Series 4

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

Committee on Insolvency & Bankruptcy Code
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

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Foreword

The Committee on Insolvency & Bankruptcy Code has been constituted by The Institute of Chartered Accountants of India to give specific focus on Insolvency and Bankruptcy Laws. The framework under Insolvency and Bankruptcy Code, 2016 has led to the emergence of professional opportunities. The Committee in this regard facilitates educating the members on the practical aspects and procedures of the Law.

I am very happy to note that the above Committee has taken the initiative in bringing out the publication- "Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016" in the form of a Series to help professionals appreciate the various aspects and provisions of the Code. Series 1, Series 2 and Series 3 of the publication were published earlier and now this being the Series 4 of the publication has been brought out by the Committee.

I sincerely appreciate the efforts of CA. Durgesh Kumar Kabra, Chairman, CA. Sripriya Kumar, Vice-Chairperson and all other members of the Committee on Insolvency & Bankruptcy Code in bringing this Series 4 of the publication.

I am sure that this publication would be immensely helpful to the members, especially to insolvency professionals and other stakeholders.

Date: 3rd February, 2023

Place: New Delhi

CA. (Dr.) Debashis Mitra

President ICAI

Preface

The Insolvency and Bankruptcy Code is a much talked about subject since its inception in the year 2016. High expectations and enormous interest are understandable as the main objective of the Code includes implementation of the insolvency resolution process in a time bound manner, maximization of value of assets of stakeholders, promote entrepreneurship, increase availability of credit and balance the interest of all stakeholders.

The outcome of the effective implementation of IBC is being witnessed by the country and it has been achieved because of the establishment of effective institutional set-up and the various judgements pronounced by Supreme Court, High Courts, NCLAT and NCLT. The judicial pronouncements are an important source to appreciate the practical aspects in implementation and in providing clarification on important requirements and issues under IBC.

The Committee on Insolvency & Bankruptcy Code of ICAI as part of its continued initiative in bringing Judicial Pronouncements under the Code in the form of a Series has brought out this publication – **Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016- Series 4** to help professionals for clear understanding of the various provisions of the Code.

We take this opportunity in thanking the President of ICAI, CA. (Dr.) Debashis Mitra and Vice President of ICAI, CA. Aniket Sunil Talati for their encouragement and support in bringing out the publication.

We would like to thank all the Committee Members for their guidance in bringing out this publication.

We would like to sincerely appreciate and thank the Members- CA. Avinash Poddar, CA. Prasad Dharap, CA. Nipun Singhvi, CA. Sundaresan Nagarajan, CA. Sumit Bansal, CA. S. Badri Narayanan and CA. Abhishek Garg for reviewing the Draft of the publication.

We appreciate the efforts put in by Ms. S. Rita, Secretary, Committee on Insolvency & Bankruptcy Code, ICAI towards the preparation of the Draft of the publication and the Committee Secretariat comprising of CA. Abhishek Tarun, Shri Eshaan Kambiri and Ms. Sarita Aggarwal for providing their technical and administrative support in bringing out this publication.

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

CA. Durgesh Kumar Kabra
Chairman
Committee on Insolvency &
Bankruptcy Code, ICAI

CA. Sripriya Kumar
Vice- Chairperson
Committee on Insolvency &
Bankruptcy Code, ICAI

Date: 3rd February, 2023

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Orders Passed by Supreme Court of India

SECTION 5

CASE NO. 1

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

M/s Orator Marketing Pvt. Ltd (Appellant (s))

Vs.

M/s Samtex Desinz Pvt. Ltd. (Respondent(s))

CIVIL APPEAL NO. 2231 OF 2021

Date of Order: 26-07-2021

Section 5(8) of the Insolvency and Bankruptcy Code, 2016 does not expressly exclude an interest free loan. Financial Debt would have to be construed to include interest free loans advanced to finance the business operations of a corporate body.

Facts:

This appeal under Section 62 of the Insolvency and Bankruptcy Code, 2016 was filed against the final judgment and order of the National Company Law Appellate Tribunal (NCLAT), New Delhi in Company Application (AT) (Insolvency) No. 1064 of 2020 dated 08-03-2021, whereby the NCLAT had dismissed the appeal of the Appellant and confirmed the order dated 23.10.2020 of the Adjudicating Authority. The National Company Law Tribunal (NCLT), New Delhi, had dismissed the petition being CP(IB) No. 908/ND/2020, filed by the Appellant under Section 7 of the IBC with the finding that the Appellant is not a financial creditor of the Respondent. The Appellant is an assignee of the debt in question.

The question involved in this Appeal was, whether a person who gives a term loan to a Corporate Person, free of interest, on account of its working capital requirements is not a Financial Creditor, and therefore, incompetent to initiate the Corporate Resolution Process under Section 7 of the IBC.

Decision:

Hon'ble Supreme Court observed that "In construing and /or interpreting any statutory provision, one must look into the legislative intent of the statute and the intention of the statute has to be found in the words used by the legislature itself and when a question arises as to the meaning of a certain provision in a statute, the provision has to be read in its context".

Section 5(8) defines 'financial debt' to mean "a debt along with interest if any which is disbursed against the consideration of the time value of money and includes money borrowed against the payment of interest, as per Section 5(8) (a) of the IBC. The definition of 'financial debt' in Section 5(8) includes the components of sub-clauses (a) to (i) of the said Section.

Hon'ble Supreme Court observed that definition of financial debt in section 5(8) of the IBC cannot be read in isolation, without considering some other definitions, particularly, the definition of claims in section 3(6), corporate debtor in section 3(8), creditor in section 3(10), debt in section 3(11), default in section 3(12), financial creditor in section 5(7) as also the provisions, interalia, of section 6 and 7 of the IBC.

Hon'ble Supreme Court observed that the NCLT and NCLAT have overlooked the words "if any" which could not have been intended to be otiose. 'Financial debt' means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt.

Hon'ble Supreme Court reiterated that the trigger for initiation of the Corporate Insolvency Resolution Process by a Financial Creditor under Section 7 of the IBC is the occurrence of a default by the Corporate Debtor. 'Default' means non-payment of debt in whole or part when the debt has become due and payable and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The definition of 'debt' is also expansive and the same includes inter alia financial debt. The definition of 'Financial Debt' in Section 5(8) of IBC does not expressly exclude an interest free loan. 'Financial Debt' would have to be construed to include interest free loans advanced to finance the business operations of a corporate body.

Apex Court, therefore, allowed the appeal. The judgment and order impugned was, accordingly, set aside. The order of the Adjudicating

Authority, dismissing the petition of the Appellant under Section 7 of the IBC was also set aside. The petition under Section 7 stands revived and may be decided afresh, in accordance with law and in the light of the findings above.

CASE NO. 2

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Sunil Kumar Jain and others (Appellants)

Vs.

Sundaresh Bhatt and others (Respondents)

CIVIL APPEAL NO. 5910 of 2019

Date of Order: 19-04-2022

Section 5(13), Section 53(1)(a), Section 53(1)(b), Section 53(1)(c) and Section 36(4) of the Insolvency and Bankruptcy Code, 2016.

The Wages and salaries of Workmen/employees who actually worked during CIRP, would be considered and included in CIRP costs and they will have to be paid as per Section 53(1)(a) of the IB Code in full before distributing the amount in the priorities as mentioned in Section 53 of the IB Code.

Facts:

This appeal arises from a judgment dt. 31.05.2019 ("Impugned Order") passed by the National Company Law Appellate Tribunal, New Delhi, ("Appellate Tribunal") in Company Appeal No. 605/2019 by which the Appellate Tribunal has dismissed an appeal preferred by the workmen/employees of Corporate Debtor against National Company Law Tribunal's order for not granting any relief to them with regard to their claim relating to salary for the period involving 'Corporate Insolvency Resolution process' ("CIRP") and the period prior thereto. Aggrieved by the said order, workmen/employees preferred appeal before the Hon'ble Supreme Court.

Initially, Appellants filed Company Application No. 348/2017 on 23.10.2017 before the National Company Law Tribunal ("Adjudicating Authority"), to direct the Resolution Professional ("RP") to make payment to the employees and the workmen. Again, the appellants filed Company Application No. 78 of 2018 in Company Application No. 348/2017 before the Adjudicating

Authority, to direct the RP to utilize the amount of Rs. 9.75 crores approx. to be received from the Indian Coast Guard solely for employees/workmen. In this regard, Adjudicating Authority vide order dated 25.04.2018, directed the RP to deposit Rs.2.75 crores in the Registry of the Adjudicating Authority, subject to the outcome of initial Application No. 348/2017.

Since no agreed resolution plan could be adopted of the Corporate Debtor, the RP filed an Interlocutory Application No. 113/2019 before the Adjudicating Authority praying for an order of liquidation of Corporate Debtor. The Adjudicating Authority vide order dated 25.04.2019 deciding various other applications including the Company Application No. 348/2017 of the appellants passed an order of liquidation of the Corporate Debtor and appointed Liquidator of the Corporate Debtor. While passing the order of liquidation, the Adjudicating Authority also disposed of the Company Application No. 348/2017 being initially filed by the Appellants in view of the order passed by the Adjudicating Authority earlier directed to deposit Rs.2.75 crores towards the dues of the appellants which as such was subject to the final outcome of initial application. Therefore, as such, the Adjudicating Authority while disposing of Initial Application did not grant the relief claimed by the appellants/employees for their claim relating to salary for the period involving CIRP and the prior period.

Feeling aggrieved and dissatisfied with the order passed by the Adjudicating Authority, not granting the relief to the appellants herein with regard to their claim relating to salary/wages, which they claimed for the period involving CIRP and prior period, the appellants workmen/employees preferred an appeal before the Appellate Tribunal vide Company Appeal No. 605/2019. The Appellate Tribunal vide the Impugned Order has disposed of the said appeal declining to interfere with the order passed by the Adjudicating Authority, however, allowed the appellants (272 workmen/employees) to file their individual claims before the Liquidator, who after going through the record and taking into consideration the pleadings made by the workmen/employees will determine the claim. The Appellate Tribunal had also further observed that if claim of one or other workmen/employee is rejected, it will be open to them to move before the Adjudicating Authority, which may decide the same in accordance with law. The Appellate Tribunal has also observed that so far as the Gratuity and Provident Funds are concerned, the same cannot be treated to be the asset of the Corporate Debtor and they are to be disbursed amongst the employees/workmen who are entitled for the same.

Feeling aggrieved with the Impugned Order, the Appellants preferred the present appeal. The Appellants submitted that the salaries/wages and the dues payable to the employees/workmen during the CIRP period will be qualified as CIRP costs under Section 5(13) of the Insolvency and Bankruptcy Code ("IB Code"). The Corporate Debtor was being managed as a going concern and therefore salaries of the workmen/employees are part of the CIRP cost under Section 5(13) of the IB Code and are liable to be disbursed even prior to the amount distributed under Section 53 of the IB Code. It was further submitted that even otherwise the provident fund, gratuity and pension fund amounts remain outside the liquidation under Section 36(4) of the IB Code. It is submitted that the obligation to pay the provident fund, gratuity fund amount would arise as soon as the employees and workmen are deemed to have been discharged under Section 33(7) of the IB Code. It is submitted that even the workmen/employees are required to be paid the wages/salaries are a component of the resolution professional costs and therefore the CIRP period salaries and wages payable to the respective workmen/employees are to be first paid and are not to be paid "pari passu" in terms of Section 53(1)(b) and (c) of the IB Code. The Appellant relied upon the findings of the Hon'ble Supreme Court in Swiss Ribbons Pvt. Ltd. v. Union of India (2019) 4 SCC 17 wherein it has been held that the costs and expenses of the RP/Liquidator are to be given preferential treatment by excepting them from the pari passu principle.

The Respondent contended that the wages and salaries claimed by the appellants who have done no work during the CIRP period and have not assisted the RP /Liquidator during the CIRP, would not fall within the parameters of CIRP costs within the definition of Section 5(13)(c) of the IB Code and due to this reason even the Committee of Creditors ("COC") did not approve any payments to the Appellants. It was submitted by the Respondent that the wages and salaries of the workmen/employees of the Corporate Debtor would fall under Sections 53(1)(b) and 53(1)(c) of the IB Code.

So, the issue before the Hon'ble Supreme Court was with respect to wages/salaries of the workmen/employees during the CIRP period and the amount due and payable to the respective workmen/employees towards Pension Fund, Gratuity Fund and Provident Fund.

Decision:

Hon'ble Supreme Court observed that –

1.1 Under the IB Code, the workmen dues have been duly protected and the provident fund, gratuity and pension fund have been excluded from the liquidation estate assets (Section 36(4) of the IB Code). Furthermore, as per Section 53 of the IB Code, the workmen dues are given the top priority in the waterfall mechanism.

1.2 It cannot be disputed that as per Section 5(13) of the IB Code, "insolvency resolution process costs" shall include any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern. Section 20 of the IB Code mandates that the interim resolution professional/resolution professional is to manage the operations of the corporate debtor as a going concern and in case during the CIRP the corporate debtor was a going concern, the wages/salaries of such workmen/employees who actually worked, shall be included in the CIRP costs and in case of liquidation of the corporate debtor, dues towards the wages and salaries of such workmen/employees who actually worked when the corporate debtor was a going concern during the CIRP, being a part of the CIRP costs are entitled to have the first priority and they have to be paid in full first as per Section 53(1)(a) of the IB Code. Therefore, while considering the claims of the concerned workmen/employees towards the wages/salaries payable during CIRP, first of all it has to be established and proved that during CIRP, the corporate debtor was a going concern and that the concerned workmen/employees actually worked while the corporate debtor was a going concern during the CIRP. The wages and salaries of all other workmen/employees of the Corporate Debtor during the CIRP who actually have not worked and/or performed their duties when the Corporate Debtor was a going concern, shall not be included automatically in the CIRP costs. Only with respect to those workmen/employees who actually worked during CIRP when the Corporate Debtor was a going concern, their wages/salaries are to be included in the CIRP costs and they shall have the first priority over all other dues as per Section 53(1)(a) of the IB Code. Any other dues towards wages and salaries of the employees/workmen of the corporate debtor shall have to be governed by Section 53(1)(b) and Section 53(1) (c) of the IB Code. Any other

interpretation would lead to absurd consequences and violate the scheme of Section 53 r/w Section 5(13) of the IB Code.

1.3 RP is under mandate to manage the operations of the Corporate Debtor as a going concern and therefore it is to be believed that during CIRP, the Corporate Debtor was a going concern, managed and/or operated as a going concern cannot be accepted. It is true that under Section 20 of the IB Code, it is the duty of the RP to manage and run the operations of the Corporate Debtor as a going concern. However, the words used in Section 20 are "the interim resolution professional shall make every endeavour to …. manage the operations of the corporate debtor as a going concern". Therefore, even if it is found that the Corporate Debtor was not a going concern during the CIRP despite best efforts by the resolution professional, it cannot be presumed that still the Corporate Debtor was a going concern during the CIRP period. It depends on the facts of each case. In a given case, the Corporate Debtor may be a going concern and in a given case, the corporate debtor might not be a going concern. Therefore, submission on behalf of the appellants that as the RP is under mandate to manage the operations of the corporate debtor as a going concern under Section 20 of the IB code and therefore it is to be presumed that the RP managed the operations of the Corporate Debtor as a going concern and therefore the workmen/employees are entitled to their wages and salaries during the CIRP, as their wages/salaries to be included in the CIRP costs cannot be accepted. However, the wages and salaries of the workmen/employees of pre-CIRP period will have to be governed as per the priorities mentioned in Section 53(1) of the IB Code.

1.4 Dues of the workmen/employees on account of provident fund, gratuity and pension are concerned, they shall be governed by Section 36(4) of the IB Code. Section 36(4)(iii) of the IB Code specifically excludes "all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund", from the ambit of "liquidation estate assets". Therefore, Section 53(1) of the IB Code shall not be applicable to such dues, which are to be treated outside the liquidation process and liquidation estate assets under the IB Code. Thus, Section 36(4) of the IB Code has clearly given outright protection to workmen's dues under provident fund, gratuity fund and pension fund which are not to be treated as liquidation estate assets and the

Liquidator shall have no claim over such dues. Therefore, the concerned workmen/employees shall be entitled to provident fund, gratuity fund and pension fund from such funds which are specifically kept out of liquidation estate assets and as per Section 36(4) of the IB Code, they are not to be used for recovery in the liquidation.

Hon'ble Supreme Court held that –

a) *the wages/salaries of the workmen/employees of the Corporate Debtor for the period during CIRP can be included in the CIRP costs provided it is established and proved that the Interim Resolution Professional/Resolution Professional managed the operations of the corporate debtor as a going concern during the CIRP and that the concerned workmen/employees of the corporate debtor actually worked during the CIRP and in such an eventuality, the wages/salaries of those workmen/employees who actually worked during the CIRP period when the resolution professional managed the operations of the corporate debtor as a going concern, shall be paid treating it and/or considering it as part of CIRP costs and the same shall be payable in full first as per Section 53(1)(a) of the IB Code;*

b) *considering Section 36(4) of the IB code and when the provident fund, gratuity fund and pension fund are kept out of the liquidation estate assets, the share of the workmen dues shall be kept outside the liquidation process and the concerned workmen/employees shall have to be paid the same out of such provident fund, gratuity fund and pension fund, if any, available and the Liquidator shall not have any claim over such funds. (Para 14)*

Hon'ble Supreme Court directed that- *let the appellants submit their claims before the Liquidator and establish and prove that during CIRP, IRP/RP managed the operations of the corporate debtor as a going concern and that they actually worked during the CIRP and the Liquidator is directed to adjudicate such claims in accordance with law and on its own merits and on the basis of the evidence which may be laid/produced, irrespective of the fact whether the RP who himself is now the Liquidator included the claims of the appellants being wages/salaries during CIRP as CIRP costs or not. The Liquidator is directed to adjudicate such claims independently. If it is found that in fact the IRP/RP managed the operations of the corporate debtor as a going concern during the CIRP and the concerned workmen/employees actually worked during CIRP, their wages and salaries be considered and*

included in CIRP costs and they will have to be paid as per Section 53(1)(a) of the IB Code in full before distributing the amount in the priorities as mentioned in Section 53 of the IB Code. The aforesaid exercise shall be completed within a period of twelve weeks from today (19-04-2022) and such amount shall be paid out of the amount which is directed to be kept aside earlier by the Adjudicating Authority/Appellate Tribunal and thereafter by this Court. Till such claims are adjudicated upon, the Liquidator is directed to keep aside the said amount exclusively to be used for the workmen/employee's dues which is to be paid on adjudication as above. (Para 15)

The present appeal was partly allowed to the aforesaid extent and disposed of accordingly.

CASE NO. 3

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

M/s Consolidated Construction Consortium Limited (Appellant)

Vs.

M/s Hitro Energy Solutions Private Limited (Respondent)

CIVIL APPEAL NO. 2839 of 2020

Date of Order: 04-02-2022

Section 5(20), Section 5(21) and Section 9 of the Insolvency and Bankruptcy Code, 2016 and Article 137 of the Limitation Act.

Whether the appellant is an operational creditor under the IBC even though it was a 'purchaser'.

Facts:

This appeal under Section 62 of the IBC arises from judgment dt. 12th December 2019 of the National Company Law Appellate Tribunal by which it reversed the decision of the National Company Law Tribunal, Chennai dated 6th December 2018.

The genesis of the appeal arises from a project which was being executed by the appellant with Chennai Metro Rail Limited (CMRL) in the course of which an order was placed by the appellant to Proprietary Concern for the supply of light fittings to CMRL and for which an advance money was paid to the respondent by CMRL. On 2nd January 2014, CMRL informed the appellant

that the project they had been working on stood terminated. According to the appellant, this information was communicated to the Proprietary Concern on the same day. However, this has been denied by the respondent.

Thereafter, the Proprietary Concern deposited the cheque issued by CMRL and withdrew the amount. Since the project had been terminated, CMRL informed the appellant that the amount would be deducted from the dues payable to it unless the amount was returned. The appellant paid the amount to CMRL and intimated this to the Proprietary Concern and requested them to make the payment.

By its letter dated 23 July 2016, the appellant requested the Proprietary Concern to refund the amount since the contract had been terminated and the amount had been returned by the appellant to CMRL. Once the amount was released by the Proprietary Concern, appellant would indemnify them against any future claim from CMRL. In its reply, the Proprietary Concern stated that it would return the amount directly to CMRL, if it was insisted upon by them. It further noted that till date it had not received any letter from the appellant informing them that the contract had been terminated with CMRL, and that it had never agreed to return the amount.

On 18th July, 2017, a demand notice under section 8 was sent by the appellant to the respondent claiming the above amount along with the interest to which the respondent denied that any debt was owed by them to the appellant. Thereafter, the appellant filed its application under Section 9 of the IBC read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 on 1st November 2017 along with the supporting affidavits.

By its judgment and order dated 6 December 2018, the NCLT admitted this application filed by the appellant under Section 9 of the IBC for the initiation of the Corporate Insolvency Resolution Process (CIRP) against the respondent. While admitting the application, the NCLT held that the respondent's Memorandum of Association, without evidence to the contrary, proved that it took over a proprietary concern and that the Proprietary Concern did owe the appellant an outstanding operational debt. Further, the NCLT declared a moratorium under Section 14 of the IBC and appointed an Interim Resolution Professional.

In appeal against the above order, the NCLAT set aside the NCLT's decision, dismissed the application of the appellant under Section 9 of the IBC and

released the respondent from the ongoing CIRP. In support of its conclusions, it held: (i) the appellant was a 'purchaser', and thus did not come under the definition of 'operational creditor' under the IBC since it did not supply any goods or services to the Proprietary Concern/respondent; (ii) there is nothing on record to suggest that the respondent has taken over the Proprietary Concern; and (iii) in any case, the appellant cannot move an application under Sections 7 or 9 of the IBC since all purchase orders were issued on 24 June 2013 and advance cheques were issued subsequently.

Based on the above facts, following issues arise before the Hon'ble Supreme Court:

(i) Whether the appellant is an operational creditor under the IBC even though it was a 'purchaser';

(ii) Whether the respondent took over the debt from the Proprietary Concern; and

(iii) Whether the application under Section 9 of the IBC is barred by limitation.

Decision:

Hon'ble Supreme Court observed that –

1.1 *While the appellant has argued that the debt is in the nature of an operational debt which makes them an operational creditor, the respondent has opposed this submission. The respondent's submission, which was accepted by the NCLAT, seeks to narrowly define operational debt and operational creditors under the IBC to only include those who supply goods or services to a corporate debtor and exclude those who receive goods or services from the corporate debtor. For reasons which shall follow, we reject this argument.* (Para 42)

1.2 *First, Section 5(21) defines 'operational debt' as a "claim in respect of the provision of goods or services". The operative requirement is that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver. Such an interpretation is also supported by the observations in the BLRC Report, which specifies that operational debt is in relation to operational requirements of an entity. Second, Section 8(1) of the IBC read with Rule 5(1) and Form 3 of the 2016 Application Rules makes it abundantly clear that an operational creditor can issue a notice in*

relation to an operational debt either through a demand notice or an invoice. As such, the presence of an invoice (for having supplied goods or services) is not a sine qua non, since a demand notice can also be issued on the basis of other documents which prove the existence of the debt. This is made even more clear by Regulation 7(2)(b)(i) and (ii) of the CIRP Regulations 2016 which provides an operational creditor, seeking to claim an operational debt in a CIRP, an option between relying on a contract for the supply of goods and services with the corporate debtor or an invoice demanding payment for the goods and services supplied to the corporate debtor. While the latter indicates that the operational creditor should have supplied goods or services to the corporate debtor, the former is broad enough to include all forms of contracts for the supply of goods and services between the operational creditor and corporate debtor, including ones where the operational creditor may have been the receiver of goods or services from the corporate debtor. Finally, the judgment of this Court in ***Pioneer Urban (supra)****, in comparing allottees in real estate projects to operational creditors, has noted that the latter do not receive any time value for their money as consideration but only provide it in exchange for goods or services…….. Hence, this leaves no doubt that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt.* (Para 43)

1.3 *In the present case, the phrase "in respect of" in Section 5(21) has to be interpreted in a broad and purposive manner in order to include all those who provide or receive operational services from the corporate debtor, which ultimately lead to an operational debt. In the present case, the appellant clearly sought an operational service from the Proprietary Concern when it contracted with them for the supply of light fittings. Further, when the contract was terminated but the Proprietary Concern nonetheless encashed the cheque for advance payment, it gave rise to an operational debt in favor of the appellant, which now remains unpaid. Hence, the appellant is an operational creditor under Section 5(20) of the IBC.* (Para 45)

2.1 *In the present case, the MOA of the respondent unequivocally states that one of its main objects is to take over the Proprietary Concern. However, the respondent has produced a resolution passed by its Board of Directors, purportedly resolving to not take over the Proprietary Concern.* (Para 53)

2.2 *In any case, Section 13 of CA 2013 provides for the procedure which has to be followed when the MOA is to be amended. In cases where the object clause is amended, it requires the Registrar to register the Special Resolution filed by the company. However, the respondent has provided no proof that: (i) the purported resolution was a Special Resolution; (ii) it was filed before the Registrar; and (iii) that the Registrar ultimately did register it. Thus, in terms of Section 13(10) of CA 2013, the purported amendment to the MOA would not have any legal effect.* (Para 55)

2.3 *Consequently, the MOA of the respondent still stands and the presumption will continue to be in favor of the appellant. Thus, it can be concluded that the respondent took over the Proprietary Concern and was liable to re-pay the debt to the appellant. Hence, the application under Section 9 of the IBC was maintainable.* (Para 56)

3.1 *A final letter was addressed by the appellant to the Proprietary Concern on 27 February 2017, demanding the payment on or before 4 March 2017. The Proprietary Concern replied to this letter on 2 March 2017, finally refusing to make re-payment to the appellant. Consequently, the application under Section 9 will not be barred by limitation.* (para 61)

Hence, The Hon'ble Supreme Court answered the three issues formulated earlier in the following terms:

(i) The appellant is an operational creditor under the IBC, since an 'operational debt' will include a debt arising from a contract in relation to the supply of goods or services from the corporate debtor;

(ii) The respondent will be considered to have taken over the Proprietary Concern in accordance with its MOA; and

(iii) The application under Section 9 of the IBC is not barred by limitation.

Accordingly, the appeal was allowed by setting aside the judgment and order of the NCLAT. Since the CIRP in respect of the respondent was ongoing due to this Court's order dated 18 November 2020, no further directions were required.

SECTION 7

CASE NO. 4

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

KOTAK MAHINDRA BANK LIMITED (Appellants)

Vs.

A. BALAKRISHNAN & ANR (Respondents)

CIVIL APPEAL NO. 689 OF 2021

Date of Order: 30-05-2022

Section 7 of the Insolvency and Bankruptcy Code, 2016

Whether within the meaning of clause (8) of Section 5 of the IBC, a liability in respect of a claim arising out of a Recovery Certificate would be a "financial debt" and the holder of the Recovery Certificate would be a financial creditor within the meaning of clause (7) of Section 5 of the IBC.

Facts:

The present appeal challenges the order passed by the Hon'ble National Company Law Appellate Tribunal ("NCLAT"), thereby allowing the appeal and reversing the order passed by Hon'ble National Company Law Tribunal ("NCLT"), whereby the application filed by the appellant under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC") was admitted. The Hon'ble NCLAT while allowing the appeal held that the application filed by the appellant was time barred and that issuance of Recovery Certificate would not trigger the right to sue.

Ind Bank Housing Limited ("IBHL") sanctioned separate credit facilities to three borrower entities. The Respondent no. 2 the ("Corporate Debtor") stood as the Corporate Guarantor in the aforesaid credit facilities sanctioned to the borrower entities. These borrower entities defaulted in repayment of the dues and due to default IBHL classified all the facilities availed by them as Non-Performing Asset ("NPA") in November 1997. Subsequently, IBHL filed three civil suits before the Hon'ble High Court of Madras, against the borrower entities and the Corporate Debtor, for recovery of the amounts due. During

the pendency of the suits, the appellant and IBHL entered into a Deed of Assignment dated 13th October 2006, wherein IBHL assigned all its rights, title, interest, estate, claim and demand to the debts due from borrower entities to the Appellant.

Subsequently after the said deed, Appellant and the borrower entities entered into a compromise. The High Court vide a common judgment dated 26th March 2007, recorded the said compromise between the parties and it was noted that the Corporate Debtor was liable to pay the amount of approx. Rs. 29 crores to Appellant. It was claimed by Appellant that the borrower entities failed to make payments as per the compromise and thus, Appellant issued a Demand Notice against the Corporate Debtor & Borrower Entities under Section 13(2) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") and the said notice was followed by a Possession Notice dated 10th January 2018 under Section 13(4) of the SARFAESI Act. Further, a Winding up Notice under Sections 433 and 434 of the Companies Act, 1956 was issued against the Corporate Debtor.

Aggrieved by the continuous default of payment by the Corporate Debtor and the borrower entities, Appellant filed three applications under Section 31(A) of the erstwhile Recovery of Debts Due to Banks and Financial Institutions Act, 1993, now known as the Recovery of Debts and Bankruptcy Act, 1993 ("Debt Recovery Act") before the Debt Recovery Tribunal ("DRT") for issuance of Debt Recovery Certificates in terms of the said compromise entered into between the parties and the said applications were allowed by the DRT. Meanwhile, from the year 2008 to 2017, certain proceedings between the parties, with regard to a contempt petition filed by Appellant as well as the dismissal of applications filed for issuance of Recovery Certificate and the subsequent grant of relief in a review application filed by the Appellant, were underway.

On the basis of the aforementioned Recovery Certificates, on 5th October 2018 Appellant, claiming to be a financial creditor, filed an application under Section 7 of IBC being CP/1352/IB/2018 before the Hon'ble NCLT and sought initiation of CIRP against the Corporate Debtor, claiming an amount of approx. Rs.835 crores.

A. Submissions of the Appellant:

i. Appellant submitted that the Hon'ble Supreme Court in Dena Bank (Now Bank of Baroda) vs. C. Shivakumar Reddy and another has held that once a claim fructifies into a final judgment and order/decree, upon adjudication, and a certificate of recovery is also issued authorizing the creditor to realize its decretal dues, a fresh right accrues to the creditor to recover the amount specified in the Recovery Certificate.

B. Submissions of the Respondent:

i. Respondent submitted that the cause of action has merged into the order of issuance of the Recovery Certificate by the DRT and therefore, by application of the doctrine of merger, the debt no more survives.

ii. In view of Section 19(22A) of the Debt Recovery Act, which states that a recovery certificate shall be a deemed decree for the initiation of inter alia winding up proceedings under the Companies Act 2013, IBC proceedings cannot be filed pursuant to a recovery certificate.

iii. The judgment in Dena Bank is per incuriam i.e., rendered without considering the correct position of law as it does not correctly consider Sections 19(22) and 19 (22A) of the Debt Recovery Act, as well as Sections 5(7), 5(8), 6 and 14(1)(a) of IBC.

iv. The judgment in Dena Bank (supra) is also contrary to the judgments of the Supreme Court in Jignesh Shah and Anr. Vs. Union of India and Anr, (2019) 10 SCC 750 wherein the initiation of CIRP was held to be barred by limitation despite pending recovery proceedings, and Gaurav Hargovindbhai Dave vs. Asset Reconstruction Company (India) Limited and Anr, (2019) 10 SCC 572 wherein also the application under section 7 of IBC was held to be barred due to limitation.

Decision:

Hon'ble Supreme Court had considered various provisions of the IBC as well as its earlier judgments in the matter of Dena Bank (Now Bank of Baroda) vs. C. Shivakumar Reddy and another and stated that Limitation Act would be applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code and Article 137 of the Limitation Act gets attracted. Apex Court further stated that a final judgment and order/decree is binding

on the judgment debtor and once a claim fructified into a final judgment and order/decree, upon adjudication, and a certificate of recovery is also issued authorising the creditor to realise its decretal dues, a fresh right accrues to the creditor to recover the amount of the final judgment and/or order/decree and/or the amount specified in the recovery certificate.

Hon'ble Supreme Court held that within the meaning of clause (8) of Section 5 of the IBC, a liability in respect of a claim arising out of a Recovery Certificate would be a "financial debt" and the holder of the Recovery Certificate would be a financial creditor within the meaning of clause (7) of Section 5 of the IBC and the holder of such certificate would be entitled to initiate CIRP, if initiated within a period of three years from the date of issuance of the Recovery Certificate.

Hon'ble Supreme Court had allowed the appeal and quashed and set aside the judgement passed by the NCLAT and the Court further clarified that they have not touched the elaborated arguments which had been advanced by the rival parties upon the merits of the matter and had only decided the legal issues. The parties to the matter would be at liberty to raise all the issues, considering the merits of the matter before the NCLT. The NCLT would decide the same in accordance with law.

Appeal is allowed and pending applications, including the application(s) for exparte stay and disposal of the matter shall stand disposed of in the above terms.

CASE NO. 5

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Laxmi Pat Surana (Appellant)

Vs.

Union Bank of India & Anr. (Respondents)

Civil Appeal No. 2734 OF 2020

Date of Order: 26-03-2021

Section 7 of the Insolvency and Bankruptcy Code, 2016

In this case, Hon'ble Supreme Court decided with respect to Application of Section 18 of Limitation Act to proceedings under IBC and regarding

the issue of whether CIRP can be initiated against Guarantor (being corporate person) for default in relation to debt of Principal Borrower (not being a corporate person).

Facts:

The Financial Creditor i.e., the bank had extended credit facility to Principal Borrower, a proprietary firm of the appellant, through two loan agreements in years 2007 and 2008 for a term loan of Rs.9,60,00,000/ and an additional amount of Rs.2,45,00,000/, respectively. Corporate Debtor, wherein the Appellant was promoter/director, had offered guarantee to the two loan accounts of the Principal Borrower. The stated loan accounts were declared NPA on 30.1.2010. The Financial Creditor then issued a recall notice on 19.2.2010 to the Principal Borrower, as well as, the Corporate Debtor, demanding repayment of outstanding amount of Rs.12,35,11,548/ and then filed an application under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 against the Principal Borrower before the Debt Recovery Tribunal at Kolkata.

During the pendency of the action initiated as mentioned above, the Principal Borrower had repeatedly assured to pay the outstanding amount, but as that commitment remained unfulfilled, the Financial Creditor wrote to the Corporate Debtor on 3.12.2018 in the form of a purported notice of payment under Section 4(1) of the Code. The Corporate Debtor replied to the said notice of demand vide letter dated 8.12.2018, inter alia, clarifying that it was neither the Principal Borrower nor owed any financial debt to the Financial Creditor and had not committed any default in repayment of the stated outstanding amount.

The Financial Creditor then proceeded to file an application under Section 7 of the Code on 13.2.2019 for initiating Corporate Insolvency Resolution Proceeding against the Corporate Debtor, before the National Company Law Tribunal, Kolkata. This application came to be resisted on diverse counts and in particular, on the preliminary ground that it was not maintainable because the Principal Borrower was not a “corporate person”; and further, it was barred by limitation, as the date of default was 30.1.2010, whereas, the application had been filed on 13.2.2019 i.e., beyond the period of three years.

The Adjudicating Authority vide judgment and order dated 6.12.2019 held that the action had been initiated against the Corporate Debtor, being

coextensively liable to repay the debt of the Principal Borrower and having failed to do so despite the recall notice, became Corporate Debtor and thus liable to be proceeded with under Section 7 of the Code. As regards the second objection, the Adjudicating Authority found that the Principal Borrower, as also, the Corporate Debtor had admitted and acknowledged the debt time and again, lastly on 8.12.2018 and thus the application filed on 13.2.2019 was within limitation.

The appellant then made appeal before the Hon'ble National Company Law Appellate Tribunal, New Delhi ("NCLAT"). The NCLAT vide impugned judgment and order dated 19.3.2020, dismissed the appeal and affirmed the conclusion reached by the Adjudicating Authority on the two preliminary objections raised by the appellant.

The appellant, feeling aggrieved, approached Hon'ble Supreme Court by way of captioned appeal reiterating the two preliminary objections referred to above.

So, two central issues that arise for determination in this appeal, are as follows:

(i) Whether an action under Section 7 of the Insolvency and Bankruptcy Code, 2016 can be initiated by the financial creditor (Bank) against a corporate person (being a corporate debtor) concerning guarantee offered by it in respect of a loan account of the principal borrower, who had committed default and is not a "corporate person" within the meaning of the Code?

(ii) Whether an application under Section 7 of the Code filed after three years from the date of declaration of the loan account as Nonperforming Asset, being the date of default, is not barred by limitation?

The Observations of the Court on the first Issue on maintainability of action under Section 7 of IBC

- Section 7 of the Code propounds the manner in which corporate insolvency resolution process ("CIRP") may be initiated by financial creditor against a corporate person being the corporate debtor.
- Section 7 is an enabling provision, which permits the financial creditor to initiate CIRP against a corporate debtor. The corporate debtor can be the principal borrower. It can also be a corporate person assuming

the status of corporate debtor having offered guarantee, if and when the principal borrower/debtor (be it a corporate person or otherwise) commits default in payment of its debt.

- It is so provided in sub-clause (i) of Section 5(8) of the Code to take within its ambit a liability in relation to a guarantee offered by the corporate person as a result of the default committed by the principal borrower. The expression claim will certainly cover the right of the financial creditor to proceed against the corporate person being a guarantor due to the default committed by the principal borrower.
- A right or cause of action would enure to the lender (financial creditor) to proceed against the principal borrower, as well as the guarantor in equal measure in case they commit default in repayment of the amount of debt acting jointly and severally. It would still be a case of default committed by the guarantor itself, if and when the principal borrower fails to discharge his obligation in respect of amount of debt. For, the obligation of the guarantor is coextensive and coterminous with that of the principal borrower to defray the debt, as predicated in Section 128 of the Indian Contract Act, 1872. As a consequence of such default, the status of the guarantor metamorphoses into a debtor or a corporate debtor if it happens to be a corporate person, within the meaning of Section 3(8) of the Code. If the guarantor is a corporate person (as defined in Section 3(7) of the Code), it would come within the purview of expression “corporate debtor” within the meaning of Section 3(8) of the Code.
- The principal borrower may or may not be a corporate person, but if a corporate person extends guarantee for the loan transaction concerning a principal borrower not being a corporate person, it would still be covered within the meaning of expression “corporate debtor” in Section 3(8) of the Code.
- The Court found no substance in the argument that since the loan was offered to a proprietary firm (not a corporate person), action under Section 7 of the Code cannot be initiated against the corporate person even though it had offered guarantee in respect of that transaction. Whereas, upon default committed by the principal borrower, the liability of the company (corporate person), being the guarantor, instantly triggers the right of the financial creditor to proceed against the corporate person (being a corporate debtor). Hence, the first question stood answered against the appellant.

The Observations of the Court on the second Issue on maintainability of action under Section 7 of IBC on the ground of being barred by Limitation

- The principal borrower as well as the corporate debtor had acknowledged the debt time and again after 30.01.2010 and lastly on 08.12.2018, which was the basis of filing of subject application under Section 7 of the Code on 13.02.2019.
- Referring to its Judgement in Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr., the Court observed that it had not ruled out the application of Section 18 of the Limitation Act to the proceedings of the Code, if the fact situation of the case so warrants. The purport of Section 238A of the Code, as enacted, is clarificatory in nature and being a procedural law had been given retrospective effect; which included the application of the provisions of the Limitation Act on case-to-case basis. The purport of the amendment in Code was not to reopen or revive the time barred debts under the Limitation Act. At the same time, accrual of fresh period of limitation in terms of Section 18 of the Limitation Act is on its own under that Act. It will not be a case of giving new lease to time barred debts under the existing law (Limitation Act) as such.
- Court held that there is no reason to exclude the effect of Section 18 to the proceedings initiated under the Code.
- Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 of the Code. However, Section 7 comes into play when the corporate debtor commits "default". Section 7 consciously uses the expression "default" — not the date of notifying the loan account of the corporate person as NPA.
- In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the moment the principal borrower commits default due to non-payment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive)

acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act.

- Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process under Section 7 of the Code enures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to time, for institution of the proceedings under Section 7 of the Code. Further, the acknowledgment must be of a liability in respect of which the financial creditor can initiate action under Section 7 of the Code.
- The fact that acknowledgment within the limitation period was only by the principal borrower and not the guarantor, would not absolve the guarantor of its liability flowing from the letter of guarantee and memorandum of mortgage. The liability of the guarantor being coextensive with the principal borrower under Section 128 of the Contract Act, it triggers the moment principal borrower commits default in paying the acknowledged debt. This is a legal fiction.
- The liability of the corporate debtor (corporate guarantor) also triggers when the principal borrower acknowledges its liability in writing within the expiration of prescribed period of limitation, to pay such outstanding dues and fails to pay the acknowledged debt. Correspondingly, right to initiate action within three years from such acknowledgment of debt accrues to the financial creditor. That however, needs to be exercised within three years when the right to sue/apply accrues, as per Article 137 of the Limitation Act. This is the effect of Section 18 of the Limitation Act. In that, a fresh period of limitation is required to be computed from the time when the acknowledgment was so signed by the principal borrower or the corporate guarantor (corporate debtor), as the case may be, provided the acknowledgment is before expiration of the prescribed period of limitation.

- The Court affirmed the view taken by the NCLT and which commended to the NCLAT — that a fresh period of limitation is required to be computed from the date of acknowledgment of debt by the principal borrower from time to time and in particular the (corporate) guarantor/corporate debtor vide last communication dated 08.12.2018. Thus, the application under Section 7 of the Code filed on 13.02.2019 is within limitation.

Decision:

As no other issue arises for consideration — except the two grounds urged by the appellant regarding the maintainability of the application for initiating CIRP by the financial creditor (Bank) under Section 7 of the Code, the appeal was disposed of leaving all "other grounds" and contentions available to both the sides open to be decided in the pending proceedings before the NCLT. The same be decided uninfluenced by any observation(s) made in the impugned judgment or in the present judgment.

Accordingly, the appeal was disposed of in the above terms with no order as to costs.

SECTION 9

CASE NO. 6

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

M/S S.S. ENGINEERS (Appellants)

Vs.

HINDUSTAN PETROLEUM CORPORATION LTD. & ORS. (Respondents)

CIVIL APPEAL NO. 4583 OF 2022

Date of Order: 15.07.2022

Section 9 of the Insolvency and Bankruptcy Code, 2016

An Operational Creditor can only trigger the CIRP process when there is an undisputed debt and a default in payment thereof.

Facts:

This appeal is against a judgment and order dated 10th January 2022 passed by the Hon'ble National Company Law Appellate Tribunal, New Delhi ("NCLAT") allowing Company Appeal (AT)(Ins) No. 332 of 2020 filed by the Respondent and setting aside the order passed by the Hon'ble National Company Law Tribunal, Kolkata ("NCLT") admitting an application filed by the appellant under Section 9 of the Insolvency and Bankruptcy Code ("IBC") as Operational Creditor, for initiation of the Corporate Insolvency Resolution Process ("CIRP") against Respondent.

The Respondent had floated various tenders for enhancing the capacity of the Boiling Houses to which appellant submitted its offer and four purchase orders were issued to the appellant. Later, the Respondent had sent email to the appellant pointing out that the appellant had been violating the terms of the purchase order causing huge losses to Respondent. After that, Respondent sent a letter to the appellant stating that the appellant had acted in violation of the General Terms and Conditions, inter alia, by raising improper invoices for materials not supplied, not renewing bank guarantees, failing to effect supplies and complete work within the stipulated period and the service rendered and/or materials supplied by the appellant were of poor quality. They also claimed that there was no payment outstanding from

Respondent to the appellant. A series of correspondence followed between the Respondent and the Appellant.

After that, the appellant sent legal notice to Respondent demanding payment or alternatively reference of the disputes to arbitration. With that, the appellant sent two demand notice under Section 8 of the IBC claiming a sum along with interest to which Respondent replied by disputing the claim.

The question here was, whether the application of the Operational Creditor under Section 9 of the IBC, should have been admitted by the Adjudicating Authority.

Decision

The Hon'ble Supreme Court observed the following points-

The Supreme Court referred the case- "Mobilox Innovations Private Limited v. Kirusa Software Private Limited" wherein the Supreme Court held that "*The Adjudicating Authority when examining an application under Section 9 of the Act, will have to determine:*

i. Whether there is an "operational debt" as defined exceeding Rs 1 lakh? (See Section 4 of the Act)

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

iii. Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected".

In this Case, the correspondence between the parties showed that Respondent had been disputing the claims of the Appellant on the contention that the appellant had not been adhering to the time schedules for completion of the contract work, had been violating the terms of Tender documents and the Purchase Orders, and backing out from its commitments thereunder, thereby causing losses to Respondent. The Respondent declined to release money claimed by the appellant on the ground of poor quality of work and breaches of the terms and conditions of the Purchase Order.

The Apex Court observed that the correspondence between the parties evince the existence of real dispute and going by the test of existence of a dispute, it was clear that Respondent had raised a plausible defence. The Court found that there was a pre-existing dispute regarding the alleged claim of the appellant against Respondent and the NCLAT rightly allowed the appeal filed on behalf of Respondent.

The Apex Court held that- it was not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor. It was patently clear that an Operational Creditor can only trigger the CIRP process when there is an undisputed debt and a default in payment thereof. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.

There were no grounds found to interfere with the judgment and order of the NCLAT. Hence Appeal was dismissed by the Court.

SECTION 10 & 14

CASE NO. 7

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

INDIAN OVERSEAS BANK (Appellants)

Vs.

M/S RCM INFRASTRUCTURE LTD. AND ANOTHER (Respondents)

CIVIL APPEAL NO. 4750 OF 2021

Date of Order: 18-05-2022

Section 10 & Section 14 of the Insolvency and Bankruptcy Code, 2016

Whether the proceedings under the SARFAESI Act could be continued once the CIRP was initiated, and the moratorium was ordered.

This appeal challenges the order dt. 26th March 2021 ("Impugned Order") passed by the Hon'ble National Company Law Appellate Tribunal, ("NCLAT") thereby dismissing the appeal filed by the present Appellant, which was in turn filed challenging the order dt. 15th July 2020 passed by the Hon'ble National Company Law Tribunal, ("NCLT") in which the Hon'ble NCLT had allowed the application filed by the former Managing Director of the Corporate Debtor and set aside the sale of the assets of the Corporate Debtor.

