ECONOMIC
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IMPORTANT JUDGMENTS UNDER SC & HC UNDER IBC

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Mere availability of an alternative remedy of appeal or revision would not oust the jurisdiction of the high court and render a writ petition not maintainable.

Availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law. Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of.

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The Supreme Court noted that NCLAT has reversed the decision while relying upon the decision of this Court in Consolidated Construction Consortium Limited vs Hitro Energy Solutions Private Limited, where it has been held that 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 leads to an operational debt. The NCLT in its original order had not considered the other defences that were raised by the applicant to the application under Section 9 of the IBC. Hence, on remand, all the rights and contentions of the parties on the merits of the case are kept open to be urged before and decided by the NCLT.

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Development rights created in favour of the Corporate Debtor constitute "property" within the meaning of the expression under Section 3(27) of the Code.

It may be noted from Sections 18 and 25 that the word "asset" and not the word "property" is what is used in these provisions, though the word "property" is defined in Section 3(27). But the said word "asset" used in Sections 18 and 25 is not defined in the IBC. The word "asset" is not defined, either in IBC. As per Section 3 (37) of the Code, words and expression used but not defined in this Code but defined in the Indian Contract Act, 1872, the Indian Partnership Act, 1932, The Security and Exchange Board of India Act, 1992, the Recovery of Debts due to Banks and Financial Institution Act, 1993, the Limited Liability Partnership Act, 2008 and the Companies Act, 2013 shall have the meanings respectively assigned to them in those acts. But asset has not been defined even in aforesaid Acts or in any of the seven enactments referred to in Section 3(37) of the Code. Since the expression "asset" in common parlance denotes "property of any kind", the bundle of rights that the Corporate Debtor has over the property in question would constitute "asset" within the meaning of Section 18(f) and Section 25(2)(a) of IBC. The Supreme Court held that a bundle of rights and interest in form of development rights have been created in favour of the Corporate Debtor. These bundles of rights have been created for a valid consideration. Development rights created in favour of the Corporate Debtor constitute "property" within the meaning of the expression under Section 3(27) of the Code. Since the expression "asset" in common parlance denotes "property of any kind", the bundle of rights that the Corporate Debtor has over the property in question would constitute "asset" within the meaning of Section 18 (f) and Section 25 (2)(a) of IBC.

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Declaration of ownership over Trademarks after approval of Resolution Plan by CoC, which is not a part of Resolution Plan amount to modification or alteration of approved Resolution Plan.

CoC approved the resolution plan with the provisions that the Corporate Debtor has a perpetual exclusive right to use the brands, namely, "Deccan Chronicle" and "Andhra Bhoomi" and it nowhere indicates regarding the right of ownership over the trademarks/brands. But the Adjudicating Authority while adjudicating application I.A. No.155 of 2018, apart from upholding the exclusive right to use the trademarks, "Deccan Chronicle" and "Andhra Bhoomi", made a further declaration that trademarks belong to Corporate Debtor/DCHL under its order dated 14th August, 2019, which, in our view, was a modification/alteration in the approved Resolution Plan which indisputably is impermissible in law and this what the NCLAT in para 32 of its impugned order has observed.

Ajay Kumar Radheyshyam Goenka Vs Trourism Finance Corporation of India Ltd - Criminal Appeal No. 172 of 2023

If Resolution Plan for Corporate Debtor is approved or the company gets dissolved, directors and the other accused cannot escape from their liability under Section 138 of Negotiable Instruments Act, 1881 already commenced and during the pendency.

Nature of proceedings under IBC and Negotiable Instruments Act, 1881 (NI Act) are different and would not intercede each other. The moratorium under Section 14 of the IBC does not apply to the proceedings initiated against signatories/directors under the NI Act. Extinguishment of debt under Section 31 or Sections 38 to 41 of the IBC would not ipso facto apply to the extinguishment of the criminal proceedings. The proceeding under the NI Act are not in the nature of debt recovery proceedings and rather are penal in character.

Relying upon the judgement in the case of *P. Mohanraj and Ors vs Shah Brothers Ispat Private Limited and Narinder Garg and Ors vs Kotak Mahindra Bank Limited and Ors* the Proceeding under NI Act had already commenced and cognizance upon the complaint was already taken and during the pendency of CIRP, the directors/signatories thus cannot escape from their penal liability by citing its dissolution. Passing of the resolution plan under Section 31 of the IBC and in light of Section 32A of the IBC, the criminal proceedings under Section 138 of the NI Act will stand terminated only in relation to the corporate debtor if the same is taken over by a new management.

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There is no bar contained in any of the provisions of the IBC restraining the complainant to approach the criminal court to seek penal action under Section 138 of the NI Act.The signatory/director cannot take the benefit of discharge obtained by the corporate debtor by operation of law under the IBC.

In view of Sections 138, 139 and 141 of the NI Act, it is also clear position of law that under provisions of Section 14 of IBC, the proceedings cannot continue against corporate debtor but can be initiated or continued against natural persons including persons mentioned under Sections 141(1) and 141(2) of the NI Act.

Abhishek Singh Vs Huhtamaki PPL Ltd & Anr.- Decided on 28th March, 2023

Application for withdrawal of the corporate insolvency resolution process under Section 12A of the Insolvency and Bankruptcy Code, 2016 can be allowed by the adjudicating authority even before the constitution of the committee of creditors.

Section 12A of the IBC permits withdrawal of applications admitted under Sections 7, 9 and 10 of the IBC with the approval of 90% voting share of CoC, only after the CoC has been constituted, it does not expressly bar entertaining the applications for withdrawal prior to the constitution of the CoC.

The IBBI Regulations are binding on the NCLT despite being sub-ordinate in nature to the IBC. Consequently, the NCLT erred in holding that Regulation 30A of the IBBI Regulations does not have a binding effect.

Following the decision in Swiss Ribbons (P) Ltd. v. Union of India, Regulation 30A of the IBBI Regulations was substituted to allow applications for withdrawal of CIRP to be entertained even before the constitution to CoC.

Regulation 30 of the IBBI Regulations is not in conflict with Section 12A of the IBC and the same only furthers the cause introduced in Section12A of the IBC.

The NCLT had inherent powers under Rule 11 of the NCLT Rules, 2016 to either allow or disallow an application for withdrawal of the CIRP even prior to the constitution of the CoC. Regulation 30A of IBBI Regulations provides a complete mechanism even for the purposes of dealing with the claim for expenses of the IRP. The other creditors of the Corporate Debtor have their independent rights against the Corporate Debtor which would not be adversely affected if the settlement between the Corporate Debtor and Operation Creditor is accepted in the present case and the proceedings are allowed to be withdrawn.

M/s Next Education India Pvt Ltd Vs M/s K12 Techno Services Pvt Ltd-Civil Appeal No. 1775 of 2021

Invoices for the period preceding three years from the date of the application under Section 9 of IBC ought to be considered rather than considering the starting point of limitation from the date of first invoice.

There were 187 different invoices for the period between 12.03.2011 and 30.06.2017. The amount under different invoices were unpaid, which gave rise to the appellant to initiate the proceedings under Section 9 of the IBC before the NCLT. The NCLT considering the starting point of limitation as 12.03.2011 held that the claim is barred by limitation. The Supreme Court held that NCLT did not take into consideration the subsequent invoices at least preceding three years from the date of filing of Section 9 application, which ought to have been considered.

M/s. South Indian Bank Ltd & Ors. Vs Naveen Mathew Philip & Anr. Etc.

High Court invoking Article 226 of the Constitution of India in Commercial Matters

Supreme Court observed that certain High Courts continue to interfere in such matters, leading to a regular supply of cases before this Court. One such High Court is that of Punjab & Haryana.

A writ of certiorari is to be issued over a decision when the Court finds that the process does not conform to the law or statute. In other words, courts are not expected to substitute themselves with the decision-making authority while finding fault with the process along with the reasons assigned. Such a writ is not expected to be issued to remedy all violations. When a Tribunal is constituted, it is expected to go into the issues of fact and law, including a statutory violation. A question as to whether such a violation would be over a mandatory prescription as against a discretionary one is primarily within the domain of the Tribunal.

A writ of mandamus is a prerogative writ. In the absence of any legal right, the Court cannot exercise the said power. More circumspection is required in a financial transaction, particularly when one of the parties would not come within the purview of Article 12 of the Constitution of India. The powers conferred under Article 226 of the Constitution of India are rather wide but are required to be exercised only in extraordinary circumstances in matters pertaining to proceedings and adjudicatory scheme qua a statute, more so in commercial matters involving a lender and a borrower, when the legislature has provided for a specific mechanism for appropriate redressal.

G. Vikram Kumar Vs State Bank of Hyderabad & Ors – Civil Appeal No. 31523153 of 2023 (@SLP (Civil) Nos. 59735974 of 2018)

In view of the availability of the alternative statutory remedy available by way of proceedings/appeal under Section 17 of the SARFAESI Act, the High Court ought not to have entertained the writ petition under Article 226 in which the e-auction notice was under challenge.

Hon'ble Supreme Court held that in view of the availability of the alternative statutory remedy available by way of proceedings/appeal under Section 17 of the SARFAESI Act, the High Court ought not to have entertained the writ petition under Article 226 of the Constitution of India in which the e-¬auction notice was under challenge. Therefore, the High Court has committed a very serious error in entertaining the writ petition under Article 226 of the Constitution of India challenging thee-¬auction notice issued by the Bank in exercise of power under Section 13(4) of the SARFAESI Act.

The aforesaid facts were pointed out before the High Court and despite the same the High Court has allowed the writ petition which is not sustainable at all. The Hon'ble Apex Court also held that even otherwise it is very debatable whether Section 13(8) of the SARFAESI Act shall be applicable in favour of a person who is only an agreement to sale holder or Section 13(8) of the SARFAESI Act shall be applicable only in case of the borrower who is ready and willing to pay the entire debt. In the present case the borrower failed to get any relief from the DRT. The borrower did not apply and/or invoke Section 13(8) and did not agree to clear the entire dues. Therefore, also the High Court has materially erred in allowing the writ petition.

M/s. Vistra ITCL (India) Ltd & Ors Vs Mr Dinkar Venkatsubramanian & Anr- Civil Appeal No. 3606 of 2020

Rights of a Secured Creditor who would not fall under the category of Financial Creditors or Operational Creditors as per the IBC

The Corporate Debtor had created a first ranking exclusive pledge in favour of Vistra ITCL (India) Ltd. over the equity shares held by it in the capital of JMT Auto Limited. Claim filed by Vistra ITCL (India) Ltd. on the basis of the pledged shares was rejected by RP.

