



ECONOMIC
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**A compilation of some recent judgements on critical issues
under the Insolvency and Bankruptcy Code (IBC) and Banking**

Contents

UPDATES – JUDGEMENTS UNDER IBC/BANKING	3
Enforcement of security under SARFAESI Act which is not used for agriculture purpose.	3
Whether the provisions of the IBC would prevail over the Customs Act, and if so, to what extent.	3
Provident Fund and Gratuity	3
Section 7 application based on a decree.	5
Dissenting financial creditors cannot question approval of resolution plan merely on account of the value of security charged to them being more than the amount being provided to them under the resolution plan.	5
Enforcement Directorate/ PMLA & CIRP	5
Conditions for Admission of Section 7 IBC Applications	7
Whether the disputes pertaining to accuracy of credit information under Credit Information Companies (Regulation) Act, 2005 are arbitrable and whether an arbitral tribunal be constituted, while an interim moratorium is in place under section 96(1)(b) of the Code.	7
Whether interim moratorium under section 96 of the Code for one of the guarantors would apply in respect of a co-guarantor.	8
Jurisdiction and Powers of NCLTs	8
Whether arbitration is permissible with regard to claims arising after October 15, 2018 i.e., cutoff date in view of order dated October 15, 2018 of the NCLAT.	8
Whether the transfer of assets within the group of companies would constitute fraudulent trading as per section 66 of the Code.	9
The CoC’s decision to liquidate the CD was challenged on the grounds of being arbitrary.	9
Whether the RP had the jurisdiction to review and revise an admitted claim	9
Whether Section 7 application can be filed based on default in payment of interest only.	9
Whether the approved resolution plan which provided 100% payments to the farmers as against 1% to the OCs, was discriminatory.	10
Definition of ‘creditor’ in the Code includes a decree holder.	10
Representation of Employees in SCC at liquidation stage when it has no subsisting claim against CD	10
Scrutiny of the alleged avoidance transactions executed by the CD beyond two years from the commencement of CIRP	11
Whether proceedings under section 19(2) and section 66 and 67 shall be deemed to have been stayed by virtue of interim moratorium under section 96(1)(b)	11
Lookback Period for Fraudulent Transactions	11

UPDATES – JUDGEMENTS UNDER IBC/BANKING

Enforcement of security under SARFAESI Act which is not used for agriculture purpose.

K. Sreedhar Vs. M/s. Raus Constructions Pvt. Ltd. & Ors.- Decided on January 05, 2023

- Merely because in the revenue records the secured properties are shown as agricultural land is not sufficient to attract Section 31(i) of the SARFAESI Act.
- In the aforesaid decision, it is specifically observed and held that for the purpose of attracting Section 31(i) of the SARFAESI Act, the properties in question ought to be actually used as agricultural lands at the time when the security interest was created.
- Only in a case where the secured property is actually put to use as agricultural land and solely on the basis of the revenue records / Pattadar and once the secured property is put as a security by way of mortgage etc. meaning thereby the same was not treated as agricultural land, such properties cannot be said to be exempted from the provisions of the SARFAESI Act under Section 31(i) of the SARFAESI Act.

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

Liquidator Of ABG Shipyard Vs. Central Board of Indirect Taxes And Customs Civil Appeal No. 7667 Of 2021

- Customs Act and the IBC act in their own spheres and in case of any conflict, the IBC overrides the Customs Act.
- Once a 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.

Provident Fund and Gratuity

Sunil Kumar Jain and others Vs. Sundaresh Bhatt and others

CIVIL APPEAL NO. 5910 of 2019 Date of Order: 19-04-2022

Wages and salaries of Workmen/employees who worked during CIRP, would be considered and included in CIRP costs/ Payment of Gratuity and Wages

- As per 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. Wages 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.
- Considering Section 36(4) of the IB code -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.

Jet Aircraft Maintenance Engineers Welfare Association Vs. Ashish Chhawchharia [CA (AT) (Ins) 752 of 2021]

Other follow-up NCLAT Judgements on the issue of Payment of Gratuity and Provident Fund

In the approved resolution plan, employees and workmen were proposed a fixed sum of INR 52 crore towards settlement of all claims including provident fund, gratuity, and pension fund.

