Series 3

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

Committee on Insolvency & Bankruptcy Code
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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Foreword

The Insolvency and Bankruptcy Code, 2016, since its implementation over the last three years has offered a much awaited successful structure for the Corporate Insolvency Resolution Process (CIRP) in the country. Creditors and Debtors both opted for the resolution process as provided under the Code. As per the data of Insolvency and Bankruptcy Board of India (IBBI), as on March 2020, Operational Creditors triggered about 50% of the CIRPs, followed by about 44% by Financial Creditors and remaining by the Corporate Debtors.

Since the Code is continuously evolving to streamline the processes in sync with the emerging scenario, the judgements as pronounced under the Code to provide clarification on various issues become all the more important to understand the aspects in operationalization of the provisions under the Code.

I compliment the Committee on Insolvency & Bankruptcy Code (CIBC) of ICAI and Indian Institute of Insolvency Professionals of ICAI (IIIPI) for taking this continued initiative of bringing out the series of the publication "Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016" to help professionals understand the application and intricacies of the provisions of the Code. The Series 1 and Series 2 of the publication were earlier published and now the Series 3 is being brought out by the Committee.

I congratulate the entire Committee and especially the efforts put in by CA. Anil Satyanarayan Bhandari, Chairman, and CA. Pramod Kumar Boob, Vice-Chairman, Committee on Insolvency & Bankruptcy Code in bringing out this Series 3 of the publication.

I am confident that this Series 3 of the publication would also be of great help to the members, especially to insolvency professionals and other stakeholders.

CA. Atul Kumar Gupta
President ICAI

Date: 27-06-2020

Place: New Delhi

Preface

The Insolvency and Bankruptcy Code, 2016 has built a strong ecosystem in the insolvency resolution sphere in the country.

Significant improvements have been registered by India for the indicator 'Resolving Insolvency', in World Bank's Doing Business Report, 2020. As per that Report, the time taken for resolving insolvency in India has also come down significantly from 4.3 years to 1.6 years. The Code that provides for a time-bound process for speedy disposal and also the manner for maximization of value of assets has been continuously instrumental in the country's performance in the overall ranking for the last few years in the said World Bank Report.

To enhance efficiency of the processes prescribed and for effective functioning, the Code has been amended four times since its enactment. The Regulations thereunder were also amended time to time to take care of the implementation issues.

One of the significant accomplishments of the Code has been the various judicial pronouncements made under the Code. These judgements are an important repository to understand the question of law and the underlying principles.

The Committee on Insolvency & Bankruptcy Code of ICAI aims to bring in awareness about this new area of practice in the insolvency resolution area to the members at large and facilitates in educating the members on the practical aspects and procedures of the Law.

As part of its initiative towards knowledge dissemination, the Committee on Insolvency & Bankruptcy Code jointly with Indian Institute of Insolvency Professionals of ICAI (IIIPI) had decided to bring out the publication on Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016 in the form of a series. The Series 1 and Series 2 of the publication were earlier published. The Series 3 of the publication is being brought out now by the Committee.

This series of the publication also like the earlier two series 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 sincerely thank the President of ICAI and Director IIIPI, CA. Atul Kumar Gupta and Vice President of ICAI, CA. Nihar Niranjan Jambusaria for their encouragement and support in all the endeavours of the Committee.

We express our gratitude towards the Board of IIIPI comprising of Shri Ashok Haldia, Chairman, IIIPI and other Directors, Ms. Rashmi Verma, Shri Ajay Mittal, Shri Satish Kashinath Marathe, CA. Prafulla P Chhajed, Past President, ICAI, CA. Durgesh Kumar Kabra, Central Council Member, ICAI, CA. Hans Raj Chugh, Central Council Member, ICAI, CA. Rahul Madan, Managing Director, IIIPI and Shri Sunil Pant, CEO, IIIPI for joining in this initiative.

We would like to thank all the Committee Members for their support and guidance in bringing out this Series 3 of the publication.

We would like to appreciate and thank our contributors CA. Prasad Dharap, CA. Tejas Jatin Parikh, CA. Rajneesh Singhvi, CA. Prashant Agrawal and CA. Abhishek Garg for summarising and analysing the Cases.

We extend our appreciation to Ms. S. Rita, Secretary, Committee on Insolvency & Bankruptcy Code, ICAI, CA. Sarika Singhal, Dy. Secretary, ICAI and Shri Susanta Kumar Sahu, COO, IIIPI for their contribution and efforts in putting together the Case Analysis.

We are sure that the members of the profession, industries and other stakeholders will find the Series 3 of the publication immensely useful.

CA. Anil Satyanarayan Bhandari
Chairman
Committee on Insolvency & Bankruptcy Code, ICAI

CA. Pramod Kumar Boob
Vice- Chairman
Committee on Insolvency & Bankruptcy Code, ICAI

Date: 27-06-2020

Contents

1. Orders passed by Supreme Court of India

2. Orders passed by High Courts

3. Orders passed by National Company Law Appellate Tribunal

4. Orders passed by National Company Law Tribunal

Chapter 1

Orders passed by Supreme Court of India

SECTION 3

CASE NO. 1

JK Jute Mill Mazdoor Morcha (Appellant)

Vs.

Juggilal Kamlapat Jute Mills

Company Ltd. Through its Director

& Ors. (Respondents)

Civil Appeal No. 20978 of 2017

Date of Order: 30-04-2019

Section 3(23) of The Insolvency and Bankruptcy Code, 2016

Rule 6, Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

Facts:

The Appeal raised an important question as to whether a trade union could be an operational creditor for the purposes of the Insolvency and Bankruptcy Code, 2016.

The Union had initiated insolvency proceedings against the Debtor by issuing a demand notice on behalf of approximately three thousand (3000) workers for payment of their outstanding dues. In adjudicating the dispute, the National Company Law Tribunal took the view that a trade union is not covered under the definition of operational creditor under the Code and dismissed the Union's application. Thereafter, the National Company Law Appellate Tribunal (the "NCLAT") also dismissed the Union's appeal and observed that each worker must file an individual application. The learned Senior Advocates appearing on behalf of respondent No.1 supported the NCLAT judgment and opined that each claim of each workman is a separate

cause of action in law, and therefore, a separate claim for which there are separate dates of default of each debt. This being so, a collective application under the rubric of a registered trade union would not be maintainable.

Decision:

The Supreme Court, however, referred to provisions of the Trade Unions Act while reading the Insolvency and Bankruptcy Code and I&B (Application to Adjudicating Authority) Rules. The Court held that,

"….a trade union is certainly an entity established under a statute – namely, the Trade Unions Act, and would therefore fall within the definition of "person" under Sections 3(23) of the Code. This being so, it is clear that an "operational debt", meaning a claim in respect of employment, could certainly be made by a person duly authorised to make such claim on behalf of a workman."

Further the Court quoted, "we are of the view that instead of one consolidated petition by a trade union representing a number of workmen, filing individual petitions would be burdensome as each workman would thereafter have to pay insolvency resolution process costs, costs of the interim resolution professional, costs of appointing valuers, etc. under the provisions of the Code read with Regulations 31 and 33 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Looked at from any angle, there is no doubt that a registered trade union which is formed for the purpose of regulating the relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members. We must never forget that procedure is the handmaid of justice, and is meant to serve justice."

The Hon'ble Court delivering its judgement said, "The NCLAT, by the impugned judgment, is not correct in refusing to go into whether the trade union would come within the definition of "person" under Section 3(23) of the Code. Equally, the NCLAT is not correct in stating that a trade union would not be an operational creditor as no services are rendered by the trade union to the corporate debtor. What is clear is that the trade union represents its members who are workers, to whom dues may be owed by the employer, which are certainly debts owed for services rendered by each individual workman, who are collectively represented by the trade union. Equally, to state that for each workman there will be a separate cause of action, a separate claim, and a separate date of default would ignore the fact that a

joint petition could be filed under Rule 6 read with Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, with authority from several workmen to one of them to file such petition on behalf of all. For all these reasons, we allow the appeal and set aside the judgment of the NCLAT."

Relying on the foregoing reasons, the SC allowed the Union's appeal and remanded the matter to the NCLAT to decide the appeal on merits expeditiously.

SECTION 7

CASE NO. 2

Jaiprakash Associates Ltd & Anr. (Appellant)

Vs.

IDBI Bank Ltd. & Anr.(Respondents)

D. No. 27229/2019

With

Civil Appeal No. 6486 of 2019

Date of Order: 06-11-2019

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

Facts:

NCLAT has earlier granted relief as sought for by the IDBI Bank to exclude period from 17th September, 2018 till 4th June, 2019 for the purpose of counting 270 days Corporate Resolution Process period and issued consequential directions.

In the appeal filed by Jaiprakash Associates Ltd (JAL), two principal questions of law have been urged. The first is as to whether the NCLAT had power or authority in law to exclude 90 days from the statutory period of the CIRP. The second question was, as to whether despite rejection of resolution plans of Suraksha Realty and NBCC by the CoC on 5th May, 2019 and 10th June, 2019 respectively, could the NCLAT, after excluding 90 days period from the total CIRP period, again start the CIRP afresh by allowing the two bidders to submit their revised resolution plans and/or invite fresh resolution plan from eligible persons and to call upon the CoC to reconsider the same, if so required, after negotiations. The home buyers' Association, in its appeal have also questioned the power of NCLAT to disregard the mandatory provisions of I & B Code and to issue directions for inviting fresh resolution plans after expiry of the statutory period for completion of the CIRP.

It is also a fact that should be remembered that during the arguments, there has been complete unanimity between all the stakeholders including the appellants before this Court that the liquidation of JIL (Jaypee Infratech Ltd)

must be eschewed as it would do more harm to the interests of the stakeholders, in particular the large number of home buyers, who aspire to have their home at the earliest.

Decision:

Considering the position taken by the stakeholders the Apex Court felt that it is necessary to exercise power under Article 142 of the Constitution of India to salvage the situation and provide for a wholesome solution which will protect the interests of all concerned and in particular of large number of home buyers who have voting share of 62.3% being constituent of CoC. Hon'ble Court felt that it may not be appropriate nor necessary to dilate on the submissions made across the Bar by the concerned parties and to answer the questions of law urged by the appellants noted hitherto. Also the fact that the recent amendment to the I & B Code has come into effect were considered, whereby amendment of Section 12 to freeze or peg the maximum period of CIRP to 330 days from the insolvency commencement date which in this case must be taken as 9th August, 2018 in light of the direction given in the case of *Chitra Sharma.* The Court also considered that several amendments were made to the I & B Code from time to time & noted that the Legislature has also continually worked upon introducing changes to the I & B Code so as to address the problems faced in implementation of the new legislation introduced as recently as in 2016. The case on hand was a classic example of how the entire process has got embroiled in litigation initially before this Court and now before the NCLT and NCLAT respectively, because of confusion or lack of clarity in respect of foundational processes to be followed by the CoC. That becomes evident from the time consumed by IRP or the adjudicating and appellate authority to remove the doubts on matter such as how the vote share of CoC be computed on account of inclusion of allottees/home buyers as financial creditors. The home buyers have also expressed some doubt about their status as secured creditors. All these issues are being ironed out by the adjudicating authority. It is also a matter of record that NCLT was functioning only on two days of the week and when it took decision on the application for clarification, there was difference of opinion between the members which was then required to be resolved by the President of the NCLT. It is not a case where one party was trying to march over the other by resorting to unnecessary or avoidable litigation. The fact remains that the application for clarification made by the home buyers on 17th September 2018 at the earliest opportunity after commencement of the

resolution process pursuant to the order dated 9th August, 2018 passed by this Court in *Chitra Sharma*, remained pending for quite some time. That delay is attributable to the law's delay. Neither the home buyers nor the other financial creditors can be blamed for the pendency of the proceedings before the NCLT and later on before the NCLAT. The NCLT realizing the uncertainty in resolving the said issue, wanted to proceed with the resolution plan subject to the outcome of the pending IA as is manifest from its order dated 6th May, 2019. Even that became subject matter of challenge in the appeal filed by the IDBI before the NCLAT which was finally disposed of vide the impugned judgment. In view of the legislative changes referred to above, the Apex Court said that the Court was of the considered opinion that it need to and must exercise the plenary powers to make an attempt to revive the corporate debtor, which otherwise is exposed to liquidation process. Court was inclined to do so because the project has been implemented in part and out of over 20,000 home buyers, a substantial number of them have been put in possession and the remaining work is in progress and in some cases at an advanced stage of completion. In this backdrop, it would be in the interest of all concerned to accept a viable plan reflecting the recent legislative changes. Thus 90 days extended period was granted for completion of CIRP in which 45 days were to be utilised in accepting revised Resolution plan from the earlier final bidders and remaining 45 days were to be utilised for removing any difficulty and passing of appropriate order by the Adjudicating Authority.

It was also mentioned that the directions issued are under exceptional situation and should not be used as precedents. Also the Apex Court expressed "This order may not be construed as having answered the questions of law raised in both the appeals, including as recognition of the power of the NCLT / NCLAT to issue direction or order not consistent with the statutory timelines and stipulations specified in the I & B Code and Regulations framed thereunder".

Case Review: Order dated 30th July 2019 of NCLAT in IDBI Bank & Ors. Vs. Mr. Anuj Jain IRP, Company Appeal (AT) (Insolvency) No.536 & 708 of 2019, was upheld.

SECTION 7

CASE NO. 3

Jignesh Shah & Anr. (Petitioners)

Vs.

Union of India & Anr. (Respondent)

Writ Petition (Civil) No.455 of 2019

With

Civil Appeal No. _____ of 2019

(Arising out of Special Leave Petition (Civil) No. _____of 2019

(Diary No.13468 of 2019)

With

Transfer Petition (Civil) No.817 of 2019

With

Civil Appeal No. 7618-19 of 2019

(D. No.16521 of 2019)

With

Writ Petition (Civil) No.645 of 2019

Date of Order: 25-09-2019

Section 7 of the Insolvency and Bankruptcy code, 2016(IBC)

Section 433 and 434 of the Companies Act, 1956

Article 137 of the Limitation Act, 1963

Facts:

A Share Purchase Agreement was executed between Multi-Commodity Exchange India Limited (MCX), MCX Stock Exchange Limited (MCX-SX) and IL&FS Financial Services Ltd.(IL&FS) on 20.08.2009. As per the said Agreement, IL&FS agreed to purchase 442 lakh equity shares of MCX-SX

from MCX. After this Agreement, La-Fin Financial Services Pvt. Ltd. (La-Fin), a group company of MCX, gave a Letter of Undertaking to IL&FS stating that La-Fin or its appointed nominees would offer to purchase from IL&FS the shares of MCX-SX after a period of one year, but before a period of three years, from the date of investment. This period of three years expired in August, 2012. IL&FS communicated via a letter to La-Fin to purchase the equity shares in MCX-SX pursuant to the Letter of Undertaking. La-Fin in response replied that there was no legal or contractual obligation for it to buy back the equity shares. Correspondence for settlement continued between the parties and continued for almost 10 months.

Thereafter, a suit came to be filed by IL&FS before the Hon'ble Bombay High Court for specific performance of the said Letter of Undertaking. The date of cause of action for the suit was mentioned as 16.08.2012, the date on which La-Fin denied the obligation. The Hon'ble High Court while passing an injunction order restrained La-Fin from alienating its assets till the pendency of the proceedings before the Hon'ble Court. It was further directed that the properties of La-Fin be attached by the Economic Offences Wing of the Mumbai Police during pendency of the suit. Appeal of La-Fin challenging the injunction order was dismissed by the Hon'ble Bombay High Court.

On 03.11.2015, statutory notice under Section 433 and 434 of the Companies Act, 1956 was issued by IL&FS against La-Fin. The notice stated that an amount of Rs. 232,50,00,000/- is recoverable from La-Fin. La-Fin replied to the notice disputing the averment that any amount due is due or payable to IL&FS.

Subsequently, a winding up petition was filed by IL&FS against La-Fin in the Hon'ble Bombay High Court under Section 433(e) of the erstwhile Companies Act, 1956 for the reason that La-Fin had become commercially insolvent and was unable to pay its debt. Thereafter coming into force of Insolvency and Bankruptcy Code, 2016, the matter was transferred to the NCLT under Section 7 of the Code with La-Fin as the Corporate Debtor and IL&FS as the Financial Creditor. The NCLT admitted the application of the Financial Creditor and aggrieved by the same, the Corporate Debtor approached the NCLAT which dismissed the appeal. The NCLAT observed that the transaction between the Financial Creditor and the Corporate Debtor constituted a financial debt and therefore, the bar of limitation would not be applicable in the present factual matrix as the winding up petition was filed within 3 years from the date of Insolvency and Bankruptcy Code, 2016

coming into force. As a result, writ petition challenging the constitutionality of certain provisions of the Insolvency and Bankruptcy Code, 2016 came to be filed before the Hon'ble Supreme Court of India. A separate writ petition was filed against the order of the NCLAT whereby winding up proceedings were initiated against the Corporate Debtor.

Decision:

It was observed by the Hon'ble Supreme Court that the introduction of Section 238A in the Insolvency and Bankruptcy Code, 2016 provides that the provisions of the Limitation Act, 1963 became applicable to all the applications made under the Code. For the winding up petitions filed before the coming into force of Insolvency and Bankruptcy Code, 2016, such petitions would be converted to be applications filed under the Code. It was clarified by the Hon'ble Court that if any suit for recovery is filed before the winding up petition, in such a scenario the period of limitation for the winding up suit will neither be increased nor be revived. The date for both the suits will be calculated from the date of default itself as once the time begins to run, it can only be extended in consonance with the provision of the Limitation Act and not otherwise. The Hon'ble Court further pointed out upon perusal Section 433(e) read with Section 434 of the erstwhile Companies Act, 1956, the trigger point for the purpose of limitation for filing of a winding up suit under the said Sections would be the date on which default of payment was made.

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

Case Review:

The impugned order of NCLAT *set aside*.

SECTION 61

CASE NO. 4

M/s Embassy Property Developments Pvt. Ltd. (Appellants)

Vs.

State of Karnataka & Ors. (Respondents)

Civil Appeal No. 9170 of 2019
(@ Special Leave Petition (C) No. 22596 of 2019)
With

Civil Appeal No. 9171 of 2019
(@ Special Leave Petition (C) No. 22684 of 2019)
And

Civil Appeal No. 9172 of 2019
(@ Special Leave Petition (C) No. 22724 of 2019)

Date of Order: 03-12-2019

Section 238 read with Section 61 of Insolvency and Bankruptcy Code, 2016 read with Article 226/227 of the Constitution of India, Sections 408 and 410 of the Companies Act, 2013 - Provisions of IBC to override other laws - NCLT can exercise only such powers within the contours of jurisdiction as prescribed by the statute, the law in respect of which, it is called upon to administer – Wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right – NCLT did not have jurisdiction to entertain an application against the Government of Karnataka for a direction to execute Supplemental Lease Deeds for the extension of the mining lease - NCLT has jurisdiction to enquire into allegations of fraud and as a corollary, NCLAT will also have jurisdiction - Hence, fraudulent initiation of CIRP cannot be a ground to bypass the alternative remedy of appeal provided in Section 61.

Following two seminal questions/issues, which are important and having a strong influence on later developments, are under consideration in the three appeals:

1. Whether the High Court ought to interfere, under Article 226/227 of the Constitution, with an Order passed by the National Company Law Tribunal in a proceeding under the Insolvency and Bankruptcy Code, 2016, ignoring the availability of a statutory remedy of appeal to the National Company Law Appellate Tribunal and if so, under what circumstances; and

2. Whether questions of fraud can be inquired into by the NCLT/NCLAT in the proceedings initiated under the Insolvency and Bankruptcy Code, 2016.

Brief background facts (For Question No. 1 above)

NCLT Chennai Bench admitted an application on 12.03.2018 moved by M/s Udhyaman Investment Pvt. Ltd. under Section 7 of IBC, 2016 against M/s. Tiffins Barytes Asbestos & Paints Ltd. for initiation of Corporate Insolvency Resolution Process (CIRP). As the mining lease granted by the Govt. of Karnataka to expire by 25.05.2018, the Resolution Professional (RP) requested the Director of Mines & Geology seeking the benefit of deemed extension of the lease beyond 25.05.2018 up to 31.03.2020 in terms of Mines & Minerals (Development and Regulation) Act, 1957 (MMDR Act,1957). Meanwhile, Govt. of Karnataka passed an order dated 26.09.2018 rejecting the proposal for deemed extension. However, by an Order dated 11.12.2018, NCLT Chennai allowed the Miscellaneous Application filed by RP setting aside the Order of the Government of Karnataka on the ground that the same was in violation of the moratorium declared on initiation of CIRP and directed the Government of Karnataka to execute Supplement Lease Deeds in favour of the Corporate Debtor for the period up to 31.03.2020.

Aggrieved by the order of the NCLT, Chennai Bench the Government of Karnataka moved a writ petition in WP No.5002 of 2019, before the High Court of Karnataka. By an Order dated 22.03.2019, the High Court of Karnataka set aside the Order of the NCLT and remanded the matter back to NCLT for a fresh consideration. On 03.05.2019, the NCLT set aside the order of rejection and directed the Govt. of Karnataka to execute Supplemental Lease Deeds. The order of NCLT was challenged by Karnataka Govt. in the High Court. The High Court granted a stay of operation contained in the

Order of NCLT. As against the interim order of High Court the Resolution Applicant, the Resolution Professional and the Committee of Creditors have come up with the present three appeals.

Supreme Court held as follows:

It is beyond any doubt that IBC, 2016 is a complete Code in itself. It is an exhaustive code on the subject matter of insolvency in relation to corporate entities and others. It is also true that IBC, 2016 is a single Unified Umbrella Code, covering the entire gamut of the law relating to insolvency resolution of corporate persons and others in a time bound manner. The code provides a three tier mechanism namely (i) the NCLT, which is the Adjudicating Authority (ii) the NCLAT which is the appellate authority and (iii) this Court as the final authority, for dealing with all issues that may arise in relation to the reorganization and insolvency resolution of corporate persons.

Jurisdiction and the powers of the High Court under Article 226

Traditionally, the jurisdiction under Article 226 was considered as limited to ensuring that the judicial or quasi-judicial tribunals or administrative bodies do not exercise their powers in excess of their statutory limits. But in view of the use of the expression “any person” in Article 226 (1), Courts recognized that the jurisdiction of the High Court extended even over private individuals, provided the nature of the duties performed by such private individuals, are public in nature. Therefore, the remedies provided under Article 226 are public law remedies, which stand in contrast to the remedies available in private law.

Further, the distinction between the lack of jurisdiction and the wrongful exercise of the available jurisdiction, should certainly be taken into account by High Courts, when Article 226 is sought to be invoked bypassing a statutory alternative remedy provided by a special statute.

On the basis of this principle, whether in the present case of the State of Karnataka fell under the category of (1) lack of jurisdiction on the part of the NCLT to issue a direction in relation to a matter covered by MMDR Act, 1957 and the Statutory Rules issued thereunder or (2) mere wrongful exercise of a recognized jurisdiction.

The MMDR Act, 1957 is a Parliamentary enactment. In this case, the land which formed the subject matter of mining lease belongs to the State of Karnataka. The mining lease was issued to Corporate Debtor in accordance

with the statutory rules namely Mineral Concession Rules, 1960. Therefore, the relationship between the Corporate Debtor and the Government of Karnataka under the mining lease is not just contractual but also statutorily governed. The decision of the Government of Karnataka to refuse the benefit of deemed extension of lease, is in the public law domain and hence the correctness of the said decision can be called into question only in a superior Court which is vested with the power of judicial review over administrative action. The NCLT, being a creature of a special statute to discharge certain specific functions, cannot be elevated to the status of a Superior Court having the power of judicial review over administrative action.

The NCLT is not even a Civil Court, which has jurisdiction by virtue of Section 9 of the Code of Civil Procedure to try all suits of a civil nature excepting suits, of which their cognizance is either expressly or impliedly barred. Therefore NCLT can exercise only such powers within the contours of jurisdiction as prescribed by the statute, the law in respect of which, it is called upon to administer.

Jurisdiction and powers of NCLT

NCLT and NCLAT are constituted, not under the IBC, 2016 but under Sections 408 and 410 of the Companies Act, 2013. Without specifically defining the powers and functions of the NCLT, Section 408 of the Companies Act, 2013 simply states that the Central Government shall constitute a National Company Law Tribunal, to exercise and discharge such powers and functions as are or may be, conferred on it by or under the Companies Act or any other law for the time being in force. Insofar as NCLAT is concerned, Section 410 of the Companies Act merely states that the Central Government shall constitute an Appellate Tribunal for hearing appeals against the Orders of the Tribunal. The matters that fall within the jurisdiction of the NCLT, under the Companies Act, 2013 lie scattered all over the Companies Act. Therefore, Sections 420 and 424 of the Companies Act, 2013 indicate in broad terms, merely the procedure to be followed by the NCLT and NCLAT before passing orders.

There are no separate provisions in the Companies Act, exclusively dealing with the jurisdiction and powers of NCLT. However, sub-sections (4) and (5) of Section 60 of IBC, 2016 give an indication respectively about the powers and jurisdiction of the NCLT. Sub-section (4) of Section 60 of IBC, 2016 states that the NCLT will have all the powers of the DRT as contemplated

under Part III of the Code for the purposes of Sub-section (2). Sub-section (2) deals with a situation where the insolvency guarantor or personal guarantor of a corporate debtor is taken up, when CIRP or liquidation proceeding of such a corporate debtor is already pending before NCLT.

