date. According to the Appellant, there was no admission made by the 'Corporate Debtor' with regards to the differential amount of Rs. 6,11,937/- and the interest as sought for.

Also plea was taken by the Corporate Debtor that the notice issued u/s 8 does not bear signature or sign on receipt by any person or employee at the registered office of the Respondent Company.

That the full and final settlement is fabricated and false and there is bonafide dispute over the final settlement between the parties.

Decision:

There is nothing on record to suggest that there is a pre-existence (bonafide) dispute raised by the 'Corporate Debtor'. That even part of the dues, once becomes payable comes within the meaning of 'debt' and if not paid it will amount to default. The 'Corporate Debtor' has not disputed the existence of debt', nor there is anything on record of the pendency of a suit or arbitration proceedings, or any pre-existing dispute raised prior to issuance of demand notice under Section 8(1) of the Code. Therefore, no relief was granted on the plea of so-called existence of dispute. In absence of any merit, the appeal was dismissed

CASE NO. 17

Sudhir Sales & Services Ltd. (Appellant/ Operational Creditor)

Vs.

D-Art Furniture Systems Pvt. Ltd (Respondent)

Company Appeal (AT) (Insolvency) No. 327 of 2018

Date of Order: 4-10-2018

Section 9 read with Section 8 of the Insolvency and Bankruptcy Code,

2016 – Application for Initiation of Corporate Insolvency Resolution Process by Operational Creditor

Facts:

The Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, by impugned order dated 24th April, 2018 had rejected the application on the ground of existence of dispute giving rise to the present appeal.

The only question arises for consideration in this appeal is an "existence of dispute."

The grievance of the Appellant- ('Operational Creditor') is that despite successful completion of the contract by 'Operational Creditor' to the satisfaction of the Respondent- ('Corporate Debtor'), the outstanding amount was not paid.

It is stated that Respondent- ('Corporate Debtor') vide communication dated 13th November, 2013 while acknowledging the amount payable, assured the applicant that the payment shall be made very soon. The Appellant- ('Operational Creditor') in his last visit in January 2016, made it clear to the Respondent- ('Corporate Debtor') that in case payment is not received by 31st March 2016, the Appellant ('Operational Creditor') will proceed against the Respondent- ('Corporate Debtor') as per law.

Further case of the Appellant- ('Operational Creditor') is that while nothing was heard from the Respondent- ('Corporate Debtor'), the Appellant- ('Operational Creditor') was constrained to send statutory notice dated 13th April, 2016 under Sections 433 (e) and 434 (1) (a) of the Companies Act, 1956. Thereafter, petition under Sections 433 and 434 of the Companies Act, 1956 for winding-up of the Respondent Company was filed before the Hon'ble High Court of Delhi.

And for the first time in a letter dated 9th September, 2017, the Respondent- ('Corporate Debtor') raised certain disputes relating to DG Sets and separate invoices for diesel which was never raised earlier. No such allegation was made in the letter dated 13th November, 2013 on the Appellant- ('Operational Creditor') about the quality of DG Sets and of raising separate invoices for diesel.

From the letter sent by the Corporate Debtor on 13th Nov 2013, it was clear that the Respondent- ('Corporate Debtor') had neither disputed the claim

made by the Appellant- ('Operational Creditor') nor raised any question relating to quality of service or material.

The only plea taken therein is that the outstanding amount will be released as soon as the Respondent- ('Corporate Debtor') get the payment from OC on this account which is subject to approval of reconciliation by a third party i.e. 'M/s. ESAJV D-Art India Pvt. Ltd.' (not the 'Corporate Debtor'). The reference of arbitration has been made in the impugned order is between other parties and the 'Operational Creditor' is not a party to it.

Pendency of any arbitral proceeding is not between the 'Operational Creditor' and the 'Corporate Debtor' but between some other parties which cannot be taken into consideration that there is pre-existing dispute between the Appellant- ('Operational Creditor') and the Respondent- ('Corporate Debtor').

In the present case, the Adjudicating Authority has decided the issue of pre-existence of dispute on the basis of letter dated 13th November, 2013 and the reply given by the 'Corporate Debtor' under Section 8(2) given by the Respondent- ('Corporate Debtor') on 9th September, 2017.

Decision :

In "Innoventive Industries Ltd.(Supra)", the Hon'ble Supreme Court held that pre-existing dispute is the dispute raised before demand notice or invoices was received by the 'Corporate Debtor'. Any subsequent dispute raised while replying to the demand notice under Section 8(1) cannot be taken into consideration to hold that there is a pre-existing dispute. Therefore, the reply given by the 'Corporate Debtor' on 9th September, 2017 is to be ignored for finding out whether there is pre-existence of dispute or not.

In "Mobilox Innovations Pvt.Ltd.(Supra)", the Hon'ble Supreme Court held that a dispute truly exists in fact and is not spurious, hypothetical or illusory. Here, no such dispute was pre-existing apart from that a hypothetical or illusory dispute which has been raised by the 'Corporate Debtor' while replying to the demand notice served under Section 8(1) by the 'Operational Creditor'.

In view of the aforesaid facts, NCLAT held that there is no pre-existing dispute in the present case and the Adjudicating Authority wrongly relied on the letter dated 13th November, 2013 and letter dated 9th September, 2017 to reject the claim of the Appellant.

NCLAT accordingly set aside the impugned order dated 24th April, 2018

passed by the Adjudicating Authority in Company Petition No. (IB)- 94 (PB)/ 2018 and remitted the case to the Adjudicating Authority for admitting the application under Section 9 filed by the Appellant- ('Operational Creditor'), in absence of any defect. The Respondent- ('Corporate Debtor') cannot raise any objection before the Adjudicating Authority for admission of the application under Section 9, having been heard by this Appellate Tribunal and the issue having been decided. However, the order passed in this appeal will not come in the way of the Respondent- 'Corporate Debtor' to settle the claim with the Appellant- ('Operational Creditor') before admission of the application under Section 9 of the 'I&B Code' in which case, the Appellant- 'Operational Creditor' may withdraw the application.

The appeal is allowed with aforesaid observations and directions.

SECTION-12A

CASE NO. 18

Praveen Arjun Patel (Appellant)

Vs

JK Lakshmi Cement Ltd. (Respondents/ Corporate Debtor)

Company Appeal (AT) (Insolvency) 264 OF 2018

Date of Order: 21-8-2018

Section 9 read with Section 12 A of the Insolvency and Bankruptcy Code, 2016 – Application Withdrawal

Facts:

Application filed under Section 9 was allowed to be withdrawn vide order dated 12/06/2018 – Intervening Application (IA) made on Grounds – 12 A of the Code not satisfied and rights adversely affected.

Being aggrieved by the said order dated 12.6.2018 the applicants had filed respective IAs thereby stating that on 6.6.2018 the Hon'ble President had promulgated the Insolvency & Bankruptcy Code (Amendment) Ordinance 2018 by which certain provisions of IBC have been amended and as per that amendment, Section 12 A of the IBC provides that the Adjudicating Authority may allow the withdrawal of application admitted under Section 7 or Section 9 or Section 10, on an application made by the applicant with the approval of

ninety percent voting share of the committee of creditors, in such manner as may be prescribed.

In view of amendment in Section 12A of the IBC, the applicants have stated that the order dated 12.6.2018 passed by this Appellate Tribunal permitting unilateral withdrawal of Section 9 application by the Operational Creditor without the approval of the 90% of the voting share in the Committee of Creditors of the Corporate Debtor is contrary to the said mandate and deserves to be recalled/modified.

Decision:

Having heard the arguments of both the parties it was said that Section 12 A of IBC would be applicable when admission for Corporate Insolvency Resolution Process application has been admitted by the Adjudicating Authority and there would be no challenge to the admission of the application. Subsequently, the Adjudicating Authority allowed the withdrawal of application in terms of Section 12A of the Code and obviously the admitted application for withdrawal will have to meet the criteria as specified in the said Section. However, in this case admission of the application filed under Section 9 of the IBC Code was challenged before the Appellate Tribunal which has set aside the admission. Consequently, there is no valid admission of the application under IBC Code. In these circumstances the position for withdrawal of application will be in terms of Rule 8 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016. Therefore, there was no impact of Section 12 A on this decision in this case.

In terms of Section 9 of the Code any Operational Creditor can initiate insolvency resolution proceedings. Therefore, the applicants herein have their rights protected by IBC that they are entitled to initiate insolvency resolution proceedings and withdrawal of this application by a third party does not impact their rights under the IBC.

No merit was found in the applications and hence accordingly dismissed.

Case Review: The order dated 12.6.2018 passed by this Appellate Tribunal permitting withdrawal of Section 9 application maintained.

SECTION-30 & 31

CASE NO. 19

Binani Industries Limited (Appellant/ Corporate Debtor)

Vs

Bank of Baroda & Anr. (Respondents)

Company Appeal (AT) (Insolvency) No. 82 of 2018

Date of Order: 14-11-2018

Facts:

Other cases which were merged and simultaneously heard were:

1) Rajputana Properties Pvt. Ltd Vs Binani Industries Limited & Ors- CA. No 123/2018

2) Rajputana Properties Pvt. Ltd Vs Ultratech Cement Ltd. & Ors- CA. No 188/2018

3) Binani Industries Limited Vs Binani Cements Limited & Anr- CA. No 216/2018

4) Mr. Vijay Kumar Iyer, Resolution Professional Vs Mr. Braj Bhusandas Binani & Ors- CA. No 234/2018

As all these appeals arise out of the order(s) passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, they were heard together and are disposed of by this common judgment.

The 'Binani Cement Limited', a flagship subsidiary of the Appellant- 'Binani Industries Limited' representing the 'Braj Binani Group', has preferred Company Appeal against order of Adjudicating Authority which has referred it back to the 'Resolution Professional' to consider in accordance with the Rules and Regulations of the 'I&B Code'. The grievance of the Appellant is that the Adjudicating Authority should have passed positive direction and should have allowed the Appellant- 'Binani Industries Limited' to interact with and/or meet the bidders/ 'Resolution Applicants', 'Financial Creditors' and other stakeholders of the 'Corporate Debtor' from time to time.

Binani Industries Limited' has also preferred another Company Appeal whereby the Adjudicating Authority refused to accept the proposal of 'Binani

Industries Limited' for repayment of the dues of the 'Financial Creditors' and close the 'Corporate Insolvency Resolution Process', in absence of any jurisdiction.

Rajputana Properties Private Limited' has preferred Company Appeal against the order passed by the Adjudicating Authority, whereby liberty was granted to the 'Committee of Creditors' to consider the settlement plan proposed by the 'Binani Industries Limited'.

