




INSOLVENCY ROUND UP

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Disclaimer: The present newsletter Insolvency Round-Up, is an in-house publication of S&A highlighting the recent changes in the I&B Code 2016 and other regulations w.r.t. Insolvency, brief of Judgments orders passed by various Courts/Tribunal. All information, interpretation, opinions are that of the contributors and should not be read or understood as professional advice in any manner of S&A. The esteemed readers are advised to seek professional advice before relying on any of the contents of this present newsletter

1. CIRCULARS/NOTIFICATIONS ISSUED BY IBBI

1. Filing of the list of stakeholders under clause (d) of sub-regulation (5) of regulation 31 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

The Insolvency and Bankruptcy Board of India (“IBBI”) had released a prescribed format for submission of a list of stakeholders by the Liquidator pursuant to Regulation 31(5)(d) of the IBBI (Liquidation Process) Regulations, 2016.

Under the prescribed format, a particular required to be provided for “Identification No.” for seeking identification details of stakeholders. However, in various instances, in the said column, the details of the Aadhar/PAN of the stakeholders were being filled.

This information is highly sensitive and prone to misuse, the IBBI, vide its Circular dated 24.11.2021, has removed the said column of “Identification No.” and provided for a new format.

2. Filing of the list of creditors under clause (ca) of sub-regulation (2) of regulation 13 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

3. The IBBI had released a prescribed format for submission of list of creditors by the Liquidator pursuant to Regulation 13(2)(ca) of the IBBI ((Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

Under the prescribed format, a particular required to be provided for “Identification No.” for seeking identification details of creditors. However, in various instances, in the said column, the details of the Aadhar/PAN of the creditors were being filled.

This information is highly sensitive and prone to misuse, the IBBI, vide its Circular dated 24.11.2021, has removed the said column of “Identification No.” and provided for a new format.

4. Clarification regarding the requirement of seeking No Objection Certificate or No Dues Certificate from the Income Tax Department during Voluntary Liquidation Process under the Insolvency and Bankruptcy Code, 2016 (Code)

Regulation 14 of the IBBI (Voluntary Liquidation Process) Regulations, 2017 (the Regulations) provides for all the financial creditors, operational creditors including government,

and other stakeholders to submit their claims within the specified period, failing which their claims may consequently get extinguished.

Despite such opportunity for filing of claims, the liquidators seek 'No Objection Certificate' (NOC) or 'No Dues Certificate' (NDC) from the Income Tax Department without any provision for the same under the Insolvency and Bankruptcy Code, 2016 ("I&B Code").

Since the I&B Code has an overriding effect on the provisions of section 178 of the Income-tax Act, 1961, hence the process of applying and obtaining such NOC/NDC from the Income Tax Department, it is has been clarified by the IBBI that as per the provisions of the I&B Code read with

Section 178 of the Income-tax Act, 1961, an Insolvency Professional handling voluntary liquidation process is not required to seek any NOC/NDC from the Income Tax Department as part of compliance in the said process. This has been done to ensure the objective of time-bound completion of the process under the I&B Code survives.

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ORDERS

1. The period from 15.03.2020 till 28.02.2022 shall stand excluded for limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings

In Re: Cognizance for Extension of Limitation [Miscellaneous Application No. 21 of 2022 in Miscellaneous Application No. 665 of 2021 in Suo Motu Writ Petition (C) No. 3 of 2020 With Miscellaneous Application No.29 of 2022 in Miscellaneous Application No. 665 of 2021 in Suo Motu Writ Petition (C) No. 3 of 2020]

Taking into consideration the arguments advanced and the impact of the surge of the Covid-19 on public health and adversities faced by litigants in the prevailing conditions, Hon'ble SC considered it appropriate to issue the following directions:

I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021, and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

II. Consequently, the balance period of limitation remaining as of 03.10.2021, if any, shall become available with effect from 01.03.2022.

III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event, the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.

IV. It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015, and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

2. No claims to be entertained after the finality and successful implementation of the Resolution Plan

Ultratech Nathdwara Cement Ltd. Vs. The state of Rajasthan, High Court of Rajasthan [S.B. Civil Writ Petition No. 7258/2019 Connected with S.B. Civil Writ Petition No. 6851/2019]

In the given matter before the Hon'ble High Court ("HC"), the claims raised by the Respondents, after the finality of the resolution plan and after the Successful resolution Applicant taking over the management of the Company and clearing all dues, any claim raised thereafter were not to be allowed.

The HC referred to the judgment in the matter Ghanashyam Mishra and Sons Pvt. Ltd. Vs. Edelweiss Asset Reconstruction Company Ltd. wherein it was held by the Hon'ble Supreme Court ("SC") that once a resolution plan is duly approved by the Adjudicating Authority ("AAA") under Sub-section (1) of Section 31 of I&B Code, the claims as provided in the resolution plan shall stand frozen and all the parties including the Corporate Debtor ("CD"), employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders shall be bound down by such plan.

The Hon'ble SC had gone to the extent of laying down the law that all dues including the statutory dues, Central Government, state government, or any other local authority, if not a part of the resolution plan, shall also stand extinguished. In view of the aforesaid observations, the present writ petitions were allowed and the claims by the Respondents were rejected.

3. The approved resolution plan has to be implemented at the earliest and that is the mandate under the I&B Code

COC of Amtek Auto Ltd. Through Corporation Bank Vs. Dinkar T. Venkatsubramaniam and others. [Civil Appeal No. 6707 of 2019]

Hon'ble SC on 01.12.2021 held that the approved resolution plan has to be implemented at the earliest and that is the mandate under the I&B Code. It observed that the entire resolution process must be completed within the period stipulated under Section 12 of the I&B Code and any deviation would defeat the object and purpose of providing such time limit.

In the present case, the timeline was pushed due to various reasons, in view of the various litigations pending between the parties including the Successful Resolution Applicant, that is, Deccan Value Investor LP ("DVI")

which was condoned in view of the peculiar facts and circumstances of the case.

It was further observed that any further delay in implementation of the approved resolution plan submitted by DVI, which was approved by the AA in July 2020 would defeat the very object and purpose of providing a specific time limit for completion of the insolvency resolution process, as mandated under Section 12 of the IBC.

Therefore, the Hon'ble SC directed all the concerned parties to the approved resolution plan and/or connected with implementation of the approved resolution plan to complete the implementation of the approved resolution plan, within four weeks from the day of the judgment. It was further directed that on implementation of the approved resolution plan, an amount of Rs. 500 crores which had been deposited by DVI, to be transferred to the respective lenders/financial creditors as per the approved resolution plan and/or as mutually agreed.

4. If the Corporate Debtor is an MSME, the Promoters don't need to compete with other Resolution Applicants to regain the control of the Corporate Debtor

**Mr. C. Raja John Vs. Mr. R. Raghavendran
RP of Springfield Shelters Pvt. Ltd., NCLAT
Chennai [Company Appeal (AT) (CH) (INS)
No. 207 of 2021]**

The Resolution Plan was submitted by the Appellant to consider as a promoter of the CD on the ground that the CD is a Micro, Small, Medium Enterprise ("MSME") and the Appellant is eligible to participate in the Resolution Plan. However, the Resolution Professional ("RP") rejected the plan stating that the Appellant does not meet the eligibility norm as per Section 25(2)(h) of I&B Code, prescribing the Net Worth of INR 2 Crores by the Committee of Creditors ("CoC") and his Director Identification Number was under default and not eligible as per Section 29A(e) of the I&B Code.

The application of the Appellant filed before the AA challenging the rejection of the Resolution Plan by the RP was dismissed on the ground that the Appellant suffers a disqualification under Section 29A(e) of the I&B Code and observed that the Appellant trying to gain a backdoor entry on the guise of presenting themselves as MSME.

However, the National Company Law Appellate Tribunal ("NCLAT") held that if the CD is an MSME, the Promoters don't need to compete with other 'Resolution Applicants' to regain the control of the CD.

NCLAT issued the directions to the RP to consider the Resolution Plan of the Appellant being erstwhile Director/Promoter of the Corporate Debtor (admittedly an MSME) and clarified that the Appellant did not fall under the category of 29A(e) of the I&B Code (i.e. disqualified to act as Director), in view of the directions of the Hon'ble HC Madras, whereby the Hon'ble HC Madras set aside the disqualification of the Appellant.