The Supreme Court that the person is whose favour the security interest is created need not be the creditor who avails the credit facility, and can be a third person. Security interest can be created for credit facilities/loan advanced to another person. It is accepted and admitted that the Vistra has security interest in the pledged shares.

Intent of the amended Section 30(2) read with Section 31 of the Code recognises and protects the interests of other creditors who are outside the purview of the CoC. First is to treat the secured creditor as a financial creditor of the Corporate Debtor to the extent of the estimated value of the pledged share on the date of commencement of the CIRP. This would make it a member of the CoC and give it voting rights, equivalent to the estimated value of the pledged shares. However, this may require re-consideration of the dictum and ratio of Anuj Jain (supra) and Phoenix ARC (supra), which would entail reference to a larger bench. The second recourse available, would be almost equivalent in monetary terms for the Vistra, who is treated it as a secured creditor and is held entitled to all rights and obligations as applicable to a secured creditor under Section 52 and 53 of the Code. This to our mind would be a fair and just solution to the legal conundrum and issue highlighted before us.

Moser Baer Karamchari Union Through President Mahesh Chand Sharma Vs Union of India & Ors. Writ Petition (C) No.421 of 2019 and other writ petitions

Waterfall Mechanism in Insolvency & Bankruptcy Code, 2016 (IBC) vs. in Companies Act, 2013

In principle, it cannot be doubted that the cases of revival or winding up of the company on the ground of insolvency and inability to pay debts are different from cases where companies are wound up under Section 271 of the Companies Act 2013. The two situations are not identical. The reasons and grounds for winding up under Section 271 of the Companies Act, 2013 are vastly different from the reasons and grounds for the revival and rehabilitation scheme as envisaged under the Code. In view of the enactment of IBC and Section 53 of the IBC, it necessitated to amend the Act, 2013. As per Sub-Section (7) of Section 327, Sections 326 and 327 shall not be applicable in theevent of liquidation under the IBC.

The waterfall mechanism is based on a structured mathematical formula, and the hierarchy is created in terms of payment of debts in order of priority with several qualifications, striking down any one of the provisions or rearranging the hierarchy in the waterfall mechanism may lead to several trips and disrupt the working of the equilibrium as a whole and stasis, resulting in instability. Every change in the waterfall mechanism is bound to lead to cascading effects on the balance of rights and interests of the secured creditors, operational creditors and even the Central and State Governments. Sub-section (7) of Section 327 of the Act, 2013 provides that Sections 326 and 327 of the Act, 2013 shall not be applicable in the event of liquidation under the IBC, which has been necessitated in view of the enactment of IBC and it applies with respect to the liquidation of a company under the IBC, Section 327(7) of the Act, 2013 cannot be said to be arbitrary and/or violative of Article 21 of the Constitution of India. In case of the liquidation of a company under the IBC, the distribution of the assets shall have to be made as per Section 53 of the IBC subject to Section 36(4) of the IBC, in case of liquidation of company under IBC.

Paschimahal Vidhyut Vitran Nigam Ltd. Vs Raman Ispat Pvt Litd. & Ors – Civil Appeal No. 7976 of 2019

Treatment of the Government Dues under Section 53 of IBC/ Priority of Government Dues

The expression “government dues” is not defined in the IBC - it finds place only in the preamble. The repeated reference of lowering of priority of debts to the government, on account of statutory tax, or other dues payable to the Central Government or State Government, or amounts payable into the Consolidated Fund on account of either government, in the various reports which preceded the enactment of the IBC, as well as its Preamble, means that these dues are distinct and have to be treated as separate from those owed to secured creditors.

The specific mention of other class of creditors whose dues are statutory, such as dues payable to workmen or employees, “the provident fund, the pension fund, the gratuity fund” under Section 36(4), which excludes these enumerated amounts from the liquidation, especially clarifies that not all dues owed under statute are treated as ‘government’ dues. In other words, dues payable to statutory corporations which do not fall within the description “amounts due to the central or state government” such as for instance amounts payable to corporations created by statutes which have distinct juristic entity but whose dues do not constitute government dues payable or those payable into the respective Consolidated Funds stand on a different footing.

On the other hand, dues payable or requiring to be credited to the Treasury, such as tax, tariffs, etc. which broadly fall within the ambit of Article 265 of the Constitution are 'government dues' and therefore covered by Section 53(1)(f) of the IBC.

Rainbow Papers judgment did not notice the 'waterfall mechanism' under Section 53 – the provision had not been adverted to or extracted in the judgment. The dues payable to the government are placed much below those of secured creditors and even unsecured and operational creditors. This design was either not brought to the notice of the court in Rainbow Papers (supra) or was missed altogether. In any event, the judgment has not taken note of the provisions of the IBC which treat the dues payable to secured creditors at a higher footing than dues payable to Central or State Government.

Review Petition against Rainbow Papers judgment dismissed - Supreme Court of India- Review Petition (Civil) No. 1620 Of 2023 - Sanjay Kumar Agarwal Vs. State Tax Officer (1) & Anr.

Even a third party to the proceedings, if he considers himself to be an "aggrieved person, may take recourse to the remedy of review petition.

Any passing reference of the judgment, which is challenged under review petition, made by the Bench of the equal strength could not be a ground for review.

Subsequent decision or a judgment of a co-ordinate Bench or larger Bench by itself cannot be regarded as a ground for review.

The well-considered judgment sought to be reviewed does not fall within the scope and ambit of Review.

A co-ordinate Bench cannot comment upon the discretion exercised or judgment rendered by another co-ordinate Bench of the same strength.

A well-considered judgment sought to be reviewed does not fall within the scope and ambit of Review.

Supreme Court of India- Civil Appeal No 2568 – Decided on 18th August 2023 - Industrial Development Bank of India Vs. Superintendent of Central Excise and Customs and Others

Whether the claim of a secured creditor has precedence over the right of the customs authorities to recover the customs duty

We must hold that the decision of the division bench of the Calcutta High Court in Dytron (India) Ltd. (supra) does not lay down the correct law and is, accordingly, overruled. The decision in Dytron (India) Ltd. (supra) was referred to in Sundaresh Bhatt, Liquidator of ABG Shipyard (supra), wherein this Court observed that reliance of the National Company Law Appellate Tribunal on Dytron (India) Ltd. (supra) was not appropriate as such interpretation has been legislatively overruled by the inclusion of Section 142A in the Customs Act. We wish to clarify, as held above, that the decision in Dytron (India) Ltd. (supra) does not lay down the correct law, as even earlier, the position in law was that the debt 'due and payable', when it falls within the four corners of clause (a) to Section 530(1) of the Companies Act,

would be treated as preferential payment, but it would not override and be given preference over the payments of overriding preferential creditors covered under Section 529A of the Companies Act..

Concept Of Clean Slate - KRBL Ltd. Vs State of Gujarat- Civil Appeal No. 7976 Of 2019

Claim of GST was rejected for want of sufficient proof and during the liquidation, no claim was lodged by GST Department, Purchaser in liquidation process is entitled to a clean slate.

In light of the judicial pronouncement in Ghanashyam Mishra and Sons (2021) the debt therefore did not form a part of the resolution plan and therefore stood extinguished.

State tax dues and the State would be a claimant as an operational creditor.

In the facts of the present case having failed to assert its claim the State as an operational creditor/stakeholder/secured creditor would have to fall in line as per the “waterfall mechanism” under Section 53 of the IBC.

The decision of the Supreme Court in the case of Paschimanchal Vidhyut Vitran Nigam Limited would indicate that once having relinquished its interest under Section 52, the State cannot continue the insistence of maintaining the charge in the revenue records and its claim will have to stand in priority.

Even otherwise as per Section 100 of the Transfer of Property Act, a charge cannot be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of such charge. The Purchaser was entitled to a clean slate.

Delhi High Court- Indian Oil Corporation Ltd. Vs. Arcelor Mittal Nippon Steel India Ltd- ARB.P. 102/2022-Judgement Delivered on 10th October 2023

Approval of Resolution Plan results in an extinguishment of a claim which was admitted on notional value.

Whether the approval of the Resolution Plan would render the disputes which are sought to be referred for the consideration of an AT non-arbitrable?

The legislative intent and command of Sections 30 and 31 of the IBC is an issue which is no longer res integra. In Ghanashyam Mishra as well as the host of judgments rendered in that context and which were duly noticed by the Supreme Court in that decision, the underlying theme has been the recognition of the right of the successful Resolution Applicant to take over the corporate debtor on a "clean" or "fresh" slate. Those decisions lay primordial importance of the successful Resolution Applicant being enabled to take over the corporate debtor without being burdened by any uncertainties or a specter of irresolution. The approval of the Resolution Plan is statutorily recognised as conferring a closure upon all claims that persons or entities may have had against the corporate debtor. The claims or liabilities which could have been enforced against the corporate debtor are duly considered in the course of the CIRP with the Adjudicating Authority undertaking a detailed exercise with respect to identification of the various creditors of the corporate debtor, including the classes thereof, the scrutiny of claims received and the

ultimate apportionment of the amounts deposited by the successful Resolution Applicant amongst the creditors inter se.

The Supreme Court while alluding to the intent of the resolution process underlying the IBC had described this aspect as the "hydra headed monster". In fact, Ghanashyam Mishra significantly observes that all claims which are not part of the Resolution Plan shall stand extinguished and no person would be entitled to "initiate or continue" any proceedings in respect of the claim.

Once it is accepted that the approval of the Resolution Plan results in the extinguishment of all claims that the petitioner may have had, the dispute which is now sought to be canvassed cannot be permitted to be urged again before the AT. That would clearly amount to rewriting upon the clean slate based upon which the respondent took over the corporate debtor. A reference of the disputes as sought by the petitioner would clearly amount to a reopening of the Resolution Plan and which is clearly impermissible in light of the finality which was accorded by the decision of the Supreme Court in Committee of Creditors. Empowering the AT to adjudicate or rule upon these disputes would also be contrary to the principles which were enunciated by the Supreme Court in Ghanashyam Mishra. The Court thus comes to conclude that on due application of the "eye of the needle" test, it is manifest that the disputes which are spoken of in the Section 11 petition are non-arbitrable and thus no reference to the AT is warranted.

Supreme Court of India- Civil Appeal No. 5590 of 2021

RPS Infrastructure Ltd. Vs. Mukul Kumar & Anr.