- NCLAT inter-alia observed that explanation to section 18 clarifies that provident fund, gratuity and pension fund are assets on which employees have rights and cannot be considered as assets of CD.
- It further observed that it was CD's statutory duty to deposit provident fund and pay gratuity, and the amount towards statutory liability of the CD against provident fund and gratuity is to be paid by SRA.

Assam Tea Employees Provident Fund Organization Vs. Mr. Madhur Agarwal & Anr. [Company Appeal (AT)(Ins.) No. 262 of 2022]

The appeal was preferred by Assam Tea Employees Provident Fund Organization against the order of Adjudicating Authority (AA) approving the resolution plan which had proposed payment of only partial amount of INR 1.07 crore for the provident fund dues as against the total admitted claim of INR 2.10 crore.

- The NCLAT relied on its earlier decision in *Regional P.F. Commissioner v. Ashish Chhawchharia*, Resolution Professional for Jet Airways (India) Ltd. & Anr. and held that provident fund dues are not the assets of the CD and they have to be paid in full.
- Accordingly, it directed the SRA to make payment of balance amount of provident fund, to save the resolution plan from invalidity.

Some Critical Differentiation on the issue of payment of Provident Fund and Gratuity

S.No.	Judgement	Particulars	Relevant Paras of the judgement
1.	Sunil Kumar Jain vs. Sundresh Bhatt	The Hon'ble Supreme Court while considering the facts of the case has directed that provident fund, gratuity fund and pension fund shall be kept outside the liquidation process and the concerned workmen/employees shall have to be paid the <i>same out of provident fund, gratuity and pension fund, if any, available.</i>	24, 25 and 26
2.	Savan Godiwala the liquidator of Lanco Infratech Limited vs. Apalla Siva Kumar	The Hon'ble NCLAT after noticing the three member bench judgment in the case of <i>State Bank of India vs. Moser Bear</i> has observed that in a case where no fund is created by a company in violation of Statutory provisions of section 4 of the Payment of Gratuity Act 1972 -then in that situation - the liquidator also cannot be directed to make the payment of gratuity to the employees. This is due to the fact that the liquidator has no domain to deal with the properties of the CD which are not a part of the liquidation estate. However, this is an appeal pending before the Supreme Court with respect to this judgement.	
3.	Regional Provident Fund Commissioner, Employees Provident Fund Organisation vs. Vandana Garg	The NCLAT, following in the footsteps of <i>Savan Godiwala and State Bank of India vs. Moser Bear</i> , dismissed the appeal challenging the approved resolution plan which waived off a major chunk of the EPF.	27 to 34
4.	Mr. B. Parmeshwara Udpa vs. Asst. PF Commissioner, Employees Provident Fund Organisation	The NCLAT, following in the footsteps of <i>Savan Godiwala</i> , allowed that since the CD has not created any specific fund for the purpose of PF - the direction to the RP to make adequate provision towards the demand of PF is not correct	

Section 7 application based on a decree.

Kotak Mahindra Bank Limited Vs. A. Balakrishnan & Anr Civil Appeal No. 689 Of 2021 Date of Order: 30-05-2022

- Under 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”. The holder of the Recovery Certificate would be a financial creditor within the meaning of clause (7) of Section 5 of the IBC. Also, the holder of such a certificate would be entitled to initiate CIRP, if initiated within a period of three years from the date of issuance of the Recovery Certificate.

Dissenting financial creditors cannot question approval of resolution plan merely on account of the value of security charged to them being more than the amount being provided to them under the resolution plan.

India Resurgence ARC Private Limited Vs. M/s. Amit Metaliks Limited & Anr. CIVIL APPEAL NO. 1700 OF 2021 Date of Order: 13-05-2021

- 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.
- A valid security interest is held by a dissenting financial creditor and the entitlement of such a 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.