Facts:

1. The appellant bank had extended certain credit facilities to the Corporate Debtor. However, the Corporate Debtor failed to repay the dues and the loan account of the Corporate Debtor became irregular & came to be classified as "Non- Performing Asset" (NPA).

2. The appellant bank issued a Demand Notice under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act"), calling upon the Corporate Debtor and its guarantors to repay the outstanding amount due to the appellant bank. Since the Corporate Debtor failed to comply with the Demand Notice and repay the outstanding dues, the appellant bank took symbolic possession of two secured assets mortgaged

exclusively with it. The same was done by the appellant bank in exercise of powers conferred on it under SARFAESI Act. One of the said properties stood in the name of Corporate Debtor and the other in the name of Corporate Guarantor. An E-auction notice came to be issued on 27th September 2018 by the appellant bank to recover the public money availed by the Corporate Debtor.

3. The Corporate Debtor in the meanwhile had filed a petition being CP(IB) No. 601/10/HDB/2018 on 22nd October 2018 under Section 10 of the Insolvency and Bankruptcy Code, 2016 ("IBC") before Hon'ble NCLT. In the E-auction, three persons became successful bidders by offering jointly a price for both the secured assets. On 13th December 2018, the sale was confirmed in favour of the auction purchasers in the public auction. The successful bidders deposited 25% of the bid amount, including the Earnest Money Deposit of the said amount and the appellant bank issued a sale certificate to them. The auction purchasers were directed to pay the balance 75% of the bid amount within 15 days.

4. The auction purchasers addressed a letter to the appellant bank seeking handing over of peaceful and vacant possession of the secured assets and also prayed for extension of time to pay the balance 75% of the bid amount till 8th March 2019. The request made by the auction purchasers was accepted by the appellant bank.

5. The Hon'ble NCLT vide order dated 3rd January 2019, admitted the petition filed by the ex-promoter of the Corporate Debtor. As a result of the said order passed under Section 10 of the IBC, the Corporate Insolvency Resolution Process ("CIRP") of the Corporate Debtor commenced. A moratorium as provided under Section 14 of the IBC was notified and an Interim Resolution Professional ("IRP") was also appointed.

6. The appellant bank on 21st January 2019 filed its claim in Claim Form-C with the IRP, upon it coming to know about the admission of the insolvency petition filed by the Corporate Debtor. According to the appellant bank, since the balance 75% of the bid amount was not yet received on the said date, it was not excluded from the claim filed before the IRP. During the pendency of the CIRP, the appellant bank accepted the balance 75% of the bid amount on 8th March 2019. Upon receipt of the payment, the appellant bank submitted its revised claim

on 11th March 2019 in Claim Form-C to the IRP. The appellant bank also intimated the IRP about the successful sale of the said secured assets. The promoter of the Corporate Debtor filed an application being I.A. No.832/2020 in the pending company petition being CP(IB) No. 601/10/HDB/2018 thereby praying the Hon'ble NCLT to set aside the security realization during the CIRP period carried out by the appellant bank or in the alternative to cancel the impugned transaction. The Hon'ble NCLT passed an order thereby allowing the said application filed by the promoter of the Corporate Debtor and setting aside the sale of the property owned by the Corporate Debtor. Being aggrieved thereby, the appellant bank filed an appeal before the Hon'ble NCLAT and the same was rejected by the Impugned Judgement.

A. Submissions of the Appellant:

i. The initiation of voluntary insolvency proceedings was with the malafide intent to stall the sale and hence comes under the ambit of Section 65 of IBC.

ii. It was submitted that the moratorium under Section 14 of the IBC ceased to subsist after the order directing liquidation was passed under Section 52 of the IBC, the secured creditors were allowed to realise their security interest.

iii. It was further submitted that Section 14(1)(c) of the IBC interdicts any action to foreclose, recover or enforce any security interest including any action under the SARFAESI Act. However, it does not undo actions which have already been completed.

B. Submissions of the Respondents

i. The title of the secured assets cannot be conveyed merely upon confirmation of sale, even before receiving full consideration. This would be contrary in view of various provisions of the SARFESI Act.

ii. Continuation of any proceeding is totally illegal in view of Section 14(1)(c) of the IBC and receipt of balance sale consideration was violative of the same. Further, all financial creditors are entitled to a share in the amount received upon realisation of the assets and the Appellant cannot keep it in entirety.

Decision:

Hon'ble Supreme Court observed that –

- After the CIRP is initiated, there is moratorium for any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the SARFAESI Act. It is clear that once the CIRP is commenced, there is complete prohibition for any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property. The words "including any action under the SARFAESI Act" are significant. The legislative intent is clear that after the CIRP is initiated, all actions including any action under the SARFAESI Act to foreclose, recover or enforce any security interest are prohibited. (Para 24)
- The provisions of the IBC shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. (Para 26)
- The IBC is a complete Code in itself and in view of the provisions of Section 238 of the IBC, the provisions of the IBC would prevail notwithstanding anything inconsistent therewith contained in any other law for the time being in force. (Para 27)
- The present case arises out of a statutory sale. The sale would be governed by Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002. The sale would be complete only when the auction purchaser makes the entire payment and the authorised officer, exercising the power of sale, shall issue a certificate of sale of the property in favour of the purchaser in the Form given in Appendix V to the said Rules.

Hon'ble Supreme Court held that-

- The balance amount had been accepted by the appellant bank on 8th March 2019. The sale under the statutory scheme as contemplated under Rules 8 and 9 of the said Rules would stand completed only on 8th March 2019 and this date falls much after 3rd January 2019, i.e., on which date CIRP commenced and moratorium was ordered. Therefore, the argument on behalf of the appellant bank that the sale was complete upon receipt of the part payment was not acceptable.

- Section 14(1)(c) of the IBC, which have overriding effect over any other law, any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the SARFAESI Act is prohibited. So, the Apex Court was of the view that the appellant bank could not have continued the proceedings under the SARFAESI Act once the CIRP was initiated and the moratorium was ordered.

Hon'ble Supreme Court further held that no case was made out for interfering with the concurrent orders passed by the NCLT dated 15th July 2020 and NCLAT dated 26th March 2021.

The present appeal was dismissed.

SECTION 10A & 62

CASE NO. 8

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Ramesh Kymal (Appellant)

Vs.

M/s Siemens Gamesa Renewable Power Pvt Ltd. (Respondent)

Civil Appeal No. 4050 of 2020

Date of Order: 09-02-2021

Section 62 and Section 10A of The Insolvency and Bankruptcy Code, 2016

Whether the provisions of Section 10A stand attracted to an application under Section 9 which was filed before 5 June 2020 (the date on which the provision came into force) in respect of a default which has occurred after 25 March 2020.

Facts:

The appellant filed an Appeal before the Supreme Court to challenge the judgement and order of the National Company Law Appellate Tribunal (NCLAT) dated 19 October 2020. The NCLAT affirmed the decision of the National Company Law Tribunal (NCLT) dated 9 July 2020, holding that in view of the provisions of Section 10A, which have been inserted by Act 17 of 2020 (the "Amending Act") with retrospective effect from 5 June 2020, the application filed by the appellant as an operational creditor under Section 9 was not maintainable.

On 11 May 2020, an application had been filed by the appellant under Section 9 of the IBC on the ground that there was default in payment of his operational dues.

While the case was pending, an Ordinance was promulgated on 5th June 2020, by virtue of which Section 10A was inserted into the IBC. The NCLT upheld the submission of the respondent, holding that a bar has been created by the newly inserted provisions of Section 10A. The NCLT decision has been upheld in appeal by the NCLAT.

The issue raised for determination in the appeal was whether the provisions of Section 10A stand attracted to an application under Section 9 which was filed before 5 June 2020 (the date on which the provision came into force) in respect of a default which has occurred after 25 March 2020.

Three significant dates which had a bearing on the proceedings:

- 30 April 2020 – date of default as set up in Form 3;
- 11 May 2020 – date of institution of the application under Section 9; and
- 5 June 2020 – date on which Section 10A was inserted in the IBC.

The Counsel appearing for the appellant submitted that:

i. Section 10A creates a bar to the "filing of applications" under Sections 7, 9 and 10 in relation to defaults committed on or after 25 March 2020 for a period of six months, which can be extended up to one year;

ii. The Ordinance and the Act which replaced it, do not provide for the retrospective application of Section 10A either expressly or by necessary implication to applications which had already been filed and were pending on 5 June 2020;

iii. Section 10A prohibits the filing of a fresh application in relation to defaults occurring on or after 25 March 2020, once Section 10A has been notified (i.e., after 5 June 2020);

iv. Section 10A uses the expressions "shall be filed" and "shall ever filed" which are indicative of the prospective nature of the statutory provision in its application to proceedings which were initiated after 5 June 2020; and

v. The IBC makes a clear distinction between the "initiation date" under Section 5(11) and the "insolvency commencement date" under Section 5(12).

The Counsel appearing for the respondents opposed the contentions and submitted that;

i. The legislative intent in the insertion of Section 10A was to deal with an extraordinary event, the outbreak of Covid-19 pandemic, which led to financial distress faced by corporate entities;

ii. Section 10A is prefaced with a non-obstante clause which overrides Sections 7, 9 and 10; and

iii. Section 10A provides a cut-off date of 25 March 2020 and it is evident from the substantive part of the provision, as well as from the proviso and the explanation, that no application can be filed for the initiation of the CIRP for a default occurring on and after 25 March 2020, for a period of six months or as extended upon a notification.

The Court stated that *"Adopting the construction which has been suggested by the appellant would defeat the object and intent underlying the insertion of Section 10A. The onset of the Covid-19 pandemic is a cataclysmic event which has serious repercussions on the financial health of corporate enterprises."*

The Court further stated that, *"Section 10A does not contain any requirement that the Adjudicating Authority must launch into an enquiry into whether, and if so to what extent, the financial health of the corporate debtor was affected by the onset of the Covid-19 pandemic. Parliament has stepped in legislatively because of the widespread distress caused by an unheralded public health crisis. It was cognizant of the fact that resolution applicants may not come forth to take up the process of the resolution of insolvencies (this as we have seen was referred to in the recitals to the Ordinance), which would lead to instances of the corporate debtors going under liquidation and no longer remaining a going concern."*

The Court observed that the Ordinance and the Amending Act enacted by Parliament, adopt 25 March 2020 as the Cut-off date. The proviso to Section 10A stipulates that "no application shall ever be filed" for the initiation of the CIRP "for the said default occurring during the said period". "*The substantive part of Section 10A is to be construed harmoniously with the first proviso and the explanation. Reading the provisions together, it is evident that Parliament intended to impose a bar on the filing of applications for the commencement of the CIRP in respect of a corporate debtor for a default occurring on or after 25 March 2020;….. Acceptance of the submission of the appellant would defeat the very purpose and object underlying the insertion of Section 10A. For, it would leave a whole class of corporate debtors where the default has occurred on or after 25 March 2020 outside the pale of protection because the application was filed before 5 June 2020."*

"*Hence, the embargo contained in Section 10A must receive a purposive construction which will advance the object which was sought to be achieved by enacting the provision."*

Therefore, the Court was unable to accept the contention of the appellant.

Decision:

The Supreme Court was in agreement with the view which has been taken by the NCLAT for the reasons which have been set out earlier in the course of the judgment.

The Court affirmed the conclusion of the NCLAT.

The appeal was accordingly dismissed.

SECTION 12

CASE NO. 9

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Committee of Creditors of Amtek Auto

Limited through Corporation Bank (Appellant)

Vs

Dinkar T. Venkatsubramanian and others (Respondent(s))

CIVIL APPEAL NO. 6707 OF 2019

Date of Order: 01-12-2021

Section 12 of the Insolvency and Bankruptcy Code, 2016

The approved resolution plan has to be implemented at the earliest and that is the mandate under the IBC.

Facts:

This Appeal was against a judgment and order dated 16th August 2019 passed by the National Company Law Appellate Tribunal ("NCLAT"), in Company Appeal (AT) (Insolvency) No.219 of 2019, by which NCLAT disposed of appeal filed by Committee of Creditors and rejected prayer for exclusion of time, and consequently virtually ordered liquidation of the Corporate Debtor. The Appellant was the Committee of Creditors of Corporate Debtor.

Initiation of CIRP

Pursuant to an application made under Section 7 of the Insolvency and Bankruptcy Code, 2016, the corporate insolvency resolution process was initiated against Corporate Debtor. Accordingly, the resolution professional invited prospective resolution applicants to submit a Resolution Plan. The Resolution Plans submitted by Deccan Value Investor LP ("DVI") and M/s Liberty House Group Private Limited ("Liberty") were considered by the CoC of Corporate Debtor. However, DVI withdrew its Resolution Plan and therefore the revised plan of Liberty was considered.

Subsequently, Liberty did not act as per the approved plan and a prayer was made by the COC before the Adjudicating Authority to grant 90 days to the resolution professional to make another attempt for a fresh process. The

Adjudicating Authority though granted liberty to the COC and the resolution professional to approach the appropriate authority under the IBC for the determination of the wilful default, it did not accede to the request for carrying out a fresh process by inviting the plans again but directed the reconstitution of the COC for re-consideration of the Resolution Plan submitted by DVI. The appeal of COC got rejected by NCLAT as well and the NCLAT virtually ordered the liquidation of the Corporate Debtor.

The liquidation proceeding was stayed by the Supreme Court's order dated 06-09-2019. The Court permitted the resolution professional to invite fresh offers within a period of 21 days. DVI also submitted the fresh resolution plan which was approved by the COC with 70% majority. Later on, DVI tried to withdraw from resolution plan, which was disallowed by the Court.

Since the approved resolution plan submitted by the DVI was not acted upon, the COC filed Contempt Petition before the Supreme Court. DVI also filed an application for rectification of the earlier order dated 18-06-2020 by which the Supreme Court had rejected DVI's prayer for withdrawal of the offer. The Supreme Court rejected both the application observing that DVI's application for rectification was an attempt to renege from the resolution plan which it submitted and to resile from its obligations.

Contention of the Parties

Appellant: Contended that successful resolution applicant was not acting as per the approved resolution plan. Under the Resolution Plan, one of the steps to be undertaken by the DVI was to deposit Rs.500 crores "Upfront Cash Amounts".

DVI: The submission on behalf of the DVI was that the said amount was lying in a deposit account in India with their custodian Bank and was ready for disbursement to lenders but unless and until the other steps were undertaken as per the Resolution Plan, the aforesaid amount of Rs.500 crores may not be transferred to Corporate Debtor.

Decision:

Apex Court observed the following points-

- *Under the approved resolution plan, both the parties have to fulfil their obligations. The Corporate Debtor has also to perform its obligations simultaneously so that the amount of Rs.500 crores be transferred to the financial creditors/lenders of the Corporate Debtor. (Para 8)*
- *The approved resolution plan has to be implemented at the earliest and that is the mandate under the IBC. As per Section 12 of the IBC,*

subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of 180 days from the date of admission of the application to initiate such process, which can be extended by a further period of 180 days. As per proviso to Section 12 of the IBC, which has been inserted by Act 26 of 2019, the insolvency resolution process shall mandatorily be completed within a period of 330 days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under Section 12 of the IBC and the time taken in legal proceedings in relation to such resolution process of the Corporate Debtor. (Para 9)

- *Thus, the entire resolution process has to be completed within the period stipulated under Section 12 of the IBC and any deviation would defeat the object and purpose of providing such time limit. However, by earlier order, the time limit has been condoned in view of the various litigations pending between the parties and in the peculiar facts and circumstances of the case. Therefore, any further delay in implementation of the approved resolution plan submitted by DVI which as such has been approved by the adjudicating authority in the month of July, 2020 and even the appeal against the same has been dismissed subsequently, any further delay would defeat the very object and purpose of providing specific time limit for completion of the insolvency resolution process, as mandated under Section 12 of the IBC. (Para 10)*

Hon'ble Supreme Court held that –

- *We direct all the concerned parties to the approved resolution plan and/or connected with implementation of the approved resolution plan including IMC to complete the implementation of the approved resolution plan, within a period of four weeks from today, without fail.*
- *It is further directed and it goes without saying that on implementation of the approved resolution plan and even as per the approved resolution plan, an amount of Rs. 500 crores now deposited by DVI-successful resolution applicant be transferred to the respective lenders/financial creditors as per the approved resolution plan and/or as mutually agreed. Any lapse on the part of any of the parties in implementing the approved resolution plan with the time stipulated hereinabove shall be viewed very seriously.*

Hon'ble Supreme Court disposed the appeal with above observation and directions.

SECTION 12A

CASE NO. 10

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

VALLAL RCK (Appellants)

Vs.

M/S SIVA INDUSTRIES AND HOLDINGS

LIMITED AND OTHERS (Respondents)

CIVIL APPEAL NOS. 1811-1812 OF 2022

Date of Order: 03-06-2022

Section 12A of the Insolvency and Bankruptcy Code, 2016

Due weightage should be given to the commercial wisdom of CoC.

Facts:

The financial creditor had filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC") for initiation of Corporate Insolvency Resolution Process ("CIRP") in respect of Corporate Debtor. After initiation of CIRP, Resolution Professional ("RP") had presented a Resolution Plan before the Committee of Creditors ("CoC"). However, since the said Resolution Plan received only 60.90% votes of the CoC and could not meet the requirement of receiving 66% votes, could not be approved. RP filed an application seeking initiation of liquidation process of the Corporate Debtor. The appellant, who is the promoter of the Corporate Debtor, filed a settlement application before the Hon'ble National Company Law Tribunal ("NCLT") under Section 60(5) of the IBC, to offer one-time settlement plan.

Deliberations took place in the meetings of the CoC with regard to the said Settlement Plan and the final settlement proposal which was submitted by the appellant was considered by the CoC which initially received 70.63% votes. However, subsequently, one of the Financial Creditors having voting share of 23.60%, decided to approve the said Settlement Plan. Since the said Settlement Plan stood approved with a voting majority of 94.23%, the RP, accordingly, filed an application before the NCLT seeking withdrawal of

CIRP initiated against the Corporate Debtor in view of the approval of the said Settlement Plan by CoC.

The Hon'ble NCLT vide its order, while holding that the said Settlement Plan was not a settlement simpliciter under Section 12A of the IBC but a "Business Restructuring Plan", rejected the application for withdrawal of CIRP and approval of the Settlement Plan. Vide another order, the NCLT initiated liquidation process of the Corporate Debtor as well. Being aggrieved thereby by the two orders of NCLT the appellant preferred two appeals before the NCLAT. NCLAT dismissed both the appeals. Hence, the present appeals were made.

Now, the question that falls for consideration in the present appeal is as to whether the adjudicating authority (NCLT) or the appellate authority (NCLAT) can sit in an appeal over the commercial wisdom of the Committee of Creditors or not.

Decision:

The provisions under Section 12A of the IBC have been made more stringent as compared to Section 30(4) of the IBC. Whereas under Section 30(4) of the IBC, the voting share of CoC for approving the Resolution Plan is 66%, the requirement under Section 12A of the IBC for withdrawal of CIRP is 90%.

When 90% and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stakeholders to permit settlement and withdraw CIRP, the adjudicating authority or the appellate authority cannot sit in an appeal over the commercial wisdom of CoC. The interference would be warranted only when the adjudicating authority or the appellate authority finds the decision of the CoC to be wholly capricious, arbitrary, irrational and de hors the provisions of the statute or the Rules.

In the present case, the proceedings of the CoC Meetings clearly show that there were wide deliberations amongst the members of the CoC while considering the Settlement Plan as submitted by the appellant. One of the members of the CoC having voting share of 23.60%, though initially opposed the Settlement Plant, subsequently decided to support the same. Accordingly, the NCLT itself, vide its order, directed the RP to reconvene the CoC meeting. As per the directions of the NCLT, meeting of the CoC was reconvened, wherein the Settlement Plan was approved by 94.23% votes.

Thus, the decision of the CoC was taken after the members of the CoC, had due deliberation to consider the pros and cons of the Settlement Plan and

took a decision exercising their commercial wisdom. Supreme Court was of the view that neither the NCLT nor the NCLAT were justified in not giving due weightage to the commercial wisdom of CoC.

The Court allowed both the appeals.

The judgment delivered by the NCLAT and the orders passed by the NCLT are set aside; and The application filed by the Resolution Professional before the learned NCLT for withdrawal of CIRP was allowed.

SECTION 29A

CASE NO. 11

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Bank of Baroda & ANR (Appellant (s))

Vs.

MBL Infrastructures Limited & Ors (Respondent(s))

CIVIL APPEAL NO. 8411 OF 2019

Date of Order: 18-01-2022

Section 29A(h) of the Insolvency and Bankruptcy Code, 2016

The ultimate object of the Code is to put the corporate debtor back on the rails.

Facts:

A judicial interpretation of Section 29A(h) of the Insolvency and Bankruptcy Code, 2016, as amended by the Act 26 of 2018 was sought from the Apex Court.

MBL Infrastructures Limited (Respondent No.1) was set up by Mr. Anjanee Kumar Lakhotiya (Respondent No. 3). Loans/ credit facilities were obtained by the Respondent No.1 from the consortium of banks. On the failure of the Respondent No.1 to act as per the terms of repayment, some of the respondents were forced to invoke the personal guarantees extended by the Respondent No.3 for the credit facilities availed by the Respondent No.1.

RBL Bank issued a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), after duly invoking the personal guarantee of the Respondent No.3. This was followed by a similar action at the hands of other banks.

Thereafter, RBL Bank filed an application under Section 7 of the IBC before the National Company Law Tribunal, Kolkata Bench (NCLT) to initiate the Corporate Insolvency Resolution Process (CIRP) against Respondent No.1. The Section 7 application was admitted vide an order dated 30 March 2017. After the expiry of the initial period of CIRP, an application was filed by the

Resolution Professional for extending the duration of CIRP by an additional 90 days, which was duly granted.

Two resolution plans were received by the Resolution Professional (Respondent No.2) as he then was, of which, one was authored by Respondent No.3. This was done prior to the introduction of Section 29A of the IBC.

Thereafter, by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, Section 29A was introduced to the IBC. The CoC held its meeting on 01 December 2017 to deliberate upon the impact of the amendment qua the eligibility of the Respondent No.3 in submitting a resolution plan in the CIRP proceedings. In view of the lingering doubt expressed, the Respondent No.3 filed an application before the NCLT praying for a declaration that he was not disqualified from submitting a resolution plan under sub-section (c) and (h) of Section 29A of the IBC.

The NCLT vide its order dated 18 December 2017 held that the Respondent No.3 was eligible to submit a resolution plan, notwithstanding the fact that he did extend his personal guarantees on behalf of the Respondent No.1 which were invoked by some of the creditors.

The order of the NCLT dated 18 December 2017 was assailed by one of the Respondent bank before the National Company Law Appellate Tribunal (NCLAT). The NCLAT passed an order dated 21 December 2017 that the NCLT would not accept or reject any resolution plan without prior approval of the NCLAT.

On 23 March 2018, the NCLAT passed an order vacating the order passed on 18 December 2017 as that Respondent bank sought permission to withdraw its appeal without any liberty. However, a request made by the present appellant before the NCLAT seeking to be impleaded as a party to continue the list was not considered favourably.

The NCLT approved the resolution plan submitted by Respondent No. 3 by an order dated 18 April 2018. A direction was also given that the resolution plan shall come into force with immediate effect. The appellant challenged the order passed by the NCLT before the NCLAT. After hearing the parties, the order passed by the adjudicating authority was confirmed, dismissing the appeal filed by the appellant while approving the revised resolution plan submitted by the Respondent No.3 before NCLAT. Aggrieved by the decision of the NCLAT, the appellant challenged the same before the Hon'ble Supreme Court.

Submissions of the Appellant:

- Respondent No.3 (who is a promoter of the corporate debtor) was ineligible to submit a resolution plan under Section 29A(h) of the IBC, as several personal guarantees executed by Respondent No. 3 in favour of various creditors of Respondent No. 1 stood invoked prior to the commencement of CIRP.
- The law which was prevailing on the date of the application had to be taken into account. Therefore, the disqualification in the present case got attracted on the date of filing of the application and on the same analogy not only Section 29(A)(h) but also Section 30(4) has to be interpreted.
- The approval of the resolution plan was made after the mandatory period of 270 days, i.e., after expiry of CIRP period. Since there is a clear infraction of Section 12, all orders passed were liable to be interfered with.

Submissions of the Respondent:

- The revised plan as accepted by NCLAT was an improvement to the earlier one submitted by Respondent No. 3 and, therefore, there could not be any grievance on that count. The object of the IBC had to be read with Section 29A(h) of IBC. The respondents submitted that as such, the appellant was estopped from questioning the eligibility of Respondent No. 3 to submit a resolution plan under Section 29A(h) of the IBC. The provision had to be literally interpreted to the extent that a personal guarantor is barred from submitting a resolution plan only when a creditor invoking the jurisdiction of the adjudicating authority had invoked a personal guarantee executed in favour of the said creditor.
- No personal guarantee stood invoked by RBL Bank at the time of application to the adjudicating authority under Section 7 of the IBC.
- The object of the IBC is to revive a corporate debtor and liquidation in such circumstances is the last resort. It was submitted that Respondent No. 3 had infused over INR 63 crores since the resolution plan was made operational and further received approval of shareholders to raise another INR 300 crores to revive Respondent No. 1.

Decision:

Apex Court observed the following points-

- The need for adopting a purposive interpretation with the primary aim to revive and restart the corporate debtor, with liquidation of the corporate debtor being the last resort was taken note of in Chitra Sharma & Ors. v. Union of India, (2018) 18 SCC 575 and followed in Arun Kumar (supra). (Para 48)
- Once a person executes a guarantee in favour of a creditor with respect to the credit facilities availed by a corporate debtor, and in a case where an application for insolvency resolution has been admitted, with the further fact of the said guarantee having been invoked, the bar qua eligibility would certainly come into play. What the provision requires is a guarantee in favour of 'a creditor'. Once an application for insolvency resolution is admitted on behalf of 'a creditor' then the process would be one of rem, and therefore, all creditors of the same class would have their respective rights at par with each other (Para 52)
- The word "such creditor" in Section 29A(h) has to be interpreted to mean similarly placed creditors after the application for insolvency application is admitted by the adjudicating authority. As a result, what is required to earn a disqualification under the said provision is a mere existence of a personal guarantee that stands invoked by a single creditor, notwithstanding the application being filed by any other creditor seeking initiation of insolvency resolution process. This is subject to further compliance of invocation of the said personal guarantee by any other creditor. (Para 53)
- Yet another issue which requires consideration is to the date of reckoning qua the provision. That is, the date of submission of resolution plan or the date of adjudication by the authority. Having understood the provision and the objective behind it, as well as the Code, it is clear that, if there is a bar at the time of submission of resolution plan by a resolution applicant, it is obviously not maintainable. However, if the submission of the plan is maintainable at the time at which it is filed, and thereafter, by the operation of the law, a person becomes ineligible, which continues either till the time of approval by the CoC, or adjudication by the authority, then the

subsequent amended provision would govern the question of eligibility of resolution applicant to submit a resolution plan. (Para 56)

- Respondent No.3 has executed personal guarantees which were invoked by three of the financial creditors even prior to the application filed. The rigor of Section 29A(h) of the Code obviously gets attracted. The eligibility can never be restricted to the aforesaid three creditors, but also to other financial creditors in view of the import of Section 7 of the Code. In the case at hand, in pursuance to the invocation, an application invoking Section 7 indeed was filed by one such creditor. It was invoked even at the time of submitting a resolution plan by the Respondent No.3. Thus, in the touchstone of our interpretation of Section 29A(h), we hold that the plan submitted by the Respondent No.3 ought not to have been entertained. (Para 58)
- The adjudicating authority and the appellate tribunal were not right in rejecting the contentions of the appellant on the ground that the earlier appeals having been withdrawn without liberty, the issue qua eligibility cannot be raised for the second time. Admittedly, the appellant was not a party to the decision of the adjudicating authority on the first occasion, in the appeal the appellant merely filed an application for impleadment. (Para 59)
- We need to take note of the interest of over 23,000 shareholders and thousands of employees of the Respondent No.1. Now, about Rs. 300 crores have also been approved by the shareholders to be raised by the Respondent No.1. It is stated that about Rs. 63 crores have been infused into the Respondent No.1 to make it functional. There are many on-going projects of public importance undertaken by the Respondent No.1 in the nature of construction activities which are at different stages. (Para 63)

Hon'ble Supreme Court held that –

We remind ourselves of the ultimate object of the Code, which is to put the corporate debtor back on the rails. Incidentally, we also note that no prejudice would be caused to the dissenting creditors as their interests would otherwise be secured by the resolution plan itself, which permits them to get back the liquidation value of their respective credit limits. Thus, on the peculiar facts of the present case, we do not wish to disturb the resolution plan leading to the on-going operation of the Respondent No.1.

Hon'ble Supreme Court disposed the appeal with above observations.

SECTION 30 & 62

CASE NO. 12

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

India Resurgence ARC Private Limited (Appellant(s))

Vs.

M/s. Amit Metaliks Limited & Anr. (Respondent(s))

CIVIL APPEAL NO. 1700 OF 2021

Date of Order: 13-05-2021

Section 30(2)(b), Section 30(4) and Section 62 of The Insolvency and Bankruptcy Code, 2016

The Apex Court in this judgement has held that the dissenting financial creditors cannot question approval of resolution plan merely on account of the value of security charged to them being more that the amount being provided to them under the resolution plan approved by CoC.

Facts:

By this appeal under Section 62 of the Insolvency and Bankruptcy Code, 2016, the Appellant sought to question the order dated 02.03.2021 passed by the Hon'ble NCLAT, New Delhi in CA(AT) (Insolvency) No. 1061 of 2020, whereby the Appellate Authority rejected its challenge to the order dated 20.10.2020 passed by the Hon'ble NCLT, Kolkata in approval of the resolution plan in the corporate insolvency resolution process concerning the Corporate Debtor as submitted by the resolution applicant.

The appellant company is said to be the assignee of the rights, title and interest carried as secured financial creditor of the corporate debtor, having 3.94% of voting share in the Committee of Creditors ("CoC").

When the resolution plan submitted was taken up for consideration by the CoC, the appellant expressed reservations on the share being proposed, particularly with reference to the value of the security interest held by it and chose to remain a dissentient financial creditor.

But, a substantial majority of other financial creditors voted in favour of the resolution plan and the resolution plan got the approval of 95.35% of voting share of the financial creditors.

The resolution plan as approved by CoC was submitted for approval by the resolution professional to the Adjudicating Authority (AA). The Adjudicating Authority examined, inter alia, the salient features of resolution plan, particularly those concerning financial proposals; and found the plan to be feasible and viable with judicious distribution of financial bids by CoC to the stakeholders according to their entitlements as also being compliant of all the mandatory requirements and the resolution plan was approved by AA vide order dated 20.10.2020. The appellant then preferred an appeal under Section 61(1) read with Section 61(3) of the Code. It was contended on behalf of the appellant, in its capacity as a dissenting financial creditor, that the approved resolution plan failed the test of being 'feasible and viable' inasmuch as the value of the secured asset, on which security interest was created by the corporate debtor in its favour, was not taken into consideration. It was contended by the appellant that after the amendment to sub-section (4) of Section 30 of the Code, which came into effect from 16.08.2019, the CoC was to ensure that the manner of distribution takes into account the order of priority among the creditors as also the priority and value of the security interest of a secured creditor.

The Appellate Authority took note of the submissions made by appellant and referred to the decision of the Hon'ble Supreme Court in the case of **Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Ors. (2020) 8 SCC 531 ("Essar Judgement")** and particularly referred to the passages explaining the meaning and contours of the concept of equitable treatment of creditors, including the observations that equitable treatment of creditors meant equitable treatment only within the same class; and that protection of creditors in general was important but it was also imperative that the creditors be protected from each other; and further that the Code should not be read so as to imbue the creditors with greater rights in a bankruptcy proceeding than they would enjoy under the general law, unless it is to serve some bankruptcy purpose.

The Appellate Authority having taken note of the principles expounded in Essar Judgement rejected the contentions of the appellant.

Seeking to question the decision of the Appellate Authority, the main plank of submissions of learned counsel for the appellant before Hon'ble Supreme

Court revolved around Section 30(4) of Code. It was contended that the CoC could not have approved the resolution plan which failed to consider the priority and value of security interest of the creditors while deciding the manner of distribution to each creditor even though the legislature in its wisdom has amended Section 30(4) of the Code, requiring the CoC to take into account the order of priority amongst creditors as laid down in Section 53(1) of the Code, including the priority and value of the security interest of a secured creditor. Appellant contended that against total admitted claim of over INR 13.38 crores, the resolution applicant had offered the appellant a meagre amount of about INR 2.026 crores without even considering the valuation of the security held by the appellant, which admittedly had the valuation of more than INR 12 crores.

Question:

The Apex Court was faced primarily with the following question:

- Whether if a dissenting financial creditor, in context of resolution plan, is having a security available with him, would be entitled to enforce the entire of security interest or to receive the entire value of the security available with him?

Decision:

The Court held that as regards the process of consideration and approval of resolution plan, it is now beyond a shadow of doubt that the matter is essentially that of the commercial wisdom of Committee of Creditors and the scope of judicial review remains limited within the four-corners of Section 30(2) of the Code for the Adjudicating Authority; and Section 30(2) read with Section 61(3) for the Appellate Authority.

The Court held that financial proposal in the resolution plan forms the core of the business decision of Committee of Creditors. Once it is found that all the mandatory requirements have been duly complied with and taken care of, the process of judicial review cannot be stretched to carry out quantitative analysis qua a particular creditor or any stakeholder, who may carry his own dissatisfaction. In other words, in the scheme of IBC, every dissatisfaction does not partake the character of a legal grievance and cannot be taken up as a ground of appeal.

The Court stated that purport and effect of the amendment to sub-section (4) of Section 30 of the Code, by way of subclause (b) of Section 6 of the Amending Act of 2019, was explained by this Court in Essar Judgement, as

duly taken note of by the Appellate Authority. The Court stated that the NCLAT was right in observing that such amendment to sub-section (4) of Section 30 only amplified the considerations for the Committee of Creditors while exercising its commercial wisdom so as to take an informed decision in regard to the viability and feasibility of resolution plan, with fairness of distribution amongst similarly situated creditors; and the business decision taken in exercise of the commercial wisdom of CoC does not call for interference unless creditors belonging to a class being similarly situated are denied fair and equitable treatment.

The Court went through the financial proposal in the resolution plan. It found that the proposal for payment to all the secured financial creditors (all of them ought to be carrying security interest with them) is equitable and the proposal for payment to the appellant is at par with the percentage of payment proposed for other secured financial creditors. No case of denial of fair and equitable treatment or disregard of priority is made out. The repeated submissions on behalf of the appellant with reference to the value of its security interest neither carry any meaning nor any substance.

It was held that the amount to be paid to different classes or subclasses of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.

The Court further held that in case a valid security interest is held by a dissenting financial creditor, the entitlement of such dissenting financial creditor to receive the amount could be satisfied by allowing him to enforce the security interest, to the extent of the value receivable by him and in the order of priority available to him. The Court clarified that by enforcing such a security interest, a dissenting financial creditor would receive payment to the extent of his entitlement and that would satisfy the requirement of Section 30(2)(b) of the Code.

The Court observed that the extent of value receivable by the appellant is distinctly given out in the resolution plan which is in the same proportion and percentage as provided to the other secured financial creditors with reference to their respective admitted claims. It has not been the intent of the legislature that a security interest available to a dissenting financial creditor over the assets of the corporate debtor gives him some right over and above

other financial creditors so as to enforce the entire of the security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors.

It was held that if the propositions suggested on behalf of the appellant were to be accepted, the result would be that rather than insolvency resolution and maximisation of the value of assets of the corporate debtor, the processes would lead to more liquidations, with every secured financial creditor opting to stand on dissent. Such a result would be defeating the very purpose envisaged by the Code; and cannot be countenanced.

The Court held that the submissions made on behalf of the appellant do not merit acceptance and are required to be rejected. The appeal was thus dismissed.

SECTION 60

CASE NO. 13

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

TATA Consultancy Services Limited (Appellant)

Vs.

Vishal Ghisulal Jain, Resolution Professional,
SK Wheels Private Limited (Respondent)

CIVIL APPEAL NO. 3045 of 2020

Date of Order: 23-11-2021

Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016

Whether the NCLT can exercise its residuary jurisdiction under Section 60(5)(c) of the IBC to adjudicate upon the contractual dispute between the parties.

Facts:

This appeal arises from a judgment dt. 24th June 2020 of the National Company Law Appellate Tribunal. The NCLAT upheld the interim order of the National Company Law Tribunal which stayed the termination by the appellant of its Facilities Agreement with corporate debtor.

The appellant and the Corporate Debtor entered into a Build Phase Agreement followed by a Facilities Agreement. The Facilities Agreement obligated the Corporate Debtor to provide premises with certain specifications and facilities to the appellant for conducting examinations for educational institutions.

One of the clauses of the Facilities Agreement stated that either party was entitled to terminate the agreement immediately by written notice to the other party provided that a material breach committed by the latter was not cured within thirty days of the receipt of the notice.

It was submitted by the appellant that there were multiple lapses by the Corporate Debtor in fulfilling its contractual obligations, which it failed to remedy satisfactorily. A termination notice was issued by the appellant to the Corporate Debtor on 10 June 2019.

The Corporate Insolvency Resolution Process was initiated against the Corporate Debtor on 29 March 2019.

The Corporate Debtor instituted a miscellaneous application before the NCLT under Section 60(5)(c) of the IBC for quashing of the termination notice. The NCLT passed an order granting an ad-interim stay on the termination notice issued by the appellant and directed the appellant to comply with the terms of the Facilities Agreement. The NCLT observed that prima facie it appeared that the contract was terminated without serving the requisite notice of thirty days. The NCLT concluded that whether the termination is good or bad in law, is a matter of inquiry, which requires examination of the fact and circumstances. In this scenario, the termination of the contract even without serving a notice to the corporate debtor was not correct. In view of the same, it hereby stayed the termination notice issued by the respondent. Until then the respondent shall adhere to the terms of contract without fail.

Aggrieved by the order, the appellant preferred an appeal before the NCLAT. The NCLAT by its order upheld the order of the NCLT observing that it had correctly stayed the operation of the termination notice since the main objective of the IBC is to ensure that the Corporate Debtor remains a going concern. The NCLAT referred to Section 14 to highlight that a moratorium is imposed to ensure the smooth functioning of the Corporate Debtor to safeguard its status as a going concern. Further, it is the responsibility of the RP under Section 25 of the IBC to preserve the Corporate Debtor as a going concern.

The submissions of the Appellant included the following before the Supreme Court that

(i) The provisions of Section 14 of the IBC have been misread which relate to the provision of goods and services to the Corporate Debtor once the moratorium is imposed. In the present case, the appellant is availing of the services of the Corporate Debtor, to which Section 14 has no Application.

(ii) As a result of the impugned order, the Facilities Agreement, which is a determinable contract has become a non-terminable contract, overlooking the mandate of Section 14 of the Specific Relief Act 1963.

(iii) The termination notice was not issued to the Corporate Debtor because it was undergoing CIRP but was on account of the material breaches of the agreement.

(iv) The NCLT under Section 60 (5) (c) of the IBC cannot invoke its residuary powers where there is a patent lack of jurisdiction. IBC does not permit a statutory override of all contracts entered with the Corporate Debtor. A third party has a contractual right of termination.

(v) The duty of the RP under Section 25 of the IBC is not determinative of the jurisdiction of the NCLT. Such a duty cannot be stretched to convert a determinable commercial contract into a non-terminable contract, forcing a contracting party to pay for deficient services that it is unwilling to avail.

Based on the appeal, two issues have arisen for consideration before the Hon'ble Supreme Court:

(i) Whether the NCLT can exercise its residuary jurisdiction under Section 60(5)(c) of the IBC to adjudicate upon the contractual dispute between the parties; and

(ii) Whether in the exercise of such a residuary jurisdiction, it can impose an ad-interim stay on the termination of the Facilities Agreement.

Decision:

Hon'ble Supreme Court observed that -

- The Facilities Agreement provides that any dispute between the parties relating to the agreement could be the subject matter of arbitration. However, the Facilities Agreement being an 'instrument' under Section 238 of the IBC can be overridden by the provisions of the IBC. In terms of Section 238 and the law laid down by this Court, the existence of a clause for referring the dispute between parties to arbitration does not oust the jurisdiction of the NCLT to exercise its residuary powers under Section 60(5)(c) to adjudicate disputes relating to the insolvency of the Corporate Debtor.
- Reliance was placed on the judgment of this Court in Embassy Property Developments (Private) Limited v. State of Karnataka, where this Court held that the duties of the RP are entirely different from the jurisdiction and powers of the NCLT. While the duty of the RP and the jurisdiction of the NCLT cannot be conflated, in Gujarat Urja (supra), this Court has clarified that the RP can approach the NCLT for adjudication of disputes which relate to the insolvency resolution process. But when the dispute arises dehors the insolvency of the

Corporate Debtor, the RP must approach the relevant competent authority (para 72).

- It was further submitted by the appellant that Section 14 of the IBC was misread, which has no application to the present case. Admittedly, the appellant was neither supplying any goods or services to the Corporate Debtor in terms of Section 14 (2) nor was it recovering any property that was in possession or occupation of the Corporate Debtor as the owner or lessor of such property as envisioned under Section 14 (1) (d). It was availing of the services of the Corporate Debtor and was using the property that had been leased to it by the Corporate Debtor. Thus, Section 14 was not applicable to the present case. However, in Gujarat Urja (supra) it was held that the NCLT's jurisdiction was not limited by Section 14 in terms of the grounds of judicial intervention envisaged under the IBC. It can exercise its residuary jurisdiction under Section 60(5)(c) to adjudicate on questions of law and fact that relate to or arise during an insolvency resolution process.
- The appellant had time and again informed the Corporate Debtor that its services were deficient, and it was falling foul of its contractual obligations. There is nothing to indicate that the termination of the Facilities Agreement was motivated by the insolvency of the Corporate Debtor. The trajectory of events made it clear that the alleged breaches noted in the termination notice were not a smokescreen to terminate the agreement because of the insolvency of the Corporate Debtor. Thus, the NCLT does not have any residuary jurisdiction to entertain the present contractual dispute which has arisen dehors the insolvency of the Corporate Debtor. In the absence of jurisdiction over the dispute, the NCLT could not have imposed an ad-interim stay on the termination notice.
- Even if the contractual dispute arises in relation to the insolvency, a party can be restrained from terminating the contract only if it is central to the success of the CIRP. Crucially, the termination of the contract should result in the corporate death of the Corporate Debtor. However, the order of the NCLT indicates that it has relied upon the procedural infirmity on part of the appellant in the issuance of the termination notice, i.e., it did not give thirty days' notice period to the Corporate Debtor to cure the deficiency in service. The NCLAT, in its impugned

judgment, has averred that the decision of the NCLT preserves the 'going concern' status of the Corporate Debtor but there was no factual analysis on how the termination of the Facilities Agreement would put the survival of the Corporate Debtor in jeopardy.

Accordingly, the Court set aside the judgment of the NCLAT dt. 24th June 2020. The proceedings initiated against the appellant stand dismissed for absence of jurisdiction. The above appeal was disposed of with no order as to costs.

SECTION 60 & 62

CASE NO. 14

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Alok Kaushik (Appellant)

Vs.

Mrs. Bhuvaneshwari Ramanathan and Others. (Respondents)

Civil Appeal No 4065 of 2020

Date of Order: 15-03-2021

Section 60(5) and Section 62 of the Insolvency and Bankruptcy Code, 2016

Where the CIRP was set aside by the Appellate Authority, there has to be within the framework of the IBC, a modality for determining the claim of a professional valuer.

Facts:

The Appeal has been filed by the appellant who was appointed as the Registered Valuer of the Plant and Machinery (P&M) of the Corporate Debtor to undertake the valuation of the P&M at 115 sites of the CD across India.

The significant dates which had a bearing on the proceedings:

- 21 March 2019- NCLT Bengaluru initiated CIRP against the CD
- 26 Aug 2019- First Respondent was appointed as Resolution Professional (RP)
- 16 Sep 2019- First Respondent appointed the appellant as Registered Valuer (RV)
- 09 Dec 2019- Appellant's appointment fee was ratified by COC
- 18 Dec 2019- NCLAT set aside the initiation of CIRP against the CD and remanded back the case to NCLT
- 19 Dec 2019- In view of the order dated 18 December 2019 of the NCLAT, the first respondent cancelled the appointment of the appellant. In relation to the fee payable to the appellant, the first

respondent requested him to consider a waiver. In return, the appellant agreed to reduce his fee by 25% from the fee ratified by the CoC, along with the expenses payable.

- 20 Dec 2019- NCLT decided on the fee of the RP and reduced it by 20% from the fee ratified by the COC.
- 02 March 2020- First respondent informed the appellant that the fee as ratified could not be paid, and paid a sum of Rs 50,000 to the RV.
- 29 June 2020- Appellant filed an application under Section 60(5) of the IBC before the NCLT challenging the non-payment of the fees. However, the NCLT dismissed the application by concluding that it had been rendered functus officio.
- 13 Oct 2020- Appeal was filed to the NCLAT, and it rejected the contention of the appellant, noting that an amount of Rs 50,000 had already been paid over.

Aggrieved by the order of NCLAT, the appellant moved to this Court in an appeal under Section 62 of the IBC.

It was contended by the Appellant that despite the order of the NCLAT, no determination was made by the NCLT of the amount which was due and payable to the appellant for the work which was done as a Registered Valuer, recording that an amount of Rs 50,000 has been paid.

The submission of the appellant was that neither the NCLT nor the NCLAT had considered the professional charges payable to him in his capacity as a registered valuer. According to the appellant, he had completed the valuation of eighty-four sites and undertaken expenses of Rs 52,000 in the valuation exercise.

The real issue which was sought to be canvassed in this appeal was that in a situation such as present, where the CIRP was set aside by the Appellate Authority, there has to be within the framework of the IBC, a modality for determining the claim of a professional valuer such as the appellant, whereas the NCLT came to the conclusion that it was *functus officio* and the NCLAT declined to exercise its appellate jurisdiction.