Can a claim after the resolution plan by the CoC be admitted by the Resolution Professional.

The mere fact that the Adjudicating Authority has yet not approved the plan does not imply that the plan can go back and forth, thereby making the CIRP an endless process. This would result in the reopening of the whole issue, particularly as there may be other similar persons who may jump onto the bandwagon. As described above, in Essar Steel,8 the Court cautioned against allowing claims after the resolution plan has been accepted by the COC.

The IBC is a time bound process. There are, of course, certain circumstances in which the time can be increased.

Section 15 of the IBC and Regulation 6 of the IBBI Regulations mandate a public announcement of the CIRP through newspapers. This would constitute deemed knowledge on the appellant. In any case, their plea of not being aware of newspaper pronouncements is not one which should be available to a commercial party.

Tata Power Western Odisha Distribution Ltd. (TPWODL) & Anr. Vs. Jagannath Sponge Pvt. Ltd. Director – (Civil Appeal No. 5556/2023) – 11 September, 2023

The Successful Resolution Applicant cannot be insisted to pay the arrears payable by the Corporate Debtor for the grant of an electricity connection in her/his name.

In "Embassy Property Developments Private Limited vs. State of Karnataka and Others"3, this Court clarified that a decision by public authority etc. may fall within the jurisdiction of the tribunals constituted under the Code, where the issue relates to or arises out of the dues payable to an operational or financial creditor, by observing:

> *"37…It will be a different matter, if proceedings under statutes like Income Tax Act had attained finality, fastening a liability upon the corporate debtor, since, in such cases, the dues payable to the Government would come within the meaning of the expression "operational debt" under Section 5(21), making the Government an "operational creditor" in terms of Section 5(2). The moment the dues to the Government are crystallised and what remains is only payment, the claim of the Government will have to be adjudicated and paid only in a manner prescribed in the resolution plan as approved by the adjudicating authority, namely, the NCLT."*

The above-quoted observations from Embassy Property Developments Private Limited (supra) would confer jurisdiction on the tribunal constituted under the Code insofar as the appellant – Tata Power Western Odisha Distribution Limited is insisting on payment of the dues of the corporate debtor for restoration/grant of the electricity connection. The dues of the corporate debtor have to be paid in the manner prescribed in the resolution plan, as approved by the adjudicating authority. The resolution plan is approved when it is in accord with the provision of the Code. Thus, the issue of corporate debtor's dues falls within the fold of the phrase 'arising out of or in relation to insolvency resolution' under section 60(5)(c) of the Code. Therefore, we do not find any good ground and reason to interfere with the impugned judgment(s)/order(s) and hence, the present appeals are dismissed.

Delhi High Court- WP (C) 13188 of 2018- Tata Steel Ltd. Vs. Deputy Commissioner of Income Tax- Decided on 17th August 2023

We may note that in Ghanshyam Mishra's case, the Supreme Court was dealing with a bunch of cases, including a civil appeal preferred against the judgment of the Allahabad High Court dated 06.07.2020, which was dismissed on the ground that the petitioner could take recourse to an alternate remedy. The High Court had ruled that qua the issue involving the UP Value Added Tax, the writ petitioner/appellant could take recourse to a statutory second appeal for redressal of its grievances. The Supreme Court reversed the judgment of the Allahabad High Court on the ground that since the subject matter of the proceedings related to claims made by the VAT authorities before the approval of the plan, no purpose would be served in relegating the writ petitioner/appellant to an alternative remedy. The Court made a specific observation which, in our view, applies to the instant cases as well: "A party cannot be made to run from one forum to another forum in respect of the proceedings and the claims, which are not permissible in law."

Madras High Court- WP No 19728 of 2020 & 484 of 2021 and WMP No. 24375 of 2020 565 of 2021 - Smt. K.Malathi Vs. State Tax Officer and Ors- Decided on 30th October 2023

Sale Tax Department cannot invoke Section 88(3) of the CGST Act, 2017 against an Ex-Director of the Corporate Debtor without filing claim before Liquidation.

The right course available for the State Tax is to file appropriate claim before the Official Liquidator. In case there are no funds available with the company in liquidation, in which case, it is not possible to recover the sales tax dues from the Company in liquidation, in such circumstances, a new cause of action would arise to invoke Section 88(3) of the CGST Act and in which event, the Sale Tax Officer are at liberty to proceed against the Ex.Directors of the Company in liquidation in accordance with law.

The present action taken by the respondents in passing the impugned orders of demand in the name of M/s.SKMPL, which is in liquidation and serving on the petitioner, is not sustainable.

High Court of Himachal Pradesh- Lalan Kumar Singh v. The Hongkong and Shanghai Banking Corporation Ltd. and Ors.- LPA No. 92 of 2022- Decided on 1st December 2023

Clean Slate Principle also binds Equity Shareholders | After approval of Resolution Plan, Share Holder/ Director / Former Director of Corporate Debtor has no locus to continue LPA, particularly when no leave of NCLT had been obtained to pursue LPA.

Once approval of the Resolution Plan was granted by the NCLT and the Resolution Applicants have taken control of the Corporate Debtor, and the existing equity share capital of the Corporate Debtor stood written off in view of the Clean Slate Principle envisaged under the IBC, the said order is binding on the appellant as well. The appellant has no locus either as a Share Holder or as a Director or as a Former Director of the Corporate Debtor to continue this Letters Patent Appeal, particularly when no leave of the NCLT had been obtained to pursue this Letters patent Appeal.

High Court of Orissa- WP (C) 1553 of 2022- Adhunik Metaliks Ltd. Vs. State of Odisha and others

HC Quashed all demands being prior to the date of commencement of the resolution plan

We have no hesitation to say that the words “other stakeholders” would squarely cover the Central Government, any State Government or any local authorities. The legislature noticing that on account of obvious omission certain tax authorities were not abiding by the mandate of the I&B Code and continuing with the proceedings, has brought out the 2019 Amendment so as to cure the said mischief. We therefore hold that the 2019 Amendment is declaratory and clarificatory in nature and therefore retrospective in operation.

In this case, Petitioner has contended that as long as the demands raised against the Petitioner pertain to periods prior to the commencement of the insolvency proceedings, those demands can no longer be enforced against the Petitioner. High Court held that with all the demand being prior to the date of commencement of the resolution plan approved by the NCLAT, following the dictum in Ghanashyam Mishra & Sons Pvt. Ltd., the Court quashes all the demands, which have been challenged in these writ petitions.

High Court of Judicature For Rajasthan At Jodhpur- M/s EMC Ltd. Vs. State of Rajasthan- S.B. Civil Writ Petition No. 6048 of 2020

Law is well-settled that with the finalization of insolvency resolution plan and the approval thereof by the NCLT, all dues of creditors, Corporate, Statutory and others stand extinguished and no demand can be raised for the period prior to the specified date.

As per Sections 31 and 238 of the IBC, the approved Resolution Plan has been made binding on the Corporate Debtors, EMC Ltd., its employees, members, creditors, guarantors including the Central Government, any State Government or any local authority and other stakeholders involved in the Resolution Plan, to whom a debt in respect of payment of dues arising under any law for the time being in force, is owed. Section 238 of the IBC provides that the Code will prevail in case of inconsistency between two laws. This proposition of law has been crystallized by Hon'ble Supreme Court in the case of Committee of Creditors of Essar Steel India Ltd. Through Authorised Signatory Vs. Satish Kumar Gupta & Ors. [2019 (16) SCALE 319]. This court also examined similar controversy in the case of Ultra Tech Nathdwara Cement Ltd. (supra) and held that any demands made by the Statutory Creditor, i.e. Commercial Taxes Department, for the period prior to the effective date stand extinguished with the approval of the Resolution Plan by the NCLT. We have no doubt that the proceedings were required to be dropped by the authority in light of the reply.

Gujarat High Court- R/Special Civil Application No. 19387 of 2022- Welspun Steel Resources Pvt. Ltd. Vs. Union of India

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, 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 property which is derived or obtained directly or indirectly as a result of a criminal activity can be regarded as proceeds of crime.

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.

High Court at Calcutta- WPA No. 12683 of 2022- Rashidhan Sales Pvt. Ltd. and another Vs. Damodar Valley Corporation and others

Property sold in an auction sale on 'as is where is' basis in liquidation under IBC, Auction Purchaser is not liable to pay pre-CIRP outstanding dues of electricity connection before getting a new electricity connection.

The expression "as is where is" basis can only signify the exact position of the property as on the date of sale. In the event the licensee had a pending claim of its dues on the property, it might have been argued that the expression "as is where is" connotes the liabilities including the electricity dues as well.

However, it is well-settled that electricity dues do not pass with the property as a charge thereon.

The auction purchaser did not purchase the company or its goodwill as a whole. At the time of sale, the company was decimated, and its assets sold separately. Hence, in the strict connotation of the term, it cannot be said that the erstwhile company "continued" its existence. The auction purchaser, a different entity altogether, now seeks to re-start afresh the business of the borrower in its independent capacity. As per the settled law, within the contemplation of the IBC, the auction purchaser is entitled to commence with a 'clean slate'. The expression "as is where is" basis can only signify the exact position of the property as on the date of sale. The proceeding before the Tribunal falls within the scope of the IBC and only in respect of liabilities arising out of the CIRP. Even when the NCLT held that the claim did not arise out of the CIRP, the same issue was under consideration. The challenge before the NCLAT also revolves around the question as to whether the claims are related to the CIRP.

High Court of Bombay- Kamla Industrial Park Ltd. Vs. Municipal Corporation of Greater Mumbai- Decided on 21st September 2023

'Regularization Penalty' imposed by Local Authority/ Municipal Corporation covered under Section 31(1) of IBC and stand extinguished on approval of the Resolution Plan.

The approved resolution plan is compulsorily, the word used is 'shall', binding not only on the corporate debtor and its employees, members and creditors but, and this is important, also on the Central Government, any State Government or any Local Authority to whom a debt in respect of payment of dues arising under any law for the time being in force is owed as also guarantors and other stakeholders. (ii) The resolution plan had to provide for known dues to the Central or State Government or any local authority. These had to form part of the plan. But this also means that if the plan was approved without provision being made for any amounts due to the Central or State Government or local authorities, then that approved resolution plan without those approved debts would also be binding on those authorities, i.e., those would not be amounts recoverable. (iii) The resolution applicant starts on a clean slate.