Some Other Judgments on Supremacy of commercial wisdom of CoC

S.No.	Judgement
1.	India Resurgence ARC Private Limited versus Amit Metaliks Limited and Anr. [2021 SCC Online SC 409] , while analyzing the supremacy and commercial wisdom of the of the CoC has emphasized on the power of CoC to decide that inter se distribution amongst secured creditors has been upheld [Refer Paras 7, 8,12,13,14,15,16 and 17 of the Judgement]
2.	Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta [(2020) 8 SCC 531] has further upheld that based on the the commercial wisdom of the Committee of Creditors , they are free to determine what amounts are to be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder [Refer Para 73 and 128 of the judgement].
3.	NCLT- Mumbai- Beacon Trusteeship Limited vs. Jayesh Sanghrajka and Anr: The India Resurgence judgement has further been referred to and quoted in the recent order of the NCLT, Mumbai in the case of Beacon Trusteeship Limited vs. Jayesh Sanghrajka and Anr. [I.A. No. 503 of 2022 in CP (IB) No. 1390 of 2020] [Refer Para 2 Pg 57 of the order].

Enforcement Directorate/ PMLA & CIRP

Ashok Kumar Sarawagi Vs. Enforcement Directorate & Anr. [Special Leave Petition (Civil) Diary No(s). 30092/2022]

CIRP was admitted against the CD in November, 2019 and thereafter the Enforcement Directorate (ED), on December 30, 2021 issued an order of provisional attachment of the immovable and movable properties of the CD under the Prevention of Money Laundering Act, 2002 (PMLA).

- Pending challenge against the order of the ED, the SC directed that the CIRP of CD to be conducted on ‘as is where is’ and ‘whatever there is’ basis.

- It also cautioned that the resolution plan shall not be approved by the AA without the express permission of the SC.

Welspun Steel Resources Pvt Ltd Vs Union of India Gujarat High Court

If PMLA authorities are given a free hand to pass orders of attachment of properties which were acquired by a successful bidder in a liquidation process, this could be contrary to the interest of value maximization of the corporate debtor's assets by substantially reducing the chances of finding a willing resolution applicant/bidder in liquidation. On this,

- High Court held that if the authorities were given a free hand to pass orders of attachment of properties which were acquired by a successful bidder in a liquidation process, on a presumption that such acquisition was as a result of a criminal activity, it could be contrary to the interest of value maximization of the corporate debtor's assets by substantially reducing the chances of finding a willing resolution applicant or a bidder in liquidation.
- Only such a property which is derived or obtained directly or indirectly as a result of a criminal activity can be regarded as proceeds of crime.
- The Hon'ble Court also held that sine qua non to arrive at a determination that the assets are proceeds of crime, the foremost requirement is that the author has to have 'reason to believe' on the basis of material in his possession.
- 'Reason to believe' cannot arise from mere suspicion, gossip or rumour.
- Merely because the impugned order records alleged fraudulent transactions and diversion of funds, it cannot automatically lead to a conclusion that the properties acquired by the petitioners are proceeds of crime. In order to arrive at a conclusion that 'reason to believe' exists, there must be some material to suggest such formation of opinion.

Rajiv Chakraborty, Resolution Professional of EIEL Vs. Directorate of Enforcement [W.P.(C) 9531/2020 and other applications]

During CIRP, the Enforcement Directorate (ED) passed provisional attachment orders against the CD. Aggrieved by the orders, RP filed an application seeking directions to restrain the ED from proceeding from taking any further action during the pendency of the CIRP.

The HC held that :

- the attached property under the PMLA comes to vest in the Union Government only upon the passing of an order by a special court under the provisions of the PMLA and therefore, the provisional attachment of properties does not violate section 14 of the Code.
- assets, which may have been obtained by the commission of a scheduled offence cannot be accorded exemption or immunity from the rigours of the PMLA which is not subservient to the moratorium provision comprised in the Code.
- The PMLA seeks to subserve a larger public policy imperative and is an enactment representing "a larger public interest, namely the fight against crime and the debilitating impact that such activities ultimately have on the society and the economy of nations as a whole". It also relied upon following observation in the 2020 Report of the Insolvency Law Committee, in Para 8.11: "...the moratorium provision is not liable to be interpreted as barring all possible actions "especially where countervailing public policy concerns are involved". It also took note of laws prevailing in different jurisdictions which permit regulatory actions which though not aimed at collecting moneys for the estate protect other vital and urgent public interests".

Other NCLT Judgements on the issue

M/s Packwell (India) Ltd. Vs. M/s Emgee Cables and Communication Ltd. [IA No. 15/JPR/2022 in CP No. (IB)-601/ND/2018]

The liquidator filed an application before AA, seeking directions to carry out the auction of properties of the CD which were attached by the order of Deputy Director, Directorate of Enforcement.