The Court while passing the order considered the following references:

- expression 'insolvency resolution costs' as defined in Section 5(13) of the IBC

- Regulation 31 of the IRP Regulation which defines IRP costs u/s 5(13)(e) of the IBC
- Regulation 33 of the IRP Regulation which defines costs of the IRP.
- Regulation 34 of the IRP Regulation which defines Resolution Professional Cost.
- Regulation 30A read with Section 12A of the IBC.
- Recent judgment in case of "Gujarat Urja Vikas Nigam Limited vs Amit Gupta and Others"

The Court was of the view that though the CIRP was set aside later, the claim of the appellant as registered valuer related to the period when he was discharging his functions as a registered valuer appointed as an incident of the CIRP and accordingly in such a situation the Adjudicating Authority is sufficiently empowered under Section 60(5)(c) of the IBC to make a determination of the amount which is payable to an expert valuer as an intrinsic part of the CIRP costs.

Further, Regulation 34 of the IRP Regulations defines 'insolvency resolution process cost' to include the fees of other professionals appointed by the RP. The determination as to whether any work has been done as claimed and if so, the nature of the work done by the valuer is purely a factual matter to be assessed by the Adjudicating Authority.

Moreover, the NCLT while dismissing the application of the appellant for the payment of fees, observed that the IBBI is the competent authority to deal with allegations against the RP relating to their failure to discharge statutory duties.

However, the Court is of the view that the availability of a grievance redressal mechanism under the IBC against an insolvency professional does not divest the NCLT of its jurisdiction under Section 60(5)(c) of the IBC to consider the amount payable to the appellant. In any event, the purpose of such a grievance redressal mechanism is to penalize errant conduct of the RP and not to determine the claims of other professionals which form part of the CIRP cost.

Decision:

Therefore, considering all the above matters, the Court allowed the appeal and set aside the impugned judgment and order of the NCLAT dated 13 October 2020.

Accordingly, the proceedings stand remitted back to the NCLT for determining the claim of the appellant for the payment of the professional charges as a Registered Valuer appointed by the RP in pursuance of the initiation of the CIRP.

SECTION 61 & 62

CASE NO. 15

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

V Nagarajan (Appellant)

Vs.

SKS Ispat and Power Ltd.& Ors. (Respondents)

CIVIL APPEAL NO. 3327 OF 2020

Date of Order: 22-10-2021

Section 61 and Section 62 of the Insolvency and Bankruptcy Code, 2016 and Limitation Act, 1963

When will the clock for calculating the limitation period run for appeals filed under the IBC and is the annexing of a certified copy mandatory for an appeal to the NCLAT against an order passed under the IBC.

Facts:

This appeal arises under Section 62 of the Insolvency and Bankruptcy Code 2016 from the judgement of the National Company Law Appellate Tribunal, Delhi. The NCLAT dismissed the appeal as barred by limitation. The appellant had filed an appeal against the National Company Law Tribunal, Chennai order dated 31 December 2019 which had dismissed the appellant's miscellaneous application in a liquidation proceeding, seeking interim relief against the invocation of a bank guarantee by Respondent No.10 against the Corporate Debtor. Respondent No 10 sought to invoke certain bank guarantees issued by the Corporate Debtor for its failure to perform its engineering services. The appellant filed a Miscellaneous Application to resist the invocation of this performance guarantee until the liquidation proceedings are concluded.

On 31 December 2019, the NCLT held that the performance guarantees were not a part of 'Security Interest', as defined under Section 3(31) of the IBC and refused to grant an injunction against the invocation of the bank guarantee until the liquidation proceedings are complete. The appellant stated that a copy of the NCLT's order dated 31 December 2019 was

uploaded on the NCLT website only on 12 March 2020. However, the uploaded order set out the incorrect name of the Judicial member who had passed the order. The corrected order was uploaded on 20 March 2020. Subsequent to the corrected order being uploaded, the appellant claimed to have awaited the issue of a free copy and allegedly sought the free copy on 23 March 2020, under the provisions of Section 420(3) of the Companies Act, 2013 read with Rule 50 of the National Company Law Tribunal Rules, 2016. According to the appellant, the free copy has not been issued till date. The appellant has stated that owing to the lockdown on account of the COVID-19 pandemic, the appeal before the NCLAT was filed on 8 June 2020 with an application for exemption from filing a certified copy of the order as it had not been issued.

The NCLAT'S impugned order dated 13 July 2020, relied on Section 61(2) of the IBC which mandates a limitation period for appeals to be thirty days, extendable by fifteen days, to hold that the appeal filed under Section 61(1) was barred by limitation. It noted that the statutory time limit of thirty days had expired and an application for condonation of delay had not been filed. Rule 22 of the National Company Law Appellate Tribunal Rules provides that every appeal must be accompanied with a certified copy of the impugned order, which had not been annexed in this case. The NCLAT observed that the appellant had not provided any evidence to prove that a certified or free copy had not been issued to him. In any event, the IBC circumscribes the discretion to condone delays up to fifteen days, which had elapsed in this case. Further, it noted that even on merits, there were no grounds for interference since a performance guarantee is explicitly excluded from the ambit of a 'Security interest' which is subject to a moratorium under Section 14 of the IBC. The appellant filed a Civil Appeal against this order of the NCLAT on the question of limitation.

The Appellant claimed that the mere absence of the words "from the date on which a copy of the order of the Tribunal is made available to the person aggrieved" in Section 61(2) of the IBC had no material bearing since an appeal cannot be filed without a copy of the order.

The Respondent contended that Section 61 of the IBC mandates an appeal against any order under the Act to be filed within 30 days, extendable by a maximum period of 15 days. The limitation for challenging the NCLT order dated 31 December 2019 expired on 15 February 2020, even after accounting for the fifteen-day extension which is granted as a matter of

discretion under Section 61(2). Section 61(2) of the IBC does not state that limitation is to be applicable from the date of the order being 'made available', as against Section 421(3) of the Companies Act. Special Acts override general enactments. In any event, "made available" does not imply that parties can indefinitely wait until a free certified copy is provided to them. A timely application for a certified copy has to be filed. It is undisputed that NCLT's order dated 31 December 2019 was dictated and pronounced in open court, where the appellant was present.

The respondent further contended that Section 12 of the Limitation Act is clear in prescribing that the limitation period can be ascertained only after an application for a certified copy of the judgement or order is filed within the limitation period, in order to not be declared as time barred. The time period of limitation can either be calculated from the date of the order, 31 December 2019 in this case, or from the date of filing an application for a certified copy of the said order. In the absence of compliance with either, any appeal will be deemed as barred by limitation.

Also, the appellant should have either waited to receive the free certified copy from the NCLT as per Section 420(3) of the Companies Act or applied for a certified copy within the limitation period. The appellant cannot be allowed to selectively take shelter under one provision. Rule 22 of the NCLAT Rules prescribes that an appeal has to be accompanied with a certified copy of the order. The appellant did not file for a certified copy of the NCLT order. Yet, the appellant instituted its appeal before the NCLAT on the basis of an online copy without an application seeking exemption from filing a certified copy or an application seeking condonation of delay.

Questions that arose in the appeal were as follows-

1. When will the clock for calculating the limitation period run for appeals filed under the IBC; and
2. Is the annexing of a certified copy mandatory for an appeal to the NCLAT against an order passed under the IBC.

Decision:

Hon'ble Supreme Court observed –

- *"The IBC is a complete code in itself and over-rides any inconsistencies that may arise in the application of other laws. Section 61 of the IBC, begins with a non-obstante provision - "notwithstanding*

anything to the contrary contained under the Companies Act, 2013" when prescribing the right of an aggrieved party to file an appeal before the NCLAT along within the stipulated period of limitation. The notable difference between Section 421(3) of the Companies Act and Section 61(2) of the IBC is in the absence of the words "from the date on which a copy of the order of the Tribunal is made available to the person aggrieved" in the latter. The absence of these words cannot be construed as a mere omission which can be supplemented with a right to a free copy under Section 420(3) of the Companies Act read with Rule 50 of the NCLT Rules for the purposes of reckoning limitation. This would ignore the context of the IBC's provisions and the purpose of the legislation."

- *The law on limitation with respect to the IBC is settled and emphatic in its denunciation of delays. The power to condone delay is tightly circumscribed and conditional upon showing sufficient cause, even within the period of delay which is capable of being condoned.*

Hon'ble Supreme Court further observed that the answers to the two issues arising in the case must be based on a harmonious interpretation of the applicable legal regime, given that the IBC is a Code in itself and has overriding effect.

Hon'ble Supreme Court held that –

- *Sections 61(1) and (2) of the IBC consciously omit the requirement of limitation being computed from when the "order is made available to the aggrieved party", in contradistinction to Section 421(3) of the Companies Act. Owing to the special nature of the IBC, the aggrieved party is expected to exercise due diligence and apply for a certified copy upon pronouncement of the order it seeks to assail, in consonance with the requirements of Rule 22(2) of the NCLAT Rules. Section 12(2) of the Limitation Act allows for an exclusion of the time requisite for obtaining a copy of the decree or order appealed against. It is not open to a person aggrieved by an order under the IBC to await the receipt of a free certified copy under Section 420(3) of the Companies Act 2013 read with Rule 50 of the NCLT and prevent limitation from running. Accepting such a construction will upset the timely framework of the IBC. The litigant has to file its appeal within thirty days, which can be extended up to a period of fifteen days, and no more, upon showing sufficient cause. A sleight of interpretation of*

procedural rules cannot be used to defeat the substantive objective of a legislation that has an impact on the economic health of a nation. (Para 21)

- *On the second question, Rule 22(2) of the NCLAT Rules mandates the certified copy being annexed to an appeal, which continues to bind litigants under the IBC. While it is true that the tribunals, and even this Court, may choose to exempt parties from compliance with this procedural requirement in the interest of substantial justice, as re-iterated in Rule 14 of the NCLAT Rules, the discretionary waiver does not act as an automatic exception where litigants make no efforts to pursue a timely resolution of their grievance. The appellant having failed to apply for a certified copy, rendered the appeal filed before the NCLAT as clearly barred by limitation. (Para 22)*
- *The appellant was present before the NCLT on 31 December 2019 when interim relief was denied and the miscellaneous application was dismissed. The appellant has demonstrated no effort on his part to secure a certified copy of the said order and has relied on the date of the uploading of the order (12 March 2020) on the website. The period of limitation for filing an appeal under Section 61(1) against the order of the NCLT dated 31 December 2019, expired on 30 January 2020 in view of the thirty-day period prescribed under Section 61(2). Any scope for a condonation of delay expired on 14 February 2020, in view of the outer limit of fifteen days prescribed under the proviso to Section 61(2). The lockdown from 23 March 2020 on account of the COVID-19 pandemic and the suo motu order of this Court has had no impact on the rights of the appellant to institute an appeal in this proceeding and the NCLAT has correctly dismissed the appeal on limitation. Accordingly, the present appeal under Section 62 of the IBC stands dismissed. (Para 23)*

SECTION 62

CASE NO. 16

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

SUNDARESH BHATT,

LIQUIDATOR OF ABG SHIPYARD (Appellants)

Vs.

CENTRAL BOARD OF INDIRECT (Respondent(s))

TAXES AND CUSTOMS

CIVIL APPEAL No. 7667 of 2021

Date of Order: 26.08.2022

Section 62(1) of the Insolvency and Bankruptcy Code, 2016

Whether the provisions of the IBC would prevail over the Customs Act, and if so, to what extent? And whether the respondent could claim title over the goods and issue notice to sell the goods in terms of the Customs Act when the liquidation process has been initiated?

Facts:

The present Civil Appeal under Section 62(1) of the Insolvency and Bankruptcy Code, 2016 ("IBC") arises out of the impugned judgment passed by the National Company Law Appellate Tribunal, New Delhi ("NCLAT"), that allowed the appeal filed by the respondent against the order of the National Company Law Tribunal whereby the Adjudicating Authority directed the release of certain goods lying in the Customs Bonded Warehouses without payment of custom duty and other levies.

Corporate Debtor used to regularly import various materials for the purpose of constructing ships which were to be exported on completion and some of these goods were stored in Custom Bonded Warehouses. The Corporate Debtor also took the benefit of an Export Promotion Capital Goods Scheme and was granted a license. Later, the National Company Law Tribunal, ("NCLT") passed an order commencing the Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor and declared a moratorium under Section 13(1)(a) of the IBC and the appellant was appointed as the

Interim Resolution Professional. The appellant informed Respondent of the initiation of CIRP.

Thereafter, the NCLT passed an order commencing liquidation against the Corporate Debtor under Section 33(2) of the IBC and a fresh direction was passed under Section 33(5) of the IBC, barring the institution of any suit or legal proceeding by or against the Corporate Debtor. Further, the appellant was appointed as the liquidator.

The appellant informed the respondent about liquidation proceedings and that the goods were to be released to the appellant. Due to inaction by the respondent, the appellant filed an appeal before the NCLT under Section 60(5) of the IBC seeking a direction against the Respondent to release the warehoused goods belonging to the Corporate Debtor. At this juncture, the respondent issued a notice to the Corporate Debtor under Section 72(1) of the Customs Act for custom dues and filed a concurrent claim for the said amount before the appellant under the IBC. The NCLT allowed the appeal of the appellant and held that the non-obstante clause in the IBC, being part of a subsequent law, shall have overriding effect on proceedings under the Customs Act.

Further to this, the respondent filed an appeal before NCLAT challenging the order passed by the NCLT which was allowed by the NCLAT. The NCLAT held that the Customs Act is a complete Code which provides that warehoused goods cannot be released until the import duties are paid and the goods in question were imported prior in time to the initiation of the CIRP.

Aggrieved by the judgment, the appellant has filed the Civil Appeal in the Hon'ble Supreme Court against the impugned judgment and submitted that the respondent, by issuing notice under Section 72 of the Customs Act and filing its claim with the liquidator, has admitted that the Corporate Debtor is the owner. Neither Sections 72 nor 48 of the Customs Act signifies any transfer to the respondent and the respondent's custody of the Corporate Debtor's goods is in violation of Sections 14 and 33 of the IBC and by submitting claims under Section 38 of the IBC, the respondent has elected to subject its dues to be governed by IBC, and more specifically, to the distribution matrix provided under Section 53 of the IBC.

The Respondent contended that despite receipt of various demand notices by the respondent, the Corporate Debtor did not clear the goods and hence the same are liable to be sold by the respondent under the Customs Act and

the liquidator can take into his possession only the assets of the Corporate Debtor as under Section 35(1)(b) of the IBC and the warehoused goods cannot be termed as assets of the Corporate Debtor, until and unless the same are legally cleared from the warehouses upon payment of relevant dues and duties. It was further submitted that the claim was filed by the respondent only to realize its dues, and hence cannot be viewed as a relinquishment or abandonment of its rights.

The two important Questions which arise for consideration of the Hon'ble Apex Court are:

a) Whether the provisions of the IBC would prevail over the Customs Act, and if so, to what extent?

b) Whether the respondent could claim title over the goods and issue notice to sell the goods in terms of the Customs Act when the liquidation process has been initiated?

Decision

The Apex Court observed that the Customs Act and the IBC act in their own spheres and in case of any conflict, the IBC overrides The Customs Act.

Before any goods can be declared to have been "abandoned", the same must be adjudged by some authority after due notice and in the present case no such adjudication or notice has been placed on record. There was no "abandonment of goods" which would authorize the Customs Authorities to initiate the adjudicatory process to transfer title to themselves.

Once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the respondent authority only has a limited jurisdiction to assess/determine the quantum of customs duty and other levies. The respondent authority does not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act.

After such assessment, the respondent authority has to submit its claims (concerning customs dues/operational debt) in terms of the procedure laid down, in strict compliance of the time periods prescribed under the IBC, before the adjudicating authority.

In any case, the IRP/RP/liquidator can immediately secure goods from the respondent authority to be dealt with appropriately, in terms of the IBC.

The Hon'ble Supreme Court allowed the Appeal and set aside the impugned order and judgment of the NCLAT.

CASE NO. 17

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

VIDARBHA INDUSTRIES POWER LIMITED (Appellant)

Vs.

AXIS BANK LIMITED (Respondent)

CIVIL APPEAL NO. 4633 OF 2021

Date of Order: 12.07.2022

Section 62 of the Insolvency and Bankruptcy Code, 2016

Whether Section 7(5)(a) is a mandatory or a discretionary provision and the expression 'may' to be construed as 'shall', having regard to the facts and circumstances of the case.

Facts:

The appeal was filed under Section 62 of the Insolvency and Bankruptcy Code 2016 ("**IBC**") against an order passed by the Hon'ble National Company Law Appellate Tribunal ("**NCLAT**") whereby the Tribunal refused to stay the proceedings initiated by the Financial Creditor against the Appellant for initiation of the Corporate Insolvency Resolution Process ("**CIRP**") under Section 7 of the IBC.

The Appellant (Corporate Debtor) is a Power Generating Company as per Electricity Act, 2003. The Corporate Debtor filed an application before Maharashtra Electricity Regulatory Commission (MERC) for determination of the tariff chargeable and MERC disposed the case by disallowing substantial portion of the actual fuel costs claimed by the Appellant and capped the tariff.

Being aggrieved by the order of MERC the Appellant filed an appeal before the Appellate Tribunal for Electricity ('APTEL'). The APTEL allowed the appeal of the Appellant and the Appellant claimed that a sum of approx. Rs. 1,730 Crores is due to it in terms of the order of APTEL. The Appellant filed an application before the MERC for implementation of the directions contained in the order of APTEL. However, the MERC filed a Civil Appeal before the Supreme Court challenging the order of APTEL which is pending in the Hon'ble Supreme Court.

Financial Creditor of the Appellant filed an application under Section 7(2) of the IBC before the National Company Law Tribunal (NCLT) for initiation of CIRP against the Appellant. The Appellant filed a Miscellaneous Application seeking stay of proceedings under Section 7 of the IBC in the NCLT and NCLT refused to stay the CIRP initiated against the Appellant. NCLT opined that satisfaction on two aspects, i.e., existence of debt and default by the corporate debtor, are sufficient to trigger CIRP against a corporate debtor. Then Appellant filed an appeal before the NCLAT, against the aforesaid order and the same was dismissed.

Appellant contended that -

- They had applied for stay of the proceedings before the Hon'ble NCLT in extraordinary circumstances where the Appellant had not been able to pay the dues of the Respondent, only because an appeal was pending and considering the special nature of the business of the Appellant of production of electricity and tariff whereof is regulated by MERC and APTEL, the application under Section 7 of the IBC should not have been admitted against the Appellant.
- The word used in Section 7(5)(a) of the IBC is 'may', which must be interpreted to say that it is not mandatory for the NCLT to admit an application in each and every case, where there is existence of a debt. If legislature had intended that an application must be admitted upon existence of a debt, then the terminology used in Section 7(5)(a) of IBC would have been 'shall' and not 'may'. A conjoint reading of Section 7(5)(a) of the IBC with Rule 11 of the NCLT Rules 2016, makes it abundantly clear that NCLT, on examining the existence of debt and its default, by a Corporate Debtor, has the discretion to admit or not admit an application for initiation of CIRP.

Respondent submitted that -

- Section 7(5)(a) of the IBC casts a mandatory obligation on the NCLT to admit an application of the Financial Creditor, under Section 7(2), once it was found that a Corporate Debtor had committed default in repayment of its dues to the Financial Creditor. In this case, there was no dispute that the Appellant had defaulted in payment of its dues to the Respondent Financial Creditor and the Adjudicating Authority was obliged to admit the application under Section 7 of the IBC in terms of Section 7(5)(a) of the IBC.

- The object of the IBC was to provide a framework for expeditious and time bound insolvency resolution. Section 7(5)(a) of the IBC had, therefore, necessarily to be construed as mandatory in the light of the objects of the IBC.

The only question in the appeal was, whether Section 7(5)(a) is a mandatory or a discretionary provision. In other words, is the expression 'may' to be construed as 'shall', having regard to the facts and circumstances of the case.

Decision

Apex Court observed that-

- The question is whether an award of the APTEL in favour of the Corporate Debtor, can completely be disregarded by the Adjudicating Authority (NCLT), when it is claimed that, in terms of the Award, a sum of approx. Rs.1,730 crores, that is, an amount far exceeding the claim of the Financial Creditor, is realisable by the Corporate Debtor and Hon'ble Supreme Court held that it can't be disregarded completely.
- NCLT had to consider relevant factors including the feasibility of initiation of CIRP, against an electricity generating company operated under statutory control, the impact of MERC's appeal, pending in this Court, order of APTEL and the overall financial health and viability of the Corporate Debtor under its existing management.
- The meaning and intention of Section 7(5)(a) of the IBC is to be ascertained from the phraseology of the provision in the context of the nature and design of the IBC and there is need to consider the effect of the provision being construed as directory or discretionary.
- The Legislature used 'may' in Section 7(5)(a) of the IBC but a different word, that is, 'shall' in the otherwise almost identical provision of Section 9(5)(a) shows that 'may' and 'shall' in the two provisions are intended to convey a different meaning. Normally, the term "*may"* is indicative. In contrast, the term "*shall*" imply a necessary duty. The usage of the word "*shall*" imply that a provision is mandatory. However, additional elements such as the scope of the statute and the consequences of the construction may rebut the *prima facie* inference that the provision is mandatory. Therefore, apparent that Legislature intended Section 9(5)(a) of the IBC to be mandatory and Section 7(5)(a) of the IBC to be discretionary. Section 7(5)(a) of the IBC,

therefore, confers discretionary power on the Adjudicating Authority (NCLT) to admit an application of a Financial Creditor under Section 7 of the IBC for initiation of CIRP. It is also pertinent to note that Section 7(5)(a) of IBC is applicable to the Financial Creditors and Section 9(5)(a) is applicable to the Operational Creditors. Non-payment of admitted dues may have significantly more serious consequences for an Operational Creditor than for a Financial Creditor. The differentiation between both is a legislature-conscious choice.

- The question of time bound initiation and completion of CIRP could only arise if the companies were bankrupt or insolvent and not otherwise. Moreover, the timeline starts ticking only from the date of admission of the application for initiation of CIRP and not from the date of filing the same. CIRP commences on the date of admission of the application for initiation of CIRP and not the date of filing thereof. There is no fixed time limit within which an application under Section 7 of the IBC has to be admitted.

The appeal was allowed, and the order passed by the Adjudicating Authority (NCLT) and the Appellate Authority (NCLAT) dismissing the appeal of the Appellant are set aside. The Court held that NCLT shall re-consider the application of the Appellant for stay of further proceedings on merits in accordance with law.

CASE NO. 18

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

E S Krishnamurthy & Ors (Appellant (s))

Vs.

M/s Bharath Hi Tech Builders Pvt. Ltd. (Respondent(s))
CIVIL APPEAL NO. 3325 OF 2020

Date of Order: 14-12-2021

Section 62 of the Insolvency and Bankruptcy Code, 2016

Whether the NCLT and the NCLAT were correct in their approach of rejecting the appellants" petition under Section 7 of the IBC at the "pre-admission stage", and directing them to settle with the respondent.

Facts:

This Appeal under Section 62 of the Insolvency and Bankruptcy Code, 2016 (IBC) was against a judgment dated 30th July 2020 passed by the National Company Law Appellate Tribunal (NCLAT) which upheld an order dated 28th February 2020 of the National Company Law Tribunal ("NCLT"), wherein the NCLT declined to admit Section 7 petition filed by Appellants for initiating CIRP and instead directed the respondent to settle the claims within three months. The NCLAT found no merit in the appeal against the NCLT's order.

The Respondent and the Corporate Debtor had entered into a "Master Agreement to Sell" followed by a "Syndicate Loan Agreement" with to secure funds for the development of an 100 acres of agricultural land by selling plots to prospective buyers and acquiring loans from prospective lenders. In 2019, a number of appellants filed a Section 7 application before the NCLT, Bengaluru due to the Respondent defaulting in making the repayment of an amount of approximately Rs. 33 Crore.

NCLT Proceeding

In the proceedings before NCLT, the tribunal initially adjourned the proceedings on the ground that the parties were attempting to resolve the dispute. Tribunal further granted requests of extension of time to the Respondent to settle the dispute. Thereafter, Respondent filed a memo before the NCLT stating that it had reached a settlement with 140 investors. According to the apellants, out of 83 petitioners who were before the Adjudicating Authority in the petition, a settlement had been arrived at only with 13 petitioners. There was, in other words, no settlement with the other 70 petitioners before the NCLT. The NCLT vide Order dated 28 February 2020 disposed the petition while relying on the following factors:

i. that Respondent's efforts to settle the dispute were bona fide, as evinced by the fact that they had already settled with 140 investors, including 13 petitioners before it;

ii. the settlement process was underway with 40 other petitioners;

iii. the procedure under the IBC was summary in nature, and could not be used to individually manage the case of each of the 83 petitioners before it; and

iv. initiation of CIRP in respect of the Respondent would put in jeopardy the interests of home buyers and creditors, who have invested in the Respondent's project, which was in advanced stages of completion.

The NCLT further directed the Respondent to settle the remaining claims as expeditiously as possible, but not later than 3 months, and communicate this decision to all the concerned parties. It further directed that if the remaining petitioners, were aggrieved by the settlement process of the Corporate Debtor, they would be at liberty to approach NCLT again, in accordance with law.

NCLAT Proceeding:

The Order of NCLT was challenged in appeal before the NCLAT by 7 of the original petitioners, along with certain other allottees who were not original petitioners before the NCLT. By its impugned judgment 30 July 2020, the NCLAT dismissed the appeal and upheld the order of NCLT.

Questions that arose before the Hon'ble Supreme Court were:

- Whether the NCLT and the NCLAT were correct in their approach of rejecting the appellants" petition under Section 7 of the IBC at the "pre-admission stage" and directing them to settle with the respondent within 3 months.

Contention of Parties

Appellant: The main contentions of the Appellants were that the Appellate Authority as well as the Adjudicating Authority have acted beyond the scope of their jurisdiction under the IBC, and thus their orders are liable to be set aside since they were coram non judice and that the impugned orders are contrary to the mandate of Section 7 of the IBC.

Respondent: The main contentions of the Respondents were that the Appeal was filed to obviate the procedural requirements of Section 7 of the IBC, to arm twist the Respondent rather than to take settlement offered. The respondent should not be pushed to insolvency merely because a few of its alleged creditors are not willing to settle.

Decision:

Apex Court observed the following points-

- *The Adjudicating Authority is empowered only to verify whether a default has occurred or if a default has not occurred. Based upon its decision, the Adjudicating Authority must then either admit or reject an application respectively. These are the only two courses of action which are open to the Adjudicating Authority in accordance with Section 7(5). The Adjudicating Authority cannot compel a party to the proceedings before it to settle a dispute. (Para 27)*

- *As the Statement of Objects and Reasons accompanying the introduction of the Bill indicates, the objective of the IBC is to facilitate insolvency resolution "in a time bound manner" for maximization of the value of assets, promotion of entrepreneurship, ensuring the availability of credit and balancing the interest of all stakeholders. What the Adjudicating Authority and Appellate Authority, however, have proceeded to do in the present case is to abdicate their jurisdiction to decide a petition under Section 7 by directing the respondent to settle the remaining claims within three months and leaving it open to the original petitioners, who are aggrieved by the settlement process, to move fresh proceedings in accordance with law. Such a course of action is not contemplated by the IBC. (Para 28)*
- *The IBC is a complete code in itself. The Adjudicating Authority and the Appellate Authority are creatures of the statute. Their jurisdiction is statutorily conferred. The statute which confers jurisdiction also structures, channelizes, and circumscribes the ambit of such jurisdiction. Thus, while the Adjudicating Authority and Appellate Authority can encourage settlements, they cannot direct them by acting as courts of equity. (Para 29)*
- *The Apex Court further reinforced its earlier decision in Pratap Technocrats (P) Ltd. and Others v. Monitoring Committee of Reliance Infratel Limited and Another ("Pratap Technocrats") wherein it was held, "that the jurisdiction of the Adjudicating Authority and the Appellate Authority cannot extend into entering upon merits of a business decision made by a requisite majority of the CoC in its commercial wisdom. Nor is there a residual equity-based jurisdiction in the Adjudicating Authority or the Appellate Authority to interfere in this decision, so long as it is otherwise in conformity with the provisions of the IBC and the Regulations under the enactment…. It needs no emphasis that neither the Adjudicating Authority nor the Appellate Authority have an uncharted jurisdiction in equity. The jurisdiction arises within and as a product of a statutory framework."*

Hon'ble Supreme Court held that –

- *we have come to the conclusion that the order of the Adjudicating Authority, and the directions which eventually came to be issued, suffered from an abdication of jurisdiction.*

Hon'ble Supreme Court set aside the impugned judgment of NCLAT and restored petition under Section of IBC to the NCLT for disposal afresh.

CASE NO. 19

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Dena Bank (now Bank of Baroda) (Appellant (s))

Vs.

C. Shivakumar Reddy and Anr (Respondent(s))

CIVIL APPEAL NO. 1650 OF 2020

Date of Order: 04-08-2021

Section 62 of the Insolvency and Bankruptcy Code, 2016 and Limitation Act,1963

Offer of OTS, Balance Sheet and Financial statements constitute acknowledgement of liability – Judgement or Decree passed by DRT/court or issuance of recovery certificate would give rise to fresh cause of action-No bar in law to the amendment of pleadings or filing of documents.

Facts:

This Appeal under Section 62 of the Insolvency and Bankruptcy Code, 2016 (IBC) was against a judgment and final order dated 18th December 2019 passed by the National Company Law Appellate Tribunal (NCLAT), allowing Company Appeal (AT) (Insolvency) No.407 of 2019, filed by the Respondents and setting aside an order dated 21st March 2019 passed by the Adjudicating Authority, whereby the Adjudicating Authority, Bengaluru had admitted the Petition being CP(IB) No.244/BB/2018 filed by the Appellant Bank against the Respondent No.2 (Corporate Debtor) under Section 7 of the IBC. The NCLAT held that the said Petition of the Appellant Bank under Section 7 of the IBC, was barred by limitation. The Respondent No.1 was a Director of the Corporate Debtor.

The Appellant Bank had sanctioned Term Loan and Letter of Credit Cum Buyers' Credit in favour of the Corporate Debtor vide letter dated 23rd December 2011. Corporate Debtor defaulted in repayment of its dues to the Appellant Bank. The Loan Account of the Corporate was therefore declared Non-Performing Asset (NPA) on 31st December,2013.

The Corporate Debtor addressed a letter dated 24th March 2014 to the appellant bank, making request for restructuring the term loan. The appellant bank did not accede to the request.

On 22nd December 2014, the Appellant Bank issued legal notice to the Corporate Debtor and respondent 2 calling upon them to make payment of Rs.52.12 crores, claimed to be due from the Corporate Debtor as on 22nd December 2014. The corporate debtor did not make the payment.

On or about 1st January 2015, the Appellant Bank filed an application under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993 before the Debt Recovery Tribunal (DRT) Bangalore for recovery of its outstanding dues. By a letter dated 5th January 2015, the corporate debtor replied to the said notice, inter alia, requesting once again, that the loan be restructured.

On or about 3rd March 2017, while proceedings were pending in the DRT, the Corporate Debtor gave a proposal for one time settlement of the Term Loan Account upon payment of Rs.5.50 crores. The proposal was, however, not accepted by the Appellant Bank.

On 27th March 2017, DRT passed a final judgment and order/decree against the Corporate Debtor for recovery of defaulted amount with future interest at the rate of 16.55% per annum, from the date of filing the application till the date of realization.

On 25th May 2017, DRT issued a Recovery Certificate in favour of the Appellant Bank for recovery of the amount from the Corporate Debtor. Thereafter, on 19th June 2017, Corporate Debtor once again gave the Appellant Bank a proposal for One Time Settlement to mutually settle the loan amount.

On 1st October 2018, the Appellant Bank issued a Demand Notice to the Corporate Debtor in Form 3 and on 12th October 2018, the Appellant Bank filed the Petition before the Adjudicating Authority under Section 7 of the IBC, 2016.

On 9th January 2019, the Appellant Bank filed an application before Adjudicating Authority under Rule 11 of the National Company Law Tribunal Rules,2016, read with Rule 4 of the 2016 Adjudicating Authority Rules for permission to place on record additional documents, including the final judgment and order of the DRT and the Recovery Certificate issued by the DRT.

On 2nd February 2019, the Corporate Debtor filed its preliminary objection to the Petition filed by the Appellant Bank under Section 7 of the IBC, contending that the said Petition was barred by limitation.

By an order dated 4th February 2019, the Adjudicating Authority allowed the application of the Appellant Bank and directed the Appellant Bank to file an amended petition enclosing the documents referred to in the Application.

On or about 5th March 2019, the Appellant Bank filed another application under Rule 11 of the NCLT Rules, before the Adjudicating Authority for permission to place on record additional documents, including the letter dated 03.03.2017 of the Corporate Debtor to the Appellant Bank proposing a One Time Settlement, the Annual Report of the Corporate Debtor for the years 2016-2017, the Financial Statement of the Corporate Debtor for the period from 1st April 2016 to 31st March 2017 and the Financial Statement of the Corporate Debtor, for the period from 1st April 2017 to 31st March 2018. By an order dated 06.03.2019, the Appellant Bank was permitted to file the documents in the Registry.

By an order dated 21st March 2019 the Adjudicating Authority admitted the Petition under Section 7 of the IBC and appointed an Interim Resolution Professional. The objection of the bar of limitation, raised on behalf of the Corporate Debtor was considered at length, but rejected by the Adjudicating Authority (NCLT).

On 6th April 2019, the Respondent No.1, filed an appeal before the NCLAT under Section 61 of the IBC. The Appellant Bank filed its written statement supporting the order of the Adjudicating Authority dated 21st March 2019 admitting the Petition of the Appellant Bank under Section 7 of the IBC.

After hearing the Appellant Bank, the Respondent No.1 and the Corporate Debtor, the NCLAT set aside the order dated 21st March 2019 passed by the Adjudicating Authority (NCLT) Bengaluru and dismissed the Petition filed by the Appellant Bank under Section 7 of the IBC, holding that the said application was barred by limitation.

Questions that arose before the Hon'ble Supreme Court were:

- The main question involved in the appeal was, whether a Petition under Section 7 of the IBC would be barred by limitation, on the sole ground that it had been filed beyond a period of 3 years from the date of declaration of the loan account of the Corporate Debtor as NPA, even though the Corporate Debtor might subsequently have

acknowledged its liability to the Appellant Bank, within a period of three years prior to the date of filing of the Petition under Section 7 of the IBC, by making a proposal for a One Time Settlement, or by acknowledging the debt in its statutory Balance Sheets and Books of Accounts.

- Whether a final judgment and decree of the DRT in favour of the Financial Creditor, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action to the Financial Creditor to initiate proceedings under Section 7 of the IBC within three years from the date of the final judgment and decree, and/or within three years from the date of issuance of the Certificate of Recovery.
- Whether there is any bar in law to the amendment of pleadings, in a Petition under Section 7 of the IBC, or to the filing of additional documents, apart from those filed initially, along with the Petition under Section 7 of the IBC in Form-1.

Decision:

Apex Court observed the following points-

- Since a Financial creditor is required to apply under section 7 of the IBC, in statutory Form-1, the financial creditor can only fill in particulars as specified in the various columns of the Form. There is no scope for elaborate pleadings. An application to the Adjudicating Authourity under section 7 of the IBC in the prescribed form cannot therefore, be compared with the plaint or suit. Such application cannot be judged by the same standards as a plaint in a suit or any other pleadings in the court of law.
- *On a careful reading of the provisions of the IBC and in particular the provisions of Section 7(2) to (5) of the IBC read with the 2016 Adjudicating Authority Rules there is no bar to the filing of documents at any time until a final order either admitting or dismissing the application has been passed. (Para 91)*
- In this case, admittedly there were fresh documents before the Adjudicating Authority (NCLT), including a letter of offer dated 3.03.2017 for one time settlement of the dues of the Corporate Debtor to the Appellant Bank. The Appellant Bank has also relied upon financial statements up to 31st March, 2018 apart from the final

judgment and order dated 27th March, 2017 and the subsequent Recovery Certificate dated 25th May, 2017 which constituted cause of action for initiation of proceedings under Section 7 of the IBC. (Para 110)

- *As per Section 18 of Limitation Act, an acknowledgement of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing a fresh period of limitation from the date on which the acknowledgement is signed. Such acknowledgement need not be accompanied by a promise to pay expressly or even by implication. However, the acknowledgement must be made before the relevant period of limitation has expired. (Para 113)*
- *The finding of the NCLAT that there was nothing on record to suggest that the 'Corporate Debtor' acknowledged the debt within three years and agreed to pay debt is not sustainable in law, in view of the Statement of Accounts/Balance sheets/Financial Statements for the years 2016-2017 and 2017-2018 and the offer of One Time Settlement referred to above including in particular, the offer of One Time Settlement made on 3rd March, 2017. (Para 126)*
- *Section 18 of the Limitation Act speaks of an Acknowledgment in writing of liability, signed by the party against whom such property or right is claimed. Even if the writing containing the acknowledgment is undated, evidence might be given of the time when it was signed. The explanation clarifies that an acknowledgment may be sufficient even though it is accompanied by refusal to pay, deliver, perform or permit to enjoy or is coupled with claim to set off, or is addressed to a person other than a person entitled to the property or right. 'Signed' is to be construed to mean signed personally or by an authorised agent. (Para 127)*
- The Certificate of Recovery in itself gives a fresh cause of action to the Appellant Bank to institute a petition under Section 7 of IBC. (Para 128)
- *Why the principles should not apply to an application under Section 7 of the IBC which enables a financial creditor to file an application initiating the Corporate Insolvency Resolution Process against a*

Corporate Debtor before the Adjudicating Authority, when a default has occurred , it is clear that a final judgment and/or decree of any Court or Tribunal or any Arbitral Award for payment of money, if not satisfied, would fall within the ambit of a financial debt, enabling the creditor to initiate proceedings under Section 7 of the IBC. (Para 132)

- *It is true that, when the petition under Section 7 of IBC was filed, the date of default was mentioned as 30th September 2013 and 31st December 2013 was stated to be the date of declaration of the Account of the Corporate Debtor as NPA. However, it is not correct to say that there was no averment in the petition of any acknowledgment of debt. Such averments were duly incorporated by way of amendment, and the Adjudicating Authority rightly looked into the amended pleadings. (Para 134)*
- *Even assuming that the documents were brought on record at a later stage, the Adjudicating Authority was not precluded from considering the same. The documents were brought on record before any final decision was taken in the petition under Section 7 of IBC (Para 137)*
- *A final judgment and order/decree is binding on the judgment debtor. Once a claim fructifies into a final judgment and order/decree, upon adjudication, and a certificate of Recovery is also issued authorizing the creditor to realize its decretal dues, a fresh right accrues to the creditor to recover the amount of the final judgment and/or order/decree and/or the amount specified in the Recovery Certificate. (Para 138)*

Hon'ble Supreme Court held that –

- *Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to proceedings under the IBC. This Court sees no reason why an offer of One Time Settlement of a live claim, made within the period of limitation, should not also be construed as an acknowledgment to attract Section 18 of the Limitation Act…… Be that as it may, the Balance Sheets and Financial Statements of the Corporate Debtor for 2016-2017, as observed above, constitute acknowledgement of liability which extended the limitation by three years, apart from the fact that a Certificate of Recovery was issued in favour of the Appellant Bank in May 2017. The NCLT rightly admitted the application by its order dated 21st March, 2019. (Para 141)*

- *…….an application under Section 7 of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years. (Para 142)*
- *Moreover, a judgment and/or decree for money in favour of the Financial Creditor, passed by the DRT, or any other Tribunal or Court, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action for the Financial Creditor, to initiate proceedings under Section 7 of the IBC for initiation of the Corporate Insolvency Resolution Process, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the Certificate of Recovery, if the dues of the Corporate Debtor to the Financial Debtor, under the judgment and/or decree and/or in terms of the Certificate of Recovery, or any part thereof remained unpaid. (Para 143)*
- *There is no bar in law to the amendment of pleadings in an application under Section 7 of the IBC, or to the filing of additional documents, apart from those initially filed along with application under Section 7 of the IBC in Form-1. In the absence of any express provision which either prohibits or sets a time limit for filing of additional documents, it cannot be said that the Adjudicating Authority committed any illegality or error in permitting the Appellant Bank to file additional documents. Needless however, to mention that depending on the facts and circumstances of the case, when there is inordinate delay, the Adjudicating Authority might, at its discretion, decline the request of an applicant to file additional pleadings and/or documents, and proceed to pass a final order. In our considered view, the decision of the Adjudicating Authority to entertain and/or to allow the request of the Appellant Bank for the filing of additional documents with supporting pleadings, and to consider such documents and pleadings did not call for interference in appeal. (Para 144)*

Hon'ble Supreme Court held that the impugned judgment and order is unsustainable in law and facts. The appeal was accordingly allowed, and the impugned judgment and order of the NCLAT was set aside.

Notification dated 15.11.2019 relating to personal guarantors to corporate debtors

CASE NO. 20

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Lalit Kumar Jain (Petitioner(s))

Vs.

Union of India & Ors. (Respondent(s))

TRANSFERRED CASE (CIVIL) NO. 245/2020

With other Writ Petitions

Date of Order: 21-05-2021

Notification dated 15.11.2019 relating to personal guarantors to corporate debtors

The Supreme Court in this case held that the notification dated 15th November, 2019, in relation to personal guarantor ("PG") to corporate debtor ("CD"), is legal and valid; and that the approval of a resolution plan relating to a CD will not operate as a discharge of the liabilities of PGs to the CD.

Facts:

The common question in all the cases concerned the vires and validity of the impugned notification dated 15.11.2019 issued by the Central Government for provisions relating to personal guarantors to corporate debtors. The petitioners had furnished personal guarantees to banks and financial institutions which led to release of advances to various companies which they (the petitioners) were associated with as directors, promoters, chairman or managing directors.

In many cases, the personal guarantees furnished by the writ petitioners were invoked, and proceedings are pending against companies which they are or were associated with, and the advances for which they furnished bank guarantees. After publication of the impugned notification, many petitioners were served with demand notices proposing to initiate insolvency proceedings under the Code. The petitioners contended that provisions of

the Code brought into effect by the impugned notification were enforced only in respect of personal guarantors to corporate debtors. The main argument advanced in all these proceedings on behalf of the writ petitioners is that the impugned notification is an exercise of excessive delegation. It is contended that the Central Government has no authority – legislative or statutory – to impose conditions on the enforcement of the Code.

The petitioners argued that the power delegated under Section 1(3) of the Code is only as regards the point(s) in time when different provisions of the Code can be brought into effect and that it does not permit the Central Government to notify parts of provisions of the Code, or to limit the application of the provisions to certain categories of persons. The impugned notification, however, notified various provisions of the Code only in so far as they relate to personal guarantors to corporate debtors. It is therefore, ultra vires the proviso to Section 1(3) of the Code.

It was urged that the impugned notification is ultra vires the provisions of the Code in so far as it notifies provisions of Part III of the Code only in respect of personal guarantors to corporate debtors. Part III of the Code governs "Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms". Also, Section 2(g) of the Code defines an individual to mean "individuals, other than persons referred to in clause (e)". Section 2 (e) relates to personal guarantors to corporate debtors. A joint reading of Section 2(e) with Section 2(g) and Part III of the Code shows that personal guarantors to corporate debtors are not covered by Part II, which only deals with individuals and partnership firms, and personal guarantors to corporate debtors stand specifically excluded from the definition of individuals. The petitioners also rely on Section 95 of the Code, which permits a creditor to invoke insolvency resolution process against an individual only in relation to a partnership debt. Part III of the Code does not contain any provision permitting initiation of the insolvency resolution process against personal guarantors to corporate debtors.

Questions before the Apex Court were predominantly:

i. Whether the impugned notification under Section 1(3) of the Code, dated 15th November, 2019 is valid?

ii. Whether approval of resolution plan for a CD operate as discharge of liabilities of the PGs to the CDs.

Decision:

The Hon'ble Supreme Court observed that the method adopted by the Central Government to bring into force different provisions of the Act had a specific design: to fulfill the objectives underlying the Code, having regard to its priorities. The Central Government followed a stage-by-stage process of bringing into force the provisions of the Code, regard being had to the similarities or dissimilarities of the subject matter and those covered by the Code.

The Court observed that having regard to the fact that Section 2 brought all three categories of individuals within one umbrella class as it were, it would have been difficult for the Central Government to selectively bring into force the provisions of part–III only in respect of personal guarantors. It was here that the Central Government heeded the reports of expert bodies which recommended that personal guarantors to corporate debtors facing insolvency process should also be involved in proceedings by the same adjudicator and for this, necessary amendments were required. Consequently, the 2018 Amendment Act altered Section 2(e) and subcategorized three categories of individuals, resulting in Sections 2(e), (f) and (g).

It was held that when Section 60(2) alludes to insolvency resolution or bankruptcy, or liquidation of three categories, i.e. corporate debtors, corporate guarantors (to corporate debtors) and personal guarantors (to corporate debtors) they apply distributively, i.e. that insolvency resolution, or liquidation processes apply to corporate debtors and their corporate guarantors, whereas insolvency resolution and bankruptcy processes apply to personal guarantors, (to corporate debtors) who cannot be subjected to liquidation.

Additionally, the Hon'ble Supreme Court observed that Parliamentary intent was to treat personal guarantors differently from other categories of individuals. The intimate connection between such individuals and corporate entities to whom they stood guarantee, as well as the possibility of two separate processes being carried on in different forums, with its attendant uncertain outcomes, led to carving out personal guarantors as a separate species of individuals, for whom the Adjudicating authority was common with the corporate debtor to whom they had stood guarantee. The fact that the process of insolvency in Part III is to be applied to individuals, whereas the process in relation to corporate debtors, set out in Part II is to be applied to such corporate persons, does not lead to incongruity.

The Court observed that there appear to be sound reasons why the forum for adjudicating insolvency processes – the provisions of which are disparate- is to be common, i.e through the NCLT. NCLT would be able to consider the whole picture, as it were, about the nature of the assets available, either during the corporate debtor's insolvency process, or even later; this would facilitate the CoC in framing realistic plans, keeping in mind the prospect of realizing some part of the creditors' dues from personal guarantors

The Supreme Court held that the impugned notification is not an instance of legislative exercise or amounting to impermissible and selective application of provisions of the Code. There is no compulsion in the Code that it should, at the same time, be made applicable to all individuals, (including personal guarantors) or not at all. There is sufficient indication in the Code- by Section 2(e), Section 5(22), Section 60 and Section 179 indicating that personal guarantors, though forming part of the larger grouping of individuals, were to be, in view of their intrinsic connection with corporate debtors, dealt with differently, through the same adjudicatory process and by the same forum (though not insolvency provisions) as such corporate debtors. The notifications under Section 1(3), (issued before the impugned notification was issued) disclose that the Code was brought into force in stages, regard being had to the categories of persons to whom its provisions were to be applied. The impugned notification, similarly, inter alia makes the provisions of the Code applicable in respect of personal guarantors to corporate debtors, as another such category of persons to whom the Code has been extended. It was held that the impugned notification was issued within the power granted by Parliament, and in valid exercise of it. The exercise of power in issuing the impugned notification under Section 1(3) is therefore, not ultra vires; the notification is valid.