Therefore in the light of the statutory scheme as culled out from various provisions of the IBC, 2016, it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right.

Therefore, the NCLT did not have jurisdiction to entertain an application against the Government of Karnataka for a direction to execute Supplemental Lease Deeds for the extension of the mining lease. Since NCLT chose to exercise a jurisdiction not vested in it in law, the High Court of Karnataka was justified in entertaining the writ petition, on the basis that NCLT was *coram non judice.*

Whether NCLT is competent to enquire into allegations of fraud, especially in the matter of the very initiation of CIRP

In the present appeals Government of Karnataka chose to challenge the order of the NCLT before the High Court under Article 226 , without taking recourse to the statutory alternative remedy of appeal before the NCLAT, due to the fraudulent and collusive manner in which the CIRP was initiated by one of the related parties of the Corporate Debtor themselves. The appellants objected to this as Section 65 of IBC specifically deals with fraudulent or malicious initiations of proceedings. Not only that even fraudulent trading carried on by the Corporate Debtor during the insolvency resolution, can be inquired into by the Adjudicating Authority under Section 66.

Therefore, it is clear that NCLT has jurisdiction to enquire into allegations of fraud. As a corollary, NCLAT will also have jurisdiction. Hence, fraudulent initiation of CIRP cannot be a ground to bypass the alternative remedy of appeal provided in Section 61.

Conclusion

The upshot of the above discussion is that though NCLT and NCLAT would have jurisdiction to enquire into questions of fraud, they would not have jurisdiction to adjudicate upon disputes such as those arising under MMDR Act, 1957 and the rules issued thereunder, especially when the disputes

revolve around decisions of statutory or quasi-judicial authorities, which can be corrected only by way of judicial review of administrative action. Hence, the High Court was justified in entertaining the writ petition and there is no reason to interfere with the decision of the High Court. Therefore, the appeals are dismissed.

Case Review:

Decision of the High Court of Karnataka, *upheld*.

SECTION 238

CASE NO. 5

Municipal Corporation of Greater Mumbai (MCGM) (Appellants)

Vs.

Abhilash Lal & Ors. (Respondents)

Civil Appeal No. 6350 of 2019

Date of Order: 15-11-2019

Section 238 of Insolvency & Bankruptcy Code, 2016 read with Section 92 of the MMC Act - Provisions of IBC to override other laws - Issue before this Court was whether the provisions of the Code override all other laws –Section 238 could be of importance when the properties and assets are of a debtor and not when a third party is involved - Hence, appeal is allowed.

The Municipal Corporation of Greater Mumbai (MCGM) appeals under Section 62 of the Insolvency and Bankruptcy Code, 2016 against the order of the National Company Law Appellate Tribunal (NCLAT) rejecting its plea with respect to a resolution plan approved by the National Company Law Tribunal, Hyderabad Bench (NCLT) under the provisions of the Code, 2016.

Brief facts of the case are as under:-

Seven Hills Healthcare (P) Ltd. (Seven Hills) entered into a contract on 20.12.2005 with the Municipal Corporation of Greater Mumbai (MCGM) to develop four plots of land (called lands) (which were to be leased for 30 years by MCGM) in Andheri (East) to construct a 1500 bed hospital. MCGM stipulated several conditions including completion of the construction in 60 months (excluding monsoons). The project, however, could not be completed by end of the sixty months i.e. 24.04.2013. Thus, the lease deed that had to be executed within a month after completion of Project was not executed. Further, as Seven Hills defaulted in payment of lease rent, the MCGM issued a show cause notice (SCN) on 23rd January, 2018, proposing termination of the contract/agreement.

Due to Seven Hills' inability to repay its debts, the Axis Bank initiated insolvency proceedings against it. The petition was admitted by NCLT, Hyderabad Bench on 13.03.2018 and the first respondent was appointed as

Resolution Professional. During the process of Corporate Insolvency, the revised resolution plan submitted by Dr. Shetty's New Medical Centre (SNMC) was approved by CoC on 4th September, 2018.

In terms of revised resolution plan, the necessary finance to be secured by hypothecation/ mortgage of Seven Hills properties. The Plan, apart from payment of Rs. 102.3 crore to MCGM as against it total claim of Rs.140.88 crore, would honor the terms of the agreement entered into by Seven Hills. Initially, the MCGM was agreeable to the resolution plan. However, later on, it opposed the resolution plan, arguing that being a public body as well as a planning authority, it had to comply with the provisions of the Mumbai Municipal Corporation Act, 1888 (MMC Act), which meant that all action and approval had to be taken by the Improvement Committee of the Corporation.

Further, it was stated that the Show Cause Notice (SCN) dated 23rd January, 2018 had been already issued by MCGM proposing to terminate the contract (with Seven Hills). As there was no response to it and in the absence of a lease, the provisions of Section 14(1) (d) of the Code could not prevent the MCGM from terming the agreement. As the period of CIRP, even after extension of 90 days u/s 12(3) of the Code, came to an end on 07.12.2018, the CIRP has lapsed by efflux of time.

The NCLT held that the plan filed met the requirements of Section 30(2) of the Code, and Regulations 37, 38, 38(IA) and 39(4) of IBBI (CIRP) Regulations, 2016. It also did not contravene any of provisions of Section 29A and was approved unanimously by Committee of Creditors (CoCs). Accordingly, it passed the order under Section 31(1) for approval of the resolution plan.

MCGM approached the Appellate Tribunal, against the impugned order of NCLT on the grounds *inter-alia,* (i) the conditions stipulated in the contract entered with Seven Hills had not been complied with and (ii) there was no lease deed and consequently no interest inured in the land, in favour of the Corporate Debtor. Further, the mandatory provisions of MMC Act i.e. authorization by the corporation for transfer/creation of interest in land had not been complied with. Thus, the plan approved by NCLT for creation of charge on lands was not enforceable against MCGM. However, NCLAT was of the opinion that there was no scope for interference with the order of NCLT.

Learned senior counsel of MCGM argued that as no lease deed was executed in favour of Seven Hills, MCGM was the undeniable owner of the land. The Resolution with regard to the lease deed had to be necessarily dealt with in accordance with law. Further, he underlined that the written submissions filed on behalf MCGM could not be construed as an admission, or that MCGM was bound to agree to the proposal. On account of non-compliance of conditions stipulated in the contract, a SCN terminating the contract prior to initiation of proceedings was served. Hence, there was no subsisting of lease.

The counsel on behalf of Resolution Professional (RP) argued that MCGM in their written submissions made on 28.11.18, 29.04.19 and 14.05.19 had categorically consented to the resolution plan approved by NCLT. Similarly, the Appellate Tribunal, after hearing the submissions of MCGM that it had no objections to the resolution plan, affirmed it. In the circumstances, counsel argues that the appeal is not maintainable.

MCGM's contentions that no Interest or leasehold rights in the land were created in favour of the Corporate Debtor, is not correct as is evident from its letters and application to the NCLT where it admitted that the lands were leased to the Corporate Debtor. In fact, in its application filed before NCLT, MCGM claimed that the lease was a capital or finance lease and the unpaid lease rentals were a financial debt within the meaning of the Code. He further argued even if it assumed that no leaseholds rights were created favouring 'CD', the approved resolution plan does not create any such rights in favour of SNMC. The plan merely envisages a change in shareholding of 'CD' and does not transfer of MCGM's assets to SNMC. Further, resolution plan absolutely is unconditional in nature and in no manner contingent on the resolution of the dispute with MCGM. Any dispute with MCGM in relation to the lease of the land has no bearing on the validity of the resolution plan, under Section 31 of the Code. Moreover, the approved resolution plan binds MCGM as a stakeholder in the Corporate Debtor.

Learned Counsel appearing on behalf of CoCs argued that the question of obtaining any approval u/s 92A MMC Act for creation of charge did not arise because the terms of the contract, which in fact amounted to a lease (as it was a registered instrument and MCGM had received over 10 crores as initial lease consideration). Furthermore, that the reliance on Section 92 of the MMC Act is misguided as it seeks to superimpose provisions of the MMC Act

on the provisions of the Code. This is clearly impermissible in terms of the non-obstante provision contained in Section 238 of the Code.

The learned senior counsel for SNMC argued that SNMC never represented that it would mortgage or obtain any loan on the strength of the lease. He pointed to the terms of the resolution plan and submitted that they were subject to MCGM's obligations to follow the law. He further submitted that the proposed plan contemplates compliance with the various conditions of the contract agreement. In any case, Section 92 of the MMC Act that prescribes the manner in which disposal of land belonging to the appellant would take place, has no bearing on the validity of the resolution plan as the same does not contemplate any disposal of the said lands. It is merely the shareholding of the Corporate Debtor which undergoes a change pursuant to the resolution plan. MCGM cannot place any embargo on such shareholding changes by resorting to proceeding under the Code. Hence, there is no question of violation of Section 92 of the MMC Act.

Now, on perusal of the contract/ agreement entered into MCGM with SevenHills it is evident that the lease deed was to be executed after the completion of the project subject to the following conditions:

(a) the project period was for 60 months starting from the date excluding the monsoon period;

(b) Seven Hills could mortgage the property for securing advances from financial institutions for the construction of the project and thereafter towards its working. Such mortgage/charge or interest was subject to approval by MCGM.

Further, the show cause notice was issued prior to admission of the insolvency petition. In view of the conditions stipulated in the contract, in the opinion of this Court, the adjudicating authority could not have approved the plan which implicates the assets of MCGM especially when Seven Hills had not fulfilled its obligations under the contract.

The argument of the RP, CoC, and the SNMC with regard to MCGM's interest not being affected is insubstantial as the provisions of the resolution plan clearly contemplated infusion of capital to achieve its objectives. One of the modes spelt out in the plan for securing capital was mortgaging the lands under question which directly affected MCGM. Section 92 of the MMC Act clearly prescribes that the MCGM's properties can be dealt with through prior permission of the corporation. In the present case, the resolution plan was

never approved by the corporation. The proposal could be approved only to the extent it did not result in encumbering the land belonging to MCGM.

On account of non-fulfilment of the terms of conditions, the contract remained an agreement to enter into a lease; it did not *per se* confer any right or interest. In Ram Singh Vijay Pal Singh & Ors Vs State of U.P. & Ors (2007) 6 SCC 44, this Court dealt with a similar provision, requiring prior approval of the statutory authority without which the property could not be disposed of. An identical approach was adopted in Saroj Screens Pvt. Ltd. Vs. Ghanshyam & Ors. (2012) 11 SCC 434. The principle is that if a statute requires a thing to be done in a particular manner, it should be done in that manner or not at all. In the context present case, it means that if alienation or creation of any interest in respect of MCGM's properties is contemplated in the statute through a particular manner, that end can be achieved only through the prescribed mode, or not at all.

This Court also notices that an initial No Objection Certificate was issued by MCGM voluntarily for creation of interest in respect of its properties. Upon its refusal to grant approval, Seven Hills filed proceedings under Article 226 before the Bombay High Court (W.P. No. 1728 of 2011) that observed *inter-alia* as under:

> ".....The said NOC can be granted by the Corporation without prejudice to its rights and contentions that the land in question belongs to them and, therefore, no mortgage could have been created for the same....."

Further, in their meeting held on 14th December, 2018, the corporation referred back to the resolution proposal given by the SNMC. It revealed from the minutes of the meeting that three members were unanimous in their view that since Seven Hills had not complied with the terms and had even sought to encumber the property by mortgage, SNMC, ought not to be granted approval to take over the plot and proceed with its project.

Now, the issue before this Court is whether the provisions of the Code override all other laws and hence, that the approved resolution plan acquires primacy over all other legal provisions. Section 238, in the opinion of this Court, cannot be read as overriding the MCGM's right – indeed its public duty -- to control and regulate how its properties are to be dealt with. That exists in Sections 92 and 92A of the MMC Act. In fact, Section 238 could be of importance when the properties and assets are of a debtor and not when a

third party like the MCGM is involved. Therefore, in the absence of approval in terms of Section 92 and 92A of the MMC Act, the adjudicating authority could not have overridden MCGM's objections and enabled the creation of a fresh interest in respect of its properties and lands.

With regard to contention of the respondents, that MCGM was bound by the statement made by its counsel, it cannot prevail as there is no approval for the plan, in accordance with law. A written plea accepting the plan by a counsel or other representative, who is not authorised to bind MCGM, is inconclusive. There can be no estoppel against the express provisions of law.

Case Review:

In view of the foregoing, this Court holds that the impugned order and the order of the NCLT cannot stand; they are hereby set aside. The appeal is accordingly allowed.

CONSTITUTIONAL VALIDITY OF IBC, 2016

CASE NO. 6

Swiss Ribbons Pvt. Ltd. & Anr. (Petitioners)

Vs.

Union of India & Ors. (Respondents)

Writ Petition (Civil) No. 99 of 2018

With

Writ Petition (Civil) No. 100 of 2018

Writ Petition (Civil) No. 115 of 2018

Writ Petition (Civil) No. 459 of 2018

Writ Petition (Civil) No. 598 of 2018

Writ Petition (Civil) No. 775 of 2018

Writ Petition (Civil) No. 822 of 2018

Writ Petition (Civil) No. 849 of 2018

Writ Petition (Civil) No. 1221 of 2018

Special Leave Petition (Civil) No. 28623 of 2018

Writ Petition (Civil) No. 37 of 2019

Date of Order: 25-01-2019

Constitutional validity of various provisions of the Insolvency and Bankruptcy Code, 2016

Facts

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

Decision

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

The key sub-text in the case is set out in the Epilogue in the last three pages of the judgment:

"The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, 'trial' having led to repeated errors, ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster."

The significant points in the verdict are as follows:

- The Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern.
- The primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.
- Classification between financial creditor and operational creditor neither discriminatory, nor arbitrary, nor violative of article 14 of the constitution of India. Financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.
- Whereas a claim gives rise to a debt only when it becomes due, a default occurs only when a debt becomes due and payable and is not paid by the debtor. It is for this reason that a financial creditor has to prove default as opposed to an operational creditor who merely claims a right to payment of a liability or obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process by financial creditors under Section 7 and by operational creditors under Sections 8 and 9 of the Code becomes clear.

- The NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the committee of creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded.
- Section 12A passes constitutional muster.
- The resolution professional has no adjudicatory powers. The resolution professional is really a facilitator of the resolution process, whose administrative functions are overseen by the committee of creditors and by the Adjudicating Authority.
- Section 29-A was considered to be Constitutionally Valid. A resolution applicant has no vested right for consideration or approval of its resolution plan. It is clear that no vested right is taken away by application of Section 29A.
- Section 53 of the code does not violate article 14. Unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute in question, Article 14 does not get infracted.

CONSTITUTIONAL VALIDITY OF AMENDMENTS MADE IN IBC, 2016

CASE NO. 7

Pioneer Urban Land & Infrastructure Limited & Another (Petitioners)

Vs.

Union of India and others (Respondent)

Writ Petition (Civil) No. 43 of 2019

And other Petitions

Date of Order: 09-08-2019

Constitutional Validity of Amendments Made in Insolvency and Bankruptcy Code, 2016 – Whether allottees of real estate projects deemed to be "financial creditors"

Facts:

The I&B Code, 2016 was amended pursuant to a report prepared by the Insolvency Law Committee dated 26th March, 2018. Vide the amendments so made, an explanation was added to Section 5(8)(f) of the I&B Code so as to deem allottees of real estate projects to be "Financial Creditors" so that they may trigger the Code, under Section 7 thereof, against the real estate developer. In addition, being financial creditors, consequent amendments were also made in Section 21 and 25 A of the I& B code to provide that they are entitled to be represented in the Committee of Creditors by authorised representatives.

The said amendment was challenged by way of various petitions before the Hon'ble Supreme Court.

Decision:

While upholding the validity of the amendments done, the Court observed that The Amendment Act to the Code does not infringe Articles 14, 19(1)(g) read with Article 19(6), or 300- A of the Constitution of India.

Further, even the Insolvency Law Committee had stated in its report that the delay in completion of flats/apartments has become a common phenomenon, and that amounts raised from home buyers contributes significantly to the

financing of the construction of such flats/apartments. Furthermore, in real estate projects, money is raised from the allottee, against consideration which is calculated as per the time value of money. Therefore, the legislature has understood and correctly appreciated the need of its people and that the amendment to the Code is directed to problems made manifest by experience, as pointed out by the Insolvency Law Committee, demonstrates the presumption of constitutionality

Therefore, even otherwise the amounts raised from allottees under real estate projects is subsumed within section 5(8)(f) even without adverting to the explanation introduced by the Amendment Act. The deeming fiction that is used by inserting the explanation is to put beyond doubt the fact that allottees are to be regarded as financial creditors within section 5(8)(f) of the I&B Code. In other words, allottees/home buyers were included in the main provision, i.e. section 5(8)(f) with effect from the inception of the Code. The explanation was added in 2018 merely to clarify doubts that had arisen.

The Hon'ble Court also stated that Legislature must be given free play in the joints when it comes to economic legislation. Apart from the presumption of constitutionality which arises in such cases, the legislative judgment in economic choices must be given a certain degree of deference by the Courts.

Apropos amendments to Section 21 and insertion of Section 25A, the Court observed that it was important, to clarify that home buyers are treated as financial creditors so that they can trigger the Code under section 7 and have their rightful place on the Committee of Creditors when it comes to making important decisions as to the future of the building construction company, which is the execution of the real estate project in which such home buyers are ultimately to be housed.

Apropos the construction of RERA laws vis-à-vis I&B Code, the Court held as below:

(a) The provisions of RERA are in addition to and not in derogation of the provisions of any other law for time being in force.

(b) The provisions of RERA will not prevail over the I&B Code. This is because from the introduction of the explanation to Section 5(8)(f) of the Code which came into force on 6th June, 2018, it is clear that Parliament was aware of RERA, and applied some of its definition provisions so that they could apply when the Code is to be interpreted.

(c) The I&B Code must be given precedence over RERA.

(d) Even by a process of harmonious construction, RERA and the I&B Code must be held to co-exist, and, in the event of a clash, RERA must give way to the I&B Code. RERA, therefore, cannot be held to be a special statute which, in the case of a conflict, would override the general statute, the I&B Code.

(e) The I&B Code and RERA operate in completely different spheres. The I&B Code deals with a proceeding in rem in which the focus is the rehabilitation of the corporate debtor by means of a resolution plan, so that the corporate debtor may be pulled out of the woods and may continue as a going concern, thus benefitting all stakeholders involved. On the other hand, RERA protects the interests of the individual investor in real estate projects by requiring the promoter to strictly adhere to its provisions.

(f) The remedies under RERA to allottees are additional and not exclusive remedies.

(g) The allottees of flats/apartments have concurrent remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the I&B Code.

In light of above, it was held that it is impossible to say that classifying real estate developers is not founded upon an intelligible differentia which distinguishes them from other operational creditors, nor is it possible to say that such classification is palpably arbitrary having no rational relation to the objects of the I&B code.

FAILURE OF RESOLUTION PLAN OWING TO NON FULFILMENT OF THE COMMITMENT BY RESOLUTION APPLICANT

CASE NO. 8

Committee of Creditors of Amtek Auto Limited
Through Corporation Bank (Appellant(s))

Vs.

Dinkar T. Venkatsubramanian & Ors. (Respondent(s))

Civil Appeal No. 6707 of 2019

Date of Order: 24-09-2019

Failure of Resolution plan owing to non fulfilment of the commitment by Liberty House.

Facts:

Owing to non fulfilment of the commitment by Liberty House i.e. the resolution applicant, that has consumed the time which was otherwise available as per the provisions contained in Section 12 of the Insolvency and Bankruptcy Code, 2016, one more effort should be allowed to resolve the issue was the contention of the CoC.

It was also pointed out that expression of interest have already been indicated by eight other parties. Attention was also been drawn to the third proviso by virtue of the Amendment Bill, 2019 with effect from 16.08.2019, by which the resolution process may be permitted to be completed within 90 days from the date of the commencement of the Amendment Act. The said period is available upto15th November, 2019.

The learned Solicitor General has also submitted that the Resolution Professional may be permitted to invite the fresh offers within a period of 21 days as an earlier offer had been invited and considering the time limit of 15.11.2019, 21 days may be fixed instead of 30 days for submission of the offer.

Decision:

Hon'ble Supreme Court permitted the Resolution Professional to invite fresh

offers within a period of 21 days. It said that, let steps be taken by the Resolution Professional by tomorrow i.e. by 25.09.2019 for invitation of the fresh offers in accordance with the rules. Within 2 weeks thereafter, the Committee of Creditors shall take a final call in the matter and the decision of the Committee of Creditors and the offers received be placed before this Court on the next date of hearing for consideration.

VARIOUS ASPECTS OF IBC, 2016

CASE NO. 9

Committee of Creditors of Essar Steel India Limited

Through Authorised Signatory. (Appellant)

Versus

Satish Kumar Gupta & Ors. (Respondents)

Civil Appeal No. 8766-67 of 2019

Diary No. 24417 of 2019

Date of Order: 15.11.2019

Through this case about 13 Civil Appeals and 17 Writ petitions were decided and disposed of simultaneously by the Hon'ble Supreme Court and is a landmark judgement in which various aspects of the I& B Code 2016 have been dealt with and spelt so as to remove confusions amongst the users of the code.

Facts:

This group of appeals and writ petitions raises important questions as to the role of resolution applicants, resolution professionals, the Committee of Creditors that are constituted under the Code, the jurisdiction of the NCLT and the NCLAT, qua resolution plans that have been approved by the Committee of Creditors. The constitutional validity of Sections 4 and 6 of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 have also been challenged. These appeals and writ petitions are an aftermath of this Court's judgment dated 04.10.2018, reported as Arcelor Mittal India Private Limited v. Satish Kumar Gupta (2019) 2 SCC 1.

This judgement has unfolded various aspects, which are explained below topic wise one after the other.

1. Dealing with Disputed Claims Filed before the Resolution Professional

In the instant case, the RP admitted the claim of certain creditors notionally at INR 1 on the ground that claims are there but were under disputes pending before various authorities in respect of the amounts of claim. However, the NCLT directed the RP to register their entire claim and the same was also upheld by the Appellate Authority.

Decision of SC: The Supreme Court set aside the decision of the Appellate Authority on the ground that the RP was correct in only admitting the claim at a notional value of INR 1 due to the pendency of disputes with regard to these claims.

2. Validity of the Constitution of a Sub-Committee by the CoC

The question of validity of the constitution of Sub-committee by the CoC was another issue that was to be discussed and decided.

Decision of SC: The Supreme Court held that as regards CoC's powers on questions which have a vital bearing on the running of the business of the corporate debtor, the same shall not be delegated to any other person in terms of Section 28(1)(h). When it comes to approving a resolution plan under Section 30(4), though such powers are administrative in nature, they shall not be delegated to any other body as it is the CoC alone who has been vested with this important business decision which it must take by itself. The Supreme Court further clarified that sub-committees can be appointed for the purpose of negotiating with resolution applicants, or for the purpose of performing other ministerial or administrative acts, provided such acts are in the ultimate analysis approved and ratified by the CoC.

3. Jurisdiction of the Adjudicating Authority and the Appellate Tribunal

Next issue was relating to the jurisdiction of Adjudicating Authority and the Appellate Tribunal particularly the discretionary powers with reference to resolution plan being adjudicated and in turn trespassing of business decisions of the CoC in exercise of their commercial wisdom.

Decision of SC: The Supreme Court has made it clear that the scope of judicial review to be exercised by the Adjudicating Authority can in no circumstances trespass business decisions of the CoC and has to be within the four corners of Section 30(2) of the Code while the review by the Appellate Tribunal has to be confined to the grounds provided in terms of Section 32 read with Section 61(3) of the Code.

The Adjudicating Authority cannot exercise discretionary or equity jurisdiction outside Section 30(2) of the Code when it comes to a resolution plan being adjudicated upon by the Adjudicating Authority. The Supreme Court further stressed that CoC exercises its commercial wisdom to arrive at a business decision of reviving corporate debtor after taking into consideration the key features of the Code. Thus the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of

Creditors ('CoC') with a caveat that the decision of the CoC must reflect the fact that the CoC has taken into account that the corporate debtor needs to keep going as a going concern during the insolvency resolution process and that it needs to maximise the value of its assets and the interests of all stakeholders including operational creditors have been taken care of.

It was observed by the Hon'ble Court that if nothing is to be paid to operational creditors, the minimum, being liquidation value - which in most cases would amount to NIL after secured creditors have been paid - would certainly not balance the interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern. Thus, the judicial review by the Adjudicating Authority would further include examining whether the resolution plan as approved by the CoC has met the requirements referred to in Section 30(2) and would include the judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. If the Adjudicating Authority finds, in the facts of the case, that there is a breach of the aforesaid, it may send a resolution plan back to the CoC to re-submit such a plan after satisfying the aforesaid requirements but cannot interfere on merits with the commercial decision taken by CoC.

4. Differentiation between Secured and Unsecured Creditors

About equality of treatment for the same class of creditors, similarly placed creditors and about how to deal with unequals amongst the creditors, was the issue under consideration.

Decision of SC: The Supreme Court categorically stated that equitable treatment is only applicable to similarly situated creditors and that the aforesaid principle cannot be stretched to treating unequals equally as that will destroy the very objective of the Code. Equitable treatment is to be accorded to each creditor depending upon the class to which it belonged to whether secured or unsecured, financial or operational. It was further held that there is no residual jurisdiction not to approve a resolution plan on the ground that it is unfair or unjust to a class of creditors, so long as the interest of each class has been looked into and taken care of. It is important to note that even under Sections 391 and 392 of the Companies Act, 1956, ultimately it is the commercial wisdom of the parties to the scheme, reflected in the 75% majority vote, which then binds all shareholders and creditors. Even under Sections 391 and 392, the High Court cannot act as a Court of appeal and sit in judgment over such commercial wisdom.