The AA directed to lift the order of attachment of the properties of the CD under the PMLA.

The AA observed that “...the IBC creates a specific bar with respect to proceedings that may be initiated under the PMLA by virtue of the provisions contained in Section 32A.

Moreover, Section 32A cannot possibly be read as being applicable prior to a Resolution Plan being approved or a liquidation measure being enforced. Further, it can therefore be construed that the objective and intention of the Code is providing a free hand to the creditors if the properties of the Corporate Debtor are attached then it will jeopardize the Liquidation Process”.

Mr Satyendra P Khorania Liquidator of M S Emgee Cables and Communications Ltd Vs Deputy Director Jaipur Zonal Office Directorate of Enforcement- NCLT Jaipur Bench

PMLA would cease to have the power to attach the property at this juncture when the order of the Liquidation under IBC has already been passed.

IBC creates a specific bar with respect to proceedings that may be initiated under the PMLA by virtue of the provisions contained in Section 32A. Moreover, Section 32A cannot possibly be read as being applicable prior to a Resolution Plan being approved or a liquidation measure being enforced. Further, it can therefore be construed that the objective and intention of the Code is providing a free hand to the creditors - if the properties of the Corporate Debtor are attached then it will jeopardize the Liquidation Process.

Conditions for Admission of Section 7 IBC Applications

Vidarbha Industries Power Limited (Appellant) Vs. Axis Bank Limited (Respondent) Civil Appeal No. 4633 Of 2021

- 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” implies 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, it is 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 Financial Creditors and Section 9(5)(a) is applicable to 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.

Whether the disputes pertaining to accuracy of credit information under Credit Information Companies (Regulation) Act, 2005 are arbitrable and whether an arbitral tribunal be constituted, while an interim moratorium is in place under section 96(1)(b) of the Code.

Kirankumar Moolchand Jain Vs. TransUnion CIBIL Ltd. & Ors. [Arb. O.P. (Com. Div) No. 86 of 2022]

- When a dispute arises between a borrower/client and the credit information company/credit institution with respect to accuracy or completeness of the credit information collected, processed or collated, the same qualifies a dispute relating to the business of credit information and such dispute may be referred for arbitration.
- As regards arbitration during interim moratorium under section 96 of the Code, it observed that section 96(1)(b) of the Code mentions that interim moratorium applies ‘in respect of any debt’ and not for ‘recovery of a debt’.
- The expression used in Section 96(1) (b) is “in respect of any debt” and not for recovery of a debt. Although on a purely textual reading, the embargo on fresh proceedings will apply only to creditors of the debtor and not to a guarantor. When interpreted in context, the ***interim moratorium applies not only to proceedings for recovery of a debt but to proceedings in which the liability of the borrower and guarantor are determined in relation to the credit facility.***

Whether interim moratorium under section 96 of the Code for one of the guarantors would apply in respect of a co-guarantor.

Axis Trustee Services Ltd. Vs. Brij Bhushan Singal & Anr. [CS (Comm) 8/2021 and other applications]

- The HC held that the effect of the interim moratorium is only in respect of the debts of a particular debtor and by no stretch of the imagination can it be said to include other independent guarantors in respect of the same debt of a CD.
- Further, merely because an interim moratorium under section 96 is operable in respect of one of the co-guarantors, the same would not ipso facto apply to other co-guarantors.

Jurisdiction and Powers of NCLTs

Alliance Broadband Services Pvt. Ltd. Vs. Manthan Broadband Services Pvt. Ltd. [IA No. GA/3/2022 in CS/54/2019]