Another Company Appeal has been preferred by 'Rajputana Properties Private Limited' against the order filed by the 'Resolution Applicant' for approval of the plan of the 'Rajputana Properties Private Limited' has not been accepted for the reasons mentioned in the said order.

Mr. Vijay Kumar Iyer, who is the 'Resolution Professional' has preferred Company Appeal against the order dated 2nd May, 2018 in so far it relates to adverse observations made by the Adjudicating Authority against the said 'Resolution Professional'.

After the aforesaid background, the facts are as below:-

Mr. Vijay Kumar Iyer- 'Resolution Professional' filed an application under Sections 30 and 31 of the IBC 2016 read with Regulation 39 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016' for approval of the 'Resolution Plan' for 'Binani Cement Limited'. It was informed that the application is within time and the 'Committee of Creditors' by majority vote approved the 'Resolution Plan' submitted by 'Rajputana Properties Private Limited'. As noticed, number of objections were filed including, by 'Binani Industries Limited', a group company of 'Binani Cement Limited'- ('Corporate Debtor'), 'Ultratech Cement Limited' and others. The Adjudicating Authority noticed that the 'Committee of Creditors' voted in the meeting held on 14th March, 2018 with 99.43% and approved the plan submitted by the 'Rajputana Properties Private Limited'. However, 10.53% of the 'Committee of Creditors' who were forced to vote in favour of the 'Resolution Plan' recorded a protest note(s) alleging that they had not been dealt equitably when compared with other 'Financial Creditors' who were corporate guarantee beneficiaries of the 'Corporate Debtor'. The Adjudicating Authority also noticed that the 'Resolution Plan' submitted by the 'Ultratech Cement Limited', including revised offer submitted on 8th March, 2018 was not properly considered by the 'Committee of Creditors' for wrong reasons.

The Adjudicating Authority held that the 'Resolution Plan' submitted by 'Rajputana Properties Private Limited' was discriminatory and contrary to the scheme of the 'I&B Code'. Thereby, while rejecting the 'Resolution Plan' submitted by 'Rajputana Properties Private Limited' as discriminatory, directed the 'Committee of Creditors' to consider the other 'Resolution Plans', including the 'Resolution Plans' submitted by 'Ultratech Cement Limited'.

The Appellate Tribunal has observed that objective of the 'I&B Code' is first Resolution, then maximisation of value of assets of the 'Corporate Debtor' and lastly to promote entrepreneurship, availability of credit and balance the interests. It also defined the Role of Financial Creditor as a member of Committee of Creditors and stated that the liabilities of all creditors who are not part of 'Committee of Creditors' must also be met in the resolution. Further while elaborating on Resolution Plan, the bench said that 'It is not a sale' nor It is an auction or a recovery, it should also not be confused with liquidation. Further it observed a discrimination being made between two same set of creditors i.e. Financial Creditors.

However, the 'I&B Code' or the Regulations framed by the Insolvency and Bankruptcy Board of India do not prescribe differential treatment between the similarly situated 'Operational Creditors' or the 'Financial Creditors' on one or other grounds.

Plea taken by learned Senior Counsel for 'Rajputana Properties Private Limited' was that the intent of the legislature is to bind 'minority Financial Creditors' with the decision of the 'majority Financial Creditors' is not based on basic principle of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016.

At this stage, it is desirable to notice that after the decision of this Appellate Tribunal in "Central Bank of India (Supra)", the Insolvency and Bankruptcy Board of India also amended/repealed the Regulation 38 aforesaid having found it discriminatory.

Decision:

In the result, the Company Appeal (AT) (Insolvency) Nos. 123, whereby liberty was granted to the 'Committed of Creditors' to consider the settlement plan proposed by 'Binani Industries Ltd' & 188 of 2018 preferred by 'Rajputana Properties Private Limited' for approval of Resolution Plan and Company Appeal (AT) (Insolvency) Nos. 82 remitting the matter to the Resolution Professional to consider their proposal for settlement which has

become infructuous & 216 of 2018 preferred by 'Binani Industries Limited' towards settlement of dues are dismissed. The Company Appeal (AT) (Insolvency) No. 234 of 2018 preferred by Mr. Vijay Kumar Iyer, 'Resolution Professional' is allowed. The observations made against Mr. Vijay Kumar Iyer were set aside. Records of Company Petition (IB) No. 359/KB/2017 is remitted to the Adjudicating Authority for constitution of monitoring committee and implementation of revised approved plan submitted by 'Ultratech Cement Limited' in accordance with law.

SECTION-34

CASE NO. 20

Mr. Devendra Padamchand Jain, Resolution Professional (Appellant)

Vs.

State Bank of India, State Bank of Hyderabad, Indian Overseas Bank, Punjab National Bank, Bank of India, Bank of Baroda, IFCI Limited, IFCI Factors Limited (Financial Creditors), VNR Infrastructure Ltd (Corporate Debtor), Insolvency and Bankruptcy Board of India (Board) ..... (Respondents)

Company Appeal (AT) (Insolvency) 177 of 2017

[arising out of Order dated 24th August, 2017 by NCLT, Hyderabad Bench, Hyderabad in C.A. No. 142 of 2017 in C.P. (IB) No. 12/10/HDB/2017]

Date of Order: 31-01-2018

The Adjudicating Authority has the right to appoint a new liquidator under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I & B Code')

Facts:

The Corporate Insolvency Resolution Process has been initiated at the instant of the corporate applicant who filed the application under Section 10 and proposed the name of interim resolution professional. After interim resolution professional, the resolution professional is appointed in accordance with law.

The Adjudicating Authority (National Company Law Tribunal) Hyderabad Bench, Hyderabad passed order under Section 33 (1) and 34(1) of I & B Code vide its order dated 24th August, 2017 removed the Resolution Professional (Appellant) and appointed a liquidator.

Appellant contended against the impugned order passed by the Adjudicating Authority by which the appellant was replaced with another person as the liquidator was beyond his jurisdiction. The appellant submitted that as per sub-section (1) of Section 34 the Adjudicating Authority while passing the order for liquidation of the Corporate Debtor under Section 33 of the Code is required to appoint the resolution professional as the liquidator for the purpose of resolution process under Chapter II. The Adjudicating Authority can only replace the resolution processional, for the reasons mentioned in sub-section (4) of Section 34. It was submitted that resolution plan was not rejected for failure to meet any requirement and in fact the draft resolution was not approved. Therefore, the stage of sub-section (2) of Section 30 never reached.

It was also stated that the Committee of Creditors had not recommended for replacement of the resolution professional or to appoint a new liquidator.

The creditor stated that the Adjudicating Authority was not satisfied with the resolution professional appointed earlier as he failed to assist the Adjudicating Authority.

The relevant provisions for removal of resolution professional and appointment of liquidator were noticed and discussed below.

In terms of the provisions of Section 22 of I & B Code, the Committee of Creditors by a majority vote of not less than 75% may allow and resolve to appoint the 'Interim Resolution Professional' as the 'Resolution Professional' or to replace the 'Interim Resolution Professional' by another 'Resolution Professional'. The Resolution Professional required to conduct Corporate Insolvency Resolution Process in terms of Section 23 read with Section 24 etc, however, Resolution Professional can be replaced by the Committee of Creditors if it is of the opinion to replace it in view of power vested under Section 27.

According to Section 27 of IBC, the Committee of Creditors by a majority vote of not less than 75% may allow and resolve to appoint the 'interim

resolution professional' as the 'resolution professional' or to replace the 'interim resolution professional' by another 'resolution professional'.

As per Section 30, the resolution professional is required to examine each resolution plan received by him and confirm accordingly. In case of non-approval of resolution plan and before expiry of the insolvency resolution period, liquidation proceedings are to be initiated under Section 33.

As per sub-section (1) of Section 34 on passing of the order for liquidation under Section 33, the Resolution Professional shall act as liquidator, unless replaced by the Adjudicating Authority for the grounds mentioned in sub section (4) of Section 34.

From the aforesaid provisions, the following facts emerge:

a) Interim Resolution Professional can be appointed as a Resolution professional; [Refer sub-section (2) of Section 22]

b) The Committee of Creditors can replace the Interim Resolution Professional by another Resolution Professional; [Refer sub-section (2) of Section 22]

c) The Committee of Creditors can replace Resolution Professional, if it is of opinion that the resolution professional appointed under Section 22 is required to be replaced, it may replace him in the manner as prescribed under Section 27; [Refer : Section 27]

d) The Adjudicating Authority is also empowered to replace resolution professional in case the resolution plan submitted under Section 13 is rejected for failure to meet the requirements mentioned sub-section (2) of Section 30. [Refer : sub-section (4) of Section 34]

e) The Resolution Professional appointed under Section 33 shall act as liquidator for the purpose of liquidation unless replaced by the Adjudicating Authority under sub-section (4) of Section 34. [Refer : sub-section (1) of Section 34]

The Financial Creditors herein having 100% voting right has accepted that the Resolution Professional (appellant herein) was not assisting the Adjudicating Authority to its satisfaction during hearing. The Resolution Professional was required to examine the Resolution Plan but had not stated that the plan submitted by him provides for all the requirements as provided under sub-section (2) of Section 30 of the Code. The Committee of Creditors

is also not satisfied with the Resolution Professional and taken plea that they are happy with the Liquidator who has been appointed and performing the duty since September, 2017 in accordance with law.

Decision:

In view of the aforesaid provisions, NCLAT held that the Adjudicating Authority has jurisdiction to remove the resolution professional if it is not satisfied with its functioning of the resolution professional, which amounts to non-compliance of sub-section (2) of Section 30 of the I & B Code. In absence of any merit this appeal is dismissed.

SECTION-60

CASE NO. 21

Amandeep Singh Bhatia & Ors (Appellant/ Operational Creditor)

Vs.

Vitol S.A. & Anr (Respondents/ Corporate Debtor)

Company Appeal (AT)(Insolvency) No.502 of 2018

Date of Order: 30-08-2018

Section 60(5)(c) read with Section 67 of the Insolvency and Bankruptcy Code, 2016 – Adjudicating Authority for Corporate Persons

Facts:

The appellants are the Ex-Directors of Corporate Debtor, which is under liquidation. The appellants are also personal guarantors on behalf of the Corporate Debtor.

In the liquidation proceedings, one of the Operational Creditors filed application with prayer to seek directions on the 2nd respondent including appellants to deposit their passports with the Registry of the Tribunal during the pendency of the said application. In similar case, the Hon'ble Supreme Court has passed order of prohibition that the Managing Director and Directors JIL and JAL shall not be permitted to leave the country without prior permission and also Adjudicating Authority (NCLT) Mumbai bench has passed order of prohibition that to protect the interest of all the stakeholders and also to facilitate the proceedings those persons should not be allowed to leave the country without prior permission.