5. Extinguishment of Personal Guarantees and Undecided Claims

Next issue was about creditors who have not submitted their claims. About extinguishment of guarantees given by the promoters / promoter group of the corporate debtor.

Decision of SC: The Supreme Court has made clear the effect of the approval of the resolution plan on the claims of creditors who have not submitted their claims before the Resolution Professional within the time frame provided under the Code. The Supreme Court held that Section 31(1) of the Code makes it clear that once a resolution plan is approved by the CoC it shall be binding on all stakeholders, including guarantors. The Supreme Court therefore said that a successful resolution applicant cannot suddenly be faced with undecided claims after the resolution plan submitted by him has been accepted as this would throw into uncertainty amounts payable by a prospective resolution applicant who has successfully taken over the business of the corporate debtor. All claims must be submitted to and decided by the RP so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor.

The Appellate Authority/ National Company Law Appellate Tribunal had in its judgment also extinguished the rights of creditors against guarantees that were extended by the promoters/promoter group of the corporate debtor. The Supreme Court set aside the aforesaid decision on the ground that the same was contrary to 31(1) of the Code and the judgment of the Supreme Court in State Bank of India v. V. Ramakrishnan was relied upon.

Apart from the aforesaid, the guarantors of the corporate debtor argued that their rights of subrogation, which they may have if they are ordered to pay amounts guaranteed by them in the pending legal proceedings could not be extinguished by the resolution plan. The Supreme Court observed in this regard that it was difficult to accept that the part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile directors of the corporate debtor. However, with regard to the present case, the Supreme Court clarified that it was not stating nothing which may affect the pending litigation on account of invocation of these guarantees. However NCLAT's Judgement being contrary to Section 31(1) of the Code was set aside.

6. Utilisation of Profits of the Corporate Debtor during CIRP to Pay Off Creditors

About the utilisation of profits that were generated during the CIRP process.

Decision of SC: The Appellate Authority had held that the profits of the corporate debtor during CIRP shall be used to pay off creditors of the corporate debtor. The Supreme Court set aside the aforesaid decision on the ground that the request for proposal issued in terms of section 25 of the Code and consented to by Arcelor Mittal and the CoC had provided that distribution of profits made during the corporate insolvency process will not go towards payment of debts of any creditor. This judgement of NCLAT was also therefore set aside.

7. Constitutional Validity of Section 4 and 6 of the Insolvency and Bankruptcy (Amendment) Act 2019

The constitutional validity of Section 4 and 6 of the Insolvency and Bankruptcy (Amendment) Act, 2019 was under challenge before the Supreme Court. Section 4 and 6 of the Amending Act, 2019 sought to introduce a mandatory timeline of 330 days for completion of CIRP, failing which, the corporate debtor would be liquidated. Section 6, on the other hand, specified the minimum payment to be made to operational creditors and dissenting financial creditors in the resolution plan.

Decision of SC: The Supreme Court observed that the time taken in legal proceedings should not harm a litigant if the tribunal itself cannot take up the litigant's case within the requisite period for no fault of the litigant and a mandatory deadline without any exception would fall foul of Article 14 and Article 19(1)(g) of the Constitution of India. Thereby, the Supreme Court while leaving section 4 of the Amending Act, 2019 otherwise intact, struck down the word "mandatorily" as being manifestly arbitrary under Article 14 of the Constitution of India and as being an excessive and unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution.

The effect of this declaration was clarified and it was held that ordinarily the time taken in relation to the CIRP of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it could be shown to that only a short period is left for completion of the CIRP beyond 330 days, and that it would be in the

interest of all stakeholders that the corporate debtor be put back to stand on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed or attributed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it was held that the Adjudicating Authority and/or Appellate Tribunal may extend the time beyond 330 days. Similarly, even under the new proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 2019 is exceeded, the Adjudicating Authority and/or Appellate Tribunal may further extend time keeping the aforesaid parameters in mind. It was stated that only in such exceptional cases, time can be extended.

With regard to Section 6 of the Amending Act of 2019, the Supreme Court held that it was is in fact a beneficial provision in favour of operational creditors and dissentient financial creditors as they are now to be paid a minimum amount in terms of the section and the computation of such minimum amount was more favourable to operational creditors while in the case of dissentient financial creditor the minimum amount provided was a sum that was not earlier payable.

With regard to the challenge to sub-clause (b) of Section 6 of the Amending Act of 2019, the Supreme Court held that the provision was merely a guideline for the CoC which may be applied by the CoC in arriving at a business decision as to acceptance or rejection of a resolution plan and thereby, the aforesaid provision was upheld. It was also clarified that the CoC does not act in any fiduciary capacity to any group of creditors. The CoC has to take a business decision based upon ground realities by a majority, which then binds all stakeholders, including dissentient creditors. Thereby, Section 6 of the Amending Act of 2019 was upheld in its entirety.

CONSTITUTIONAL VALIDITY OF SECTIONS 35AA AND 35AB OF THE BANKING REGULATION ACT, 1949

CASE NO. 10

Dharani Sugars and Chemicals Ltd. (Petitioner)

Versus

Union of India & Ors. (Respondents)

Transferred Case (Civil) No.66 of 2018

In

Transfer Petition (Civil) No.1399 of 2018

Date of Order: 02-04-2019

Constitutional validity of Sections 35AA and 35AB of the Banking Regulation Act, 1949 introduced by way of amendment w.e.f. 04.05.2017. The real bone of contention is a RBI Circular issued on 12.02.2018, by which the RBI promulgated a revised framework for resolution of stressed assets.

Facts:

Facts and the matter discussed and deliberated were as follows:

The petitioners have argued that the aforesaid Ordinance and Amendment Act are unconstitutional on two grounds; (i) that the Sections introduced are manifestly arbitrary; and (ii) that they suffer from absence of guidelines.

A cursory reading of section 35A makes it clear that there is nothing in the aforesaid provision which would indicate that the power of the RBI to give directions, when it comes to the Insolvency Code, cannot be so given. The width of the language such as 'public interest', 'banking policy', etc. used in section 35A makes it clear that if otherwise available, use of section 35A as a source of power for the impugned circular cannot be interdicted on the ground that the Insolvency and Bankruptcy Code, 2016 (Code) could not have been in the contemplation of Parliament in 1956, when section 35A was enacted.

If a specific provision of the Banking Regulation Act makes it clear that the RBI has a specific power to direct banks to move under the Code against

debtors in certain specified circumstances, it cannot be said that they would be acting outside the four corners of the statutes which govern them.

Section 35AA makes it clear that the Central Government may, by order, authorise the RBI to issue directions to any banking company or banking companies when it comes to initiating the insolvency resolution process under the provisions of the Code. Therefore, without authorisation of the Central Government, no such directions can be issued by the RBI.

Prior to the enactment of section 35AA, it may have been possible for the RBI to issue directions under sections 21 and 35A to a banking company to initiate insolvency resolution process under the Code. But after introduction of section 35AA, it may do so only within the four corners of section 35AA.

If a statute confers power to do a particular act and has laid down the manner in which that power has to be exercised, it necessarily prohibits the doing of the act in any manner other than that which has been prescribed.

The RBI can only direct banking institutions to move under the Code if two conditions precedent are specified, namely, (i) that there is a Central Government authorisation to do so; and (ii) that it should be in respect of specific defaults. The section, therefore, by necessary implication, prohibits this power from being exercised in any manner other than the manner set out in section 35AA.

The words "without prejudice" appearing in a section makes it clear that powers that are enumerated are only illustrative of a general power and do not restrict such general power. Therefore the power to issue directions given by section 35AB is, therefore, in addition to the power under section 35A.

The scheme of sections 35A, 35AA, and 35AB is as follows:

(i) When it comes to issuing directions to initiate the insolvency resolution process under the Code, section 35AA is the only source of power.

(ii) When it comes to issuing directions in respect of stressed assets, which directions are directions other than resolving this problem under the Code, such power falls within section 35A read with section 35AB.

When one section of a statute grants general powers, as opposed to another section of the same statute which grants specific powers, the general provisions cannot be utilised where a specific provision has been enacted with a specific purpose in mind.

Stressed assets can be resolved either through the Code or otherwise. When resolution through the Code is to be effected, the specific power granted by section 35AA can alone be availed by the RBI. When resolution *de hors* the Code is to be effected, the general powers under sections 35A and 35AB are to be used. Any other interpretation would make section 35AA otiose.

Decision:

a. The provisions are not excessive in any way nor do they suffer from want of any guiding principle. These are in the nature of amendments which confer regulatory powers upon the RBI to carry out its functions under the Banking Regulation Act and are not different in quality from any of the sections which have already conferred such power. Section 21 makes it clear that the RBI may control advances made by banking companies in public interest, and in doing so, may not only lay down policy but may also give directions to banking companies either generally or in particular. Similarly, under section 35A, vast powers are given to issue necessary directions to banking companies in public interest, in the interest of banking policy, to prevent the affairs of any banking company being conducted in a manner detrimental to the interest of the depositors or in a manner prejudicial to the interest of the banking company, or to secure the proper management of any banking company. Therefore, these provisions which give the RBI certain regulatory powers cannot be said to be manifestly arbitrary.

b. As regards guidelines for exercise of powers, such guidance can be obtained not only from the Statement of Objects and Reasons and the Preamble to the Act, but also from its provisions. Sections 22 (3), 25, 29, 30, and 31 all give guidance as to how the RBI is to exercise these powers under the newly added provisions. There is no dearth of guidance for the RBI to exercise the powers delegated to it by these provisions.

In view of the above, sections 35AA and 35AB are constitutionally valid.

However it was further held that:-

Section 35 AA enables the Central Government to authorise the RBI to issue such directions in respect of “a default”. Default would mean non-payment of a debt when it has become due and payable and is not paid by the corporate debtor. Therefore, what is important is that it is a particular default of a particular debtor that is the subject matter of section 35AA. Any directions which are in respect of debtors generally would be *ultra vires* section 35AA.

The power to be exercised under the authorisation of the Central Government requires "due deliberation and care" and hence refer to specific defaults.

There is nothing to show that the provisions of section 45L(3) have been satisfied in issuing the impugned circular. The impugned circular nowhere says that the RBI has had due regard to the conditions in which and the objects for which such institutions have been established, their statutory responsibilities, and the effect the business of such financial institutions is likely to have on trends in the money and capital markets.

The impugned circular applies to banking and non-banking institutions alike. Non-banking financial institutions are inseparable from banking institutions insofar as the application of the impugned circular is concerned. It is very difficult to segregate the non-banking financial institutions from banks so as to make the circular applicable to them even if it is *ultra vires* insofar as banks are concerned.

In view of the above, the impugned circular is *ultra vires*, and has no effect in law. Consequently, all actions taken under the said circular, including actions by which the Code has been triggered must fall along with the said circular. As a result, all cases where debtors have been proceeded against by financial creditors under section 7 of the Code, only because of the operation of the impugned circular, are non-est.

SECTION 434 OF THE COMPANIES ACT, 2013

CASE NO. 11

Forech India Ltd (Appellant (s))

Vs.

Edelweiss Assets Reconstruction Co. Ltd (Respondent (s))

Civil Appeal no. 818 of 2018

Date of Order: 22.1.2019

Section 434 – Transfer of Pending Proceedings with effect from 1.12.2016 and subsequently amended on 17.8.2018

Rule 5 (Transfer of Pending Proceedings) Rules, 2016 into force from 1.4.2017 and subsequently amended on 29.6.2017.

Sub clause 2 of the Companies (Removal of Difficulties) Fourth Order 2016

Rule 26 and Rule 27 of the Companies (Court) Rules, 1959

Section 7 of IBC dealing with initiation of CIRP by financial creditor

Section 238- Provisions of IBC to override other laws

Section 11(d) of the IBC 2016 dealing with Persons not entitled to make applications

Section 255 of the IBC 2016 whereby the Companies Act, 2013 shall be amended in the manner specified in the Eleventh Schedule

Facts:

The winding up petition was filed by Appellant/Operational Creditor before High Court of Delhi in 2014 against Corporate Debtor in 2014 under section 433(e) of the Companies Act for inability to pay dues. The reference was also made by the Corporate Debtor in the year 2015 but was abated in the year 2016. Meanwhile Respondent Financial Creditor filed an application in the year 2017 which was admitted by NCLT Mumbai. Appeal was filed by appellant against the said NCLT order in NCLAT and NCLAT held that appeal was not maintainable as there was no winding up order by the High Court passed against the Corporate Debtor referring to section 11 of the IBC.

The Counsel on behalf of the Appellant has argued that the winding up petition should continue with the High Court as petition clearly falls within Rule 5 (Transfer of Pending Proceedings) Rules, 2016 and under Rule 26 of the Companies Court Rules as notice had been served much prior to the commencement of the Code.

The Counsel on behalf of the Respondent referred to Section 238 of the Code. According to him, the proceedings that were initiated under Section 7 or Section 9 of the IBC are independent proceedings, which must reach their logical conclusion unhampered by any winding up petition that may be pending in a High Court. According to him, it is also important to remember that the basic objective of the Code is to infuse life into a corporate debtor who is in the red, and it is only if the resuscitation process cannot be completed in accordance with the provisions of the Code that liquidation takes place under the Code.

The precise question of law before Supreme Court is as whether winding up proceedings initiated before High Court by Appellant can be ground that winding up proceedings cannot be transferred to NCLT.

Decision:

The Supreme Court decided the following:

— The Supreme Court relied on the Bombay High Court decision in Ashok Commercial Enterprises vs. Parekh Aluminex Limited, (2017) 4 Bom. CR 653, wherein the Bombay High Court had stated that the notice referred to in Rule 26 was a pre-admission notice and held that all winding up petitions where pre-admission notices were issued and served on the respondent will be retained in the High Court.

— The Supreme Court relied on amended section 434 of the Companies Act in which a proviso was added by which even in winding up petitions where notice has been served and which are pending in the High Courts, any person could apply for transfer of such petitions to the NCLT under the Code, which would then have to be transferred by the High Court to the adjudicating authority and treated as an insolvency petition under the Code. This statutory scheme has been referred to, albeit in the context of Section 20 of the SICA, in Supreme Court judgment which is contained in Jaipur Metals & Electricals Employees Organization Through General Secretary Mr. Tej Ram

Meena vs. Jaipur Metals & Electricals Ltd. Through its Managing Director & Ors.

— The Supreme Court relied and approved Bombay High Court Judgement in PSL Limited vs. Jotun India Private Limited where it was decided the following:

(a) The transitional provision cannot in any way affect the remedies available to a person under IBC, vis-à-vis the company against whom a winding up petition is filed and retained in the High Court, as the same would amount to treating IBC as if it did not exist on the statute book and would deprive persons of the benefit of the new legislation.

(b) The mere fact that post notice winding up proceedings are to be "dealt with" in accordance with the provisions of the Companies Act, 1956, does not bar the applicability of the provisions of IBC in general to proceedings validly instituted under IBC, nor does it mean that such proceeding can be suspended.

The Supreme Court did not agree with NCLAT reasoning as it made reference to section 11(d) which pertains to persons not entitled to initiate proceedings under IBC and only bars a corporate debtor from initiating a petition under Section 10 of the Code in respect of whom a liquidation order has been made. The Supreme Court mentioned that reference to Section 11 in the present context is wholly irrelevant. However, the Apex Court declined to interfere with the ultimate order passed by the Appellate Tribunal because it is clear that the financial creditor's application which has been admitted by the Tribunal is clearly an independent proceeding which must be decided in accordance with the provisions of the Code.

Supreme Court dismissed appeal and granted liberty to the appellant before them to apply under the proviso to Section 434 of the Companies Act (added in 2018), to transfer the winding up proceeding pending before the High Court of Delhi to the NCLT, which can then be treated as a proceeding under Section 9 of the Code.

SECTION 434 OF THE COMPANIES ACT, 2013

CASE NO. 12

Jaipur Metals & Electricals Employees Organisation through General Secretary Mr. Tej Ram Meena (Appellant)

Vs.

Jaipur Metals & Electricals Ltd Through its Managing Director & Ors (Respondents)

Civil Appeal no. 12023 of 2018

(Arising out of SLP (Civil) No 18598 of 2018)

Date of Order: 12-12-2018

Section 434 – Transfer of Pending Proceedings with effect from 1.12.2016 and subsequently amended on 17.8.2018

Rule 5 (in particular rule 5(2)) and 6 of Companies (Transfer of Pending Proceedings) Rules, 2016 into force from 1.4.2017 and subsequently amended on 29.6.2017. Rule 5(2) dealt with continuation of winding up proceedings with High Court pursuant to section 20 of the SIC Act.

Section 7 of IBC dealing with initiation of CIRP by financial creditor

Section 238- Provisions of IBC to override other laws

Section 255 of the IBC 2016 whereby the Companies Act, 2013 shall be amended in the manner specified in the Eleventh Schedule.

Facts:

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

Meanwhile, NCLT passed order to initiate CIRP under section 7 of IBC referring to non-obstante clause contained in Section 238 of the IBC, 2016 and conditions under section 7 of IBC being fulfilled. The High Court, by an interim order stayed the order passed by NCLT to initiate CIRP against the Corporate Debtor. Against this order, a Special Leave Petition ("SLP") was

preferred in which Supreme Court dismissed the SLP as withdrawn and directed the petitioner to make submissions before the High Court in the pending company petition and allied matters. The High Court then passed the impugned judgment in which it refused to transfer the winding up proceedings pending before it and set aside the NCLT order stating that it had been passed without jurisdiction. On this impugned judgement of High Court, Supreme Court issued notice and stayed the operation of this impugned judgment.

The precise question of law before Supreme Court is as follows:

1. Whether High Court was correct in refusing to transfer proceedings pending before it to NCLT considering the following

    a) Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 and subsequent omission of Rule 5(2) on 29.6.2017.

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

2. Supremacy of NCLT order passed under section 7 read with Section 238 of IBC, 2016 vis a vis pending proceedings before High Court.

Decision:

The Supreme Court decided the following:

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

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

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

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

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

Case Review: Order dated 1.06.2018 of High Court *set aside*.

Chapter 2

Orders passed by High Courts

SECTION 14

CASE NO. 1

HIGH COURT OF DELHI AT NEW DELHI

SSMP Industries Limited (Plaintiff)

Vs.

Perkan Food Processors Pvt. Ltd. (Defendant)

C.S. (COMM) 470/2016 & CC (COMM) 73/2017

Date of Order: 18-07-2019

Section 14 of the Insolvency and Bankruptcy Code, 2016-Application of moratorium period on adjudication of counter-claim

Facts:

The Plaintiff filed the suit seeking recovery of Rs.1,61,47,336.44 with respect to an order placed by the Defendant for purchase of *Totapari Mango pulp*. The Plaintiff contended that as per the agreement, supplies were made, and various amounts became due towards excess payments, damages and other costs.

The Defendant in its reply-cum-counter claim contended that rather than paying the Plaintiff, it is, in fact, entitled to recover a sum of Rs.59,51,548/- and no amount is due and payable by it to the Plaintiff. Thereafter, the Plaintiff had gone into insolvency and a Resolution Professional had been appointed.

The Plaintiff claimed that the amount of Rs.59,51,548/- payable by the Defendant is in the nature of a set off and is intertwined and interlinked with the Plaintiff's suit. It was further contended that the claim is not an independent claim by the Defendant and must be adjudicated in the light of the claims made by the Plaintiff in the suit.

The question which arose for consideration was as to whether the adjudication of the counter claim would be liable to be stayed in view of Section 14 of the Insolvency and Bankruptcy Code, 2016.

Decision:

Learned Single Judge of the High Court in *Power Grid Corporation of India vs. Jyoti structures ltd.(2018) 246 DLT 485* held that embargo of Section 14(1)(a) of the Code would not apply in all circumstances. It was held in the captioned appeal that a perusal of this judgment would reflect that until and unless the proceeding have the effect of endangering, diminishing, dissipating or adversely impacting the assets of Defendant, it would not be prohibited under Section 14(1)(a) of the Insolvency and Bankruptcy Code, 2016.

The Hon'ble High Court thereafter observed that in *Jharkhand Bijli Vitran Nigam Ltd. vs. IVRCL Limited & Anr. [Company Appeal (AT) (Insolvency) No. 285/2018 Decided on 03.08.2018]*, the NCLAT, in similar circumstances, held that until and unless the counter claim is itself determined, the claim and the counter claim deserve to be heard together and there is no bar on the same in the Code.

Based on the aforementioned observations, the Hon'ble Court held that the Plaintiff's and the Defendant's claim ought to be adjudicated comprehensively by the same forum. The Hon'ble Court further observed that till the defence was adjudicated, there was no threat to the assets of the Defendant and hence continuation of the counter claim would not adversely impact the assets of the Defendant. Once the counter claims are adjudicated and the amount to be paid/recovered is determined, at that stage, or in execution proceedings, depending upon the situation prevalent, Section 14 of the Insolvency and Bankruptcy Code, 2016 could be triggered. And hence, the Hon'ble Court opined that at this stage, due to the reasons set out above, the counter claim did not deserve to be stayed under Section 14 of the Code.

SECTION 14

CASE NO. 2

HIGH COURT OF DELHI AT NEW DELHI

Amira Pure Foods Private Limited (Petitioner)

Vs.

Canara Bank & Ors. (Respondents)

W.P.(C) No. 5467/2019

Date of Order: 20-05-2019

Section 14 of the Insolvency and Bankruptcy Code, 2016 moratorium on continuation of the proceedings against the Corporate Debtor.

Facts:

The Corporate Debtor was proceeded against by respondent before the Debt Recovery Tribunal ("DRT") under the Recovery of Debts Due to Banks & Financial Institutions Act, 1993. The matter reached to Debt Recovery Appellate Tribunal ("DRAT") and DRAT appointed vide its order respondents no 2 and 3 as Joint Court Commissioners to inter alia take over the assets of the petitioner, including the perishable assets, i.e. grains as also other assets.

Meanwhile, NCLT appointed Interim Resolution Professional / Resolution Professional ("IRP/RP") in relation to proceeding before it to fulfil its mandate in a time bound manner as prescribed under the IBC, 2016.

The IRP/RP approached DRAT for taking over the godowns / properties of the Corporate Debtor, including its plant, machinery, mortgaged properties and stocks of gain etc. and prayed for an early hearing. The lender, who is also initiator of the original application also consented to the application. The DRAT did not consider the application for early hearing moved by IRP/RP and proceedings were adjourned. Consequently, Corporate Debtor through IRP/RP filed writ petition before High Court of Delhi. High Court of Delhi directed DRAT to hear and dispose of the applications of the Resolution Professional within next one week and also permitted RP to inspect the premises, records, goods lying therein and to make inventory of the same, in presence of the officers of the Respondent Bank and receivers appointed by

DRAT. In this said order, liberty is also granted to RP to move an application in the present petition in case DRAT does not dispose the applications. However, the DRAT dismissed applications by RP since it is of the view that Section 14 of the Insolvency and Bankruptcy Code, 2016 will come into operation and it prohibits DRAT from proceeding in the present matter. In case any direction(s) which is being sought by RP and the alleged landlord of the one godown in question is passed, the moratorium will stand violated.

The Counsel on behalf of the petitioner contended before High Court against the above DRAT order on the ground that Section 14 of the Insolvency & Bankruptcy Code, 2016 only imposes a moratorium and prohibits the institution of pending suits or proceeding against the corporate debtors. However, there is no prohibition against the undertaking of proceedings which cannot be considered as being against the Corporate Debtor. He submitted that since the IRP/RP has been appointed in respect of Corporate Debtor, its Board of Directors stands suspended and the IRP/RP has to manage the affairs of the Corporate Debtor. He further contended that the appointment and continuation of the Court Commissioners with vesting of the assets of the Corporate Debtor in them, is preventing the IRP/RP from discharging his time bound duties and the interest of the Corporate Debtor is suffering and submits that the effect of the impugned order is that the Court Commissioners, appointed by the DRAT, continue to remain in control and custody of the assets of the corporate debtor, which would be detrimental to the interest of the Corporate Debtor.

Decision:

The High Court set aside learned DRAT order considering that the Respondent Bank has expressed its willingness to the IRP/RP taking control of all the assets. It was of the view that DRAT should have recalled its order so that the IRP/RP could take over the assets of the Corporate Debtor in exercise of its mandate under the Insolvency & Bankruptcy Code 2016.

The High Court also recalled the appointment of Court Commissioners and permitted IRP/RP to exercise powers vested to it by IBC, 2016. The High Court directed Court Commissioners to deseal the premises of the petitioner and hand over the possession of the same to the IRP/RP within next two days. High Court directed IRP/RP to pay Rs.25,000/- each to the two of the Court Commissioners appointed by DRAT towards their fees.

ENCASHMENT OF BANK GUARANTEES (BGS)

CASE NO. 3

HIGH COURT OF DELHI AT NEW DELHI

Liberty House Group Pte Ltd
(Plaintiff)

Vs.

State Bank of India & Ors.

(Defendants)

CS(COMM) 1246/2018 and 1247/2018 &

IAs No.16056/2018 and 16061/2018

Date of Order: 22-02-2019

The application of the plaintiff in both the suits, for interim injunction restraining encashment of Bank Guarantees (BGs) on one hand and the objection of the defendants to the subject jurisdiction of this Court to entertain these suits, on the other hand were main matter under consideration.