- NCLT and NCLAT are constituted under sections 408 and 410 of the Companies Act, 2013 but without specifically defining the power and functions. While there is no provision in the Companies Act, 2013 exclusively dealing with the jurisdiction and powers of NCLT, section 60 of the Code gives an indication about the powers and jurisdiction of the AA.
- Section 60(4) states that the AA will have the powers of debt recovery tribunal (DRT) as contemplated under part III of the Code for the purpose of sub-section (2).
- The HC observed that as per section 60(5) of the Code, the petitioner can approach the AA instead of the HC.
- It held that the object of section 60(2) of the Code is to group together, (a) CIRP or liquidation proceedings of a CD, and (b) insolvency resolution/ liquidation/ bankruptcy proceedings of the corporate guarantor or personal guarantor of the same CD before a single forum.
- This is to ensure that the CRIP of the CD and the insolvency resolution of the individual guarantors of the very same CD do not proceed on different tracks, before different forums, leading to conflict of interest, situations, or decisions.
- The HC held that section 238 of the Code has an overriding effect on any other law for the time being in force.
- Section 430 of the Companies Act, 2013 itself provides an additional bar that no injunction shall be granted by any civil court in respect of any action taken or to be taken in pursuance of any power conferred on the NCLT by the Companies Act, 2013.
- It observed that the matter in issue in the suit can be more appropriately and effectively decided and adjudicated by the AA.

Whether arbitration is permissible with regard to claims arising after October 15, 2018 i.e., cutoff date in view of order dated October 15, 2018 of the NCLAT.

DLF Ltd. Vs. IL&FS Engineering and Construction Company [2022/ DHC/005697]

- It noted that during the resolution process of a company, its creditor is obligated to necessarily lodge claims before the RP, as a successful resolution applicant (SRA) cannot suddenly be faced with undecided claims after the resolution plan submitted by him has been accepted.
- This would amount to a 'hydra head popping up' which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully takes over the business of the CD.
- The effect of the order of the NCLAT is primarily akin to moratorium under section 14. The intent of the order of the NCLAT was to protect the assets of IL&FS and its group companies in order to make the resolution process effective and purposeful.

Whether the transfer of assets within the group of companies would constitute fraudulent trading as per section 66 of the Code.

Mrs. Renuka Devi Rangaswamy Vs. M/s Regen Powertech Private limited and Ors. [Comp. (AT) (CH) (Ins) No. 357 / 2022 & IA/814/2022] - NCLAT

Held:

- it must be borne in mind that whenever a fraud on a CD is committed, in the course of business, it does not necessarily mean that the business is being carried on with an intent to defraud the creditors.
- A higher degree of proof is required in regard to a fraudulent intent.
- it is the duty of the appellant to satisfy the NCLAT that an individual is carrying business with CD with dishonest intent.
- **the transfer of assets among the group companies ex-facie was not fraudulent.**

The CoC's decision to liquidate the CD was challenged on the grounds of being arbitrary.

Sreedhar Tripathy Vs. Gujarat State Financial Corporation & Ors. [Company Appeal (AT) (Insolvency) No. 1062 of 2022]

The NCLAT observed that:

- the CD has not been functioning for the last 19 years and all machinery had become scrap, even the building is in dilapidated condition and the CIRP would involve huge costs.
- In such a case, CoC is empowered to take a decision under the statutory scheme of the Code.
- The NCLAT upheld the decision of the AA for liquidation.

Whether the RP had the jurisdiction to review and revise an admitted claim

Punjab National bank Vs. Mr. Ashish Chhawchharia and Ors. [Company Appeal (AT) (Insolvency) No. 584 of 2021 & IA No. 2720 of 2021]

Post admission of claim of FC, RP reduced the claim on the ground that on invocation of the pledged shares, the FC had become the owner of the pledged shares. NCLAT held that:

- **the RP had incorrectly reduced the FC's admitted claim and directed the SRA to bear the liability of paying additional amount to FC from the amount reserved under resolution plan.**

Edelweiss Asset Reconstruction Company Ltd. Vs. Mohit Goyal, [Company Appeal (AT)(Ins) No. 583 of 2022]

The FC's application for its non-inclusion in the CoC by RP, was disposed of by AA as being infructuous as the RP had subsequently included the FC in CoC.

- FC was also provisionally admitted by the IRP, yet he chose to exclude the FC on the ground that there was a need to verify the provisional claims submitted by the FC.
- This conduct is unjustified in that the exclusion of Financial Creditor from the CoC or delayed inclusion of the Financial Creditor on the CoC is prejudicial to the best interests of the Corporate Debtor.
- Various crucial decisions were taken in the 1st CoC meeting such as confirmation of IRP as RP, appointment of professionals and raising of interim finance and the IRP/ RP was expected to take such decisions under the guidance and directions of a properly constituted CoC.