5. Claim filed after the specified period, cannot be considered at a belated stage.

Department of Goods & Service Tax, Deputy Commissioner of CGST, Kadi. Vs. Technovaa Plastic Industries Pvt. Ltd., NCLAT New Delhi

Company Appeal (AT) (Ins.) No. 474 of 2021

The issue in this appeal was whether the claim filed by the Appellant was within the period specified in the public announcement and the extended period of 90 days included in Regulation 12 of the CIRP Regulations, 2016 and whether a claim if filed after the specified period, could be considered at a belated stage. The fact of rejection of Appellant's claim was within its knowledge from 03.1.2020 pursuant to the same being informed by the RP.

It is noted that the Resolution Plan was submitted for approval to the AA on 4.9.2020, which was much before the claim was filed by the Appellant. The erstwhile RP stated in his additional affidavit that the claim of the Appellant did not form part of the Resolution Plan as it was filed belatedly and rejected by the Resolution Professional.

NCLAT referring the judgment in *CoC of Essar Steel India Limited v. Satish Kumar Gupta and Others, and Ghanashyam Mishra & Sons (P) Ltd. V. Edelweiss Asset Reconstruction Co. Ltd.*, held that the Resolution Plan as approved by the AA, not including the claim of Appellant, which was filed much belatedly, does not need any interference. Hence, the appeal was rejected.

6. The security interest created by virtue of the judgment of the Debt Recovery Tribunal cannot be classified as Unsecured Creditor

SICOM Ltd. Vs. Mr. Sundaresh Bhat, The Liquidator of ABG Shipyard Ltd., NCLAT New Delhi [Company Appeal (AT) (Insolvency) No. 470 of 2021]

The CD (ABG Shipyard Limited) was classified as Non-Performing Asset on 31.10.2013. SICOM (Appellant) issued notices and reminders to pay outstanding money and ultimately filed an O.A. No.274 of 2016 before the Debt Recovery Tribunal,

(“DRT”) Ahmedabad seeking recovery of INR 144,46,95,879/- together with interest. The DRT Ahmedabad vide its judgment dated 26.04.2017 allowed the O.A. and directed the defendants (including the Corporate Debtor) to jointly and severally deposit INR 144,46,95,879/- within 30 days, failing which, due was to be recovered from their mortgaged and hypothecated properties.

Subsequently, ICICI Bank Limited—Financial Creditor of the CD filed an Application under Section 7 of the I&B Code, which was admitted vide order dated 01.08.2017.

An order dated 25.04.2019 was passed directing for liquidation of the CD. Liquidator issued a public announcement on 03.05.2019, in response to which, the Appellant filed its proof of claim of INR 259,97,90,186/-. On 06.06.2019, the Appellant gave its consent regarding the relinquishment of a security interest in accordance with Section 52(1) (a) of the I&B Code. A list of stakeholders and Financial Creditors (“FC”) was prepared by the Liquidator, in which the claim of the Appellant was put under the head of “amount unsecured”. The Appellant protested the categorization. . The AA vide order dated 28th April 2021 rejected the application filed by the Appellant observing that the Application was barred by timesince the Application

was filed after 551 days and the charge was not duly registered under Section 77 sub-section (3) of the Companies Act, 2013, the Liquidator did not commit any error in not taking into consideration and classifying the Appellant as 'unsecured creditor'.

The Hon’ble NCLAT set aside the order of AA dated 28.04.2021, w.r.t. application barred by time, stating that the Application filed by the Appellant was under Section 60(5) of I&B Code, was fully maintainable and it could not have been rejected since Section 42 was inapplicable, as no appeal was filed by the Appellant. Further, the Hon’ble NCLAT further considering the decision of Hon’ble SC in the matter Indian Bank v. Official Liquidator, Chemmeens Exports (P) Ltd. & Ors., held that there being adjudicatory order of the DRT in favor of the Appellant, the mortgage and hypothecation was created in favor of the Appellant by the CD, hence, non-registration of mortgage and hypothecation under Section 77 of the Companies Act, 2913 cannot be a ground to hold that Appellant was not a ‘secured creditor’. Under the order of the DRT, the CD has not deposited the amount within 30 days, the Appellant was at liberty to realize the amount from mortgaged and hypothecated assets. Hence, the security interest was created by virtue of the judgment of DRT dated 26.04.2017.



7. Moratorium in respect of debt is restricted to proceedings for recovery of any debt against the bank "in person". To stay willful defaulter proceedings, criminal proceedings, or quasi-criminal proceedings under any moratorium under section 96 would defeat the object and purpose of part III of the I&B Code.

Adarsh Jhunjunwala Vs State Bank of India & Anr. [WPO 1548 of 2021]

Insolvency proceedings u/s 7 of the I&B Code were filed against one M/s JVL Agro Industries Ltd ("CD"). The resolution plan failed and the company was directed to be wound up. The bank issued a show-cause notice to Adarsh Jhunjunwala, director of CD, being the Petitioner under the Wilful Defaulter Guidelines on 07.11.2019. During the pendency of said proceedings, an application u/s 95 of the I&B Code was filed by the Bank against the writ petitioner, requesting for declaring Petitioner as "willful-defaulter". The review committee vide order dated 18.10.2021 passed the final order declaring Petitioner as "wilful defaulter". Aggrieved by the said order, Petitioner filed this writ petition for the stay of the said order in view of moratorium u/s 96 of the I&B Code.

Hon'ble HC Calcutta, while dismissing the present petition, held that proceedings under Willful Defaulter Guidelines are not covered under Moratorium in Section 96 of the I&B Code. As per Hon'ble HC Calcutta, Section 96 of the I& B Code operates only against the "debt" of a bank. Placing reliance on the decision of Ayan Mallick & Anr vs SBI, this Hon'ble HC Calcutta held that the scope of moratorium under section 14 of the I&B Code applies to a CD, as opposed to moratorium under section 96 which is against the "debt". As per Hon'ble HC Calcutta, there is no bar to proceed parallelly under the two laws as the purpose of the two proceedings is completely different. Thus, the Writ Petition was dismissed.

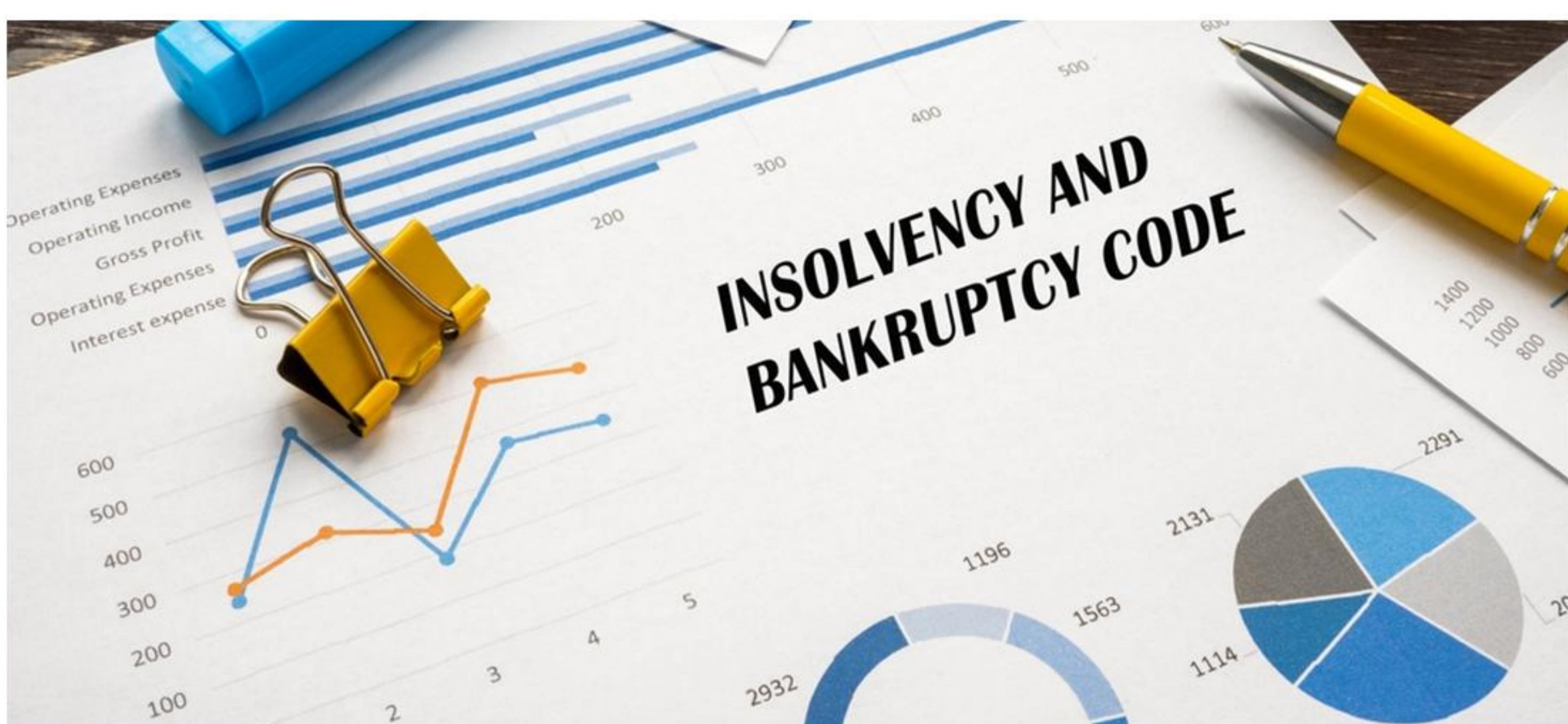
8. Claim not forming part of the Resolution Plan including recoverable statutory dues, shall stand extinguished upon approval of the Resolution Plan.