Calcutta High Court- Candor Gurgaon Two Developers & Projects Pvt. Ltd. Vs. Srei Infrastructure Finance Ltd.- Decided on 20th December 2023

Whether attachment order passed prior to initiation of CIRP of Award Debtor shall remain unaffected to ensure the realization of the decretal dues or arbitral award?

Once Resolution Applicant submits resolution plan and it is approved by the committee of creditors, the Adjudicating Authority is to take the call and once such plan is accepted the moratorium under Section 14 of the Code ceased to operate. But that does not permit the proceeding including one in the execution to dance back to life. The provision as laid down under Section 31 of the Code of 2016 takes over.

The execution proceeding appears to be not maintainable for the simple reason that if by way of execution the claim is satisfied and thereby the quantum of money is realized and given to the Corporate Creditor (in this case the Award Holder) it would amount to preferential transaction, which is not permitted under Section 43 of the IBC, 2016.

The provision of Section 231 of the IBC, 2016 is eloquent about ouster of jurisdiction of Civil Code in respect of matter in which the Adjudicating Authority or the Board is empowered by or under the Code of 2016. The order of attachment in favour of the Award Holder, in view of Section 238 of the IBC, 2016 as a natural corollary shall be void.

High Court of Madras- WP No. 29614 of 2022 and WMP No. 28992 of 2022- Czarnikow Group Ltd. Vs. Commissioner of Customs (Preventive)-Decided on 26th June 2023

In the event no claim has been filed under IBC, the Creditor would have no recourse to the distribution of assets by Liquidator

The High Court held that (i) The right of any creditor whether a financial creditor, operational creditor, secured or unsecured creditor would arise only in the event, and upon condition, that a claim is made by that creditor. In the event no claim has been put forth that creditor would have no recourse to the distribution of assets by the Liquidator appointed.

(ii) The proceedings of the NCLT are stated to be uploaded promptly and advertisements are issued in publications with sufficient circulation to enable the creditors to be aware of pending proceedings.

(iii) Any person who claims to be a stakeholder, financial/ operational/ secured/ unsecured is liable to submit a claim as this is a precondition/ requisite for any benefit to be obtained by an entity claiming to be a creditor in the proceedings before the NCLT.

(iv) As a matter of prudence, the Departments must consider appointing a Nodal officer who would monitor the proceedings before the NCLT on a regular basis. This process does not appear very cumbersome as the proceedings are stated to be available online for periodical reference and timely action.

Madras High Court – WP No. 21174 of 2013 & M.P. Nos. 1 to 4 of 2013- Aircel Cellular Ltd. Vs. Union of India- Decided on 10th January 2023

Once the resolution plan stands approved by the NCLT, all claims stand frozen, and no claim, which is not a part of the resolution plan, survives.

The distinction between the case of Ruchi Soya Industries Limited (Supra)and the present matter is that in the former, the Union of India had not laid any claim before the Committee of Creditors, leading the Court to observe at para 11, as follows:
"11.Admittedly, the claim in respect of the demand which is the subject matter of the present proceedings was not lodged by Respondent 2 after public announcements were issued under Sections 13 and 15 IBC. As such, on the date on which the resolution plan was approved by the learned NCLT, all claims stood frozen, and no claim, which is not a part of the resolution plan, would survive."

Thus, once the resolution plan stands approved by the NCLT, all claims stand frozen, and no claim, which is not a part of the resolution plan, survives. In the present case, the claim of the respondents has not only been noted, but also has been accepted, in part.

Allahabad High Court- Narendra Singh Panwar Vs. Pashchimanchal Vidyut Vitran Nigam Ltd. and 2 Others

Approval of a resolution plan does not ipso facto absolve the surety/guarantor of his or her liability, which arises out of an independent contract of guarantee.

In view of the above discussions, it is clear that approval of a resolution plan does not ipso facto absolve the surety/guarantor of his or her liability, which arises out of an independent contract of guarantee. To what extent, the liability of a guarantor can be pressed into service would depend on the 22 terms of the guarantee/contract, itself.

For the above position of law, the main contention of the learned counsel for the petitioner to challenge the recovery on the ground that approval of the resolution plan in the insolvency proceeding in relation to the defaulter company namely M/s Trimurti Concast Pvt ltd (Corporate debtor) would ipso facto discharge both the Directors of the defaulter Company, one of whom is the petitioner before us, is liable to be turned down.

High Court of Kerala- WP (C) No. 7997 of 2023- Platino Classic Motors India Pvt. Ltd. Vs. Deputy Commissioner of Central Tax and Central Excise- Decided on 26th October 2023

Section 14 of IBC does not create a bar for finalisation of the assessment and adjudication proceedings in respect of the taxes.

From perusal of Section 14 of the IBC and several Judgments of the other High Courts as well as the Supreme Court, it is well settled that Section 14 of the IBC does not create a bar for finalisation of the assessment and adjudication proceedings in respect of the taxes. On the resolution once the reference has been admitted, there is moratorium for recovery of the tax dues but, there is no bar for finalisation of the assessment and adjudication proceedings.

Union Bank of India Vs. Financial Creditors of M/s. Amtek Auto Ltd. & Ors.

Supreme Court upholds the view taken by the Five Judges Bench of the NCLAT on the power to Review and Recall the judgment.

Power of NCLT To Recall Judgement

The Five Judges Bench of the has held that NCLAT is not vested with any power to review the judgment, however, in exercise of its inherent jurisdiction this Tribunal can entertain an application for recall of judgment on sufficient grounds. The judgment of this Tribunal in Agarwal Coal Corporation Pvt. Ltd. vs Sun Paper Mill Limited & Anr. and Rajendra Mulchand Varma & Ors vs K.L.J Resources Ltd & Anr. observing that this Tribunal cannot recall its judgment does not lay down the correct law.

It was held by the Supreme Court that "We are in agreement with the view taken by the Five Judges Bench of the NCLAT and thus find no reason to interfere with the impugned judgment."

Supreme Court of India- Civil Appeal No. 7906 of 2021- Eva Agro Feeds Pvt Ltd Vs Punjab National Bank and Anr.

Power of Liquidator to carry out multiple Auctions does not necessarily imply that he would abandon or cancel a valid Auction.

Mere expectation of the Liquidator that a still higher price may be obtained can be no good ground to cancel an otherwise valid auction and go for another round of auction. Such a cause of action would not only lead to incurring of avoidable expenses but also erode credibility of the auction process itself. That apart, post auction it is not open to the Liquidator to act on third party communication and cancel an auction, unless it is found that fraud or collusion had vitiated the auction. The necessary corollary that follows therefrom is that there can be no absolute or unfettered discretion on the part of the Liquidator to cancel an auction which is otherwise valid.

Supreme Court of India- Civil Appeal No. 2085 of 2022 Decided on 12th September 2023- Axis Bank Ltd. Vs. Naren Sheth & Anr.

Acknowledgement of debt – Benefit of Section 18 of Limitation Act can be accepted at Appellate Stage

Section 14 will have no application inasmuch as the proceedings under the SARFAESI Act before the DRT cannot be said to be before a Court or Tribunal having no jurisdiction.

A Secured Creditor would definitely have a right to invoke the power under the SARFAESI Act and the said proceedings cannot be said to be without jurisdiction. Therefore, no benefit under Section 14 of the Limitation Act would be admissible to the Secured Creditor.

The documents relating to acknowledgement claiming benefit of Section 18 could be accepted even at the appellate stage.

A settlement offer akin to an OTS proposal would be an acknowledgment of debt for the purpose of Section 18 of Limitation Act. A balance sheet acknowledging debt is also a document relevant for calculating the limitation.

Supreme Court of India- Civil Appeal No. 5985-6001/2023- Regen Powertech Pvt. Ltd. Vs. Giriraj Enterprises & Anr.

Resolution Professional Need to Maintain Neutral stance.

The Resolution Professional should have maintained a neutral stand. It is for the aggrieved parties, including the Committee of Creditors of Regen Powertech Private Limited and Regen Infrastructure and Services Private Limited, to take appropriate proceedings or file an appeal before this Court. If required and necessary, the Court can take assistance and ascertain the facts from the Resolution Professional, in case an appeal(s) is preferred by the Committee of Creditors or a third party.

Supreme Court of India- Civil Appeal No. 3806 Of 2023- Decided On 6th October 2023- Vishal Chelani & Ors. Vs. Debashis Nanda

No Distinction can be mad between the Home Buyer who Approached RERA & Other Home Buyers

It is only home buyers that can approach and seek remedies under RERA – no others. In such circumstances, to treat a particular segment of that class differently for the purposes of another enactment, on the ground that one or some of them had elected to take back the deposits together with such interest as ordered by the competent authority, would be highly inequitable. As held in Natwar Agarwal (HUF) (Supra) by the Mumbai Bench of National Company Law Tribunal the underlying claim of an aggrieved party is crystallized in the form of a Court order or decree. That does not alter or disturb the status of the concerned party - in the present case of allottees as financial creditors. Furthermore, Section 238 of the IBC contains a non obstante clause which gives overriding effect to its provisions. Consequently its provisions acquire primacy, and cannot be read as subordinate to the RERA Act. In any case, the distinction made by the R.P. is artificial; it amounts to “hyper classification” and falls afoul of Article 14. Such an interpretation cannot therefore, be countenanced.

Supreme Court of India- Civil Appeal No 4929/2023- IFCI Ltd. Vs. Sutanu Sinha & Ors.

CCDs with obligation on the third Party- Not a Financial Debt Under IBC

The Supreme Court noticed that the debenture subscription agreement clearly defines ICTL(Corporate Debtor) as the special purpose vehicle while IVRCL is the sponsor company and IFCI is the lender. The appellant was provided security under the Debentures Subscription Agreement but the obligations are of the sponsor company. A contract means as it reads. It is not advisable for a Court to supplement it or add to it. Our jurisdiction comes from Section 62 of the Code. The jurisdiction is restricted to a question of law akin to a second appeal. The law does not envisage unlimited tiers of scrutiny and every tier of scrutiny has its own parameters.

A reading of the impugned judgment, specifically the rationale from para 19 onwards shows that the issue has been correctly crystallized as to whether CCDs could be treated as a debt instead of an equity instrument. In that sense, it was observed that treating them as a debt would tantamount to breach of the concessional agreement and the common loan agreement. The investment was clearly in the nature of debentures which were compulsorily convertible into equity and nowhere is it stipulated that these CCDs would partake the character of financial debt on the happening of a particular event.