Whether Section 7 application can be filed based on default in payment of interest only.

Base Realcon Pvt. Ltd. Vs. Grand Realcon Pvt. Ltd. [Company Appeal (AT) (Ins.) No. 882 of 2022]

The AA dismissed the application of FC on the ground that only interest amount would not fall within the definition of 'financial debt', until and unless the principal amount has also become due and payable.

- NCLAT observed that there was no dispute that the amount of interest became due and payable and relying on the SC observation in *Innovative Industries Ltd. v. ICICI Bank and Orator Marketing Pvt. Ltd. v. Samtex Desinz Pvt. Ltd.*, it held that the application filed under section 7 of the Code could be maintained relating to the component of interest which became due and payable, without asking for the principal amount which has not yet become due and payable.

Whether the approved resolution plan which provided 100% payments to the farmers as against 1% to the OCs, was discriminatory.

Excel Engineering & Ors. Vs. Mr. Vivek Murlidhar Dabhade & Anr. [Company Appeals (AT) (Insolvency) No. 85-86 of 2020]

- There is no embargo for the classification of 'Operational Creditors' into separate/ different classes for deciding the way in which the money is to be distributed to them by the CoCs .
- It is the final discretion of the 'Collective Commercial Wisdom' in relation to (1) The amount to be paid (2) The quantum of money to be paid to a certain category or the incidental category of Creditors, balancing the interests of the 'Stakeholders' and the 'Operational Creditors', as the case may be.

Definition of 'creditor' in the Code includes a decree holder.

Darshan Gandhi Vs. USV Private Limited [Company Appeals (AT) (Ins.) No. 644 of 2019 & I.A. Nos. 2106, 2660, 4316, 2609 & 2614 of 2019]

- NCLAT held that as per section 5(10), the definition of 'creditor' in the Code includes a decree holder.
- If a section 7 application is filed for realization of the decretal amount, it cannot be dismissed on the ground that no steps were taken for filing execution case in a civil court.

Excel Engineering Vs. Mr. Vivek Murlidhar Dabhade Resolution Professional of New Phaltan Sugar Works Ltd. [Company Appeals (AT) (Insolvency) No. 85-86 of 2020]

An intervention application which was filed by OC during pendency of approval of the resolution plan was dismissed on the ground of locus standi. This was challenged on the plea that all the OCs collectively formed 32.78% of the total debt and, therefore they should be part of the meetings and decision making in the CoC.

- The NCLAT held that the OCs had filed their claims independently but there was no application filed forming the group or consortium of OCs.
- Further, placing reliance on the decision of the Hon'ble SC in *Kalpraj Dharamshi & Anr. v. Kotak Investment Advisors Ltd. & Anr.*, it observed that as the OCs were paid as per section 30(2)(b) and read together with regulation 38 of the CIRP Regulations, the OCs are entitled to receive only such money that are payable to them as per section 53 of the Code. OCs can attend meetings but cannot vote.

Representation of Employees in SCC at liquidation stage when it has no subsisting claim against CD

Varrsana Employee Welfare Association Vs. Anil Goel Liquidator [Company Appeal (AT)(Insolvency) No. 544 of 2021]

The appeal was preferred by Varrsana Employee Welfare Association on the ground that the liquidator had to include one of the representatives of the workmen/employees of the CD in the SCC irrespective of the fact that these employees have a subsisting 'claim' or not.

- The NCLAT held that regulations 31 and 31A of Liquidation Regulations have to be read together and interpreted in their truest sense keeping the objective of the Code.
- Read congruously, they specify that when the employees have no subsisting claim, they cannot be included in the list of stakeholders, thereby meaning that if the workers are not specifically included in the list of stakeholders, under regulation 31, they cannot be made a part of the SCC under regulation 31A(1).

- The NCLAT further held that claim of gratuity is payable only at a future date in the happening of any event like retirement, resignation, termination, death, etc., and therefore, it cannot be construed as a 'claim subsisting' to be included in the list of stakeholders and consequently seeking a place in the SCC.