The Court held that any recourse under Section 133 of the Contract Act to discharge the liability of the surety on account of variance in terms of the contract, without her or his consent, stands negated. The language of Section 31 makes it clear that the approved plan is binding on the guarantor, to avoid any attempt to escape liability under the provisions of the Contract Act. The sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantor's liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee itself.

It was held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. Further, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.

For the above reasons, it was held that the impugned notification is legal and valid. It is also held that approval of a resolution plan relating to a corporate debtor does not operate so as to discharge the liabilities of personal guarantors (to corporate debtors). The writ petitions transferred cases and transfer petitions were accordingly dismissed.

Chapter 2

Orders Passed by High Court

SECTION 9

CASE NO. 1

HIGH COURT OF DELHI AT NEW DELHI

Skillstech Services Private Limited (Petitioner)

Vs.

Registrar, National Company Law Tribunal, New Delhi & Anr (Respondents)

W.P.(C) 474/2021 & CM APPL. 1227/2021

Date of Order: 13-01-2021

Section 9 of the Insolvency and Bankruptcy Code, 2016

Whether the NCLT has the pecuniary jurisdiction or not, cannot be decided by the Registrar of the NCLT, but in fact the same ought to be looked into and determined by an appropriate bench of the NCLT, after appreciating the fact situation involved.

Facts:

The Petitioner filed the petition seeking its listing under Section 9 of the Insolvency and Bankruptcy Code, 2016, before the appropriate bench of the National Company Law Tribunal (NCLT). It was stated that the Registrar of the NCLT has failed to even list the Petitioner's matter before the appropriate bench of NCLT, on the ground that the threshold of the pecuniary jurisdiction of the NCLT has now been amended by a notification dated 24th November, 2020, from Rs.1 lakh to Rs.1 crore.

It was submitted that the question as to whether the NCLT has the pecuniary jurisdiction or not, cannot be decided by the Registrar of the NCLT, but in fact the same ought to be looked into and determined by an appropriate bench of the NCLT, after appreciating the fact situation involved.

Decision:

The Court was of the opinion that the question as to whether the NCLT has jurisdiction to entertain a particular case or not cannot be determined by the Registrar in the administrative capacity. The Registrar would have to place the matter before the appropriate bench of the NCLT, for the said question to be judicially determined. The appropriate bench of the NCLT would have to then, take a considered view as to whether notice is liable to be issued in the matter or not.

The Court was of the view that the question as to whether the notification dated 24thMarch, 2020 applies to a particular petition that has been filed prior to the said notification or not is also a question to be determined by the Bench of the NCLT and not by the Registrar of the Tribunal.

It was directed that the petition under section 9 of the IBC, moved by the Petitioner before the NCLT, shall be placed by the Registrar, NCLT before an appropriate bench for proceeding further in accordance with law. The listing of the petition is directed to be done within a period of ten days from the date of Order.

Petition and all the applications were disposed.

SECTION 60 & 64

CASE NO. 2

HIGH COURT OF DELHI AT NEW DELHI

Surjendu Sekhar Kulia & Anr. (Petitioner)

Vs.

National Company Law Tribunal & Ors. (Respondents)

W.P.(C) 3164/2021 & CM APPL. 9606/2021

Date of Order: 09-03-2021

Section 60(5) and Section 64 of the Insolvency and Bankruptcy Code, 2016

The NCLT would have complete power to regulate its own procedure and priority of matters to be taken up.

Facts:

The petition had been filed by the Petitioners who were the home buyers in housing project of Respondent No-3 which is undergoing CIRP proceedings before the NCLT.

It was stated that the petitioners have not received the possession of their flat, despite moving an application before the tribunal and the matter gets adjourned from time to time, where other buyers were stated to have been given possession.

Therefore, this petition had been filed for seeking early adjudication of the application in a time bound manner.

Decision:

The Court after considering the facts allowed the petitioner to file a specific application under section 64 of the IBC, which shall be considered by the NCLT and expeditious disposal of which shall be made, preferably within a period of three months.

However, the NCLT would have complete power to regulate its own procedure and priority of matters to be taken up, considering the large quantum of work pending before it.

Chapter 3

Orders Passed by National Company Law Appellate Tribunal

SECTION 4 & 9

CASE NO. 1

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

In the matter of:

Prashant Agarwal

Member of Suspended Board of

Bombay Rayon Fashions Limited (Appellant)

Vs.

Vikash Parasrampuria

Sole Proprietor of Chiranjilal Yarns Trading (Respondent No.1)

Shantanu T. Ray

Interim Resolution Professional of

Bombay Rayon Fashions Limited (Respondent No.2)

Company Appeal (AT) (Ins) No. 690 of 2022

Date of Order: 15.07.2022

Section 4 and Section 9 of the Insolvency and Bankruptcy Code, 2016

The total amount for maintainability of claim will include both principal debt amount as well as interest on delayed payment.

Facts:

The Present Appeal is filed against the Impugned Order dated 07.06.2022 passed by the National Company Law Tribunal, Mumbai Bench – IV ("**Adjudicating Authority**"), in CP (IB) No. 1443/MB-IV/2020 whereby, Adjudicating Authority admitted an Application filed by Respondent No. 1

under Section 9 of the Insolvency & Bankruptcy Code, 2016 ("**IBC**") and appointed an Insolvency Professional ("**IRP**") (Respondent No. 2).

The Operational Creditor ("**OC**") (Respondent No.1) has supplied goods to Bombay Rayon Fashions Limited Corporate Debtor ("**CD**"). Nine invoices were raised. The CD paid for three invoices with delay; for one invoice part payment was made and remaining five invoices, CD failed to make any payment.

Based on above position, the Adjudicating Authority admitted the Section 9 application and approved initiation of CIRP along with appointment of IRP. Aggrieved by Impugned Order Appellant has preferred Appeal before the Tribunal.

Submissions of the Appellant:

Appellant contended that Section 4 of IBC mandate that for an application to be maintainable under Section 9 of IBC, the minimum amount of Operational Debt must be Rs. 1 crore but the principal amount of debt was only Rs. 97 Lakhs (approx.) which was below the prescribed threshold limit. Hence, application was not maintainable and consequently was nullity in law and deserved to be dismissed.

Appellant also raised issue regarding limitation stating that cause of action arose as early in 2017 but the petition was filed on 16 December 2020 hence time barred by Limitation Act, 1963.

Decision

As regard to the time barred claims as per Limitation Act, National Company Law Appellate Tribunal ("**NCLAT**") observed that the last date of invoice was 01.02.2020 and date of filing of Application before Adjudicating Authority was 31.12.2020 and therefore Section 9 Application was made well within the limitation and hence issue of limitation cannot be agreed to.

NCLAT also observed that 9 invoices were issued by OC raised against CD and noticed that on all the invoices it was mentioned under terms and condition "interest will be charged @ 18% plus GST P.A after due date of the bill". It was also observed by the NCLAT that Adjudicating Authority while referring to the Judgement of NCLAT in the case of Pavan Enterprises v. Gammon India allowed interest on delayed payment to be part of total debt for calculation of minimum threshold limit for Section 4 of IBC in the Impugned Order.

Further, the word “claim” which is mentioned in definition of debt in Section 3(11) means as per Section 3 (6) “a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured”. Since, interest on delayed payment was clearly stipulated in invoice and therefore, this will entitle for “right to payment” and therefore will form part of “debt”. Thus, the total amount for maintainability of claim will include both principal debt amount as well as interest on delayed payment which was clearly stipulated in the invoice itself and since the total debt outstanding of OC is above Rs. 1 crore as per requirement of Section 4 under IBC, the Application is therefore maintainable in present case.

Hence, the NCLAT concurred with the orders of Adjudicating Authority and dismissed the appeal.

SECTION 7

CASE NO. 2

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

In the matter of:

Pramod Sharma (Appellant)

Vs.

Karanaya Heart Care Pvt. Ltd. (Respondent)

COMPANY APPEAL (AT) (INS.) NO.426 OF 2022

Date of Order: 21-04-2022

Section 7 of the Insolvency and Bankruptcy Code, 2016

Whether Share Application Money can be treated to be a financial debt so as to enable the Appellant to trigger the Insolvency Process under Section 7 of the Code.

Facts:

This appeal was filed by the appellant against the order dated 02.03.2020 by which Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**Code**") filed by the Appellant has been dismissed.

Appellant had given an amount in the share capital of Respondent and same was shown as Share Application Money but no share was allotted in lieu of such money. It was submitted by the appellant that principal amount was paid but no amount was paid towards interest. It is submitted that neither any share was allotted nor amount was returned, it became deposit. Hence, appellant contended that application under Section 7 was maintainable.

Decision:

NCLAT observed that Adjudicating Authority in para 7 of the impugned order has made following observations –

"7. The matter between both the parties was amicably settled as recorded in order dated 11th October, 2017 of the Hon'ble National Company Law Tribunal passed in C.P. No. 205(ND)/2017, between the parties along with that the Respondent failed to show any agreement to substantiate the fact

that money was paid as a financial debt or that the money was paid against the payment of interest. Therefore, we find that the share application money does not fall under any of the clauses of Section 5(8) of the Code and it cannot be said to fall under the definition "a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money" since no debt was disbursed by the Applicant to the Respondent and no time value has been attached with the share application money. Thus, since the claim is not a financial debt the present application under Section 7 of the Code is not maintainable and is dismissed with no costs."

NCLAT observed that the amount was given, as per the case of the Appellant, as a Share Application money on which no share was allotted. Under some settlement, the principal amount was refunded and thereafter, the Application under Section 7 was filed by the Appellant.

NCLAT was of the view that the Adjudicating Authority rightly took the view that the amount which was given by the Appellant as Share Application Money cannot be treated to be a financial debt so as to enable the Appellant to trigger the Insolvency Process under Section 7 of the Code.

NCLAT found no merit in the Appeal. The Appeal was dismissed.

CASE NO. 3

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

In the matter of:

M/s. Vrundavan Residency Pvt. Ltd. (Appellant)

(Financial Creditor)

Vs.

M/s. Mars Remedies Pvt. Ltd. (Respondent)

(Corporate Debtor)

Company Appeal (AT) (Insolvency) No. 345 of 2021

Date of Order: 04-03-2022

Section 7 of the Insolvency and Bankruptcy Code, 2016

When debt is acknowledged in Financial Statement and Annual Tax Statement the same would be considered for limitation purpose.

Facts:

The Appeal had been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 by Financial Creditor being aggrieved by the order passed by National Company Law Tribunal, Ahmedabad Bench, Ahmedabad where the Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 filed by the Appellant was dismissed.

The Corporate Debtor defaulted in repayment of the loan and the default has continued since 31.03.2017 to 31.12.2019. Thereafter, the Appellant filed an Application under Section 7 of the IBC before the Adjudicating Authority and after hearing the parties the said Application was rejected holding that the petition is not maintainable as time barred.

The Application under Section 7 of the IBC filed by the Appellant was for a default of Rs. 89,24,630/- which was advanced to the Respondent as an unsecured loan.

It is further submitted by the Appellant that the default by the Respondent was a continuing default as mentioned in the Section 7 Application. The Respondent's last payment was made on 29.09.2015 and thereafter, an amount of Rs. 54,71,783/- remained unpaid.

Decision:

After hearing the Appellant and having gone through the pleadings, NCLAT was of the view that the following facts are admitted in the instant Appeal.

- Financial Statement of the Respondent ending on 31.03.2017 for amount of Rs. 54,71,783/- is shown under the heading of "Long Term Borrowing".
- Financial Statement of the Respondent ending on 31.03.2016 for amount of Rs. 54,71,783/-is shown under the heading of "Long Term Borrowing".
- Annual Tax Statement of the Appellant under Section 203AA of the Income TaxAct 1961 in form 26AS known as TDS certificate shows that the Respondent has deducted the TDS amount in the year 2016-17.
- Account Ledger Confirmation of the Appellant duly signed by the Respondent's authorized signatory starting from 01st April 2015 to 31st March 2016shows that the amount of Rs. 54,71,783/- as a "Long Term Borrowing".

- Certificate given by Chartered Accountants firm after verified from the ledger account and other relevant documents shows that the Respondent had an outstanding of Rs. 89,24,630/- till 31st December 2019.

NCLAT further observed that taking all these facts and circumstances impugned order cannot be sustained in the eyes of law.

NCLAT set aside the impugned order dated 22.03.2021 passed by the Adjudicating Authority (National Company Law Tribunal) and the matter is remitted back to the Adjudicating Authority with a request to hear the parties and after perusing the aforesaid documents whereby the Respondent categorically acknowledged the debt, pass fresh orders within twelve weeks from the date of receipt of the judgment. The instant Appeal was disposed of accordingly. No costs.

CASE NO. 4

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

In the matter of:

Rajeev R. Jain, Director (Suspended) (Appellant)

Vs.

1. AASAN Corporate Solutions Private Limited
2. Nirmal Lifestyle Realty Private Limited (Respondents)

Company Appeal (AT)(Insolvency) No. 1085 of 2021

Date of Order: 12-01-2022

Section 7 of the Insolvency and Bankruptcy Code, 2016

The Mortgage Deed is an instrument which cannot come into way of Section 7 Application and shall be overridden by virtue of Section 238 of the 'I&B Code'.

Facts:

- This Appeal has been filed against judgment dated 06.12.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-III, by which C.P. No. 315/IBC/MB/2019 filed by the Respondent- Financial Creditor under Section 7 of the Insolvency

and Bankruptcy Code, 2016 has been admitted. The Appeal has been filed by Suspended Director of the Corporate Debtor challenging the impugned judgment.

- The Corporate Debtor obtained two loans from the Financial Creditor by means of two deposits agreements for Rs. 500 crores (approximately). The two deposits were secured by Deed of Mortgage and other security documents. As per the terms of the First Deposit Agreement, the first loan was repayable on the expiry of three months from the date of first loan. The date for payment was extended and the Corporate Debtor was liable to repay the outstanding principal amount and interest to the tune of Rs. 241 crores (approximately. An Application under Section 7 of the 'I&B Code' was filed by the Financial Creditor claiming default of debt of Rs. 258 crores (approximately). After issuance of notice by the Adjudicating Authority, the Corporate Debtor appeared and opposed the Application. The Corporate Debtor objected to the petition on the ground that (i) Financial Creditor has committed breach of contract in not fully making the payment of advance amount of Second Deposit Agreement (ii) amounts under the First Deposit are secured and amounts under the Second Deposit are also secured. The Adjudicating Authority by impugned judgment admitted the Application.

Appellant's Contention:

- Application under Section 7 ought not to have been filed by the Financial Creditor due to the reason that under the terms and conditions of agreement and mortgage deed, the entire amount was secured and the assets mortgaged were of more value than the amount due. The Appellant ought to have realised its amount from the security as per terms and conditions of the mortgage deed and Application under Section 7 was not maintainable.
- That before the Adjudicating Authority a judgment of co-ordinate Bench dated 07.10.2021 in Company Petition (IB) No. 993 of 2020- "Beacon Trusteeship Limited vs. Neptune Ventures and Developers Private Limited" was referred to where the Adjudicating Authority had occasion to consider similar terms of agreement and mortgage and has rejected Section 7 Application holding that remedy available to Applicant was to realise the amount from security. It was held that there was no default.

Respondent's Contention:

- Application filed under Section 7 by the Financial Creditor was well within the jurisdiction and fully maintainable. Even under the terms and conditions of the Mortgage Deed, it was right of the Mortgagee to seek remedy by realising his dues from security or to take any other remedy available in law.
- It is submitted that the terms and conditions of the loan Agreement as well as the Mortgage Deed did not put any embargo on the right of the Financial Creditor to take recourse of Section 7 of the 'I&B Code'.
- Insofar as the judgment of the co-ordinate Bench relied by Counsel for the Appellant, it is submitted that the Adjudicating Authority has given reason for not following the said judgment.

Observation:

- *It is clear that there no kind of embargo has been put on the mortgagee to necessarily realise his dues from the secured assets. Clause 11.3 itself provides "If any one or more of the Events of Default occur, the Mortgagee shall, without prejudice to any other rights and remedies it may have and without prior notice to the Mortgagors". (Para 8)*
- *Similarly, clause 19.4 specifically reserves the other remedies available to the Mortgagee which clearly mentioned that the rights and remedies conferred upon the Mortgagee under this indenture shall not prejudice any other rights or remedies, to which the Mortgagee may, independently of this Indenture, be entitled. Thus, if the law provides any other remedy to Mortgagee the same can very well be availed by him. It is the choice of the mortgagee to recover his dues from secured assets or to take other recourse of remedy as provided under law. (Para 9)*
- *The remedy under Section 7 is special remedy and the provision of 'I&B Code' has been given overriding effect from any other law or instrument. (Para 10)*
- *A reading of Section 238 indicates that 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. Thus, what is overridden by the 'I&B*

Code' is both inconsistency with any other law or any instrument having effect. The mortgage is an instrument. The terms and conditions of the mortgage thus cannot claim any superior status and proceedings under Section 7 can be availed irrespective of any contrary or inconsistent condition in mortgage. However, as noticed above, the mortgage entered between the parties in the present case does not have any inconsistent condition rather the mortgage itself reserves and protects other remedies which are available to the Financial Creditor in any other law. (Para 11)

- *The reason given by the Adjudicating Authority in not following the co-ordinate Bench judgment was that the same Judicial Member has taken a contrary view in another matter i.e. "IDBI Trusteeship Services Ltd. V. Ornate Spaces Pvt. Ltd.". (Para 13)*
- *The Mortgage Deed is an instrument which cannot come into way of Section 7 Application and shall be overridden by virtue of Section 238 of the 'I&B Code'.*
- *There can be no doubt that registered mortgage is instrument which shall also be overridden by Section 238 which specifically provides for overriding of provisions of 'I&B Code' to a contrary provisions of law as well as an instrument made under any other law. The Tribunal while deciding "Beacon Trusteeship Limited" did not advert to Section 238 of the 'I&B Code' which had overriding effect on any clause of any Debenture of Trust Deed cum Indenture of Mortgage. (Para 20)*

Decision:

- *We are of the view that the above view taken by the Tribunal in "Beacon Trusteeship Limited" is not inconsonance with Section 7 read with Section 238 of the 'I&B Code'. The Financial Creditor has full right to initiate action under Section 7 for non-payment of dues. We, thus, are of the view that the judgment of the co-ordinate Bench in "Beacon Trusteeship Limited" was not a binding precedent to be followed by any other co-ordinate Bench. We, thus, are also of the view that no error has been committed by the Adjudicating Authority in admitting Section 7 Application filed by the Financial Creditor. There is no merit in this Appeal. The Appeal is dismissed.*

CASE NO. 5

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

In the matter of:

Ananta Charan Nayak (Appellant)

Vs.

State Bank of India & Ors. (Respondents)

Company Appeal (AT) (Ins) No. 870 of 2021

Date of Order: 10-11-2021

Section 7 of the Insolvency and Bankruptcy Code, 2016

The acceptance of the settlement proposal by the financial creditor is a matter entirely in the ambit of the financial creditor and therefore, the proceedings before the Adjudicating Authority cannot be held up.

Facts:

This appeal preferred by the Appellant, who is aggrieved by the order dated 26.8.2021 (hereinafter called Impugned Order) passed in CP (IB) No. 10/2021 by the Adjudicating Authority qua which an application under section 7 of the Insolvency and Bankruptcy Code, 2016 has been admitted against the Corporate Debtor. The Appellant is a shareholder, promoter, and suspended Director of the Corporate Debtor.

The Appellant argued that the loan taken by it from the financial creditor was wrongly declared as non-performing asset but no alleged default was stated in the notice issued by financial creditor. The Appellant requested financial creditor to restructure its loan. Despite many meetings for restructuring of the loan, it was finally not agreed to by financial creditor, and instead of responding to One Time Settlement (OTS) proposal of the Appellant, financial creditor filed application under section 7 of the IBC against the Corporate Debtor.

The Appellant also argued that Corporate Debtor had raised objections relating to defect in the application filed by the financial creditor and challenged the maintainability of section 7 application. The defect pointed out by the Appellant is that the Financial Creditor had made all the directors and guarantors parties in the section 7 application, and a defective application

could not have been adjudicated upon. He, further claimed that despite bringing on record the defects in the application, financial creditor did not file any application before the Adjudicating Authority seeking to amend the application for removal of defects, nor did the Adjudicating Authority issue any direction to that effect.

Pending decision on the OTS, the Adjudicating Authority has passed the Impugned Order to the detriment of the Corporate Debtor. He has also argued that the petitioner State Bank of India was granted seven days' time to file an affidavit for deletion of the names of personal guarantors from the section 7 application. Such an affidavit was not filed and thus requirements under section 7 of IBC were not complied with strictly. He argued that in such a situation, and as laid down by the Hon'ble Apex Court in the matter of Innoventive Industries Ltd. v. ICICI Bank [MANU/SC/1063/2017], the order for admission of section 7 application should not have been given.

Decision:

NCLAT was of the view that

- Firstly, it was mentioned in the order of NCLT that the Financial Creditor filed an affidavit in which it was stated that due to inadvertence names of the personal guarantors were inserted and the names of the such personal guarantors be deleted from the instant application. Therefore, NCLAT did not agree with the contention of the Appellant that the petitioner did not comply with the order given by the Adjudicating Authority.
- Secondly, the acceptance of the settlement proposal by the financial creditor is a matter entirely in the ambit of the financial creditor and therefore, the proceedings before the Adjudicating Authority should not have been held up and delayed, waiting for a response by the Financial Creditor. IBC does not provide for keeping the proceedings in abeyance and the application for admission has to be decided in a stipulated timeframe. If a settlement would have been reached, the Appellant would have had recourse to Section 12A of the IBC. Thus, the contention of the Appellant is not sustainable.
- Lastly, the Innoventive Industries judgment (supra) of the Hon'ble Supreme Court does not put any bar on the admission of an application under section 7 if the defects as pointed out to the petitioner have been cured.

On the basis of the above discussion, NCLAT was of the clear view that the Impugned Order does not require any intervention. The appeal is, therefore, dismissed at the stage of admission. No order as to the cost.

CASE NO. 6

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

In the matter of:

Mr Harish Raghavji Patel (Appellant)

Vs.

Shapoorji Pallonji Finance Private Limited & Anr. (Respondents)

Company Appeal (AT)(Ins) No. 391 of 2021

Date of Order: 06-10-2021

Section 7 of the Insolvency and Bankruptcy Code, 2016

There is a prescribed procedure for withdrawal of Petition under Section 7 of the IBC. Therefore, there was no justification to ask for invoking the inherent power of Appellate Tribunal and to take on record the terms of the settlement and pass the order for withdrawal of Petition under Section 7 of the IBC.

Facts:

The Appeal is filed against the impugned order by which the Respondent No.1's Petition u/s 7 of the IBC was admitted and initiated Corporate Insolvency Resolution Process (CIRP) against the Appellant (Corporate Debtor). Before constitution of CoC, the settlement was arrived at between the parties and the terms of settlement are filed along with the Application.

It was further submitted by the Appellant that Appellate Tribunal can exercise the inherent power under Rule 11 of NCLAT, Rules, 2016 and can set aside the impugned order and quash the CIRP against the Corporate Debtor in terms of settlement. In support of the arguments reliance on the following Judgements of Hon'ble Supreme Court and the Judgment of this Appellate Tribunal were placed by the Appellant:

(i) Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors (2019)

(ii) Brilliant Alloys Pvt. Ltd. Vs. S. Rajagopal & Ors. Special Leave to Appeal (c) No (s). 31557/2018 order dated 14.12.2018

(iii) Kamal K Singh Vs. Dinesh Gupta & Anr. Civil Appeal No. 4993 of 2021 order dated 25.08.2021

(iv) Anuj Tejpal Vs. Rakesh Yadav & Anr. Company Appeal (AT) (Insolvency) No. 298 of 2021 order dated 07.07.2021

Respondent No.1 supported the arguments advanced by the Appellant and also submitted that in case the Application for withdrawal of the Petition is filed, it will take time to decide before the Adjudicating Authority, consequently, the CIRP costs may be increased, therefore, it was requested that the Appellate Tribunal may take on record the terms of the settlement and set aside the impugned order.

Decision:

NCLAT considered the following points-

- Hon'ble Supreme Court in Swiss Ribbons Case unequivocally held that before constitute of committee of creditors, a party can approach the NCLT directly, and the Tribunal may, in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of each case. It cannot be read that Hon'ble Supreme Court has held that this Appellate Tribunal should exercise inherent power and allow or disallow an Application for withdrawal or settlement.
- Hon'ble Supreme Court in the case of Brilliant Alloys Pvt. Ltd. held that Regulation 30-A (1) of the Regulations is not mandatory but a directory for the simple reason that on the facts of a given case, an application for withdrawal may be allowed in exceptional cases even after issue of invitation of expression of interest under Regulation 36-A. The facts of the given case are altogether different.
- In the case of Kamal K Singh Vs. Dinesh Gupta & Anr., Operational Creditor who initiated the CIRP against the Corporate Debtor, filed an Application before the Adjudicating Authority for withdrawal of the Petition and set aside the initiation of CIRP before the Constitution of CoC. The Application was dismissed by the Adjudicating Authority. In this context, the Hon'ble Supreme Court held that the Applicant (Operational Creditor) was justified in filing the Application under Rule 11 of NCLT Rules for withdrawal of Petition on the ground that the

matter has been settled between the parties. There was no ratio of this order that this Appellate Tribunal should exercise inherent power under Rule 11 of NCLAT Rules and entertain the Application for withdrawal of Petition on the ground that the matter has been settled between the parties. Thus, none of the Judgment/Order supports the arguments advanced by both the parties.

- It was well settled that inherent power can be exercised only when no other remedy is available to the litigant and nowhere a specific remedy is provided by the statute. If an effective alternative remedy is available, inherent power will not be exercised, especially when the applicant may not have availed of that remedy. It was also settled law that inherent power cannot be invoked which intends to by-pass the procedure prescribed. The procedure prescribed under the law is to be followed strictly.
- The procedure prescribed for withdrawal of the petition under Section 7, 9 or 10 of the IBC before the constitution of CoC and after constitution of CoC is provided in Section 12-A and Regulation 30-A of the Regulation. When the settlement has taken place at an appellate stage the Applicant who has filed the petition under Section 7 or 9 of the IBC may file the Application (Form – FA) under Section 12-A of the IBC r/w Regulation 30-A of the Regulations for withdrawal of the Petition before the Adjudicating Authority.
- In the Application and the arguments, the parties have not specified as to why they did not want to file the Application as per prescribed procedure.

NCLAT held that there is a prescribed procedure for withdrawal of Petition under Section 7 of the IBC. Therefore, there was no justification to invoke inherent power of this Appellate Tribunal and to take on record the terms of the settlement and pass the order for withdrawal of Petition under Section 7 of the IBC. On the contrary, in the facts of the given case exercising the inherent power under Rule 11 of NCLAT Rules amounts to abuse of process of the Appellate Tribunal.

The Appeal was accordingly dismissed.

CASE NO. 7

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

In the matter of:

Chand Prakash Mehra (Appellant)

Vs.

Praveen Bansal (Respondent No. 1)

(Interim Resolution Professional)

State Bank of India (Respondent No. 2)

Company Appeal (AT) (Insolvency) No. 1378 of 2019

Date of Order: 20-09-2021

Section 7 of Insolvency and Bankruptcy Code, 2016 and Limitation Act, 1963

If the Lead Bank for any reason does not take steps or fails to take steps, the other Banks in the consortium cannot be left high and dry without any remedy, as Limitation Act does not differentiate on such count.

Facts:

This Appeal had been filed by the Director of Corporate Debtor against Order of Admission of Application under Section 7 of Insolvency and Bankruptcy Code, 2016 against the Corporate Debtor dated 8th November, 2019 passed by the Adjudicating Authority (National Company Law Tribunal) Kolkata Bench, Kolkata in C.P. (IB) No. 522/KB/2018.

The Respondent bank claimed before the Adjudicating Authority that the Corporate Debtor was granted credit facility initially by a Bank and subsequently two more banks became part of the lenders and granted credit facilities to the Corporate Debtor. In 2010, there was revival structuring effort and new Sanction Letter was issued on 18th March, 2013. However, the Corporate Debtor failed to act as per the CDR Package and the Account was termed NPA on 25.08.2015. Subsequently as per Procedure under the RBI Guidelines date of NPA was revised to 15.01.2013 based on when the CDR Package had been formalized. The Bank pointed out the acknowledgements

of the Corporate Debtor and the existence of the outstanding debt which was in default. The Application under Section 7 of IBC was filed on 05th March, 2018.The Bank also claimed that the balance sheets of the Corporate Debtor showed the overall borrowings and that anything contrary in any instrument would not be applicable in view of the Section 238 of IBC. Thus, the Bank claimed that the debt was within limitation.

Corporate Debtor claimed before the Adjudicating Authority that the Debt was barred by Limitation. It was claimed that the original amounts became NPA on 15.01.2013. Because of the CDR Package time was given to the Corporate Debtor which ultimately failed in August, 2015. The Corporate Debtor claimed the debt to be time barred.

The Adjudicating Authority looked in the record as well as the acknowledgments in the correspondence and came to the conclusion that there was debt outstanding which attracted provisions of Section 7 of IBC; that the Debt was within limitation; and admitted the Application under Section 7 of IBC.

In the present Appeal, the Appellant claimed that when Corporate Debtor failed to comply with the terms of CDR Package the Corporate Debtor was reverted to state of NPA classified on 27th July 2009 as per RBI Guidelines and thus the Appellant claims that the said debt is time-barred and that bank could not have initiated proceedings under Section 7 of IBC. It also argued that the CDR restructuring schemes could not be considered to be acknowledgments of debts and Section 18 of the Limitation Act could not be relied on in view of the Judgments passed by the Hon'ble Supreme Court. It was argued that the entries in the balance sheets of the Corporate Debtor with regard to the amounts due show overall amounts due and did not reflect any specific debt owed to the bank. It was also argued that in view of the agreements between the parties only the Lead Bank could have initiated proceedings.

Respondent claimed that the Corporate Debtor made acknowledgements of debt firstly in Letter dated 21.05.2015 informing to the lead bank that there was change in the name of the Company and then via letter dated 15.06.2016 as a proposal for resolution of debts.

Decision:

NCLAT referred Section 7 of IBC which provides that Financial Creditor either by itself or jointly with other Financial Creditors or any other person on behalf of Financial Creditor as may be notified by the Central Bank may file

an Application for initiating Corporate Insolvency Resolution Process against a Corporate Debtor before the Adjudicating Authority when a default has occurred. Considering this, even if the bank was part of the consortium or there are documents executed between the parties, or there are circulars of RBI as to how Banks should try to help the defaulting debtors with CDR Packages and how date of NPA should be calculated, still in IBC for Section 7 of IBC, the material factor is that the bank is a Financial Creditor whose debt is outstanding and it was in default on the part of the Corporate Debtor and thus the Bank has a right to move Application under Section 7 of IBC. The personal documents between the parties cannot take away such statutory right of the Bank to initiate proceedings. If the Lead Bank for any reason does not take steps or fails to take steps, the other Banks in the consortium cannot be left high and dry without any remedy, as Limitation Act does not differentiate on such count.

It observed that if that account of the Corporate Debtor with the Bank became NPA on 15.01.2013 there was firstly acknowledgement in Letter dated 21st May, 2015 and then there was another acknowledgment vide letter dated 15.06.2016. As such, Section 7 of IBC Application filed on 05th March, 2018 must be said to be within limitation.

NCLAT while referring to clause (a) of the Explanation of Section 18 was of the view that even if an acknowledgment is made to person other than a person entitled to the property or right, still it shall fall in the definition of Explanation below the Section 18 of the Limitation Act. NCLAT observed that the Hon'ble Supreme Court of India itself has referred to its earlier Judgments and legal positions with regard to the applicability of the Limitation Act to provisions of IBC and has made quite clear in recent Judgments of Hon'ble Supreme Court of India. NCLAT further observed that now the legal position is quite clear with regard to the applicability of Section 18 of the Limitation Act and other provisions of Limitation Act, as far as may be.

NCLAT didn't find that there is any substance in the Appeal and held that the Adjudicating Authority rightly found the Application to be within limitation and has rightly admitted the Application filed by Respondent Bank. The Appeal was dismissed. No costs.

CASE NO. 8

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

In the matter of:

M Sai Eswara Swamy (Appellant)

Vs.

Siti Vision Digital Media Pvt. Ltd. (Respondent)
Company Appeal (AT) (Insolvency) No. 706 of 2021

Date of Order: 09-09-2021

Section 7 of the Insolvency and Bankruptcy Code, 2016

A person duly authorized by the BOD of a Company by way of a Board Resolution is competent to file Petition under Section 7 of the IBC on behalf of the Financial Creditor, which was missing in the instant case hence dismissed.

Facts:

The Appellant was a director and 50% Shareholder of both the Financial Creditor Companies. There was a deadlock in the Financial Creditor Company Managing Director who holds remaining 50% share of the Financial Creditors Companies and his wife holds 4% shareholding in the Respondent Company (Corporate Debtor). The Appellant has requested several times to Managing Director to sign the board resolution to initiate legal proceedings against the Respondent Company but he refused to sign the Board Resolution.

Adjudicating Authority has dismissed the Application under Section 7 of the IBC on the ground that no board resolution authorizing the Petitioner (Appellant herein) to file the Petition is filed along with the Petition.

Appellant submitted that Shareholder/Director of the Company can initiate action on behalf of the Company if the same is in the interest of the Company and the Board is not pursuing the same. As per doctrine of derivative action the Appellant being 50% shareholder and director of the Petitioner Company can maintain the Petition under Section 7 of the IBC.

Appellant further submitted that Adjudicating Authority has dismissed the Petition under Section 7 of the IBC on the other ground that no Board

Resolution was passed to advance loan under Section 186 of the Companies Act, 2013. It was submitted that such board resolution was not required when the Corporate Debtor in his Balance Sheet acknowledging the debt.

Respondent on notice opposed the admission and supported the impugned order passed by the Adjudicating Authority. Respondent submitted that the Central Government (Ministry of Corporate Affairs) vide notification dated 27.02.2019 S. O. 1091 (E). Exercising power under sub-Section 1 of Section 7 of the IBC notified the persons who may file an application for initiating CIRP against a Corporate Debtor. In the notification at serial No. (iv) a person duly authorized by the Board of Directors of a Company is competent to file Petition under Section 7 of the IBC on behalf of the Financial Creditor. Respondent also submitted that the Appeal was not maintainable as the Appeal is filed by the Shareholder of the Financial Creditor Company. Such person does not come within the definition of aggrieved person under Section 61 of the IBC.

Decision:

NCLAT observed that undisputedly there is no board resolution authorizing the appellant to file the petition under Section 7 of the IBC and filed this Appeal as there is deadlock in the Financial Creditors Company.

NCLAT considered whether Director and Shareholder of the Company can file the Petition under Section 7 of the IBC on the doctrine of derivative action. So far as the Petition under Section 7 of the IBC is concerned, there is a specific notification by the Central Government under sub-section (1) of Section 7 of the IBC that on behalf of the Financial Creditor a guardian, an executor or administrator of an estate of a financial creditor, a trustee and a person duly authorized by the board of directors of a company may file Application for initiation of CIRP against the Corporate Debtor. In such situation, doctrine of derivative action cannot be applied in Petition under Section 7 of the IBC. Thus, NCLAT affirmed the findings of Adjudicating Authority that there was no Board Resolution authorizing the petitioner to file the Petition. Therefore, the Petition is not maintainable.

NCLAT further observed that Adjudicating Authority had also held that no Board Resolution was filed in regard to advance loan to Corporate Debtor Company as required under Section 186 of the Companies Act, 2013. In this regard, the Appellant submitted that the Corporate Debtor Company in his balance sheet acknowledged the debt. Therefore, such resolution is not

required to maintain the petition under Section 7 of the IBC. NCLAT was not convinced with the argument and found no flaw in the findings of Adjudicating Authority.

NCLAT held that Adjudicating Authority had rightly held that the Petition is not maintainable. Therefore, no interference is called for in the impugned order.

The Appeal was dismissed summarily without notice to the Respondent. No order as to costs.

CASE NO. 9

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

In the matter of:

Ishita Halder (Appellant)

Vs.

Mr. Siba Kumar Mohapatra (Respondent No. 1)

State Bank of India (Respondent No. 2)

Company Appeal (AT) (Insolvency) No. 282 of 2021

Date of Order: 18-08-2021

Section 7 of Insolvency and Bankruptcy Code, 2016 - offer of OTS can be relied on for the purpose of considering acknowledgement under Section 18 of Limitation Act - Issue of Recovery Certificate by DRT also is relevant for the purpose of calculating limitation.

Facts:

This Appeal had been filed by the Appellant who claims to be shareholder of the Corporate Debtor against impugned order dated 3rd February, 2020 passed by the Adjudicating Authority (National Company Law Tribunal) Kolkata Bench, Kolkata in C.P. (IB) No. 213/KB/2019.The said Company Petition was filed by way of application under Section 7 of Insolvency and Bankruptcy Code by Financial Creditor (Bank) which was a Respondent in the case. The Adjudicating Authority had admitted the application and initiated Corporate Insolvency Resolution Process (CIRP).

In the present Appeal, the Appellant claimed that the debt of the Corporate Debtor was declared NPA on 31st March, 2013 and the Application under Section 7 was filed on 1st February, 2019 and thus the claim was time barred.

The Appellant submitted that the question is whether proposal made in OTS can be considered to be acknowledgement and further submitted that in view of Section 23 of the Indian Evidence Act, 1872, any admission given in the OTS proposal could not be used in Court of Law.

It was also submitted that the judgements relied on by the Adjudicating Authority had not taken note of provisions of section 23 of Evidence Act and thus they were *per incurium*.

The Respondent Bank argued that Section 23 of the Evidence Act would not apply as no such ground was raised before the Adjudicating Authority and that if the OTS documents are seen there is nothing to show that there was any express condition that evidence of the OTS offer would not be given, nor there is any circumstance from which it can be inferred that the parties agreed together that the OTS offers would not be treated as evidence for the purpose of Court. Thus, Section 23 of the Evidence Act cannot be applied.

The Appellant as well as Respondent Bank accepted that Respondent Bank filed OA-103 of 2015 for recovery of the debts before DRT. It is stated that DRT vide order dated 08.06.2018 has issued Recovery Certificate.

Decision:

NCLAT relied on the judgement in the matter of "Dena Bank (Now Bank of Baroda) vs C. Shivakumar Reddy and Anr", Civil Appeal No. 1650 of 2020 dated 04.08.2021 and NCLAT observed that the Hon'ble Supreme Court extensively considered the Law of Limitation in the context of IBC

NCLAT held that offer of OTS can be relied on for the purpose of considering acknowledgement under Section 18 of Limitation Act. Issue of Recovery Certificate by DRT also is relevant for the purpose of calculating limitation.

Respondent Bank claims Corporate Debtor made various repayments in 2018 while making OTS offers. Repayments were made was not disputed by Appellant but argued that payments were made so that OTS proposals should be accepted. NCLAT didn't find that it makes any difference for applicability of Section 19 of the Limitation Act.

NCLAT didn't find that there is any substance in the Appeal. The Appeal was dismissed. There shall be no orders as to costs.

CASE NO. 10

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

In the matter of:

Pawan Kumar (Appellant)

Vs.

Utsav Securities Pvt. Ltd. and Anr.(Respondents)
Company Appeal (AT) (Insolvency) No. 251 of 2020

Date of Order: 03-08-2021

Section 7 of Insolvency and Bankruptcy Code, 2016 – Need for formal loan agreement – Real nature of transaction need to be unearthed

Facts:

The Appellant an ex-director of the Corporate Debtor filed this Appeal against the order dated 30.01.2020 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench) in CP (IB) No. 1593/(ND)/2019 whereby the Financial Creditor's Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) was admitted and initiated Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

The business of the Financial Creditor is that of Non-Banking Finance company and having the Certificate of Registration issued by the RBI. The Financial Creditor had granted financial assistance to the Corporate Debtor for a total of Rs. 6.10 Cr in between 16.02.2017 to 22.02.2017 through Bank Account. The Corporate Debtor has paid interest Rs.6,05,718, once on 14.02.2018 after deduction of TDS. Thereafter corporate debtor failed to pay interest. Therefore, the Financial Creditor vide notice dated 27.04.2019 has recalled the loan. The Corporate Debtor has not liquidated the outstanding liabilities. Hence, the Financial Creditor has filed the Application under Section 7 of the IBC.

The Corporate Debtor had filed the Reply and resisted the Application on various grounds namely- lack of any contractual agreement, an undefined period of loan, absence of any agreement for payment of interest at any specific rate and the said transaction did not fall within the definition of Financial Debt.

Adjudicating Authority found no substance in the defence raised by the

Corporate Debtor and the transaction does not get vitiated for want of agreement in terms of section 186(11) of the Companies Act 2013 (The Act). Thus, transaction in question is a financial debt. Therefore, admitted the Application under Section 7 of the IBC and initiated CIRP against the Corporate Debtor and appointed Insolvency Resolution Professional (IRP).

Being aggrieved with the order, the Appellant has filed the Appeal under Section 61(1) of the IBC.

NCLAT after going through the record observed that the only issue which arose in the Appeal was whether the transaction in question was a Financial Debt.

Decision:

NCLAT observed that-

- The following essential conditions are required to be satisfied by a financial creditor
- There must be disbursal of loan
- Such disbursal should be made for a consideration for time value of money and
- When the debt (whole or any part or instalment) be ome due and payable and is not paid by the Corporate Debtor means committed default
- The Financial Contract as per the Rule 3(1) (d) is must between the corporate Debtor and the Financial Creditor for setting out the terms of a Financial Debt including the tenure of the Debt, interest payable and the date of repayment. In the absence of such Financial Contract, the Financial Creditor has failed to satisfy that when the debt and interest become due and payable.
- The Financial Creditor has not filed any writing to show that when the debt become due and payable. But as per the Financial Creditor the debt in question is payable on demand. From the notice and the Application, it is not clear that on which date the demand was made and the loan and interest become due and payable.
- Section 7(3)(a) of the IBC, provides that the Financial Creditor shall along with the Application is required to furnish, a record of default recorded with the information utility or such other record or evidence of

default as may be specified. The Financial Creditor has not filed any evidence of default along with the application under section 7 of IBC.

With above mentioned points, NCLAT was of the view that Financial Creditor failed to establish when the debt become due and payable, and the Corporate Debtor has committed default. Appellate Tribunal observed that there is no agreement of loan and interest, and no document is to stipulate the period of repayment even from the demand notice and the Application under Section 7 of the IBC. The terms of the loan agreement and other factors are not clear.

Hon'ble Supreme Court held in Phoenix Arc Pvt. Ltd. Vs. Spade Financial Services Ltd. & Ors that the IBC recognizes that for the success of Insolvency regime the real nature of transaction has to be unearthed in order to prevent any person from taking undue benefit of its provisions to the detriment of the rights of legitimate creditors. It means according to the Hon'ble Supreme Court, while admitting the Application under Section 7 of the IBC, it is the duty of the Adjudicating Authority to investigate the real nature of the transaction in order to prevent any person from taking undue benefit of its provisions to the detriment of the rights of legitimate creditors.

NCLAT also referred pronouncement of Hon'ble Supreme Court held in Swiss ribbons (P) Ltd v Union of India that even if the Application filed under Section 7 meets all the requirements, then also the Adjudicating Authority has exercised discretion carefully to prevent and protect the Corporate Debtor from being dragged into the Corporate Insolvency Resolution Process malafide.

Section 65 provides that if any person initiates the Insolvency Resolution Process or liquidation proceedings fraudulently or with malicious intend for any purpose other than for resolution of Insolvency or Liquidation, the Adjudicating Authority may impose upon such person a penalty.

NCLAT held that the Financial Creditor has failed to establish that the transaction in question is a Financial Debt and due and payable and the Corporate Debtor has committed default. Thus, the impugned order was set aside.

The orders passed by the Adjudicating Authority initiating CIRP against the Corporate Debtor and appointing IRP and all other orders pursuant to impugned order and actions were set aside and the Application preferred by

the Financial Creditor under Section 7 of the IBC was dismissed. Adjudicating Authority will close the proceedings. The Corporate Debtor Company was released from all the rigor of law and was allowed to function independently through its board of directors with immediate effect.

NCLAT also held that Adjudicating Authority will fix the fees of IRP/RP/Liquidator, as informed that Corporate Debtor Company was in liquidation. Payment of fees and CIRP Costs will be regulated in accordance with the provisions of the IBC and Regulations. The Appeal was allowed with aforesaid observations, however, there shall be no order as to costs.

CASE NO. 11

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

In the matter of:

Vivekanand Jha

(Suspended Management of Telstar Industries Pvt. Ltd.) (Appellant)

Vs.

Punjab National Bank and Anr. (Respondents)

Company Appeal (AT) (Insolvency) No. 407 of 2021

Date of Order: 14-06-2021

Section 7 of the Insolvency and Bankruptcy Code, 2016 and Limitation Act, 1963 – The period of limitation is to be calculated from the date of acknowledgement of debt by way of OTS.

Facts:

This Appeal was filed by the Appellant who was on suspended management of the Corporate Debtor against impugned Order dated 20.04.2021 passed by Adjudicating Authority in C.P. (IB) No.179/7/NCLT/AHM/2019. By the said Impugned Order, the Adjudicating Authority admitted Application under Section 7 of Insolvency and Bankruptcy Code, 2016 filed by the Respondent (Bank) against the Corporate Debtor. Respondent claimed before the Adjudicating Authority that it had approved various financial facilities and disbursed Loan in the form of Cash/ Credit and Over Draft Facilities but the Corporate Debtor did not pay the instalments as per the Agreement. The Respondent had to resort to proceedings before Debts Recovery Tribunal.