Facts:

CS(COMM) No.1246/2018 was been filed against (a) State Bank of India (SBI); (b) Barclays Bank PLC (Barclays), (c) Barclays Bank PLC, United Kingdom; and, (d) Mr. Dinkar T. Venkatasubramanian, for (a) permanent injunction restraining (i) SBI from invoking and/or encashing and/or seeking remittance under BG for Rs. 40,00,00,000/- issued by Barclays in favour of SBI on instructions of the plaintiff; (ii) Barclays from remitting the amounts under the said BG and from transmitting the amount under the Counter Guarantee; and, (b) declaration that the notice of Demand/Invocation dated 20th November, 2018 addressed by SBI to Barclays is invalid, illegal.

Castex Technologies Ltd. (Part of Amtek Group) was undergoing CIRP due to application filed by SBI u/s 7 of Insolvency and Bankruptcy Code, 2016. Pursuant to process memorandum issued by the RP, plaintiff being a prospective resolution applicant submitted BG in favour of SBI. This resolution plan was accepted by the CoC upon which the LOI was issued in

favour of plaintiff which was duly accepted. The RP therefore applied to NCLT for approval of resolution plan. Meanwhile as per the terms of LOI, plaintiff was required to submit performance bank guarantee (PBG) for Rs. 100 Crores and who requested to convert Rs. 40 Crores Bid Bank Guarantee (BBG) as PBG and balance Rs. 60 Crores by way of creating an overseas escrow account. The said request was turned down by CoC hence RP communicated with Plaintiff requesting for PBG of entire Rs. 100 Crores from a scheduled commercial bank of India. In the meanwhile SBI invoked the BBG for Rs. 40 Crores.

It is important to note that plaintiff was not only resolution applicant for Amtek but also for ARGL Ltd., another company of Amtek Group wherein also almost similar situation arose wherein pursuant to approval of resolution plan and as per terms of accepted LOI, the plaintiff was required to furnish PBG for Rs. 60 Crores. A similar request was made requesting for converting the BBG earlier taken amounting to Rs. 10 Crores into PBG and creating an overseas escrow account for Rs. 50 Crores. The request was similarly turned down by CoC and the same was communicated by the RP to the plaintiff. Thus, subsequently SBI invoked the BBG for Rs. 10 Crores in this case also.

While pleading counsel representing SBI brought it to the notice of the Hon'ble High Court that Section 63 of the Code bars jurisdiction of the Civil Court in respect of any matter on which NCLT and NCLAT has jurisdiction under the Code. Section 231 of the Code also bars the jurisdiction of this Court. Also, that the Process Memorandum required the plaintiff to furnish a PBG for Rs.100 crores within ten days of issuance of LOI and provides that non-submission of PBG will lead to the resolution plan submitted by such successful resolution applicant being treated as non-responsive and invocation of BBG; admittedly PBG had not been submitted. Also the plaintiff was aware of the requirement of submission of PBG but instead of furnishing PBG offered conversion of the BBG into PBG for part of the requisite amount and furnishing of Escrow Account for the balance.

The senior counsel for the plaintiff, on the aspect of jurisdiction of the Civil Court, has contended (i) the subject BGs are not subject matter of any proceedings under the Insolvency and Bankruptcy Code, 2016 and the NCLT has no jurisdiction to decide the dispute raised in the subject suits; (ii) illegal invocation of BG is a dispute of a civil nature, independent of the Code and the plaintiff does not rely on any provision of the Code in support of its cause of action; (iii) the cause of action for the suits is illegal and fraudulent

invocation of the BGs; (iv) while the jurisdiction of this Court is unlimited in all disputes of civil nature, the jurisdiction of NCLT is only with respect to matters entrusted to it by the Companies Act, 2013 and by the Code. It was also contended that mere submission of a resolution plan, even if approved by the CoC, does not amount to binding of document, till the order under Section 31 of the NCLT, approving the same; the resolution plans have not been approved by the NCLT and thus there is no relationship binding the plaintiff.

Decision:

The High Court concluded that it does not have jurisdiction over the subject matter of the suit. The reasons for such conclusion given were as follows:

The Corporate Debtor, the RP, resolution applicant, the entitlement of SBI to be the beneficiary of the BBG, the CoC, the resolution plan and the NCLT as the Adjudicating Authority, all are creation of the Code. The entire transaction is in the ambit of the Code. However the Court further opined that SBI thus does not have a chance even under the civil law of contracts and guarantees of justifying the forfeiture and once it is so, the forfeiture of the amount of BBGs has necessarily to be held to be bad and no long drawn trial required. However, Section 63 and Section 231 of the Code provides "No civil Court……shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal……. has jurisdiction under this code. Large number of cases were also critically discussed and analysed.

Thus it was held that this Court as the Civil Court of Original Jurisdiction to be not having jurisdiction to entertain the dispute subject matter of the present suits. Resultantly, the plaints in the suits are liable to be rejected.

It was further observed that the BGs which are the subject matter in two suits were unconditional. Use of the words "hereby agrees unequivocally, irrevocably and unconditionally to pay to ……forthwith on demand in writing from the bank or any officer authorised by it in this behalf, in the manner set out in paragraph 6 hereof…… the guarantor Bank hereby expressly agrees that it shall not require any proof in addition to the complying written demand from the bank in the format set out.

The Court further said that it cannot also be lost sight of that in the whole process, considerable time, out of the time bound schedule in terms of the Code for the resolution process, has been wasted and wastage of which time

may ultimately result in the possibility of Castex and ARGL Limited being restructured ceasing to exist and being inevitably required to be liquidated, all at the cost of the creditors thereof and wastage of the stressed assets of the said two companies. The loss caused by such conduct of the plaintiff is thus mammoth, having adverse consequences on all the creditors and shareholders of the said two companies and also on the economy of the country and to remedy which, the Code was enacted. The NCLT is best equipped to also deal with apportionment of the amount of the BBGs in proper account. The law requires Courts to, while vacating the interim injunction, balance the equities. Though the Court refrained from directing the plaintiff to reimburse SBI with interest on the amounts of the BGs but burdened the plaintiff in each of the suits with costs of Rs. 25,00,000/- considering the expense incurred by the defendants in contesting the suits including by engaging senior counsels. The plaintiff was directed to pay the said costs to SBI within four weeks from the date of order.

RULE 3(2) OF THE COMPANIES (REGISTERED VALUERS AND VALUATION) RULES, 2017

CASE NO. 4

HIGH COURT OF DELHI AT NEW DELHI

Cushman and Wakefield India Private Limited (Petitioner)

Vs.

Union of India & Anr. (Respondents)

W.P.(C) 9883/2018, CM No. 38508/2018

Date of Order: 31-01-2019

These petitions were to declare Rule 3(2) of the Companies (Registered Valuers and Valuation) Rules, 2017 as unconstitutional for violating Article 14, Article 19(1)(g) and Article 301 of the Constitution of India.

Facts:

Petitioners were engaged in the business of real estate consultancy services including provision of real estate valuation services. The petitioner being a subsidiary of a reputed body corporate, which is universally recognized as a lauded leader in providing valuation services and enjoys a reputation beyond reproach both in India and abroad. The petitioner contended that they have over the years been instrumental in setting benchmark for high standards, transparency and fairness with respect to valuation services in India. Further the petitioner had invested time, money and experience in creating a pool of resources to carry out quality valuation services in India. With the introduction of the Companies Act, 2013, the concept of '*Registered Valuer'* was introduced for the first time. As per Section 247 of the Companies Act, where a valuation is required to be made in respect of any property, stocks, shares, debentures, securities or goodwill or any other assets or net worth of a company or its liabilities under the provision of the Companies Act, it must be valued by a Registered Valuer.

On October 18, 2017, Section 247 of the Companies Act was notified along with the Companies (Registered Valuers and Valuation) Rules, 2017. Rule 3 (2)of the RV Rules and in particular Rule 3(2)(a) explicitly provides that a company shall not be eligible to be a Registered Valuer, if it is a subsidiary,

joint venture or associate of another company or body corporate, and this has impaired the right of the petitioners to carry on trade and business, which is guaranteed by the Constitution of India, as it ousts the petitioner from being a Registered Valuer merely on the ground of it being a subsidiary of a body corporate, which is patently discriminatory and arbitrary.

Ld. Counsel for the respondent argued that Section 247 of the Act which was introduced for the very first time has the concept of valuation by a Registered Valuer having qualifications, and requisite experience so that an impartial, true and fair valuation may be made. Such a provision did not exist under the old Companies Act, 1956. With the change in economic scenario globally, credible valuation of assets is critical to the efficient working of the financial market. Till the commencement of the Act and the Rules, there had not been any generally accepted and uniform standards in asset valuation system in India. Valuers had been adopting divergent methodologies resulting in vast differences in their conclusions. There was no uniformity. Due to such divergent valuation outcomes and criteria, asset valuation in India was not considered credible. Lack of authentic valuation reports of assets pointed fingers at the method of asset valuation and even the credibility of valuers. It is in order to regulate valuation profession under a regulatory regime and to guide and develop the same, the Parliament decided to bring in uniformly acceptable norms and generally accepted global valuation practices in India by incorporating a separate Chapter in the Act to set regulatory norms for various classes of asset valuation for the purposes of Companies Act, 2013. The integrity, impartiality and truthfulness of the valuation process is absolutely essential to the proper working of these laws and to particularly incoming FDI in India which is based on such valuation.

The objective and intention behind laying down the impugned Rule is clearly to introduce higher standards of professionalism in valuation industry, specifically in relation to valuations undertaken for the purpose of Companies Act and IBC, 2016. The impugned Rule obviates the possibility of conflict of interest on account of diverging interests of constituent / associate entities which resultantly shall undermine the very process of valuation, being one of the most essential elements of the proceedings before NCLT.

Decision:

The Hon'ble Court keeping in view the position of law and the reasoning given by the respondents and making eligible only companies other than

subsidiary companies, associate companies and joint ventures for the purpose of registration as Valuer, a separate class has been carved out based on classification which is founded on intelligible differentia opined that as such the Rule cannot be faulted. The Hon'ble Court therefore did not see any merit in the only ground urged by the petitioners. The petitions were dismissed as infructuous.

SECTION 482 OF THE CRIMINAL PROCEDURE CODE

CASE NO. 5

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Mr. Ajay Kumar Bishnoi, Former MD, M/s. Tecpro Systems Ltd.

(Petitioner)

Vs.

M/s. Tap Engineering (Respondent/Complainant)

Crl OP(MD)No.34996 of 2019

Date of Order: 09-01-2020

Section 238 read with Sections 14, 31 of Insolvency and Bankruptcy Code, 2016 read with Section 138 & 141 of the Negotiable Instruments Act, 1881 and Section 482 of the Criminal Procedure Code - Provisions of IBC to override other laws - The juristic entity cannot be imprisoned, the person in charge of the entity found guilty can be imprisoned as per Section 141 of the Negotiable Instruments Act - Section 138 of NI Act is not covered under the prohibition set out in Section 14 of the Code - The inherent powers of the Court are meant to be exercised only to prevent the abuse of process of law or to secure the ends of justice - facts on record shows that continuation of the impugned prosecution would not constitute an abuse of legal process - Hence, inherent powers of this Court under Section 482 of Cr. PC in favour of the petitioner were not invoked.

Brief background facts:

Tecpro Systems Limited ('Corporate Debtor') came under Corporate Insolvency Resolution Process (CIRP) as one of its financial creditors filed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal, New Delhi. The application was admitted on 07.08.2017 and eventually a resolution plan submitted by Kridhan Infrastructures Private Limited (KIPL) was approved on 15.05.2019. As the resolution plan approved provided for change in the management, the control of the 'Corporate Debtor' was to vest with KIPL.

Prior to insolvency commencement of CIRP against the 'Corporate Debtor', M/s. Tap Engineering, one of the 'Operational Creditors' filed complaints before the jurisdictional Magistrate Court as the Cheques issued by 'Corporate Director' in its favour against supply of goods were dishonoured for the reason of 'insufficient funds". Cognizance of the offence under Section 138 r/w 141 of the Negotiable Instruments Act, 1881 was taken and summons were issued. Tecpro Systems Limited was shown as the first accused. The petitioner herein was shown as the second accused in each of the complaints filed.

The petitions in the present case have been filled under Section 482 of the Criminal Procedure Code by the former Managing Director of M/s. Tecpro Systems Limited. The prayer in these criminal original petitions is for quashing the complaints instituted by M/s. Tap Engineering under Section 138 r/w 141 of the Negotiable Instruments Act, 1881.

The petitioner's counsel submits that the approved resolution plan clearly states that all the outstanding negotiable instruments issued by the company or by any persons/entities on behalf of the company prior to the insolvency commencement date shall stand terminated and the liability of the company and its current employees under such instruments shall stand extinguished and all the legal proceedings relating thereto shall stand irrevocably and unconditionally abated. His contention is that on approval of the Resolution Plan, KIPL has taken over the entire management of Tecpro Systems Limited coupled with assets and liabilities. The petitioner is therefore crippled by law and cannot defend himself or conduct the case before the trial Court as he does not have access to any of the company records. Moreover, the Cheques in question were not issued in personal individual capacity of the petitioner. In fact, the Cheques were issued by the authorized signatory. Therefore, no penal liability can be fastened on the petitioner. Further, he contended that the Insolvency and Bankruptcy Code, 2016 has an overriding effect over other laws. Therefore, continuation of the impugned prosecution would only amount to an abuse of legal process.

Section 14 of the Insolvency and Bankruptcy Code, 2016 contemplates declaration of moratorium. The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any Court of law, tribunal, arbitration panel or other authority is prohibited. Here, the moot point is whether the expression "proceedings" will include criminal prosecution. This question arose before various judicial fora.

The High Court of Calcutta in C.R.R No.3455 of 2018 vide judgment dated 16.04.2019, declined to quash the complaint under Section 138 of the Negotiable Instruments Act, 1881 merely on account of the declaration of moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016. It was held that declaration of moratorium under Section 14 of the Code does not create any bar for continuation of criminal proceedings initiated under Section 138/141 of the Negotiable Instruments Act, 1881. Even this Court vide order dated 02.04.2019 in CRL OP No. 8869 of 2018 held that Section 138 of NI Act is not covered under the prohibition set out in Section 14 of the Code.

Realizing the position, the counsel for the petitioner argued that he is not anchoring his contention on Section 14 of the Code. He submitted that Section 31 of the Code states that on approval of the resolution plan, moratorium order passed u/s 14 of the Code, shall cease to have effect. Further, he argued that Section 31(1) of Code states that approved resolution plan be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

The question is whether by operation of the provisions of Code, 2016, the criminal prosecution initiated under Section 138 r/w.141 of the Negotiable Instruments Act, 1881 r/w. 200 of Cr. P.C, can be terminated. In JIK Industries Limited Vs. Amarlal V. Jumai (2012) 3 SCC 255, the Hon'ble Supreme Court held that the binding effect contemplated by Section 31 of the Code is in respect of the assets and management of the corporate debtor. No clause in the Corporate Insolvency Resolution Plan even can take away the power and jurisdiction of the criminal Court to conduct and dispose of the proceedings before it in accordance with the provisions of the Code of Criminal Procedure. Under Section 238, the provisions of the Code shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. But no provision of the Insolvency and Bankruptcy Code bars the continuation of the criminal prosecution initiated against the corporate debtor or its directors and officials

In the present case, 'Corporate Debtor', the accused company, had not been dissolved. Rather, its management has been taken over. As such, the impugned prosecution against Tecpro Systems is to continue. On account of takeover of the management of the company by KIPL, the petitioner claim that the principles of natural justice stand violated as at the stage of

evidence, he cannot lead any documentary evidence. The argument is devoid of any merit as it is always open to the petitioner to file an application for causing production of any document or examination of any witness in terms of Section 243 of Cr. PC.

Further, the approved resolution plan in this case provides for only 0.22% of the operational debt. Therefore, it is not a case of "hair cut" but appears to be a clean shave and complete tonsure for the 'Operational Creditors''. Section 138 of the Negotiable Instruments Act, provides not only for punishment but also for payment of fine/compensation. Though the juristic entity cannot be imprisoned, the person in charge of the entity found guilty (Petitioner) can be imprisoned as per Section 141 of the Negotiable Instruments Act. Section 138 of the Negotiable Instruments Act provides not only for punishment but also for payment of fine/compensation. The amount of fine/compensation can also be recovered from the assets of the corporate entity or that of its directors and officials who have been found guilty and vicariously liable in the same trial.

In the present case, the petitioner, figuring as the second accused, made prayer for quashing the criminal complaint. Tecpro Systems Limited is the first accused. He is asking for quashing of entire prosecution. Since, petition has been filed only by the erstwhile director; he cannot maintain prayer for quashing of the entire prosecution. He can confine the relief to himself. As already held, protection shield will not fit the erstwhile director as it was never designed for him.

Decision:

These petitions have been filed under Section 482 of Cr. PC. The inherent powers of this Court are meant to be exercised only to prevent the abuse of process of law or to secure the ends of justice. The facts appearing on record and the contentions put forth by the learned counsel for the petitioner do not persuade to come to the conclusion that continuation of the impugned prosecution would constitute an abuse of legal process. Therefore, the Court declined to invoke the inherent powers of this Court under Section 482 of Cr. PC in favour of the petitioner. As such, all these criminal original petitions stand dismissed.

Chapter 3

Orders passed by National Company Law Appellate Tribunal (NCLAT)

SECTION 7

CASE NO. 1

M/s Saregama India Limited. (Appellant)

Vs.

M/s Home Movie Makers Private Ltd. (Respondent/ Corporate Debtor)

Company Appeal (AT) (Insolvency) 359 of 2019

Date of Order: 23-10-2019

Section 7 of the Insolvency and Bankruptcy Code, 2016 – Appeal against dismissal of application for Initiation of Corporate Insolvency Resolution Process by Operational Creditor

Facts:

The only point for consideration is whether the claim of the Appellant fall under the category of financial debt or not for initiating Corporate Resolution Insolvency Process ("CIRP") under Section 7 of the I&B Code.

Before filing the application for initiation of CIRP, the Appellant issued notice to the Respondents under Section 8(1) of the I&B Code. However, it filed the application for initiation of CIRP under Section 7 of the I&B Code which is applicable for applications field by financial creditors. The Adjudicating Authority dismissed the application on this ground.

Decision:

The Hon'ble NCLAT held that the claim of the Appellant is not a Financial Debt within the meaning of Section 5(8) of the I&B Code.

The Hon'ble NCLAT observed that under the provisions of I&B Code, the Adjudicating Authority or the Appellate Tribunal would not go into the aspects of veracity of an agreement, its breach, void, voidable etc. The only thing to be seen by the Adjudicating Authority is whether a claim is made under

Section 9 by the Operational Creditor or under Section 7 by a financial creditor or under Section 10 by the Corporate Applicant.

Thereafter, the Hon'ble NCLAT analysed various terms and conditions of the agreement between the Appellant and the Respondent to conclude if the money given by the Appellant amounts to giving of debt. The Hon'ble NCLAT also observed that nowhere in the marketing agreements and subsequent correspondence exchanged between the Appellant and the Respondent, it is mentioned that the amount paid by the Appellant would be repayable along with interest over a period of time in a single or series of payments in future. The Appellant has not disbursed money against the consideration for the time value.

Therefore, the same is not a Financial Debt within the meaning of Section 5(8) of the I&B Code.

Case Review: Order dated 14 February 2019 passed by NCLT, Division Bench, Chennai in Saregama India Private Limited v. Home Movie Makers Private Limited (C.P. No.1506/IB/2018), *upheld*.

SECTION 7

CASE NO. 2

IDBI Bank Ltd. (Appellant/Financial Creditor)

Vs.

Mr. Anuj Jain (Interim Resolution Professional)

Jaypee Infratech Ltd. & Anr. (Respondents/Corporate Debtor)

AND

Jaypee Greens Krescent Home Buyers Welfare Association & Ors.

Vs.

Jaypee Infratech Ltd. Through Mr. Anuj Jain, Interim Resolution Professional

Company Appeal (AT) (Ins) No. 536 of 2019 with

I.A. No. 1857 of 2019

With

Company Appeal (AT) (Ins) No. 708 of 2019

Date of Order- 30-07-2019

Section 7 of the Insolvency and Bankruptcy Code, 2016 – Application for Initiation of Corporate Insolvency Resolution Process against Corporate Debtor.

As both these appeals related to Corporate Insolvency Resolution Process against Jaypee Infratech Limited (Corporate Debtor), the NCLAT decided the appeals by a common order.

Facts :

The question that arises in the case is whether in the Corporate Insolvency Resolution Process, 'exclusion of certain period' for the purpose of counting of total period of 270 days for justified grounds, facts and circumstances and in interest of allottees can be allowed.

The 'Corporate Insolvency Resolution Process' was initiated against 'Jaypee Infratech Limited' pursuant to an application under Section 7 of the

'Insolvency and Bankruptcy Code, 2016 (for short, 'the I&B Code') filed by the 'IDBI Bank Limited' which was admitted with respect to same 'Corporate Debtor'. One 'Chitra Sharma' moved before the Hon'ble Supreme Court, in *'Chita Sharma Vs. Union of India'* wherein the Hon'ble Supreme Court by its judgement reported in *'2018 SCC OnLine SC 874'* (decided on 9th August, 2018) passed the order and directions.

After the decision of the Hon'ble Supreme Court, during the 'Corporate Insolvency Resolution Process', the 'Home Buyers Association' preferred an application before the Adjudicating Authority (National Company Law Tribunal), Allahabad Bench on 17th September, 2018 seeking clarification as to what will be the manner in which the voting percentage of allottees (Financial Creditors) has to be calculated.

On 13th December, 2018 the Hon'ble Members of Adjudicating Authority (National Company Law Tribunal), Allahabad Division Bench expressed difference of opinion. The matter was referred to the President, National Company Law Tribunal, Principal Bench, New Delhi to place the matter before the third Hon'ble Member, who by impugned order dated 24th May, 2019 gave its observations.

The aforesaid order dated 24th May, 2019 is under challenge in *'Company Appeal (AT) (Insolvency) No. 708 of 2019'* preferred by 'Jaypee Green Krescent House Buyers Welfare Associations & Ors.'

The Adjudicating Authority (National Company Law Tribunal) Allahabad Bench by impugned order dated 6th May, 2019 asked the authorised representative of the Allottees and other learned counsel appearing on behalf of the Allottees to file respective replies. The aforesaid order dated 6th May, 2019 has been challenged before this Appellate Tribunal by the 'IDBI Bank Limited' in *'Company Appeal (AT)(Insolvency) No. 536 of 2019'*.

Decision:

The Appellate Tribunal decided the appeal in the light of the decision *Quinn Logistics India Pvt. Ltd. vs. Mack Soft Tech Pvt. Ltd. & Ors. [Company Appeal (AT)(Insolvency) No. 185 of 2018]*wherein it was observed that exclusion of certain period is allowed if the facts and circumstances justify exclusion in unforeseen circumstances. For example, for following good grounds and unforeseen circumstances, the intervening period can be excluded for counting of the total period of 270 days of resolution process:-

(i) If the corporate insolvency resolution process is stayed by 'a Court of law or the Adjudicating Authority or the Appellate Tribunal or the Hon'ble Supreme Court.

(ii) If no 'Resolution Professional' is functioning for one or other reason during the corporate insolvency resolution process, such as removal.

(iii) The period between the dates of order of admission/moratorium is passed and the actual date on which the 'Resolution Professional' takes charge for completing the corporate insolvency resolution process.

(iv) On hearing a case, if order is reserved by the Adjudicating Authority or the Appellate Tribunal or the Hon'ble Supreme Court and finally pass order enabling the 'Resolution Professional' to complete the corporate insolvency resolution process.

(v) If the corporate insolvency resolution process is set aside by the Appellate Tribunal or order of the Appellate Tribunal is reversed by the Hon'ble Supreme Court and corporate insolvency resolution process is restored.

(vi) Any other circumstances which justifies exclusion of certain period. However, after exclusion of the period, if further period is allowed the total number of days cannot exceed 270 days which is the maximum time limit prescribed under the Code.

The Appellate Tribunal in this case found that no regulation was framed under the Insolvency and Bankruptcy Code as to how the voting share of thousands of allottees will be counted, all of whom come within the meaning of Financial Creditors and thereby are members of the Committee of Creditors. It was in this background that the Home Buyers Association preferred an application before NCLT Allahabad bench in September 2018 to decide such issue. The two Hon'ble Members of NCLT differed on the principle in order dated 13.12.2018 and referred the matter to the Principal Bench for placing the matter before Third Hon'ble Member who has delivered its decision by the order dated 24.05.2019.

In the meantime, 270 days lapsed, if counted from the date the proceeding was remitted by the Hon'ble Supreme Court i.e., 06.05.2019.

The Court observed that this as an extra-ordinary situation when the law was silent and there was no guideline, which caused difference of opinion

between the two Hon'ble Members and finally decided by the third Hon'ble Member. In the view of this extra ordinary situation, the Court held that the period from 17th September, 2018 i.e. the date of application filed by the Association of the allottees for clarification for the order and till the final decision i.e. 4th June, 2019 i.e. the date the matter was finally decided by the third Hon'ble Member (a total of 260 days) can be excluded for the purpose of counting the 270 days. However, considering that the matter was pending for long, instead of excluding 260 days, it excluded 90 days for the purpose of counting the period of 270 days of Corporate Insolvency Resolution Process which should be counted from the date of receipt of the copy of this order.