Decision:

It cannot be stated that the Adjudicating Authority is not empowered to direct the Ex- Directors not to leave the country without prior permission of Adjudicating Authority.

Further any order passed under the law, cannot be held to be violative of Article 21 of Constitution of India.

Further, the Adjudicating Authority has not stayed the movement of the appellants, but has only observed that if they intend to leave the country, they should take the permission of the Adjudicating Authority. Therefore, the order cannot be held to be an order of permanent injunction on the appellants.

No merit found and accordingly the appeal is dismissed.

APPLICABILITY OF LIMITATION ACT UNDER IBC

CASE NO. 22

Neelkanth Township and Construction Private Limited (Appellant)

Vs.

Urban Infrastructure Trustee Limited (Respondents)

Company Appeal (AT) (Insolvency) 44 of 2017

Date of Order: 11-08-2017

Facts:

One of the questions which arises for consideration in this appeal is whether provision of the Limitation Act, 1963 is applicable under IBC?

The Hon'ble Court was faced with the issue of whether the Limitation Act would apply to the applications filed by financial and Operational Creditors for initiation of CIRP under IBC.

The judgment in Neelkanth Township was pursuant to an appeal filed by a Corporate Debtor, i.e., Neelkanth Township & Construction Pvt. Ltd., against the order of the Hon'ble National Company Law Tribunal (NCLT) allowing commencement of insolvency proceedings on the action of a Financial Creditor, i.e. Urban Infrastructure Trustees Ltd. (Urban Infrastructure).

Urban Infrastructure had subscribed to optionally convertible debentures (OCDs) issued by Neelkanth. These OCDs matured in the years 2011, 2012 and 2013. However, the application for insolvency of Neelkanth was made in 2017, i.e. after expiry of a period of 3 (three) years from the date of maturity of the said OCDs. The NCLT, however, proceeded to admit the insolvency application in April 2017, since the Corporate Debtor defaulted in repaying the debt.

Arguments:

The CD Counsel argued that because three debenture certificates were due for redemption for the years 2011, 2012 & 2013 and since application is filed in the year 2017, this claim is ex facia time barred, and hence Tribunal ought not to entertain or proceed with the same.

A procedural provision cannot override or affect the substantive obligation of the Adjudicating Authority to deal with applications under Section 7 merely on the ground that Board has not stipulated or framed any Regulations with regard to Section 7(3)(a) of the Code.

Board has framed IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016' where 'Form-C' attached to the Regulations relates to proof of claim and under serial no.10, Financial Creditor is supposed to submit the list of documents in proof of claims. Therefore, the stand that there are no Regulations made by the Board in case of Section 7(3) (a) of the Code cannot be accepted.

The NCLAT reasoned that the IBC was not an Act for recovery of money claims, but an Act relating to the initiation of Corporate Insolvency Resolution Process. Resultantly, if a debt were to arise, which included interest and there was a default on repayment of such debt having a continuous course of action, the argument that the claim of the financial debtor stood barred by limitation could not be accepted.

Further, the NCLAT stated that the Corporate Debtor has the liability and obligation in respect of amount which is due to the debenture holder from the Corporate Debtor, including Financial Debt i.e, the amount due on maturity of debentures.

With the debenture payable, as on the maturity date with interest, it was disbursed against consideration for the time value of the money. Thus, it

cannot be said that debentures on maturity do not come under the purview of Section 5(8)(c) of the Code.

Decision:

The Appellate Authority held that the learned Adjudicating Authority having admitted the application under Section 7 of the Code, the application being complete, no interference is called for.

In absence of any merit the appeal is dimissed.

In the recent pronouncements *the Hon'ble Supreme Court held that Limitation Act is applicable to applications filed by financial and Operational Creditors under Section 7 and 9 of the Code, from the inception of the Code. The right to sue accrues when a default occurs and if the default occurs over three years prior to the date of filing of the application, the application would be barred by limitation, except in those cases where delay can be condoned by showing sufficient cause under Section 5 of the Limitation Act.*

Now by the IBC(Second Amd) Act, 2018, it provides that the provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.

Chapter 4

Orders passed by National Company Law Tribunal (NCLT)

SECTION-7

CASE NO. 1

Bench	National Company Law Tribunal (NCLT), Ahmedabad Bench, Ahmedabad
Financial Creditor	Small Industries Development Bank Of India
Corporate Debtor	Alps Leisure Holidays Pvt. Ltd.
Amount of Default	Rs. 7.58 cr
Date of Order	13-11-2018
Relevant Section	Section 7 of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	The Financial Creditor has granted financial assistance of term loan of Rs. 7,80,00,000/- on 07-03-2014 and was disbursed in two instalments before end of March 2014. Date of NPA was 08-02-2017 (as per RBI Norms) and default date as per IBC 2016 being 10-11-2016, when the instalment of the loan repayment fell due. Letter for re-schedulement was given which was rejected. The case came for first hearing on 22-11-2017 and till final admission, the case was adjourned 14 times for various reasons. Reasons were like documents presented were in vernacular language which needed to be translated in English, or some times for one side not being present or sometimes both sides were not present, sometime

	was spent, to work for settlement between the parties since it was reported.
Decision of the Tribunal	The bench after having satisfied about the default and after having been given more than enough opportunity of being heard, admitted the case.

CASE NO. 2

Bench	National Company Law Tribunal (NCLT), Chennai Bench,Chennai
Financial Creditor	Asset Reconstruction Company (India) Limited
Corporate Debtor	M/S Sri Srivathsa Paper Mills Private Limited
Amount of Default	Rs 142.89 cr
Date of Order	13-11-2018
Relevant Section	Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016– Initiation of Corporate Insolvency Resolution Process by Financial Creditor.
Facts of the Case	Corporate Debtor availed terms loans and other facilities from Indian Overseas Bank, by execution of various Documents. The Debt was assigned to Asset Reconstruction Company (India) Ltd. by execution of instrument of assignment on 10.02.2015. The Corporate Debtor failed to repay Rs 142,89,19,352 which was outstanding on 6-4-2018 and also failed to make a fixed deposit of Rs 2.5 crores as per the agreed terms. In spite of plenty of opportunities provided, the Corporate Debtor could not present reasonable terms for OTS. The Counsel for Corporate Debtor has fairly admitted to the liability that was projected and did not resist the application of the Financial Creditor.

Decision of the Tribunal	The Adjudicating Authority was satisfied that a default has been committed by the Corporate Debtor in repayment of the loan amount. The petition was therefore admitted and Interim Resolution Professional was appointed.

CASE NO. 3

Bench	National Company Law Tribunal (NCLT), Division Bench, Chennai
Financial Creditor	Stanbic Bank Ghana Limited
Guarantor	Rajkumar Impex Private Limited
Amount of Default	US $10,849,284.88
Date of Order	27-04-2018
Relevant Section	Section 7 of the Insolvency and Bankruptcy Code, 2016– Initiation of Corporate Insolvency Resolution Process by Financial Creditor
Facts of the Case	The only question arises for consideration in this appeal is what comes under the purview of Financial Creditor under Section 5(7) read with Section 5(8) of the 'I & B Code'? In Section 5(7) read with Section 5(8) of the 'I & B Code' “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 and "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money. In this proceeding, Learned Counsel for the petitioner submitted that M/s. Rajkumar Impex Ghana Limited (Principal Borrower) is the subsidiary of Respondent and borrowed money to the tune of US $10,849,284.88 from the Financial Creditor and has

	failed to repay the said amount and hence, the Financial Creditor initiated proceedings against the respondent. After giving sufficient opportunity to respondent, a decree was passed in favour of Financial Creditor for sum of US $12,878,922.47 comprising the principal amount and the interest that would be payable by the respondent who is guarantor herein. The Learned Counsel for the respondent filed a counter and argued that the petition under IB Code, 2016 is not maintainable on the grounds that the Financial Creditor not being an Indian Company cannot invoke the provisions of IB Code. He also submitted that the principal borrower is an independent entity and not a subsidiary of the Respondent Company and hence, the Financial Creditor cannot enforce the claim against the Guarantor (Respondent). The Learned Counsel for the Financial Creditor submitted that dispute is irrelevant for the purpose of an application under Section 7 of the IB Code, 2016 consequently dispute with the principal borrower is also irrelevant. The respondent is not only liable as guarantor but also as a principal obligator. The order of Hon'ble High Court of Justice, London was made on merits and IB Code, 2016 does not prohibit filing a petition by foreign creditor.
Decision of the Tribunal	Heard both the parties and perused the pleadings. Since, the Respondent failed to defend its case before Hon'ble High Court of Justice, London, now it cannot contend that the said order is not on the merits. In view of all the submissions made by the parties and the observations made, the Tribunal concludes that the Financial Creditor has made out a prima facie case under IB Code, 2016. This Tribunal has no jurisdiction to enforce the foreign decree; however there is no bar

	in it taking cognizance of the foreign decree. The objections raised by Counsel for the Respondent are not valid ground for rejection of the instant petition. Therefore, the petition stands admitted. The Tribunal thus orders for the commencement of the Corporate Insolvency Resolution Process.

SECTION-9

CASE NO. 4

Bench	National Company Law Tribunal (NCLT), Jaipur Bench, Jaipur
Operational Creditor	Manohar Karamchandani
Corporate Debtor	Balajidham Buildestates Pvt. Ltd.
Amount of Default	Rs.10.08 lacs
Date of Order	02-11-2018
Relevant Section	Section 9 of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	Operational Creditor (OC) was acting as a selling agent and an agreement has been entered to that effect on 01-06-2013. Operational Creditor was entitled to a sum of Rs. 6,49,575/- for the invoices raised during the period 01-10-2015 to 30-06-2016 as also interest @ 12% and further an amount of Rs. 3,00,000/- towards refund of security deposit taken at the time of agreement by the Corporate Debtor. Since the Corporate Debtor had not responded to reminders, a notice u/s. 8 of IBC 2016 was issued. To this notice, the Corporate Debtor did not respond and no sum was paid against the said notice. In view of the non-payment or lack of any response on the part of the Corporate Debtor it is averred, this petition had been preferred before this Tribunal seeking for initiation of

	Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor. The matter was originally filed before the NCLT New Delhi, Bench of this Tribunal, however, consequent to the constitution of Jaipur Bench, the above company Petition transferred from NCLT, New Delhi to NCLT, Jaipur Bench and pursuant to the transfer, the case was listed before this Jaipur Bench of the Tribunal on 26-07-2018.
Decision of the Tribunal	Taking into consideration all the aspects and the records as well as the statements made by the Corporate Debtor based on affidavit that it is unable to satisfy the claim as made by the Operational Creditor, this petition was admitted as envisaged by Section 9 of the IBC,2016 as against the Corporate Debtor. Moratorium in terms of Section 14 of IBC, 2016 will commence from the date of this order admitting the petition and the proposed IRP proposed by the Operational Creditor is appointed as an IRP to commence and carry forward the CIRP against the Corporate Debtor.