The Respondent claimed that Notice under Section 13(2) of SARFAESI Act, 2002 was issued to the Corporate Debtor when the Loan Account became Non-Performing Assets. The Bank claimed that the date of default was 27th December, 2014.

The Adjudicating Authority heard the defence raised by the Corporate Debtor and after considerations admitted the Application under Section 7 of IBC by the Impugned Order.

Decision:

NCLAT observed that there was an earlier offer of settlement dated 09th November, 2015 and there was yet another offer by way of OTS on 29th March, 2016. After the grant of Loan, the Corporate Debtor made default in payment of installments. The Bank relied on the OTS offer and OTS as acknowledgments and thus claimed before Adjudicating Authority that this Application under Section 7 of IBC filed on 12th February, 2019 was in Limitation.

NCLAT further observed that the Loan Account of the Corporate Debtor was in default on 27th December,2014 and if on 29th March, 2016, the Corporate Debtor entered into the OTS that is in the context of the Debt already due and in default. Date of Default will not shift. The OTS is only an Acknowledgment of debt due and arrangement how the debt in default would be paid.

NCLAT found no substance in the appeal and agreed with the Adjudicating Authority with regard to finding that the application was within limitation.

The Appeal was dismissed.

CASE NO. 12

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

In the matter of:

Vijayalakshmi Enterprises (Appellant)

Vs.

Malabar Hotels Pvt. Ltd. (Respondent)

Company Appeal (AT)(Insolvency) No. 1068 of 2020

Date of Order: 15-12-2020

Section 7 of the Insolvency and Bankruptcy Code, 2016

Proceedings under Insolvency and Bankruptcy Code, 2016 are only meant to resolve the insolvency issues and not adjudge a claim and thereby, the appropriate remedy would not lie in triggering the CIRP provisions of the Code.

Facts:

Pursuant to the dismissal of application filed under Section 7 of the I&B Code by National Company Law Tribunal, Division Bench- 1, Chennai, for initiating Corporate Insolvency Resolution Process against Corporate Debtor wherein Resolution Plan has already been approved by the Adjudicating Authority vide Order Dated 17th September, 2018, an appeal was filed by the Financial Creditor.

The NCLAT noted that the Resolution Plan, as approved by the Adjudicating Authority, has a saving clause for the Financial Creditor providing that the Financial Creditor shall be paid on the basis of the outcome of the adjudication of the legal proceedings and keeping in view that the claim of the Financial Creditor was rejected by the Resolution Professional at the first instance in its entirety and the Resolution Applicant having submitted the Resolution Plan to the Committee of Creditors, which was approved by the Adjudicating Authority, held that the amount payable to the Financial Creditor has not been crystalized.

NCLAT was of the view that it is therefore clear that the claim of the Appellant was to be paid on the basis of outcome of adjudication of legal proceedings.

NCLAT stated that filing an application under Section 7 of the I&B Code cannot be held to be a legal proceeding dealing with the adjudication of the disputed claims.

The NCLAT opined that there is no difficulty in holding that initiation of Corporate Insolvency Resolution Process would not tantamount to adjudication of the claim in regard to right to recover money which claimant in respect of a disputed claim, claims to be entitled to.

Decision:

The NCLAT upheld the Order of the Adjudicating Authority dismissing the petition under Section 7 of the Code filed by the appellant / Financial Creditor by holding that Proceedings under Insolvency and Bankruptcy Code, 2016 are only meant to resolve the insolvency issues and not adjudge a claim and thereby, the appropriate remedy for the Appellant / Financial Creditor would not lie in triggering the CIRP provisions of the Code.

NCLAT held that Adjudication has to be by a Civil Court and other adjudicatory mechanism like Arbitral Proceedings, in respect of the claim.

NCLAT found no merit in the appeal. The appeal was accordingly dismissed. However, it was stated that disposal of the appeal will not preclude the Appellant from seeking remedy from the competent forum, subject to all just legal exceptions.

SECTION 9

CASE NO. 13

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

In the Matter of

M/s Hacxad Infotech Private Limited (Appellant)

Vs.

M/s Skootr Global Private Limited (Respondents)

Company Appeal (AT) (Insolvency) No. 1064 of 2021

Date of Order: 10-03-2022

Section 9 of the Insolvency and Bankruptcy Code, 2016

Whether an Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 is maintainable if notices issued by Registered Post as well as Speed Post have not been delivered and registered email IDs of the Corporate Debtor and its Directors was no more in operation.

Facts:

The Appeal had been filed by the Corporate Debtor through its Ex-Management, challenging the order passed by the National Company Law Tribunal, New Delhi Bench, Court III rejecting the Application filed by the Appellant to recall ex-parte order dated dated 8th February, 2019 and admission order dated 10th April, 2019 passed by Adjudicating Authority.

- The Corporate Debtor entered into Facility Management Agreement with the Respondent (Operational Creditor), under which the Respondent had provided facility and workspace to run office operation by the Corporate Debtor.
- The Corporate Debtor opted out of the Facility Management Agreement & shifted his registered office. The Corporate Debtor informed the Operational Creditor about the issues which arose regarding operation at the space provided by the Operational Creditor.
- The Operational Creditor claimed to have issued notice under Section 8 to the Corporate Debtor on the registered email IDs as available on

the portal of Ministry of Corporate Affairs and Demand Notice by Speed Post on the registered address of the Corporate Debtor as well as on its registered email IDs. The email did not bounce back or returned, but no reply was filed to the notice.

- An Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 has been filed by the Operational Creditor. The Adjudicating Authority issued notice of appearance, but the Corporate Debtor did not appear. An affidavit of service was filed by the Operational Creditor before the Adjudicating Authority wherein it was mentioned that notices issued by Registered Post as well as Speed Post have not been delivered and returned with the endorsement "Addressee left without instruction", whereas email sent to the Corporate Debtor on email IDs as provided in the Ministry of Corporate Affairs data base was sent. The Adjudicating Authority after the receipt of the affidavit of service held that notices are served and directed to proceed exparte against the Corporate Debtor by its order dated 8th February, 2019. The Application under Section 9 was taken up for ex-parte hearing and by order dated 10th April, 2019 it was admitted.
- The Appellant after coming to know about the initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor filed an application on 10th June, 2019 for setting aside ex-parte order and impugned order dated 8th February, 2019 and 10th April, 2019 on the ground of non service of notice and petition under the Code.
- The Adjudicating Authority by impugned order dt. 30th November, 2021 rejected the Application. The Adjudicating Authority took the view that order dated 8th February, 2019 and 10th April, 2019 have been passed after due consideration, which cannot be recalled/ reviewed by the Tribunal. The Tribunal followed the judgment of Allahabad High Court in the matter of Khan Enterprises vs. National Company Law Tribunal & Ors. to the effect that there is no provision in IBC for review of order admitting a petition filed under Section 9. Aggrieved by the order dated 30th November, 2021, this Appeal has been filed.

Appellant also submitted that the Corporate Debtor has already informed the Operational Creditor that he has to shift his premises, which fact is fully proved by the notices sent at the registered office having been returned with the endorsement that addressee has shifted the premises. It is further submitted that the domain services, which was being provided by the service

provider had informed the Corporate Debtor that official domain and email services are going to expire and by the end of September 2018, email services provided by the third-party service provider expired hence, no email could be received by the Appellant at email domain service.

Decision:

Appellate Tribunal observed that –

- Order dated 8th February, 2019 by which Adjudicating Authority decided to proceed ex-parte against the Appellant, itself noted that notices sent by Speed Post have been received back unserved.
- The order dated 8th February, 2019 passed by the Adjudicating Authority on the basis of affidavit of service filed by the Operational Creditor. In the affidavit, it has been pleaded that Operational Creditor has tried to serve the copy of the order (Order by which notices were issued to the Corporate Debtor), which letter was not delivered. The registered letter sent by Speed Post service were also not delivered and returned with the endorsement "addressee left without instruction". Thus, the notices, which were sent by the Adjudicating Authority to the Corporate Debtor, both by Registered Post and Speed Post were not served, which fact is also noticed in the order dated 8th February, 2019. In the Application, the Appellant has come up with a case that registered email IDs of the Corporate Debtor and its Directors through the domain service was no more in operation, as the domain service provided by the third-party had expired. It is also the case of the Corporate Debtor that immediately after passing of the order dated 10th April, 2019, an email was received on the personal email ID of the Director, which was duly received. The Corporate Debtor has made sufficient ground to prove that order dated 8th February, 2019 as well as order dated 10th April, 2019 were passed without serving any notice. In the order which was passed on 10th April, 2019, admitting Section 9 Application, the Adjudicating Authority itself has noticed that notices sent by Speed Post have been received back unserved.
- In the present case Corporate Debtor was asking for recall of the order dated 8th February, 2019 and 10th April, 2019. Both the orders were passed ex-parte and no notices were served. NCLAT had noticed that what Corporate Debtor was seeking, was to recall the ex-parte order,

which power was specifically conferred on the Adjudicating Authority under Rule 49, sub-rule (2) and when power is specifically conferred under the Rule, there was no question of exercising any review jurisdiction.

NCLAT held that orders dated 8th February, 2019 as well as 10th April, 2019 were passed without service of any notice on the Corporate Debtor and both the orders being ex-parte, deserve to be set aside by the Adjudicating Authority by exercising the power under Rule 49, sub-rule (2).

NCLAT set-aside the order dated 30th November, 2021 passed by the Adjudicating Authority. The Appeal was allowed and the order dated 8th February, 2019 as well as 10th April, 2019 were also set-aside. Application was revived before the Adjudicating Authority, to be heard and decided after hearing the parties. The Appellants were also allowed 30 days' time to file reply to Section 9 Application before the Adjudicating Authority. The Adjudicating Authority after hearing the parties may decide on merits and in accordance with law. The Appeal was allowed accordingly. No order as to costs.

CASE NO. 14

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

In the matter of

Jumbo Paper Products (Appellant)

Vs.

Hansraj Agrofresh Pvt. Ltd. (Respondents)

Company Appeal (AT) (Ins) No. 813 of 2021

Date of Order: 25-10-2021

Section 9 of Insolvency and Bankruptcy Code, 2016

Application filed u/s 9 after 24.03.2020 wherein the threshold limit of application was raised from Rs. 1 Lakh to 1 Crore could not be entertained for default less than Rs.1 Crore.

Facts:

This Appeal is filed by the Appellant whose application under section 9 of the Insolvency and Bankruptcy Code, 2016(hereinafter called IBC) was

dismissed by the Adjudicating Authority through impugned order dated 23.07.2021.

The Appellant-Operational Creditor had argued that the Corporate Debtor never raised any dispute about quality or quantity of the supplied goods when he was supplying them. Since some payment was pending with the Corporate Debtor, the Appellant sent demand notice under section 9 to the Corporate Debtor. In reply to the demand notice, the Corporate Debtor did not advert to any pre-existing dispute about the quality or quantity of the goods supplied but only sought time to clear the dues. The Operational Creditor thereafter filed application under section 9 of IBC on 13.9.2020 since there was a debt in default since 27.5.2018 till 23.6.2018.

The Adjudicating Authority dismissed the application of the Operational Creditor in view of notification S.O 1205(E) dated 24.3.2020issued by the Ministry of Corporate Affairs, Government of India on the ground that the alleged debt that was claimed to be payable in application under section 9 was below the threshold limit stipulated in the said notification.

The Appellant also argued that the notification cannot be applied retrospectively, as was held by NCLAT, in their order previously, since the notification of the Ministry of Corporate Affairs issued on 24.3.2020 was prospective in effect. Therefore, it was to be considered that the debt was payable on the date the Section 9 application was filed, on 13.9.2020. Therefore, the Operational Creditors claim was that though the Section 9 application was filed on 13.9.2020, the debt in default related to the period 27.5.2018 to 23.6.2018. The debt which was of an amount of Rs.13,46,278/- predated the issue of notification on 24.3.2020, hence the application should be admitted.

Decision:

Appellant Tribunal observed that the NCLAT judgement in CA (AT) (Insolvency) No. 557 of 2020 in the matter of Madhusudan Tantia Vs. Amit Choraria & Anr referred by Appellant shows that the demand notice under section 8 was issued on 31.7.2019 and the application under section 9 was filed on 5.9.2019. Both these dates were before 24.3.2020, and therefore threshold limit of the debt asper law at the time the application under section 9 was filed was Rs. 1lakh. So Appellant Tribunal did not think the facts of the instant appeal are same as the facts in Madhusudan Tantia case.

NCLAT observed that any statute/law can be applied retrospectively only if explicit provision regarding its retrospective application is made in the statute. It was seen that notification dated 24.3.2020made it unambiguously clear that the threshold limit to be considered for section 9 application will be Rs. 1 crore. NCLAT held that the threshold limit will be applicable for application filed/s 7 or 9 on or after 24.3.3020 even if debt was of a date earlier than24.3.2020. Since the application under section 9 which is the subject matter of this appeal was filed on 13.9.2020, therefore the threshold limit of Rs. 1 crore of debt would be applicable in the present case.

The Appeal was failed and accordingly dismissed at the stage of admission.

CASE NO. 15

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

In the matter of

Crown Tobacco Company Pvt. Ltd. (Appellant)
(Operational Creditor)

Vs.

Crale Foodlinks Pvt. Ltd. (Respondent No. 1) (Corporate Debtor)

Mrs. Leonys Pereira (Respondent No. 2)

Mr. Craig Pereira (Respondent No. 3)

Company Appeal (AT) (Insolvency) No. 951 of 2020

Date of Order: 30-09-2021

Section 9 of Insolvency and Bankruptcy Code, 2016

There existed a pre-existing dispute and also part debt was time barred – so case was dismissed.

Facts:

This Appeal has been preferred by Operational Creditor of Corporate Debtor being aggrieved by the order passed by the Adjudicating Authority (National Company Law Tribunal) whereby the Adjudicating Authority had dismissed the C.P. (IB) 388/2018 holding that the Company Petition is not maintainable before the Tribunal and is liable to be dismissed.

The Respondent No. 1 entered into a Business Conducting Agreement (BCA) with the Appellant Company on 29.04.2010 which was followed by two

Supplemental Agreements dated 30.04.2010. It was an agreement of 7 years expiring on 30.09.2017.

In 2016, the Appellant Company indicated that it did not wish to extend or renew the BCA beyond the expiration dated 30.09.2017. However, before the expiry of BCA, Respondent No.2 & 3 filed R.A.D. before the Court of Small Causes Bandra, claiming tenancy rights in the business premises. Further on expiry of BCA, the Appellant was not interested in continuing with the business arrangement any longer, and the Respondent Company vacated the possession of the business premises. However, the Monthly Conducting Fee and the utility bills for the month of August and September and Municipal Assessment Taxes from June 2010 to September,2017 remained unpaid.

On 08.11.2017 and 24.11.2017, the Appellant wrote letters to the Respondent No. 1 Company calling upon it to clear the outstanding. However, no response was received from the Respondent No.1. Meanwhile, on 15.12.2017, in Commercial Suit which was filed by Respondent No. 2 and 3 and one more individual of the Pereira family under Section 6 of the Specific Relief Act, 1963 seeking possession of the Business Premises, the Hon'ble Bombay High Court granted Status Quo.

With no sight of any repayment from the Respondent, Appellant sent a Demand Notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 (IBC) calling upon the Respondent to clear the outstanding amount to which respondent 2 and 3 denied to pay any outstanding amount to the Appellant on various grounds, including the pre-existence of disputes pending before the Court of Small Causes, Bandra and the Hon'ble Bombay High Court. Thereafter, the Appellant filed Company Petition before the NCLT under Section 9 of the IBC for the amount outstanding against the corporate debtor including amount of Municipal taxes pertaining to the period from 2010 to 2017. NCLT dismissed the petition on the basis that all claims prior to 12.03.2015 are time barred. However, the appellant may institute necessary recovery proceedings against the Corporate Debtor for recovery of their dues in respect of the claims that were within limitation.

Decision:

NCLAT was of the considered view that there was pre-existing dispute between the parties and two cases were also pending one was before the Hon'ble Bombay High Court and other was before the Court of Small Causes Bandra. It agreed that NCLT rightly came to the conclusion that total amount of 14,62,205/- (Municipal Taxes) which was claimed by the Appellant from

period 2010 to 2017 and the Petition under Section 9 of the IBC was filed on 12.03.2018, so all claims prior to 12.03.2015 are time barred. It agreed with the finding passed by NCLT.

NCLAT agreed with the reasons mentioned in the impugned order passed by the Adjudicating Authority while dismissing the Company Petition under Section 9 of the IBC filed by the Appellant and was thereby affirmed.

No merit was found in the instant Appeal and accordingly dismissed. There shall be no order as to costs.

CASE NO. 16

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

In the matter of

Tek Travels Private Limited (Appellant)

Vs.

Altius Travels Private Limited (Respondent)

Company Appeal (AT)(Insolvency) No. 172 of 2020

Date of Order: 19-04-2021

Section 9 of The Insolvency and Bankruptcy Code, 2016

Hon'ble NCLAT decided in this matter as to whether an authorization provided prior to initiation of IBC valid for triggering insolvency proceedings under IBC and whether there can be outright dismissal by Adjudicating Authority without opportunity to rectify.

Facts:

The appeal arises from the Order dated 13 December 2019 passed by the Hon'ble NCLT, Ahmedabad Bench, in Company Petition (IB) No. 252/NCLT/AHM/2019, whereby the Application filed by Appellant under Section 9 of the I&B Code 2016 was rejected on the ground of maintainability for want of proper Authorisation, which is of the year 2013 when Insolvency and Bankruptcy Code, 2016 was not in existence.

The question that arose for consideration of Hon'ble NCLAT was as follows:

1. Whether Authorisation for filing a petition under Section 9 of the Code before the commencement of the Code can be treated as a valid authorisation?

2. Whether Adjudicating Authority instead of dismissal of the Petition should have given the opportunity to rectify the defects as per proviso to Section 9 (5) (ii)(a) of the Code?

Hon'ble NCLAT had already before taken the view in earlier decisions that if the Adjudicating Authority finds any defect in the Application filed under Section 7 or 9 of the Code, then instead of rejecting the Application, the Applicant should be granted seven days' time to remove the defect.

In the case of Ramesh Murji Patel v Aramex India Pvt Ltd. Company Appeal (AT) (Ins)No 1447 of 2019 and Rajendra Narottamdas Sheth v Smt Heenaben Rajendra Kumar Sheth Company Appeal (AT) (insolvency) No 621 of 2020, NCLAT has already taken the view that if Authorisation is prior to the enactment of the Code, then it can not be treated as a defect in the Application and 'authorisation letter, even if, issued prior to the enactment of I&B Code can be looked into for the purpose of entertaining an Application under Section 7 or 9 of the Code.

The Tribunal observed that if Applications filed under Section 9 of the Code is found incomplete, then Adjudicating Authority in compliance of proviso to Section 9 (5) (ii)(a) of the Code is obliged to issue notice on the applicant and provide an opportunity to rectify the defects within seven days, failing which petition can be rejected.

In the present case, the Tribunal observed that the Adjudicating Authority noticed that the Authorisation was much before the commencement of the I&B Code, and only on this basis, the Application under Section 9 of the Code was rejected without allowing the applicant to rectify the mistakes.

The Tribunal further stated that the Insolvency and Bankruptcy Code is a self-contained Code. It has made provision for providing an opportunity to rectify the defects of application, and in any position, it cannot be denied. Proviso to Section 9(5)(ii)(a) of the Code makes it mandatory to provide an opportunity to the applicant for rectifying the defects of the application.

Decision:

The Appeal was allowed, and impugned Order was set aside. The Adjudicating Authority was directed to decide the application afresh at the earliest in the light of the directions above.

CASE NO. 17

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

In the matter of

Mazda Agencies (Partnership firm) (Appellant)

Vs.

Sh. Hemant Plastics & Chemicals Ltd. (Respondent)

Company Appeal (AT)(Insolvency) No. 763 of 2020

Date of Order: 05-03-2021

Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Limitation Act, 1963.

Entitlement of exclusion of period spent during the pendency of proceedings under SICA

Facts:

The Operational Creditor (Appellant) supplied printing and packaging material to the Corporate Debtor (Respondent) the last payment of which was made on 22.11.2004. On 11.01.2005 the Corporate Debtor has acknowledged outstanding dues amounting to Rs. 1,48,11,572/- as on 31.12.2004. However, the Corporate Debtor failed to make the payment due to financial crunch and therefore was referred to BIFR, which did not work out.

Subsequently, The Sick Industrial Companies (Special Provision) Act, 1985 was repealed on 01.12.2016. Thereafter, Operational Creditor filed an Application under Section 9 of the I&B Code after serving notice under Section 8 of the I&B Code on the Corporate Debtor.

It is claimed by the Appellant that the Corporate Debtor acknowledged the debt on 11.01.2005 hence, the period of limitation would start from this date as per the provisions of Section 18 of the Limitation Act, 1963. BIFR and AAIFR proceedings under SICA commenced in the year 2005 and remained in process till repeal of such Act i.e. 01.12.2016. Hence, as per the provisions of Section 22(5) of SICA the period consumed in the course of such proceedings had to be excluded in computing the period of limitation. Thus, the Application under Section 9 of the I&B Code is within limitation.

Further it was stated that the Respondent has proposed for settlement of outstanding dues at 20% and in case this proposed settlement is not acceptable to the appellant, they can wait till the scheme of rehabilitation of the company has worked itself out. Therefore, the Appellant could not initiate any legal action against the Respondent. Hence, the Appellant is entitled to get exclusion in computing the period of limitation spent in legal proceedings specified under Section 22(1) of the SICA.

The appellant also submitted that Ld. Adjudicating Authority, in the impugned order wrongly mentioned that the Appellant has filed suit for recovery of Operational Debt actually, the suit was filed for declaration and permanent injunction against the Respondent not to alienate or transfer their assets.

Issues that were cropped up before the NCLAT for its consideration were:

a) Whether as per section 22(1) of the SICA the legal proceedings for recovery of operational debt were suspended, if yes?

b) Whether as per section 22(5) of the SICA the Appellant is entitled to get exclusion in computing the period of limitation spent in SICA Proceedings?

In this regard, the NCLAT held that the Appellant was not part of the scheme and they have already approached Civil Court for recovery of operational debt by not accepting the settlement of outstanding dues at 20%. In such circumstances, it cannot be said that the legal right of remedy of the Appellant against the Respondent was suspended as per section 22(1) of the SICA. Therefore, the Appellant is not entitled to claim extension of period of limitation by virtue of exclusion of period of suspension.

With the aforesaid view, the appellant is not entitled to get exclusion in computing the period of limitation spent in SICA Proceedings. Further, NCLAT was of the view that the facts of the given case are distinguishable from the facts of Gouri Prasad Goenka (Supra). Thus, the cited Judgment is also not helpful to the Appellant.

Decision:

The NCLAT upheld the view of AA that the Appellant is not entitled for exclusion of the period which spent during the pendency of proceedings under SICA. Thus, the Application under Section 9 of the I&B Code is barred by Limitation.

With this the Appeal is dismissed, however, no order as to cost.

SECTION 14

CASE NO. 18

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

In the matter of

Executive Engineer, Uttar Gujrat VIJ Company Ltd (Appellant)

Vs.

Mr. Devang P Samapat, RP of M/s. Kanoovi Foods Pvt. Ltd (Respondent)

Company Appeal (AT) (Insolvency) No. 371 & 372 of 2021

Date of Order: 27-05-2021

Section 14 (2A) of The Insolvency and Bankruptcy Code, 2016

Vide this Judgement, Hon'ble NCLAT held that electricity consumed for running of office and security, as against consumption for manufacturing, shall be CIRP cost and shall be recovered upon approval of resolution plan or in accordance with Section 53 of the Code. The same does not fall under Section 14(2A).

Facts:

Appeal has been filed by the Appellant aggrieved by two orders passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Court 1) in I.A. No. 443 of 2020 in CP(IB) 377/2018 order dated 21st October, 2020 for recovery of electricity charges during CIRP period ("First Impugned Order") and in I.A. No. 819 of 2020 in same CP(IB) 377 of 2018 for review of Order ("Second Impugned Order") order dated 2nd December, 2020.

The Appellant submits that the appellant was entitled to recover electricity charges being incurred by the Corporate Debtor on month to month basis after the CIRP was initiated against the Corporate Debtor. The same should have been paid but were not paid. The Appellant further submits that it is erroneous that Application claiming recovery of electricity charges during CIRP is not maintainable. Further, as per Section 14(2A), Appellant was entitled to recover electricity charges which have been held to be essential services.

The Corporate Debtor is manufacturer of Biscuits. The Liquidator who was also the Resolution Professional and consumption of electricity has been done was only with regard to the running of office during the CIRP period and was for the security and essential purposes only and that it was not for manufacturing purposes.

Decision:

Illustration of Regulation 32 makes the distinction clear. If the electricity consumption was for manufacturing and output of the Biscuits which is the normal operation of the Corporate Debtor, in that case dues arising from such supply of electricity during moratorium would have to be paid during moratorium.

Sub-section 2A of Section 14 read with Regulations 31 and 32 as appearing in IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) makes it clear that if the supply is for managing the operations of the Corporate Debtor the supply cannot be interrupted during moratorium except where Corporate Debtor has not paid dues arising from such supply during the moratorium period.

Hon'ble NCLAT observed that the consumption of electricity is stated to have been for running of office and security of Corporate Debtor. In that case, the same will be part of the CIRP Costs which can be recovered when the Resolution Plan is approved or would form part of Section 53 if the Liquidation has been initiated.

Hon'ble NCLAT agreed with the Adjudicating Authority order dated 21st October, 2020 which had held that the electricity charges during CIRP would form part of CIRP Costs.

Hon'ble NCLAT declined the Appeal. The Appeal was disposed accordingly.

SECTION 14, 63 & 238

CASE NO. 19

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

In the matter of

The Directorate of Enforcement (Appellant)

Vs.

Sh. Manoj Kumar Agarwal and Ors. (Respondents) Company Appeal (AT)(Insolvency) No. 575 of 2019

Date of Order: 09-04-2021

Section 14, Section 63 and Section 238 of the Insolvency and Bankruptcy Code, 2016

If a property has been attached in the PMLA which is belonging to the Corporate Debtor, if CIRP is initiated, the property should become available to fulfil objects of IBC till a resolution takes place or sale of liquidation asset occurs in terms of Section 32A.

Facts:

The appeal has been filed by the Directorate of Enforcement being aggrieved by impugned order dated 12.02.2019 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench, Mumbai in MA No.1280 of 2018, directing that the attachment order dated 29.05.2018 and the Corrigendum dated 14.6.2018 issued by the deputy Director, Directorate of Enforcement, under the provisions of Prevention of Money Laundering Act, 2002 (PMLA in short) which has been confirmed by the Adjudicating Authority under PMLA was nullity and nonest in law in view of Sections 14(1)(a), 63 and 238 of Insolvency and Bankruptcy Code (IBC) and ordered the Resolution Professional to take charge of the properties and deal with them under IBC as if there is no attachment order.

The appellant claimed:

- that the properties were validly attached under the provisions of PMLA and in another proceeding before another Bench of the same Tribunal in MA No.1243/2018 in CP(IB) No.490/MBH/2018 in the matter of

Sterling Biotech Ltd Vs Andhra Bank where quashing of attachment was sought, the concerned Bench did not interfere and observed that the appeal could be filed only under the provisions of PMLA.

- Further, claimed that no moratorium is applicable in criminal proceedings Imposing of moratorium under Section 14 of IBC does not take away the powers of the Enforcement Directorate to attach proceeds of crime in possession of the Corporate Debtor under PMLA.
- That PMLA is a special legislation which is aimed at dealing with the offence of money laundering and, therefore, has primacy over the IBC in proceedings relating to money laundering.

The NCLAT held that after the attachment when matter goes before the Adjudicating Authority under PMLA, proceeding before Adjudicating Authority for confirmation would be civil in nature. That being so, Section 14 of IBC would be attracted and applies.

In the present matter, the Provisional Attachment took place on 29th May, 2018 and corrigendum was issued on 14th June, 2018. The CIRP started on 16th July, 2018. Once moratorium was ordered, even if the Appellant moved the Adjudicating Authority under PMLA, further action before Adjudicating Authority under PMLA must be said to have been prohibited. Even if confirmation has been done as stated to have been done on 20th November, 2018, the same will have to be ignored. Section 14 of IBC will hit institution and continuation of proceedings before Adjudicating Authority under PMLA. The CIRP will of course not affect prosecution before Special Court, till contingencies under Section 32A of IBC occur.

Further, NCLAT held that in case of quasi-criminal proceeding as regards Corporate Debtor, application of Section 14 has been found. Considering this as well as the nature of proceedings that takes place before the Adjudicating Authority under PMLA, NCLAT is of the view that even if the Authority issues order of provisional attachment, the institution and continuation of proceedings before the Adjudicating Authority for confirmation would be hit by Section 14 of IBC.

Alternatively, even if for any reason it was to be held that Section 14 of IBC would not help, section 238 of IBC would still apply. Although it is argued that PMLA is a special statute and has an overriding effect still Section 238 of IBC is also a special statute and which is subsequent statute. If this Section is perused, the provisions of this Code would have effect notwithstanding

anything inconsistent therewith contained "in any other law" for the time being in force. Section 238 of IBC does not give over riding effect merely to Section 14. The other provisions also are material, and will have effect if there is anything inconsistent therewith contained in any other law for the time being in force.

Further, the NCLAT held that if the aims and objects of IBC are to be achieved, there cannot be obstructions of attachments and seizures existing. If the property is under attachment or seizure, or possession is taken over, keeping the corporate debtor a going concern would be a serious issue.

Decision:

The NCLAT upheld the view of NCLT and held that there is no conflict between PMLA and IBC and even if a property has been attached in the PMLA which is belonging to the Corporate Debtor, if CIRP is initiated, the property should become available to fulfil objects of IBC till a resolution takes place or sale of liquidation asset occurs in terms of Section 32A.

Considering the above reasons, the appeal has been dismissed.

SECTION 29A

CASE NO. 20

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

IN THE MATTER OF

Harkirat Singh Bedi (Appellant)

Vs.

1. **The Oriental Bank of Commerce & Anr**
2. **Velayudham Jayavel**
3. **State Bank of India, Bengaluru (Respondents)**

Company Appeal (AT)(Ins.) No. 40 of 2020

Date of Order: 12-01-2021

Section 29A of The Insolvency and Bankruptcy Code, 2016

It is the commercial wisdom of the COC whether they want to seek extension of time or not after considering the feasibility and viability of the submitted resolution plan.

Facts:

The appeal has been preferred by an erstwhile promoter of Corporate Debtor challenging the impugned order dated 8th November 2019 passed by National Company Law Tribunal, Bengaluru Bench in Company Petition No. C.P. (IB) No. 17/BB/2019 for liquidation of the Corporate Debtor.

On initiation of CIRP against the Corporate Debtor, Expression of Interest (EOI) was published by RP on 16th June 2019, for which the Appellant submitted its EOI on 28th June, 2019. But, EOI of the Appellant was not considered by the Committee of Creditors (CoC) and RP on the ground that the Appellant was declared as 'willful defaulter"' by SBI, State Bank of Travancore and Oriental Bank of Commerce (OBC) and the resolution plan cannot be considered as per section 29A(b) of I&B Code. The Appellant challenged the decision of COC and preferred a Writ Petition No. 35567/2019 against the OBC and SBI. The High Court vide its order dated 23rd August 2019, issued notice in the said Writ and permitted the Appellant to submit his Resolution Plan to the RP on the ground that section 29A(b) of I&B Code prima facie appears to be prospective in nature.

Based on the said order, CoC allowed the Appellant to submit his resolution plan. Thereafter the COC in its meeting rejected the resolution plan of the Appellant on the following grounds:

a) The Appellant is declared as a willful defaulter by SBI, State Bank of Travancore and Oriental bank of Commerce and the same is visible in CIBIL database.

b) The resolution plan was not in compliance with the IBC.

c) The Appellant did not file affidavit under regulation 39 of the code regarding eligibility of the Appellant under section 29A of the IBC.

d) Further, the Appellant had also failed to provide undertaking under regulation 38 of the IBC for payment to Operational Creditors.

e) Appellant also failed to provide undertaking that all the information which Appellant had provided with his resolution plan are true and accurate.

The COC then decided to liquidate the Corporate Debtor as per the provisions of Section 33(2) of the IBC, with 92.63% of the COC members voting in favour of the same and thereafter, the CIRP period expired on 25th September 2019. The Adjudicating Authority vide its order dated 8th November 2019 confirmed the Corporate Debtor to be liquidated.

Being aggrieved by the impugned order, the Appellant preferred the instant Appeal before the Appellate Tribunal.

Decision:

The appellant in its EOI claimed the advantage of section 240A of the Code claiming exemptions from applicability of section 29A(c) and 29A(h) in terms of eligibility to be a resolution applicant as a medium level enterprise under MSME Development Act, 2006. The Tribunal resolved that the exemption is only in respect of clause (c) and (h) of Section 29A of the I&B Code. In the present case the Appellant is declared ineligible under clause (b) of Section 29A where no exemption has been given to MSME. Also, the date of registration of the Corporate Debtor as MSME as on record was 5th June 2019, i.e., after CIRP admission order dated 29th March 2019. The application for registration of MSME by the Appellant was without authorization, being subsequent to initiation of CIRP and hence was invalid. Therefore, the Appellant is ineligible to take the benefits of section 240A under I&B Code.

The Appellant cannot take plea that he was not given the statutory time period of 30 days to place his resolution plan as he had submitted his resolution plan well within time as agreed in the COC meeting i.e., on or before 16th September 2019. The contention of the Appellant that COC abruptly decided not to seek extension of time for CIRP process from the Adjudicating Authority is invalid as it is the commercial wisdom of the COC whether they want to seek extension of time or not after considering the feasibility and viability of the submitted resolution plan.

Therefore, the Tribunal found no legal infirmity in the impugned Order of the Adjudicating Authority and dismissed the Appeal.

SECTION 30

CASE NO. 21

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

In the matter of:

Employees Provident Fund Organisation

Through Regional Provident Fund Commissioner-II (Appellant)

Vs.

Mr. Subodh Kumar Agarwal

Resolution Professional & Ors. (Respondents)

Company Appeal (AT) (Insolvency) No. 116 of 2022

Date of Order: 27-05-2022

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

NCLAT drew attention of regulation making authority and Government on the law as it stands today does not require any claim which is not filed to be included in the Resolution Plan.

The Appeal was filed by the Appellant against the order passed by the National Company Law Tribunal, Kolkata ("Adjudicating Authority") allowing application filed by the Resolution Professional for approval of the Resolution Plan in respect of the Corporate Debtor.

Facts:

1. Insolvency proceedings were initiated against the Corporate Debtor by order dated 10.12.2020 passed by the Adjudicating Authority.

2. In the CIRP process of the Corporate Debtor, a Resolution Plan was filed by one of the Director of the Suspended Board of Directors of the Corporate Debtor. Resolution Plan was approved by the Committee of Creditors ("**CoC**") as the Corporate Debtor being a Micro, Small & Medium Enterprise ("**MSME**") and letter of intent was issued to the Resolution Applicant and an application for approval of the Resolution Plan was also filed before the Adjudicating Authority.

3. The Resolution Plan came to be approved by the Adjudicating Authority, wherein no allocation has been made towards dues of Employees Provident Fund Organisation as mentioned under Section 7A. Aggrieved by the said order the Appeal had been filed.

Appellant submitted that the Appellant had issued Show Cause Notice to the Corporate Debtor and the Director of the Corporate Debtor was duly served with the Show Cause Notice and he also appeared before the Organisation prior to even submission of Resolution Plan, it was obligatory on his part to provide for payment of the provident fund dues of the employees.

Successful Resolution Applicant submitted that no claim had been filed by the Appellant, therefore, there was no occasions for inclusion of their claim in the Resolution Plan. He submitted that Resolution Plan was in accordance with Section 30(2) of the Code which does not warrant any interference.

Decision:

NCLAT observed that –

- The proceedings under Section 7A of 1952 Act were initiated against the Corporate Debtor by issuing Show Cause Notice.
- It was clear that no claim was submitted by the Appellant in the Corporate Insolvency Resolution Process ("**CIRP**") but there was no denying to the fact that in CIRP notice of proceedings under Section 7A were issued. Director of the Corporate Debtor who is now the Resolution Applicant also participated in the proceedings under Section 7A but the proceeding under Section 7A does not find any mention in the Resolution Plan, supposedly due to non-filing of any claim.
- The provisions of the Insolvency and Bankruptcy Code, 2016 ("**Code**") and Regulations do not contemplate any cognizance of any ongoing proceeding under which Corporate Debtor may be saddled with any liability financial or otherwise.
- Although Section 18 of the Code uses the expression "collate all the claims" but the said expressions being followed by the words "submitted by creditors", the Resolution Professional is entitled to contend that unless the claim is received by him, he has no obligation to include it in the list of claims or even the Information Memorandum.

- Large number of cases are coming where Resolution Professional although have record of the Corporate Debtor which indicates several liability and claims against Corporate Debtor but in absence of want of any claim by such statutory authority, the claim does not find place anywhere in the list of claims or Information Memorandum and there is no obligation of the IRP/RP place such information before the CoC.

NCLAT held that "*The Regulation framing authority need to consider as to whether the Regulations need any amendment, clarification so as to include in the Information Memorandum any ongoing statutory proceeding which is likely to saddle the Corporate Debtor with financial or other liability. Further, even if the Resolution Professional has details of record, notices, orders indicating that certain amounts have been finalized to the received from the Corporate Debtor but due to want of claims being filed of such statutory authority they do not find any mention in the list of claims or Information Memorandum"*

It is the matter on which attention of regulation making authority and Government has to be drawn by this Tribunal so as to take remedial measures.

NCLAT further held that the law as it stands today does not require any claim which is not filed to be included in the Resolution Plan. In the given case, the claim which is now crystalized under Section 7A was not there at the time of currency of the Corporate Insolvency Resolution Process, hence, it is not necessary for NCLAT to express any concluding opinion as to what steps to be taken by the Appellant for a claim which has been crystalized after close of CIRP process. Appellant are at liberty to take such appropriate remedy for recovery of the amount under Section 7 as may be advised. However, NCLAT cannot find any fault due to above ground in the Resolution Plan nor Resolution Plan deserves any interference by the Appellant Tribunal on the aforesaid grounds.

NCLAT, thus, disposed of the appeal with observations and liberty as noted above.

CASE NO. 22

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

In the matter of:

Shravan Kumar Vishnoi (Appellant)

Vs.

Upma Jaiswal & Ors. (Respondents)

COMPANY APPEAL (AT) (INS.) NO.371 OF 2022

In the matter of:

Kumari Durga Memorial Sansthan (Appellant)

Vs.

Shravan Kumar Vishnoi & Ors. (Respondents)

COMPANY APPEAL (AT) (INS.) NO.374 OF 2022

Date of Order: 05-04-2022

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

The Resolution Professional can give his opinion with regard to each plan before the CoC and it is for the CoC to take a decision as to whether the plan is to be approved or not

Facts:

These two Appeals had been filed against the same order passed by the National Company Law Tribunal, Allahabad Bench ("**Adjudicating Authority**"). Application was filed before Adjudicating Authority by Respondent i.e. Resolution Applicant seeking a direction to the Resolution Professional to place the Resolution Plan submitted by the Appellant before the Committee of Creditors ("**CoC**").

The Adjudicating Authority after hearing the parties issued following directions in para 5:

"5. When these provisions are read together along with the judgment of the Hon'ble Supreme Court cited above, what appears is that the RP is a facilitator and not a gatekeeper. In these circumstances, the ends of justice would be met if we direct the RP to place all Resolution Plans along with his

opinion on the contravention or otherwise of the various provisions of law before the CoC which should take a considered view in the matter, if not already done."

The Appeal being Company Appeal (AT) (Ins.) No.371 of 2022 had been filed by the Resolution Professional challenging the order. It was submitted by the Appellant that according to the opinion obtained by the Resolution Professional, the plan submitted by Respondent was not eligible as per Section 29A of the Code. Due to this, the Resolution Professional is unable to place the plan before the CoC for approval.

Appellant in Company Appeal (AT) (Ins.) No.374 of 2022 submits that the plan which was submitted by the Appellant was considered by the CoC and CoC has asked the Appellant to increase the plan value which it had done. It was submitted that at this stage, the Adjudicating Authority ought not to have directed the plan of Respondent in Company Appeal (AT) (Ins.) No.371 of 2022 to be considered by the CoC.

Respondent contends that the question as to whether the plan submitted by Respondent is to be rejected or approved is a question which needs to be decided by the CoC. The Resolution Professional at best can give his opinion with regard to eligibility of the Resolution Applicant whether it conforms to Section 29A and other provisions of the Code or not. It is submitted that the Resolution Professional of its own cannot withhold any plan and refuse to submit the same before the CoC.

Decision:

National Company Law Appellate Tribunal, Principal Bench New Delhi ("**NCLAT**") observed that both the parties have placed reliance on the judgment of the Hon'ble Supreme Court in "Arcelormittal India Private Limited vs. Satish Kumar Gupta & ors.".

NCLAT also observed that the Resolution Professional is not to take a decision regarding the ineligibility of the Resolution Applicant. It has only to form its opinion because it is the duty of the Resolution Professional to find out as to whether the Resolution Plan is in compliance of the provisions of the Code or not the Resolution Professional can give his opinion with regard to each plan before the CoC and it is for the CoC to take a decision as to whether the plan is to be approved or not. In para 5 of the impugned order, it was noticed that the direction has been issued to the Resolution Professional to place all the Resolution Plans along with his opinion on the contravention

or otherwise of the various provisions of law. The aforesaid direction clearly indicates that the Resolution Professional is free to submit his opinion with regard to contravention or otherwise of the various provisions of law. The aforesaid observations take care of the duties and responsibilities of the Resolution Professional. The Resolution Professional can give his opinion with regard to each Resolution Applicants and further steps are to be taken for the CoC as per the direction issued by the Adjudicating Authority.

NCLAT held that various issues regarding ineligibility or eligibility need not be gone into the Appeal. It is only after the CoC's decision if any question arise regarding eligibility that can be gone into before the Adjudicating Authority in accordance with the law.

Both the Appeals were dismissed.

CASE NO. 23

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

In the matter of

Directorate of Commercial Taxes (Appellant)

Vs.

Kharkia Steels Pvt. Ltd. & Ors. (Respondents)

COMPANY APPEAL (AT)(Insolvency) No.387 OF 2021

Date of Order: 22-03-2022

Section 30(2)(b) and Section 238 of the Insolvency and Bankruptcy Code, 2016.

The feasibility and viability of the proposed resolution plan is established and are approved by the commercial wisdom of the CoC and the payments to operational creditors and financial creditors, is in accordance with the provisions of IBC then the Commercial wisdom of the CoC will prevail.

Facts:

This appeal has been preferred by the Appellant assailing the order dated 21.9.2020 passed by the Adjudicating Authority (NCLT, Kolkata) approving the application submitted by the Resolution Professional for approval of the resolution plan approved by the CoC.

The Appellant has stated in the appeal that Respondent No. 1 is a dealer since 19.3.2008 and is liable to pay Entry Tax as levied under the West Bengal Tax of Entry on Goods into Local Areas Act, 2012, Value Added Tax and Central Sales Tax to the Appellant as a registered dealer. Due to non-payment of dues, an accumulated amount became due for payment to the Appellant by Respondent No. 1. The Appellant has further stated that an application filed by its Financial Creditor under section 7 of the Insolvency and Bankruptcy Code, 2016 was initiated against the Respondent No. 1. During the CIRP, the Resolution Professional sought Resolution Plan from prospective Resolution Applicants and the submitted resolution plans were considered by the Committee of Creditors and approved by a voting share of 82.75% in a meeting of the CoC.

The Appellant has claimed that against the admitted operational debt, due for payment to the Appellant, the Successful Resolution Plan has made a provision of 0.16% of the admitted claim for payment.

The Appellant has claimed that the Successful Resolution Plan is not keeping with the judgement passed in the matter of Binani Industries Ltd. and Ors vis. Bank of Baroda and Ors (MANU/NL/0284/2018), where NCLAT held that Code aims to balance the interest of all stakeholders and does not maximize value for 'Financial Creditors' and the dues of 'Operational Creditors' must get at least similar treatment as compared to the dues of 'Financial Creditors'. The Appellant has also referred to the judgment of Hon'ble Supreme Court in the matter of Committee of Creditors of Essar Steel India Limited vs. Satish Gupta and Ors. (CA No. 8766-67 of 2019) to emphasize that the majority decision of the CoC should examine the 'feasibility and viability' of a Resolution Plan which should take into account all aspects of the Plan including the manner of distribution of funds among the various classes of creditors.

The Appellant has also argued that appointment of registered valuers for ascertaining the liquidation value of the Corporate Debtor was not done in accordance with the requirement of Regulation 27 of the IBBI (CIRP) Regulations, 2016 whereby the appointment of registered valuers has to be done by the Resolution Professional within 47 days from the insolvency commencement date, which was not done in this case. The Appellant also argued that the total admitted claim of the Operational Creditor pertains to the dues that relate to a long period which is much before the commencement of CIRP and was assessed by the State Tax Authorities and such an assessment can only be overturned through an appeal to the designated authority and not through a Resolution Plan which is approved by the Adjudicating Authority. Appellant also pointed out that the demand notice was issued to the Corporate Debtor, which was neither replied to nor any appeal was preferred against the said tax assessment and on grounds argued the appeal should be allowed.

The Respondent No. 1 stated that while the registered valuers were appointed two days later than the prescribed time limit for their appointment under the CIRP Regulations, that was a mere technical defect which does not cause any substantial difference in the liquidation assessment process or vitiate the entire valuation process. It was also urged that under the provision of section 30(2)(b) of the IBC, the share of Operational Creditors in the event

of liquidation comes as 'NIL'. The Resolution Professional/Respondent No. 2 has adopted the argument of Respondent No. 1 and has cited the judgment of the Hon'ble Supreme Court in the matter of Principal Commissioner of Income Tax vs. Monnet Ispat and Energy Limited (2018 18 SCC 786) wherein the Hon'ble Supreme Court has held that by virtue of section 238 of IBC, the provisions of IBC will override anything inconsistent contained any other enactment, including Income Tax Act and in such a view the Appellant's contention that the liability accrued due to state taxes prior to enactment of the IBC cannot be overridden by the resolution plan approved under the provisions of IBC is erroneous.