Supreme Court of India- Civil Appeal No 1733/2022- Haldiram Incorporation Pvt. Ltd. v. Amrit Hatcheries Pvt. Ltd. and Ors.

If sale under the SARFAESI Act is Completed before Declaration of Moratorium – The properties cannot be treated as Liquidation Estate

Sale certificate was issued on 19.08.2019 under the provisions of the SARFAESI Act, 2002. CIRP admitted and declared moratorium by NCLT on 20.08.2019.

These properties cannot be treated to be liquidation assets of the Corporate Debtor for the purpose of further steps to be taken in the liquidation proceeding.

Supreme Court of India- Civil Appeal No 8093/2023- Pankaj Majithia v. Honest Shelters Pvt. Ltd. and Ors.

CIRP under Insolvency & Bankruptcy Code, 2016 Started after issued sale certificate under SARFAESI Act, 2002- The rights of flat buyers cannot be affected by insolvency proceedings

Sale Certificate issued on 26.06.2019 under the SARFAESI Act, 2002 in terms whereof while giving the description of the immovable property have been specifically excluded. Reasons for this is that qua these flats the work is assigned to respondent No. 1 and there are flat buyers who made payment in respect thereof. The orders of Real Estate Regulatory Authority (RERA) dated 20.03.2023 and 19.07.2023 required to complete the project and handover possession to the flat owners. The obligations of the flat buyers would be governed by their agreements. It is perceived that the impugned order would amount to revisiting this issue by the NCLT. The Hon'ble Court held that since the process by the NCLT under the IBC commences on 06.11.2019 and the sale certificate was issued on 26.06.2019, the rights of respondent No. 1 and the flat buyers cannot be affected by this process. Thus the NCLT is not to examine these aspects which apparently troubles the parties.

Supreme Court of India - Dilip B. Jiwrajka Vs. Union of India & Ors.

Constitutional Validity of Provisions of IBC Relating to Personal Insolvency

- No judicial adjudication is involved at the stages envisaged in Sections 95 to Section 99 of the IBC.
- The resolution professional appointed under Section 97 serves a facilitative role of collating all the facts relevant to the examination of the application for the commencement of the insolvency resolution process which has been preferred under Section 94 or Section 95. The report to be submitted to the adjudicatory authority is recommendatory in nature on whether to accept or reject the application.
- The submission that a hearing should be conducted by the adjudicatory authority for the purpose of determining 'jurisdictional facts' at the stage when it appoints a resolution professional under Section 97(5) of the IBC is rejected. No such adjudicatory function is contemplated at that stage. To read in such a requirement at that stage would be to rewrite the statute which is impermissible in the exercise of judicial review.
- The resolution professional may exercise the powers vested under Section 99(4) of the IBC for the purpose of examining the application for insolvency resolution and to seek information on matters relevant to the application in order to facilitate the submission of the report recommending the acceptance or rejection of the application.
- There is no violation of natural justice under Section 95 to Section 100 of the IBC as the debtor is not deprived of an opportunity to participate in the process of the examination of the application by the resolution professional.

- No judicial determination takes place until the adjudicating authority decides under Section 100 whether to accept or reject the application. The report of the resolution professional is only recommendatory in nature and hence does not bind the adjudicatory authority when it exercises its jurisdiction under Section 100.
- The adjudicatory authority must observe the principles of natural justice when it exercises jurisdiction under Section 100 for the purpose of determining whether to accept or reject the application.
- The purpose of the interim moratorium under Section 96 is to protect the debtor from further legal proceedings.
- The provisions of Section 95 to Section 100 of the IBC are not unconstitutional as they do not violate Article 14 and Article 21 of the Constitution.

Jagdish Prasad Saboo Vs. IDBI Bank Ltd. – Gujarat High Court R/Special Civil Application No. 19261 of 2022- Decided on 27th March 2023

Interim Moratorium under Section 96 of IBC cannot be extended to the proceedings with respect to a borrower, who has been declared as a Wilful Defaulter

Intention of the moratorium, granted under Section 96 of the IBC cannot be extended to the proceedings with respect to a borrower, who has been declared as a Wilful Defaulter. The interim moratorium under Section 96 of the IBC can be referred only to the debt, as mentioned therein. The Apex Court in the case of P Mohanraj has not dealt with the aspect of Wilful Defaulter and has only confined its observations with regard to the proceedings under Section 138 of the N.I. Act and with regard to recovery proceedings of debt, as envisaged under Section 96 of the IBC. The proceedings of declaring the borrower, as per the master circular as a Wilful Defaulter, are in absolutely different realm than the recovery proceedings of debt and hence, the provision of Section 96 of the IBC cannot be extended to the petitioner, which has been declared as Wilful Defaulter.

Supreme Court of India – Civil Appeal No. 4422/2023- Hari Babu Thota- Decided on 29th November 2023

If MSME certificate is obtained prior to date of submission of Resolution Plan, ineligibility under Section 29A of IBC would not be incurred and benefit of Section 240A of IBC would be available to promoter of MSE Corporate Debtor

The objective of Sec. 29A of IBC is to cure the mischiefs of the persons who may be responsible for the financial situation of the company against trying to submit a plan and take over the company. (ii) It is the initiation of the CIRP proceedings which is the relevant date, cannot be said to reflect the correct legal view and thus, we are constrained to observe that the law laid down in Digambar Anand Rao Pigle (2021) case by the Tribunal is not the correct position in law and the cut off date will be the date of submission of resolution plan.

Supreme Court of India- Civil Appeal No 1527 of 2022- Ramkrishna Forgings Ltd. Vs. Ravindra Loonkar, RP of ACIL Ltd. & Anr.

Commercial wisdom is not required to be called into question or casually interfered with

The CoC is the decision-maker and in the driver's seat, so to say, of the Corporate Debtor.

If the CoC had undertaken repeated negotiations with the Resolution Applicant with regard to the Resolution Plan and thereafter, with a majority of votes, approved the final negotiated Resolution Plan, unless the same was failing the tests of the provisions of the Code, especially Sections 30 & 31, no interference was warranted. It is for the Financial Creditors who constitute the CoC to take a call, one way or the other. Stricto sensu, it is now well-settled that it is well within the CoC's domain as to how to deal with the entire debt of the Corporate Debtor.

The Adjudicating Authority has jurisdiction only under Section 31(2) of the Code, which gives power not to approve only when the Resolution Plan does not meet the requirement laid down under Section 31(1) of the Code, for which a reasoned order is required to be passed.

NCLT's jurisdiction and powers as the Adjudicating Authority under the Code, flow only from the Code and the Regulations thereunder.

Recording of reasons, and not just reasons but cogent reasons, for orders is a duty on Courts and Tribunals. There was no occasion before the Adjudicating Authority-NCLT to be swayed only on the per se ground that the hair-cut would be about 94.25%.

Gujarat High Court – R/Special Civil Application No. 3688 of 2022- Biotor Industries Ltd. (In Liquidation) Represented By Liquidator Mr. Sanjay Kumar Agarwal Vs. Gujarat Industrial Development Corporation

The residuary jurisdiction of NCLT under Section 60(5)(c) of the IBC provides a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings.

While in the case of Gujarat Urja (supra) and Tata Consultancy Services Limited (supra) the contract was central to the success of CIRP. Reading paras 84 to 91 of the judgment in Gujarat Urja (supra), what is evident is that the residuary jurisdiction of NCLT under Section 60(5)(c) of the IBC provides a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. Reading the relevant paragraphs in Tata Consultancy Services Limited (supra) as cited by the respondent, the NCLT can intervene when, it is even the case of the petitioner that there is an embargo under the IBC. In the application filed by the respondent which is pending before the NCLT, it is open for the C/SCA/3688/2022 CAV JUDGMENT DATED: 13/02/2023 petitioner to take all the contentions raised in this petition. The residuary jurisdiction of the Tribunal therefore to decide this issue had already been invoked by the respondent and the petition therefore, at the hands of the petitioner company which seeks the protective umbrella under the IBC itself can oppose the prayers made in that application.

DB Judgement of Delhi High Court - Tata Steel BSL Ltd. Vs. Venus Recruiter Private Ltd. & Ors- Neutral Citation Number: 2023/DHC/000257- Decided on 13th January 2023

RP will not be functus officio with respect to adjudication of avoidance applications. RP can continue to pursue such applications.

The High Court set aside the impugned order of single judge bench and held that:

- The timelines under CIRP Regulation 35A are directory and not mandatory in nature. The premise of 35A timelines not being mandatory itself, adherence to Regulation 35A timelines cannot be required so strictly as to render the provisions of avoidable transactions redundant. There is also no time limit prescribed for the NCLT to adjudicate these applications.
- The provisions pertaining to avoidable transactions is to primarily benefit creditors. In cases where the Resolution Plan is silent on the treatment of any pending applications because such information could not be made available to the applicant, the creditors of the corporate debtor can still be the beneficiaries of the sum or properties that may be recovered from adjudication of an avoidance application.
- The benefit arising out of the adjudication of avoidance applications is not for the corporate debtor in its new avatar since it does not continue as a debtor and has gone through the process of resolution. This is public money, and, therefore, the amount that is received if and when transactions are avoided and receive the imprimatur of adjudicating authority must be distributed amongst the committee of creditors in a manner determined by the adjudicating authority.
- The scheme of the Act suggests that proceedings for unearthing such transactions are ancillary proceedings and the resolution of the corporate debtor need not be stalled due to pendency of such proceedings.
- The phrase “arising out of” or “in relation to” as situated under Section 60(5)(c) of the IBC is of a wide import and it is only appropriate that such applications are heard and adjudicated by the Adjudicating Authority, i.e., the NCLT or the NCLAT, as the case maybe, notwithstanding that the CIRP has concluded and the resolution applicant has stepped into the shoes of the promoter of the erstwhile corporate debtor.
- It follows that the RP will not be functus officio with respect to adjudication of avoidance applications.

Calcutta High Court- WPO/374/2023 - Suresh Kumar Patni and Ors. Vs. Bank of Baroda and Anr.

A decision in a proceeding under Section 66 of IBC does not influence or affect in any manner an independent consideration of Wilful Defaulter identification.