The aforesaid period was excluded so as to enable the Resolution Professional/CoC to call for fresh resolution plans and consider them and pass appropriate order under 30(5) of Insolvency and Bankruptcy Code preferably within 45 days and rest 45 days margin were given to remove any difficulty and appropriate order as may be passed by the Adjudicating Authority. Voting share of the allottees were to be counted in terms of the Code as existing on the date of voting and/or in accordance with majority decision of the Adjudicating Authority

Both the appeals stand disposed of with aforesaid observations and directions.

SECTION 7

CASE NO. 3

Export Import Bank of India (Appellant/Financial Creditor)

Vs.

CHL Limited (Respondent/Corporate Debtor)

Company Appeal (AT) (Insolvency) No. 51 of 2018

Date of Order: 16-01-2019

Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Section 128 of Indian Contract Act, 1872

Facts:

The question that arose in this appeal was whether the liability of a corporate guarantor/ surety is co-extensive with that of the principal borrower and can Corporate Insolvency Resolution Process be initiated against such Corporate Guarantor/Corporate Debtor.

The Appellant, Export Import Bank (hereinafter 'Exim Bank'), being the Financial Creditor filed an appeal for initiation of Corporate Insolvency Resolution Process against the Respondent/Corporate Debtor, CHL Limited, on the ground of default in discharging its obligation upon invocation of guarantee. The NCLT passed order dated 11.01.2018 whereby application filed by the Financial Creditor-Applicant was dismissed on the ground that Respondent/Corporate Guarantor's liability as a surety was not co-extensive with that of the principal borrower.

Decision:

The NCLAT (Appellate Tribunal) dismissed the appeal of the Appellant/ Financial Creditor. The Appellate Tribunal observed that if after reconciliation process between the Principal Borrower and the Financial Creditor, any fresh demand which is made by the Financial Creditor is defaulted by the Principal Borrower, only then can the Financial Creditor invoke the Corporate Guarantee. Reference was made to Section 128 of the Indian Contract Act, 1872 by the Appellate Tribunal to reason that surety's liability is co-extensive with that of the principal debtor, i.e. Corporate Guarantee can be invoked only in case of a default on the part of the Principal Borrower.

The Appellate Tribunal further observed while dismissing the appeal that if an application under section 7 of the Insolvency and Bankruptcy Code, 2016 is accepted as against the Corporate Guarantor then it could have serious consequences for a business up and running. The Appellate Tribunal reasoned that the Corporate Insolvency Resolution Process is an irreversible process, which once started can lead to the suspension of the Board of Directors of such a Corporate Guarantor, appointment of the Interim Resolution Professional and so on. These, the Appellate Tribunal held, are stringent consequences which cannot be compensated later to the Corporate Guarantor/Corporate Debtor. Thus, if after the reconciliation process, the Principal Borrower pays the amount, if any, found payable, it would confirm that there never existed any debt which is due and payable or defaulted by the Corporate Guarantor.

Further, the Appellate Tribunal observed that in the present factual matrix, the Economic Court of Dushanbe restrained the Financial Creditor in the present case from proceedings on the basis of loan contracts or any other supplement contract. Further, the Economic Court of Dushanbe also suspended the loan agreement and any other contract and all obligations arising out of that contract. The decision of Economic Court was later upheld by the Supreme Economic Court of Dushanbe vide order dated 14.08.2018.

On the basis of the above observations, the NCLAT dismissed the appeal and consequently Corporate Insolvency Resolution Process against the Corporate Debtor/Corporate Guarantor as well.

Case Review:

Appeal arising out of order dated 11.01.2018 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in C.P. No. IB-392(PB)/2017] dismissed.

SECTION 7

CASE NO. 4

Ferro Alloys Corporation Ltd. (Appellant)

Vs

Rural Electrification Corporation Ltd. (Respondent)

Company Appeal (AT) (Insolvency) No. 92 of 2017

Date of Order: 08-01-2019

Section 7 of the Insolvency and Bankruptcy Code, 2016

Facts:

With this appeal two more appeals viz. Rai Bahadur Shree Ram & Company Pvt. Ltd. (Appellant) Vs. 1. Rural Electrification Corporation Ltd.,2. Ferro Alloys Corporation Ltd., (Respondents), Company Appeal (AT) (Insolvency) No. 93 of 2017 AND, Bank of India, (Appellant) Vs. 1. Rural Electrification Corporation Ltd., 2. Ferro Alloys Corporation Ltd., 3. FACOR Power Ltd., (Respondents), Company Appeal (AT) (Insolvency) No. 148 of 2017, being all arising out of order dated 6th July, 2017 passed by National Company Law Tribunal, Kolkata Bench, Kolkata in C.P. (IB) No. 251/KB/2017 are heard and decided simultaneously.

An application U/s. 7 was preferred by Rural Electrification Corporation Ltd. (Financial Creditor) against 'Ferro Alloys Corporation Ltd. (Corporate Guarantor - Corporate Debtor). The said application being admitted is under challenge. The Appellate Authority opined that the appeal at the instance of 'Ferro Alloys Corporation Ltd.' (Corporate Debtor) through its (suspended) Board of Directors is not maintainable in view of the decision of the Hon'ble Supreme Court in "Innoventive Industries Ltd. v. ICICI Bank. Though the learned counsel appearing on behalf of the 'Corporate Debtor' pleaded that the observation made by the Hon'ble Supreme Court in the said case is not a law lay down under Article 141 of the Constitution of India and thereby not binding for this Appellate Tribunal and hence in reply quoted a judgement of Starlog Enterprises Limited Vs. ICICI Bank Limited – Company Appeal (AT)(Ins.) No. 5 of 2017' and submitted that in this case the Appellate Tribunal held that the appeal by 'corporate debtor' is also maintainable.

However, the Appellate Authority was not inclined to accept such submission in view of the specific finding in 'Innoventive Industries Ltd.(Supra)'. While the Appellate Authority held that the present appeal by 'Ferro Alloys Corporation Ltd.' through (suspended) Board of Directors is not maintainable, however, as the other appeal has been preferred by shareholders against the common order dated 6th July, 2017, submissions by the Learned counsel, were noted.

According to the learned Senior Counsel per se of the I&B Code does not use the concept or the phrase 'corporate guarantor'. This is in contradiction to specific inclusion of 'personal guarantor' in multiple provisions. 'Corporate Guarantor' is, therefore, conspicuous by its absence in the I&B Code. It was submitted that there is no definition of 'Corporate Guarantor' in Section 3 or 5, the two definitional provisions. However, Section 5(22) of the I&B Code defines 'personal guarantor' which means an individual who is a surety to a 'corporate debtor'. Use of the word 'individual' precludes any corporate person or entity.

It was further submitted that the I&B Code does not use the word 'guarantor' in a general sense in Section 31 which mandates that a resolution plan will be binding on the guarantors – this provision envisages a situation where the resolution plan has already been made for a 'principal debtor' and which is binding on the guarantor i.e. a resolution plan of a 'principal borrower' is prior in time; Section 43(2) and 44 (1)(e) is giving beneficial preference by a corporate debtor to a guarantor. Therefore, according to him a combined reading of Section 3(8) – definition of 'corporate debtor' and Section 3(11) – definition of 'debt' and Section 5(8)(i) – definition of 'financial debt' would imply that a liability in respect of a guarantee would form part of financial debt, however, while this may be so, the word 'corporate guarantor' does not find mention in the I&B Code

It was submitted that simultaneously two applications under Section 7 of the I&B Code can be filed, one against the 'principal debtor' and the other against the 'corporate debtor'. According to the learned counsel there is no provision in the I&B Code for filing a simultaneous Section 7 of the I&B Code application against a 'principal debtor' as well as a 'corporate guarantor'. Thus, Section 7 application cannot be jointly filed against both the 'principal debtor' and the 'corporate guarantor'.

The Bank of India, on its behalf and on behalf of other members Banks of its association, has made wide claim that the consortium being a prior and first charge holder, its right could not be defeated by the respondent – 'Rural Electrification Corporation Limited', which not only was a subsequent guarantee-holder but even its authenticity of its guarantee was liable to be adjudicated.

However, Appellate Tribunal was of the view that aforesaid submission cannot be accepted at the stage of admission of an application under Section 7, as there is no need to implead any person or party (respondent) at the initial stage, except the 'corporate debtor', who owes the 'debt' and because of 'default' the application under Section 7 is filed. Therefore, the appeal at the instance of 'Bank of India' on its behalf and member banks of the consortium being on merit is fit to be rejected.

The other appellant – Rai Bahadur Shree Ram and Company Pvt. Ltd. is a promoter and shareholder of 'Ferro Alloys Corp. Ltd.' (Corporate Debtor). The appeal at his instance being maintainable, in fact the Appellate Authority heard the learned Senior Counsel of the Appellant with regard to the larger issue raised by him regarding the maintainability of the petition under Section 7 against the 'corporate guarantor'. In the individual appeal preferred by the promoter, the main ground taken is that there is a dispute about the amount of 'debt'. However, mere dispute of quantum of amount cannot be a ground and that too can be taken at the stage of admission. If the 'debt' is more than one lakh and there is a 'default', the application to be admitted. Therefore, the ground taken by Rai Bahadur Shree Ram and Co. Pvt. Ltd. (Promoter) against the order of the Adjudicating Authority dated 6th July, 2017 was found fit to be rejected.

The only question arises for determination in this appeal is whether the application under Section 7 of the I&B Code is maintainable against the 'corporate guarantor' without initiation of 'corporate insolvency resolution process' against the 'principal borrower' ('principal debtor').

In "State Bank of India v. Indexport Registered and Ors.– (1992) 3 SCC 159", the Hon'ble Supreme Court held that the decree holder bank can execute the decree first against the guarantor without proceeding against the 'Principal Borrower'.

Decision:

In view of the aforesaid decision of the Hon'ble Supreme Court, the Appellate Authority held that it is not necessary to initiate 'Corporate Insolvency Resolution Process' against the 'Principal Borrower' before initiating 'Corporate Insolvency Resolution Process' against the 'Corporate Guarantors'. Without initiating any 'Corporate Insolvency Resolution Process' against the 'Principal Borrower', it is always open to the 'Financial Creditor' to initiate 'Corporate Insolvency Resolution Process' under Section 7 against the 'Corporate Guarantors', as the creditor is also the 'Financial Creditor' qua 'Corporate Guarantor'.

SECTION 9

CASE NO. 5

Gammon India Ltd. (Appellant)

Vs.

Neelkanth Mansions and Infrastructure Pvt. Ltd. (Respondent/ Corporate Debtor)

Company Appeal (AT) (Insolvency) 698 of 2018

Date of Order: 19-12-2018

Section 433 (e) & (f) read with Section 434 of the Companies Act, 1956 (Winding up)

Rule 5 -Transfer of pending proceedings of Winding up on the ground of inability to pay debts of the Companies (Transfer of Pending Proceedings) Rules, 2016

Section 9 of the Insolvency and Bankruptcy Code, 2016 – Application for Initiation of Corporate Insolvency Resolution Process against Corporate Debtor.

Section 79 (16) of the Insolvency and Bankruptcy Code, 2016 (definition of firm)

FACTS:

The question that arose in the present appeal was limited to the proposition as to whether an Insolvency Application could be entertained under the Insolvency and Bankruptcy Code, 2016 against a partnership firm.

Relevant facts:

By agreement dated 17.06.2005, Appellant and the Corporate Debtor entered into partnership to be known as M/s. Gammon Neelkanth Realty Corporation. The said agreement was executed between the Neelkanth Mansions and Infrastructure Pvt. Ltd., M/s. Neelkanth Realtors Pvt. Ltd. (a company under the Companies Act) and Gammon Housing and Estates Developers Ltd. (a group company of the Appellant). The purpose of the agreement was completion of several residential buildings at a cost of Rs. 88.75 Crores with completion date being 31.12.2007.

While the work was in progress, the Corporate Debtor filed suit, being Suit No. 830/2010 on 17.03.2010 before the Bombay High Court against various persons including the Appellant seeking relief in respect to 22 flats wrongly transferred by Treetop (a company belonging to the Appellant).

Meanwhile, Appellant filed suit before Bombay High Court for winding up of the corporate debtor for default of payment of Rs. 54,86,09,635 with interest @15% from 15.08.2016 till its realization. Due to enactment of the Insolvency and Bankruptcy Code 2016, the case was transferred from the Bombay High Court to the NCLT, Mumbai Bench, Mumbai.

Appellant thereafter filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor. The Adjudicating Authority vide the impugned order dated 23.08.2018 dismissed the application on the ground that the application under Section 9 is not maintainable against the partnership firm. The Adjudicating Authority held that the Respondent is a partnership firm by associated companies of the Appellant of which the Respondent is one of the partners. Therefore, it was held that the application under Section 9 of the Insolvency and Bankruptcy Code, 2016 against the Respondent, one of the partner of the partnership firm is not maintainable.

Decision:

As per section 76 (16) of the Insolvency and Bankruptcy Code, 2016, a firm means a body of individuals carrying on business in partnership which may be registered under Section 59 of the Indian Partnership Act, 1932. The NCLAT held that the definition makes it abundantly clear that only when a firm is comprised of individuals, that is to say natural persons only, the provisions of Part III of the Code will get attracted. In case where two or more persons (whether artificial or legal) who are not individuals are carrying on a business in partnership, then application for insolvency resolution against such partnership cannot be entertained by the Adjudicating Authority due to lack of jurisdiction.

It was observed that in the facts of the case captioned above, the application under Section 9 was filed against one of the partners which is a legal entity (corporate body) and not an individual. The NCLAT therefore held that the Adjudicating Authority has rightly held that the application under Section 9 was not maintainable against one of the members of the partnership firm (Respondent herein) and rightly rejected the said application. The appeal was accordingly dismissed.

SECTION 10(3) (C)

CASE NO. 6

Export-Import Bank of India & Anr. (Appellants/ Financial Creditors)

Vs.

Astonfield Solar (Gujarat) Pvt. Ltd & Anr. (Respondents/ Corporate Debtor)

Company Appeal (AT) (Insolvency) No.754 of 2018

Date of Order: 04-12-2018

Section 10(3)(c) of IBC, 2016 – Right of shareholders of Corporate Debtor with respect to the decision to proceed with Corporate Insolvency Resolution Process

Facts:

The Corporate Debtor's application under section 10 of IBC 2016 for initiation of corporate insolvency resolution process (CIRP) was admitted by NCLT New Delhi, order of moratorium has been passed and Resolution Professional has been appointed.

The appeal was preferred by Financial Creditors against order passed by NCLT and submitted that the shareholders had no voting right to approve the decision of the Board of Directors for initiating of CIRP under section 10 of IBC. The appellant placed reliance on the Deed of Pledge of Securities entered into between the Corporate Debtor and Financial Creditors (Appellant) wherein clause 5.2 and clause 5.2.2 inter alia contained that upon the occurrence of event of default, all the voting rights of the shareholders of the pledgor (Corporate Debtor) shall cease forthwith and security agent was irrevocably authorised to attend annual general meeting of members & exercise voting rights.

Decision:

NCLAT held that though from the Deed of Pledge of securities, the voting rights of the shareholders shall cease to exist upon the occurrence of an event of default, it will not deprive the shareholder to continue to be a shareholder and their shares do not stand transferred to the Financial Creditor. Even if it is presumed that the shareholder ceased to exercise their

right to vote with regard to the Corporate Debtor, their right under clause (c) of sub section (3) of section 10 of IBC, Code 2016 to decide whether approving or disapproving the decision to proceed with the corporate insolvency resolution process does not stand curtailed or superseded by Deed of Pledge.

Hence no interference was called for and in absence of any merit, the appeal was dismissed. No cost.

SECTION 14

CASE NO. 7

Varrsana Ispat Limited (Appellant)

[Through the Resolution Professional Mr. Anil Goel]

Vs.

Deputy Director, Directorate of Enforcement (Respondent)

Company Appeal (AT) (Insolvency) No. 493 of 2018

Date of order: 02-05-2019

Sections 14 and 238 of Insolvency and Bankruptcy Code, 2016 (IBC, 2016) read with sections 2(1)(u), 3 and 4 of the Prevention of Money Laundering Act, 2002 (PMLA, 2002)

Facts:

The Directorate of Enforcement of Central Government, New Delhi, attached some of the properties of 'Varrsana Ispat Limited'- ('Corporate Debtor'). The 'Resolution Professional' filed application before the Adjudicating Authority for releasing the attachment of certain assets of the 'Corporate Debtor' by Deputy Director of Enforcement.

On-going through the order of attachment, the Adjudicating Authority observed that the attachment order was issued on 10th July, 2017 prior to the order of declaration of the 'Moratorium'. Therefore, an order releasing the order of attachment by the Directorate of Enforcement is not maintainable. The aforesaid order dated 12th July, 2018 is under challenge in this appeal.

Learned counsel appearing on behalf of the Appellant- 'Resolution Professional' submitted that Section 14 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) has an overriding effect on the provisions of the 'Prevention of Money Laundering Act, 2002'. Reference was made to Section 238 of the 'I&B Code'.

Question that arises for consideration in this appeal is whether section 14 of the Insolvency and Bankruptcy Code, 2016 has an overriding effect on the provisions of the Prevention of Money Laundering Act, 2002?

Decision:

Section 14 is not applicable to the criminal proceeding or any penal action taken pursuant to the criminal proceeding or any act having essence of crime or crime proceeds. The object of the PMLA, 2002 is to prevent the money laundering and to provide confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.

As per PMLA, 2002, Section 2(1)(u) defines "proceeds of crime", section 3 relates to "offence of money-laundering" and section 4 prescribe "Punishment for money laundering".

From the aforesaid provisions, it is clear that the 'Prevention of Money-Laundering Act, 2002' relates to 'proceeds of crime' and the offence relates to 'money-laundering' resulting confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto. Thus, as the 'Prevention of Money Laundering Act, 2002' or provisions therein relates to 'proceeds of crime', the Appellate Authority held that Section 14 of the 'I&B Code' is not applicable to such proceeding.

Further, the Appellate Authority observed that, offence of money-laundering is punishable with rigorous imprisonment which is not less than three years and has nothing to do with the 'Corporate Debtor'. It will be applicable to the individual which may include the Ex-Directors and Shareholders of the 'Corporate Debtor' and they cannot be given protection from the 'Prevention of Money Laundering Act, 2002' and such individual cannot take any advantage of Section 14 of the 'I&B Code'.

Also, the Appellate Authority found that the attachments were made by the Deputy Director of Directorate of Enforcement much prior to initiation of the 'Corporate Insolvency Resolution Process', therefore, the 'Resolution Professional' cannot derive any advantage out of Section 14.

It was held that PMLA, 2002 relates to different fields of penal action of "proceeds of crime", it invokes simultaneously with the IBC, 2016, having no overriding effect of one Act over the other including IBC, 2016. So, the Appellate Authority found no merit in the appeal. It was accordingly dismissed. No costs.

SECTION 29A

CASE NO. 8

Sunil Jain (Appellant)

Vs.

Punjab National Bank & Ors. (Respondents)

Company Appeal (AT) (Insolvency) No. 156 of 2018

Date of order: 24-04-2019

Section 29A of The Insolvency and Bankruptcy Code, 2016

Facts

In the 'Corporate Insolvency Resolution Process' against 'Divya Jyoti Sponge Iron Private Limited'- ('Corporate Debtor'), the Adjudicating Authority by impugned order dated 13th March, 2018, approved the 'Resolution Plan' submitted by 'CP Ispat Private Limited'- ('Successful Resolution Applicant'). The same is under challenge by the Appellant- Mr. Sunil Jain, the Shareholder/ Promoter.

Mr. Sunil Jain also filed a 'Resolution Plan', being a Promoter, but the same was rejected, he being ineligible under Section 29A (c) of the 'I&B Code'.

It was submitted by the Appellant that the 'Resolution Plan' so approved is not in accordance with law as the right of the shareholders extinguished in violation of Sections 56 & 57 of the Companies Act, 2013.

Decision

The Appellate Tribunal held that the 'Committee of Creditors' rightly rejected the 'Resolution Plan' submitted by Appellant- Mr. Sunil Jain, he being ineligible in terms of Section 29A (c).

It was noticed that though time was allowed to Mr. Sunil Jain to pay the NPA amount of the 'Corporate Debtor' in terms of Clause (c) of Section 29A but he expressed his inability to pay the same.

So far as right of Shareholders are concerned, the shareholders claim have been taken into consideration by 'Successful Resolution Applicant' in the 'Resolution Plan' submitted by him. The Appellate Tribunal held that in view of proposal of taking over the shares of the Promoters as approved by the Adjudicating Authority, it is not required to comply with the provisions of

Sections 56 & 57 of the Companies Act, 2013 being a formality which can be completed even after the approval of the 'Resolution Plan', at the stage of implementation of the plan.

In view of the findings above, the Company Appeal was dismissed.

SECTION 31

CASE NO. 9

Asset Reconstruction Company(India) Ltd. (Appellant)

Vs.

Unimark Remedies Ltd.

(Through Resolution Professional) & Anr. (Respondents)

Company Appeal (AT)(Ins.) No. 131 of 2019

Date of order: 23-10-2019

The Appellant filed a 'Resolution Plan' which was approved by CoC and submitted that the matter was brought to the notice of NCLT Mumbai Bench which passed impugned order dated 4th February, 2019.

Facts:

The impugned order dated 4th February, 2019 of NCLT Mumbai bench states that, it has been submitted by the Counsel representing the Corporation Bank that there is a lot of variations in both the plans and the actual market value of the assets of the Company, even in the recent past was about Rs. 630 Crores whereas the Resolution Applicants have come forward to infuse only to an extent of about Rs. 280 Crores. Apart from that it is alleged, the said successful Resolution Applicant is actually not interested in running the company but to dispose of one particular unit of the Corporate Debtor more like a slum sale to another party, which cannot be accepted. Then the Bench questioned the Counsel for the Corporation Bank that, being the member of Committee of Creditors why did not they object to such a proposal at the meeting of Committee of Creditors and the answer was that even though the objection were put forth before Committee of Creditors & Resolution Professional the same was not considered. Bench after hearing from all the parties concerned was of the view that both the Resolution Applicants have to improve their offer and submit the same to the Bench at the earliest point of time.

Bench said that a final call will be taken only after the financial creditors submit their reports with regard to the merits of each plan. Bench also said that no financial creditor be discriminated against on the basis of securities provided. It is also important that the claim of the Operational Creditor be

considered before considering the Resolution Plan. Accordingly, the M.A. No. 191/2019 is allowed with a direction to the IRP to examine the claim of Manali Petrochemicals Limited.

Decision:

Earlier, Appellate Tribunal asked the Adjudicating Authority to pass final order under Section 31 of the 'I&B' Code, however, tribunal found that because of the difference of opinion between two Hon'ble Members of the Adjudicating Authority relating to valuation of the assets of the Company, no final order has been passed yet. The Appellant merely being a 'Resolution Applicant' has no right to assail the final order which is yet to be passed.

In the circumstances, the bench was not inclined to deliberate on the issue as raised in this appeal. If the 'Resolution Plan' submitted by the Appellant is not approved or is rejected by the Adjudicating Authority, it will be open to the Appellant to raise the issue at that stage.

The appeal was disposed of with aforesaid observation.

SECTION 31

CASE NO. 10

Ashok B. Jiwrajka, Director of Alok Infrastructure Ltd.(Appellant)

Vs.

Axis Bank Ltd. (Respondent / Financial Creditor)

Company Appeal (AT) (Insolvency) No. 683 of 2018

Date of Order: 16-01-2019

Insolvency Resolution Process should not continue till the Corporate Insolvency Resolution Process is decided under Section 31 in the case of 'Alok Industries Ltd.' (Holding Company).

Facts:

A separate CIRP was initiated against 'Alok Industries Ltd.' (Holding Company). Subsequently, another CIRP was initiated pursuant to application filed by another financial creditor against 'Alok Infrastructure Ltd.' (A Subsidiary of Alok Industries Ltd.). This appeal has been preferred by 'Mr. Ashok B. Jiwrajka', Director of 'Alok Infrastructure Ltd.' against order dated 24th October, 2018 whereby and where under Corporate Insolvency Resolution Process has been initiated against 'Alok Infrastructure Ltd.' (Subsidiary Company).

Plea that was taken by the Ld. Counsel of the appellant was that a resolution plan has already been approved in the case of 'Alok Industries Ltd.' (Holding Company) and the matter was placed before the Adjudicating Authority in July, 2018 for its approval under Section 31 of Insolvency and Bankruptcy Code, 2016. However, no decision has been taken by the Adjudicating Authority.

Decision:

Both the CIRP initiated are separate from each other and hence the submission of the appellant was not acceptable to the Appellate Tribunal.

On the other plea the Appellate Tribunal expressed that the concerned Adjudicating Authority should decide the same immediately. The Appellate authority made it clear that they have not stayed the CIRP initiated against 'Alok Infrastructure Ltd.'

SECTION 32

CASE NO. 11

Standard Chartered Bank (Appellant)

Vs.

Satish Kumar Gupta, RP of Essar Steel Ltd. & Ors. (Respondents)

Company Appeal (AT) (Insolvency) 242 of 2019 and Ors

Date of Order: 04-07-2019

Section 31 and 32 of the Insolvency and Bankruptcy Code, 2016 – Appeal against approval of Resolution Plan by the Adjudicating Authority

Facts:

In the Corporate Resolution Insolvency Process ("CIRP") of 'Essar Steel Limited' ("Corporate Debtor") the CoC had approved the Resolution Plan submitted by Arcelormittal India Private Limited ("Successful Resolution Applicant") which was approved by the Hon'ble NCLT, Ahmedabad with certain modifications.