CASE NO. 5

Bench	National Company Law Tribunal (NCLT), Ahmedabad Bench, Ahmedabad
Operational Creditor	Venus Furniture
Corporate Debtor	AUM Structbuild Pvt. Ltd.
Amount of Default	Rs. 79.20 lacs (inclusive of interest)
Date of Order	12-11-2018
Relevant Section	Section 9 of the Insolvency and Bankruptcy Code, 2016
Facts of the	Against purchase orders issued by the Corporate

Case	Debtor for supply of Godrej Lab Furniture and office furniture on 21-12-2016 and 26-12-2016 against which tax invoices were raised on 30-03-2017 and 02-03-2017 totalling to Rs. 2,76,17,772/- out of which Corporate Debtor has paid Rs. 2,22,32,000/- and the balance amount which was unpaid alongwith interest amounted to Rs. 79,19,876/-. Proper procedures as required under IBC 2016 were followed by the Operational Creditor and inspite of that Corporate Debtor did not respond to the notice issued under Section 8 of IBC 2016. On the date of hearing on 09.07.2018 Corporate Debtor prayed for 2 weeks time which was granted. On 26.07.2018 the Corporate Debtor raised that there was a pre-existing dispute, which however could not be proved. Argued that there was no provision of delayed payment in any of the invoices.
Decision of the Tribunal	It was found that in this case the provisions as contained in Section 9 (5) (a) to (c) of IBC 2016 are satisfied. Bank statement as required under Section 9(3) (c) of the Code is produced. Respondent has failed to file any evidence regarding pre existing dispute. Thus the application filed by applicant is complete in all legal aspects. Hence, the case was admitted.

CASE NO. 6

Bench	National Company Law Tribunal (NCLT), Chandigarh Bench, Chandigarh
Operational Creditor	Bhagwati Kripa Paper Mills Pvt. Ltd.,
Corporate Debtor	A.P. Enterprises Private Limited
Amount of Default	Rs. 4.48 cr
Date of Order	13-11-2018

Relevant Section	Section 9 of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	The Operational Creditor passed a Resolution dated 23.03.2018 resolving to file the petition under the Code against the Corporate Debtor petitioner. Operational Creditor is the manufacturer and supplier of high quality kraft paper. The goods were supplied to the respondent-Corporate Debtor from time to time. On the basis of various purchase orders issued by the respondent, the petitioner raised sale orders and periodically raised the invoices of the goods delivered to the respondent-Corporate Debtor. The last invoice was issued on 8-11-2017. Notice of demand was issued dt. 27-03-2018 and it is alleged that the reply to the demand notice has been sent much after the expiry of 10 days containing the allegations which mostly was an afterthought just to defeat the rights of the Operational Creditor. It is alleged that all the allegations contained in the reply are disputed. The reply contains only the bald averments. The dispute raised with regard to the deterioration of the quality of goods supplied by the petitioner are being raised for the first time which in any case is belated and the same has been taken only to create a sham and illusory defence. The quality issue was never raised by the Corporate Debtor nor any proof to substantiate such a claim has been annexed, especially the plea has no legs to stand as the respondent-Corporate Debtor admitted the liability by way of the balance confirmation and issuing multiple cheques. Even these undated cheques, according to Corporate Debtor were issued as security and were said to have been misused by the Operational Creditor. Balance confirmation was also denied stating that in good faith signature was obtained on 3-4 blank papers. It was brought to the notice of petitioner towards

	Section 75 & 76 of IBC 2016 wherein punishment for false information is stipulated.
Decision of the Tribunal	With the help of various documents including emails placed before the bench, the bench was convinced that there is a default in making the payment to the Operational Creditor and after ruling out all the contentions made by the Counsel of the Corporate Debtor, the case was admitted.

CASE NO. 7

Bench	National Company Law Tribunal (NCLT), Mumbai Bench, Mumbai
Operational Creditor	Deevya Shakti Paper Mills (P) Ltd
Corporate Debtor	Borkar Colour Packs Private Limited
Amount of Default	Rs.52.20 lacs (inclusive of interest @24%)
Date of Order	1-11-2018
Relevant Section	Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 and Rule 10
Facts of the Case	Operational Creditor claims that they supplied Coated Duplex Paper Boxes to the Corporate Debtor and raised invoices till 10.07.2017 for Rs. 36,62,285. The Corporate Debtor deliberately withheld the payments, failed and neglected to pay the outstanding principal amount of Rs. 36,62,285/-. The Operational Creditor sent Demand notice to the Corporate Debtor in Form 3 on 07.03.2018 calling upon the Corporate Debtor to make the payment of Rs. 52,20,560/- which is inclusive of interest calculated @24%p.a. The Corporate Debtor contended that the Petition is liable to be dismissed with the exemplary cost on account of the blatant and mala-fide suppression of documents. It was further contended by the Corporate

	Debtor that, even according to the Operational Creditor there was a confusion regarding the amount due. The Corporate Debtor further claimed that they are remitting 100% advance against purchase orders and as per their records no payment is pending. It was submitted that the charging of interest for the delayed payment was informed to the Corporate Debtor only at the time when the demand notice was sent on 07.12.2017 as well as the demand notice under Section 8 of the Code was sent on 07.03.2018. The Corporate Debtor was not aware of the charging of interest by the Petitioner for the past 3 years. The Petitioner itself has stated that there was no agreement for payment of interest in respect of three invoices, however the Petitioner has claimed the interest of 24% in the demand notice and in the petition, now in the revised claim scaled down the rate of interest to 18% even though the Petitioner is not entitled to charge any interest. The Hon'ble NCLAT in its order dated 27.07.2018 in the case of Krishna Enterprises Vs. Gammon India Ltd. in CA No. 144/2018 held as below:- "*5. In the present appeals, as we find that the principal amount has already been paid and as per agreement no interest was payable, the applications under Section 9 on the basis of claims for entitlement of interest, were not maintainable. If for delayed payment the Appellant(s)' claim any interest, it will be open to them to move before a court of competent jurisdiction, but initiation of Corporate Insolvency Resolution Process is not the answer.*"
Decision of the Tribunal	The Application was Rejected. The AA stated though there is a debt due, definitely substantial amount, but Petitioner has not come up with a proper claim. The interest charged was sudden, though mentioned on invoices, was never put to practice. Sudden interest charges will affect the profitability, financial stability and the very existence of

	the industry itself which will give hardship to the economy as a whole. The petition is dismissed with the liberty to the Petitioner to proceed in accordance with law.

SECTION-10

CASE NO. 8

Bench	National Company Law Tribunal (NCLT), Hyderabad Bench, Hyderabad
Financial Creditor	Indian Bank, Oriental Bank of Commerce, Allahabad Bank, Indian Overseas Bank, Karur Vysya Bank, Central Bank of India, Andhra Bank, Bank of Maharashtra
Corporate Debtor	Kamineni Steel & Power India Pvt. Ltd
Amount of Default	1405.01 Crores
Date of Order	10-02-2017
Relevant Section	Section 10 of the Insolvency and Bankruptcy Code, 2016 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016– Initiation of Corporate Insolvency Resolution Process by Corporate Applicant.
Facts of the Case	The principal business activities of the company include manufacture of steel billets and wholesale of metal scraps, etc. The company was installed with a capacity of 360,000 MTPA and a captive gas-based power plant of 220 MW. The major portion of the total estimated cost of project had been funded by term loans by Financial Creditors. Due to delay in commencement of operation of steel plant, the company could not meet the repayment schedule as per the original loan agreement. The term loans were restructured with sanction of additional term loan to meet expenses towards IDC. Further due to other

	major factors which resulted in mismatch of cash flows and resultant financial crisis leading to heavy operational losses and consequent erosion of entire net worth. At the instance of consortium bankers, detailed Techno Economic Viability (TEV) study was conducted and they concluded that project can be made technically feasible subject to implementation of Flexi-structuring scheme by consortium banks and infusion of additional funds as per RBI Guidelines. Out of 8 Consortium Bankers, 4 Bankers have implemented the scheme and 4 are yet to implement the scheme. The Learned Counsel further submits that default is still continuing and is required institution of Corporate Insolvency Resolution Process by this Tribunal. Accordingly, the Company Petition is filed requesting for implementation of Resolution Plan by the lenders which includes re-phasement and restructuring of the debt which will result in the improvement of operations and serviceability of debt operations.
Decision of the Tribunal	From the material placed on record, this Adjudicating Authority is satisfied that a default has been committed by the Corporate Debtor in repayment of the loan amount. The petition was therefore admitted, and Interim Resolution Professional was appointed.

CASE NO. 9

Bench	National Company Law Tribunal, Mumbai Bench, Mumbai
Financial Creditor	Allahabad Bank
Corporate Debtor	SBM Paper Mills Ltd
Applicant	Satyanarayan Malu
Date of Order	20.12.2018