Section 14, on the other hand, speaks about the corporate ‘debtor’. Thus the Sections respectively seek to protect each of the said entities. (ii) Mere protection of the debt or the corporate debtor cannot be equivalent to giving unnecessary and unwarranted protection to persons who are guilty of wilful default under the Master Circular of the RBI. (iii) A guarantor, who stands on co-extensive footing with the debtor, cannot be absolved from a wilful defaulter proceeding at the inception, merely by citing the pendency of a proceeding under Section 96 of the IBC. (iv) A decision in a proceeding under Section 66 of the IBC does not influence or affect in any manner an independent consideration of Wilful Defaulter identification within the purview of the Master Circular.

Jharkhand High Court – C.M.P. No 376 of 2023- Electrosteel Steel Ltd. (now M/s ESL Steel Ltd.) Vs. Ispat Carriers Pvt. Ltd.

Award by MSME Facilitation Council after approval of the Resolution Plan under Section 31 of IBC.

If the decree/arbitral award has been passed by court which has no jurisdiction to the extent that it can be held to be void-ab-initio/nullity/suffering from inherent lack of jurisdiction on the fact of the record, such objection can be raised and entertained under Section 47 of the Code of Civil Procedure.

Having not challenged the arbitral award under section 34 of the A&C Act, the law does not contemplate second opportunity to challenge the award particularly when the A&C Act is a self-contained code which prescribes the specific grounds and specific mode of challenge to an arbitral award. (iii) Award which suffers from inherent lack of jurisdiction in the eyes of law, cannot be said to be award and therefore would fall outside the provision of Arbitration and Conciliation Act, 1996 and can certainly be declared as a nullity in an appropriate proceeding including under section 47 of CPC at the stage of execution of the award. (iv) Irrespective of maintainability of the objection to arbitral award under section 47 of the CPC, on facts, the Facilitation Council did not lose its jurisdiction to proceed and pronounce the arbitral award on account of approval of the insolvency resolution plan of the petitioner under section 31 of the IBC. This is on account of the reason that the arbitral proceedings were initiated prior to insolvency resolution date, suspended during the moratorium period, resumed upon expiry of the moratorium period and the approved resolution plan did not determine the claim of the respondent as nil whose pending litigation before the west Bengal facilitation council was taken note of in the resolution plan.

High Court of Kerala- Crl MC No. 8157 of 2022-M/s PVS Memorial Hospital Vs. Dr. Satheesh Iype – Decided on 5th January 2023 -Moratorium under Section 14(1) of the Insolvency and Bankruptcy Code, 2016 and the Proceedings under Section 141 of the Negotiable Instruments Act, against Directors.

Effect and Limit of Moratorium under section 14 of IBC.

The High Court held that in view of the legal position settled by the Three Bench of the Apex Court in P. Mohanraj & Ors. Vs. M/S. Shah Brothers Ispat Pvt. Ltd. (2021), holding the view that, moratorium provision contained under Section 14 (1) of IBC would apply only to a corporate debtor and the natural persons mentioned in Section 141 continuing to be statutorily liable under Chapter XVII of the N.I.Act. Therefore, the complaint against the petitioners (accused Nos.1 to 7) cannot be quashed, simply on the ground of moratorium order. However, the prosecution against the 1st petitioner/1st accused being corporate debtor can be kept in abeyance till finalization of the moratorium proceedings, while allowing prosecution against petitioners 2 to 7, natural persons.

Punjab & Haryana High Court- CRM-M-16158 of 2023 (Neutral Citation No. 2023:PHH:047147)- Sachin Goyal and another Vs. M/s Rajasthan Trading Co. and another- Decided on 29th March 2023

During the pendency of the proceedings under the IBC, the criminal prosecution initiated under the Negotiable Instruments Act, 1881 against Directors of a Corporate Debtor can continue simultaneously or not.

The High Court held that what flows from the law laid down by a Three Judge Bench of the Hon'ble Supreme Court in Ajay Kumar Radheyshyam Goenka vs. Tourism Finance Corporation of India Ltd. (2023) is that whereas recovery proceedings barred under Section 14 of the IBC are primarily civil in nature, the proceedings under Section 138 of the NI Act are criminal in nature, and both have a different set of purpose. Furthermore, the complainant approaches the Criminal Court not only for recovery of the legally enforceable debt but also for taking penal action under Section 138 of the NI Act for the offence already committed by the accused by not making the payment of the cheque amount despite the receipt of the statutory notice. Therefore, by operation of the provisions of the IBC, the criminal prosecution initiated against the natural persons under Section 138 read with 141 of the NI Act would not stand terminated.

Madras High Court- Crl.O.P. No. 24506 of 2023 and Crl.M.P. No. 17044 of 2023 Ashok B.Jeswani and Anr. Vs. Redington India Ltd. – Decided on 7th December 2023

Moratorium given to an individual under Chapter III of IBC, 2016 will not cover the proceedings under Sec. 138/141 of Negotiable Instruments Act, 1881 initiated against Directors or Guarantors of any Company.

On considering the judgement rendered in Mohanraj case (cited supra), the Hon'ble Supreme Court in Ajay Kumar Radheyshyam Goenka -vs- Tourism Finance Corporation of India Ltd reported in [2023 (1)MadWN (cri) 145] has reiterated that, if the guarantors does not get the benefit of extinguishment of debt, the Signatory or Director cannot get any benefit. If the argument that the Signatories or Directors are not liable to be proceeded under Section 138/141 of NI Act, once the resolution plan is approved, it may lead to absurd situations.

The moratorium given to the corporate debtor under Chapter II will not cover the individuals, who are the Guarantors of Directors. Similarly, the moratorium given to an individual under Chapter III will not cover the proceedings initiated against them as Directors or Guarantors of any company, which is not a corporate debtor under this Code.

Bombay High Court- Interim Application (L) No 4988 of 2020 In Company Petition No 756 of 2014 Export Import Bank of India Vs. GOL Offshore Ltd.

Having chosen not to realize security, a secured creditor is not entitled to lay an exclusive claim over the proceeds realised from the sale of the assets of the company by the Official Liquidator under the control of the Company Court.

The High Court held that a secured creditor, who stands outside the winding up is expected to institute proceeding, other than that of winding up proceeding, to realise his security. It could be a proceeding under Recovery of Debts and Bankruptcy Act, 1993, or the measures under the SARFAESI Act, 2002, without the intervention of the Court, or for that matter, The Admiralty (jurisdiction and settlement of Maritime Claims) Act, 2017. In conclusion, the proviso to Sub Section (1) and Sub Section (2) of Section 529 of the Act, 1956, give an option to the secured creditor to "realise" the security and not a right to "appropriate" the sale proceeds of the security which have been realised by

the Official Liquidator, on the premise that he is a secured creditor. If a secured creditor exercises the option to realise the security, he has to enforce the same in a proceeding other than the one under the Companies Act, 1956 and bear the process, costs and expenses. Having chosen not to realize his security, in the manner ordained, a secured creditor is not entitled to lay an exclusive claim over the proceeds realised from the sale of the assets of the company by the Official Liquidator under the control of the Company Court.

High Court of Tripura- WP (C) (PIL) 04 of 2023- Smt. Sudipa Nath Vs. Union of India- Decided on 18th January 2023

Section 66(1) of IBC confers no jurisdiction but declaring any transaction as void, even if fraudulent, but confers jurisdiction on NCLT to fix the liabilities on the persons responsible for conducting business of corporate debtor which is fraudulent or wrongful transactions.

Hon'ble High Court held that in legislature wisdom and as apparent from the text of 66(1) it is clear that firstly it confers no jurisdiction but declaring any transaction as void, even if fraudulent, but confers jurisdiction on NCLT to fix the liabilities on the persons responsible for conducting business of corporate debtor which is fraudulent or wrongful. Secondly section 66(1) contemplates an application thereunder only by the resolution professional and by none other.

Thirdly section 66 (1) also restricts the power of NCLT subject to being satisfy with pre-requisite that any business of the corporate debtor has been carried on with intent to defraud creditors or the corporate debtors or for any fraudulent purpose and if satisfied it powers to pass an order is only against such person who are responsible for the conduct of such fraudulent business of the corporate debtor with mens rea to make them personally liable to make such contributions to the assets of the corporate debtor as it may deem fit.

Bombay High Court- Interim Application No 1161 of 2020 in First Appeal No 1539 of 2012- Rajendra Prasad Bansal- In the matter of Reliance Communication Limited Vs Rajendra P Bansal

The IBC does not confer any such statutory power upon the NCLT to sit in appeal over a judgment and decree of a Civil Court, nor decide an interim application arising out of such civil appeal.

IBC does not confer any such statutory power upon the NCLT to sit in appeal over a judgment and decree of a Civil Court, nor decide an interim application arising out of such civil appeal. This is a power that is solely vested in a civil court under Section 96 of CPC. Since the First Appeal arises out of a challenge against the Impugned Judgment passed by the Trial Court on the issue of termination of respondent's employment, it has nothing to do with the insolvency of the corporate debtor. The NCLT could never sit in appeal over the judgment/decree of a Civil Court. Further the Hon'ble Court held that as on the date of the commencement of CIRP, the monies deposited by appellant with the Trial Court did not constitute a part of the assets/property of the corporate debtor, allowing the withdrawal of the deposited sum does not contravene Section 14 of the IBC.

Bombay High Court- WP (L) No. 20484 of 2022- Punjab National Bank Vs. Assistant Commissioner of State Tax (D-815)

Mortgage of a Secured Asset registered with CERSAI will have priority over the claims/charge of Sales Tax Department arising out of the dues under the Maharashtra Value Added Tax Act, 2002 (MVAT)

Full Bench of this Court also considered whether the provisions of a statute, becomes a 'first charge' on the property, in view of the plain language of Article 327 of the Constitution, must be held to prevail over a Crown debt, which is an unsecured one. This Court held that the rights of such of the first charge holders accorded by several legislation enacted by the State, having regard to the language in Tikam page 48 of 60 WPL 21538 of 2022 aw WPL 20484 of 2022.doc which section 26E is couched, would rank subordinate to the right of the secured creditor as defined in Section 2(1) (zd) subject, of course, to compliance with the other provisions of the statute.

This Court held that Section 26E of the SARFAESI Act is a subsequent legislation, as it was notified on 24th January, 2020. Subject to compliance of the terms of Chapter IV-A, Section 26E of the SARFAESI Act would, thus, override any provision in the MGST Act and the BST Act in case of a conflict with the SARFAESI Act. This Court held that Section 26D which also refers with a non-obstante clause, prohibits a secured creditor from exercising the rights for enforcement of security interest conferred by Chapter III, unless the secured interest created in its favour by the borrower has been registered with the CERSAI.