However, appeals had been filed by various stakeholders including the promoter of Corporate Debtor against the approval of Resolution Plan by the Hon'ble NCLT on the following grounds:

(i) The Resolution Applicant is ineligible to file a Resolution Plan under Section 29A of the I&B Code ("1st issue");

(ii) The Resolution Plan and the modifications suggested by the Hon'ble NCLT while approving the Resolution Plan is discriminatory so far as it related to distribution of assets to different Financial Creditors and Operational Creditors. Further, the manner of approval of Resolution Plan, the classification of debts was also challenged in the Appeal ("2nd Issue").

Decision:

The Hon'ble NCLAT while deciding both the above issues held as:

(i) 1st Issue – The Hon'ble NCLAT observed that the question of eligibility of Resolution Applicant to file resolution plan has already been agitated and settled by the of Hon'ble Supreme Court of India in Arcelormittal India Private Limited v. Satish Kumar Gupta and Ors.reported at (2018) SCC OnLine SC 1733. Therefore, the same is barred by the principle of *res-judicata*. Therefore, the appeal of the promoter of Corporate Debtor on this ground was dismissed;

(ii) 2nd Issue – While approving the Resolution Plan with modifications, below are the findings of the Hon'ble NCLAT on the question whether the CoC can delegate its power to a 'Sub Committee' or 'Core Committee' for negotiation with the 'Resolution Applicant' for revision of plan? And if at all this could be done, whether such 'Sub Committee' or the 'Committee of Creditors' are empowered to modify the Resolution Plan to distribute the resolution amount amongst the 'Financial Creditors' and the 'Operational Creditors' and other Creditors?

(a) The Hon'ble NCLAT held there is neither provision under I&B Code which permits constitution of a 'Core Committee' or 'Sub-Committee' nor the I&B Code or Regulations empowers the 'Committee of Creditors' to delegate its duties any other person.

(b) The Hon'ble NCLAT relied upon Section 30(2)(b) of the I&B Code and observed that the 'Resolution Professional' is required to notice whether the 'Resolution Plan' provides for the payment of the debts of the 'Operational Creditors' in such manner as may be specified by the Board. Further, as per Section 30(3), the Resolution Professional has to present before the CoC only that plan which confirms the conditions referred to in sub-section (2). The said provision makes it clear that the 'Resolution Applicant' in its 'Resolution Plan' must provide the amount it proposes to pay one or other Creditors, including the 'Operational Creditors' and the 'Financial Creditors'.

(c) Further, as per Regulation 38(1A) of the CIRP Regulations, 'Resolution Plan' must include a statement as to how it has dealt with the interests of all stakeholders, including 'Financial

Creditors' and the 'Operational Creditors', of the Corporate Debtor. In other words, the distribution of amount to all creditors and stakeholders must be reflected in the Resolution Plan.

(d) The Hon'ble NCLAT further held that members of CoC are required to study the Resolution Plan and ascertain if:

(i) it is in accordance with provisions of Section 30(2);

(ii) it's feasible and viable and meets all the requirements as specified therein;

(iii) the 'Resolution Applicant' is ineligible in terms of Section 29A of the I&B Code

(e) Further, Section 30(4) provides that the 'Resolution Plan' is required to be approved by a vote of not less than 66% of voting share of the CoC;

(f) CoC has no role to play in the matter of distribution of amount amongst the Creditors including the 'Financial Creditors' or the 'Operational Creditors'.

(g) Section 53 cannot be made applicable for distribution of amount amongst the stakeholders, as proposed by the 'Resolution Applicant' in its 'Resolution Plan'. The 'Financial Creditors' cannot be discriminated on the ground of 'Secured' or 'Unsecured Financial Creditors' for the purpose of distribution of proposed amount amongst stakeholders in the Resolution Plan by the 'Resolution Applicant.

(h) In cases where the Successful Resolution Applicant does not pay the total dues to the Creditors such as the 'Financial Creditors' or the 'Operational Creditors' but pays lesser amount than the claim, then in such case, the profit generated during the 'Corporate Insolvency Resolution Process' after due verification by the Auditors it should be distributed amongst all the 'Financial Creditors' and the 'Operational Creditors' on pro-rata basis of their claims subject to the fact that it should not exceed the admitted claim.

(i) The cases in which the Adjudicating Authority or NCLAT could not decide the claim on merit, such Appellants are allowed to

raise the issue before an appropriate forum in terms of Section 60(6) of the 'I&B Code'. The 'Financial Creditors' and the 'Operational Creditors' whose claims have been decided by the Adjudicating Authority or NCLAT, such decision being final and is binding on all such 'Financial Creditors' and the 'Operational Creditors' in terms of Section 31 of the 'I&B Code'. Their total claims stand satisfied and, therefore, they cannot avail any remedy under Section 60(6) of the 'I&B Code'. The 'Financial Creditors' in whose favour guarantee were executed as their total claim stands satisfied to the extent of the guarantee, they cannot reagitate such claim from the Principal Borrower.

SECTION 43, 45

CASE NO. 12

SKS Power Generation Chattisgarh Limited (Appellant/Operational Creditor)

Vs.

Mr. V. Nagarajan, Resolution Professional in respect of M/s Cethar Limited. & Ors.(Respondents/ Corporate Debtor)

Company Appeal (AT) (Insolvency) No.206 of 2018

Date of Order: 14-12-2018

Section 43, 45,180 and 186 of the Insolvency and Bankruptcy Code, 2016 – Appeal against interim orders passed by the Adjudicating Authority

Facts:

The Appellant filed appeal against Adjudicating Authority's interim order whereby it had allowed the prayer of the Respondent/Applicant in an application filed under provisions of Section 43 and 45 of the I&B Code and directed the Appellant to pay a sum of INR 158 crores received from the Corporate Debtor.

Decision:

The Appellant submitted that the Hon'ble NCLT had allowed the main prayer in the guise of interim order without even impleading and hearing the third party. The Hon'ble NCLAT set aside the interim order passed by the Hon'ble NCLT and held that the impugned order was passed by way of an interim order without deciding the question of maintainability of application under Sections 43 and 45 of the I&B Code and remitted the matter to the Adjudicating Authority to decide the application on merit if not yet decided. The Appeal was allowed with aforesaid observations and directions. No cost.

Case Review: Order dated 24th April, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Single Bench, Chennai in MA/25/IB/2018 in CA/38/IB/2018 in CP/511(IB)/2017, *set aside*.

SECTION 60(5)(C)

CASE NO. 13

Edelweiss Asset Reconstruction Company Limited
(Appellant/ Financial Creditor)

Vs.

Synergies Dooray Automotive Ltd & Ors.
(Respondents/ Corporate Debtor)

Company Appeal (AT) (Insolvency) No.169 of 2017

With

Company Appeal (AT) (Insolvency) No.170 of 2017

Company Appeal (AT) (Insolvency) No.171 of 2017

Company Appeal (AT) (Insolvency) No.172 of 2017

And

Company Appeal (AT) (Insolvency) No.173 of 2017

Date of Order: 14-12-2018

Section 60(5)(c) of IBC, 2016 read with Rules 14 and 34 of the National Company Law Tribunal Rules, 2016 dealing with any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

Section 5(24) definition of related party in related to Corporate Debtor

Section 21 dealing with constitution of Committee of Creditors

Section 30(2)(e) dealing with resolution plan not contravening and provision of law for the time being force

Regulation 38(2) of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016 providing what resolution plan should provide for.

Regulation 8, 10, 13 of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016 dealing with claims of financial

creditors, substantiation of claims and verification of claims respectively

Facts:

All these appeals have been preferred by 'Edelweiss Asset Reconstruction Company Limited'- ('Financial Creditor') against different orders all dated 2nd August, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad.

The 'Corporate Insolvency Resolution Process' was initiated against 'Synergies-Dooray Automotive Limited'. After the submission of the 'Resolution Plan(s)', a number of applications were preferred by the Applicant/Appellant under sub-section (5) (c) of Section 60 of the Insolvency and Bankruptcy Code, 2016 and related Rules. All the applications have been rejected by different orders all dated 2nd August, 2017 and the 'Resolution Plan' submitted by 'Synergies Castings Ltd.' as approved by the 'Committee of Creditors' with 91.06% vote, has also been approved by the Adjudicating Authority in terms of Section 31(1) of the 'I&B Code'.

The Appellant Financial Creditor contended the following pleas before NCLAT

- Interim Resolution Professional has failed to consider that the assignment agreements which were entered into as late as 24th November, 2016, by which the existing debt of the 'Corporate Debtor' was suspiciously changed hands from a related party of the 'Corporate Debtor' being 'Synergies Castings Limited' to a third-party Non-Banking Financial Company being 'Millennium Finance Limited'. It was alleged that the same is invalid as it was entered into with the *malafide* ulterior motive of reducing the voting rights of the Applicant Financial Creditor/Appellant in the meeting of the 'Committee of Creditors'.
- To declare all the decisions taken by the 'Committee of Creditors' at its second meeting as invalid and consequently to set aside and quashing of all the resolutions passed in the said meeting.
- To declare first CoC meeting as invalid and consequently declare all the decisions of CoC as wrong
- To declare three assignment agreements, all dated 24th November 2016 entered into between Synergy Castings Limited (Related Party) and Millennium Finance Limited as invalid and un-reliable for the purpose of determining claims against the 'Corporate Debtor'

- Challenged resolution plan submitted by Synergy Castings Limited and approved by NCLT.

Regarding above, NCLT approved Resolution Plan' submitted by 'Synergies Castings Ltd.' under section 31(1) of IBC, 2016 as it was approved by the 'Committee of Creditors' with 91.06% vote and thereby dismissed the application preferred by Appellant and made following observations:

- Adjudicating Authority cannot go into roving enquiry especially in the case where several issues have been settled by 'BIFR' and several agreements have already been executed and approved.
- With respect to the allegation of 'Synergies Castings Limited' assigning its debts to 'Millennium Finance Limited', the Adjudicating Authority having noticed that the said assignments were made on 24th November 2016, held that there was no merit in the argument of alleged illegal assignment.

Stand of the Appellant Financial Creditor

— Appellant contended that the Synergy Castings held around 78.03% of the total financial debt and being related party of the Corporate Debtor, they were ineligible to be part of Committee of Creditors as per section 21 of IBC.

— Transfer of debt by entering three assignment agreements between Synergy Castings Limited and Millennium Finance Limited was fraudulent having been made with sole intent to defeat and negate the rigours and mandate of section 21 of the IBC, 2016. Appellant further claimed that assignment agreements were inadequately stamped and were unregistered instruments and hence challenged validity of assignment agreements for the purpose of including Millennium Finance Limited (76.32% share) as a member of CoC with right to voting and participation.

— Appellant Financial Creditor alleged that due to the above assignment agreements, appellant financial creditor voting share reduced from 41.59% to 9.85%.

— Appellant Financial Creditor alleged that Resolution Plan submitted by Synergy Castings was approved without considering their suggestions/concerns in 2nd CoC meeting.

— Appellant contended that the 'I&B Code' does not contemplate/ permit/ provide for effecting amalgamation before implementation of the 'Resolution Plan' especially in case such amalgamation has an effect of extinguishment of the 'Corporate Debtor' itself. Also, Resolution Plan' does not have an implementation schedule or means of supervision, which are mandatory contents of any 'Resolution Plan' under section 30 of the 'I&B Code' read with Regulation 38 (2) of 'Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016'.

— RP is required to verify and determine only those claims as admissible, where the supporting documents constitute "proof" and are admissible in evidence. RP should not have admitted claim of Millennium Finance as assignment agreements were not adequately stamped and were unregistered. Also, no purchase consideration is paid by the Millennium Finance Limited to Synergy Castings in respect of these assignment agreements.

Stand of RP - Respondent

— Counsel for RP submitted that RP merely receives and collates claim and mentioned that the Corporate Debtor in its section 10 application reflected Millennium Finance as its financial creditor.

— Millennium Finance submitted as proof that through assignment agreements Synergies Castings Limited' assigned the debts qua 'ICICI Bank', 'SBI' and 'IDBI Bank' in favour of 'Millennium Finance Limited'. Along with the Assignment Agreements 'Millennium Finance Limited' had also filed Form No. CHG-I which demonstrates that the charges were registered with the Registrar of Companies in favor of the 'Millennium Finance Limited' on 24th November, 2016 itself which is even prior to coming into force of provisions of 'I&B Code'.

— RP informed that objection of the Appellant that no consideration was disbursed by 'Millennium Finance Limited' to 'Synergies Castings Limited' was unfounded as the payment schedule agreement had been duly placed by 'Synergies Castings Limited'.

— RP informed that all the 'Financial Creditors' of the 'Corporate Debtor' including the Appellants herein are assignee of the original lenders and thus to be treated identically.

— RP had received three resolution plans which was placed before CoC, however CoC approved resolution plan submitted by 'Synergies Castings Limited' which provided for merger of 'Synergies Castings Limited' with the 'Corporate Debtor' with a majority of 91.06%.

— The 'Resolution Plan' of 'Synergies Castings Limited' has been duly approved by the Adjudicating Authority pursuant to which the same has been made binding on all stakeholders.

Stand of Synergies Castings (Related Party to Corporate Debtor)-Respondent

— The counsel for 'Synergies Castings Limited' submitted that the debt of 'Synergies Castings Limited' in the 'Corporate Debtor' were assigned to 'Millennium Finance Limited' on 24th November 2016 vide Assignment Agreements all dated 24th November 2016. In furtherance of Assignment Agreements, the charge was created in favor of the 'Millennium Finance Limited' in Form No. CHG-1 on 24th November 2016 itself.

— The creation of charge with the Registrar of Companies in favor of 'Millennium Finance Limited' substantiates the fact that the debt was validly transferred from 'Synergies Castings Limited' to 'Millennium Finance Limited' on 24th November, 2016 which is even prior to coming into force of 'I&B Code'.

— The payment schedule agreement dated 24th November 2016 establishes the fact that the consideration towards the assignment of debt from 'Synergies Castings Limited' of 'Millennium Finance Limited' is being duly paid by 'Millennium Finance Limited' to 'Synergies Castings Limited'.

— The 'Resolution Plan' submitted by 'Synergies Castings Limited' was approved by the 'Committee of Creditors' with 91.06% majority. The 'Resolution Plan' of 'Synergies Castings Limited' was thereafter approved by the Adjudicating Authority in terms of Section 31 of the 'I&B Code'. The approved 'Resolution Plan' is final and binding on all.

— The 'Resolution Plan' approved by the 'Committee of Creditors' and Adjudicating Authority duly identifies specific sources of funds that will be used to pay Insolvency Resolution Process Costs, liquidation value due to 'Operational Creditors' and liquidation value due to dissenting

'Financial Creditors' in terms of priority prescribed under Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

— The 'I&B Code' is a complete code and thus, a 'Resolution Plan' approved under Section 31 of the 'I&B Code' can be appropriately given effect to.

Stand of Millennium Finance Limited (Financial Creditor)- Respondent

— According to learned counsel for the Respondent- 'Millennium Finance Limited', the debt of 'Synergies Castings Limited' in the 'Corporate Debtor' were assigned in favour of 'Millennium Finance Limited' as on 24th November 2016. Three Assignment Agreements all dated 24th November, 2016 were executed by 'Synergies Castings Limited' in favour of the 'Millennium Finance Limited', whereby the 'Synergies Castings Limited' assigned the debts qua 'ICICI Bank', 'SBI' and 'IDBI Bank' in favour of 'Millennium Finance Limited'.

— In pursuance of execution of above Assignment Agreements, appropriate charges in Form No. CHG-I were duly created in favour of the 'Millennium Finance Limited' on 24th November 2016. The said assignment is duly evidenced by creation of charge as a contemporaneous document with the Registrar of Companies on 24th November 2016 itself. The creation of charge with the Registrar of Companies which is an independent third-party evidences valid transfer of debt in favour of 'Millennium Finance Limited' which is even prior to coming into force of the 'I&B Code'.

— It was submitted that the transfer of debt is valid even if the assignment agreements dated 24th November 2016 were not registered immediately on 24th November 2016. It is a settled position of law that a debt can be transferred / assigned on execution of an instrument in writing signed by the transferor or his duly authorized agent.

— In terms of section 47 of the 'Indian Registration Act, 1908', registration relates back to the date of execution of the agreements itself. In terms of Section 47 of the 'Indian Registration Act, 1908', once a document is registered, the operation of the said relates to the date of execution of the document as held by the Hon'ble Supreme Court in the matter of "Gurbax Singh V. Kartar Singh & ors., SLP

(Civil) No. 1969 of 2002" and "Principal Secretary Gov. of Karnataka and Anr. V. Ragini Narayan and Anr., Civil Appeal No. 8895 of 2012". Accordingly, the assignment deeds by virtue of which 'Millennium Finance Limited' became a 'Financial Creditor' of the 'Corporate Debtor', are validly executed and in force w.e.f. 24th November 2016.

— Refuted the allegation of fraud played in the transaction entered between 'Millennium Finance Limited' and 'Synergies Castings Limited' whereby debts have been assigned by 'Synergies Castings Limited' in favour of 'Millennium Finance Limited'. It is contended that there is no evidence placed on record nor there is circumstances evidence brought on record to prove the allegations.

The questions that arise for consideration in these appeals are:

- Whether the assignment(s) made by 'Synergies Castings Limited' on 24th November 2016 in favour of 'Millennium Finance Limited' is legal?
- Whether the order dated 2nd August 2017 passed by the Adjudicating Authority approving the 'Resolution Plan' submitted by 'Synergies Castings Limited' is legal?

Decision:

NCLAT held the following:

— On perusal of above three assignment agreements, it is clear those documents are duly executed with the concerned authorities, and they are not questioned by any party to those proceedings. Appellant herein, being similarly situated like that of 'Synergies Castings Limited' and 'Millennium Finance Limited', do not have any locus standi to question the veracity of those documents on mere apprehensions or allegation of malafides or fraudulent etc. It is a settled law that whatever the rights the original assignor got it from the original lender will automatically accrues to subsequent assignees basing on executing appropriate legal documents in accordance with law. In this case, 'Millennium Finance Limited' has got all the rights as per the assignment agreements all dated 24th November 2016. Hence, the allegations/ apprehensions made by the Appellant being baseless and mere apprehensions, and based on conjuncture and surmised cannot be accepted, particularly when they have been executed in accordance with law and accepted by the Registrar of Companies. The Appellant doesn't have any locus standi to question those documents in the insolvency proceedings initiated under 'I&B Code' on a

farfetched argument that they are going to be effected if the rights of 'Synergies Castings Limited' and 'Millennium Finance Limited' are recognized basing on the Assignment Agreements in question and the Appellant cannot assume jurisdiction to question the documents in question basing on baseless allegations, apprehension etc.

— 'Synergies Castings Limited' and 'Millennium Finance Limited' were eligible to execute the assignment agreements in question and all rights flow those agreements to 'Millennium Finance Limited'. After getting assignment of rights, the 'Millennium Finance Limited' is fully competent to participate in 'Committee of Creditors' in question and it cannot be called a related party as explained.

— The contentions of the Appellant that the 'Millennium Finance Limited' would become a related party by virtue of Section 5 (24) is not at all tenable.

— Resolution Plan' submitted by 'Synergies Castings Limited', cannot be held to be violation of sub-section (2) of Section 30 or any of the provisions of the law on the ground of violation of Sections 230-232 of the Companies Act, 2013. Section 230 of the Companies Act, 2013 relates to 'power to compromise or make arrangements with creditors and members' whereas Section 232 relates to 'merger and amalgamation of companies'. The question of filing an application before the National Company Law Tribunal under Sections 230-232, does not arise at the stage of filing of the 'Resolution Plan' as it is not known as to which of the 'Resolution Plan' will be approved. Once a plan is approved, one may argue that in terms of the provisions of the Companies Act, a formal order of amalgamation is required. No such argument can be advanced at the time of approval of the 'Resolution Plan' which merely proposes merger.

— The 'I&B Code' is a code by itself and Section 238 of IBC, 2016 provides over riding effect of it over the provisions of the other Acts, if any of the provisions of an Act is in conflict with the provisions of the 'I&B Code'. Therefore, the arguments of the Appellant that merger and amalgamation of the companies cannot be proposed in the 'Resolution Plan' or such proposal is violative of clause (e) of sub-section (2) of Section 30 is fit to be rejected.

In view of the aforesaid findings and in absence of any merit, the appeals were dismissed. No cost.

SECTION 66

CASE NO. 14

Axis Bank Ltd. (Appellant)

Vs.

Anuj Jain, Resolution Professional for Jaypee Infratech Ltd. (Respondent)

Company Appeal (AT) (Insolvency) No. 243 of 2018

Date of order: 01-08-2019

Facts:

The RP of 'Jaypee Infratech Limited'- ('Corporate Debtor') filed application under Section 43, 45, 60(5)(a) & 66 read with Section 25(2)(J) of the Code before the NCLT Allahabad Bench seeking direction that the transactions entered into by the promoters and Directors of the 'Corporate Debtor' creating mortgage of 858 acres of immovable property owned by it and in possession of the 'Corporate Debtor', to secure debt of related party i.e. 'Jaiprakash Associates Limited' by way of mortgage deeds dated 29th December, 2016, 12th May, 2014, 7th March, 2017, 24th May, 2016 and 4th March, 2016 are fraudulent and wrongful transactions within the meaning of Section 66 of the 'I&B Code'.

The impugned order has been challenged by the Appellants- Banks/Financial Institutions (lenders of 'Jaypee Infratech Limited'/ 'Jaiprakash Associates Limited') on various grounds.

It was submitted that the 'Corporate Debtor' was in dire needs of funds during the period and was facing severe liquidity crunch to complete the construction of own projects and deliver the flats to home-buyers, as well honour the payment obligations to 'Financial Creditors' as also the 'fixed deposit' holders. 'Jaypee Infratech Limited' ('Corporate Debtor') owns various pieces of unencumbered land which was available to be liquidated or offered as security to raise finance to complete the constructions of flats and deliver possession of flats to the homebuyers/ allottees.

It was also submitted that in the middle of its immense financial crunch, the 'Corporate Debtor' while continuing to commit default to allottees and other 'Financial Creditors', even after being declared as NPA, the directors of

'Jaypee Infratech Limited' in utter disregard to their fiduciary duties mortgaged 585 acres of unencumbered land owned by 'Jaypee Infratech Limited' ('Corporate Debtor') to secure the debt of 'Jaiprakash Associates Ltd.' which is the related party.

According to the 'Resolution Professional', the mortgaged 858 acres of land valued at Rs.5,900 Crores approximately, which the directors of the 'Corporate Debtor', mortgaged to secure the debt of 'Jaiprakash Associates Ltd.', when the 'Corporate Debtor' itself was in dire need of funds and could have sold/ mortgaged unencumbered land to raise funds to complete the construction of flats in timely manner to fulfil its own obligation to its creditors and prevent value deterioration or erosion or insolvency.

Decision:

Appellate Tribunal noticed that the transactions in question i.e. mortgage(s) were made in favour of the 'Banks and Financial Institutions' by the 'Corporate Debtor' ('Jaypee Infratech Limited') in the ordinary course of business of the 'Corporate Debtor'. The Appellants- Banks and Financial Institutions have given loans to the holding Company namely— 'Jaiprakash Associates Limited'. The 'Corporate Debtor' being one of the group company, like a guarantor, executed mortgage deed(s) in favour of the Appellants- 'Banks and Financial Institutions'. Bench also observed that none of the transactions were 'preferential transaction' or 'undervalued transaction'. It has not been alleged that the transactions, in question, were made to defraud the creditors in terms of Section 49 so allegation has been made that such transactions amount to 'extortionate credit' as defined under Section 50. Therefore, the Adjudicating Authority in absence of any such finding is not empowered to pass order under Section 51. Further, as it is held that the transactions were made in the ordinary course of business in absence of any contrary evidence to show that they were made to defraud the creditors of the 'Corporate Debtor' or for any fraudulent purpose, on mere allegation made by the 'Resolution Professional', it was not open to the Adjudicating Authority to hold that mortgage deeds, in question, were made by way of transactions which come within the meaning of 'fraudulent trading' or 'wrongful trading' under Section 66. The Adjudicating Authority having failed to notice the aforesaid relevant facts and as it misread the provisions of Sections 43, 45 & 66 of the 'I&B Code' and on the basis of wrong presumption and error of fact held that transactions in question amount to 'preferential transactions' (Section 43); 'undervalued transactions' (Section

45) and 'for fraudulent purpose to defraud the creditors of the 'Corporate Debtor' (Section 66), the impugned order cannot be upheld. For the reasons aforesaid, the impugned order dated 16th May, 2018 was set aside so far it relates to the Appellants.

WHETHER THE PROVIDENT FUND, PENSION FUND AND GRATUITY FUND COME WITHIN THE MEANING OF ASSETS OF 'CORPORATE DEBTOR' FOR DISTRIBUTION UNDER SECTION 53 OF THE IBC 2016

CASE NO. 15

State Bank of India (Appellant)

Vs.

Moser Baer Karamchari Union & Anr.(Respondents)

Company Appeal (AT) (Insolvency) No. 396 of 2019]

Date of order : 19-08-2019

Whether the Provident Fund, Pension Fund and Gratuity Fund come within the meaning of assets of 'Corporate Debtor' for distribution under Section 53 of the Insolvency and Bankruptcy Code, 2016?