Scrutiny of the alleged avoidance transactions executed by the CD beyond two years from the commencement of CIRP

Amardeep Singh Bhatia Vs. Abhishek Nagori & Ors. [Company Appeal (AT) (Insolvency) No. 671 of 2020 & I.A. No. 2116 of 2020]

Promoters of the CD challenged AA's order permitting the liquidator to scrutinize the alleged avoidance transactions executed by the CD beyond two years from the commencement of CIRP.

- The NCLAT held that AA has rightfully exercised its inherent powers under rule 11 of NCLT Rules, 2016 in the interest of justice by directing the promoters to provide the relevant information.
- Also, if liquidator was not in the possession of all the material documents, he could not determine whether they are undervalued transactions or preferential transactions, therefore, the CD could not deny the documents on the ground of look-back period.
- Further, it was observed that there is no provision in the Code for the appellant to invoke the clause concerning relevant period of two years solely on the ground of denying information directed to be given to the liquidator.

Whether proceedings under section 19(2) and section 66 and 67 shall be deemed to have been stayed by virtue of interim moratorium under section 96(1)(b)

Ashok Mahindru & Anr. Vs. Vivek Parti [Company Appeal (AT) (Insolvency) No. 1324 of 2022]

During CIRP, avoidance applications were filed by the IRP and RP under section 19, 66 and 67 of the Code against the suspended directors of CD. Thereafter, proceedings were also initiated under section 95 against the appellants as a personal guarantor of CD. Stay of proceeding under section 19(2) as well as under section 66 and 67 was sought in view of the interim moratorium in insolvency proceedings.

- interim moratorium shall be for such proceedings which relate to a liability or obligation due i.e., due on date when interim moratorium has been declared.
- Section 96(1)(b) cannot be read to mean that any future liability or obligation is contemplated to be stayed.
- **Thus, stay of proceedings under section 19(2) and section 66 and 67 is not contemplated under section 96(1)(b) and the scheme of Code in no matter provide for stay of such applications.**

Mr. Aroon Kumar Aggarwal Vs. M/s ABC Consultants Pvt. Ltd. [Company Appeal (AT) (Ins) No. 409 of 2020]

An ex-employee of the CD filed a section 9 application. The AA dismissed the application on the ground that since the service of the employee was terminated on the ground of fraudulent activities, forgery, etc., the amount claimed by him cannot be termed as an 'operational debt'. Further, since criminal proceedings against the employee were pending, there was a pre existing dispute.

- On appeal, the NCLAT held that the order of AA is illegal and allowed the appeal. It observed that section 8(2)(a) of the Code provides that the dispute must be in respect of the claimed amount and must not be referable to any other kind of dispute.

Lookback Period for Fraudulent Transactions

Mr. Thomas George Vs. K. Easwara Pillai & Ors. [Company Appeal (AT) (CH) (Insolvency) No. 293 of 2021]

Unlike other types of transactions provided under the Code, there is no specified look back period for fraudulent trading under section 66 of the Code. Hence, the RP is allowed to retrieve/ repossess without any limitation of time and correct all the wrong doings for any relevant point of time..

Whether the assignee could be permitted to continue section 7 proceedings under the Code.

Siti Networks Ltd. Vs. Assets Care and Reconstruction Enterprises Ltd. & Anr. [Comp. App. (AT) (Ins.) No. 1449 of 2022]

After CIRP, FC assigned the debt to another person and informed the CD.

- NCLAT held that there is no prohibition in the Code or the Regulations from continuing the proceeding by an assignee. Section 5(7) of the Code which defines ‘financial creditor’ includes a person to whom such debt has been legally assigned or transferred to.
- By virtue of assignment, an assignee becomes the FC and it has every right to continue the proceeding which was initiated by the original FC/assignor.

Modification of Resolution Plan by AA

Mathuraprasad C Pandey & Ors. Vs. Partiv Parikh, RP of M.V. Omni Projects (India) Ltd. & Anr. [Company Appeal (AT) (Ins) No. 201/2021 with 266/2021]

While approving the resolution plan, the AA modified the resolution plan to the extent that “if any member of Resolution applicants has entered into or stand as guarantor in the individual capacity, in that event, he shall not be covered with any immunity given under the Resolution Plan”.