It has further held that not only therefore registration with the CERSAI has been made a mandatory pre-condition for invocation of the provisions contained in Chapter III of the SARFAESI Act, the provisions relating to debts that are due to any secured creditor being payable to such creditor in priority over all other debs and revenue, taxes etc. is available to be invoked only after the registration of security interest.

Even if there is any inconsistency between the Securitization Act and the MVAT Act, in view of Article 254 of the Constitution of India, the provisions of the Securitization Act would prevail over the provisions of the MVAT Act which is a State enactment. The issue of similar clauses have been already construed by the Full Bench of this Court in case of Jalgaon Janta Sahakari Bank Ltd. & Anr. The Court held that the non-registration of the claim and/or attachment order by the Sales Tax Authority under Section 26B(4) of the SARFAESI Act, can only be at the peril of the department. Mere recording of the purported charge in the record of right of the secured asset, in the absence of the registration with CERSAI cannot be to the detriment of the auction purchaser, though the auction sale was on “as is where is and as is what is basis”.

High Court of Telengana- Writ Appeal No 414 of 2023- M/s. Anirudh Agro Farms Pvt. Ltd. Vs. The State of Telangana- Decided on 4rth April 2023.

No stamp duty would attract on sale of property through auction of a Corporate Debtor during liquidation process as per the provisions of IBC.

Liquidator issued a certificate of sale in favour of the Successful Purchaser under Section 35(1)(f) of IBC and handed over the auctioned property.

Sub-Registrar declined to do the needful on the ground that there is no practice of filing certificate of sale of this nature in his office and also on the ground that such filing would attract stamp duty at par with sale under Article 47-A of the Indian Stamp Act, 1899.

Division Bench of Hon’ble High Court of Telangana held that in Madhurambal (SC) special leave petition was filed before the Supreme Court. While dismissing the special leave petition, Supreme Court has held that law on this point is well settled that a sale certificate is not an instrument of the kind mentioned in clause (b) of Section 17 of the Registration Act; the authorized officer of the bank under the SARFAESI Act, 2002 should hand over the duly validated

sale certificate to the auction purchaser with a copy forwarded to the registering authority to be filed in book No.1 as per Section 89 of the Registration Act.

Supreme Court has further opined that once a direction is issued for the duly validated certificate to be issued to the auction purchaser with a copy forwarded to the registering authority to be filed in book No.1 as per Section 89 of the Registration Act, it has the same effect as registration and obviates the requirement of any further action. Supreme Court has observed that the authorities should stop filing unnecessary special leave petitions on this issue.

Delhi High Court- M/s Tata Iron & Steel Co. Ltd. Vs. M/s Jhalani Tools India Ltd.- Decided on 19th July 2023

First and Second Charge Holders cannot be treated equally.

Dena Bank's attempt to prioritize their claims above the claims of the workmen lacks a valid basis. They cannot contend that the Consortium's second charge should be merged with their first charge. Therefore, to maintain the integrity of the statutory framework and ensure equitable treatment of all creditors, it is crucial to distinguish between first and second charge holders when applying the pari passu principle under Sections 529 and 529A of the Act.

Accepting Dena Bank's interpretation of Sections 529 and 529A would effectively undermine the two crucial legislative provisions. Firstly, Section 48 of the Transfer of Property Act, 1882, which establishes a clear hierarchy of charges. Secondly, Section 529 of the Companies Act, 1956, which is a welfare provision enacted to acknowledge the contributions of workmen to the company in liquidation.

The priority between two sets of secured creditors has been elucidated in the judgment in ICICI Bank Ltd v. SIDCO Leathers Ltd & Ors. (2017) wherein the Supreme Court addressed the relationship between various types of secured creditors and determined their respective rights and priorities. The Court was tasked with examining inter alia the following key issues: a) Whether the rights of priority between different sets of secured creditors are diminished under Section 529A of the Act. b) Whether Section 48 of the TP Act is overridden by Section 529-A of the Act. After analysing the law on the subject, it was observed that the claim of first charge holder will prevail over the claim of the second charge holder. The Supreme Court has held that the absence of explicit provisions in Section 529 of the Act regarding priority rights over mortgaged assets does not exclude the application of Section 48 of the TP Act in cases of company liquidation.

The Court has reasoned that if inter se priority rights of secured creditors were disregarded, it would result in their exclusion from dividend distribution and unjustly treat them as unsecured creditors. This would also unjustly deprive the secured creditor of their rights over the security, which surely is not the legislature's intent. Furthermore, the Court held that while the Companies Act, 1956 is a specialized statute, nonetheless it does not specifically address the contractual and statutory rights between different types of secured creditors. Thus, the specific provisions outlined in a general statute like the TP Act should take precedence. This interpretation preserves the hierarchy of charges and protects the rights of various secured creditors as envisioned by both the Act and the TP Act.

In view of the aforenoted discussion and holding in ICICI Bank Ltd. (supra), it becomes evident that the first and second charge holders cannot be treated equally. Upholding the objection of the second charge holder would upset the priority of the first charge holder, which would go against the provisions of Section 48 of the TP Act. The OL position on this issue, as stated in paragraph 10 of its compliance report OLR No. 109/2019, is thus accepted.

Calcutta High Court- Abhijeet Projects Ltd.- APO/12/2023 with CP/572/2014, APO/14/2023 In IA No: ACO/1/2023 with APO/35/2023 IA No: ACO/2/2023- Decided on 16th August 2023

Transfer of winding up proceeding to NCLT - discretion is not always dependent upon any formal application being made.

In paragraph 23 of the A. Navinchandra Steels (supra) it has been clearly stated that only where a company in winding up is near corporate death that no transfer of the winding up proceeding would then take place to the NCLT to be tried as a proceeding under the IBC. Short of an irresistible conclusion that corporate death is inevitable, every effort should be made to resuscitate the corporate debtor in the larger public interest, which includes not only the workmen of the corporate debtor, but also its creditors and the goods it produces in the larger interest of the economy of the country.

The aforesaid judgments thus, clearly spell out that unless the court is convinced that the company is to suffer an inevitable corporate death the first choice would to be to make an all out attempt to revive the company and this procedure has been elaborately laid down in IBC. The Companies Act, 2013 is not suited for such situation. This is clearly reflected from the amended and substituted Section 434 of the Companies Act, 2013 read with Sections 7 and 8 of the IBC and the objects and reasons of both the statutes. There is no conflict between the two provisions.

In the light of the aforesaid discussion we are of the view that the Court has discretion to transfer the proceeding depending upon the stage of the proceeding. If it appears to the Company Court that the die is cast and the corporate death of the company is inevitable there is no requirement to transfer such proceeding. The said discretion is not always dependent upon any formal application being made but it is always desirable that the views of the petitioning creditor, secured creditors and the official liquidator are ascertained.

High Court of Himachal Pradesh- CWP No. 3569 of 2021- Groupe SEB India Pvt. Ltd. and Another Vs. State of Himachal Pradesh and others-Decided on 3rd August 2023

Change of name of a company would not amount to transfer of assets.

Mere acquiring of equity share capital of 'Company does not amount to transfer,assignment or parting with the possession or any other rights of the allottee Company, neither with the plot in question nor structure in existence thereon.

Transfer of shares of shareholders of company to third party, does not mean transfer of properties of the company to third party nor shareholders have any right, title or interest in the property belonging to the company.

Approval for change of name by Registrar of Companies under Section 13 of the Companies Act, 2013 does not mean transaction or sale as such no stamp duty is chargeable.

Change of name of the Company in revenue record does not mean transfer of assets, consequently, there is no obligation to pay stamp duty and registration fee.

High Court of Himachal Pradesh- CWP No. 5194 of 2023- Canara Bank Vs. State of Himachal Pradesh & Ors.- Decided on 21st August 2023

Non-obstante clause in Section 26E of SARFAESI Act shall prevail over the MSMED Act.

While dealing with the scope of MSMED Act, 2006 vis-à-vis SARFAESI Act, 2002 and the validity of the order of attaching of mortgaged secured assets, in view of recoverable dues, the Hon'ble Apex Court has categorically held Kotak Mahindra Bank Ltd. vs. Girnar Corrugators Private Limited and Others (2023) that non-obstante clause in Section 26E of SARFAESI Act shall prevail over the MSMED Act, in absence of any specific express provision giving priority for payment under the MSMED Act over the dues of the secured creditors or over any taxes or cesses payable to central/state government or local authority.

A similar issue, came up for adjudication before the Coordinate Bench of this Court in LPA No. 156 of 2021, decided on 12.04.2023, titled as State of H.P. & Ors vs. State Bank of India & Anr. along with connected matters. This LPA along with other connected matters were decided by relying upon the judgment of Hon'ble Apex Court in case of Punjab National Bank (supra) whereby, the appeals filed by the State of Himachal Pradesh were dismissed. The Petitioner-Bank-secured creditor cannot be deprived of its rights to proceed against the secured assets-immovable lease hold property as detailed in Para 2(i) of this petition.

Bombay High Court At Bombay- WP No. 11156 of 2023- Urshila Ajit Kerkar Vs. Office of the Court Receiver, High Court, Bombay & Anr.- Decided on 7th September 2023

Possession of a Receiver is not the possession or occupation contemplated under Section 14(1)(d) of the IBC.

In the context of the nature of possession of agent of private property, in Maria Margarida Sequeria Fernandes and Others vs. Erasmo Jack de Sequeria (Dead) through L.Rs. reported in (2012) 5 SCC 370, the Apex Court was considering a suit for injunction filed by a person in possession of immovable property claiming his right to continue with possession of immovable property. In the context of said issue, the Apex Court laid down four classes of possession as follows:

Possession in consequence of proprietary interest;

Possession in consequence of licensor or contractual right;

Gratuitous or purely permissive possession; and

Trespasser possession. 18. In this context, the Apex Court considered possession of a caretaker or agent.

In the context of said issue, the Apex Court, in paragraph 97, crystallized principles of law under:

> *"(1) No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.*
>
> *(2) Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.*
>
> *(3) The courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.*
>
> *(4) The protection of the court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or licence agreement in his favour. (5) The caretaker or agent holds property of the*

principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession."

On careful reading of Clause (5) of the Apex Court's judgment, it is clear that the caretaker is equated with the agent who holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property, irrespective of his long stay or possession.

Apart from the said judgment, it must be noted that the receiver's possession is that of the custodian on behalf of the parties to the suit. The receiver's agent cannot claim himself to be in possession within the normal term "possession" as is contemplated by Clause D of Section 14 of the IBC.