Facts:

Pursuant to an application under Section 7 of Insolvency and Bankruptcy Code, 2016, the Corporate Insolvency Resolution Process was initiated against Corporate Debtor on 14th November, 2017. Finally the National Company Law Tribunal, Principal Bench, New Delhi on 20th September, 2018 passed a liquidation order and the workmen stood discharged under Section 33(7) of the Insolvency and Bankruptcy Code, 2016. Afterwards, the Liquidator, by email, denied payment of Gratuity Fund, Provident Fund and Pension Fund preferentially and included the same for the payments under the waterfall mechanism under Section 53 of the Insolvency and Bankruptcy Code, 2016.

In January 2019, "Moser Baer Karamchari Union" prayed that – Directions be issued to the liquidator to exclude amount due to them towards: Provident Fund, Pension Fund and Gratuity Fund from the Waterfall Mechanism under Section 53 of I&B Code, 2016 as these will not constitute part of liquidation estate.

The Adjudicating Authority ruled in favour of the Karamchari Union and by order dated 19th March, 2019 held that the Provident Fund, Pension Fund and Gratuity Fund did not constitute part of the liquidation estate of the corporate debtor.

An appeal was preferred by the State Bank of India against the order passed by the National Company Law Tribunal, Principal Bench, New Delhi.

The question arises for consideration in this appeal is whether the provident fund, pension fund and gratuity fund come within the meaning of assets of the 'Corporate Debtor' for distribution under Section 53 of the 'I&B Code'.

Decision:

After hearing the parties, the NCLAT noted that from Section 36(4)(a)(iii), it was clear that all sums due to any workman or employee from the provident fund, the pension fund, and the gratuity fund were not to be included in the liquidation estate assets and could not be used for recovery in the liquidation.

Therefore, the question of distribution of the provident fund, pension fund or the gratuity fund in order of priority and within such period as prescribed under Section 53(1) did not arise, it added. NCLAT quoted that "the provisions of the I&B Code have overriding effect in case of consistency in any other law for the time being enforced, we hold that Section 53(1) (b) read with Section 36(4) will have overriding effect on Section 326(1) (a), including the Explanation (iv) mentioned below Section 326 of the Companies Act, 2013." Adding further, "Once the liquidation estate/ assets of the Corporate Debtor under Section 36(1) read with Section 36 (3), do not include all sum due to any workman and employees from the provident fund, the pension fund and the gratuity fund, for the purpose of distribution of assets under Section 53, the provident fund, the pension fund and the gratuity fund cannot be included."

The appeal was accordingly, dismissed. No costs.

WHETHER THE 'INCOME TAX', 'VALUE ADDED TAX' OR OTHER STATUTORY DUES, SUCH AS 'MUNICIPAL TAX', 'EXCISE DUTY', ETC. COME WITHIN THE MEANING OF 'OPERATIONAL DEBT' OR NOT

CASE NO. 16

Pr. Director General of Income Tax (Admn. & TPS). (Appellant)

Vs.

M/s. Synergies Dooray Automotive Ltd. & Ors.(Respondents)

Company Appeal (AT) (Insolvency) No. 205 of 2017

And connected matters

Date of Order: 20-03-2019

Facts:

The question that arises for consideration in this appeal are:

(i) Whether the 'Income Tax', 'Value Added Tax' or other statutory dues, such as 'Municipal Tax', 'Excise Duty', etc. come within the meaning of 'Operational Debt' or not? and;

(ii) Whether the Central Government, the State Government or the legal authority having statutory claim, come within the meaning of 'Operational Creditors'?

Decision:

National Company Law Appellate Tribunal held in this case that Income Tax Department of the Central Government and the Sales Tax Department(s) of the State Government and Local Authority, who are entitled for dues arising out of the existing law are 'Operational Creditor'.

The extract of the para 29 and 30 from the NCLAT Order are as follows:

'Operational Debt' in normal course means a debt arising during the operation of the Company ('Corporate Debtor'). The 'goods' and 'services' including employment are required to keep the Company ('Corporate Debtor')

operational as a going concern. If the Company ('Corporate Debtor') is operational and remains a going concern, only in such case, the statutory liability, such as payment of Income Tax, Value Added Tax etc., will arise. As the 'Income Tax', 'Value Added Tax' and other statutory dues arising out of the existing law, arises when the Company is operational, we hold such statutory dues has direct nexus with operation of the Company. For the said reason also, we hold that all statutory dues including 'Income Tax', 'Value Added Tax' etc. come within the meaning of 'Operational Debt'.

For the said very reason, we also hold that 'Income Tax Department of the Central Government' and the 'Sales Tax Department(s) of the State Government' and 'local authority', who are entitled for dues arising out of the existing law are 'Operational Creditor' within the meaning of Section 5(20) of the 'I&B Code'.

Chapter 4

Orders passed by National Company Law Tribunal (NCLT)

SECTION 3

CASE NO. 1

Bench	National Company Law Tribunal (NCLT), New Delhi Bench V
Operational Creditor	Apeejay Trust
Corporate Debtor	Aviva Life Insurance Co. India Ltd.
Amount of Default	Rs. 27,67,203/-
Particulars of the Case	IB-1885(ND) 2019
Date of Order	04-11-2019
Relevant sections	Sections 3(16), 3(17), 3(18) read with Sections 9 and 14 of the Insolvency and Bankruptcy Code, 2016 - Initiation of Corporate Insolvency Resolution Process by Operational Creditor.
Facts of the Case	An Agreement came to be executed between the Operational Creditor and the Corporate Debtor for leave and license for office premises and other services at Mumbai. The Operational Creditor provided office premises and other services as required by the Corporate Debtor. As per the agreed terms, the Corporate Debtor had to pay the license fees, car parking, maintenance, service charges and service tax which the Corporate Debtor failed to pay after its last payment on 05.10.2017. Thus, the Operational Creditor prayed for initiation of

	Corporate Insolvency Resolution Scheme against the Corporate Debtor for its inability to liquidate their claim of Rs. 27,67,203/-pending since 05.10.2017. The Operational Creditor issued the demand notice to the Corporate Debtor as required under Section 8 of the Insolvency and Bankruptcy Code, 2016 which was vehemently denied by the Corporate Debtor in its reply stating that no such dues were payable. Aggrieved by the reply of the Corporate Debtor, the Operational Creditor filed an application under the Section 9 of the Insolvency and Bankruptcy Code, 2016. It was contended by the Corporate Debtor that the application is not maintainable on the grounds that they are an insurance company and therefore, they are "Financial Service Provider", a business which is strictly regulated by the "Financial Sector Regulator". It was prayed that that therefore, as per Sections 3(17) and 3(18) of the Insolvency and Bankruptcy Code, 2016, the application was liable to quashed and set-aside.
Decision of the Tribunal	The Tribunal held that financial service under Section 3(16) of the Code includes the transactions effecting contract of insurance. However, it was observed by the Tribunal that the Corporate Debtor had not provided any insurance cover or any kind of financial assistance to the Operational Debtor as defined under Section 3(16) of the Code and further the defaulted dues were for the lease and rentals and therefore held that the Corporate Debtor was not covered as a 'financial service provider' under section 3(17) of the Insolvency and Bankruptcy Code, 2016. The petition was thus admitted and an Interim Resolution Professional was appointed.

SECTION 7

CASE NO. 2

Bench	National Company Law Tribunal (NCLT), Mumbai Bench, Mumbai
Financial Creditor	State Bank of India
Corporate Debtor	Jet Airways (India)Ltd.
Particulars of the case	MA 2360/2019, MA 2387/2019, MA 2390/2019 in CP(IB) 2205(MB)/2019
Date of Order	05-07-2019
Relevant Section	Section 7 of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	There is a lease agreement between Corporate Debtor and Fleet Ireland Aircraft lease 2007-B2 Limited for aircraft with Registration No. VT-JEW. This is an application filed by the Resolution Professional against a holder of Irrevocable De-registration and Export Requested Authorization (IDERA) who had requested for de-registration of Aircraft from the aircraft registry of the Respondents. The intent of seeking de-registration was to recover the possession of aircraft from Corporate Debtor and utilize the aircraft for recovery of dues. The applicant contended that the proposed action of Respondent is against the moratorium imposed under Section 14 of the Insolvency and Bankruptcy Code, 2016 ("Code") and this will lead to loss of valuable assets of the Corporate Debtor. The Court noted that as per the Aircraft Rules, 1937 if an application is filed by IDERA holder, then DGCA has to cancel the registration of aircraft within 5 days without seeking any consent or documents from operator of aircraft.

Decision of the Tribunal	The application that has been filed by IDERA holder, and as per Aircraft Rules. 1937 within five working days, DGCA has to cancel the registration of the Aircraft without seeking consent or any documents from the operator of the Aircraft. During CIRP, if such process is permitted, not only this Aircraft but other property of the Corporate Debtor in this case, most of the leased Aircrafts, a similar situation may occur, and the application may be filed by IDERA holder for de-registration of the Aircraft, and the peculiar situation will be created, and the most valuable assets of the Corporate Debtor will be taken away by IDERA holder. However, the Tribunal did not pass any order and gave the Respondent a chance to present his case and posted the hearing 19.07.2019. Till then Respondent is directed not to take any decision on the application filed by the IDERA holder regarding de-registration of the Aircraft and maintain the status quo.

SECTION 9

CASE NO. 3

Bench	National Company Law Tribunal (NCLT), Kolkata Bench, Kolkata
Operational Creditor	Affinity Finance Services Pvt. Ltd.
Corporate Debtor	Kiev Finance Limited
Particulars of the Case	IA No. 905/KB/2018 in CP(IB)No.110/KB/2018
Date of Order	20-12-2018
Relevant Section	Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016– and an application u/s. 60(2) of I & B Code 2016, read with Rule 11 of NCLT Rules 2013, and Section 12 (2) of I & B Code 2016 read with Regulation 40 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016.
Facts of the Case	The application was filed by liquidator on the ground that after the order for liquidation was passed, one prospective resolution applicant has approached Resolution Professional evincing interest to submit a resolution plan for the corporate debtor under liquidation. Earlier the case was admitted on 28.02.2018 on an application made by the Operational Creditor. The IRP was confirmed to RP and was also appointed as liquidator. During the CIRP process period of 180 days, no resolution plan was received hence the CoC resolved to liquidate the company and an order was passed on 10.09.2018. However before that an 04.09.2018 a prospective resolution applicant approached Resolution professional and hence a

	CoC meeting was called on 08.09.2018 wherein it was resolved to make an application to Adjudicating Authority for extension of CIRP period of 90 days. Before the RP could make an application, the liquidation order was passed. Hence the application was made for recalling of liquidation order. Ld. Counsel of CoC submitted that the Adjudicating Authority may pass such order invoking its inherent power under Rule 9 of Companies (Court) Rules 1959 or under Rule 11 of NCLT Rules.
Decision of the Tribunal	The Adjudicating Authority made it clear that the inherent powers cannot be used to circumvent the procedure. Secondly, as the NCLT Rules are made applicable even to the Adjudicating Authority under Section 5(1) of the Insolvency and Bankruptcy Code, the Rules under Companies (Court) Rules 1959 cannot be invoked because they are replaced by NCLT Rules. The order of liquidation of Corporate Debtor passed by the Authority cannot be reviewed or revoked as prayed by RP. It was pointed out that the RP can sell the Corporate Debtor as a going concern as per Regulation 32 (c) of IBBI (Liquidation Process) Regulations 2016. Since the Authority cannot review its own order, it was held that the application requesting for recalling of liquidation order is not maintainable and hence stands rejected.

SECTION 12

CASE NO. 4

Bench	National Company Law Tribunal, Division Bench, Chennai
Applicant	Mr. Santanu T. Ray, Resolution Professional
Financial Creditor	Edelweiss Asset Reconstruction Co. Ltd.
Corporate Debtor	AML Steel & Power Ltd.
Particulars of the case	MA/630/2018 in CP/632/IB/2017
Date of Order	11-12-2018
Facts of the Case	The registered office of the corporate debtor was situated in Tamilnadu whereas the Factory Premises was situated in Jharkhand. Though CIRP period commenced on 21.03.2018, the RP till the date of application could not secure the physical possession of the factory premises, though expression of interests were given by eight prospective resolution applicants, the RP was unable to show factory premises to these prospective resolution applicants. The RP submitted that CIRP period of 270 days though came to close by 07.12.2018, they could not accomplish the work for lack of financial information and could not secure the physical possession of the factory premises. The RP moved an application with CoC passed resolution seeking exclusion of at least 90 days from the CIRP period.
Decision of the Tribunal	As per Hon'ble Adjudicating Authority, in this extra ordinary situation, unless at least some period of unutilised CIRP period is excluded permitting the RP and the CoC to process the Resolution Plans and visit the factory premises so as to provide access to the Resolution Applicants to visit the factory, the

	very purpose of the admission of the CP will be lost. In the light of the Order dt. 8th May 2018 passed by Hon'ble NCLAT in the matter of *Quinn Logistics India Private Limited Vs. Mack Soft Tech Private Limited and two others* dt. 8th May, 2018 , the bench excluded 90 days from the CIRP period w.e.f. 07.12.2018.

SECTION 12A

CASE NO. 5

Bench	National Company Law Tribunal (NCLT), Mumbai Bench, Mumbai
Financial Creditor/ Petitioner	Andhra Bank
Corporate Debtor	Sterling Biotech Limited
Particulars of the Case	MA 951/2019 in CP No.(IB)490(MB)/2018
Date of Order	11-03-2019
Relevant Section	Section 7, Section 12A read with Section 60 (5) of the Code.
Facts of the Case	Application was filed u/s. 12A seeking permission to withdraw the CIRP process initiated against the corporate debtor under admission order dated 11.06.2018. As per regulation 30A of the CIRP regulations, application u/s 12A shall be submitted to IRP / RP as the case may be. Till date the bench has not received any communication from the RP. The application was moved directly by the financial creditor / petitioner. Therefore RP has not given any certificate whether CIRP costs has been provided, whether he has received any Bank Guarantee. This application has been directly made by financial creditor by the decision of CoC. During CIRP, resolution for withdrawal of CIRP as well as resolution for approval of resolution plan submitted had failed and as directed by CoC the RP went ahead to put a resolution for the liquidation of the Corporate debtor to vote. The said resolution was rejected by 85.58% of the members of CoC. The RP asked the CoC for directions on the way forward about the CIRP and during discussion

	majority of the CoC members supported fresh withdrawal of the CIRP and thus the RP was directed by CoC to put a fresh resolution for withdrawal of CIRP to vote. The RP asked for details like, the OTS offer, source of funds, timeframe for payment to each lender, compliance with RBI norms and whether interest of all the stakeholders /CoC members have been provided for under the OTS offer. The applicant further informed the RP that, should the NCLT seek information the applicant and the CoC will address all such queries posed by the NCLT directly and not with the RP. It was mentioned by the bench that the promoters of the corporate debtor are absconding and the news about the same has appeared in various newspapers that various Govt. Agencies like ED, CBI and other agencies are unable to trace the promoters. The OTS proposal mentioned that the group is exploring to raise funds for OTS from private group of financial / strategic investors. Bench also noted that the OTS proposal was from Mr. Farhad Daruwalla who has signed on behalf of Sandesara Group. It was not mentioned whether Farhad Daruwalla has been authorised by the corporate debtor to submit OTS proposal. The bench observed that the CIRP was pertaining to Sterling Biotech (Corporate debtor), how the proposal submitted by Sandesara Group is accepted by the financial creditor, creates suspicion when the promoters / directors are absconding.
Decision of the Tribunal	Thus before passing any order on the present application, the bench served a notice of 7 days to Central Govt. Through Regional Director, Ministry of Corporate Affairs, ED, CBI, Income Tax Authorities, SEBI, RBI so that if they want to make any representation they can make before passing of any order on this application for withdrawal.

SECTION 12A

CASE NO. 6

Bench	National Company Law Tribunal (NCLT), Ahmedabad Bench, Ahmedabad
Corporate Debtor	Essar Steel Asia Holdings Limited & Ors.
Resolution Professional	Satish Kumar Gupta (RP of Essar Steel India Limited)
Amount of Default	Rs.54,389 Crores (Proposed Settlement Amount)
Particulars of the Case	IA No.430/NCLT/AHM/2018 in C.P.(I.B) No. 39/7/NCLT/AHM/2017 & 40/7/NCLT/AHM/2017
Date of the Order	29-01-2019
Relevant sections	Section 12A and 60(5) of Insolvency and Bankruptcy Code, 2016
Facts	An application came to be filed by the majority shareholders of the Corporate Debtor, Essar Steel India Limited, having about 70% share in the Corporate Debtor, praying *interalia* to direct the Resolution Professional and Committee of Creditors to consider the settlement proposed by the Applicants and terminate the Corporate Insolvency Resolution Process against the Corporate Debtor. Alternatively, it was prayed that in case the proposed settlement plan of the Applicants is not accepted, the right may be given to the shareholders to pay the amount agreed by the CoC and discharge the liability of Corporate Debtor in accordance to the principle of redemption of debt under the Transfer of Property Act, 1882. The Applicants also contended that the Committee of Creditors and the Resolution Professional accepted the resolution plan of Arcelor Mittal India Private Limited ignoring the fact that offer made by the Applicants was much higher than that of Arcelor Mittal India Private Limited.

Decision of the Tribunal	The Tribunal noted that the constitutional validity of the Insolvency and Bankruptcy Code, 2016 more specifically Section 12A of the Code, introduced later, has also been upheld by the Hon'ble Supreme Court in the decision of *Swiss Ribbon V.Union of India (Writ Petition (Civil) No. 88/2018)* and thus, the Tribunal has power to decide the case keeping in view the provisions of the Code. The Tribunal held that if the present case is reopened, being limited by the previous orders of the Hon'ble Supreme Court and Learned NCLAT, on the ground of inquiry of settlement plan under Section 60(5) of Insolvency and Bankruptcy Code, 2016, it would tantamount to redoing the whole exercise by the Resolution Professional and the Committee of Creditors which would be in violation of the Hon'ble Supreme Court's order. Hence, the application was found to be not maintainable. As for right of redemption of the Applicants under the Transfer of Property Act, 1882, the Tribunal noted that by virtue of Section 238 of Insolvency and Bankruptcy Code, 2016, the Code has overriding effect on any other law in force which includes Transfer of Property Act. The only mode prescribed by the Code is an application under Section 12A of the Code. It was thus held by the Tribunal that to consider the scope of settlement under Section 60(5) of the Code when remedy for settlement of debts is provided under Section 12A of the Code, in the present facts and circumstances, would be a violation of a statutory provision and of the legal proposition that what cannot be done directly, cannot be done indirectly as well. The Tribunal further observed that even Article 300A of the Constitution of India places reasonable restrictions on the right to property. Therefore, it was held that the provisions of Section 12A of the Code, encapsulating the settlement procedures, must be adhered to for allowing the withdrawal of Resolution Process.

SECTION 14

CASE NO. 7

Bench	National Company Law Tribunal (NCLT), Single Bench, Chennai
Applicant	Mr. Vasudevan - Resolution Professional
Respondents	State of Karnataka and others
Corporate Debtor	M/s Tiffins Barytes Abestos & Paints Limited
Particulars of the case	MA 632/ 2018 filed in CP/39/2018
Date of Order	03-05-2019
Relevant Section	Section 14, 20 and 25 read with section 60 (5) of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	In this case, the Corporate Insolvency Resolution Process was commenced on 12 March 2018. Thereafter, the deemed extension of the Mining Lease of the Corporate Debtor was rejected by the State of Karnataka authorities *vide* an order passed on 26 September 2018.i.e. during the ongoing moratorium. The Resolution Professional filed an application before the Hon'ble Tribunal challenging the order dated 26 September 2018 passed on grounds of moratorium and ongoing CIRP. The Resolution Professional had cited Clause (d) of Sub Section (1) of Section 14 of the IBC, to state that the declaration of the Moratorium prohibits "the recovery of any property by any owner or lessor where such property is occupied by or in possession of the Corporate Debtor".
Decision of the Tribunal	The Hon'ble Tribunal observed that intent behind Section 14 of the I&B Code is to ensure that there is

	a standstill period during which there is a bar on creating any encumbrance, sale or alienation of any assets of the Corporate Debtor so that the financial position of the Corporate Debtor can be preserved and remains transparent as going concern. The suspension of all proceedings against the Corporate Debtor is essential as it stabilizes the assets of the Corporate Debtor thereby giving creditors stability regarding the financial health of the Corporate Debtor and providing them a drawing board to formulate the Resolution Plan, which could restructure the outstanding debts. Thus, the language of Section 14 is wide enough to include legal proceedings of any nature within its ambit. The Hon'ble NCLT further observed that the mining lease bearing number M.L. No. 2293 granted by State Government of Karnataka to Corporate Debtor which is valid till 31.03.2020, had created interest for present and future property of State for purpose of mining ore which is the sole business of Corporate Debtor and business of the company has the intrinsic link with the lease terminated. Therefore, the same is covered under the definition of Property provided under Section 3(27) of the I&B Code. Therefore, the Hon'ble NCLT has set aside the order rejecting extension of mining lease as null and void by State Government of Karnataka.

SECTION 14

CASE NO. 8

Bench	National Company Law Tribunal (NCLT), Mumbai Bench, Mumbai
Operational Creditors/Applicants	Bharti Airtel Limited, Bharti Hexacon Limited
Corporate Debtors	Dishnet Wireless Limited (CP 302/2018) and Aircel Limited (CP 298/2018)
Amount in Dispute	Rs 112 crores approx.
Particulars of the case	MA 230/2019 in CP No. 302/IBC/NCLT/MB/MAH/ 2018 & MA 219/2019 in CP No. 298/IBC/NCLT/MB/ MAH/2018
Date of Order	01-05-2019
Relevant Section	— Section 14 dealing with moratorium during CIRP — Regulation 29 of the IBBI (Liquidation Process) Regulations, 2016 dealing with mutual credits and set off. — Claim Form B under the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 — Section 3(11) definition of debt
Facts of the Case	— Airtel entities (Bharti Airtel Limited and Bharti Hexacon Limited) had withheld amount of Rs 453.73 crores, which they were required to pay to Aircel in connection to Spectrum Trading Agreements entered into between Aircel Entities (Aircel Limited and Dishnet Wireless Limited) and Airtel Entities. Airtel Entities submitted bank guarantees of Rs 453.73 crores to the Department of Telecommunications (DoT) on behalf of Aircel

	Entities. The bank guarantees were required to be submitted as part of DoT condition for granting the requisite approval for transfer of the right to use the spectrum by Aircel Entities in favour of Airtel Entities, the said condition was also affirmed by Telecom Disputes Settlement and Appellate Tribunal (TDSAT). — In another transaction the Aircel entities owed approx. amount of Rs 145.20 crores to Airtel entities consisting of Rs 139.34 crores pursuant to unpaid invoices under various service and inter-connection agreements and Rs 5.85 crores towards Telenor, which was merged with Bharti Airtel Limited. — On 9.1.2018 TDSAT directed DoT to return the bank guarantees (BGs) within 4 weeks and in the event of failure on the part of DoT to return BGs, the BGs would stand cancelled and the parties would not be able to use the BGs for any purpose whatsoever. TDSAT order dated 9.1.2018 was upheld by the Supreme Court on 28.11.2018 and then on 8.1.2019. — Airtel Entities in compliance with the Supreme Court released the withheld amount of Rs 453.73 in the following manner: a) Payment of Rs 341.80 crore to Aircel Entities on 10.1.2019. b) Application of balance amount of approx. Rs 112 crores for set off against dues of Rs 145.20 crore owed by Aircel Entities to Airtel Entities. The application is filed for a direction to the RP to honour the legal and equitable right of Airtel Entities to apply set off on account of mutual dealings for an amount of Rs 112 crores during the CIRP process.

	Submission by Airtel Entities (Applicants) — There is no provision for set off in section 14 which means that there is no effect of moratorium on the claims of the creditors which can be set off. — Claim B under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides for set off of mutual credits or mutual debits to be claimed during CIRP proceedings. — Meaning of debt under section 3(11) of the Code has an inbuilt provision of set off because of the terminology "Claim" and "Due" is used. — Reference was drawn to Regulation 29 of the IBBI (Liquidation Process) Regulations, 2016 which provides for mutual credits and set off and further contended CIRP proceedings and the liquidation proceedings are two faces of the same coin and therefore even at the time when CIRP proceedings are in progress the terms and conditions of liquidations has to be taken into account. Under section 30(2) of IBC, resolution plan should provide for payment of operational creditors which shall not be less than amount to be paid in the event of liquidation of the Corporate Debtor. — The meaning of mutual dealings although not defined specifically in any provisions of the IBC, however the regulation 29 contain the same. The Regulations in a statue are part and parcel of the code and Insolvency Code is no exception. Submissions by Respondent/ Corporate Debtor — Claims for set off arise at the time of liquidation proceedings and not at CIRP stage.