Murli Industries Limited Vs ACIT & Anrs. [WP No. 2948 of 2021]., High Court of Judicature at Bombaynagpur Bench, Nagpur.

M/s Edelweiss Asset Reconstruction Company Limited filed an application u/s 7 of I&B Code against M/s Murli Industries Limited ("CD") and the same was admitted by the AA. The RP made the public announcement, in response to which, DCIT submitted a claim of INR 50,23,770/-.

Thereafter, Resolution Plan was made which was approved by CoC and AA respectively and was made effective from 25.08.2020. After Resolution Plan was made effective, Assistance Commissioner of Income Tax vide notice dated 25.03.2021 issued u/s 148 of the Income Tax Act, 1961 reopened the case of the Petitioner for the AY 2014-15. Aggrieved by said notice, Petitioner filed present writ petition, requesting for quashing of the notice on the ground that reopening notice u/s 148 of the Income Tax Act, 1961 was issued after approval of Resolution Plan by the AA. It was contended that any claim which was not the part of Resolution Plan is not maintainable against CD, nor can any claim be initiated thereafter.

The Hon'ble HC Bombay, while upholding the view of Petitioner held that, on the date of approval of the Resolution Plan, all such claims which are not the part of the Resolution Plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not a part of Resolution Plan. As per Hon'ble HC Bombay, providing certainty to the Resolution Applicant of "no" claims in the future against the CD appears to be the essence of the Resolution Plan.



9. The opinion expressed by CoC after due deliberations in the meeting is the collective business decision and that the decision of CoC, being a 'commercial wisdom' is non-justiciable, except on limited ground as envisaged u/s 30(2) or Section 61(3) of I&B Code 2016.

Ngaitlang Dhar Vs Panna Pragati Infrastructure Private Limited & Ors. [Civil Appeal No. 3665-3666 of 2020]

An appeal was filed the order by AA, approving the Resolution Plan as submitted by Ngaitlang Dhar. Being aggrieved by the aforesaid order, the appeal was filed by Panna Pragati Infrastructure Private Limited.

The Hon'ble SC held that it is trite law that "commercial wisdom" of the CoC has been given paramount status without any judicial intervention. It is not open to AA or Hon'ble NCLAT to interfere with the decision of CoC, unless, the case of the Applicant falls within the provision of Section 30(2) or Section 61(3) of I&B Code. Hon'ble SC further held that it is evident from the facts of the case, RP, as well as CoC, has acted transparently. An equal opportunity was accorded to all the prospective Resolution Applicant. Thus, in the absence of any irregularities, the provision of Section 61(3) of the I&B Code cannot be invoked. Accordingly, the decision was passed by Hon'ble. NCLAT was quashed and set aside by Hon'ble SC.

10. Once condition u/s 32A has been fulfilled, no prosecution can be continued against CD, irrespective of the fact that an appeal has been filed u/s 32 of I&B Code, challenging resolution plan approved by NCLT.

Dewan Housing Finance Corporation Limited Vs UOI [WP No. 3157 of 2021]., High Court of Judicature at Bombay Criminal Appellate Jurisdiction

CBI filed a petition before AA for initiation of CIRP against Dewan Housing Finance Corporation Limited ("CD"), which was admitted and moratorium u/s 14 of I&B Code also commenced. Thereafter, on 7.03.2020, CBI ("Respondent No. 1") registered FIR against DHFL, its erstwhile directors, and others including one, Mr. Rana Kapoor u/s 420 read with section 120B of Indian Penal Code ("IPC") and under Prevention of Corruption Act, 1988 ("POCA"). It is pertinent to mention that all the transactions which form the subject matter of FIR were prior to initiation of CIRP against CD. Subsequently, thereto, Resolution Plan was submitted by Piramal Capital and Housing Finance Limited ("PCHFL") which was approved by CoC and later by the AA. However, the same was challenged before Hon'ble NCLAT. Hon'ble NCLAT on 02.08.2021 issued a notice in this regard. Thereafter, on 02.07.2021, CD filed application u/s 32A of I&B Code, seeking discharge from CBI case in view of the order passed by AA u/s 31 of I&B Code.

On 20.08.2021, CBI Court partially allowed Section 32A of the I&B Code application by dismissing the prayer made by CD, yet, the CD was permitted to be prosecuted through its erstwhile directors. Being aggrieved by the abovementioned order, CD or Petitioner filed Writ Petition before Hon'ble HC Bombay.

Issue Involved

"Whether Section 32(1)(a) of I&B Code lays down a direction that, CD, would be absolved of all criminal offenses committed prior to commencement of CIRP, from the date of approval of Resolution Plan, although, appeals against Section 31 order of the I&B Code were pending before the Hon'ble NCLAT? "

The Hon'ble HC Bombay held that as per the provision of Section 32A of I&B Code, the CD would not be liable for any offense committed prior to commencement of CIRP and prosecution would not continue against CD once;-

1. Resolution Plan in regard to CD has been approved by AA u/s 31 of I&B Code.
2. Resolution Plan approved caused and resulted in a change in management of CD.
3. Change in management is in favor of persons who were not the party to the CD.

Since all the aforesaid conditions were satisfied in the present case, Petitioner is entitled to immunities u/s 32A of I&B Code. It was submitted by Respondent that an appeal has been filed u/s 32 of the I&B Code against the approved Resolution Plan, thus, Petition filed by Petitioner is not maintainable. However, dissenting with an aforesaid view, Hon'ble HC Bombay held that mere filing of appeal would not by itself operate as a stay, until, specific prayer in this regard is made before Hon'ble NCLAT u/s 32 of the I&B Code and order in this regard is passed by Hon'ble NCLAT. Accordingly, a petition filed by Petitioner was allowed.

11. Minimum Default amount to be considered INR 1 Lakh in cases filed prior to the date of notification raising the minimum threshold to INR 1 Crore.

Jumbo Paper Products vs. Hansraj Agrofresh Pvt. Ltd. NCLAT [Company Appeal (AT) (Ins) No. 813 of 2021]

In the instant case, the Operational Creditor (Appellant) had filed an application under section 9 of the I&B Code, on 13.9.2020 as the debt in default was from 27.5.2018 till 23.6.2018. The Appellant stated the notification dated 24.3.2020 issued by the Ministry of Corporate Affairs w.r.t minimum amount of default under I&B Code, applies prospectively, hence the application is not below the threshold limit stipulated in the said notification.

The Hon'ble NCLAT held that said notification makes it unambiguously clear that the threshold limit to be considered for Section 9 Application of I&B Code will be INR 1 Crore. This threshold limit will be applicable for the application filed u/s 7 or 9 of I&B Code on or after 24.3.2020 even if the debt is of a date earlier than 24.3.2020.