The two issues that arise in this appeal are:–

(i) Whether the commercial wisdom of the CoC has taken into account the feasibility and viability of the proposed resolution plan which does not treat the operational and financial debts on parity; and

(ii) Whether the process assessment of liquidation value is vitiated as the registered valuers were appointed beyond the stipulated time period stipulated in the CIRP regulations rendering the approval of resolution plan defective.

Decision:

NCLAT found that the operational creditors have been paid an amount in accordance with section 30(2)(b) of the IBC, and hence the successful resolution plan is in consonance with the provisions of IBC, wherein the payment to the operational and financial creditors and other stakeholders is according to the commercial wisdom of the CoC.

NCLAT further observed that the mere fact that the appointment was done two days after the 47th day from the insolvency commencement date, does not make the process vitiated because no other irregularity has been urged by the Appellant in the process of valuation of the corporate debtor's assets. Moreover Form-H, in which the compliance certificate under Regulation 39(4) of the CIRP Regulations is given, and which is obligatory to be submitted before the Adjudicating Authority, both fair value and liquidation value are mentioned. The Appellant did not raise any objection regarding assessment of the liquidation value before the Adjudicating Authority. And the Adjudicating Authority has accepted the compliance certificate submitted by the Resolution Professional during the consideration of the proposed resolution plan. Therefore, it was held by the NCLAT that there was no

organic error in the calculation of liquidation value of the corporate debtor and, therefore, the payment proposed in the successful resolution plan keeping the liquidation value so arrived at could not be found fault with.

NCLAT also observed that Appellant has also claimed that the past dues relating to commercial taxes should have been appealed before the designated authority and it cannot be adjudicated by the Adjudicating Authority under the IBC. In this regard, NCLAT held that, in accordance with section 238, when the resolution plan is proposed under the provisions of IBC during the currency of CIRP and considered by the CoC and subsequently approved by the Adjudicating Authority, all these actions taking place during the currency of CIRP, section 238 provides full protection to the actions taken under IBC against any other law or instrument, which may be inconsistent with the provisions of IBC. Therefore, the payments of operational debt as proposed in the successful resolution plan is completely legitimate and having the force of law.

In view of the discussion in the aforementioned paragraphs, NCLAT held the view that the Resolution Plan was approved by the CoC in its commercial wisdom and later by the Adjudicating Authority. The feasibility and viability of the resolution plan was established and the payments to operational creditors and financial creditors, particularly to the Appellant/Operational Creditor, was in accordance with the provisions of IBC.

Thus, the appeal was dismissed.

SECTION 30 & 31

CASE NO. 24

NATIONAL COMPANY LAW APPELLATE TRIBUNAL CHENNAI BENCH

In the matter of

Regional Provident Commissioner

Employees Provident Fund Organisation (Appellant)

Vs.

Vandana Garg (Respondent No. 1)

UV Asset Reconstruction Company Limited (Resolution Applicant) (Respondent No. 2)

Company Appeal (AT) (CH) (Ins.) No. 50 of 2021

Date of Order: 12-05-2021

Section 30(2) and Section 31 of The Insolvency and Bankruptcy Code, 2016

Vide this Judgement, Hon'ble NCLAT held that claims considered as part of approved resolution plan are frozen and binding on stakeholders including Central Government.

Facts:

Pursuant to the order dated July, 20, 2020, passed by the Hon'ble NCLT, Chennai Bench, Chennai ("NCLT") in MA No.1433 of 2019 in CP/941/IB/2018, whereby the NCLT approved the Resolution Plan, which waives off a major portion of the Provident Fund dues owed by the Corporate Debtor, this appeal was filed.

The Corporate Debtor had defaulted in payment of dues/damages/interest, including the employees share of contribution, since 2014, which were deducted from employees' wages, to the tune of Rs. 2,84,69,797.

The CIRP started against the Corporate Debtor on October 15, 2018 and the Appellant had submitted its claim to the Resolution Professional. Thereafter, the Resolution Professional informed the Appellant about approval of the Resolution Plan by the Adjudicating Authority.

Decision:

NCLAT observed that the Appellant, despite filing a claim of Rs.1,95,01,301/- has raised a claim of Rs.2,84,69,797/-, i.e. much higher than the amount claimed by the Appellant in its claim before the Resolution Professional. The Appellant's claim admitted by Respondent No. 1/RP had been considered while formulating the Resolution Plan of the Corporate Debtor. The said Resolution Plan was further approved by the Adjudicating Authority/NCLT vide its Order dated July 20 2020, in conformity with Section 30 (2) of the I&B Code,2016 and the Rules and Regulations framed thereunder. The Appellant has not provided any reason or justification for raising the enhanced claim of Rs.2,84,69,797/-, which is much higher than the amount claimed.

Hon'ble NCLAT stated that the question of applicability of Section 36 (4) (a) (iii) of the Insolvency and Bankruptcy Code 2016 arises at the stage of the formation of Liquidation Estate by the Liquidator. Since the Corporate Debtor has not gone into Liquidation and is currently under Insolvency Resolution, Section 36 of the I&B Code cannot be applied. Moreover, no fund could be excluded from the Liquidation Estate in terms of Section 36 (4) (a)(iii) of the I & B Code 2016.

Hon'ble NCLAT, based on the law as laid by Hon'ble Supreme Court in the case of **Ghanashyam Mishra and Sons Private Limited v Edelweiss Asset Reconstruction Company Limited**, held that after approval of the Resolution Plan under Section 31, the claims as provided in the Resolution Plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors including the Central Government, any State Government or any Local Authority, Guarantors and other Stakeholders.

On the approval of the Resolution Plan by the Adjudicating Authority, all such claims that are not a part of the Resolution Plan shall stand extinguished. No person will be entitled to initiate continuing any proceedings regarding a claim that is not part of the Resolution Plan.

The Appellants claim about Provident Fund dues amounting to Rs.1,95,01,301/-which was earlier raised at the time of initiation of CIRP and was later admitted, stood frozen and will be binding on all the Stakeholders, including the Central Government.

After approval of the Resolution Plan by the Adjudicating Authority, all such claims that are not part of the Resolution Plan shall stand extinguished. No person is entitled to initiate or continue any proceeding regarding a claim that is not part of the Resolution Plan.

The Appeal was dismissed without order as to costs.

SECTION 60 & 95

CASE NO. 25

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

In the matter of

State Bank of India,

Stressed Asset Management Branch (Appellant)

Vs.

Mahendra Kumar Jajodia,

Personal Guarantor to Corporate Debtor (Respondent)

Company Appeal (AT) (Insolvency) No. 60 of 2022 with

Company Appeal (AT) (Insolvency) No. 61 of 2022

Date of Order: 27-01-2022

Section 95(1), Section 60(1), Section 60(2) of the Insolvency and Bankruptcy Code, 2016

Whether Section 60(2) of the Code requires that for an insolvency Resolution Process to be initiated against the guarantor there must be CIRP or Liquidation Process is pending against the principal borrower/Corporate Debtor

Facts:

This Appeal has been filed against the Order dated 5th October, 2021 passed by National Company Law Tribunal, Kolkata Bench, Kolkata. The State Bank of India had filed an Application under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 seeking initiation of Corporate Insolvency Resolution Process against the Guarantor. The Application came to be rejected by the Adjudicating Authority as premature by order dated 05th October, 2021. NCLT in its order had stated that, "*This is an application filed by the petitioner/financial creditor u/s. 95(1) of the Insolvency and Bankruptcy Code, 2016 seeking initiation of Insolvency Resolution Process against the guarantor. As on date no CIRP or Liquidation Process is pending against the Corporate Debtor because of approval of the Resolution Plan. Section 60(2) of the Code requires that for an insolvency Resolution Process*

to be initiated against the guarantor there must be CIRP or Liquidation Process is pending against the principal borrower/Corporate Debtor. Since, that requirement is not satisfied in the present case, at this point of time CP(IB)/230/KB/2021 is premature and is dismissed as such."

Contention of Appellant:

It was submitted that Application was fully maintainable under Section 60(1) of the Code despite there being no pendency of any Corporate Insolvency Resolution Process in National Company Law Tribunal (NCLT).

Contention of Respondent:

- Section 60(2) of the Code clearly provides that Corporate Insolvency Resolution Process (CIRP) and Liquidation Process if pending before the NCLT, an Application relating to the Corporate Insolvency Resolution Process of the Corporate Guarantor and Personal Guarantor can be filed before the NCLT.
- In the present case, no proceedings are pending as contemplated in Section 60(2) of the Code the Application has rightly been rejected by NCLT as premature.

Observation:

- Sub-Section 1 of Section 60 provides that Adjudicating Authority for the corporate persons including corporate debtors and personal guarantors shall be the NCLT. The Sub-Section 2 of Section 60 requires that where a CIRP or Liquidation Process of the Corporate Debtor is pending before 'a' National Company Law Tribunal the application relating to CIRP of the Corporate Guarantor or Personal Guarantor as the case may be of such Corporate Debtor shall be filed before 'such' National Company Law Tribunal. The purpose and object of the sub-section 2 of Section 60 of the Code is that when proceedings are pending in 'a' National Company Law Tribunal, any proceeding against Corporate Guarantor should also be filed before 'such' National Company Law Tribunal. The idea is that both proceedings be entertained by one and the same NCLT. The sub-section 2 of Section 60 does not in any way prohibit filing of proceedings under Section 95 of the Code even if no proceeding are pending before NCLT.

- The use of words 'a' and 'such' before National Company Law Tribunal clearly indicates that Section 60(2) was applicable only when a CIRP or Liquidation Proceeding of a Corporate Debtor is pending before NCLT. The object is that when a CIRP or Liquidation Proceeding of a Corporate Debtor is pending before 'a' NCLT the application relating to Insolvency Process of a Corporate Guarantor or Personal Guarantor should be filed before the same NCLT. This was to avoid two different NCLT to take up CIRP of Corporate Guarantor. Section 60(2) is applicable only when CIRP or Liquidation Proceeding of a Corporate Debtor is pending, when CIRP or Liquidation Proceeding are not pending with regard to the Corporate Debtor there is no applicability of Section 60(2).
- Section 60(2) begins with expression 'Without prejudice to sub-section (1)' thus provision of Section 60(2) are without prejudice to Section 60(1) and are supplemental to sub-section (1) of Section 60.
- The substantive provision for an Adjudicating Authority is Section 60, sub-Section (1), when a particular case is not covered under Section 60(2) the Application as referred to in sub-section(1) of Section 60 can be very well filed in the NCLT having territorial jurisdiction over the place where the Registered office of corporate Person is located.

Decision:

NCLAT held that, *"The Application having been filed under Section 95(1) and the Adjudicating Authority for application under Section 95(1) as referred in Section 60(1) being the NCLT, the Application filed by the Appellant was fully maintainable and could not have been rejected only on the ground that no CIRP or Liquidation Proceeding of the Corporate Debtor are pending before the NCLT. In result, we set aside the order dated 05th October, 2021 passed by the Adjudicating Authority. The Application filed by the Appellant under Section 95(1) of the Code is revived before the NCLT which may be proceeded in accordance with the law."*

The appeal was allowed accordingly.

The Hon'ble Supreme Court upheld the National Company Law Appellate Tribunal Judgement in CIVIL APPEAL No(s). 1871-1872 OF 2022 vide order dated 06 May 2022.

SECTION 61

CASE NO. 26

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

In the matter of:

Alok Sharma

Authorised Representative (Appellant)

Vs.

M/s IP Construction Private Limited

through Resolution Professional

Anju Agarwal (Respondent)

Company Appeal (AT) (Insolvency) No. 350 of 2022

Date of Order: 17-06-2022

Section 61(1) of Insolvency and Bankruptcy Code, 2016

Whether under real estate project Revenue from sale of such constructed spaces/houses will be considered under the caption "Asset" sale or will it be considered as "Revenue from operations" under Schedule -III, Part-II of the Companies Act, 2013

Facts:

The Appeal was filed by the Appellant 'authorized representative of the 'allottees' /buyers of the commercial space in the real estate project, of the Corporate Debtor under Section 61(1) of the Insolvency and Bankruptcy Code,2016 ("**Code**") against the Order passed by the National Company Law Tribunal, Principal Bench, New Delhi ("**Adjudicating Authority**") whereby the Adjudicating Authority had dismissed the application.

Submissions of the Appellant:

The allottees had invested in the project in the year 2013 and Corporate Debtor ("**CD**")/Respondent have given them possession in 2015 and the allottees were continuously paying electricity and parking charges to the CD. The CD went into Corporate Insolvency Resolution Process ("**CIRP**") vide order dated 11.01.2019.

The allottees requested the CD to execute the sale deed in their favour. They had raised the issue of registration of sale deed in the meeting of the CoC of the CD as well.

They approached the Adjudicating Authority for directions for execution of duly registered sale deed and the Adjudicating Authority has observed that since the Corporate Debtor is undergoing CIRP, in the CIRP period, the RP is not expected to create rights in favour of somebody indeed to maintain status quo until the resolution plan is approved or liquidation is recorded and hence, this class of creditors cannot ask a relief for execution of the registered sale deed and the Application was dismissed.

Contentions of the Respondent :

The Appeal is barred by limitation. The impugned order was pronounced on 16.01.2020 and the period of 30 days expired on 15.02.2020 and the Appellant has approached this Tribunal on 20.02.2020 which is beyond the period of 30 days as prescribed under Section 61 of the Code.

The Execution of sale deed shall be in violation to moratorium in terms of Section 14 of the Code.

Decision:

Hon'ble NCLAT made the following observations:

- It is not in dispute even by the Respondent that the Appellants /allottees are not in possession of their respective units since 2015
- The issue that has been raised by the Respondent is that the appeal is barred by limitation as the same has not been filed within the prescribed period of 30 days as per Section 61(2) of the Code. However, according to Section 61(2), Appellate Tribunal has power to grant extension up to 45 days. The Appeal will be banned by limitation if it is filed after 45 days which would have ended on 02.03.2020 whereas the Appeal has been filed on 20.02.2020. The impugned order dated 16.01.2020 came to the knowledge of the Appellant on 21.01.2020 when it was uploaded on the website of NCLT. Accordingly, the present appeal is within limitation.
- It is clear that 'moratorium' is applicable under Section 14(1)(b) of the Code is on transferring of any assets of the CD.
- It has to be seen whether under real estate project Revenue from sale of such constructed spaces/houses will be considered under the

caption "Asset" sale or will it be considered as "Revenue from operations" under Schedule -III, Part-II of the Companies Act, 2013

- In case of real estate company, such constructed spaces/houses as and when sold its sale price goes to the heading 'Revenue from operations' of the profit and loss accounts of the Company being part of its commercial operation. If this houses / constructed spaces belongs to a company which is not in real estate business and is an industrial company/manufacturing company then the impact of sale from such houses will appear in the 'Balance Sheet' of the Company as per Schedule-III Part-I-(II Assets) of the Companies Act, 2013 and any sale of this house by this industrial company, if it results into a profit or loss on the sale of such assets, then it will reflect to the extent of profit or loss on sale of this assets only in the profit and loss account under the heading " other income " and the cost value of the assets will be reduced from the assets side of the 'Balance Sheet'.
- The houses so constructed is the business of the real estate company and the value of sale of those houses will always appear in the credit side of the profit and loss accounts as "Revenue from operations". Hence, this is not an asset, in case of real estate company as it is recurrent business activity for the company & it is its business for continuation of its operation as a going concern even during CIRP
- Hence, the views of Respondent/RP that these houses registration will violate 'Moratorium' under Section 14 of the Code are not sustainable. The Registration of all these houses is the 'procedural requirements', in case of 'Real Estate Company' where the Appellants are already in possession of these spaces from 2015 whereas CIRP was initiated on 11.02.2019.

NCLAT set aside the order of the Adjudicating Authority and directed the `Resolution Professional' to execute the sale deed after collecting `Dues and Costs', if any, remaining unpaid, including the `Costs of Registration', `Penalty' and `other incidental Costs', till date, etc.

The Appeal was allowed with the above observations.

CASE NO. 27

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
CHENNAI BENCH, CHENNAI

In the matter of

METAL'S & METAL ELECTRIC PRIVATE LTD (Appellant)

Vs.

Goms Electricals Pvt Ltd (Respondent)

COMPANY APPEAL (AT)(CH)(INS) NO.243 OF 2021

Date of Order: 24-02-2022

Section 61 of the Insolvency and Bankruptcy Code, 2016

Section 9 of the I&B Code makes it clear that the date of initiation of 'Corporate Insolvency Resolution Process' shall be on the date on which an application is made. The date of default is not to come into 'operative play' and the same ought not to be taken into account for anything but computing the period of limitation.

Facts:

This appeal was filed by the appellant being aggrieved against the order dated 15.03.2021 in CP/IB/23/CHE/2021 passed by the Adjudicating Authority (National Company Law Tribunal, Division Bench, Court No.1, Chennai).

The Adjudicating Authority while passing the impugned order on 15.03.2021 observed that on and from 24.03.2020 the pecuniary jurisdiction for entertaining the Petition under the provisions of Sections 7, 9 and 10 of the IBC, 2016 stands in relation to threshold limits was increased from Rs.1,00,000/- to Rs. 1,00,00,000/ and the amount claimed by the appellant in the petition filed on 12.03.2021 was below Rs. 1,00,00,000/-. Therefore, Adjudicating Authority opined that in these circumstances, the Adjudicating Authority has no jurisdiction to entertain the Petition and was constrained to dismiss the same for 'lack of pecuniary jurisdiction'.

The appellant before the NCLAT contends that the Appellant/Operational Creditor had sold and supplied the goods in question to the Respondent/Corporate Debtor and that the Respondent had received, accepted and used those goods. However, the Respondent did not make

payment for the same even after the Demand Notice was issued and that the amount was in default from December, 2018, which was within limitation to prefer the petition.

Now, the grievance of the Appellant is that the amount in default is more than Rs.1,00,000/- and the correct interpretation of the Notification dated 24.03.2020 is that in case of 'Default' that takes place on or after 24.03.2020, the threshold limit shall be Rs.1,00,00,000/-. As such, if a 'Default' has been committed by a 'Corporate Debtor' before the issuance of the Notification i.e. prior to 24.03.2020, then, for the purpose of initiation of CIRP under Section 9 of the I&B Code, the threshold limit shall be considered as Rs.1 lakh.

The Respondent submits that the 'Adjudicating Authority' had rightly observed that the case was filed on 12.03.2021, nearly one year after the amendment to Section 4 of Code which had raised the threshold limit for preferring an 'Application' under the Code to Rs.1,00,00,000/ and that Appellant had issued the Notice of Demand on 10.10.2020 and filed the Application before the 'Adjudicating Authority' on 12.03.2021 and that the 'impugned order' was passed on 15.03.2021 dismissing the Application for lack of 'pecuniary jurisdiction' .The issue of 'Prospective' and 'Retrospective' would not apply and that the Appellant had mistaken the date on which the 'Debt' accrued with the date on which the Application was filed. The plea of the Appellant is repelled by the Respondent based on the ground that Section 4 of the I&B Code, is applicable, on the date of 'application' and not on the date on which the 'Debt' became due.

Decision:

NCLAT stated that Section 9 of the I&B Code makes it clear that the date of initiation of 'Corporate Insolvency Resolution Process' shall be on the date on which an application is made. To put it precisely, 'the date of default' is not to come into 'operative play' and the same ought not to be taken into account for anything but computing the period of limitation.

NCLAT was of the view that in the present case, the 'application' was made before the 'Adjudicating Authority' by the Applicant/Appellant which came to be listed on 12.03.2021, however, the 'Demand Notice' was issued after the date of amendment to Section 4 of the Code.

Therefore, based on the above fact, NCLAT concluded that the threshold limit under Section 10A of the Code for initiation of CIRP of Rs.1 crore shall be applicable and since the sum claimed in the 'Application' was below the

sum of Rs.1 crore and the present 'application' having been filed on 12.03.2021, before the 'Adjudicating Authority' after the Notification dated 24.3.2020 in and by which, the threshold limit was increased from Rs.1 lakh to Rs. 1 Crore, therefore, the 'Application' filed by the 'Appellant' is not per se maintainable because of the lack of pecuniary jurisdiction to the 'Adjudicating Authority' and the conclusion arrived at by the Adjudicating Authority in not entertaining the application and dismissing the same as a logical corollary are free from legal infirmities.

The appeal was dismissed. No costs.

CASE NO. 28

NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI

(APPELLATE JURISDICTION)

In the matter of

Mr. C. Raja John (Appellant)

Vs.

Mr. R. Raghavendran

Resolution Professional of

Springfield Shelters Pvt. Ltd and others (Respondents)

Company Appeal (AT) (CH) (INS) No. 207 of 2021

Date of Order: 01-12-2021

Section 61 of Insolvency and Bankruptcy Code, 2016

If the corporate debtor is a MSME, it is not necessary for the promoters to compete with other resolution applicants to regain the control of the corporate debtor.

Facts:

The Appeal was filed against the Order dated 18 June 2021 passed by the Adjudicating Authority (National Company Law Tribunal, Division Bench-I, Chennai).

The appellant, the promoter of the corporate debtor submitted a resolution plan for Corporate Debtor. It was appellant's stand that as Corporate Debtor is a micro, small and medium enterprises ("MSME"), a promoter is eligible to submit a resolution plan under the Insolvency and Bankruptcy Code, 2016 ("Code"). The NCLT as well as the resolution professional dismissed appellant's resolution plan on the ground that he suffers a disqualification (i.e., disqualified to act as a director) under the Code and he does not meet the eligibility norm of net worth of Rs. 2 Crores and moreover, his director identification number ("DIN") was under default.

Decision:

The NCLAT, keeping in view of the object of the Code i.e., maximization of the value of the assets of corporate debtor, and considering the Judgment in

Saravana Global Holdings Ltd. and Anr v Bafna Pharmaceuticals Ltd. and Ors. in Company Appeal CA (AT) (INS) No.203 of 2019 dated 04.07.2019, held that if the corporate debtor is a MSME, it is not necessary for the promoters to compete with other resolution applicants to regain the control of the corporate debtor. In fact, the DIN of the appellant was reactivated pursuant to the directions of the Madras High Court. Hence, the resolution professional was directed to consider the resolution plan of the appellant and the order of the NCLT as well as the order passed by the resolution professional rejecting the resolution plan was quashed and set aside.

Accordingly, the appeal was allowed.

CASE NO. 29

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

In the matter of:

The Deputy Commissioner Division-VII, Central GST, Ahmedabad South (Appellant)

Vs.

Mr. Kiran Shah

Resolution Professional (Respondent)

Company Appeal (AT) (Insolvency) No. 328 of 2021

Date of Order: 16-09-2021

Section 61 of Insolvency and Bankruptcy Code, 2016

Resolution Professional was not duty bound to collate claims which are belatedly received after the last date thereby delaying the entire CIRP which is a time bound process.

Facts:

This Appeal had been filed by the Deputy Commissioner, Central GST, Ahmedabad South under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 who was aggrieved by the Order dated 10.03.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench).

The CIRP had admittedly commenced from 12.03.2020 and the period of 90 days from the Insolvency Commencement Date had concluded on 10.06.2020. Considering the period of lockdown of 68 days, the last date of receipt of claims was considered up to 16.08.2020. There was no dispute that the last date of submission of claim in the public announcement was given as 31.03.2020. The date was extended after following due procedure under Regulation 40 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

The Appellant argued that the Appellant was intimated about the CIRP Proceedings vide email dated 28.07.2020; the Appellant filed their claim in Form-B on 04.09.2020 and thereafter received an email dated 05.09.2020 from the Respondent that the claim was rejected on the ground that it was belatedly filed after the last date of submission of claims, which was 27.08.2020.

Decision:

NCLAT observed from the email that the intimation with respect to initiation of CIRP and appointment of IRP was duly informed enclosing the copy of the Order of the Adjudication Authority. The claim was made with a 19 days delay on 04.09.2020.

- Section 21(1) envisages the collation of claims which are received against the 'Corporate Debtor'. It cannot be interpreted that the Interim Resolution Professional/ Resolution Professional should collate the claims even if they are received outside the prescribed time limit. If the Appellant submitted the claim within the time frame and the IRP had not chosen to collate the claim as provided for in the Code, only then it can be stated that there is some material irregularity.
- Hon'ble Supreme Court in 'Ghanashyam Mishra and Sons Private Limited' Vs. 'Edelweiss Asset Reconstruction Co. Ltd.' held that with respect to statutory dues owed/claims raised in relation to the period prior to amendment, the Resolution Plan shall still be binding on the statutory Creditors concerned, and the statutory dues owed to them, which are not included in the Resolution Plan, and such claims shall stand extinguished.
- In 'Director General of Income Tax' Vs. Synergies Dooray Automotive Ltd.', this tribunal had observed that once the Resolution Plan is

approved, it shall be final and not subject to modification even if the statutory claims are not included in the Plan.

- In 'Ebix Singapore Private Limited' Vs. 'Committee of Creditors of Educomp Solutions Limited & Anr.', the Hon'ble Apex Court while dealing with the issue of withdrawals or modifications of the Resolution Plan, once submitted to Adjudicating Authority, after due compliance with procedural requirements stressed on the importance of adhering to the prescribed timelines, keeping in view the scope and objective of the Code.

NCLAT further observed that the Resolution Plan was approved by 91.02% of the Members of CoC and was pending approval before the Adjudicating Authority. The literal language of Section 12 mandates strict adherence to the time frame it lays down. The Hon'ble Supreme Court has noted that the model timelines provided in Regulation 40A of the CIRP Regulations should be followed as closely as possible. In this case, on account of lockdown and pandemic the last date was extended from 31.03.2020 to 16.08.2020 to facilitate all creditors to file their claims. In the background of this factual matrix, NCLAT held that the delay/latches are on behalf of the Appellant and there is no dereliction of duty on behalf of the Respondent.

NCLAT held that the Resolution Professional was not duty bound to collate claims which are belatedly received after the last date thereby delaying the entire CIRP which is a time bound process and further having regard to the fact that the claim of the Appellant was incorporated in the Information Memorandum which was circulated to the Prospective Resolution Applicant and the Members of the Committee of Creditors for their consideration, there is no dereliction of duty on behalf of the IRP/RP as provided for under Sections 18 and 21(1) of the Code.

For all the reasons as noted above, the appeal failed and accordingly dismissed. There shall be no order as to costs.

SECTION 95

CASE NO. 30

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

In the matter of:

Amit Jain (Appellant)

Vs.

Siemens Financial Services Pvt. Ltd. (Respondent)

Company Appeal (AT) (Insolvency) No. 292 of 2022

Date of Order: 23.08.2022

Section 95 of the Insolvency and Bankruptcy Code, 2016

Whether the benefit of Section 10A can also be claimed by a Personal Guarantor and an application under Section 95 shall be barred for a default which has arisen on or after 25.03.2020 till 24.03.2021?

Facts:

This Appeal has been filed against the order passed by the Adjudicating Authority in an application under Section 95 of the Insolvency and Bankruptcy Code, 2016 filed by the Respondent against the Appellant – the Personal Guarantor in which the Adjudicating Authority ordered to initiate interim moratorium under Section 96 and further appointed Resolution Professional and notice was also issued to the Appellant regarding this.

The Respondent – Financial Creditor sanctioned loan cum hypothecation to Corporate Debtor/Principal Borrower to which Appellant stood as Personal Guarantor. Two Master Finance Agreements were executed by and between the Corporate Debtor, the Appellant and the Respondent and the Corporate Debtor defaulted in paying the EMI. A Company Petition was filed and application mentions the date on which account was declared NPA as 11.09.2020.

The Appellant raised two submissions: (1) It is submitted that in the I&B Code, Section 10A was inserted by ordinance that no application for initiation of Corporate Insolvency Resolution Process (CIRP) of a Corporate Debtor shall be filed for any default on or after 25.03.2020 for a period of six months,

which was subsequently extended for further period till 24.03.2021 and by considering this, Section 10A has to be given interpretation to protect the Personal Guarantor also, failing which the provision will become discriminatory. Hence, When the default of Principal Borrower is covered by Section 10A, no insolvency resolution process can be initiated against the Personal Guarantor. (2) It is submitted that the no notice was issued by the Adjudicating Authority before appointing the Resolution Professional.

The Respondent contended that Section 10A cannot be extended to an application under Section 95(1) since provision of Section 10A is clear and unambiguous and it applies only to Corporate Debtor. Demand notice in Form-B was also served on the Personal Guarantor before filing Section 95 Application and further by order a notice had been issued by Adjudicating Authority to the Appellant and Appellant has also appeared before the Adjudicating Authority.

The two questions to be considered were - Whether the benefit of Section 10A can also be claimed by a Personal Guarantor and an application under Section 95 shall be barred for a default which has arisen on or after 25.03.2020 till 24.03.2021?

Decision of the Tribunal

The Tribunal stated that the basic principle of statutory interpretation is that when a word of statute is clear, plain, and unambiguous the courts are bound to give effect to that meaning irrespective of consequences. The provision of Section 10A is capable of only one meaning that is suspension of initiation of CIRP was only for a Corporate Debtor. Had the legislature intended suspension of initiation of CIRP against the Personal Guarantor also, similar amendment was also required to be made in Chapter III of Part III of the Code. The statutory scheme does not contain any indication that CIRP shall also remain suspended for Personal Guarantor for any default between 25.03.2020 to 24.03.2021, therefore, submission of Appellant could not be accepted.

The Court held that Application under Section 95(1) was filed by serving advance notice to the Appellant in Form-B and the Adjudicating Authority issued notice to the Personal Guarantor who also appeared before the Adjudicating Authority. Further, Interim moratorium under Section 96 shall automatically commence on the date of application filed under Section 95.

The Court also held that the Personal Guarantor was entitled to raise all his pleas for opposing admission of Section 95 application at the time the Adjudicating Authority passes order under Section 100.

Therefore, the appeal was dismissed by the Tribunal subject to observations as made above.

Regulation 7 and 8 of CIRP Regulation

CASE NO. 31

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

In the matter of:

The Commissioner of Central Taxes

Goods & Service Tax (Appellant)

Vs.

C.S. Ashish Singh & Ors. (Respondents)

Company Appeal (AT) (Ins) No. 854 of 2021

Date of Order: 10-11-2021

Regulation 7 and 8 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

Whether once the Resolution Plan is approved by the Adjudicating Authority, it is binding on all the stakeholders including the Central Government, any State Government or any local authority to whom a debt in respect of payment of dues arising under any law is owned.

Facts:

This appeal which has been filed under Section 61(3) (i) to (iii) of the Insolvency and Bankruptcy Code, 2016 challenged the Impugned Order dated 25.09.2020 of the National Company Law Tribunal, New Delhi Bench II in I.A. No. 2159/ND/2020 in Company Petition No. (IB) 1232 (ND)/2019.

The Appellant appealed that his claim of GST dues arises from a Show Cause Notice issued on 19.6.2019, which was available in the record of the Corporate Debtor, which was taken over by the Interim Resolution Professional. Hence the statutory dues of the Department of Central Taxes

automatically considered by the Resolution Professional in the Information Memorandum and should have been accounted for in the Resolution Plan, which was approved by the Adjudicating Authority vide the Impugned Order dated 25.9.2020.

The Successful Resolution Applicant argued that the Resolution Plan was approved by the Adjudicating Authority on 25.9.2020. Thereafter, the Successful Resolution Applicant has stepped into the shoes of the Corporate Debtor and the approved Resolution Plan has been implemented. He referred to section 31 of the IBC to claim that once the Resolution Plan is approved by the Adjudicating Authority, it is binding on all the stakeholders including the Central Government, any State Government or any local authority to whom a debt in respect of payment of dues arising under any law is owned.

Decision:

NCLAT was of the view that according to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, financial and operational creditors have to file claims in accordance with Regulations 7 and 8 respectively of the aforementioned Regulations in a specified format and stipulated time period. In the records submitted and presented by the Appellant, it was nowhere pointed out as to when and in what form, the claim of pending dues of GST was filed by the Appellant.

NCLAT also referred the judgement of Hon'ble Supreme Court in the matter of Ghanshyam Mishra and Sons Private Limited through the Authorised Signatory Vs. Edelweiss Asset Reconstruction Company Limited that once the Resolution Plan has been approved and implemented, no further claims will lie or can be considered. The relevant extract is reproduced hereunder : -

".....A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional 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. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count."

NCLAT concluded that in the light of the aforesaid discussion, the claim of the Appellant could not be considered at this stage. And the appeal was, therefore, dismissed at the stage of admission. No orders as to costs.

Regulation 7 and 12 of CIRP Regulations

CASE NO. 32

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

In the matter of:

The Assistant Commissioner of Central Tax (Appellant)
Vs.
Mr. V. Shanker, RP for
M/s. Sri Ramanjaneya Ispat Pvt. Ltd & Ors. (Respondents)

Company Appeal (AT) (Insolvency) No. 56 of 2021

Date of Order: 11-06-2021

Regulation 7 and Regulation 12 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

Vide this Judgement, Hon'ble NCLAT held that claims are required to be filed in accordance with the provisions and procedures laid down under IBC.

Facts:

Appeal has been filed against Impugned Order dated 28th January, 2020 passed by the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench, Hyderabad) in I.A. No. 779 of 2019 in CP (IB) No. 344/9/HDB/2018 in the matter of Corporate Debtor. By the said Impugned Order, the Adjudicating Authority allowed Resolution Plan which was filed by Resolution Applicant.

According to the Appellant, the Appellant had filed claim with the Interim Resolution Professional on 07th August, 2019. On 16th August, 2019, the Appellant filed Application to consider Proof of claim along with condonation of delay before the Adjudicating Authority.

The grievance of the Appellant is that when the Adjudicating Authority passed the Impugned Order it did not take into consideration and include the claim made by the department for Operational dues of Rs. 3,88,38,963/-.

Decision:

Hon'ble NCLAT, referred to Hon'ble Supreme Court Judgement in Ghanashyam Mishra Vs. Edelweiss Asset Reconstruction Company" (Civil Appeal No. 8129/2019 & Others decided on 13.04.2021) and observed that the Appellant was required to file claim in terms of IBC provisions but did not follow the procedure as laid down in the IBC read with the Regulations and did not duly file claim in proper format within time. Even when the time was over and the Appellant department was advised by the Resolution Professional to get delay condoned by moving Adjudicating Authority, the department instead of resorting to Section 60 of IBC and other enabling provisions only sent a letter, further with a wrong Format, that too addressed to Adjudicating Authority.

In the facts of the matter, Hon'ble NCLAT could not find fault with Respondent (RP) for not including such operational debt so as to be part of the Resolution Plan as necessary procedure was not followed. In IBC delay affects maximization of Value, and time bound steps for CIRP are prescribed. Reversal of stages, affects progress. Timely and duly taking steps by all stakeholders is material.

Hon'ble NCLAT did not find any error in the Impugned Order which was passed accepting the Resolution Plan. Hence, the Appeal was dismissed.

REGULATION 16 OF LIQUIDATION PROCESS

CASE NO. 33

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
CHENNAI BENCH, CHENNAI

In the matter of

The Assistant Commissioner of Commercial Taxes (Appellant)

Vs.

1. Right Engineers & Equipment India Pvt. Ltd (in liquidation)

(Respondent No.1)

2. Mr. Addanki Haresh (Liquidator of Right Engineers &

Equipment India Pvt. Ltd) (Respondent No.2)

Company Appeal (AT)(CH) (Ins) No. 255 of 2021

Date of Order: 15-11-2021

Regulation 16 (1) of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

CIRP/Liquidation is time bound manner and it cannot be put on hold on continuous basis on receiving belated claims and considering them

Facts:

This appeal was filed by the Appellant/Applicant, being dissatisfied with the 'Impugned Order' dated 5th April, 2021 passed in I.A. No. 106 of 2021 in CP(IB) No. 320/BB/2019 (filed under Section 42 & 60 of the Insolvency & Bankruptcy Code, 2016 read with Rule 11 of NCLT Rules, 2016) passed by the Adjudicating Authority (National Company Law Tribunal, Bengaluru), dismissing the said application.

NCLT had passed an order directing initiation of 'Liquidation Proceeding' against the Respondent No. 1- Company on 02.12.2020 and further that the Public Announcement was issued by the Respondent No. 2 as per which the last date of submission of claim was on 11.01.2021.

The Appellant through its application sought to set aside the order dated 17.03.2021 passed by the Respondent No. 2 in rejecting the Appellant's Statement of Claim based on the reason that it was submitted belatedly

delay of 52 days. Also that, the Appellant/Applicant had prayed for the condonation of the said delay of 52 days for submission of its Claim before the 2nd Respondent and prayed for consequential directions to the 2nd Respondent to verify, admit and process the claim of the Appellant in liquidation proceeding of the 1st Respondent.

The Appellant had passed 'Reassessment Order' in terms of Karnataka Value Added Tax by which the Respondent No. 1/Company is liable to pay tax interest and penalty. on 04.03.2021, the Statement of Claim was filed by the Appellant before the Respondent No. 2 covering the dues payable by the Respondent No. 1 to the Appellant.

On 17.03.2021, the Respondent No. 2 passed an order rejecting the claim passed on the reason that it was filed belatedly.

The NCLT pointed out that the reasons cited by the Applicant that it was unaware of the CIRP/Liquidation of Corporate Debtor, the State would lose its legitimate dues viz., the tax collected from public, it is duty of Liquidator alone to verify its records etc., were not at all tenable. While alleging that the Liquidator had failed to discharge his duties, the Applicant had failed to take any action at appropriate time to recover tax and they could not wait for proceeding to be initiated by others under provisions of the Code. The Applicant has absolute independent right to initiate appropriate action to recover the tax in question, but they have failed to discharge their duties. The reasons cited for delay in approaching the Liquidator were not at all tenable. And CIRP/Liquidation is time bound manner and it cannot be put on hold on continuous basis on receiving belated claims and considering them. The Respondent had followed extant provisions of law in continuing proceedings under the provisions of the Code, and the impugned order cannot be interfered with. Therefore, the Application was liable to be dismissed.

Decision:

NCLAT was of the view that it is an axiomatic principle in law that the 'Tribunal' is required to consider the 'sufficiency of cause', whether the cause ascribed is reasonable looking to all the facts of the matter. However, the aspect of an existence of 'sufficient cause' is to be determined based on the facts and circumstances hovering around particular case. There should not be an 'inaction' or 'want of bonafide' or no negligence attributable to a litigant/party, as the case may be.

NCLAT further stated that the Liquidator by adverting to the Regulation 16(A) Regulations 2016 (Liquidation Process) had rejected the claim through his letter on 17.03.2021 mentioning that the claims required to be furnished on or before 11.01.2021. However, the Appellant/Applicant had submitted its claim only on 04.03.2021 and to come out with the reason that the Appellant/Applicant was not aware of the CIRP and Liquidation Process of the Corporate Debtor were unworthy of acceptance and in the considered opinion of this Tribunal, the said reason was rightly rejected by the 'Adjudicating Authority'.

Thus, NCLAT viewed that 'Appeal' was devoid of merits and it failed. The appeal was, therefore, dismissed. No costs.

Section 230 of Companies Act, 2013 & Regulation 2B of Liquidation Process

CASE NO. 34

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

In the matter of:

Mr. Rakesh Kumar Agarwal and Ors. (Appellants)

Vs.

Mr. Devendra P. Jain (Respondent)

Company Appeal (AT) (Insolvency) No. 1034 of 2020

Date of Order: 01-06-2021

Section 230 of the Companies Act, 2013 & Regulation 2B of Insolvency and Bankruptcy Board of India (IBBI) (Liquidation Process) Regulations 2016 – Liquidation is only the last resort – The main object of the Code is in resolving corporate insolvencies and not the mere recovery of monies due and outstanding.

Facts:

The Present Appeal was filed challenging the order dated 15.10.2020, passed by the Adjudicating Authority whereby the Adjudicating Authority (NCLT, Ahmedabad) whereby the AA rejected the I.A No. 496 of 2020 in CP (IB)No.148/NCLT/AHM/2017) filed by the Appellants.

The Corporate Debtor filed an application under Section 10 of Insolvency and Bankruptcy Code (IBC) and the Application was admitted by the Adjudicating Authority on 11.01.2018.

By virtue of admission the Adjudicating Authority appointed IRP and the IRP taken over the charge and conducted the proceedings. The IRP issued Expression of Interest (EOI) on 15.02.2018 and only one application was received. However, they did not file any Resolution Plan to the EOI.

Thereupon the Second EOI was issued on 09.08.2018 and in pursuance thereof applications were received from the applicants. However, none of the Prospective Resolution Applicant (PRA) submitted a Resolution Plan. In view of the situation, CoC passed a Resolution for Liquidation of the Corporate Debtor by approving it with 97.37% of the Voting Share.

RP was appointed as Liquidator and issued form –B inviting Applications. The Appellant submitted a scheme under Section 230 of the Companies Act, 2013. The Scheme submitted by the Appellant was approved by stakeholders of the Corporate Debtor and an Application bearing I. A No. 66 of 2020 for approval of this scheme of arrangement was filed before the Adjudicating Authority. But I. A No. 66 of 2020 was dismissed as withdrawn in view of notification dated 06.01.2020 issued by Government of India whereby an amendment was made in Regulation 2B of Insolvency and Bankruptcy Board of India (IBBI) (Liquidation Process) Regulations 2016, by virtue of which the Appellants became ineligible to submit a scheme in the liquidation process of the Corporate Debtor.

But after this, there was an amendment in MSME Act where certain changes were made in the criteria for classifying entities as Micro, Small & Medium Enterprises. In view of the amendment the Appellants became eligible to submit a scheme in the liquidation process. Hence, the Appellant filed I.A No. 496 of 2020 before the Adjudicating Authority seeking permission to propose a scheme and a direction to consider the said scheme in view of the amendment.

The Appellant prayed to allow the Appeal by setting aside the impugned order dated 15.10.2020 passed by the Hon'ble Adjudicating Authority in I. A No. 496 of 2020. The Appellant also sought a relief that the Appellants be allowed to propose the scheme of arrangement and the same may be considered by the liquidator.

Decision:

NCLAT held that based on the decisions of the Hon'ble Supreme Court that the liquidation is only the last resort and as per the preamble of the IBC the main object of the Code is in resolving corporate insolvencies and not the mere recovery of monies due and outstanding.

NCLAT was of the view that the Appellant being eligible to submit a scheme by virtue of an amendment to Section 7 of Micro, Small and Medium Enterprises Development Act, 2006 vide notification dated 01.06.2020. Accordingly, the impugned order dated 15.10.2020 passed by the Adjudicating Authority in I.A. No. 496 of 2020 in CP (IB) No.148/NCLT/AHM/2017 was set aside.

The Appellants were allowed to submit a scheme of arrangement to the liquidator of the Corporate Debtor within a period of one week from the receipt of copy of the order and the liquidator shall consider the scheme of arrangement in accordance with the law.

Whether Spectrum is a natural resource and Government is holding the same as cestui que trust

CASE NO. 35

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

In the matter of:

Union of India (Appellant)
Vs.
Vijaykumar V. Iyer (Respondent)

Company Appeal (AT)(Insolvency) No. 733 of 2020 and other appeals

Date of Order: 13-04-2021

The Appellate Authority decided in this case on Whether Spectrum is a natural resource and Government is holding the same as cestui que trust.

Facts:

10 appeals were preferred before the Hon'ble National Company Law Appellate Tribunal ("NCLAT") against approval of resolution plans in respect of Aircel Ltd., Dishnet Wireless Ltd. and Aircel Cellular Ltd. in terms of common order dated 9th June, 2020 passed by the Hon'ble National Company Law Tribunal, Mumbai Bench II ("NCLT").

After that when it was brought to the notice of Hon'ble Apex Court that the Resolution Plans of Resolution Applicants have been approved by the NCLT under Section 31 of the Insolvency and Bankruptcy Code, 2016 and that an appeal has already been filed against the approval order by the Department of Telecommunications ("DOT") before the NCLAT, the Hon'ble Apex Court modified the directions given in terms of paragraph 23 of its judgment dated 1st September, 2020 by providing as under:-

"23. *In view of above, we direct the NCLAT to first consider the various questions framed in paragraphs '18' to '22' of the Judgment, mentioned above, and pass a reasoned order in accordance with paragraph '23' thereof.*"

So, NCLAT was required to consider first the questions formulated by Hon'ble Apex Court in paragraphs 18 to 22 of the Judgment and record their findings. The appeals pending consideration before NCLAT in regard to approval of the Resolution Plans as mentioned above had to be taken up for consideration only thereafter.

The extract of the questions that are specified in Paragraphs 18 to 22 of the said Hon'ble Apex Court judgment are given below:-

Whether TSPs can be said to be the owner based on the right to use the spectrum under licence granted to them?

Whether a licence is a contractual arrangement?

Whether ownership belongs to the Government of India?

Whether spectrum being under contract can be subjected to proceedings under Section 18 of the Code?

Whether the spectrum can be said to be in possession, which arises from ownership.

What is the distinction between possession and occupation?

Whether possession correlates with the ownership right?

A question also arises concerning the difference between trading and insolvency proceedings. Whether a licence can be transferred under the insolvency proceedings, particularly when the trading is subjected to clearance of dues by seller or buyer, as the case may be, as provided in Guideline Nos. 10 and 11; whereas in insolvency proceedings dues are wiped off. Guideline No. 12 is also assumed to be of significance in case spectrum is subjected to insolvency proceedings, which must be considered.

In view of the fact that the licence contained an agreement between the licensor, licensee, and the lenders, whether on the basis of that, spectrum can be treated as a security interest and what is the mode of its enforcement.

Whether the banks can enforce it in the proceedings under the Code or by the procedure as per the law of enforcement of security interest under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (the SARFAESI Act) or under any other law.

A question of seminal significance also arises whether the spectrum is a natural resource, the Government is holding the same as cestui que trust.

Whether dues under the licence can be said to be operational dues? It is also to be examined whether deferred/default payment instalment(s) of spectrum acquisition cost can be termed to be operational dues besides AGR dues.

Whether as per the revenue sharing regime and the provisions of the Telegraph Act, 1885, the dues can be said to be operational dues?

Whether natural resource would be available to use without payment of requisite dues, whether such dues can be wiped off by resorting to the proceedings under the Code and comparative dues of the Government, and secured creditors and bona fides of proceedings are also the questions to be considered.