	— At the time of filing of the claim form, Airtel entities did not seek any set off (legal or equitable) from the amounts withheld for the provisions of the BGs — Even if assuming if the RPs were to admit the claims, it would not entitle Airtel Entities to any priority over the other creditors as Airtel will remain as an operational creditor for the aggregate amount of the admitted claims. Airtel Entities are not entitled to claim legal or equitable set-off as attempted to the extent of Rs 112 crores because by doing so, Airtel entities put themselves in an advantageous position over and above rest of the financial and operational creditors, by recovering its debt. — There is no provision under IBC which allows parties to claim set off during CIRP process. Thus, once the Airtel Entities filed their claim before RP and did not take into account any set off towards the money withheld by it, no advantage of set off can be claimed. — Reliance was placed on Swiss Ribbon Pvt Ltd v/s Union of India, 2019 SCC Online SC 73 wherein while dealing the constitutional validity of IBC this point also has been touched upon and commented that set off can be considered at the stage of filing proof of claim during the resolution process by the Resolution Professional, however this decision is subject to challenge before the Adjudicating Authority u/s 60 of IBC. The set off, if allowed, at this stage would violate the basic purpose of introduction of IBC. The operational creditor is required to be in the queue with other operational creditors so that no creditor shall have preference over other creditors. By this

	set off, the operational creditor is recovering its debt which is nothing but upsetting the queue and suo motu enjoying preferential treatment. Submissions by Resolution Professional — Application by Airtel Entities is nothing, but an afterthought, filed in order to unlawfully withhold money duly payable to Aircel Entities — Airtel Entities does not have right to set off at the stage of CIRP proceedings and if the same is allowed it would violate the core objective of the IBC — Reliance on NCLAT judgement in the case of Indian Overseas Bank v/s Mr. Dinkar T Venkasubramaniam (Company Appeal (AT) (Insolvency) No 267 of 2017, where it is clarified that such acts of set off are against the provisions of the Code and hence cannot be allowed once the moratorium is declared against the Corporate Debtor. — Various other judgements and report of Bankruptcy Laws Reforms Committee was relied upon which stated that order of moratorium during CIRP imposes stay not just on Debt Recovery actions but also any claims or expected claims from old lawsuits or a new lawsuits for any manner of recovery from the entity. Thus, a primary question arises that whether the set off is allowable under Insolvency Proceedings.
Decision of the Tribunal	Tribunal observed and held the following: — The term of "set-off" is well recognised and accepted mode of settling of accounts. The set off is a technique applied between parties having mutual rights and liabilities, replacing gross position with net position. It permits the

	rights to be used to discharge the liabilities where cross claims exists between a debtor and a creditor. There is nothing new about this age-old principle of accountancy. — The legitimacy of doctrine of set off has been well established in the latest Supreme Court Decision in Swiss Ribbon Private Limited v/s Union of India & Others. — Tribunal observed that even while submission of resolution plan, resolution applicant must be aware of the correct outstanding balances appearing at the date of commencement of insolvency in the balance sheet of a Corporate Debtor. — Regarding plea of the Corporate Debtor that once on commencement of Insolvency Proceedings Section 14 of IBC came into operation by declaring 'Moratorium" in respect of certain transactions, therefore, the impugned transaction of set-off is prohibited, Tribunal placed its reliance on Section 14 (1) (d) of The Code for the legal proposition that the Adjudicating Authority shall prohibit the recovery of any property by an owner where such property is occupied or in the possession of the Corporate Debtor. In this regard, attention of Adjudicating Authority was drawn on the definition of “Property” as defined under Section 3(27) of The Code means money, actionable claim, goods, land etc. So it is submitted that the impugned set-off of 112 Crore although a property of Airtel Entities cannot be allowed to be recovered in the guise of set-off while discharging the Debt belonging to Aircel recoverable from Airtel Entities. This Bench is not agreeable to this argument because Section 14(1)(d) has taken into consideration only one type of situation when a Creditor has to recover any property which is in

	possession of the Corporate Debtor. In this case, the position is somewhat reverse because the major amount i.e. 453 Crores is to be recovered from the Operational Creditor by the Corporate Debtor, however, as against that only sum of 112 Crores is the property of the said Operational Creditor, that too, not in possession of the Corporate Debtor. — Tribunal relied on explanation (a) to section 18(1)(f) of the IBC, that certain assets shall not be included while taking control and custody of assets by RP. These assets include assets held under trust or under contractual arrangements. The provision of the Code is squarely applicable on the present situation that a sum of 112 Crores, although said to be under ownership of the Corporate Debtor, but the right is arising out of a contractual arrangement. — On co-joint reading of section 14(1)(d) and explanation (a) to section 18(1)(f) of the IBC 2016, Tribunal is of the view that if an asset is in possession of the Corporate Debtor then in spite of the applicability of "Moratorium", if that asset came into existence out of a contractual obligation then set-off or adjustment is required to be allowed so that the Resolution Professional be not entitled to take control over such an asset. — Tribunal also relied upon judgement of Chandigarh bench in the case of Weather Makers Private Limited v/s Parabolic Drugs Ltd, where conclusion can be drawn that even during CIRP a question of set off or netting off adjustment can be raised either by the Creditor or by the Debtor which is permissible and to be adjudicated upon. — Argument of the Respondent that set off is subject matter at the stage of liquidation and

	not at this stage is not sustainable for the simple reason that even at CIRP stage, resolution plan needs to be examined keeping in mind the provisions of section 53 i.e. Distribution of Assets on Liquidation. Tribunal is of the opinion that whatever is the stage, either CIRP or liquidation a true and correct position of accounts should emerge from the records of both the sides. — There is no specific bar or barrier in Insolvency Code that upto CIRP process only gross amounts/claims are to be taken into account and netting is permissible only in the case of liquidation. In absence of any such restrictions, this Bench has liberty to take an independent view which is not at variance with the provisions of the Code, rather remove ambiguity between gross claim or net claim, that too at what stage. — As per clause 8 of the Form B, the details of mutual credit, mutual debit between the Corporate Debtor and creditor are required to be informed which may be arrived by set off against the claim. As a result, conclusion can be drawn that the submission of Form B by Airtel Entities has given entitlement of netting off the amount. — To conclude, Tribunal is of the view that the applicant is legally entitled under the IBC to set off the amount of Rs 112 crore while making a payment of the amount retained out of the total consideration settled as per Spectrum Trading Agreement. — The Adjudicating Authority held that the application deserves to be allowed.

SECTION 33

CASE NO. 9

Bench	National Company Law Tribunal (NCLT), Mumbai Bench, Mumbai
Financial Creditor	State Bank of India
Corporate Debtor	Ushdev International Limited
Particulars of the case	CP No.1790/IBC/NCLT/MB/MAH/2017 MA 626/2019 Under Section 33 of the Insolvency and Bankruptcy Code, 2016 By Mr. Subodh Kumar Agrawal - Applicant/Resolution Professional MA 517/2019 Under section 60(5) of I&B Code By Canara Bank - CoC Member MA 716/2019 Under Section 60(5) of I&B Code By Lodha Development Management Pvt. Ltd. CoC Member MA 989/2019 Under section 60(5) of I&B Code By Suman Gupta- Promoter of Corporate Debtor MA 762/2019 Under Section 60(5) of I&B Code By Taguda Pte. Ltd - (Unsuccessful) Resolution Applicant MA 857/2019 Under Section 60(5) of I&B Code By Ushdev Employees Association - Employees of Corporate Debtor
Date of Order	07-11-2019
Relevant Section	Section 33, 60(5) of the Insolvency and Bankruptcy Code, 2016.
Facts of the Case	An application under Section 33 of the I&B Code, 2016 was filed by the Resolution Professional for liquidation of the Corporate Debtor as the CoC had rejected the Resolution Plan submitted by a Resolution Applicant with 77.61% voting share against the Resolution Plan.

	The decision of CoC was being challenged by (i) one of the Financial creditor of the Corporate Debtor having 1.03% share in CoC, namely Lodha Development Management Pvt. Ltd. ("Lodha"), (ii) the Promoters of the Corporate Debtor, namely Mr. Suman Gupta, promoter (iii) the employees of the Corporate Debtor, namely Employees Association and the (iv) Resolution Applicant himself, namely Taguda Pte. Ltd. (the Resolution Applicant/Taguda). The objection raised was regarding the justification of the alleged 'commercial wisdom' claimed to be exercised by the CoC.
Decision of the Tribunal	After considering various laws and discussions, the Hon'ble NCLT decided that the decision made by CoC for liquidation of company shall stand cancelled. The Hon'ble NCLT observed the job of the Adjudicating Authority is not merely a stamping authority to approve each and every decision of the CoC, but to test decision on three parameters i.e. (i) it's feasibility, (ii) it's viability and (iii) it's effective implementation. In the present case, the CoC has not demonstrated "No Viability" and "No Feasibility" of the Resolution Plan, therefore, the decision to liquidate is a flawed decision. The Hon'ble NCLT also observed that Liquidation has to be a last resort, that too in Public interest which ought to be fair and just, only in the absence of a Resolution Plan. Therefore, the decision of CoC, which is adversely affecting so many lives, be based upon common judicious prudence coupled with commercial viability, and lack of these criteria is nothing but a bad exercise of a non-commercial decision.

SECTION 53

CASE NO. 10

Bench	National Company Law Tribunal, Single Bench, Chennai
Applicant	The Regional Provident Fund Commissioner-I
Corporate Debtor	M/s Karpagam Spinners Private Limited and Anr.
Amount of Default	Rs. 71,76,644/-
Particulars of the case	MA/99/2018 in TCP/225 (IB)/2017
Date of Order	21-01-2019
Relevant Section	Section 39, 53 and 238 of the Insolvency and Bankruptcy Code, 2016 and Section 8B and 11 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952.
Facts of the Case	Corporate Debtor was an establishment covered under the Employees Provident Funds and Miscellaneous Provisions Act, 1952 and defaulted in payment of dues/damages/interest including the Employees' share of contributions, which were deducted from the wages of employees to the tune of Rs.71,76,644/-. The corporate debtor subsequently went in to liquidation. EPFO submitted their claim and submitted that according to section 8B and 11 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 the said amount shall be made a first charge on the assets of the establishment and shall be paid in priority against all other dues, while the liquidator submitted that admitted claim amount will be settled by distribution of proceeds from the sale of liquidation assets in the order of priority as provided in section 53 of the IBC, 2016 and under section 53(1)(f) as other remaining debts and dues.

Decision of the Tribunal	As per material placed on record, this Adjudicating Authority is satisfied that issue raised by applicant seems to have been settled by Hon'ble Apex Court in a recent judgement given in SLP (C) No(s) 6438, 2018 titled PR. Commissioner of Income Tax vs. Monnet Ispat and Energy Ltd., wherein it was observed that "Given section 238 of the Insolvency and Bankruptcy Code, 2016, it is obvious that the Code will override anything in consistent contained in any other enactment, including the Income Tax Act". Further the Adjudicating Authority also relied upon another Supreme Court judgement in the matter titled M/s. Innoventive Industries Limited Vs. ICICI Bank and Anr. [Civil Appeal Nos. 8337-8338 of 2017]. Therefore the I & B Code 2016, will override anything inconsistent contained in EPF & MP Act, 1952. In the light of the facts and circumstances and the legal position stated above, the verification and admission of the claim of the applicant viz. EPFO has been correctly recorded by liquidator. Therefore the application of EPFO is devoid of merits and stands rejected.

SECTION 60 (5)

CASE NO. 11

Bench	National Company Law Tribunal (NCLT), Mumbai Bench, Mumbai
Financial Creditor	State Bank of India
Corporate Debtor	Videocon Group of Companies, (1. Videocon Industries Limited 2. Videocon Telecommunications Limited 3. KAIL Ltd. 4. Evans Fraser & Co. (India) Ltd. 5. Millennium Appliances (India) Ltd. 6. Applicomp India Ltd. 7. Electroworld Digital Solutions Ltd. 8. Techno Kart India Ltd. 9. Trend Electronics Ltd. 10. Century appliances Ltd. 11. Techno Electronics Ltd. 12. Value Industries Ltd. 13. PE Electronics Ltd. 14. CE India Ltd. 15. Sky Appliances Ltd.
Amount of Default	More than Rs. 20,000 Crores
Particulars of the case	MA 1306/2018 in CP No. 02/2018, CP No. 01/2018, CP No. 543/2018, CP No. 507/2018, CP No. 509/2018, CP No. 511/2018, CP No. 508/2018, CP No. 512/2018, CP No. 510/2018, CP No. 528/2018, CP No. 563/2018, CP No. 560/2018, CP No. 562/2018, CP No. 559/2018, CP No. 564/2018 & MA 1416/2018 in CP No. 02/2018 & MA 393/2019 & MA 115/2019 in CP No. 543/2018 & MA 1574/2019 in CP No. 01/2018 & MA 774 /2019 in CP No. 543/2018 & MA 778/2019 in CP No. 559/2018 & MA 1583/2018 IN CP No. 559/2018
Date of Order	08-08-2019
Relevant Section	Section 60 (5) of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	A total of 15 applications were filed, some were in favour of the consolidation and some were opposing the consolidation of insolvency process of the

	Videocon Group Companies. State Bank of India had made an application dated 30.10.2018 seeking consolidation of all 15 companies of Videocon Group of Companies which was promoted by Dhoot family and seeking relief as below: (i) 'Substantive consolidation of the corporate debtors into single proceedings', (ii) 'merging of all assets and liabilities of corporate debtors', 'single common resolution professional', (iii) common CoC may be constituted', etc. All the companies of Corporate Debtors were interdependent, inextricably interlinked and intertwined. It was submitted before the Tribunal that the inter-linkage and interdependence of the Corporate Debtors is to so much extent that the creditors of the Corporate Debtors have to be dealt as if Corporate Debtors are "Single Economic Unit" because they used to prepare Consolidated Financial Statements which clearly shows the lenders and other stakeholders as Single Economic Unit.
Decision of the Tribunal	The Hon'ble Tribunal while relying upon the "Report of the Insolvency Law Committee" dated 26th March 2018 noted that the Hon'ble Members of the Insolvency Law Committee have thought that the mechanism of combining Insolvency proceedings in respect of associate or holding companies was 'too soon to introduce' , but the jurisprudence on Insolvency Code developed very fast in last 3 years, as witnessed by all of us, that this problem of 'Consolidation' has also cropped sooner than expected in this Group of cases, so pressing that it cannot be avoided or deferred. Further, even if no specific provision is there in I&B code to address the

	issue of Consolidation, it cannot be held that the question of Consolidation need not to be addressed. The Tribunal observed that the right recourse shall be to examine the necessity of Consolidation. Before arriving at any conclusion on 'Consolidation', the existence of certain ingredients are necessary to be examined, viz ; (1) Common Control, (2) Common Directors, (3) Common Assets, (4) Common Liabilities, (5) Inter-dependence, (6) Inter-lacing of finance, (7) Pooling of resources, (8) Co-existence for survival, (9) Intricate link of subsidiaries, (10) Inter-twined of accounts, (11) Inter-looping of debts, (12) Singleness of economics of units, (13) Cross shareholding, (14) Inter dependence due to intertwined consolidated accounts, (15) Common pooling of resources, etc. This is not an exhaustive list and cannot be. These are the elementary governing factors, prima-facie to activate the process of consolidation. However, the Court further held that it is appropriate and suitable to give a ruling at this occasion that there is no single yardstick or measurement on the basis of which a motion of consolidation can or cannot be approved. Considering various factors, the Hon'ble Tribunal approved the consolidation of insolvency proceedings for 13 of the entities, namely 1. Videocon Industries Limited 2. Videocon Telecommunications Limited 3. Evans Fraser & Co. (India) Ltd. 4. Millennium Appliances (India) Ltd. 5. Applicomp India Ltd. 6. Electroworld Digital Solutions Ltd. 7. Techno Kart India Ltd. 8. Century appliances Ltd. 9 Techno Electronics Ltd. 10. Value Industries Ltd. 11. PE Electronics Ltd. 12. CE India Ltd, 13. Sky Appliances Ltd. except the two entities. So, finally KAIL Ltd. and Trend Electronics Ltd. was not included for consolidation.

	The CIRP proceedings are to be completed within a period of 180 days from the date of the order that is 08.08.2019, under section 12 of the IBC, 2016, for all the consolidated 13 companies and for the two other companies which are not included in the Consolidation, namely KAIL Ltd. and Trend Electronics Ltd

SECTION 60 (5)

CASE NO. 12

Bench	National Company Law Tribunal (NCLT), Chandigarh Bench, Chandigarh
Petitioner/ Financial Creditor	Corporation Bank
Corporate Debtor	Amtek Auto Limited
Particulars of the Case	CA. No. 567/2018 in CP(IB)No.42/Chd/Hry/2017 (Admitted)
Date of Order	13-02-2019
Relevant Section	Section 60 (5) read with Section 74 (3) of the Code Section 31 of the Code
Facts of the Case	The instant application was filed on behalf of the CoC u/s. 60 (5) read with Section 74 (3) of the Code with a prayer to declare the resolution applicant on whom the resolution plan is binding u/s. 31 of the code as disqualified, having knowingly contravened the terms of plan, having failed to implement the same. Further prayer was that the CoC be reinstated and to grant a further 90 days process so that the Resolution Professional can make another attempt afresh towards resolution rather than forcing the Corporate Debtor into liquidation. It was also prayed for debarring the said resolution applicant from making an application under the fresh process. Earlier the case was admitted on 24.07.2017 u/s. 7 of the Code appointing an IRP who was then confirmed to act as RP by CoC. During CIRP an extension of 90 days was also applied for and was granted. The Resolution plan submitted by the applicant was approved by the Tribunal on 25.07.18. However the Resolution Applicant failed to honour its

	commitments viz. A) Failure to pay Rs. 3,310 Crores upfront alongwith fresh infusion of Rs. 350 Cr and compliance of terms within 90 days. B) Furnishing of performance guarantee, creation of escrow equivalent to 15% of upfront cash payout contemplated. Out of the 2 plans received, the bid of the present applicant was highest and hence was approved by CoC.
Decision of the Tribunal	There being a clear default in implementing the plan within the time stipulated in the Resolution Plan, the instant application deserves to be allowed with a liberty to any Member of CoC or RP to file a complaint before IBBI or Central Government with a prayer to file a criminal complaint on the ground that there was intentional and wilful contravention of terms of Resolution plan. It was observed from the order approving the resolution plan that out of the two applicants, one applicant's plan with a highest value was approved by CoC. It was also observed that there were four more applicants, who neither submitted the resolution plan nor bid bond guarantee. So bench opined that looking to the object of the code and the principles laid down by Hon'ble Supreme Court, the prayer made for starting fresh process for resolution of the corporate debtor cannot be accepted.

SECTION 60 (5)

CASE NO. 13

Bench	National Company Law Tribunal (NCLT), Allahabad Bench, Allahabad
Applicant	Pramod Kumar Sharma (Resolution Professional)
Financial Creditor/Respondent	IDBI Bank Limited
Corporate Debtor	Uniworld Sugars Private Limited
Amount of Default	Rs. 32.40 Lakh
Particulars of the case	CA No. 277 / 2018 in CP No. (IB) 120/ALD/2017
Date of Order	31-01-2019
Relevant Section	Section 60(5)(b) of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	Consortium of bankers sanctioned credit facility to Corporate Debtor i.e. Uniworld Sugars Private Limited in the year 2012-13 under consortium agreement in which IDBI Bank Limited was lead banker. Corporate Debtor was maintaining a Current Account with the Respondent bank located in Gandhidham, Gujarat but that account was being operated from the Zonal Office of bank located at Karol Bagh, New Delhi. On 08.03.2018, the head office of IDBI Bank freezed the No-Lien account of the Corporate Debtor and stopped all the transactions therein. Then on 25.04.2018 bank debited Rs. 32,40,000/- on its own from the Corporate Debtors Account and transferred the same to the suspense account maintained at the Delhi office of the respondent bank without giving any information to the Corporate Debtor. In the Joint Lenders Forum (JLF) meetings which

	was held on 01.12.2017 and 11.12.2017 presided by the representative of the Respondent bank, it was decided that the lenders would be paid out of usage of the sale proceeds of the sugar lying at Corporate Debtors premises was decided by all. For these transactions, letter was sent to respondent bank on 05.12.2017, for setting up Trust and Retention Account (TRA) of Escrow nature with the respondent or convert the existing current account of the Corporate Debtor maintained at Gandhidham, Gujarat into No-lien Account. On 19.12.2017, respondent bank agreed to convert the Current Account into No-lien Account. During May, 2018 respondent bank raised an Invoice No. IDBI/MCG/DELHI/2017-18/USPL/34 dated 20.04.2017 towards Lead Bank Charges of 2017-18 aggregating of Rs. 23,00,000/-. IDBI Bank's Lead Charges was pending for 3 years i.e. Rs. 53.10 Lakh, from which they recovered an amount of Rs. 21.94 Lakh on 25.04.2018 from Current Account of Corporate Debtor and Rs. 32.40 Lakh from Trust and Retention Account (TRA) on 25.04.2018, which is well before commencement of CIRP. As per the Applicant, no Financial Creditor can recover their amounts from the Corporate Debtor after commencement of CIRP. Further, it was also contended that the lead bank charges adjusted are in excess of the agreement or it is arbitrary, and thus can be recovered.
Decision of the Tribunal	The Hon'ble Tribunal observed that in the present case, no amount is withdrawn from the TRA account after commencement of CIRP. Therefore, no merit was found in the application. However, the RP was given the liberty to agitate over the quantum of the lead bank charges claimed by the respondent bank if he is advised so.

BIDDING IN E-AUCTION

CASE NO. 14

Bench	National Company Law Tribunal, Single Bench, Chennai
Applicant	Mr. S.S. Chockalingam
Respondent	Mr. CA Mahalingam Suresh Kumar (Liquidator)
Corporate Debtor	Nag Yang Shoes Pvt. Ltd.
Particular of the case	MA/661/2018 in TCP/431/2017 filed under Rule 11 of the NCLT Rules, 2016
Date of Order	18-12-2018
Facts of the Case	The applicant participated in e-auction held on 26.10.2018 and declared as successful bidder, who offered the highest bid amount, sale letter has been issued in the favor of the Applicant. Applicant was asked to deposit 25% of total bid amount within 24 hours and the rest within 15 days. Applicant has paid 25% of the bid amount on 3rd day and thereafter sought extension of time and respondent viz. liquidator granted extension of time twice for making payment of rest 75% of bid amount but applicant could not adhere to the timeline. Therefore liquidator cancelled the proposed sale and negotiated with 2nd highest bidder who paid bid amount in one shot on 13.12.2018 and machinery stood sold to the 2nd highest bidder. Applicant submitted that the process that has been initiated by the liquidator to cancel the proposed sale and proceed to negotiate with 2nd bidder is not in accordance with law and he has no authority to forfeit amount that he has paid towards the payment as part of highest bid amount.
Decision of the Tribunal	As per Adjudicating Authority, there does not appear any provision in the I&B Code, 2016 to give

	extension of time as far as bidding process is concerned. Moreover the liquidator negotiated with 2nd bidder who already made payment equivalent to the amount offered by applicant being highest bidder. Therefore the application of the applicant has become infructuous and the same stands dismissed.

SECTION 230 OF THE COMPANIES ACT, 2013

CASE NO. 15

Bench	National Company Law Tribunal (NCLT), Mumbai Bench, Mumbai
Financial Creditor	M/s. Edelweiss Asset Reconstruction Company Ltd
Corporate Debtor	M/s. Bharti Defence and Infrastructure Ltd.
Particulars of the Case	MA 2689/2019, MA 2803/2019, MA 2742/2019 in C.P. (IB)- 292/(MB)/2017
Date of Order	26-08-2019
Relevant Section	Section 230 of the Companies Act, 2013 (time for submission of scheme of compromise or arrangements is 90 days). Section 238 of the Insolvency and Bankruptcy Code, 2016 (IBC has overriding effect over all other laws to the extent of inconsistencies between the two). Section 14 of the Insolvency and Bankruptcy Code, 2016 (During moratorium period the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any Court of law, tribunal, arbitration panel or other authority is prohibited).
Facts of the Case	MA 2803/2019 In this application, the Liquidator prayed a further period of 90 days for submission of scheme of compromise or arrangements beyond the original time period of 90 days as per section 230 of the Companies Act, 2013. MA 2742/2019 In this application, the Liquidator prayed for seeking a stay in Recovery proceedings bearing no 287/2018 and the e-auction notice dated 10.7.2019

	wherein e-auction of Vessel No. V-419 has been ordered. Facts: Ship building contract between GOL Offshore Ltd. and the Corporate Debtor, M/s. Bharti Defence and Infrastructure Ltd., vide agreement dated 21.11.2011 wherein the Corporate Debtor agreed to build, launch and deliver vessel V-419 for USD 30 million. Title and risk of entire vessel and equipment was on M/s. Bharti Defence and Infrastructure Ltd. till the delivery. There was no delivery till the filing of the application. Still DRT-I, Ahmedabad vide order dated 24.04.2018 held that the Vessel does not belong to the Corporate Debtor. Based on that the Recovery Officer directed the Vessel V-419 to be auctioned off.
Decision of the Tribunal	MA 2803/2019 The Adjudicating Authority held that in the present circumstances, it is justified to extend the period of 90 days with effect from 12.08.2019. The Adjudicating Authority directed that the Liquidator will ensure that the proposals would be invited and the Schemes would be received in such way to ensure that some reasonable financial commitment commensurate with the value of the scheme is taken in the form of Earnest Money Deposit, which could be forfeited in case of non-finalization of the scheme. MA 2742/2019 The order dated 24.04.2018 passed by DRT-I, Ahmedabad was during the moratorium period and by observing the other circumstances, order was passed by Adjudicating Authority to restrain the Respondent from auctioning the Vessel V-419 during the liquidation proceeding without prior approval of the Tribunal.

Glossary

CD	:	Corporate Debtor
CIRP	:	Corporate Insolvency Resolution Process
CoC	:	Committee of Creditors
DRT	:	Debt Recovery Tribunal
IBBI	:	Insolvency and Bankruptcy Board of India
I&B Code/ IBC/Code	:	The Insolvency and Bankruptcy Code, 2016
IRP	:	Interim Resolution Professional
NCLT	:	National Company Law Tribunal
NCLAT	:	National Company Law Appellate Tribunal
RP	:	Resolution Professional
SC	:	Supreme Court of India