Relying on the ratio of its judgment of Madhusudan Tantia Vs. Amit Choraria & Anr., the Hon'ble NCLAT held that the threshold limit of the debt will be INR 1 Lakh only if the issuance of demand notice and filing of section 9 Application of I&B Code, both are prior to the date of notification i.e., 24.03.2020. Accordingly, the appeal was dismissed.

12. FC is always open to taking all possible steps that are available to him/it to recover the money lent to the borrower.

Ravindranathan vs. Sundaram BNP Paribas, NCLAT [Company Appeal (AT)(Insolvency) No.1087/2020]

In the instant case, the Hon'ble NCLAT reaffirmed that there is no impediment for an 'Applicant' to prefer an application under section 7 of the I&B Code when already the proceedings under The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI"), 2002 are pending.

For maintaining an application u/s 7 of the I&B Code, an applicant is to establish the existence of a debt, which is due from the CD. The ingredients of the I&B Code will have an overriding effect in respect of the SARFAESI, by means of Section 238 of the I&B Code. Further, the FC is always open to taking all possible steps that are available to him/it to recover the money lent to the borrower. Consequently, the Appeal filed by a Suspended Member of the Board of Directors of CD was dismissed as devoid of merits.

13. CoC to consider the Resolution Plan(s) submitted to it only before the due date

Committee of Creditors of Meenakshi Energy Ltd. vs. Consortium of Prudent ARC Limited & Vizag & Anr., NCLAT [Company Appeal (AT) (CH)(Insolvency) No. 166 of 2021]

In the instant case, the RP and the CoC members preferred an Appeal against the NCLT order, whereby the NCLT denied giving any further RFR extension beyond 330 days and let a new Prospective Resolution Applicant (“PRA”) submit its Resolution Plan.

The Hon'ble NCLAT reiterated that AA is to adhere to the procedural and statutory requirements of the I&B Code and heavily placed reliance on the ratio of the judgment of Hon'ble SC in *The Committee of Creditors of Essar Steel India Ltd. vs.*

Satish Kumar Gupta and Ors. The Hon'ble NCLAT held that CoC is to consider the Resolution Plan(s) submitted to it only before the due date and plan of new PRA cannot be considered as the timely resolution of stressed assets is a prime factor in the successful working of the I&B Code. The Hon'ble NCLAT further upheld the other findings of AA and set aside only those observations against the CoC and the RP which were in detriment to their interest and an aberration of justice.

14. No provision of review of an order under the I&B Code: NCLAT upholds the order of NCLT dismissing the review application

MRA Associates(India) vs. Red Fort Capital Advisors Private Limited, NCLAT [Company Appeal (AT) (INSOLVENCY) No. 640 of 2021]

In the instant case, AA dismissed the Review Application filed by the Appellant, thereby holding there is no provision for review of an order under the I&B Code. The power of Appeal, Revision, and the Review is the creation of legislature, that is the statutory powers that cannot be exercised by the Court/Tribunal unless and until it is provided under the Act/I&B Code.

The Hon'ble NCLAT upheld the findings of AA and held that Rule 11 of the NCLT Rules, 2016, deals with inherent powers and Court/Tribunal has no jurisdiction to review its order unless authorized by the statute. In view of the same, the Hon'ble NCLAT reiterated that the 'Power of Review' is not inherent and is required to be conferred either specifically or necessary by implication. Accordingly, the appeal was dismissed.

15. Documentary evidence showing supply of goods and/or services as substandard and deficient in quality amounts to 'Pre-Existing Dispute'

M/s. Oriental Coal Corporation vs. M/s. Decore Exxoils Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 1015 of 2020]

In the instant case, the Hon'ble NCLAT relied on the ratio judgment of the Hon'ble SC in Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr. held that 'Limitation' is a mixed question of law and facts and in absence of any communication in the last three years from the date of default, the Application u/s 9 I&B Code is barred by Limitation. Further, relying on the ratio of the judgment of the Hon'ble SC in Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd., Hon'ble NCLAT held that documentary evidence showing supply of goods and/or services as substandard and

deficient in quality amounts to 'Pre-Existing Dispute', prior to the issuance of the Notice under Section 8 of I&B Code. Accordingly, the appeal was dismissed.

16. The litigant must file an appeal within 30 days without waiting for the copy of the Order of the AA

Asset Reconstruction Company India Limited vs. Mangesh Vitthal Kekre & Anr. [Company Appeal (AT) (Insolvency) No. 286 of 2020]

In the instant case, Appeal was filed on 29.01.2020 along with the application for condonation of 52 days' delay against the order of AA dated 22.10.2019. The Hon'ble NCLAT based on the settled position law as laid down by Hon'ble SC in the case of *V Nagarajan vs. SKS Ispat Powers Limited and National Spot Exchange Limited vs. Anil Kohli, RP for Dunar Foods Limited*, observed that Section 61 (1) and (2) of the I&B Code, consciously omit the requirement of Limitation being computed from when the order is made available to the aggrieved party and it is not open to a person aggrieved by an order under the I&B Code to await the receipt of the free certified copy under Section 421 (3) of the Companies Act 2013 read with Rule 50 of the NCLT Rules, 2016 to prevent Limitation from running.

The litigant has to file its appeal within 30 days, which can be extended up to a period of 15 days, and no more, upon showing sufficient cause. A sleight of interpretation of procedural rules cannot be used to defeat the substantive objective of the legislation that has an impact on the economic health of a nation.

Accordingly, the Hon'ble NCLAT held that present Appeal was filed 98 days after passing of the impugned order, i.e. with a delay of 68 is beyond 30 days prescribed under Section 61 (2) of the I&B Code thus, suffers from delay beyond the condonable period of 15 days under the proviso of Section 61 (2) of the I&B Code and as such not maintainable as barred by Limitation hence is liable to be dismissed.

17. Provisions of the I&B Code cannot be invoked whenever there is an existence of a real dispute.

Tijaria Polypipes Limited vs. Kevadiya Construction Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 85 of 2021]

In the instant case, the Hon'ble NCLAT relying on the Judgement of the Hon'ble SC in the matter of 'Transmission Corporation of Andhra Pradesh Limited vs. Equipment Conductors and Cables Limited' observed that I&B Code is not intended to be a substitute to a recovery forum.

The Hon'ble NCLAT further observed that the delivery of demand notice is a grey area but whenever there is an existence of a real dispute, the I&B Code provisions cannot be invoked.

18. NCLT not to adjudicate the dispute but to look only into the substance of the pleading

Henan Boom Gelatin Co. Ltd. Vs. Sunil Healthcare Ltd. [Company Appeal (AT) (Insolvency) No. 256 of 2021]

In the instant case the Hon'ble NCLAT observed that in reply to Demand Notice under Section 8(1) I&B Code, there is a statutory purpose requiring a CD to bring into the notice of the Operational Creditor ("OC") about the 'existence of a dispute. The purpose of which is that if there is a dispute in existence, the same may be immediately communicated to the OC such that he may chart his course of action and in case of no mention of the existence of a dispute, the OC can immediately file an Application under Section 9 of I&B Code. The Hon'ble NCLAT further observed that the CD is to raise a real substantial dispute and not bogus disputes. The NCLT is not to enter into the adjudication of the dispute but to look only into the substance of the pleading to find out whether there is a real dispute.

19. A fresh right accrues to the Creditor to recover the amount once the recovery certificate authorizing realization of decretal dues is issued

Rajmee Power Construction Limited Vs. M/s. Jharkhand Urja Sancharan Nigam Ltd. [Company Appeal (AT) (Insolvency) No. 596 of 2020]

The Hon'ble NCLAT relies on the judgment of Hon'ble SC in the matter of Dena Bank (now Bank of Baroda) Vs. C. Shivakumar Reddy & Anr. 2021 observed that once a recovery certificate is issued authorizing the Creditor to realize its decretal dues, a fresh right accrues to the Creditor to recover the amount of the final Judgement/Order/decree. In facts of the instant case, the Hon'ble NCLAT held that challenge to the Arbitral Award was dismissed on 06.10.2018 attaining finality and part payment was made on 31.03.2016. Therefore, the Application filed by the Appellant on 04.06.2019 is not barred by Limitation.