Decision:

The NCLAT dealt with the questions raised in paragraphs 18 to 22 of the Judgement in detail and in conclusion summarised the findings as under:

- Spectrum is a natural resource and the Government is holding the same as cestui que trust.
- Spectrum, being intangible asset of the Licensee/TSPs/TelCos/ Corporate Debtor, can be subjected to insolvency/liquidation proceedings.
- Dues of Central Government/ DOT under the Licence fall within the ambit of Operational Dues under I&B Code.

- Deferred/ default payment instalments of spectrum acquisition cost also fall within the ambit of Operational Dues under I&B Code.
- As per Revenue Sharing Regime and the provisions of Indian Telegraph Act, 1885, the nature of dues payable to Licenser continues to be 'Operational Dues' which are payable primarily in terms of the Licence Agreement.
- Natural Resource would not be available to use without payment of requisite dues.
- Triggering of CIRP under the Code with malicious or fraudulent intention, would be impermissible.
- Telecom Service Providers have the right to use spectrum under licence granted to them. They cannot be said to be the owners in possession of the spectrum but only in occupation of the right to use spectrum. Ownership of spectrum belongs to Nation (people) with Government only being its Trustee. Possession correlates with the ownership right.
- Under Section 18 of the I&B Code, the Interim Resolution Professional is bound to monitor the assets of the Corporate Debtor and manage its operations, take control and custody of assets over which the Corporate Debtor has ownership rights including intangible assets which includes right to use spectrum.
- Insolvency Proceedings arise out of default in discharge of financial or operational debt and are triggered for insolvency resolution of corporate persons, etc. in a time bound manner for maximization of value of assets of such persons.
- While a licence can be transferred as an intangible asset of the Licensee /Corporate Debtor under Insolvency Proceedings in ordinary circumstances, however as the trading is subjected to clearance of dues by Seller or Buyer, as the case may be, the Transferor/Seller or Transferee/Buyer being in default, would not qualify for transfer of licence under the insolvency proceedings.
- The spectrum cannot be utilized without payment of requisite dues which cannot be wiped off by triggering CIRP under I&B Code.
- The defaulting Licensees/ TelCos cannot withhold the huge arrears payable to Government, obtaining moratorium to abort Government's

move to suspend, revoke or terminate the Licences and in the event of a Resolution Plan being approved, subjecting the Central Government to be contended with the peanuts offered to it as 'Operational Creditor' within the ambit of distribution mechanism contemplated under Section 53 of I&B Code.

Having regard to Clause 3.4 and 3.5 of the Tripartite Agreement according priority/first charge to DOT, the spectrum cannot be treated as a security interest by the Lenders. So, the mode of Enforcement of security interest was not considered.

Chapter 4

Orders Passed by National Company Law Tribunal

SECTION 3 & 7

CASE NO. 1

Whether a Non-Banking Finance Company is covered within the definition of Section 3(7) of the Code to initiate CIRP under Section 7 of the Code.

Bench	National Company Law Tribunal, Kolkata Bench
Corporate Debtor	Asharam Leasing and Finance Private Limited
Financial Creditor	Punjab National Bank
Particulars of the case	CP (IB) No.2029/KB/2019 alongwith IA No.164/KB/2020 in CP (IB) No.2029/KB/2019
Date of Order	12.05.2021
Relevant Sections	Section 7, Section 3 (7) and Section 3 (8) of The Insolvency and Bankruptcy Code, 2016
Facts of the Case	Financial Creditor has filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016, for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor which was incorporated on 29.4.1986 as a private company limited by shares. During the course of hearing on 08.02.2021, it was revealed that the corporate debtor is a Non-Banking Finance Company (NBFC) registered with the Reserve Bank of India (RBI). NCLT observed that the petition in that case cannot be maintained.
Decision of the Tribunal	The Tribunal observed that Section 3(7) of the Code defines a “Corporate Person” as meaning –

	(a) a company, as defined in section 2(20) of the Companies Act, 2013, (b) a limited liability partnership, as defined in section 2(1)(n) of the Limited Liability Partnership Act, 2008; or (c) any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider. The Tribunal observed that Section 7 speaks of initiation of CIRP against a corporate debtor by a financial creditor. The Tribunal observed that Section 3(8) of the Code defines a "Corporate Debtor" as meaning a corporate person who owes a debt to any person. Reading the provisions together, the Tribunal stated that it is clear that a section 7 petition may be initiated against any corporate debtor who is a corporate person within the meaning of section 3(7) of the Code. The Corporate Debtor herein is not covered within the definition of section 3(7) of the Code, since it is a NBFC. The Tribunal held that the present petition is not maintainable and is required to be dismissed. It is ordered accordingly. The Tribunal made it clear that the dismissal of the petition was not on merit, but only because Section 7 application is not maintainable against the corporate debtor. The order shall, therefore, not prejudice the right of the Financial Creditor to initiate appropriate steps under any other law and before any other forum.

SECTION 3 & 60

CASE NO. 2

Disputed claim pending adjudication by the Hon'ble Arbitral Tribunal is necessarily to be declared as contingent claim by the Resolution Professional in the information memorandum.

Bench	National Company Law Tribunal, Mumbai Bench, Mumbai Bench - IV
Applicant	Ultra Tech Cement Limited
Respondent/Resolution Professional	Minita D. Raja
Particulars of the case	IA 1304/NCLT/MB-IV/2020 IN CP (IB) No.1712/NCLT/MB-IV/2019
Date of Order	05.05.2021
Relevant Sections	Section 60(5) and Section 3(6) of The Insolvency and Bankruptcy Code, 2016
Facts of the Case	The application was filed by the Applicant against rejection of claim by the Resolution Professional in respect of operational debt due and payable by the Corporate Debtor. The submissions on behalf of the Respondent were: i. The claim of the Applicant correlates with the counter claim filed by the Applicant in the pending Arbitration Proceedings. Corporate Debtor has filed Arbitration Proceedings against the Applicant and claimed INR 52,40,93,628/- against which the Applicant has filed its counterclaim of INR 35,87,06,000/-. The Applicant has also filed a claim to the Respondent under CIRP amounting INR35,85,96,601 ii. The Claim has been received/filed after expire of the time to receive such claim.

	iii. The amount claimed does not find place in the Books of Accounts of the Corporate Debtor. Further, there is no correspondence to show that the said amount has been acknowledged as debt by the Corporate Debtor, making it difficult to verify the claim.
Issue	The question for consideration is whether the non-admission of claim by the Resolution Professional stating it to be a disputed claim pending adjudication by the Hon'ble Arbitral Tribunal is bad in law
Decision of the Tribunal	The Tribunal observed that the arbitration proceedings were initiated by the Corporate Debtor and a counter claim was filed by the Applicant and the same was pending adjudication before the Arbitral Tribunal. The said proof of claim was filed on 12.11.2019 and whereas the last date of submission of claim was 07.11.2019. The Bench condoned the delay of four days of filing the claim before the IRP. The Tribunal upon perusal of the Section 3(6) of IBC and the scheme envisaged in the IBC and judicial precedents laid down by Hon'ble Supreme Court, held that the Applicant who has filed a counter claim before the Arbitral Tribunal is said to have a claim and is contingent upon adjudication by the Arbitral Tribunal and hence, such a claim is necessarily to be declared as contingent claim by the Resolution Professional in the information memorandum. In view of the above observation, the IA is partly allowed and disposed of.

SECTION 3 & 9

CASE NO. 3

Whether a proprietorship firm is a person as per section 3 (23) of IBC for the purpose of filing application u/s 9 of I & B Code.

Bench	National Company Law Tribunal, Ahmedabad Bench, Ahmedabad
Petitioner/Operational Creditor	M/S Shri Shakti Dyeing Works
Respondent/ Corporate Debtor	M/s Berawala Textiles Private Limited
Particulars of the case	C. P. No. (IB) 854/9/NCLT/AHM/2019
Date of Order	25th January, 2021
Relevant Section	Section 9 read with Section 3 (23) of The Insolvency and Bankruptcy Code, 2016
Facts of the Case	The application was filed by M/s Shri Shakti Dyeing Works showing itself as a proprietorship concern and as Operational Creditor. The main contention raised by the operational creditor that the corporate debtor ordered the operational creditor to supply goods and accordingly, goods supplied to the respondent were received on behalf of the corporate debtor. It is mentioned that having failed to receive the payment, the operational creditor was compelled to issue demand notice under Section 8 of the I&B Code and call upon the respondent to clear the operational debt.
Decision of the Tribunal	The Tribunal held that a proprietorship firm is not a legal entity and it is only the proprietor who is a legal entity and the petition should have been filed by the sole proprietor in his name on behalf of his sole proprietorship firm as a proprietary concern is

	not a person as per section 3 (23) of IBC for the purpose of filing application u/s 9 of I & B Code. The Tribunal held that under the facts of the circumstances, the application, so filed, by the applicant is not maintainable and is bad in law as well as in facts. However, it was stated that it will not stand in the way of the Petitioner invoking the appropriate forum seeking to enforce its claim as against the Respondent, as the petition has been dismissed on the issue of maintainability taking into consideration the provisions of IB Code, 2016.

SECTION 7

CASE NO. 4

Whether without proof of disbursement, the amount could not be claimed as financial debt, as a disbursement is a sine qua non for any debt to fall within the ambit of the definition of financial debt.

Bench	National Company Law Tribunal, Mumbai Bench, Court - II
Financial Creditor	Sudhir T Deshpande
Corporate Debtor	Dhanada Corporation Limited
Particulars of the Case	CP (IB) 4671/MB/2018
Date of Order	26.08.2022
Relevant Section	Section 7 of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	This is a Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 seeking to initiate Corporate Insolvency Resolution Process against Corporate Debtor alleging default in payment of a Financial Debt. The Financial Creditor submitted that the corporate debtor had changed its Company name and the amounts were paid by Financial Creditor and his family Members on his behalf by way of Investment. The Financial Creditor further submitted that an e-mail sent by the Director of the Corporate Debtor Company stated that the Financial Creditor would be paid an amount of Rs. 7.07 crores (approx.), but it was defaulted, and the Corporate Debtor also issued various cheques which were returned as dishonored. The Corporate Debtor contended that the Financial Creditor has not fulfilled the pre requirements mentioned under section 7 of the Code and had not

	produced any evidence as to the existence of the claim. There was nothing to demonstrate any valid claim against the Corporate Debtor. After the year of 2013, the Corporate Debtor has never ever acknowledged the liability against the Financial Creditor and the debt is a time barred debt. Further, the amount as claimed were not in pursuance to any legal obligation enforceable contract or agreement and therefore does not fall within the purview of the definition of Financial Credit extended to the Corporate Debtor.
Decision of the Tribunal	The Court held the cheques annexed to the Petition were issued by someone in his personal capacity and could not considered as a proof of evidence of any liability owned to the Corporate Debtor. Therefore, without proof of disbursement, the said amount could not be claimed as financial debt, as a disbursement is a sine qua non for any debt to fall within the ambit of the definition of financial debt. The Court also placed reliance on judgement of NCLAT in the case of Dr. B.V.S Laxmi Vs. Geometrix Laser Solution Private Limited : "….*In absence of such evidence, the Appellant cannot claim that the loan if any given by the Appellant comes within the meaning of 'financial debt' in terms of sub-section (8)(a) of Section 5 of the 'I & B Code*". The Court further held that, after the year 2013, the Corporate Debtor has not acknowledged the liability against the Financial Creditor and hence the debt was hopelessly barred by the law of limitation and could not be adjudicated upon by the Tribunal and deserved to be dismissed in *limine.* Hence, the Company Petition was rejected.

CASE NO. 5

When the surety has repaid the amount of financial Debt would it make the surety, a "Financial Creditor", eligible for proceeding against the Corporate Debtor (the Principal Borrower) without there being any agreement between the two.

Bench	National Company Law Tribunal, Kolkata Bench, Kolkata
Applicant/ Financial Creditor	Orbit Towers Private Limited
Respondent/ Corporate Debtor	Sampurna Suppliers Private Limited
Particulars of the case	C.P (IB) No. 2046 /KB/2019
Date of Order	27.06.2022
Relevant Section	Application under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
Facts of the Case	This petition under section 7 of the Insolvency and Bankruptcy Code, 2016 has been filed by the Appellant through its Director authorised vide Board Resolution for initiation of Corporate Insolvency Resolution Process in respect of the Respondent. The Financial Creditor /applicant submitted in its petition that the Corporate Debtor took a loan of Rs.10 crores from the the Bank to which in view of the business association with Corporate Debtor the Financial Creditor secured the borrowing of the Corporate Debtor from the Bank both by executing a deed of corporate guarantee and by creating an equitable mortgage of its property. It is submitted that the Financial Creditor called upon the Corporate Debtor to forthwith liquidate the dues of the said Bank but the Corporate Debtor failed to pay the dues to the said Bank along with

	interest. Thereafter the Corporate Debtor paid a sum to the Financial Creditor towards part discharge of its liabilities and a sum of Rs.5.85 crores (approx.) remained due and payable. Further the Corporate Debtor made several part payments till 04.10.2016 and the Financial Creditor treated this date as the date of default for the purpose of present application. It is submitted that the Financial Creditors as a guarantor claimed to have discharged the debt of the CD by paying Rs. 8.45 crores (approx.) to the Bank. **The Respondent contended that-** The present petition filed by the Financial Creditor under section 7 of the IBC is not maintainable and deserves to be dismissed as the application based on payments made by the alleged Financial Creditor as a guarantor to the Bank on behalf of the Corporate Debtor. It is submitted that the dues of the Bank were in respect of the Corporate Debtor. It submitted that what has been paid by the Financial Creditor to the Bank on behalf of the Corporate Debtor was only a sum of Rs. 3.20 crores (approx.) and not the sum of Rs.8.45 crores (approx.). It is further submitted that the last payment was allegedly received by the Financial Creditor on 4th October 2016 and hence, application is, otherwise, ex-facie barred by the laws of limitation and the said application liable to be dismissed on the said ground. Further it is submitted that the alleged debt claimed by the Financial Creditor is not a "financial debt" within the meaning of Section 5(8) of the Code and the applicant is also not a Financial Creditor within the meaning of Section 5(7) of the Code and, therefore, the present proceedings are liable to be

	dismissed and the Corporate Debtor has fully discharged its liability by admittedly paying off Rs.3.90 crores to the Financial Creditor.
Decision of the Tribunal	Sections 140 and 141 of the Indian Contracts Act, 1872 talk of "right of subrogation". Section 140 provides that rights of surety of payment or performance where a debt has become due on default of the Principal Debtor to perform, the surety upon making payment or performance of all that, is eligible for and is invested with all the rights which the Creditor had against the Principal Debtor. The Creditor had the rights to sue the Principal Debtor. The Guarantor may, therefore, sue the Principal Debtor having got and invested with all rights of the Creditor. Section 141 of the Indian Contract Act,1872 further provides that the surety is entitled to the benefit of every security which the creditor has against the Principal Debtor, at the time when the contract of surety-ship is entered into, whether the surety knows of the existence of such security or not and if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security. In the present case, the Corporate Debtor had borrowed the sum from the Bank for which, the Financial Creditor stood surety and as the amount had not been paid by the Corporate Debtor, the surety had to liquidate and discharge the liability of the Corporate Debtor towards the Bank. Therefore, under the provisions of the Indian Contract Act, 1872, all the rights of the then Creditor i.e. the Bank, would automatically become the rights of the surety (Financial Creditor herein). The question is when the surety has repaid the amount of financial Debt would it make the surety, a "Financial Creditor", eligible for proceeding against the Corporate Debtor (the Principal Borrower) without there being any agreement between the two. The Tribunal stated that any agreement of

	guarantee between the Bank and the Guarantor is sufficient for the purpose of bestowing all the rights of the Bank/creditor upon the Financial Creditor herein once the Financial Creditor has discharged all the liability of the Corporate Debtor towards the Bank. There may or may not be any agreement between the Financial Creditor and the Corporate Debtor. It does not make any difference at all. In this matter, the amount of debt has been repaid by the Financial Creditor to the Bank in its capacity as Guarantor for and on behalf of the Corporate Debtor which has put the guarantor in the shoes of the Creditor i.e. the Bank. When all the rights of the Creditor have been subrogated in favour of the Guarantor/Financial Creditor, the Financial Creditor is eligible and entitled to proceed against the Corporate Debtor for recovery of the said dues and file the petition under section 7 of the Code. Therefore, hold that the Financial Creditor is entitled to file this petition as Financial Creditor against the Corporate Debtor. As regards the limitation issue, the Corporate Debtor has acknowledged and admitted the debt by issuing the balance confirmation statements and by making payment on October 4, 2016, and the balance sheets of the Corporate Debtor constitute a continuous admission and acknowledgement of its liability. Therefore, this issue of the application being barred by limitation does not survive. Financial debt has also been acknowledged by the Corporate Debtor in its balance sheets as on 31st March 2017 and 31st March 2018. The amount has admittedly been paid by the Guarantor/ Financial Creditor herein to the Bank and the said amount is much above the threshold limit fixed by the Code for filing a petition under section 7 of the Code. Therefore, the petition was admitted.

CASE NO. 6

Whether the CIRP can be initiated / triggered solely on the basis of the un-paid amount of interest when the entire principal amount of debt has been discharged by the Corporate Debtor.

Bench	National Company Law Tribunal, New Delhi Bench (Court-II)
Applicant/ Financial Creditors	Saraf Chits Private Limited and VKSS International Private Limited
Respondent/ Corporate Debtor	KAD Housing Private Limited
Particulars of the case	(IB)-255(ND)/2021
Date of Order	23.05.2022
Relevant Section	Section 7 of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	An application was filed by the Financial Creditors under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC") to initiate the Corporate Insolvency Process ("CIRP") against Corporate Debtor. It was submitted by the Applicants that the principal amount was already paid by the Corporate Debtor and only an amount towards the interest component was left to be paid. Since the liability towards the principal amount was discharged during the pendency of the present application, therefore, the petition was maintainable. It was further added that the term "financial debt" as defined under Section 5(8) of IBC, 2016 includes the interest component. However, the Corporate Debtor stated that since the principal amount has been paid by the Corporate Debtor, therefore, the petition needs to be dismissed. Now the issue which emerges for adjudication is "Whether the CIRP can be initiated / triggered solely

	on the basis of the un-paid amount of interest when the entire principal amount of debt has been discharged by the Corporate Debtor".
Decision of the Tribunal	NCLT while referring to the definition of "financial debt" under Section 5(8), "debt" under Section 3(11) and "claim" under Section 3(6) of IBC, 2016, observed that the interest is not included in the term "debt" per se. Rather, the "interest" can be claimed as "financial debt" only if such debt exists. NCLT also referred to the Judgment of Hon'ble NCLAT in the matter of S. S. Polymers v. Kanodia Technoplast Ltd. in Company Appeal (AT) (Insolvency) No. 1227 of 2019, dated 13.11.2019. The relevant extracts are given below: *"5. Admittedly, before the admission of an application under Section 9 of the I&B Code, the 'Corporate Debtor' paid the total debt. The application was pursued for realisation of the interest amount, which, according to us is against the principle of the I&B Code, as it should be treated to be an application pursued by the Applicant with malicious intent (to realise only Interest) for any purpose other than for the Resolution of Insolvency, or Liquidation of the 'Corporate Debtor' and which is barred in view of Section 65 of the I&B Code.."* On the basis of above discussions, NCLT inferred that the "interest" component alone cannot be claimed or pursued, in absence of the debt, to trigger a CIR process against the corporate Debtor. Further, the application pursued for realization of the interest amount alone is against the intent of the IBC, 2016. Hence, concluded that the CIRP against a Corporate Debtor cannot be initiated/triggered solely on the basis of the un-paid amount of interest where the entire principal amount has already been discharged by the Corporate Debtor. Accordingly, the Petition was dismissed.

SECTION 7 & 60

CASE NO.7

In order to exercise residuary powers by Tribunal contained in Section 60(5)(c) of the Code, any question of priorities or any question of law or facts, should arise out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor.

Bench	National Company Law Tribunal, Bench-1, Hyderabad
Petitioner/ Financial Creditor	Prudent ARC Ltd.
Respondent/ Corporate Debtor	Indu Techzone Private Limited
Particulars of the case	CP (IB) NO. 207/7/HDB/2021
Date of Order	07.02.2022
Relevant Section	Section 7 & Section 60 (5) of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	• An application was filed by the Petitioner under Section 7 of the Insolvency and Bankruptcy Code, 2016 seeking admission of Corporate Insolvency Resolution Process contending that Respondent made default in the payment of alleged debt. • Corporate Debtor was engaged in business of setting up IT parks in Special Economic Zones and construction of IT SEZ. During the course of business, it had availed term loan facility vide Rupee Loan Agreement dated 08.09.2008 entered between Corporate Debtor and Infrastructure Development Finance Company Limited (IDFC). • IDFC Limited had assigned all its rights, title and interests, benefits in and to the debts due and payable by the Corporate Debtor, to

	Edelweiss Asset Reconstruction Company Limited (EARC) under a valid Assignment Agreement dated 24.12.2013 (Assignment Agreement – 1). • Due to non-payment of outstanding dues, the loan account of Corporate Debtor was declared as Non-Performing Asset (NPA) on 13.10.2013. EARC filed application before the Debt Recovery Tribunal under Sec 19 of Recovery of Debts due to Institutions & Financial Institutions Act, 1993. • It is further stated that, while the application was pending before DRT, EARC and the corporate debtor entered into a Settlement of Financial Assistance on 12.03.2018 vide wherein the Corporate Debtor had to pay settlement amount which includes outstanding debt plus applicable interest originally owed to IDFC, in three trenches. But, Corporate Debtor cleared till 2nd payment trench as per the settlement letter. • Debt granted to the Corporate Debtor by IDFC, which was later assigned to EARC vide Assignment Agreement – 1 was further assigned by EARC to Financial Creditor vide Assignment Agreement 2 dated 04.09.2020. • When the Corporate Debtor failed to pay the third tranche of payment, notice was issued to the Corporate Debtor by Financial Creditor seeking payment of the amount as per the contractual rate of Interest less the amount paid, as per the terms & conditions mutually agreed upon by EARC and Corporate Debtor under the Settlement Letter dated 12.03.2018. Date of default is reckoned as 31.03.2020 when the Corporate Debtor failed to pay the amounts as provided under the Settlement

	letter. • The Corporate Debtor contended that neither IDFC nor EARC Ltd. nor the Applicant intimated the Corporate Debtor about the assignment of loan between them and violated terms of Inter-Creditor Agreement dated 27.02.2009, where it was written that IDFC is incapable to assign loan unless Deed of Adherence is entered with the Respondent/Borrower and other lenders. In other words, without Deed of Adherence new lender (by assignment or induction) shall not deemed to be party to the respective Rupee Loan Agreements under which Respondent availed loans. According to the Respondent, the assignment agreement dated 24.12.2013 and 04.09.2020 are not legally enforceable more so because they are not registered under Registration Act,1908 and Assignment Agreement dated 24.12.2013 is inadequately stamped. • In response to averments that by virtue of Assignment of Agreement- 2, the Applicant became the full and absolute legal owner and is legally entitled to receive the repayment of the said debts owed by the Corporate Debtor, the Corporate Debtor vehemently denied the statement contending that, M/s EARC Limited has transferred its *legally not enforceable rights* to the Applicant and hence the Applicant cannot become the full and absolute legal owner and is not entitled to receive the repayment of the said debts owned by the Corporate Debtor. The Respondent though admits that it had availed financial facility from IDFC Limited, but the same is not due to the Applicant herein by virtue of the fact that it was not a party to the Assignment Agreement

	through which it is claiming to be a Financial Creditor. • The points that emerged for consideration before this Tribunal is- 1. Whether this Tribunal, under its residuary power contained in Section 60 (5) (C) of I&B Code, entertain the plea of legality or otherwise of the assignment of debt in favour of the Petitioner? 2. Whether the documentary evidence furnished with application show that a debt is due and payable and has not been paid by the corporate debtor?
Decision of the Tribunal	Tribunal noted the followings points in relation to Question 1 - • Tribunal referred to Section 60 of I&B Code in relation to ascertain whether or not this Tribunal, under its residuary powers contained in section 60 (5) (C) of I&B Code can entertain the above plea challenging the legality of the clause relating to assignment contained in the Inter-Creditor Agreement dated 27.02.2009. • Tribunal held that clause 5 (b) of section 60 of I&B Code, manifestly state that in order to exercise the residuary power as above, any question of priorities or any question of law or facts, should arise out of or in relation to the *insolvency resolution or liquidation proceedings* of the corporate debtor or corporate person under this Code. Thus, the *sine qua non*, for exercising the residuary power being, the 'question must arise either out of or in relation to corporate debtor or corporate person, it is to be seen whether the above plea of the corporate debtor satisfies this test. • NCLT observed –

	➢ The SARFAESI Act 2002, provides for acquisition of rights or interest in a financial asset by an Asset Reconstruction Company ARC and there is no quarrel that M/s EARC Limited which has assigned its rights to the applicant is an Asset Reconstruction Company and that the assignment agreement was only between the ARC and the native lender and the corporate debtor herein is not a party to the assignment agreement. Indisputably, the subject assignment agreement has been entered much prior to the initiation of the CIRP against the Corporate debtor herein. ➢ it is an admitted fact that on the strength of the very same assignment agreement the assignee financial creditor herein, has moved DRT for recovery of its dues against the very same corporate debtor herein, wherein, the corporate debtor has agreed to pay the sum which includes outstanding debt plus applicable interest in trenches, however breached the agreement, which ultimate compelled the applicant herein to trigger CIRP against the corporate debtor. Therefore, having accepted to discharge the debt in a manner as afore mentioned, the corporate debtor, firstly, is *estopped* from questioning the *locus*, of the applicant. Nextly, from raising the question as to the legality of the said assignment or clauses of the said assignment. ➢ it can easily be noticed that the question as to the legality of the assignment neither arose out of or in relation to the insolvency resolution proceedings of the corporate

	debtor herein, in as much as it was an independent agreement between the asset recovery company and the secured creditor under the provisions of the SARFAESI Act. Thus, the so called question' raised by the corporate debtor is undoubtedly extraneous to the insolvency resolution of the corporate debtor herein and invariably falls outside the scope of Section 5 (c) of section 60 of I&B Code. • Tribunal further observed that in Hon'ble Supreme Court of India in the matter between, Tata Consultancy Services Ltd vs Vishal Ghisulal Jain Resolution Professional, held that, *"The residuary jurisdiction of NCLT Under Section 60(5)(c) of IBC provides it a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. If the jurisdiction of NCLT were to be confined to actions prohibited by Section 14 of IBC, there would have been no requirement for the legislature to enact Section 60(5)(c) of IBC. Section 60(5)(c) would be rendered otiose if Section 14 is held to be exhaustive of the grounds of judicial intervention contemplated under IBC in matters of preserving the value of the corporate debtor and its status as a "going concern". We hasten to add that our finding on the validity of the exercise of residuary power by NCLT is premised on the facts of this case. We are not laying down a general principle on the contours of the exercise of residuary power by NCLT. However, it is pertinent to mention that NCLT cannot exercise its jurisdiction over matters dehors the insolvency proceedings since such matters would fall outside the realm of IBC.*

	Any other interpretation of Section 60(5)(c) would be in contradiction of the holding of this Court in Satish Kumar Gupta (Essar Steel (India) Ltd. (COC) v. Satish Kumar Gupta……)." • NCLT held that the case of hand squarely falls within the purview of the above ruling, hence NCLT held that the above plea of the corporate debtor is liable to be rejected and accordingly rejected the same. • Tribunal held for Question 2 that the existence of financial debt and its default by the corporate debtor are ex facie, clear and stand admitted. • NCLT held that this is a fit case to order CIRP, against the CD herein. Hence, it admitted the Petition under Section 7 of IBC, 2016.

SECTION 7

CASE NO. 8

Whether a society registered under the Societies Registration Act would fall under the definition of a corporate person under the Code.

Bench	National Company Law Tribunal, Mumbai Bench - III
Financial Creditor/ Applicant	The Solapur Dist. Central Co – Operative Bank Limited
Corporate Debtor/ Respondent	Sangola Taluka Sahakari Sakhar Karkhana Limited
Particulars of the case	CP(IB) No. 263/MB/2019
Date of Order	04.02.2022
Relevant Section	Section 7 of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	This application was filed by the Financial Creditor under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against the Corporate Debtor for initiating Corporate Insolvency Resolution Process (CIRP) on account of default made in the repayment of the credit facilities and interests thereon by the Corporate Debtor. Relying upon the Judgement of Hon'ble Supreme Court in "M/s Adani Power (Mumdra) Ltd. v/s Gujarat Electricity Regulatory Commission and Ors." (Civil Appeal No. 11133 of 2011), the Financial Creditor submits that applying the rule of construction in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provisions. While explaining the same the petitioner submits that according to Section 3(7) of the Code, 2016, being

	more specific in nature would prevail over Section 2 (d) of the Code, 2016. The Financial Creditor argued that the intention of the Central Legislature was always to include registered co-operative societies within the purview of the Code, 2016. The Petitioner further argued that the Code, 2016 had been enacted with the intention of including all the registered legal entities, with the exception of financial service providers. The issues which arose before the NCLT were as follows : I. Whether the Petition filed by the Financial Creditor under section 7 of the Code is well within limitation? II. Whether the Petition filed by the Financial Creditor under section 7 of the Code is maintainable under the provisions of IBC?
Decision of the Tribunal	NCLT observed – 1. In case of first issue, that the Financial Creditor has submitted an Additional Affidavit dated 11.11.2019 wherein the Financial Creditor has submitted the Audited Financial Statement of the Corporate Debtor as on 31.03.2018. The said Audited Financial Statement shows the loan amount due and owed to the Financial Creditor. Hence the Petition was well within Limitation. No further discussion was needed on the issue of limitation. 2. In case of Second Issue, 1. This Bench has relied upon the Judgment of Hon'ble NCLAT in the matter of Asset Reconstruction Company (India) Ltd. v. Mohammadiya Educational Society [Company Appeal (AT) (Insolvency) No. 495 of 2019. The issue before the Hon'ble NCLAT was whether a society registered under the Societies Registration Act would fall under the definition of a corporate person under the Code.

	2. NCLAT, while referring Section 18 of the AP Societies Registration Act, 2001 held that *although the Society is not incorporated and it is registered, it is rendered a body corporate which can have perpetual succession and have a common seal. The Society which will be deemed to be a body corporate is for the purposes as mentioned in Section 18, and not Company incorporated as such. Looked at in any manner, Section 2 read with Section 3 (7) does not spell out that the Respondents in these Appeals are 'Corporate Persons' under the 'I&B Code' to whom provisions for 'I&B Code' would apply.* 3. Moreover, the Central Government has not issued notification with respect to the CIRP of the Co-Operative Societies. In view of this, it is not admissible to initiate the CIRP of the Co-Operative Society as the Corporate Debtor is registered/incorporated under the Maharashtra State Co-Operative Societies Act, 1960 or any other Legislation in this respect. 4. Even if the Petition filed by the Financial Creditor is within the limitation, the Financial Creditor is not eligible to file a petition under the IBC against the Corporate Debtor here, being a Co-operative Society registered under the Maharashtra State Co-operative Societies Act, 1960. In view of the above, the NCLT held that the Petition filed by the Financial Creditor is not maintainable and therefore, the petition filed by the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Corporate Debtor, for initiating Corporate Insolvency Resolution Process was Dismissed with no Cost.

SECTION 7 & 60

CASE NO.9

Any increase in the claim amount of the Assenting FCs due to the invocation of such BG cannot be a ground for challenge by the Dissenting FCs on grounds of discrimination.

Bench	National Company Law Tribunal, Mumbai Bench Court - I
Corporate Debtor	Jyoti Structures Ltd.
Applicant(s)/Financial Creditor(s)	Union Bank of India, Bank of Maharashtra, Central Bank of India
Particulars of the case	IA 2025,2028,2035/2021 in CP(IB) No.1137/MB/2017
Date of Order	23.12.2021
Relevant Section	Section 60(5) and 7 of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	The Company Petition (CP 1137 of 2017) filed under section 7 of the Insolvency and Bankruptcy Code 2016 (the Code) seeking Corporate Insolvency Resolution Process (CIRP) of Corporate Debtor was admitted by this bench on 04.07.2017. During CIRP, Resolution Applicant had submitted a Resolution Plan along with others, which was approved with more than 81% of voting shares. The Plan was approved by Adjudicating Authority. Applicant filed this Application submitting that in the approved Resolution Plan, there is glaring inequality in the payment between the Assenting/ Dissenting FCs and Operational Creditors (OCs). OCs are paid 10% more than that of the Dissenting/ Abstaining FCs and Assenting FCs are getting around 18 times more under the Resolution Plan. Applicant sought to modify the payment under Resolution Plan to the extent that all Secured FCs are treated equally for

	payment of Plan value subject to their individual exposure with the same terms as that of Assenting FCs.
Decision of the Tribunal	NCLT noted that the invocation of BG is as per the terms of Resolution Plan. Thus, any increase in the claim amount of the Assenting FCs due to the invocation of such BG cannot be a ground for challenge by the Dissenting FCs on grounds of discrimination. Further, the decision to include the invoked amount of the BG to the fund-based debts is a commercial decision of the CoC. NCLT observed that Section 30(2)(b) of the Code provides for the payment of debts of the Dissenting FCs in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with Section 53(1) of the Code in the event of liquidation. Explanation I to Section 30(2)(b) of the Code further clarifies that distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors. Further, it referred to Judgement of The Hon'ble Supreme Court in the matter of *Ghanshyam Mishra and Sons Private Limited vs. Edelweiss Asset Reconstruction Co. Ltd. (Civil Appeal 8129 of 2019, dated 13.04.2021)* and observed that Resolution Plan once approved by the AA shall stand frozen and binding on all stakeholders including FCs. In view of the above, the Application was rejected and dismissed.

SECTION 7

CASE NO.10

Rental lease agreement can be operational debt but not financial debt.

Bench	National Company Law Tribunal, Principal Bench, New Delhi
Corporate Debtor	M/s. Synergy Petro Products Private Limited
Financial Creditor/ Applicant	M/s. National Agriculture Cooperative Marketing Federation Limited
Particulars of the case	(IB)/1106(PB)/2020
Date of Order	31.05.2021
Relevant Section	Section 7 of The Insolvency and Bankruptcy Code, 2016
Facts of the Case	The Financial Creditor filed an application filed u/s 7 for initiation of Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor on the ground that Corporate Debtor defaulted in repaying the Arbitral Award dated 10.07.2019, amounting to ₹55,37,797/- (i.e. monthly license fee from April 2007 to October 2009) and due license fee from November 2009 to 15th July, 2015, with interest of 6% per annum, aggregating to ₹3,14,36,864/- as on 11.10.2019. It was submitted by the Applicant that the award being passed on 10.07.2019 and the same becoming enforceable on expiry of a period of 90 days thereafter, the Corporate Debtor has failed to make the payment in terms of award and has thus committed default in terms of Section 7 of Insolvency and Bankruptcy Code, 2016. Corporate Debtor raised preliminary objections that the Applicant doesn't fall under the definition of Financial Creditor and there is no existence of

	Financial Debt as defined under the provisions of the Code.
Decision of the Tribunal	The Tribunal held that the basic nature of transaction is not covered under financial debt. Rental lease agreement can be operational debt but not financial debt. In any case, the transactions which transpired between the parties does not partake the character of a 'Financial debt' and as such the Applicant does not qualify to be a Financial Creditor in relation to the Corporate Debtor. Under these circumstances, the Tribunal was of the considered opinion that the instant Application was liable to be dismissed and accordingly dismissed the Application.

SECTION 9

CASE NO. 11

Whether an investment made by the Director of the Company falls under the definition of Operational Debt?

Bench	National Company Law Tribunal, Kolkata Bench, Kolkata
Operational Creditor	Akshat Pandey
Corporate Debtor	Avighna Films Private Limited
Particulars of the Case	C.P. (IB) No. 178/KB/2021
Date of Order	14.07.2022
Relevant Section	Section 9 of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	This was a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 by Operational Creditor seeking to initiate Corporate Insolvency Resolution Process against Corporate Debtor on the ground that the Corporate Debtor failed to make payment of Rs. 1.14 crores (approx.). The Operational Creditor submitted that the Corporate Debtor had two directors and the Operational Creditor was inducted as an Additional Director for production of a movie to which payments were made by him for the completion of the cinema. Later, the Operational Creditor under section 8 of the Code asked the Corporate Debtor to return the investment amount to which one of the directors requested for settlement but without any payment. So, no payment had been received by Operational Creditor. The Corporate Debtor contended that the Operational Creditor had no locus standi to institute the instant proceeding. Further, no date of default

	had been mentioned and it was barred by limitation and should be rejected as *ab initio*. The Question that arose in this matter was 'Whether an investment made by the Director of the Company falls under the definition of Operational Debt?
Decision of the Tribunal	The Court stated that "*under section 5(21) of the Code, an Operational Debt means a claim in respect of the provision of goods or services including employment or a debt in respect of the re-payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government, or any local authority. Further, section 5(20) of the Code an 'Operational Creditor' meaning a person to whom an Operational debt is owed and includes any person to whom such debt has been legally assigned or transferred*". However, Investment made by the Petitioner, who is also one of the directors of the Corporate Debtor, does not fall under the purview of an Operational Debt under the Code. Hence, the petition stood dismissed.

CASE NO. 12

Whether the Application being filed through Monitoring Professional be considered proper in respect of I & B Code?"

Bench	National Company Law Tribunal (NCLT), Bench- V at New Delhi
Applicant/ Operational Creditor	M/s. Educomp Infrastructure & School Management Ltd.
Respondent/ Corporate Debtor	M/s. Millenium Education Foundation
Particulars of the Case	Company Petition No. IB-245/ND/2022
Date of Order	03.06.2022
Relevant Section	Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and

	Bankruptcy (Application to Adjudicating Authority) Rules, 2016)
Facts of the Case	The Application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('IBC, 2016') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('the Rules') by Operational Creditor through the chairman of Monitoring Committee, by virtue of Admission order dated 25.04.2018, by the Adjudicating Authority, Chandigarh Bench, with a prayer to initiate the Corporate Insolvency Resolution Process ('CIRP') against Corporate Debtor (Respondent). The order in the matter was reserved in the pre-admission stage, for issuance of Notice on the Application under Section 9 of the Code. The Question of Law to be considered by the bench was; "Whether the Application being filed through Monitoring Professional be considered proper in respect of I & B Code?"
Decision of the Tribunal	The NCLT is of the view that the Applicant being the Monitoring Professional for Operational Creditor is covered under the provisions of the Code, by virtue of Section 2(d) of the IBC 2016. Hence the Monitoring Professional has proper authority to serve the Notice on the Corporate Debtor.

CASE NO. 13

Whether a foreign award was sufficient to initiate insolvency proceedings against the Corporate Debtor under the Insolvency and Bankruptcy Code, 2016.

Bench	National Company Law Tribunal, Cuttack Bench, Cuttack
Applicant/ Operational Creditor	Jaldhi Overseas Pte. Ltd.

Respondent/ Corporate Debtor	Steer Overseas Private Limited
Particulars of the case	TP No. 18/CTB/2019 Connected with CP (IB) No. 1374/KB /2018
Date of Order	17.11.2021
Relevant Section	Section 9 of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	The Applicant/Operational Creditor has been incorporated and organized under the appropriate laws of Singapore whereas the registered office of the respondent company (Corporate Debtor) is situated in Bhubaneswar, Odisha and therefore the Adjudicating Authority has jurisdiction to entertain this application. This application has been filed under section 9 of the Insolvency and Bankruptcy Code, 20L6 for initiation of Corporate Insolvency Resolution Process (CIRP) in the case of the respondent. The corporate debtor/ respondents availed services rendered by the operational creditor through its vessel which was taken on hire by the corporate debtor for carrying its cargo of iron-ore fines from Haldia and Vizag port to a port in China. In the course of transportation of goods from the said vessel, detention and demurrage charges became payable at Vizag port and at a port in China respectively. Thereafter the amount of charges payable became disputed between both the parties. Subsequently, the matter was referred to arbitration by the operational creditor which was duly contested by the corporate debtor and on completion of hearing and pleadings, the partial foreign award was passed by arbitral tribunal based in Singapore in favour of the Operational Creditor. The operational creditor thereafter applied before the High Court of the Republic of Singapore for

	leave of the court to enforce the award which was duly accepted and allowed by the High court of Singapore, after rejecting objections raised by the corporate debtor. The operational creditor submits that since the corporate debtor failed to repay the debt, the operational creditor had raised a demand notice demanding payment in respect of the award given by the arbitral Tribunal of Singapore to which corporate debtor raised the objections in his submission. Now, the question involved in this case is whether a foreign award was sufficient to initiate insolvency proceedings against the Corporate Debtor under the Insolvency and Bankruptcy Code, 2016. The foreign award is quite different from domestic award. Unlike a domestic award, a foreign award has to undergo certain test to become enforceable award/deemed decree.
Decision of the Tribunal	Tribunal was of the view that the foreign award is not a decree in itself. A foreign award cannot directly constitute debt to initiate proceedings against Corporate Debtor under IBC. The mere production of foreign award is not enough to give an effect. Part II Chapter I of Arbitration and Conciliation Act 1996 deals with enforcement of foreign awards in India. Asper per explanation to Section 47, 'the court' mentioned therein denotes only High Courts. It was made clear from this provision that High Courts alone has exclusive jurisdiction to deal with foreign awards to enforce foreign awards. To enforce foreign award in India the party in who's favor award stands shall file the documents referred in Section 47 (I) and (2) of Arbitration and Conciliation Act 1996. The enforcement of foreign award in India is subjective satisfaction of concern

	High Court to the conditions set out in Section 48 of the Act. After the satisfaction of High Court only the foreign award become enforceable, then only the award shall be deemed to be a decree as per Section 49 of the Arbitration and Conciliation Act, 1996. Tribunal held that in the given situation the Tribunal cannot act upon the foreign award under the presumption that there is undisputed debt amount due, such an exercise will amount to give an effect to foreign award bye passing/violating the procedures laid down in Part II Chapter I of Arbitration and Conciliation Act, 1996. In view of the above, the Tribunal held that this application ought to be rejected and was accordingly dismissed. No order to cost.

CASE NO. 14

If the amount defaulted by the CD is neither arising out of provision of goods and services nor is a claim in respect of employment nor it represents the dues payable to the Govt. then it is not an operational debt within the meaning of Section 5(21).

Bench	National Company Law Tribunal, New Delhi Bench (Court II)
Applicant/ Operational Creditor	Transit Geo System Integrators Private Limited
Respondent/ Corporate Debtor	Stahl Tecniks Private Limited
Particulars of the case	(IB)-265/ND/2021
Date of Order	20.10.2021
Relevant Section	Section 9 of Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016.

Facts of the Case	The petition was filed under Section 9 of Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by 'Applicant' with a prayer to initiate the Corporate Insolvency process against Corporate Debtor. That from perusal of the Application, it was observed that the entire claim of the Operational Creditor was based on the Assessment Order passed by the Sales Tax Department. It had been stated that the demand raised by the Sales Tax Department was paid by the Operational Creditor on behalf of the Corporate Debtor. Issue which emerged was – Whether the Sales Tax Demand paid by the Operational Creditor can be claimed as reimbursement from a Corporate Debtor as an "Operational Debt"? Applicant had claimed that the aforesaid debt was an "Operational debt" since the same was arising out of the dues payable to the Sales Tax Department of the State Government.
Decision of the Tribunal	Tribunal observed that Final Notice of Assessment (Supra), the Tax Demand has been raised by the Sales Tax Department against the Operational Creditor and not against the Corporate Debtor. Tribunal further observed that the definition of the Operational Debt includes the dues arising under any law in force and recoverable by the Central Government or State Government or any local authority and the dues payable to the Government can be claimed by the Government only in the capacity of the Operational Creditor. Tribunal held that the payment of Tax Demand made and discharged by the Applicant herein to the State Government will not result in automatic assignment or transfer of such payment/ debt to the Corporate Debtor and therefore, Operational

	Creditor cannot claim the same as reimbursement from the Corporate Debtor as the Operational Debt. Tribunal further concluded that the amount shown in part IV of the application as defaulted amount, based on the Final Notice of Assessment was neither arising out of provision of goods and services nor was a claim in respect of employment nor it represents the dues payable to the Government, is not an Operational Debt within the meaning of Section 5(21) of the IBC,2016 and therefore, the applicant is not the operational creditor u/s5(20) of IBC 2016. Accordingly, the Application filed under Section 9 of IBC, 2016 is not maintainable and hence, dismissed

CASE NO. 15

The moment it is established that there is a pre-existing dispute, the Corporate Debtor gets out of the clutches of the IBC.

Bench	National Company Law Tribunal, New Delhi Bench - (Court – II)
Respondent/ Corporate Debtor	M/s. Diamond Traexim Pvt. Ltd.
Petitioner/ Operational Creditor	M/s K K Continental Trade Ltd.
Particulars of the case	(IB)- 172/ND/2021
Date of Order	16.08.2021
Relevant Section	Section 9 of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	The Application was filed under Section 9 of the Code read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Applicant with a prayer to initiate the Corporate Insolvency Resolution Process against Corporate Debtor.

	It was submitted by the Applicant that a High Seas Sale Agreement was executed between the Applicant and Corporate Debtor for import of Crude Palm Oil. In pursuant to the aforesaid High Seas Sale Agreement, the Corporate Debtor purchased Crude Palm Oil from the applicant for which an Invoice was raised. It has been added that towards the aforesaid invoice, a part payment was received till date and the balance amount of remained due and unpaid. It was stated by the applicant that at the request of the Corporate Debtor it had appointed the Sole Arbitrator to adjudicate upon the disputes between the parties. It had been added that the Sole Arbitrator after hearing both the parties and considered the documents placed on record had passed an Arbitral Award whereby the Sole Arbitrator had dismissed the claim of the applicant stating that the Claim is premature. It was contended by the Applicant that the default is continuing and subsisting and the Applicant was legally entitled to receive the aforesaid amount from the Corporate Debtor along with interest which was due and payable by the Corporate Debtor to the Applicant. The Applicant had further stated that the Corporate Debtor responded to the Demand Notice vide its reply, whereby it denied the debt due and further disputed the amount claimed by that the goods supplied were of the deteriorated quality. The Corporate Debtor had also referred to the Arbitral Award, whereby the claim of applicant and counter claim of Corporate Debtor were dismissed as pre-mature. The parties were, however, given liberty to file fresh claims/ counter claims after the (original) supplier have addressed the complaint / claim of the Corporate Debtor once it was lodged by the Applicant with that supplier.