Bombay High Court- Criminal Application No. 1505 of 2019- Mehul Choksi Vs. State of Maharashtra

Confiscation of properties under Enforcement Directorate u/s 4 of the Fugitive Economic Offenders Act, 2018.

As per Section 12 of the Fugitive Economic Offenders Act, 2018, there are two stages as provided under sub-sections (1) & (2). In the first stage, provided under sub-section (1), a declaration will have to be made about the individual being a fugitive economic offender; and the second stage provided under sub-section (2) is for confiscation of the properties. (ii) Therefore, the application filed for issuing notice to the Official Liquidator to appear and represent the company Gili India Ltd. cannot be considered at this stage as the matter as to confiscation was not to be considered first as per the order dated 31.1.2019 and it can be taken up at an appropriate stage subject to result of the declaration sought under Section 4 read with Section 12 of the FEO Act. (iii) The Court rightly decided to complete the stage one under Section 12(1) of the FEO Act. Only after that stage is crossed, the question about necessity to issue notice to the other persons would arise.

High Court of Chhattisgarh (DB)- Writ Appeal No 246 of 2020- Nand Kumar Adil Vs. State Bank of India- Decided on 5th September 2023

No right of general lien under section 171 of the Contract Act when the security is given for specific loan.

The Bank had lent money to the Borrower for specific purpose and specific amount, it cannot be disputed that the property in question was bailed out to the Bank by the Borrower at any point of time.

Where the contract between a borrower and his bank specifically showed that the property was given as security only for a particular transaction, the bank could not hold it as security for repayment of another loan.

The Bank has a statutory right of lien in absence of contract to the contrary, retain as a security for general balance of account, any goods bailed to them.

Deposit of title deeds by way of mortgage was for specific purpose to cover an advance for specific term loan and when the Borrower has deposited the title deeds for a specific transaction of loan, the Bank cannot be allowed to contend that they are entitled to hold the title deeds of the Borrower for other loan amounts.

The Bank cannot claim title deeds of the Borrower by invoking the power of general lien under Section 171 of the Indian Contract Act, 1872. The Bank is absolutely unjustified in exercising the general power of lien over the properties of the Borrower under Section 171 of the Contract Act.

Bank has no general power of lien to retain the title deeds of the Borrower for nonpayment of other dues which the Borrower had allegedly taken.

High Court of Kerala- Heny Thankanchan Vs Union of India and Ors.- Hawking Technolgies India LLLP- Decided on 17th November 2023

There is no question of IBC 2016 overriding the provisions of the SARFAESI Act, 2002 in totality - mere uploading of an application cannot be taken as filing of an application.

The argument of the petitioner that the IBC 2016 shall have overriding effect over the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 cannot be of any avail to the petitioner. It is true that in view of Section 238 of the IBC 2016, the IBC 2016 will have overriding effect.

But, Section 238 of the IBC 2016 cannot oust the operation of the Act, 2002 for the reason that the IBC 2016 and the Act, 2002 operate in different fields. Therefore, unless there is any repugnancy between the provisions of the IBC 2016 and the provisions of the Act, 2002, there is no question of IBC 2016 overriding the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in totality.

The petitioner is not entitled to urge the overriding effect of IBC 2016 based on the facts of the case for yet another reason. As far as the proceedings under the Act, 2002 initiated by the Bank, the petitioner has been proceeded against in his capacity as guarantor to the financial advance by the LLP. In the judgment in State Bank of India v. Ramakrishnan and another [(2018) 17 SCC 394], the Apex Court has held that the protective provisions of IBC 2016 are not applicable to a personal guarantor of a corporate debtor. The securitisation proceedings against personal guarantors of corporate debtors can continue under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Therefore, initiation of a Section 94 (IBC 2016) proceedings by a Partner of an LLP in his capacity as a guarantor, cannot be averted to the proceedings initiated by the Bank against the petitioner, but in his capacity as a guarantor, under the Act, 2002.

High Court of Madras- Subrata Monindranath Maity v. The State, Rep. by Deputy Director, Industrial Safety and Health-II- Decided on 12th December 2023

Resolution Professional is 'Occupier' of Corporate Debtor's factory as defined under Section 2(n) of the Factories Act, 1948.

The protection to the resolution professional given under Section 233 of IBC is obviously only in respect of act done or intended to be done in good faith under the code. The failure or omission to provide safety measures in the factory cannot be stretched to inaction.

The resolution professional is the occupier of the factory (as defined under Section 2(n) of the Factories Act, 1948) and he cannot abdicate his duties and responsibility of providing necessary safety measures in the factory as mandated in the Factories Act.

The expression used in section 17 of the Code explicitly say that the resolution professional is the person who is vested with absolute control of the Corporate Debtor company. While so, for the violation or omission in the factory premises, Resolution Professional is responsible for the Proceedings if any, initiated against Resolution Professional under the Factories Act in his capacity as occupier. The said proceedings will not be covered under section 14 or 233 of the Code.

Delhi High Court- CS (OS) 439/2023 and IA No. 13566/2023 (Stay) -Tejinder Pal Setia v. Kone Elevators India Pvt. Ltd. and Anr. – Decided on 15th December 2023

No civil court shall have jurisdiction in respect of any matter in which the Adjudicating Authority is empowered by, or under the Code.

As such, this Court has no territorial jurisdiction to entertain the prayers of the plaintiff with respect to the assignment deed dated 03.02.2023, which is the fulcrum of the present suit.

Sections 63 and 231 IBC create a bar on the jurisdiction of the civil court in respect of any matter in which the NCLT and NCLAT has jurisdiction under the IBC and the adjudicating authority under the Code is competent to pass any order.

The jurisdiction vested in NCLT while dealing with a resolution plan is of wide ambit and any question of law or fact in relation to the insolvency resolution has to be determined by the NCLT.

Madras High Court- W.P. Nos. 21777 and 22518 of 2023 and W.M.P. Nos. 21117 and 21956 of 2023- Tamilnad Mercantile Bank Ltd. v. Recovery Officer, The Regional Commissioner-II, Employees' Provident Fund Organisation- Decided on 21st November 2023.

EPFO cannot issue orders prohibiting and restraining Secured Creditor from utilising the amount paid by Liquidator.

The Liquidator released Rs.14,34,73,661/- to the petitioner Bank towards its share for the credit of the loan account of M/s.Sri Textile Erode Private Limited with them. This was from the sale proceeds of the properties sold.

In the meanwhile, EPFO issued proceedings by invoking Section 8(B) of the EPF and MP Act prohibiting and restraining the Bank from making payments of the said deposit or any part thereof, to any person, whomsoever or otherwise than to the EPFO.

It was held that Section 53(1) of the IBC, 2016 shall not be applicable to dues governed by Section 36(4) of IBC 2016, which are to be treated outside the liquidation process and liquidation estate assets under the IB Code.

IB Code which stipulates that the IRP should obtain and review Income Tax and other statutory notices and obtain details of the financial institutions that are maintaining accounts of the CD and inform them of commencement of CIRP of the CD and appointment of IRP.

The IRP should also immediately give instructions for stopping payment from the account without the authority of the IRP and also change the details of the signatories of the accounts so as to take control of the account. In fact, it is recommended that where required, a new account may be opened.

In such circumstances, the prohibitory orders or attachment order being sent to the Bank appears out of the rule book. This is not a case where the defaulter is not under liquidation initiated by the IBC. This is also a case where the Bank intimated of the dues.

The orders of the EPFO on the hapless Bank Management is erroneous. The impugned orders of the EPFO are quashed.

High Court of Karnataka- WP No 483 of 2023 (GM-RES) - Mr. Farooq Ali Khan v. Punjab National Bank and Ors.- Decided on 21st November 2023

Resolution Professional has to give notice of each meeting of CoC even in case of adjournment of meeting.

On 11-02-2020 at 12.20 pm an e-mail is sent communicating that the second meeting of 19th CoC which was sought to be adjourned on 10-02-2020 is scheduled on the same day i.e., 11-02-2020 at 3.00 p.m.

It was held Section 24(3) mandates that the Resolution professional shall give notice of each meeting of the CoC. The section does not depict the manner in which notice should be given. It only indicates that notice shall be given of each meeting to the CoC. In the considered view of this Court, 'each' would mean each and every.

The time limit for issuance of notice of meeting was reducible to 24 hours. This should be in the considered view of the Court, for reasons to be recorded in writing, as the words used are'as it deems fit'.

This Court, in exercise of its jurisdiction under Article 226 of the Constitution of India would not enter into venturing a fact finding enquiry to examine whether the resolution professional has acted in accordance with the duties and responsibilities under the Act.

Reserve liberty to the petitioner to submit a representation/complaint before the Board within a fortnight from the date of receipt of the copy of this order and if such a complaint is received, the Board would decide the issue, in accordance with law.

The CoC shall reconsider the restructuring proposal submitted on behalf of the petitioner in terms of Section 12A of the Code.

Bombay High Court Nagpur Bench- Misc Civil Application No. 374 of 2020- M/s. Sunflag Iron & Steel Co. Ltd. Vs. M/s. J. Poonamchand & Sons – Judgement pronounced on 5th June 2023

Whether the provisions of the IBC, 2016 interdict the appointment of an Arbitrator by invoking Section 11(6) of the Arbitration and Conciliation Act, 1996.

In view of what has been held in Indus Biotech (supra) that, the triggering of a petition under Section 7 of the IB Code to consider the same as a proceeding in rem, it is necessary that the Adjudicating Authority ought to have applied its mind, recorded a finding of default and admitted the petition, Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta and others (2021) 7 SCC 209 and KSL and Industries Limited Vs. Arihant Threads Limited and others, (2008) 9 SCC 763 are of no assistance, for a contrary argument, to be acceptable.

No doubt there is very narrow scope of judicial consideration in an application under Section 11 (6) of the A & Act, however, in light of what has been held in Indus Biotech (supra) in which Vidya Droila (supra) has been considered and Jasani Realty Pvt. Ltd. (supra), in my considered opinion, cover the issue.

The admission of an application after recording its satisfaction as contemplated by Section 7(5) of the IB Code would be the starting point where the bar under Section 238 of the IB Code can be said to be capable of being invoked and the mere filing of an application under Section 7(1) of the IB Code cannot be said to be enough to invoke the bar.

We hope you have found this information useful. For any queries/clarifications please write to us at insights@elp-in.com or write to our authors:

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