20. 14-point test to be considered for consolidation of a case involving individual CIRPs and a subsidiary

Jitender Arora RP M/s. Premia Projects Ltd. Vs. Tek Chand. [COMPANY APPEAL (AT) (INSOLVENCY) No. 596 of 2020]

In the instant case, the RP sought directions from the Hon'ble NCLT to either allow RP to take charge of assets of the Subsidiary Company or allow RP of the CD to initiate joint CIRP of both the holding company and its subsidiary. AA rejected the same. The Hon'ble NCLAT observed that if a CD has an intricate financial relationship with another company which is controlled in an overwhelming manner by the same set of directors, as the CD and their businesses are inter-related, intertwined, and interwoven, such companies should be looked at jointly for matters related to insolvency resolution. Further, relying on the judgment of the State Bank of India and Anr. versus Videocon Industries Limited & Ors, the Hon'ble NCLAT observed that in said case a 14-point test as to whether consolidation of individual CIRPs should be done or not, to yield maximum benefits to stakeholders is given. In the facts of the present case, the Hon'ble NCLAT held that the CD and the Subsidiary Company broadly satisfy the points enumerated in the 14-Point Test. Thus, the matter was remanded to AA with directions that an admission application for the subsidiary is considered by the AA and consolidation of CIRP be thereafter considered so that the combined assets of land and flats are considered together to provide fair, just, and proper relief to the creditors of the CD, Premia Projects Limited.

21. The auction-purchaser cannot be held liable to pay any such dues relating to the period prior to confirmation of sale

Bhatpara Municipality v. Nicco Eastern Private Limited & Anr. [Company Appeal (AT) (Ins) No. 714 of 2021]

In the instant case, an Appeal was preferred against the order of Hon'ble NCLAT, whereby the claims in respect of past dues of the Appellant (Municipality) against a third party (Respondent/Auction-Purchaser) were rejected. The facts of the case are that the Respondent obtained possession of some property by means of an auction purchase in the Liquidation proceedings of a CD. Thereafter the respondent applied to the Appellant to obtain a trading license and mutation of the said property in its name and issued a demand notice for pending dues of property tax.

The Hon'ble NCLAT, while relying on the relevant provisions of the IBBI (Liquidation Process) Regulations, 2016 and Transfer of Property Act, 1882 observed that a duty is cast upon the Liquidator to make a public announcement and thereafter preparation of an asset memorandum containing the value of the assets, including any other information that may be relevant for the sale of the asset.

The Hon'ble NCLAT further relies on the Judgment of the Hon'ble SC in the matter of AI Champdany Industries Ltd. vs. The Official Liquidator & Anr. observed that the auction-purchaser cannot be held liable to pay any such dues relating to the period prior to confirmation of sale. Thus, outstanding dues of the property tax relating to a period prior to the sale are dues that are similar to the claims of an unsecured creditor and therefore should be discharged as per the provisions of Section 53 of the I&B Code. Accordingly, the appeal was dismissed.

22. NCLT and NCLAT cannot usurp the legitimate jurisdiction of other Courts and Tribunals when the dispute does not arise solely from the insolvency of the CD

Central Board of Indirect Taxes and Customs vs. Sundaresh Bhatt [Company Appeal (AT) (Insolvency) No. 236 of 2021]

In the instant case, the Hon'ble NCLAT reiterated that I&B Code is a special law that provides a non-obstante clause under Section 238 of the I&B Code, with overriding effect over other prevailing law and statute time being in force. Further, in the case of two special statutes, which contain non-obstante provisions, the latter statute must prevail.

Therefore, by virtue of Section 238, I&B Code being a subsequent law, the proceeding contained therein shall have an overriding effect on the other proceedings of the Customs and Central Excise Act. The Hon'ble NCLAT further observed that the provisions of the I&B Code and Customs Act, 1962 on levy of customs stand on a different footing and by not paying requisite dues, the importer is deemed to have lost his title to the imported goods. Even before the initiation of CIRP, the CD could not have secured the possession of the imported goods except by paying the customs duty. The Hon'ble NCLAT relying on the judgment in Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta observed that that AA and Hon'ble NCLAT cannot usurp the legitimate jurisdiction of other Courts and Tribunals when the dispute does not arise solely from the Insolvency of the CD. Hence the present Appeal was allowed and the Appellant was allowed to recover its dues.

23. An appeal under Section 61 of the I&B Code cannot be treated to be under suspension till a free of cost copy is received by the party

M/s. Hasmukh N. Shah & Associates Vs. M/s. Victoria Entertainment Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 918 of 2021]

In the present Appeal, the facts of the case are that the AA delivered its judgment on 20.07.2018 whereas the Appellant applied for a certified copy of the order twice firstly on 21.01.2019 and then on 29.07.2021. Thereafter, the certified copy was ready and issued on 29.07.2021 and all Appeals under Section 61 of the I&B Code were filed on 20.09.2021.

The Hon'ble NCLAT held that the limitation to file Appeal under Section 61 of the I&B Code cannot be treated to be under suspension till free of cost copy is received by the party as enjoined by Rule 50 of the NCLT Rules, 2016, which oblige the Registry to send a certified copy of final order passed to the parties concerned free of cost. The Hon'ble NCLAT further differentiated the case of the Hon'ble SC in the matter of Ms. Sagufa Ahmed & Ors. Vs. Upper Assam Plywood Products Pvt. Ltd. & Ors. Thus, the Appeals have been filed after expiry of limitation, are barred by time, and cannot be entertained.

24. Once the CIRP has commenced and Moratorium is declared, the assets of the CD cannot be alienated

The Assistant Commissioner Central Goods and Service Tax vs Pravin Charan Dwary IRP/RP M/S. Swastik Ceracon [Company Appeal (AT) (Insolvency) No. 894 of 2021]

In the instant appeal, the Appellant was aggrieved by the order of the AA whereby its application seeking permission to auction the assets of the CD was rejected. The Appellant submitted that since the assets of the CD were seized before the declaration of Moratorium under Section 14 of I&B Code, they are entitled to auction the said assets, for recovering the Government dues. The Hon'ble NCLAT relies on the landmark judgment of the Hon'ble SC in the case of Anand Rao Korada, Resolution Professional vs. Varsha Fabrics Private Limited and Ors. observed that once the CIRP has commenced and the moratorium is declared, the assets of the CD cannot be alienated. Furthermore, since the Appellant had already filed its claims to the RP, they cannot auction the assets of the CD to recover their dues.

25. AA while considering the approval of the Resolution Plan shall also consider the objection of the Appellant in accordance with the law

Rajat Metaal Polychem Pvt. Ltd. vs Neeraj Bhatia Resolution Professional [Company Appeal (AT) (Insolvency) No. 979 of 2021]

In the instant Appeal the facts of the case are that the AA dismissed the Appellant's grievance that the RP had not admitted his claim(s) in full, on the ground that after approval of a

Resolution Plan by the CoC, AA cannot interfere with the decisions of the CoC and question its commercial wisdom.

The Hon'ble NCLAT without going into the merits of the Appellant's grievances observed that despite there being no provision to file an appeal against the rejection of claims, an aggrieved party can present its grievance u/s 60 (5)(b) of I&B Code. The Hon'ble NCLAT also observed that the AA should have gone into the merits of the Appellant's grievances before dismissing them, as the Resolution Plan was still pending approval before the AA. The Hon'ble NCLAT further observed that when a Resolution Plan is submitted to the AA which is pending approval, AA has jurisdiction to issue suitable directions. Hence the present Appeal was disposed of.

26. Procedural law should not be construed as an obstruction but as an aid to justice

Prakash Chandra Kapoor Vs Vijay Kumar Iyer, (Liquidator). [Company Appeal (AT) (Insolvency) No. 140 of 2021]

In the instant case, the Hon'ble NCLAT held that to achieve beneficial liquidation as provided under Section 35(1)(e) of I&B Code and maximization of the value of assets under Section 53 of the I&B Code, it is just and expedient to exercise inherent powers under Rule 11 of the NCLAT Rules,

2016 to extend the period by six weeks, enabling the Liquidator to attempt the sale as a 'Going Concern' at an appreciable value. The Hon'ble NCLAT further observed that the timelines under Regulation 47 for Liquidation Process, are directories. Procedural law should not be construed as an obstruction but as an aid to justice. Extension of time under Liquidation may be allowed only on the satisfaction that there exist exceptional circumstances. Thus, the Regulation cannot override the objective of 'beneficial liquidation' provided for in Section 35(1)(e) of the I&B Code.