Relevant Section	10 & 12A
Facts of the Case	Several Miscellaneous Applications were filed and were decided together. One was filed by the Corporate Debtor himself praying to Allow the Applicant to withdraw Company Petition No. 1362 of 2017 filed under Section 10 of the IBC in accordance with Section 12A of the IBC. The other was filed by the Resolution Professional, seeking approval of resolution plan approved by the Committee of Creditors u/s 31(1) of the IBC, 2016. The Third petition was filed by Resolution Applicant M/s. Khandesh Roller Floor Mills on 03.10.2018 seeking permission for withdrawal of its resolution plan along with refund of Earnest Money Deposit of Rs. 50.00 Lacs and termination of Bank Guarantee of Rs. 95.00 Lacs. The essential questions of law were : (i) Whether an Applicant who has filed an Application/Petition u/s 10 of the IBC is entitled to withdraw its own petition u/s 12A of IBC 2016? (ii) Whether a Resolution Applicant who has submitted a Resolution Plan which was approved with majority vote by CoC can be allowed to withdraw the said Resolution Plan which is under consideration for approval before the NCLT? (iii) Whether ex-director of the Corporate Debtor, which is under Insolvency, can offer One Time Settlement (OTS) with the Financial Creditor/Creditors if qualified u/s 29A of the Insolvency Code 2016? These intermingled issues were decided by the Hon'ble bench. While the RP has approached to NCLT for approving the resolution plan approved by the COC, simultaneously, Satyanarayan Malu, Suspended director of the Corporate Debtor was negotiating OTS proposal with Allahabad Bank. He offered Rs. 14 Crores which was improved to Rs. 17 Crores and finally

	reached to Rs. 18 Cr. and contended that this is a better proposal than the Resolution Plan under consideration which was at Rs. 12.50 Cr. Though the Resolution plan offered significantly lesser amount than the said amount under OTS, it was sent for approval of the Adjudicating Authority after passing through all the legal process. While at the same time Allahabad bank demanded 10% upfront payment and an amount of Rs. 1 Cr was deposited by the suspended board member in a no lien account towards OTS acceptance. It was pleaded that the applicant (suspended Director) is giving the best offer to the Financial Creditor and others, therefore, withdrawal is beneficial for all stakeholders. If withdrawal is permitted, the stakeholders shall get 100% of their dues without haircut.
Decision of the Tribunal	It was discussed that while interpreting legal provisions laid down in connection with the business transactions or even imposition of taxes, it is healthier to frame, as also interpret a law, which is capable of understanding the market conditions, indeed not having a straight graph. Hence a strict rule of interpretation is sometimes avoided, the bench opined. The Bench opined that a Law is mandated for the benefit of the society and not vice-versa. Interpreting a statute is ought to be based upon sound understanding of business operations and corporate model of functioning. A golden rule of interpretation of such statute is to subscribe a 'creative interpretation'. However, a "Laxman Rekha" is to be drawn while interpreting the provisions of a Law so that the main Legislative intent is not disturbed. A purposeful interpretation, also termed as "purposive interpretation" is sometimes more helpful to redress the grievance, so therefore preferred from literal interpretation. A fair construction of a statute dealing with economic laws is expected to be a purposive interpretation coupled with

	literal interpretation and this approach is said to be a correct modern day approach. The first reaction during the course of hearing of this Bench was that how is it justifiable on the part of an applicant who has moved a Petition u/s 10 to declare itself insolvent (as happened in this case) at one point of time and thereafter at a later stage suo-moto seeking permission for withdrawal of the said Petition? It has also been questioned that in this manner the procedure laid down in the provisions of the IBC may be wrongly utilized? How a person can be allowed to play with the precious time of a Court by moving a Petition with the prayer to commence CIRP and at the fag end of the process seeking permission of withdrawal of the said Petition? Moreover, Section 12A was introduced and even at that time Regulation 30A was not in the statute Book being introduced w.e.f. 03.07.2018. It was made clear that the Regulations **shall come into force on their publication in the Official Gazette and shall apply to CIRP commencing on or after the said date i.e. 03.07.2018.** Thus no uncertainty was left in the statute Book about enforceability of Regulation 30A. Only Section 12A is relevant for judicial consideration. Since the provisions of Section 12A has not laid down a condition of pre-EoI advertisement, therefore, the present **'withdrawal'** application is **maintainable**. Bench Expressed that this has happened for the first time in the two and half years (Approx.) that a Resolution Applicant is withdrawing a Resolution Plan which is approved by the CoC with majority vote. But if the sole Resolution Plan be allowed to be withdrawn then there shall be no option left but to declare 'Liquidation' of the Corporate Debtor. Due to the unexpected and unprecedented development on the part of the Resolution Applicant, the CoC as well as the RP have been put in a strange situation that what to do and how to proceed when the CIRP period has also expired. Also Bank authorities through an affidavit

	conveyed their consent for withdrawal of the Petition on account of acceptance of OTS. As a result, circumstances of this case demands that **permission be granted to allow the withdrawal of Application.** A conscious decision to impose a **cost of litigation on the Corporate Debtor of Rs. 5,00,000/-** (Rupees Five Lakhs only) to be paid to MCA/NCLT within 15 days on receipt of this order was however taken. Subject to the fine imposed (supra) this withdrawal application was **allowed** by invoking the jurisdiction prescribed u/s 12A of the IBC. Due to the withdrawal of the main Petition, the approval of the Resolution Plan or withdrawal of the Resolution Plan, either way not going to have any impact on the issue of insolvency. However, certain admitted facts cannot be ignored that without assigning convincing reason, this Resolution Applicant is making an attempt to withdraw the Resolution Plan, in other words thwarting the CIRP process. It is not appropriate on the part of a Resolution Applicant to first bid and thereafter on its own withdraw its proposal. The Bench was of the view that under the peculiar situation as discussed hereinabove, this Resolution Plan has although become futile, however, such attempt on the part of a Resolution Applicant needs to be discouraged. It is a common practice, as also adopted by Hon'ble Courts, that in case of breach of commitment, an earnest money can be forfeited. Therefore, the Prayer of return of entire earnest money deposited of Rs. 50 Lakhs is not acceptable in toto and the Resolution Professional is directed that out of Rs. 50 Lakhs, a sum of Rs. 25 Lakhs to be retained as a deterrence to be utilized towards CIRP cost and other related expenses yet to be ratified by this Tribunal. Only Rs. 25 Lakhs is directed to be refunded to the Resolution Applicant. Lastly, regarding the application as submitted by the

	Resolution Professional for approval of Resolution Plan, no adjudication under the provisions of the Code was therefore required because this Resolution Plan has become redundant.

SECTION-12

CASE NO. 10

Bench	National Company Law Tribunal (NCLT), Kolkata Bench, Kolkata
Financial Creditor	State Bank of India
Corporate Debtor	Adhunik Metaliks Limited
Date of Order	15-06-2018
Relevant Section	Application made by Resolution Professional to allow him to exclude a period of 20 days from the statutory period of 270 days within which Resolution Professional is obliged to complete the entire Insolvency Resolution Process.
Facts of the Case	Application was filed by Financial Creditors Under Section 7 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) rules, 2016 whereby IRP was appointed by order dated 3rd August, 2017 and the Corporate Insolvency Resolution Process was initiated under the I & B Code. CIRP process was due to end on 29th January, 2018 and with extension of 90 days the period was to end on 29th April, 2018. The Resolution Professional received two resolution plans and placed before the CoC on 13th April, 2018. After a lot of deliberations and negotiations, CoC decided to accept the Resolution Plan as submitted by M/s. Liberty House Group. On 19th April, 2018, CoC and Resolution Professional came across the media reports that M/s. Liberty House Group has been declared ineligible under Section 29A of Insolvency

	and Bankruptcy Code, 2016 in some other proceedings. The Resolution Professional called for some clarification about the same from Liberty House Group on 19th April, 2018 and received the clarification in 20 days, resultantly he could not submit the resolution plan for approval by the Adjudicating Authority within the period of 270 days. The Corporate Debtor is the company as a going concern and there are 3000 regular employees and 10000 casual employees working in the company. Section 12 of the I & B Code, mandates that CIRP shall be completed within the period of 180 days from the date of admission of the application to initiate such process. Section 12(2) permits the Tribunal to extend the above period by 90 days provided such application is filed by Resolution Professional in concurrence with Committee of Creditors. Section 12(3) makes it clear that such period can not be extended beyond period of 90 days. Proviso to that Section further mandates that such extension shall not be granted more than once. Therefore, Tribunal has no authority under the law to allow the process to continue beyond statutory period of 270 days. Following issues were considered: a) If Tribunal refuse to exclude 20 days, the Resolution Professional has no option but to file the report that he has not received any resolution plan worthy of acceptance within the period of 270 days and in that event Bench has to allow the Corporate Debtor to go into liquidation. In that case, the Corporate Debtor will not be treated as going concern and thereby throwing the fate of regular and casual employees into uncertainty. b) If Tribunal use its discretion by allowing the resolution process to continue beyond statutory period of 270 days then that would be without the authority under the law.

Decision of the Tribunal	The Tribunal had referred the following Guidelines provided by Hon'ble NCLAT in Company Appeal No. (AT) (Insolvency) 185 of 2018 in Quinn Logistics India Pvt Ltd vs Mack Soft Tech Pvt Ltd and others while considering the application for exclusion of such period from statutory period of 270 days. i) If the CIRP stayed by a court of law or the Adjudicating Authority or Appellate Tribunal or the Hon'ble Supreme Court. ii) If no Resolution Professional is functioning for one or other reason during the CIRP, such as removal. iii) The period between the date of order of admission/moratorium is passed and the actual date on which the Resolution Professional take charge for completing the CIRP iv) On hearing a case, if the order is reserved by the Adjudicating Authority or the Appellate Tribunal or the Hon'ble Supreme Court and finally pass the order enabling the Resolution Professional to complete the CIRP. v) If CIRP is set aside by the Appellate Tribunal or order of the Appellate Tribunal is reversed by the Hon'ble Supreme Court and CIRP restored. vi) Any other circumstances which justifies the exclusion of certain period. Guideline No. (vi) above may somewhat permit the Tribunal to consider the application. Tribunal has taken the view that the Corporate Debtor is the company as a going concern and if 20 days are not excluded then Corporate Debtor will be liquidated which will cause great prejudice to the workmen and other stakeholders. Hence, considering the statement and object of the statute, the applications are allowed and Period of 20 days stands excluded from statutory period of 270 days and Resolution Professional is allowed to consider the plans before him.

SECTION-19

CASE NO. 11

Bench	National Company Law Tribunal (NCLT), Chandigarh Bench, Chandigarh
Petitioner	Oasis Agro Infra Ltd, Amandeep Singh, Resolution Professional.
Corporate Debtor	Mandeep Singla & Ors. (Suspended Board of Directors)
Date of Order	04-05-2018
Relevant Section	Section 19(2) of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	This is an application filed under Section 19 (2) of the Code for issuance of appropriate directions to Ex-Directors/Management for extending full cooperation and to provide necessary information to the resolution professional. Question of law: Can erstwhile management deny the IRP/RP that they will not provide the information/details beyond 2 years? Section 19 of the Code casts an obligation on the ex-personnel of the Corporate Debtor, its promoter or any other person associated with the ex-management including ex-directors to extend all assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the Corporate Debtor. Section 19 (2) of the Code then empowers the resolution professional to file appropriate application before the Adjudicating Authority-NCLT to seek necessary directions and the Adjudicating Authority must issue direction to such defaulting personnel of ex-management.

Decision of the Tribunal	The limit of two years imposed on Resolution Professional for presenting it before CoC creates no right in the ex-management to deny any information prior to two years. The provision is couched/framed in the language which requires performance of duties by Interim Resolution Professional / Resolution Professional. It does not attire the Ex-Directors with a right to withhold information beyond period of two years. Therefore, the attempt to escape from furnishing of information is wholly against the spirit of the IB Code. The application was thus allowed.