- The NCLAT found that AA has exceeded its jurisdiction by modifying the resolution plan. It observed that if a resolution plan is submitted before the AA which is in compliance with section 31(1) as well as section 30, such resolution plan has to be approved by the AA. This is due to the fact that in section 31 word ‘shall’ has been incorporated with proviso that the AA must be satisfied that the resolution plan has provisions for its effective implementation.
- It is clear that mandate of legislation is either to approve the resolution plan or to reject it. However, there is no provision for making alteration or modification in the resolution plan.

Consideration of a new resolution plan from a third party after approval of another plan

Kalinga Allied Industries India Private Limited Vs. Committee of Creditors & Anr. [Company Appeal (AT) (Insolvency) No. 689 of 2021]

CoC approved a resolution plan but later on approached AA for direction to consider a new resolution plan of a third party who was not a part of the CIRP and sought to withdraw its approval after more than two years of the approval of the first resolution plan. The AA allowed.

- In appeal, the NCLAT observed that “... it is crystal clear that any modification or a withdrawal (by SRA or otherwise) after approval by the CoC and submission to the Adjudicating Authority, ‘irrespective of the content’ of the terms envisaged by the Resolution Plan, would only lead to further delay and defeat the very scope and objective of the Code”.
- ***The existing framework does not provide any scope for effecting any further modifications or withdrawals of the CoC approved Resolution Plan by the SRA or the Creditors.***
- The Adjudicating Authority can interfere only if the Plan is against the provisions of the Code.
- Once the Plan is submitted to the Adjudicating Authority, it is binding and irrevocable between the CoC and the SRA in terms of the provisions of the Code”.
- The ‘Maximisation of Value of Assets’ ought to be ‘within the specified time lines’ and if it is not a ‘timebound process’, the entire scope and objective of the Code would fail merely because there is another higher offer made by a third party. The CoC cannot consider another Plan of a third party who did not participate in the CIRP Proceedings.

Resolution plan providing differential treatment to OCs

Paramvir Singh Tiwana & Ors. Vs. Puma Realtors Pvt. Ltd. & Anr. [Company Appeal (AT) (Insolvency) No. 554 of 2021]

- Differential treatment to OCs is solely based on the commercial decision of the CoC and any differential treatment between the class of creditors, based on the nature of business involved, cannot be construed as 'material irregularity'.
- So long as the provisions of the Code and the regulations have been met, it is the Commercial Wisdom of the requisite majority of the CoC to negotiate and accept the Resolution Plan. This may involve differential payments to different classes of Creditor, together with negotiating with a Prospective Resolution Applicant for better or different terms which may also involve differences in amounts of distribution between the different classes of Creditors.
- NCLAT recommended that the IBBI and the Government may take effective steps to make necessary amendments to protect the class of 'FCs' /Homebuyers from imposition of any haircuts, and likewise take essential measures to safeguard the interest of OCs in the resolution plans.

Equitable set-off

Simplex Castings Limited Vs. Titagarh Wagons Limited [C.P (IB) No. 27/KB/2019]

AA noted that the CD had accepted that the OC has a claim against it, arising out of separate transactions thereby accepted the objection relying upon Supreme Court judgement in UOI v. Karam Chand Thapar & Bros. (Coal Sales) Ltd. & Ors., **wherein it was held that the nature of equitable set-off is not available when the cross-demands do not arise out of the same transaction.**

IBC has overriding effect on the Income Tax Act which has been specifically provided under Section 178(6) of the Income Tax Act as amended w.e.f. 01.11.2016 – ITAT Delhi

ACIT Vs. ABW Infrastructure Ltd.

ITAT held that in view of the CIRP, no proceedings can be initiated against the corporate debtor i.e., assessee company including the present proceedings before this Tribunal, or the income tax proceedings and recovery of demand or giving effect of any order.

It is well settled now that IBC has overriding affect on all the acts including Income Tax Act which has been specifically provided u/s 178(6) of the I.T. Act as amended w.e.f. 01.11.2016.

In view of moratorium declared by NCLT, all the proceedings in the Court of Law, Tribunal etc. cannot continue in view of the Amendment to Section 178(6) of the Act. Therefore, no useful purpose is going to be served in continuing the present proceedings.

We trust you will find this an interesting read. For any queries or comments on this update, please feel free to contact us at insights@elp-in.com or write to our authors:

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