27. I&B Code does not permit the Hon'ble NCLAT to recall a judgment

Apya Capital Services Private Limited vs Guardian Homes Private Limited. [Company Appeal (AT) (Insolvency) No. 412 of 2020]

In the instant case, the Hon'ble NCLAT had passed an order in favor of the Appellant. The Respondent being aggrieved of the same challenged the said order before the Hon'ble SC, whereby the Hon'ble SC rejected the same. Thereafter, the Respondent herein filed an application in the disposed of appeal of the Appellant, inter alia seeking recall of its earlier order passed u/s 424(1) of the Companies Act, 2013 read with Rule 11 of National Company Law Appellate Tribunal Rules, 2016.

The Hon'ble NCLAT in this case observed that neither Section 424 of the Companies Act, 2013 nor Rule 11 of the NCLAT Rules, 2016 grants power to the Hon'ble NCLAT to recall an order passed by it after the said order has been challenged before the Hon'ble SC, same being dismissed. The Hon'ble NCLAT further observed that the I&B Code does not permit the Hon'ble NCLAT to recall a judgment. Hence the present appeal was dismissed.

28. IRP has no right to continue to function as the RP after there is no order of NCLT in this regard

Invent Assets Securitisation & Reconstruction Pvt. Ltd. Vs. Rajmal Labhchand Mogra, IRP of Enviuro Bulkk Handling Systems Pvt. Ltd [Company Appeal (AT) (Insolvency) No. 709 of 2019]

In fact of the instant case, the CoC decided to change the Interim Resolution Professional ("IRP") on 16.07.2018, and an application in this regard was filed before the NCLT on 31.07.2018. The application was allowed on 09.10.2018 with the fee to the IRP till 09.10.2018. The same was objected to by CoC, hence Appeal was filed with the Hon'ble NCLAT, as to whether IRP is entitled to receive his fees till 09.10.2018 when he was replaced or he was entitled to his fees up to an early date.

The Hon'ble NCLAT held that after 10 days of sending the name of RP to IBBI by the NCLT and there being no order of NCLT to continue the IRP as RP, then the IRP has no right to continue to function as the RP after such date. The Hon'ble NCLAT further observed that NCLT has erred in allowing the claim of fee of RP till 09.10.2018.

29. It cannot be said that the NCLT has no powers of contempt

Shailendra Singh vs. Nisha Malpani, Resolution Professional [Company Appeal (AT)(Insolvency) No. 945 of 2020]

In the instant case, the Appellant provided legal services to the Respondent/RP and raised legal bills but the said bills were not approved by the CoC. The AA directed the Respondent to pay the Appellant within two days. However, the Respondent did not abide by the orders of the AA. Consequently, the Appellant filed for initiating contempt proceedings against the Respondent but the same was dismissed by the AA.

The issue that arose before the Hon'ble NCLAT was whether, Section 425 of the Companies Act, 2013 empowers AA and Hon'ble NCLAT to initiate proceedings against its contempt in matters related to the I&B Code.

The Hon'ble NCLAT while referring to the Statement and Objects and Reasons of the I&B Code observed that NCLT is to act as an AA for the purpose of matters pertaining to the I&B Code and just because I&B Code does not specifically mention the contempt provisions, it cannot be said that the NCLT has no powers of contempt. It further observed that if such a restricted interpretation is to be given that NCLT has no jurisdiction of contempt, then its orders cannot be implemented and I&B Code shall remain in Black Letters without a teeth to bite. Hence, the present Appeal was allowed.

30. NCLT does not consider the reasons for the CD's default

Drip Capital Inc. vs. Concord Creations (India) P. Ltd. [Company Appeal (AT)(CH) (Ins.) No. 167 of 2021]

In the instant case, the issue that arose before the Hon'ble NCLAT was whether AA was legally justified in dismissing the application u/s 7 of the I&B Code by holding that the CD is not an insolvent company and should be given more time to repay the debt, etc. especially after admitting the fact that debt is due and payable by the CD. The Hon'ble NCLAT set aside the impugned order by observing that the said observation of AA is in the negation of the principles laid down in the judgment of the Hon'ble SC in Innovative Industries Ltd. Vs. ICICI Bank.

The Hon'ble NCLAT set aside the impugned order by observing that the said observation of AA is in the negation of the principles laid down in the judgment of the Hon'ble SC in *Innovative Industries Ltd. Vs. ICICI Bank*. The Hon'ble NCLAT held that the impugned order suffers from patent legal infirmities as NCLT exceeded its jurisdiction by taking the defense of the CD. The initiation of CIRP does not amount to recovery proceedings and the NCLT at the time of determination as to whether to admit or reject an application u/s 7 of the I&B Code is not to consider the reasons for the CD's default. Hence, the appeal was allowed.

31. Considering further claim(s) after the Resolution Plan being implemented amounts to a 'hydra-head popping up'

Greater Noida Industrial Development Authority vs. Mr. Dinesh Chandra Agarwal (IRP) & Anr. [Company Appeal (AT) (Insolvency) No. 853 of 2021]

In the instant case, Greater Noida Industrial Development Authority (GNIDA) filed an application u/s 60(5) of the I&B Code challenging the decision of RP and sought for recall of resolution plan approval order passed by NCLT. The Appellant claimed they were unaware of the CIRP proceedings and could not submit their claims in a timely manner.

The Hon'ble NCLAT after observing the timelines in the case held that the appellant was well aware of the ongoing CIRP and had sufficient time to file its claims. By being remiss, it has not only missed the opportunity to file a claim but has also filed a claim after much delay, after the lapse of respective limitations. Further, the Hon'ble NCLAT relies on the judgments of the Hon'ble SC in the matter of *CoC of Essar Steel India Limited vs. Satish Kumar Gupta and Ors., and Ghanashyam Mishra and Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.* held that once the Resolution Plan has been implemented after approval by AA, any further claim(s) cannot be considered as it would amount to a 'hydra-head popping up, which would throw into uncertainty amounts payable by a prospective Resolution Applicant who successfully takes over the business of the CD.

32. The decision of CoC was taken in its commercial wisdom, should prevail unless such a decision has some legal infirmity

Sudip Dutta @ Sudip Bijoy Dutta vs. Deepika Bhugra Prasad & Anr. [Company Appeal (AT) (Insolvency) No. 883 of 2021]

In the present case, the Appellant is an ex-Director of the CD who is aggrieved by the order of liquidation passed by the AA in view of the rejection of the resolution plan by the CoC.

The Appellant contends that he submitted several OTS proposals to the creditor proposing better returns as compared to the returns in liquidation, but the same was rejected by the CoC. The Hon'ble NCLAT relying on the judgment of Hon'ble SC in the matter of Kalparaj Dharamshi vs Kotak Advisories Limited observed that the commercial wisdom of the CoC is not open to judicial intervention unless there is a legal fallacy in its decision. In the instant case, there was no legal weakness in the decision of the CoC nor any infirmity in the order under section 33 of NCLT Rules on which the liquidation order has been challenged. Accordingly, the appeal was dismissed.

33. A submitted Resolution Plan is binding and irrevocable as between the CoC and the Successful Resolution Applicant in terms of the provisions of the I&B Code

Committee of Creditors of Educomp Solutions Limited vs. Mr. Mahender Kumar Khandelwal.[Company Appeal (AT) (Insolvency) No. 587 of 2020]

In the instant case, an appeal was filed by the CoC of the CD, M/s. Educomp Solutions Limited, whereby the AA had rejected the Plan Approval Application filed by the RP, as being infructuous on the ground that the Application filed by the Resolution Applicant seeking withdrawal of the Resolution Plan has been allowed.

The Hon'ble NCLAT relies on the judgment of Hon'ble SC in the matter of Ebix Singapore Pvt. Ltd. Vs. CoC of Educomp Solutions Ltd. & Anr. observed that there is no scope for effecting further modification or withdrawal of Resolution Plans which is approved by the CoC, at the behest of the Successful Resolution Applicant once the Plan has been submitted to the AA. This Hon'ble NCLAT further observed that a submitted Resolution Plan is binding and irrevocable as between the CoC and the Successful Resolution Applicant in terms of the provisions of the I&B Code and the CIRP Regulations and thus, the Resolution Applicant is bound by the Plan. Accordingly, the Appeal was allowed with a direction for restoration of the Plan Approval Application.