	NCLT after hearing both the parties observed that the present claim of the Applicant primarily arose out of the High Seas Sales Agreement, the dispute relating to which was referred by the Applicant to the Arbitrator by invoking Arbitration clause of the Agreement.
Decision of the Tribunal	Tribunal observed that the Applicant had claimed the same amount in the present Petition filed under Section 9 of the IBC 2016, which was the subject matter of the Arbitration and which had already been rejected by the Sole Arbitrator. That further, there was no averment made by the Applicant in its Petition with regard to the steps it had taken for lodging its claim with the original Supplier on the basis of the complaint of the Corporate Debtor. Tribunal further observed that Corporate Debtor had raised dispute over the claim of the applicant within 10 days, as prescribed under Section 8 of the Code. The Corporate Debtor in reply to the demand notice had referred to the Arbitration Proceedings and claimed pre-existing dispute. Further, NCLT noticed that the applicant itself had initiated the Arbitration Proceeding to resolve the dispute relating to its claim, which resulted in dismissal of the claim being pre-mature. NCLT referred the judgement of *Mobilox Innovations Private Limited V/s. Kirusa Software Private Limited in Civil Appeal No. 9405 of 2017* wherein Hon'ble Supreme Court has observed that – "40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the

	"existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties……" NCLT further referred the judgment of *Transmission Corporation of Andhra Pradesh Limited V/s. Equipment Conductors and Cables Limited - Civil Appeal Re. 9597 of 2018*, the Hon'ble Supreme Court has observed that: "15. In a recent judgment of this Court in Mobilox Innovations Private Limited vs. Kirusa Software Private Limited1, this Court has categorically laid down that IBC is not intended to be substitute to a recovery forum. It is also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked…." Tribunal held that the material on record sufficiently indicates that there has been a pre-existing dispute between the parties prior to issuance of demand notice. Therefore, there being a pre-existing dispute and a situation in which the Applicant itself has referred the dispute to the Arbitration proceeding, which resulted in dismissal of the claim of the Applicant being pre-mature, the applicant has failed to prove that its operational debt is undisputed. In terms of Section 9 (5)(ii)(d) of the IBC, the moment it is established that there is a pre-existing dispute, the Corporate Debtor gets out of the clutches of the IBC. Thus, NCLT dismissed the Application.

CASE NO. 16

Whether the mutually agreed genuine pre-determined compensation for the cost incurred due to the pre-mature termination of leave and licence agreement by the Corporate Debtor can be claimed as an "Operational Debt" within the meaning of the Code.

Bench	National Company Law Tribunal, Mumbai Bench Court - III
Corporate Debtor	Jatoyah Investments & Holdings Limited
Applicant/ Operational Creditor	Wellspring Helathcare Pvt. Ltd
Particulars of the case	C.P. No.4768 /IBC/MB/2018
Date of Order	05.08.2021
Relevant Section	Section 9 of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	Company Petition was filed by "Operational Creditor" claiming to be an "Operational Creditor" under section 9 of the Code for ordering initiation of CIRP against the Corporate Debtor. The applicant was claiming an amount being the mutually agreed pre-determined genuine compensation for the costs and loss of business said to have been incurred by the Petitioner herein. The Corporate Debtor further contended that the applicant was not an "Operational Creditor" and the amount claimed by him was not an "Operational debt" within the meaning of the Code and there was no "Operational Creditor" and "Corporate Debtor" relation between the parties. Question that needed to be answered in the Company Petition was- 1) Whether the petitioner qualifies as an "Operational Creditor" and the amount claimed by the applicant was an "Operational Debt" within the meaning of the Code? And

	2) Whether the Company Petition was maintainable?
Decision of the Tribunal	NCLT observed that it was an admitted case of the Petitioner in his petition itself that the amount claimed by the Petitioner is due towards mutually agreed genuine pre-determined compensation for the cost incurred due to the pre-mature termination of leave and licence agreement by the Corporate Debtor. NCLT further observed from the definitions of "Operational Creditor" & "Operational Debt" that the Petitioner does not qualify as an "Operational Creditor" and the amount claimed by it was an "Operational Debt" within the meaning of the Code. On the basis of above observation, NCLT held that Company Petition was liable to be dismissed on the issue of maintainability. Accordingly, the application was hereby rejected. However, Tribunal further held that the order did not preclude the Petitioner from recovering the above amount from the Respondent by approaching an appropriate legal forum.

CASE NO. 17

Whether an application is maintainable if there is pre-existing dispute with regard to the quality of the goods supplied.

Bench	National Company Law Tribunal, Ahmedabad Bench, Ahmedabad
Petitioner/ Operational Creditor	M/S Auto Mat Lub Systems
Respondent/ Corporate Debtor	Anupam Industries Limited
Amount of Default	Rs. 65,58,785/-
Particulars of the Case	C. P. No. (IB) 590/9/NCLT/AHM/2019

Date of Order	20th April, 2021
Relevant Section	Section 9 of the IBC read with Rule 6 of the Insolvency and Bankruptcy (Application to AA) Rules, 2016
Facts of the Case	The application was filed by Proprietor of Operational Creditor, as he had supplied lubrication pumps to Corporate Debtor for which the principal and interest amount was outstanding and payable. Having failed to receive the payment, the applicant was compelled to issue demand notice under Section 8 of the I&B Code and call upon the respondent to clear the operational debt. The Respondent filed affidavit in reply raising various objections such as: the petition is barred by limitation, the application is filed by a proprietary concern in its name and the same not being a person cannot file a petition under section 9 of the IBC, none of the invoices contain any endorsement from the respondent as to the receipt of the goods, that pre-existing dispute exists with regard to the quality of the product etc. On perusal of record, it was found by the Tribunal that delivery challans and lorry receipts were not filed by applicant, which could otherwise substantiate that the goods were supplied and received by the respondent.
	Further, it was noted that the applicant had not disclosed material fact that there existed a dispute regarding the quality of the goods supplied by the applicant during the year 2013-14, for which no action had been taken by the applicant to resolve the dispute despite of reminders from the respondent.
Decision of the Tribunal	Considering the above issues and material placed on record, the Tribunal held that the application was barred by limitation and there existed a dispute with regard to the quality of the goods supplied by the

	applicant, therefore the application was not maintainable and deserved to be rejected. The Tribunal dismissed and disposed of the petition without any cost. However, this will not stand in the way of the Petitioner approaching the appropriate forum seeking to enforce its claim against the Respondent, as this petition has been dismissed on the issue of maintainability taking into consideration the provisions of IB Code,2016.

CASE NO. 18

The provision of Section 250 of Companies Act, 2013 which provides for the realization of the amount is not applicable on the application filed under Section 9 of the Code.

Bench	National Company Law Tribunal, New Delhi, Bench-VI
Applicant/ Operational Creditor	Sh Bhavya Prakash and Anr
Respondent/ Corporate Debtor	M/s DD Motors Ltd
Amount of Default	Rs. 4,04,00,239/-
Particulars of the Case	IB 765/(ND)/2020
Date of Order	13th April, 2021
Relevant Section	Section 9 of the IBC read with Rule 6 of the Insolvency and Bankruptcy (Application to AA) Rules, 2016
Facts of the Case	The application has been filed by Operational Creditor with the prayer for initiation of CIRP of the Corporate Debtor. The applicant was the director shareholder of the erstwhile company which got struck off from the Registrar of Company vide notice dated 08.08.2018.

	It was submitted that the said company has provided parking services to the Corporate Debtor and the outstanding amount as per the invoice raised by the OC is Rs 2,97,60,000/- along with interest @ 18% as on 31.08.2019 amounting to Rs 1,06,40,239/- It was further stated by the applicant that vide section 250 of the Co. Act, 2013, the applicant can realize the amount due from the CD and therefore a demand notice dated 10.01.2020 demanding payment of unpaid operational credit has been moved by the applicant. The Corporate Debtor in its reply submitted that the applicant had not taken any step for restoration of the said company. Also, it submitted that the applicant had deliberately concealed the fact that the respondent has sent a notice of dispute in reply to the demand notice and has concealed that a previous notice has also been served before the demand notice dated 10.01.2020 for which due reply had been sent in the past. Further it was stated that the purported invoices attached with the present application were false and fabricated and it was even informed to the applicant that the Respondent is not liable to pay a single rupee as respondent had never availed any parking service provided by the company.
Decision of the Tribunal	The Tribunal relied on the following facts: • That the applicants of the said company had not taken any steps for restoration of the name of the company and they could not prove with the documentary evidence as to how they were the operational creditor of the company when they have not supplied any goods or services to the CD in their personal capacity. • Allegation of false and fabrication of Invoices have been raised by the Respondent in their

	reply. The Respondent pointed out that the invoice had been generated by the applicant post the date of dissolution of the Co. after which it has ceased to operate and could not do business. • The Co. is not in existence. Section 250 of the Co Act, 2013 provides for the realization of the amount but this is not a recovery proceeding therefore the provision of Section 250 is not applicable on the application filed under Section 9 of the Code. • And that the claim had been disputed by respondent even before filing the application.
	Considering the above facts and reasons, the NCLT held that the applicants were not the creditors of the CD and therefore were not entitled to file the present application. The petition was dismissed. It was made clear that any observations made in this order shall not be construed as an expression of opinion on the merit of the controversy and the right of the Applicants before any other forum shall not be prejudiced on account of dismissal of instant application.

SECTION 24 & 25

CASE NO. 19

Whether an Advocate, Chartered Accountant, Company Secretary of the Corporate Debtor can be permitted to attend the meetings of Committee of Creditors and whether they have to be provided the copies of all documents in connection with the CIRP process.

Bench	National Company Law Tribunal, Kochi Bench, Kerala
Applicant- Corporate Debtor	M/s Propyl Packaging Limited
Respondent/Resolution Professional	Mr. George Vakey, Resolution Professional of Propyl Packaging Limited
Particulars of the case	M.A. No. 162/KOB/2020 in IBA No. 52/KOB/2019
Date of Order	21.01.2021
Relevant Section	Section 24, Section 25(2)(d) of The Insolvency and Bankruptcy Code, 2016 and Regulation 24 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
Facts of the Case	The Applicant sought for the following reliefs: - (a) Direct the Respondent to permit the Advocate, Chartered Accountant, Company Secretary of the Corporate Debtor/ Applicant to attend the meetings of Committee of Creditors. (b) Direct the Respondent to provide the copies of all documents in connection with the CIRP process to the above-mentioned professionals.
Decision of the Tribunal	The Tribunal observed that Regulation 24 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 makes it clear that the Resolution Professional has the power and responsibility to monitor and manage the operations and assets of the enterprise. The professional will manage the resolution process of negotiation to ensure balance of power between

	the creditors and debtor, in order to protect the rights of all creditors and the professional has to ensure the reduction of asymmetry of information between creditors and debtor in the resolution process.
	Further, the Tribunal observed that Sec 24 of IBC provides that if there are Financial Creditors to Corporate Debtor, only Financial Creditor can attend and vote in the meeting. Directors and partners can only attend the meeting of Committee but shall not have any right of voting and their absence does not invalidate any of the proceedings, which means that even if they are allowed to attend the meeting of Committee of Creditors, they will be only silent spectators and they have no say on any of the transactions in the proceedings. Hence, the Tribunal was of the view that by allowing the Advocate/ CA/ Company Secretary of the Corporate Debtor no purpose will be served. With regard to the second prayer of providing the copies of all documents in connection with the CIRP process to the Corporate Debtor is concerned, the Tribunal was of the view that it is the discretion of the Resolution Professional to appoint Accountants, legal and other professionals following the due process as specified under Section 25(2)(d) of the Code and that Resolution Professional is not permitted to disclose any information pertaining to the CIRP to any third parties including Advocate/ CA/ Company Secretary and so the Tribunal did not grant the prayer. In view of the facts and circumstances as also the above mandates, the Tribunal mentioned that it cannot travel beyond the IBC Regulations and pass orders contrary to the Regulations. Therefore, the Miscellaneous Application being devoid of merit was dismissed.

SECTION 35 & 60

CASE NO. 20

The Code does not bar the distribution of accumulated cash profit of the Corporate Debtor which are in excess of liquidation cost to the stakeholders in accordance with the waterfall mechanism as specified under Sec 53 subject to deduction of withholding tax of the Insolvency and Bankruptcy Code, 2016.

Bench	National Company Law Tribunal, Allahabad Bench
Corporate Debtor	JVL Agro Indstries Ltd.
Applicant	Sri Supriyo Kumar Chaudhuri (Liquidator of JVL Agro Indstries Ltd)
Respondent	State Bank of India, SARG & Ors.
Particulars of the case	IA No.19/2021, IVN. P. 02/ALD/2020 In CP No. (IB) 223/ALD/2019
Date of Order	26.07.2021
Relevant Section	Sec 35(1)(n) IBC read with Sec 60(5) of IBC,2016
Facts of the Case	The present application has been filed under Sec 35(1)(n) IBC read with Sec 60(5) IBC and the applicable provisions on behalf of the liquidator with the prayer to grant leave / sanction to the applicant to distribute an amount of Rs. 61 crores, less any applicable withholding tax, out of the accumulated cash profits lying in the bank accounts of the corporate debtor, to the stakeholders in accordance with Sec 53 IBC. Applicant filed the present application seeking clarification whether the accumulated cash profit presently lying in the bank account of the Corporate Debtor which are in excess of liquidation cost can be distributed by the liquidator to the stakeholders u/s 53 subject to deduction of withholding tax as may be applicable pending sale of assets forming part of liquidation estates and realisation of proceeds thereof.

	Further, an Intervention application has also been filed as IVN. P.02/ALD/2021 on behalf of another Financial Creditor of Corporate Debtor and a member of CoC, whose security interest stands relinquished as part of liquidation estate and has a substantial and vital interest in the relief relating to distribution of accumulated cash balances in the bank account of the Corporate Debtor.
Decision of the Tribunal	The Tribunal observed that Regulation 42 of the IBBI (Liquidation Process) Regulation 2016 provides that the Liquidator can commence with the distribution once the list of stakeholders and asset memorandum have been filed with the Tribunal and in the present case, it is a matter of record that it has already been done and filed before this Tribunal. Further, since the corporate debtor in liquidation is not a going concern and assets which are to be distributed are in the form of liquid assets and are non-saleable, thus the Adjudicating Authority was of the opinion that the Code does not bar such distribution as such distribution will not hamper the liquidation process of the corporate debtor. The Tribunal was of the opinion that as the amount to be distributed is in excess of the liquidation cost as estimated by the liquidator and is to be distributed to them who are entitled to the benefit of the distribution of liquidation proceedings, therefore the Adjudicating Authority allowed the Applicant to distribute an amount of Rs. 61 crores, less any applicable withholding tax, out of the accumulated cash profits lying in the bank accounts of the corporate debtor , to the stakeholders in accordance with the waterfall mechanism as specified under Sec 53 of the Insolvency and Bankruptcy Code, 2016. IA No. 19/2021 was allowed and stands disposed of.

SECTION 54A

CASE NO. 21

Documents and materials required in order to make the application for Pre-Packaged Insolvency Resolution Process to be admitted.

Bench	National Company Law Tribunal, Ahmedabad, Court -2
Corporate Debtor/ Applicant	GCCL Infrastructure & Projects Ltd.
Particulars of the case	CP (IB) No. 116/54/NCLT/AHM/2021
Date of Order	14.09.2021
Relevant Section	Section 54A of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	▪ An application to initiate Pre-Packaged Insolvency Resolution Process (PPIRP) of the Corporate Debtor under Section 54A of the Insolvency and Bankruptcy Code, 2016 was filed by the Corporate Debtor which is a Micro, Small & Medium Enterprises ("MSME"). ▪ A Special Resolution by the Members of the Corporate Debtor to initiate “PPIRP" under Section 54A(2)(g) of the Code was passed.
	▪ An application to initiate Pre-Packaged Insolvency Resolution Process (PPIRP) of the Corporate Debtor under Section 54A of the Insolvency and Bankruptcy Code, 2016 was filed by the Corporate Debtor which is a Micro, Small & Medium Enterprises ("MSME"). ▪ A Special Resolution by the Members of the Corporate Debtor to initiate “PPIRP" under Section 54A(2)(g) of the Code was passed. ▪ The majority of the Directors of the Corporate Debtor gave declaration as per Section 54A(2)(f) in Form P6.

	▪ The Financial Creditor approved the decision of the directors to file the application as contemplated under Section 54A(3) of the Code after considering the formalities completed by Corporate Debtor including submission of Base Resolution Plan. ▪ As per the provisions of Section 54A(2)(e) of the Code read with Regulation 14(5) of IBBI (Pre-packaged IRP) Regulation, 2021, the Financial Creditor approved the appointment of the Resolution Professional to conduct PPIRP and to discharge duties before initiation of PPIRP. ▪ The Resolution Professional's Report under Section 54B(1)(a) of the Code was produced in form – 8. ▪ The declaration regarding existence of avoidance of transactions relating to the company and its directors as per Section 54C(3)(c) of the Code read with Regulation 16(2) of IBBI (Pre-packaged IRP) Regulation, 2021, was produced. ▪ Affidavit of the Corporate Debtor regarding its eligibility under Section 29A of the Code to submit Resolution Plan had been filed as per the provisions of Section 54A(2)(d) of the Code. ▪ The Applicant had also produced the audited financial Statements of the company for the year 2019-20 and 2020-21 as per the provision of Section 54C(3)(d) of the Code. List of the assets and liabilities of the Corporate Debtor, names and amount of the debt of all Financial Creditors and Operational Creditors and names of all the Directors and Members of the Corporate Debtor were also produced. ▪ The Corporate Applicant proposed name of

	Insolvency Professional to be appointed as Resolution Professional as per the provision of Section 54C(3)(b) of the Code. Such RP also gave consent in writing.
Decision of the Tribunal	NCLT found that the Corporate Debtor has produced all the required documents and materials in order to comply the provisions of Law making the application liable to be admitted under Section 54A of the Code. NCLT admitted the application and passed the following order: ▪ The application for Pre-Packaged Insolvency Resolution Process Corporate Debtor stands admitted under Section 54C of the Code. ▪ The moratorium under Section 14 of Insolvency and Bankruptcy Code, 2016 was declared. ▪ The RP as proposed by the Corporate Applicant was appointed as a Resolution Professional to conduct Pre-Packaged Insolvency Resolution Process ("PPIRP") as per the Provisions of Chapter III A of the Insolvency Regulations. Further, the Resolution Professional would also perform his duties and functions as per the provisions given under Section 54F of the Code. ▪ RP was directed to make a public announcement of Pre-Packaged Insolvency Resolution Process ("PPIRP") of the Corporate Debtor as per Section 54A of the Code. ▪ As mentioned under Section 54F(5), the personnel of the Corporate Debtor shall extend all assistance and cooperation to RP. In case of non-cooperation, the RP could approach NCLT under Section 19(2) of the Code. The management of the Corporate Debtor shall remain vested with the Board of Directors of

	the Corporate Debtor as per the provisions of Section 54H subject to action under Section 54J of the Code, if, any. The Board of Directors shall discharge their duties as specified under Section 54H(b) and Section 54H(c) of the Code. ▪ Resolution Professional was directed to file an interim report within thirty days to NCLT. ▪ The Registry was directed to communicate a copy of the order to the Financial Creditor, Corporate Debtor and to the Resolution Professional and the concerned Registrar of Companies, after completion of necessary formalities, within seven working days and upload the same on website immediately after pronouncement of the order.

SECTION 59

CASE NO. 22

What are the requisites to be followed for application to initiate Voluntary liquidation proceedings.

Bench	National Company Law Tribunal, Chandigarh Bench, Chandigarh
Petitioner Company	Sakhi Resorts and Farmlands Private Limited
Particulars of the case	CP (IB) No.04/Vol./Chd/Pb/2019
Date of Order	17.03.2022
Relevant Section	Section 59 of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	The Company Petition was filed under Section 59 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 and applicable rules of the National Company Law Tribunal Rules, 2016 ("Rules") by the liquidator of Sakhi Resorts and Farmlands Private Limited for dissolution of the Petitioner Company. It was submitted that the company was incorporated to carry on business of hotels, restaurants, resorts and guest houses etc. However, due to certain reasons the company was not carrying on its business activities from the past four years, therefore the management had decided to liquidate the company voluntarily. Even before the period of four years the company was not getting adequate bookings to fulfill its day to day expenditures so only the resort cum banquet hall was sold by the company on 29.12.2015. The Board of Directors of the Company in its meeting had passed a resolution for Voluntary

	Liquidation of the Company in terms of Section59 of the IBC, 2016 and for filing the declaration of solvency for voluntary liquidation as well as for appointing liquidator of the company in terms of Regulation 5 of the IBBI Regulations (Regulation 14 of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017, subject to the approval of members in the Extra Ordinary General Meeting (EOGM) in the Company. The copy of the Board Resolution is attached as Annexure of the petition. The Declaration of Solvency as required under Section 59 (3) (a) of the Code was signed by the directors and accordingly filed with the Registrar of Companies. The copy of E-Form MGT-14 and GNL-2 along with the challan and declaration of solvency duly signed by the directors is attached as Annexure of the petition. The copies of audited financial statements for the financial year ended on31.12.2017 and 31.12.2018 have been filed as Annexure of the petition. It is averred that the Equity Shareholders of the company (constituting 100%) have passed a special resolution in the EOGM approving voluntary liquidation of the company in terms of Section 59 of IBC, 2016 and appointing Liquidator. Accordingly, the liquidation of the company is deemed to have commenced. The copy of notice, explanatory statement, certified true copy of the Special Resolutions along with the minutes of the EOGM is attached as Annexure of the petition. In compliance of the provisions of Section 59(4) of the Insolvency and Bankruptcy Code, 2016, the special resolution passed by the Equity Shareholders of the company were duly notified/filed with the office of the concerned Registrar of Companies (ROC) and IBBI. Copies of

	e-form MGT-14and Form GNL-2 filed with the office of Registrar of Companies (ROC) along with Challan dated are attached as Annexure of the petition. The liquidator has duly intimated to the IBBI with regard to the voluntary liquidation vide email which is attached as Annexure of the petition. Also, in terms of Section 178 of the Income Tax Act 1961, the liquidator vide letter informed the Department of Income Tax regarding the liquidation of the company and also about the appointment of the Liquidator. Copy of the intimation given to the Income Tax Department is attached as Annexure of petition. The Liquidator made public announcement on 12.02.2019 inviting claims from the stakeholders, if any as required under Regulation 14 of IBBI (Voluntary Liquidation Process) Regulations, 2017. The original newspaper cuttings of the public announcement made by the liquidator are attached as Annexure of the petition. The Public Announcement was simultaneously notified to the Insolvency and Bankruptcy Board of India (IBBI) vide email publishing it on its website. It is further submitted that in terms of Regulation 29 of the IBBI (Voluntary Liquidation Process) Regulations, 2017, the Liquidator fixed the last date for submitting the claims by the creditors. It is stated that the Liquidator has prepared the list of stakeholders on the basis of claims received from the creditors and after due verification. The copy of the claim forms received from all the creditors and list of stakeholders are attached as Annexures respectively of the petition. The Liquidator in terms of Regulation 9 of IBBI (Voluntary Liquidation Process) Regulations, 2017 submitted the preliminary report. A copy of the preliminary report is attached as Annexure of the petition.

	It is submitted that in terms of IBBI (Voluntary Liquidation Process) Regulations, 2017, upon completion of the liquidation process the liquidator has prepared a Final Report containing the details of receipts and payments pertaining to the liquidation since the liquidation commencement date. The same has been submitted to the concerned Registrar of Companies and also to the Insolvency and Bankruptcy Board of India (IBBI). A copy of the Final Report and E-Form GNL-2 filed with the concerned RoC along with acknowledgement regarding its service to IBBI are attached as Annexures of the petition. It is submitted that the liquidator has opened a bank account with a Bank bearing Account no. xxxxxx. It was further submitted that the aforesaid bank account had been closed by the liquidator. The receipt and payment account duly certified by the liquidator showing the distribution of assets to its stakeholders is attached as Annexures of the petition. The petitioner had also filed audited financial statements as on 31.12.2018, 11.01.2019 and 31.03.2019 as Annexure of the petition. The liquidator of the petitioner company has also filed a compliance affidavit wherein it has been stated that in response to the public announcement no objections have been received from any person or authority. The Income Tax Return for the F.Y. 2018-2019 has been filed on 31.12.2019 and there are no pending dues of taxes. When the matter was heard, this Bench had directed that notices be issued to the concerned RoC and Insolvency and Bankruptcy Board of India. The petitioner has filed an affidavit of service showing duly service of notices to the statutory authorities vide speed post. The RoC has filed its report wherein the concerned

	department has no objection to the dissolution of the company. The IBBI has also filed a report and it has been stated that there are no business activities in the company for the past four years and the Board can examine the records of the proceedings of CIRP/liquidation/voluntary liquidation only on the receipt of a complaint and grievance and it has no other role in the voluntary liquidation proceedings. The liquidator for the petitioner company has filed a reply and it has been stated that the role of IBBI arises only in case of receipt of a complaint or a grievance and in the present case there is no such instances where the Board needs to perform any function. It is also stated the IBBI was notified about the resolution of voluntary liquidation within seven days.
Decision of the Tribunal	NCLT observed that the Company is incorporated to carry on the business of hotels, restaurants, banquet halls. The company was incorporated to carry on the business of hotels and resorts and it is not carrying on any business from the last four years as the company was not getting adequate bookings to fulfill its day to day expenditures. Therefore, the only resort cum-banquet hall of the company was sold. The Board of Directors in its meeting have decided to voluntary liquidation of the company and equity shareholders in EOGM has approved the resolution for voluntary liquidation of the company and approving the appointment of liquidator. Further, the liquidator has informed the concerned authorities i.e. IBBI, RoC and Income Tax Department and has also made paper publication in Form A in two newspapers. The liquidator has also prepared the list of stakeholders after due verification of claims. The Liquidator has completed

	the final distribution of assets and has also closed the bank account. The voluntary liquidator has also prepared and submitted the final report to the IBBI via e-mail and RoC. The Application is duly supported by the affidavit of the Voluntary Liquidator. NCLT held that in view of the discussion foregoing and to meet the ends of justice the Petition Company is hereby dissolved in terms of Section 59(8) of the Insolvency& Bankruptcy Code, 2016 with effect from the date of the present order. The Liquidator is directed to communicate a copy of this order to the concerned, wherein the registered office of the company was situated. Such communication should be made within the stipulated period of fourteen days in terms of Section 59(9) of the Insolvency & Bankruptcy Code, 2016 from the date of receipt of certified copy of this order. Further, a copy of this order should also be communicated to the IBBI, New Delhi and other statutory authorities for the information at the earliest. The petition is accordingly allowed and stands disposed of.

SECTION 60

CASE NO. 23

Whether the constitution of Project-based Committee of Creditors and issuance of separate Expression of Interest for each project for conducting CIRP is allowed under IBC.

Bench	National Company Law Tribunal, Division Bench II, Chennai
Applicant/Resolution Professional	Mr. N. Kumar
Dissenting Financial Creditor	Tata Capital Housing Finance Ltd.
Corporate Debtor	M/s. Sheltrex Developers Private Limited
Particulars of the case	IA (I.B.C)/1245(CHE)/2020 In CP (IB)/889(CHE)/2019
Date of Order	25.04.2022
Relevant Section	Section 60 (5) of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	• An application was filed by the applicant under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 seeking following reliefs: ➢ Permit the Applicant to constitute Project-based Committee of Creditors, for the purpose of conducting reverse corporate insolvency resolution process, as mandated by the Hon'ble NCLAT in Flat Buyers Association vs. Umang Realtech Pvt. Ltd. ➢ Permit the Applicant to issue separate Expression of Interest for each project under control of the Corporate Debtor and to consequently invite and place before the respective Committee of Creditors,

	Resolution Plans for each project under control of the Corporate Debtor. ➢ Pass such other order as Hon'ble Tribunal may, in the facts and circumstances of the case, deem fit and thus render justice. • Applicant contended that the Corporate Debtor ("CD") is a real estate company whose only business is promoting real estate projects, particularly affordable housing. CD currently manages two projects & each of which had a separate set of creditors who are not related to one another. The Applicant cited NCLAT's decision in Flat Buyers Association v. Umang Realtech Pvt. Ltd., which allowed for a real estate company's project-based insolvency. • Applicant also relied as the judgements of Hon'ble NCLAT in Rajesh Goyal Vs. Babita Gupta & Bijay Pratap Singh Vs. Unimax International and stated that, if a CD has two projects, each project has to be treated as a separate entity under reverse insolvency resolution process mechanism and consequently creditors should be classified and allocated into each project, based on the contribution/ involvement in the said project. • Dissenting Financial Creditor submitted that the application is not maintainable as neither the IBC, 2016 nor the regulations stipulate project wise splitting of the company. • Dissenting Financial Creditor submitted that from reading of Regulation 38(2)(b) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, it is clear that the plan to be submitted by the Resolution applicant will be in respect of the entire business of the Corporate Debtor and not project wise.

Decision of the Tribunal	• Tribunal observed that on a thorough reading of the IBC, 2016 read along with the regulations made thereunder envisage the insolvency of the Corporate Debtor and it can be seen that there is no concept of limited CIRP or CIRP for specific projects anywhere. • NCLT further observed that the Supreme Court in the case of Pioneer Urban Land and Infrastructure Ltd. versus Union of India [WP(Civil) No. 43 of 2019], held that IBC is a beneficial legislation which can be trigged to put the whole corporate Debtor back on its feet in the interest of unsecured creditors like allottees, so that a replaced management may carry out the real estate project as originally envisaged and deliver the flat/ apartment as soon as possible or pay late fees for late delivery. • Tribunal observed that as no promoters in the case had put any funds to avoid CIRP, the process of project-wise CIRP cannot be followed in the case. • NCLT held that reliefs sought by the Applicant are well outside the purview of IBC, 2016, and the relevant regulations, and by reason that the view taken by Hon'ble NCLAT in the decisions as relied on by the Applicant does not apply in the present case. Application is not maintainable and is liable to bed is missed.

CASE NO.24

The assets found in the temple which is within the premises of the corporate debtor to be regarded as the assets of the corporate debtor and therefore to form part of the liquidation estate of the corporate debtor.

Bench	National Company Law Tribunal, Allahabad Bench
Corporate Debtor	M/s LML Limited
Liquidator / Applicant	M/s LML Limited (In Liquidation) Through Liquidator, Arun Gupta
Particulars of the case	IA No. 275/2020 IN CP (IB) No.55/ALD/2017
Date of Order	09.07.2021
Relevant Section	Section 60(5) of The Insolvency and Bankruptcy Code, 2016
Facts of the Case	An application has been filed under section 60(5)(c) of the IBC, 2016 on behalf of the liquidator for seeking direction for donating the temple assets of the Almighty Deity ("Temple Assets") situated within the premises of Corporate Debtor, which is under Liquidation. It was stated that the liquidator after taking control of the assets and liabilities of the corporate debtor, came to know that at in its premises a temple is situated having the collection of valuable objects including crowns (mukut), coins, bell, Pooja Utensils, Jewellery and other items and the same has not recorded as "Assets" in the Balance Sheet for the period ended on 23rd March,2018, thus it is contented that the temple assets belongs to the Almighty Deity and cannot be treated as a part of liquidation estate of the corporate debtor. It was further argued that the said temple remained unattended for long period of time and neither there was any deed of dedication or similar document nor any shebaits/ sarvakars/ managers

	was appointed to manage the temple assets. Accordingly, the liquidator has no right to alienate/ transfer/ sell the temple assets and distribute the proceeds to the stakeholders of the corporate debtor.
Decision of the Tribunal	The Tribunal observed that though the valuable objects found in temple are not recorded as "assets" in the balance sheet of the corporate debtor but as the temple is in the factory premises of the corporate debtor and there is nothing on record to show that the temple does not belong to corporate debtor or any interest has been created in favour of third party by the corporate party as there is no deed of dedication or any manager appointed to manage the assets of temple. The Tribunal held that in absence of any deed or the other documents, the assets found in the temple which is within the premises of the corporate debtor to be regarded as the assets of the corporate debtor and therefore to form part of the liquidation estate of the corporate debtor.

CASE NO. 25

The Corporate Debtor who suffers disqualification under Section 29A(e) cannot be granted a protection under section 240A of the IBC, 2016 which exempts applicability of only section 29A(c) and 29A(h) in terms of eligibility to be a resolution applicant as a medium level enterprise under MSME Development Act, 2006.

Bench	National Company Law Tribunal, Divisional Bench - I, Chennai
Corporate Debtor	M/s. Spring Field Shelters Pvt. Ltd.
Applicant	C. Raja John, promoter / suspended Director of the Corporate Debtor
Respondent	R. Raghavendran, RP of Corporate Debtor
Particulars of the case	IA/33/CHE/2021 and IA/500/CHE/2021 In CP/158/IB/2018

Date of Order	18.06.2021
Relevant Section	Section 60(5)(c) of The Insolvency and Bankruptcy Code, 2016 and Rule 11 of NCLT Rules, 2016
Facts of the Case	The Applicant, a promoter / suspended Director of the Corporate Debtor moved an Application IA/500/CHE/2021 under Rule 11 of NCLT Rules, 2016 seeking for early listing of IA/33/CHE/2021 which is an Application filed by the promoter / suspended Director of the Corporate Debtor, aggrieved against the rejection of the Resolution Plan by the Resolution Professional on 20.11.2020 and sought for a direction against the RP to consider the same. Since the IA/33/CHE/2021 was posted to 24.05.2021, the Applicant has moved the present IA/500/CHE/ 2021 seeking relief as follows; a. To fix the date of hearing before 24.05.2021 to take up the matter on priority basis and held the applicant to participate in EOI process. b. To issue necessary direction to Resolution Professional to consider the Applicant as an eligible "resolution applicant" and also issue necessary directions that until a decision is taken by the Hon'ble NCLT on the matter, the resolution process followed by the Respondent shall be kept in abeyance or stayed.
Decision of the Tribunal	The Hon'ble Tribunal held that: in so far as the prayer (a) is concerned, since the IA/500/CHE/2021 which was filed by the Applicant, came up for hearing before the Tribunal only on 17.06.2021 and the IA/33/CHE/2021 is posted for hearing on 02.07.2021, hence the prayer as sought has become infructuous. With respect to prayer (b), it is seen that the CIRP in relation to the Corporate Debtor was initiated by this Tribunal on 12.02.2020 and thereafter, the RP

	has conducted the Committee of Creditors (CoC) meeting periodically. Thereafter, the CoC has fixed the minimum eligibility criteria in relation to the submission of the Resolution Plan by the prospective Resolution Applicant and in pursuance of the same, the RP has issued Expression of Interest in Form- G, to which the Applicant has also submitted the Resolution Plan to the RP. The CoC had fixed the minimum eligibility criteria, from which it is evident that a prospective Resolution Application should have a net worth of 2 Crore. Since the Applicant did not meet the said criteria, his Expression of Interest and consequent submission of Resolution Plan was rejected by the CoC. Further, the DIN of Applicant is under "default" Directors list and hence is disqualified to act as a director under the Companies Act, 2013 and accordingly not eligible as per Section 29A(e). It was submitted by the Applicant that the Corporate Debtor is an MSME and as such they are not disqualified to submit a Resolution Plan. Further, the Applicant submitted that he has filed a case before Madras High Court for reactivation of DIN but did not place on record any document so as to purge himself from the said disqualification. A perusal of the MSME certificate showed that the CIRP in relation to the Corporate Debtor was initiated by the Tribunal on 12.02.2020 and after the initiation of the CIRP, the Applicant has obtained MSME Certificate from Government of India as the UDYAM Registration is seen mentioned as 19.12.2020. The Tribunal placed reliance on the decision of Hon'ble NCLAT in the matter of *Harkirat Singh Bedi – Vs – The Oriental Bank of Commerce & Anr. In Company Appeal (AT)(Ins) No.40 of 2020.*

	Further, section 240A of the IBC, 2016 exempts applicability of only section 29A(c) and 29A(h) in terms of eligibility to be a resolution applicant as a medium level enterprise under MSME Development Act, 2006. In the present case, the Applicant suffers disqualification under Section 29A(e) and unfortunately, such a protection is not being granted to the Applicant / Corporate Debtor, under Section 240A of IBC, 2016 who claims themselves to be an MSME. In any case, the Applicant suffers disqualification under Section 29A(e) of IBC, 2016. In view of the above reasons Adjudicating Authority was of the view that the Respondent was right in rejecting the Application of the Applicant for the Resolution Plan and as such the order dated 20.11.2020 is free from any legal infirmities and does not warrant any interference by the Adjudicating Authority. Therefore, IA/33/CHE/2021 and IA/500/CHE/2021 were dismissed.

Subsequently, the Applicant filed an appeal on the matter before NCLAT. NCLAT vide order dated 01st December, 2021 in Company Appeal (AT) (CH) (INS) No. 207 of 2021 allowed the appeal and set aside the order.

Please refer Page No. 160 of this Handbook.

SECTION 95

CASE NO. 26

Whether initiation of the Corporate Insolvency Resolution Process of the Corporate Debtor is a prerequisite for maintainability of an application under Section 95 of the IBC, 2016 filed for initiating IR Process of the Personal Guarantor of that Corporate Debtor before the National Company Law Tribunal?

Bench	National Company Law Tribunal, New Delhi Bench (Court-II)
Applicant/ Financial Creditor	PNB Housing Finance Ltd.
Corporate Debtor	Supertech Ltd.
Respondent (Personal Guarantor/Debtor)	Mr. Mohit Arora
Particulars of the case	(IB)-395(ND)2021
Date of Order	29.09.2021
Relevant Section	Section 95(1) of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	The Application was preferred by Financial Creditor under Section 95(1) read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for IRP for Personal Guarantors to Corporate Debtor) Rules, 2019 to initiate the Insolvency Resolution Process (the "IR Process") against the Personal Guarantor who is the Managing Director of Corporate Debtor. There was a Loan Agreement which was executed between the Applicant and the Corporate Debtor along with its other co-borrowers. Applicant stated that in order to secure the loan amount, an irrevocable Deed of Guarantee was executed by the Personal Guarantor in favour of the Financial Creditor where the Guarantor unconditionally and

	absolutely agreed to pay, without demur, all the amounts payable by the Corporate Debtor under the Loan Agreement. It was further stated by the Applicant that the Corporate Debtor committed breach of the Loan Agreement by making defaults in payments of the monthly installments due and payable to the Financial Creditor and due to the circumstances Financial Creditor was constrained to recall the Loan Facility and as a result, the account of the Corporate Debtor was declared as a "Non-Performing Asset "in the books of accounts of the Financial Creditor. Applicant also invoked the personal guarantee given by the Guarantor. Respondent opposed the prayer made by the Applicant on the ground of maintainability of the present Application. Respondent had submitted that if the CIRP/Liquidation proceedings against the Corporate Debtor had not commenced, which was the case in the present proceedings, the jurisdiction to entertain an application against the Personal Guarantor shall lie with the DRT, where the Personal Guarantor resides/ works for gain. Applicant argued that the Adjudicating Authority for individuals (Personal Guarantor) shall be, what has been provided under Section 60 of the Code [as amended vide the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018] [effective from 06.06.2018]. It is further argued by the Applicant that all the three sub-sections of Section 60 are independent of each other and come into effect in three different situations. Question that arose before the Tribunal in the case which required adjudication was – "Whether initiation of the Corporate Insolvency Resolution Process of the Corporate Debtor is a prerequisite

	for maintainability of an application under Section 95 of the IBC, 2016 filed for initiating IR Process of the Personal Guarantor of that Corporate Debtor before the National Company Law Tribunal?"
Decision of the Tribunal	Tribunal observed the following points – • From the plain reading of Section 179(1) of IBC, 2016, it is amply clear that the provision is subject to Section 60 of the IBC, 2016, which implies that whenever Section 60 is attracted, the provision of Section179(1) of IBC, 2016 shall not be applicable and the jurisdiction shall vest with NCLT. Contents of Section 60(1), 60(2) and 60(3) indicate three different situations/ circumstances regarding the jurisdiction of this Adjudicating Authority to entertain application for initiating IR process against the Personal Guarantor. Following analysis of Section 60(1), 60(2) and 60(3) makes it clear- ➢ Section 60(1) depicts a situation, where the Corporate Insolvency Resolution Process or Liquidation process has not been initiated. The same can be inferred from the words "in relation to" insolvency resolution and liquidation for corporate persons, which includes the Pre-CIRP Period. ➢ Section 60(2) depicts a situation, where the Corporate Insolvency Resolution Process or Liquidation process is already initiated and pending. The same can be inferred from the words "is pending". ➢ Section 60(3) deals with the provision of transfer of proceedings from DRT to NCLT in case the Corporate Insolvency

	Resolution Process and Liquidation are pending against the Corporate Debtor. • Various definitions like "guarantor", "Personal guarantor", "Corporate debtor" & "Corporate person" as provided under the Code were visited. Rule 3(f) of the Personal Guarantor Rules 2019, which defines the term 'Guarantor', nowhere stipulates that the Corporate Debtor shall be under Corporate Insolvency Resolution Process or Liquidation. Hence, the Personal Guarantor herein, is deemed to have been covered under the definition of the Guarantor as defined under Rule 3(f) of the Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors Rules, 2019. Tribunal held that – • While going through the Section 60(1), the Adjudicating Authority, in relation to the insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the NCLT having territorial jurisdiction over the place where the registered office of a corporate person is located. Hence there is a situation where various applications for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor are pending. Tribunal was of view that the moment the application in relation to Insolvency resolution of the Corporate Debtor is pending before the Adjudicating Authority, the provisions of Section 60(1) get attracted and the jurisdiction to entertain insolvency process against the personal guarantor would lie with the NCLT.

	NCLT concluded that in a situation where Application(s) in relation to the Corporate Debtor for initiation of CIRP is pending at National Company Law Tribunal (NCLT) then, initiation of CIRP of the Corporate Debtor is not a prerequisite for maintainability of an application under Section 95 of the IBC, 2016 filed for initiating IR Process against the Personal Guarantor of that Corporate Debtor before the NCLT.

CASE NO. 27

Whether an application for insolvency resolution against the personal guarantor is not maintainable unless that CIRP/liquidation is ongoing against the Corporate Debtor.

Bench	National Company Law Tribunal, Mumbai Bench - IV
Applicant/ Financial Creditor	Insta Capital Private Limited
Respondent	Ketan Vinod Kumar Shah (Personal Guarantor of the Corporate Debtor S.K. Products LLP)
Particulars of the case	CP (IB)/ 1365/MB-IV/2020
Date of Order	10.08.2021
Relevant Section	Section 95 of Insolvency and Bankruptcy Code, 2016 read with Rule 7(2) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019
Facts of the Case	This Petition had been filed by the Applicant (Financial Creditor), under Section 95 of the Code read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 against the Respondent/Personal Guarantor of the Corporate Debtor for initiating Insolvency Resolution Process. Corporate Debtor had applied for sanction of loan from the Financial Creditor vide application form dated 05.10.2018. The debt was due as on 12.04.2019, and the default occurred on 12.04.2019. Corporate Debtor, vide letter dated 10.10.2018, proposed disbursal against Bill of Exchange. The

	financial creditor had advanced a cheque dated 11.10.2018 and executed a demand Bill of Exchange dated 11.10.2018 along with the discount letter dated 11.10.2018, Post-dated cheques issued by Corporate Debtor to Financial Creditor which got dishonoured on presentation. The Financial Creditor issued loan recall notice to the guarantor and sent demand notice dated 03.02.2020 under Rule 7(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019. Question arises in the appeal was whether a Financial Creditor can initiate CIRP against the personal guarantor in the absence of any resolution process/liquidation process against the corporate debtor.
Decision of the Tribunal	Tribunal observed that it was settled law that the liability of principal borrower and guarantor is coextensive as enunciated u/s 128 of the Contract Act, 1872, and the Creditor may proceed against the principal borrower or the guarantor simultaneously, however, the judgement of Hon'ble NCLAT in the case of Dr. Vishnu Kumar Agarwal Vs. Piramal Enterprises Limited, it was laid down that there cannot be two CIRP proceedings, one against the borrower and one against the guarantor. Tribunal further observed the judgment of Hon'ble NCLAT in State Bank of India Vs. Athena Energy Ventures Private Limited, where NCLAT clarified that CIRP can be initiated against the principal borrower and the guarantor. Adjudicating Authority observed that upon conjoined reading of section 60 r/w section128 of the Contract Act, 1872, it was clear that the CIRP can be initiated against the Corporate Debtor as well as corporate guarantor.

	However, in the instant case, section 60(2) contains a non- obstante clause which specifies that only where a CIRP process or liquidation process of a Corporate Debtor is pending before NCLT, an application initiating Insolvency Resolution Process against the Personal Guarantor, of such Corporate Debtor shall be filed before such NCLT. Further, the Code also provides the definition of personal guarantor which includes the surety in a contract of guarantee to a Corporate Debtor which means that Financial Creditor can initiate proceedings of CIRP against the personal guarantor of Corporate Debtor. While Section 7 petition can be filed by the Financial Creditor against the Corporate Debtor and Corporate Guarantor, but under Section 95 of the Code can be filed by Financial Creditor only against personal guarantor of Corporate Debtor, which is already been undergoing CIRP or is in Liquidation. NCLT held that in view of the judgement of Hon'ble NCLAT in State Bank of India Vs. Atheena Energy Ventures Limited and the law as entailed in section 60(2), the bench is of the considered view that an application for insolvency for resolution against the personal guarantor is not maintainable unless that CIRP/liquidation is ongoing against the Corporate Debtor. It is further observed that filing of applications seeking resolution of personal guarantors without the Corporate Debtor undergoing CIRP, would tantamount to vesting of jurisdiction on two course one is NCLT and another is the Debts Recovery Tribunal. The petition was dismissed with no costs.

Subsequently, NCLAT vide its order dated 27.01.2022 in the matter of SBI Vs. Mahendra Kumar Jajodia has held on the same issue that CIRP against personal guarantor can be initiated u/s. 95(1) even if no CIRP or liquidation process is pending against CD.

The Hon'ble Supreme Court upheld the National Company Law Appellate Tribunal Judgement in CIVIL APPEAL No(s). 1871-1872 OF 2022 vide order dated 06 May 2022.

Please refer Page No. 151 of this Handbook.

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
FC	:	Financial Creditor
OC	:	Operational Creditor
AA	:	Adjudicating Authority

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