SECTION-29A

CASE NO. 12

Bench	National Company Law Tribunal (NCLT), Kolkata Bench, Kolkata
Financial Creditor	State Bank of India
Corporate Debtor	Electrosteel Steels Ltd.
Amount of Default	Rs. 13395.00 cr (total permitted financial debt)
Date of Order	17-04-2018
Relevant Section	Section 29A Ineligibility & Connected Person
Facts of the Case	Resolution Plan of Vedanta Limited was approved by 100% voting shares of Committee of Creditors. It had subsidiary (held by 20-03-2018 order) Kankola Copper Mines Pvt. Ltd. (KCM) (A connected party) in Zambia where it was charged for violation of environment laws. CoC contended – KCM being a Corporate entity can't be convicted of offence punishable with imprisonment,

	directors or managers of KCM can't be deemed to be convicted of offence of KCM, directors, managers don't fall in definition of connected persons, phrase '…punishable with imprisonment for Two Years or more…." excluded cases wherein the law does not provide a minimum sentence of 2 years.
Decision of the Tribunal	Offence punishable with imprisonment is different from offence punishable with fine or imprisonment. The KCM in the case was found guilty of an offence punishable with imprisonment or fine for a term not exceeding 3 years or both. So there was no imprisonment, disqualification as stated under Clause (d) of Sec 29A of the Code. So it is held that Vedanta Limited is eligible Resolution Applicant. Once the order came that KCM is connected person none including CoC challenged. Resolution Plan of Corporate Debtor, Electrosteel Steels Ltd, approved by 100% voting shares of CoC is Approved and binding on the Corporate Debtor, its employees, members, creditors, coordinators and other stakeholders involved in the Resolution Plan.

CASE NO. 13

Bench	National Company Law Tribunal (NCLT), New Delhi Bench, New Delhi
Financial Creditor	State Bank of India
Corporate Debtor	Bhushan Steel Limited
Amount of Default	Rs 58,926.74 crores (aggregate claims received by IRP)
Date of Order	15.5.2018

Relevant Section	Section 29A(a) & 29A(d) of the Insolvency and Bankruptcy Code, 2016 – Person not eligible to be resolution applicant Section 30 and 31 dealing with submission of resolution plan by RP and approval of resolution plan by Adjudicating Authority. Regulation 39(6) giving preference of resolution plan over constitutional documents of the Corporate Debtor (i.e. shareholders agreements, joint venture agreement or other document of similar nature).
Facts of the Case	Tata Steel Limited (TSL) and JSW Living Private Limited resolution plans were found compliant with the requirements of Code and CIRP Regulations. However, on recommendation of CoC, TSL was notified as highest scoring resolution applicant. <u>Objections by Bhushan Steel Employees</u> • They have raised an objection that a wholly owned subsidiary of TSL-Resolution Applicant was a connected person and the entity was known as Tata Steel UK. The aforesaid connected person had been found guilty on two counts under the Health and Safety at Work Act, 1974 ('HSW Act') vide an order dated 2-2-2018 for failing to discharge its duties under Section 2(1) of the HSW Act, UK. The objection raised was that since Tata Steel UK had been convicted by order dated 2-2-2018 passed by the Crown Court at Kingston upon Hull of an offence punishable with imprisonment for two years or more it attracted disqualification under Section 29A of the Code. • TSL had a relation with Mr. C. Sivasankaran (Mr. C) who was declared bankrupt by the Supreme Court of Seychelles in August 2014. Mr C through his Company, Sterling Infotech Private Limited had purchased shares in Tata Teleservices Limited. It was alleged that he had taken a loan of Rs 650 crores from Standard Chartered Bank and Resolution Applicant – TSL stood guarantee. It

	was also alleged Mr. C made a post-bankruptcy composition offer and came out of the bankruptcy in 2016 which would not cure the embargo imposed by the provisions of Section 29A of the Code. Application by Larsen & Toubro Limited • Larsen & Toubro Limited has filed application under Section 60(5) (c) of the Code asserting that they should be regarded as secured creditor as there is charge created on plant and machinery and the resolution plan must provide for full of its dues. Application by Bhushan Energy Limited (Group Company of Bhushan Steel) against approved Resolution plan • Reply filed by the Bhushan Energy Limited (BEL) which itself is under CIRP, it has been submitted that the resolution plan adversely effects the rights of BEL which arise under the power purchase agreements dated 29.03.2007 as amended on 30.06.2014 and dated 26.10.2010 as amended on 05.05.2014 (PPA-1 & PPA-2). These agreements were entered between BEL and the Corporate Debtor. The objection raised is that the resolution plan submitted by TSL seeks to terminate the said power purchase agreements unlawfully and BEL objects to the resolution plan filed by the Resolution Applicant. • Counsel of RP of BEL submitted that valid contracts are 'property' within the meaning of Article 300A of the Constitution and no person can be deprived of his property save by authority of law. Article 300A provides that property includes valid contracts and intangibles such as intellectual property. According to the learned counsel vested right created in favour of a party under a valid contract cannot be taken away. Highlighting another aspect, learned counsel has submitted

	that Insolvency Code does not enable termination of valid contracts by way of a resolution plan nor there is any provision under Sections 30 and 31 read with Regulations 37 and 38 of the CIRP Regulations. The termination on the ground that the PPAs are onerous is wholly unsustainable and the resolution plan cannot avoid the transaction on account of increase in the rates merely because it is a contract between related parties.
Decision of the Tribunal	Adjudicating Authority (NCLT) decision on above various matters as follows: <u>Decision in the matter of allegation raised by Bhushan Steel Employees</u> • With regard to prosecution and conviction of Tata Steel UK which is a 100 per cent subsidiary of H1 Resolution Applicant-TSL, NCLT observed that on perusal of the clause (*d*) of Section 29A, it shows that the expression used is 'punishable with imprisonment for two years or more' whereas under Section 33(1)(*a*) of the HSW Act, the expression used is 'imprisonment for a term not exceeding two years or a fine or both'. The provisions of Section 29A(d) would not be applicable to cover a juristic person and could be applied only to a natural person because it contemplates visiting the convict with imprisonment for two years or more. As there is no provision for imposition of fine and a corporate body like a company cannot be visited with imprisonment/custodial sentence (Para 72 of the Order). NCLT was of the view that Section 29A(*d*) does not provide for imposition of fine and therefore, it would not be applicable to the facts in the instant case because a Corporate Entity cannot be subjected to any custodial sentence which is the only provision made by sub-section (*d*) of Section 29A. [Para 74 of the Order]. • NCLT ruled that Sterling Infotech Private Limited cannot be concluded as a 'connected person' or

	'related party' or 'associated company' as TSL never furnished any guarantee for repayment of loan taken by 'C' from Standard Chartered Bank. The Resolution Applicant-TSL merely sought to purchase the shares which were with pre-emptory rights. Even that undertaking had lapsed nine years ago as it ceased to operate in March 2009 and has not been acted upon by Standard Chartered Bank. In any case the order of Bankruptcy issued by Supreme Court of Seychelles has been subsequently revoked in 2016. Tribunal also observed that the application has not been filed by the Bhushan Employees authorizing anybody. The allegation even otherwise on facts is not sustainable. Accordingly, it is held that the objection is frivolous and the same is rejected. [Para 69 of the Order]. Decision in the matter of application by Larsen & Toubro Limited • NCLT was of the view that claim of L&T to be treated as secured creditor on the face of it appears to be wholly unsustainable. There is no document placed on record showing any creation of charge or security warranting a view that the L&T should be regarded as a secured creditor and not as the Operational Creditor. The charge is created by execution of a document as per the requirements of the Companies Act, 2013. In the absence answering the basic description of Section 55(4)(b) of Transfer of Property Act, 1882, no benefit could be gained by L&T. It is well settled that any supplier of goods and services would fall within the meaning of expression 'Operational Creditor' and the claim made by L&T would amount to rewriting the provisions of the statute which is an impossible proposition. Therefore, there is no substance in the aforesaid argument and same is rejected. [Para 80 of the Order] Decision in the matter of application by Bhushan

	Energy Limited (Group Company of Bhushan Steel) against approved Resolution plan • NCLT decided that the objections raised by BEL are not sustainable, it has also been made clear by Regulation 39(6) of the CIRP Regulations, 2016 that a resolution plan which would otherwise require consent of members of the Corporate Debtor under the terms of the constitutional document, shareholders' agreement, joint venture agreement or other document of a similar nature shall take effect notwithstanding that such consent has not been obtained. Regulation 39(6) of the CIRP Regulations in fact takes care of the provisions made for termination of PPAs which were entered between the Corporate Debtor and the BEL. Sub-Regulation 6 of Regulation 39 is couched in very wide language and provides in categorical terms that no consent from the BEL or its RP is required. The case of the RP would fall within the expression of 'or other document of a similar nature'. If the Resolution Applicant has found the terms of PPAs as onerous and it has been approved by the CoC then it is no ground for the BEL to argue that it is a constitution right conferred by the article 300A and the same cannot be taken away without due process of law. The I&B Code provides for due process of law. As a matter of fact, the provisions of Regulation 39(6) fully back up the claim of the Resolution Professional and therefore, the objection raised by BEL is rejected. [Para 78 of the Order] Conclusion Considering the above, Adjudicating Authority (NCLT, New Delhi) ordered the following: • When the resolution plan as approved by the CoC is placed before the NCLT, then it is to record its satisfaction as to whether the requirements as referred to in sub-section 2 of Section 30 are fulfilled. On its satisfaction the NCLT is to approve

	the resolution plan which is to be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. [Para 59 of Order] • The CoC approved resolution plan of H1 Resolution Applicant-TSL is accepted & approved. The appointment of monitoring agency is approved from the date of the approval of the CoC approved resolution plan to function until the closing date i.e. the date on which the implementation of the steps set out in the CoC approved resolution plan would be completed. The monitoring agency shall have the same function, power and protection as conferred on the resolution professional under the Code and the CoC shall continue with its role and responsibility and have protection as set out in the Code including approving the matter as has been approved during the period prior to effective date. [Para 81 of the Order]. • Thus, the application filed by the Resolution Professional for accepting the resolution plan approved by the CoC submitted by Resolution Applicant-TSL is accepted and it is clarified that application for reliefs and concessions sought in resolution plan should be filed before appropriate authorities by monitoring agency and TSL [Para 83 of the Order].