34. Both NCLT and NCLAT are bound by the doctrine of stare decisis.

Rajeev R. Jain (Suspended Director) v. AASAN Corporate Solutions Private Limited [Company Appeal (AT) (Insolvency) No. 1085 of 2021]

The Hon'ble NCLAT in the instant case, while dismissing the appeal held that the principle of stare decisis is fully applicable on judgments delivered by the NCLT as well as this Appellate Tribunal. Both NCLT and NCLAT are bound by the doctrine of stare decisis.

To clarify what is binding as a precedent on Company Law Tribunal is the judgment of a jurisdictional Tribunal. Judgment delivered by NCLT in other jurisdictions has only persuasive value. The Hon'ble NCLAT further relying on the judgment of the Supreme Court in the matter of Collector of Central Excise, Kanpur vs. Matador Foam and Others stated that the principle behind the doctrine is that men who are governed by law should be fixed definite and known and when a law is declared by the Court of Competent Jurisdiction in absence of any palpable mistake or error, it is required to be followed. The doctrine of stare decisis is the wholesome doctrine that gives certainty to law and guides the people to mould their affairs in the future.

35. No recovery action in form of lien or set-off can be exercised by banks in discharge/settlement of their pre-CIRP dues.

Kotak Mahindra Bank Limited v. Ravindra Loonkar (RP of ACIL Ltd.) [Company Appeal (AT) (Insolvency) No. 132 of 2021]

The facts of the present case are that the respondent had two fixed deposits with the appellant bank which it wanted to close and transfer the amount to TRA A/c. The bank while submitting its claim to the IRP declared that as a part of security over the corporate debtor it has a lien over the Fixed Deposits.

The Hon'ble NCLAT while upholding the order of the NCLT held that once an order of Moratorium under Section 14(1)(c) is imposed, it creates a bar on the enforcement of any security interest in respect of the Corporate Debtor. No recovery action in form of lien or set-off can be exercised by banks in discharge/settlement of their pre-CIRP dues. Thus the Hon'ble NCLAT held that Fixed Deposits were not charged under Section 77 of the Companies Act, 2013 or as Additional Security hence, the appellant bank has no right over these Fixed Deposits.

36. The Application for withdrawal cannot be considered unless the consent from CoC as required under the statute, is obtained

M/s. Ashish Ispat Pvt. Ltd. v. Primuss Pipes and Tubes Ltd. [Company Appeal (AT) (Insolvency) No. 892 of 2021]

In the facts of the present case, an application under section 9 of the I&B Code was admitted by the NCLT and after issuance of Form-A, the parties amicably settled the dispute and executed a Memorandum of Understanding.

In light of the settlement, Form-FA was received by the IRP for withdrawal of the Application in terms of Section 12A of the I&B Code read with Regulation 30A. Accordingly, an Application for withdrawal was filed by the IRP before NCLT. During the pendency of said Application, a CoC was constituted and the 1st meeting of CoC was also held. Thereafter, the NCLT observing that there being two Financial Creditors out of which one has 17% of voting shares has dissented to allow withdrawal, the Application for withdrawal cannot be considered unless the consent from CoC as required under the statute, is obtained. Hence, the Appellants and the Suspended Director of Corporate Debtor both aggrieved by the said order have filed two Appeals.

The Hon'ble NCLAT held that when the Application under Section 12A was filed for withdrawal, the CoC was not constituted, and hence there was no requirement of approval of 90% of the voting share of CoC. Further Regulation 30A also makes it clear that when an application is filed prior to the constitution of CoC the requirement of 90% vote of CoC is not applicable and the NCLT has to consider the Application without requiring approval by 90% vote of the CoC. Thus, the Hon'ble NCLAT relies on the judgment of the Hon'ble Supreme Court in the matter of Kamal K. Singh vs. Dinesh Gupta & Anr. and its previous judgments in the matters of Anuj Tejpal vs. Rakesh Yadav & Anr. and Sunil Tandon v Manoj Kumar Anand, IRP & Ors.

held that the NCLT without considering the facts and sequence of the events had refused to entertain the Application on the ground that it is not supported by 90% vote of CoC. Thus, the present Appeals were allowed to permit withdrawal of CIRP.

37. When the sale of mortgaged and hypothecated properties was directed as per judgment of the DRT, the mortgage and hypothecation no longer remained the matter of contract

SICOM Limited v. Mr. Sundaresh Bhat (The Liquidator of ABG Shipyard Limited) [Company Appeal (AT) (Insolvency) No. 470 of 2021]

In the present case, the Hon'ble NCLAT observed that NCLT erroneously held that the charge is not duly registered under Section 77 sub-section (3) of the Companies Act, 2013, the Liquidator did not commit any error in not taking into consideration and classifying the Appellant as 'unsecured creditor'. The Hon'ble NCLAT further observed that when the sale of mortgaged and hypothecated properties was directed as per judgment of the DRT, the mortgage and hypothecation no longer remained the matter of the contract, rather it was the part of the judgment of the Tribunal and the non-registration of charge as required by Section 77 of Companies Act, 2013 does not in any manner affect the enforceability of the order.

Thus, by virtue of judgment and order of the DRT, the Appellants were entitled to recover their dues from the secured assets and they having relinquished the security interest according to Section 52 of the I&B Code, as was requested by the Liquidator, in the liquidation proceedings, they have to be treated as 'secured creditor. Accordingly, the Appeal was allowed.

38. It is the duty of the RP to scrutinize the Resolution Plan

Canara Bank Vs. Ms. Mamta Binani, RP of Aristo Texcon Pvt. Ltd. [Company Appeal(AT)(Insolvency) No. 1117 of 2019]

In the facts of the present case, an appeal was filed by Canara Bank, being dissatisfied with the order of NCLT as it failed to consider equal treatment between the Financial Creditors while distributing Funds under the Resolution Plan. The Hon'ble NCLAT observed that the Resolution Professional is an Officer of the Court and he is to exercise reasonable and responsible care for the company whose property and affairs are entrusted with him. It is the duty of the RP to scrutinize the Resolution Plan to ensure it is in accordance with Section 30 of the Code and to consider the objections brought to his notice prior to the submission of the Plan to the CoC, amongst the others.

Further, the Hon'ble NCLAT held that in the present case the distribution of the amount was made by the 'Committee of Creditors' resting on the total dues of individual Creditors and the same was neither whimsical nor arbitrary in any manner. Thus, the 'distribution of the amount' between the Creditors provides equal treatment to all of them, the fair value was provided to the Appellant as per the decision of the CoC and the value proportionate to the dues. Further, the Hon'ble NCLAT reiterated that the commercial decision and matters pertaining to it solely come within the ambit of the CoC who in the present case had approved the Resolution Plan with a majority of affirmative votes. Accordingly, the present Appeal was dismissed.

39. Filing of Application under Section 60(5) of the I&B Code is not an all-pervasive one

Kiran Shah RP of KSL and Industries Limited. VS ENFORCEMENT DIRECTORATE KOLKATA [Company Appeal (AT)(Insolvency) NO. 817 of 2021]

In the present case, a Provisional Attachment Order (PAO) was passed by the competent authority under Section 5 of the Prevention of Money Laundering Act, 2002 attaching, property of the Equivalent Value of the proceeds of crime. Thereafter, a Prosecution Complaint was filed before the Adjudicating Authority, PMLA, and the PAO was affirmed in respect of the property of the Corporate Debtor, which according to the Appellant was done in spite of the imposition of moratorium under the I&B Code and the objections raised by the Erstwhile IRP. The Appellant/RP had filed an Appeal before the Appellate Tribunal, PMLA, and further filed the instant Appeal.

The Hon'ble NCLAT observed that a mere running of the eye of PMLA, patently indicates that it pertains to Proceeds of Crime and provides for the penal action. Further, Section 14 of the I&B Code deals with a moratorium which is not a hindrance for the Authority and the Officers under the PMLA to deny a person of the tainted Proceeds of Crime.

The Assets/Properties being the Proceeds of Crime takes primacy and precedence over the I&B Code which promotes Resolution as its objective over Liquidation. The Hon'ble NCLAT further observed that Section 60(5) of the I&B Code showers jurisdiction to Hon'ble NCLT to determine issues/ questions relating to priorities, the question of Law, or fact emanating out of or in relation to the Insolvency Resolution. Section 61 of the I&B Code provides for filing of an Appeal to the Hon'ble NCLAT by any person aggrieved by an Order of a Hon'ble NCLT within 30 days. In view of same Hon'ble Tribunal held that filing of Application under Section 60(5) of the I&B Code is not an all-pervasive one, thereby conferring Jurisdiction to an NCLT to determine any question/issue of priorities, the question of Law or Facts pertaining to the Corporate Debtor. Thus, in view of the above, it was held that Hon'ble NCLT is not empowered to deal with the matters falling under the purview of another authority under PMLA. Accordingly, the Appeal was dismissed.