SECTION-30 AND SECTION 31

CASE NO. 14

Bench	National Company Law Tribunal (NCLT), Mumbai Bench, Mumbai
Petitioner	Pratik Ramesh Chirania
Corporate Debtor	Trinity Auto Components Limited
Date of Order	22-01-2018

Relevant Section	Section 30(1) & (6) and Section 31 read with Section 60(5) of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	An order was passed on 25 May 2017 admitting the petition by appointing the IRP with an order for commencement of Moratorium as well as CIRP. The Corporate Debtor itself moved this petition to commence the CIRP under IBC. The appointed IRP had followed the procedures laid down under the IBC 2016 making Public announcement, invited EOIs, filed constitution of Committee of Creditors report. Thereafter in response to the advertisement calling EOI only one Resolution Applicant has submitted the plan to the RP. The Resolution Plan was considered in the meeting of COC held on 05 Oct 2017 with voting of 96.54% in terms of the Section 30(4) read with Regulation 39(3) of the CIRP Regulation 2016. A certificate in compliance with Regulation 39(4) of the CIRP Regulation submitted by RP before the Hon'ble NCLT. On careful reading of the Resolution Plan, Hon'ble Tribunal was of the view that a modification is required under the Resolution Plan submitted by Resolution Applicant and approved by the COC members. But it is to be examined "whether AA has authority to incorporate any suggestion in a Resolution Plan, already approved by the Committee of Creditors"? The procedure as prescribed under the Code is that a Resolution Plan is required to be submitted by a **Resolution Application U/s 30 of the Code.** On approval, the Resolution Professional is to submit U/s 30 (6) the Resolution Plan, as approved by the Committee of Creditors, to the AA. Thereafter, u/s 31, AA is to examine the contents of the Resolution Plan. The mandate of this Section is that if the AA is "satisfied" that the Resolution Plan as approved by the

	Committee of Creditors meets the requirement, as referred to in Section 30 (2), shall by an order, approve the Resolution Plan. So the prerequisite is that recording of "satisfaction" by AA is condition precedent. A "Satisfaction" is to be recorded in writing in the Judgement approving the Resolution Plan. "Satisfaction" is required to be based upon a conscious decision on examination of the terms of the Resolution Plan.
Decision of the Tribunal	If the AA is satisfied that the Resolution Plan as approved by COC under Section 30(4) meets the requirements as referred in Section 30(2) and Hon'ble Tribunal by order approve the said Resolution Plan which shall be binding on the Corporate Debtor and its employees, members, creditors and other stake holders involved in the Resolution Plan. In the present case, The Hon'ble NCLT has approved the Resolution Plan subject to some modification.

CASE NO. 15

Bench	National Company Law Tribunal (NCLT), Principal Bench, New Delhi
Financial Creditor	Reliance Commercial Finance Limited
Corporate Debtor	Ved Cellulose Limited
Amount of Default	2.01 Crore (approx.) (amount claimed)
Date of Order	04-10-2017
Relevant Section	Section 30 and Section 31 of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	The IRP had filed his report on CIRP dated 08th Aug 2017 along with Resolution Plan dated 03rd August 2017 mooted by the Corporate Debtor/Company as

	accepted by Reliance Commercial Finance Limited. The Resolution Plan showed that the proposal made by the Corporate Debtor towards full and final settlement along with their claim has been accepted by the Corporate Debtor in respect of the loan in question. Accordingly, IRP has filed an application before NCLT for approval of the Resolution Plan under Section 31. In meanwhile, Bank of India has raised certain objections to the Resolution submitted by the IRP before the Hon'ble Tribunal. Accordingly, Learned Counsel of the BOI submitted to the Hon'ble Tribunal that there are grave irregularities in the public announcement made by IRP. There was defect in the Constitution of the CoC, details concerning constitution of CoC were filed after expiry of the limitation period prescribed under the IBBI Regulations, there are material defects in the Resolution Plan, the IRP has failed to maintain the updated list of claims etc. The IRP continued to act in his capacity as IRP and held meeting of the creditors after his tenure of 30 days come to an end on 30.07.2017.
Decision of the Tribunal	The Hon'ble National Company Law Tribunal pointed out that there is an obligation casted on the IRP/RP to constitute a committee of creditors after collation of claims received against the Corporate Debtor. However, the objector BOI was not included in the COC despite of the fact that its name figures in the certificate of charge with ROC. Therefore, there is flagrant violation of the provisions of Section 21(2) of the Code. It appears that the IRP was in a hurry even though the Initial period of 180 days as stipulated under Section 12 of the Code was to expire much later. It is further highlighted by Hon'ble Tribunal that 90 days extension is permissible if the AA is satisfied on the application filed by IRP. The term of IRP as per Section 16 (5),

	came to an end on 30th July, 2017. Therefore, NCLT stated that it is unable to approve the Resolution Plan as it fails to confirm the mandatory provisions of the Code and Regulations framed by IBBI. As a sequel to the above discussion, the Hon'ble Tribunal rejected the report along with Resolution Plan and requested the IBBI to appoint new IRP in this matter.

SECTION-60

CASE NO. 16

Bench	National Company Law Tribunal (NCLT), Kolkata Bench, Kolkata
Financial Creditor	RBL Bank Ltd.
Corporate Debtor	MBL Infrastructure Ltd.
Date of Order	18-04-2018
Relevant Section	Rule 15 and Rule 153 0f NCLT Rules 2016 read with Section 60 (6) of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	Exceptional Circumstances beyond control and litigation led to CIRP not being completed in 270 days. Two questions arise for consideration: Firstly, whether this Adjudicating Authority is empowered to extend the time limit prescribed under Section 12 of the Code? If not, whether this Adjudicating Authority has power to exclude the duration of continuation of stay order to Hon'ble Appellate Tribunal and the period rendered for the disposal of interim applications by this Bench during the CIRP? Secondly, whether reconsideration of vote in respect of the approval of the resolution plan already finalized on 22.12.2017 is permissible under the law?

	The Adjudicating Authority(AA) observed that this is a unique case in which a Resolution Plan which has been originally failed for the want of requisite voting percentage as required under sub-section (4) of Section 30 of the Code when put up for reconsideration obtained the required voting share so as to approve the resolution plan by the CoC. The AA noted here that the Resolution Applicant in the application CA (IB)288/KB/2018 not at all prayed for extension of CIR Process period but prayed for exclusion of the period due to pending litigation. Therefore, the question is whether this Adjudicating Authority can exclude the period spent for litigation during the CIRP and consider the plan for approval as if it was filed within time as per Section 12 of the Code. At the outset a reading of Section 12 of the Code and its proviso, it appears that it does not specify any restriction upon the Adjudicating Authority in excluding the period taken for inter party litigation before the conclusion of CIR process. What is prohibited is extension beyond 270 days. It is further noted that in this case, resolution applicant is none other than a promoter/director of the Corporate Debtor who is familiar with the operation of the Corporate Debtor company attempted to convince the then existing CoC to approve his plan by modifying it so as to suit the CoC requirements from 22.06.2017 onwards and ultimately succeeds in his endeavour to convince majority of the Financial Creditors except few so as to see that his company may not go for liquidation but to survive upon the approval of the plan in hand. From a reading of Rules 15 and 153 of NCLT Rules, 2016, the AA drew the understanding that the Tribunal in its discretion from time to time in the interest of justice and for reasons to be recorded, enlarge such period, even though the period fixed by or under these Rules or granted by the Tribunal may have expired.

	This is a case in which so many issues came up for consideration before the Tribunal during the period of CIRP. The CoC has changed the IRP thereby, there is change in IRP. During the consideration of the only one plan of the resolution applicant, an amended Ordinance was notified laying down certain disqualification to promoter directors of a company like the promoter in the case in hand. A clarification was sought for by the resolution applicant before the Bench. Against the order of clarification, two of the Financial Creditors filed appeal before the Hon'ble NCLAT. There was an order of stay restricting the Bench from proceeding further in regard to approval of the plan. The AA observed that in this case CIR Process could not be completed within the statutory period fixed under Section 12 of the Code by the acts beyond control of the applicants and non-exclusion, no doubt would cause grave in justice to the applicant. No specific legal bar enables the Adjudicating Authority to prevent an order of exclusion as prayed for by the resolution applicant. In this case, it appears to the Tribunal that the time period of continuation of the stay order in CA(AT) (Insolvency) No. 330 of 2017 preventing them from approving the plan and the period taken for disposal of CA (IB) 543 of 2017 by this Bench shall be excluded from the 270 days fixed for the conclusion of CIRP. According to Rules 15 and 153 of NCLT Rules, 2016, it appeared to the AA that even in a case if they are satisfied that grave injustice would be occurred if a prayer of extension for a no fault of the applicant is occurred this Adjudicating Authority can extend the time limit provided under Section 12 of the Code. However, the bench was not asked to extend the time limit as provided under Section 12 of the Code but to exclude the period due to litigation and upon the findings by the AA, it held that the exclusion of period due to litigation is liable to be allowed in a case of this

	nature. So, the AA did not hold that it can extend the period of CIRP as prescribed under Section 12 of the Code. The next question that came before the Tribunal was whether reconsideration by dissenting creditor and abstaining the creditor on resolution plan after the time limit of completion of the insolvency process can be allowed? Both Learned Counsel for IDBI and Bank of Baroda raised the question. The Tribunal in answering the earlier question came to a conclusion that the time period due to continuation of the stay order and period due to litigation before this bench shall be excluded. Therefore, total of 106 days should be counted for exclusion. That being excluding 106 days from the 270 days fixed under Section 12 of the Code also expired on 10.04.2018. The AA observed that whether or not a member of CoC can change its mind on a decision once it has been adopted, is within their own power and choice. Two dissenting Financial Creditors out of 20 Financial Creditors alone were challenging the reconsideration of resolution plan. The AA further observed that from a practical standpoint of a prudent man thinking also, if one person wishes to change its mind that is not debarred from changing its mind, why not change stand considering the subsequent change in the circumstances or events. So, the AA did not find any justifiable reason to hold that reconsideration of the resolution plan is bad in law as contended by IDBI and Bank of Baroda.
Decision of the Tribunal	106 days excluded from 270 days and the Resolution Plan approved by the Financial Creditors of CoC with a voting share of 78.5% was hereby approved under Section 31(1) of the Insolvency & Bankruptcy Code, 2016 which will be binding on the Corporate Debtor, its employees, members, creditors, coordinators and other stakeholders involved in the Resolution.

CASE NO. 17

Bench	National Company Law Tribunal (NCLT), Mumbai Bench, Mumbai
Financial Creditor	State Bank of India
Applicant	Mr. Sunil Gopichand Teckchandani & Others
Respondent	Metallica Industries Limited Through IRP
Date of Order	29-10- 2018
Relevant Section	Section 60(5)(c) of the IBC 2016
Facts of the Case	The Miscellaneous Application No.1253 of 2018 is filed by the Applicants under Section 60(5)(c) of the IBC 2016 on behalf of the individuals who have purchased units in a "KamlaIndustrial Park" which is an industrial gala which is located at Kandivali (W). The Applicants purchased these units from a Company bearing name "Metallica Industries Ltd."- the Corporate Debtor. The Corporate Insolvency Resolution Process has been initiated against the Corporate Debtor upon an Application filed the by State Bank of India under Section 7 of the I&B Code, 2016 and IRP had been appointed to conduct the Corporate Insolvency Resolution Process of the Corporate Debtor. The Applicants have filed this present Application against the actions of the Respondent Resolution Professional, whereby he is deliberately preventing the Applicants and other Unit Purchasers from participating in the Corporate Insolvency Resolution Process. Applicant has sought relief to stay the Corporate Insolvency Resolution Process of the Corporate Debtor pending the admission of the claims of the

	Applicants and other Unit Purchasers of the said development project. Applicants had further sought declaration that the constitution of Committee of Creditors of the Corporate Debtor is illegal, unlawful and contrary to the provisions of I&B Code, 2016. **NCLT observations:** In the case of Arcelormittal India Pvt. Ltd. v/s. Satish Kumar Gupta &Ors. in Civil Appeal No.9402-9405 of 2018, the Hon'ble Supreme Court has specifically laid down the law that: *What is important to note is that the committee of creditors shall not approve a resolution plan where the resolution applicant is ineligible under Section 29 A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available. Once approved by the committee of creditors, the resolution plan is to be submitted to the Adjudicating Authority under Section 31 of the Code.* *It is at this stage that a judicial mind is applied by the AA to the resolution plan so submitted, who then, after being satisfied that the plan meets (or does not meet) the requirements mentioned in Section 30, may either approve or reject such plan.* Section 60(5) of the Code, when it speaks of the NCLT having jurisdiction to entertain or dispose off any application or proceeding by or against the Corporate Debtor or Corporate person, does not allow the NCLT with the jurisdiction to interfere at the Applicant's behest at a stage before the submission of the Resolution Plan before the Adjudicating Authority. *By law laid down by the Hon'ble Supreme Court in the Arcelormittal case, it is clear that before approval of the Resolution Plan by the CoC, no Application can be entertained by the Adjudicating Authority under Section 60(5).*

Decision of the Tribunal	In MA 1253 of 2018 Applicant has sought relief of staying the process of CIRP and further sought declaration that constitution of CoC is unlawful is not permissible. *The Application can be entertained by the Adjudicating Authority under Section 60(5) of I&B Code, 2016 only after the approval or disapproval of the Resolution Plan by the CoC.* It is clear that relief sought by the Applicants is not permissible in law at this stage since the Resolution Plan is not yet approved. Therefore, the Application moved at this stage u/s 60(5) of the I&B Code, 2016 is pre-mature, hence liable to be rejected as not maintainable. This MA is disposed off accordingly.

SECTION-66

CASE NO. 18

Bench	National Company Law Tribunal (NCLT), Allahabad Bench, Allahabad
Financial Creditor	IDBI Bank Ltd.
Corporate Debtor	Jaypee Infratech Limited
Date of Order	16-05-2018
Relevant Section	Application made by Resolution Professional under Section 66, 43, 45 and 60(5)(a) read with Section 25(2)(j) of the Insolvency and Bankruptcy Code, 2016 ("I & B Code")
Facts of the Case	Application was filed by Financial Creditors Under Section 7 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 whereby IRP was appointed by Hon'ble

	Supreme Court vide order dated 11th September, 2017 and initiated the Corporate Insolvency Resolution Process under the I & B Code. The Resolution Professional had then filed this application for seeking direction that the transactions entered into by the Promoters and Directors of the Corporate Debtors creating the mortgage of 858 acres of immovable property owned and in possession of the Corporate Debtor, to secure the debt of related parties i.e. Jaiprakash Associates Ltd., by way of mortgage deeds dated 29.12.2016, 12.05.2014, 07.03.2017, 24.05.2016 and 04.03.2016 are the fraudulent and wrongful transactions within the meaning of Section 66 of I & B Code. The directors of the Corporate Debtor had mortgaged 858 acres of land to secure the debt of Jayprakash Associates Limited which is the holding the company of the Corporate Debtor, at the time when the Corporate Debtor itself was in dire need of funds. Further, there are no approvals obtained from the shareholders of the Corporate Debtor as well as the lenders of the Corporate Debtor to mortgage the land in favour of landers of related party. The creation of Mortgage was made without any consideration of economic gain and had not taken place in the ordinary course of business of the Corporate Debtor. Following were the issues for consideration: a) Whether Interim Resolution Professional has authority to file the application? b) Whether the impugned transactions have been carried out with the intent of defraud the creditors of the Corporate Debtor or for any fraudulent purpose and is covered under Section 66 of the I&B Code? c) Whether the impugned transactions are preferential transactions covered under Section 43(2)(a) of the I&B Code or undervalued

	transaction under Section 45 of the Code? d) Whether look back period available for the impugned transactions as per provisions of Section 46(1)(i) is one year or two years?
Decision of the Tribunal	In respect of the issue whether Interim Resolution Professional has authority to file the application - a) Hon'ble Supreme Court vide its order dated 21st March, 2018 has directed the Resolution Professional to proceed with finalising the Resolution Plan. The Supreme Court has further issued the direction to Resolution Professional to proceed and finalise the Resolution Plan but the same shall be implemented after taking the leave from this Court. b) As per Regulation 39(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process of Corporate Persons) Regulations, 2016, he is required to submit to the Committee of Creditors all details of the transactions which fall under Section 43, 45, 50 and 66 of I&B Code. c) Section 25(1) casts a duty upon the Resolution Professional to preserve and protect the assets of the Corporate Debtor, including to continue the business operation of Corporate Debtor. Section 25(2)(j) casts a duty upon Resolution Professional to apply for the avoidance of any such transaction before the Adjudicating Authority by Chapter III of the Code. Therefore it was held that the company application filed by Resolution Professional under Section 43,45 and 66 of I&B Code is allowed. In respect of the issues (b) to (d) – it was observed that : a) 'Security Interest' created by Jaypee Infratech in favour of the lenders of Jaypee Associates was found to be "fraudulent, preferential and undervalued"

	b) The preferential, undervalued and fraudulent transactions undertaken by the management of the Corporate Debtor, were found to be detriment of the corporate creditors (including home buyers) and shareholders. c) The provisions indicate that the retrospective effect is laid down in the legislation itself and is two years preceding the insolvency commencement date for a related party and one year for other than related party. Thus look back period of the transaction is made dependent on the insolvency commencement date and not on the date when the I & B Code came into effect. Therefore, it was held that the impugned transactions are declared as fraudulent, preferential and undervalued transactions as defined under Section 43, 45 and 66 of I & B Code, 2016 and hence, the order was passed to release and discharge the security interest created by Corporate Debtor in favour of lenders of Jaiprakash Associates Limited under the provision of Section 44(c) of I & B Code, 2016. Also passed an order under Section 48(a) of the Code that the properties mortgaged during two years preceding from the date of commencement of CIRP i.e. 9th August, 2017 by way of preferential and undervalued transactions shall deem to be vested in the Corporate Debtor.

APPLICATION BY IRP SEEKING FOR DISCHARGE FROM CIRP

CASE NO. 19

Bench	National Company Law Tribunal (NCLT), Bench III, New Delhi
Operational Creditor	Takkshill Enterprises
Corporate Debtor	IAP Company Private Limited
Date of Order	16-05-2018
Relevant Section	Application made by Insolvency Resolution Professional seeking for discharge from the Corporate Insolvency Resolution Process (CIRP) initiated by the Tribunal by admitting the Company petition filed by Operational Creditor vide its order dated 28.02.2018.
Facts of the Case	Application was filed by Operational Creditor whereby IRP was appointed by Tribunal vide order dated 28th February, 2018 and initiated the Corporate Insolvency Resolution Process under I & B Code, 2016. It was contended by the Resolution Professional that the order was not received by him either by way of email or by way of post till 14th March, 2018. The order was also not uploaded on time. On 15th March 2018, it is further stated that a representative was sent by IRP to collect the free copy. However, on receipt of the copy of the order, the Insolvency Resolution Professional sent an email on 17th March, 2018 to the advocate for Operational Creditor and the Registrar of the Tribunal, expressing the inability of Insolvency Resolution Professional to continue as IRP and that the consent given be treated as withdrawn due to unavoidable circumstances. IBBI having been impleaded as party to this application, IBBI has filed a detailed reply wherein it

	has been stated that the Application is not justified as it lacks merit since the issue raised is based upon an incorrect understanding of law. In accordance with the guidelines of December, 2017, the Board prepared the panel of IPs for appointment as IRP or Liquidator and has shared the Panel with the Tribunal. Further, the said Panel has validity of 6 months and that a new panel replaces the earlier panel. It is further pointed out that the affidavit submitted as reply, the reasons given was of inability to devote adequate time to the subject assignment and hence the reason for discharge given by IRP was contradictory and non maintainable. In furtherance to this, OC has also made an application to Tribunal to issue appropriate directions to the IRP or for appointment of new IRP and in addition, the new application was filed for appointment, mentioning the name of IRP. Therefore, an issue for consideration was whether Insolvency Resolution Professional can make an application to seek for discharge from CIRP initiated by Tribunal.
Decision of the Tribunal	The Tribunal had considered the pleas made in the application filed by IRP appointed by Tribunal vide its order dated 28th February, 2018, the reply filed by IBBI and application filed by Operational Creditor and was of the opinion that the unprofessional action of IRP has virtually made the CIR Process initiated by this Tribunal as a non-starter. Tribunal referred to the Paragraph of Chapter 4.4 of the Report of Bankruptcy Law Reforms Committee Volume I, Rationale and Design 2015 extracted herein below to describe where the success of IBC rests: "The role of the IP's, thus vital to the efficient operation of the insolvency and bankruptcy resolution process. A well functioning system of resolution driven by IPs enables the adjudicator to delegate more and

	more powers and duties to the Professionals. This creates the positive externality of better utilisation of judicial time. The worse the performance of IPs, the more the adjudicator may need to personally supervise the process, which in turn may cause inordinate delays. Consumers in a well functioning market for IPs are likely to have greater trust in the overall insolvency resolution system. On the other hand, poor quality services and recurring instances of malpractice and fraud, erode consumer trust." Tribunal rejected the application made by Insolvency Resolution Professional with costs of Rs. 50,000 payable to Insolvency and Bankruptcy Fund or in the absence of this fund to the credit of Prime Minister's Relief Fund. Further, it has directed the IRP to commence the performance of his duties. In furtherance to above, due to unprofessional act, Tribunal directed IBBI to take such action against the IRP as contemplated under various Regulations as framed by it in relation to IP and IPA empanelled with it.