40. The object of the Code is to resolve the insolvency of the Corporate Debtor and to bring back the Corporate Debtor on its feet.

M/s Amsons Communication Pvt Ltd. v. M/s ATS Estates Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 540 of 2020]

The Hon'ble NCLAT upholding the order of the Hon'ble NCLT reiterated that the provisions of the Code cannot be allowed as a recovery mechanism or to recover the claim of interest by OC. An application under Section 9 of the I&B Code cannot be converted into proceedings for recovery of interest by OC on delayed payment, as it is not the object of the I&B Code. The object of the I&B Code is to resolve the insolvency of the CD and to bring back the CD on its feet. The Hon'ble NCLAT reiterated the case of SS Ploymers v. Knodia Technoplast Limited to hold that an application for the realization of interest amount under Section 9 is against the principle of the I&B Code, as it should be treated to be an application pursued with malicious intent (to realize only Interest) for any purpose other than for the Resolution of Insolvency, or Liquidation of the 'Corporate Debtor', same being barred in view of Section 65 of the I&B Code.

41. The corporate Death of a company should be the last resort

Indiabulls Housing Finance Limited v. Sandeep Chandna and Ors. [Company Appeal (AT) (Insolvency) No. 619 of 2021]

In the facts of the present case, IRP convened a CoC meeting to discuss the filing of an exclusion Application and put it to vote. The resolution failed as only 19.81% voted in favor. Despite the same, the IRP filed an application for exclusion of 87 days (covid lockdown) from 180 days period, without intimating the same to the CoC. Hon'ble NCLT allowed the same. In Appeal, the Appellant (a member of CoC having 42% voting) contested the mandatory requirement of Section 12(2) of I&B Code and requested to seek replacement of IRP/RP.

The Hon'ble NCLAT observed that Section 12(2) of the I&B Code provides an extension of time with the approval of 66% CoC voting and Regulation 40C of the CIRP Regulations speaks about the exclusion of time. Hon'ble NCLT had exercised its Discretionary Powers under Rule 11 of the NCLT Rules, 2016 allowed exclusion based on the fact that had this period not been excluded, the Company would have gone into Liquidation.

Thus, the Hon'ble NCLAT held that the Corporate Death of a company should be a last resort as observed by the Hon'ble Supreme Court in a catena of judgments. Moreover, keeping in mind the unforeseen pandemic and conjoint reading of Section 12 of I&B Code with Regulation 40C, the NCLT has rightly excluded the period of 87 days from the CIRP period, same being in the spirit of the I&B Code. The Hon'ble NCLAT further held that IRP is appointed as per Section 22 of the I&B Code and replaced under Section 27 of the I&B Code. Therefore, there is no provision under the Code empowering only one of the Members of the CoC to approach this Hon'ble NCLAT seeking replacement of the IRP or RP when the same is rejected by a majority of Members of the CoC.

42. The Appellants have been not able to convincingly advance their arguments for the replacement of the liquidator as no material irregularities have been found in the functioning of the liquidator

BDR Builders and Developers Pvt. Ltd. v. Mohan Lal Jain, Liquidator and Ors. [Company Appeal (AT) (Insolvency) No. 997 of 2021]

In the present case, the Appellants pleaded for the replacement of the Liquidator as he failed to consult and take the advice of SCC members relating to the sale of the CD assets and failed to carry liquidation process fairly and transparently.

The Hon'ble NCLAT held that Regulations 47 and 44 of the Liquidation Regulations, provide that if liquidation of the CD is to be done as a going concern, an additional 90 days is allowed beyond one year for completion of the liquidation process. In the present case, from the third SCC meeting, it was decided that the CD is not to be sold as a going concern hence, the time limit of 365 days for completion of liquidation be counted from the date of the 3rd meeting. Further, the Hon'ble NCLAT after relying on the facts of the case observed that the Appellants have been not able to convincingly advance their arguments for replacement of the liquidator as no material irregularities have been found in the functioning of the liquidator, as the liquidator sought and obtained approval of the SCC for selling the CD as a going concern in the 1st SCC meeting and recorded provisions for the sale of assets in SCC minutes but the same was not done in a specific manner. Thus, the Hon'ble NCLAT strongly recommended that the liquidation of the CD should be done as quickly as possible to ensure that the assets of the CD do not undergo deterioration resulting in loss of their value, and liquidation costs should be restricted to the payment of actual costs incurred in the liquidation process.

43. There is no special treatment or category under the Code, made separately for statutory dues

Government of India Vs. Ashish Chhawchharia (RP) [Company Appeal (AT) (Insolvency) No. 02 of 2021]

The present Appeal was filed by the Appellant (Government of India) being aggrieved by the order of Hon'ble NCLT whereby the Hon'ble NCLT approving the Resolution Plan reduced the allocation of the claim of the Appellant to the extent of Rs.1,75,46,497/-. The Hon'ble NCLAT held that the Appellant falls under the category of OC as the statutory dues payable to the Central Government are covered under Operational Debt as defined in Section 5(21) of the I&B Code. Further, the Hon'ble NCLAT relies on the judgment of the Principal Director General of Income Tax v M/s. Synergies Dooray Automotive Ltd. and Ors. held that there is no special treatment or category under the I&B Code, made separately for statutory dues. The Appellant contended that the Resolution Plan cannot extinguish statutory dues without seeking approval of the concerned Revenue Authority as it does not arise out of a mutual agreement or contract and are like statutory dues. The Hon'ble NCLAT observed that the payments are to be made in terms of the approved Resolution Plan by the Resolution Applicant, of the claims admitted by the RP.

Once the Resolution Applicant takes over the CD on a fresh slate the claims of all creditors get settled and extinguished by operation of the I&B Code. Section 238 of the I&B Code has the overriding effect of other laws. Therefore, the stand of the Appellant that the statutory dues cannot be extinguished has no legs to stand. The plan submitted by the SRA was approved as per Section 31(1) of the I&B Code and Hon'ble NCLT clearly stated that the same shall be binding on the CD, its employees, members, creditors, including the Central Government, State Governments, Local Authority, Guarantors and other Stakeholders. The Appellant was paid to the extent of 36.30% of the amount claimed and the Resolution Plan has dealt with the interest of all the stakeholders of the CD including FC and OC in compliance with Regulation 38(1)(A) of the CIRP Regulations. Thus, there is no infirmity in the order passed by the Hon'ble NCLT. Accordingly, the Appeal was dismissed.

44. Liquidator to pay the portion of salary deducted from the salary of the employees with applicable bank interest. Varrsana Ispat Ltd. v. Varrsana Employee Welfare Association [Company Appeal (AT) (Insolvency) No. 885 of 2020]

In the facts of the present case, the Hon'ble NCLT allowed distribution of funds by the liquidator amongst Stakeholders including the claims of the employees in accordance with Section 53 of the I&B Code. However, upon a review petition filed by the Respondent herein, the Hon'ble NCLT virtually reversed its decision by asking the Liquidator that the Stakeholders/Financial Creditor who are in receipt of the funds shall keep the amounts in an interest-bearing account of the CD and returnable if the need arises for operating the CD. The Hon'ble NCLT also directed the Liquidator to pay the portion of salary deducted from the salary of the employees with applicable bank interest. However, in Appeal, the Hon'ble NCLAT relying on various provisions of the I&B Code and Liquidation regulations held that recovery from the Debtors also forms part of liquidation estate, and the liquidator complied with Regulation 43 of the IBBI Regulations by taking an appropriate undertaking from the concerned Nationalized Public Sector Banks.

Further, Hon'ble NCLT has only power to rectify any mistake apparent from the record in accordance with Section 420 of the Companies Act, 2013 R/w Rule 154 of NCLT Rules, 2016. Thus, basis the provisions of law and facts on record, the Hon'ble NCLAT partially allowed the Appeal and held the distribution made by the liquidator was in accordance with the provisions of the I&B Code and Regulations.



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