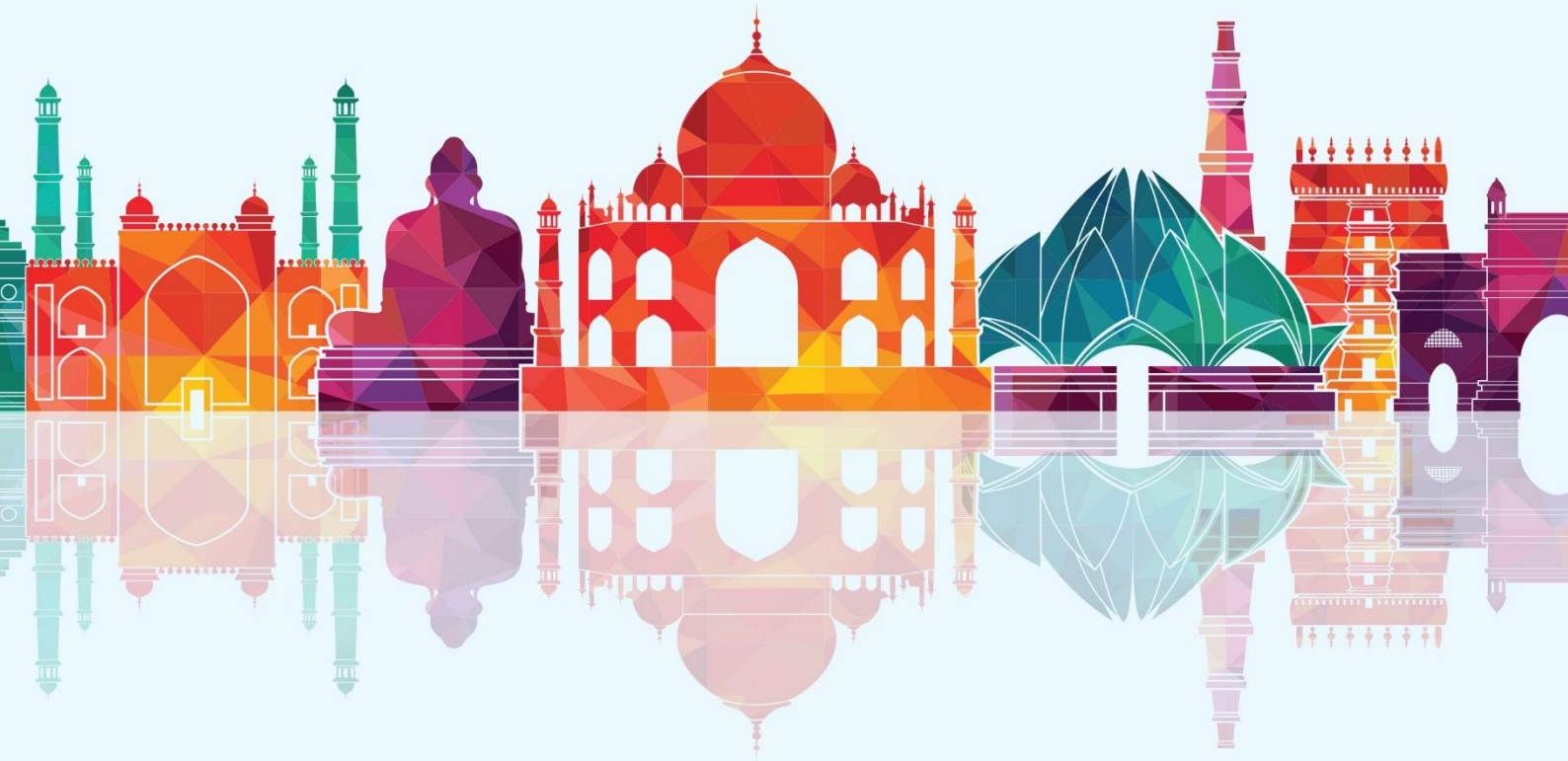
ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS



IMPORTANT IBC JUDGMENTS IN 2023 BY NCLAT

VOLUME II

TABLE OF CONTENTS

WITHDRAWAL OF APPLICATION UNDER SECTION 12A

Vadakkedathu Paul Vs. Sunstar Hotels and Estates Pvt. Ltd.

Judgment date: February 27, 2023 | NCLAT, Chennai Bench

There is no law which allows a third-party/shareholders to settle the claims of Financial Creditor on behalf of the Corporate Debtor

"Prima-facie there is no specific law which allows any shareholder of the Corporate Debtor to challenge the admission of Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor, once the debt due and default is established by the Adjudicating Authority, in an application made by the Financial Creditor filed under Section 7 of the IBC, 2016 before the Adjudicating Authority. Moreover, there is no law which allows a third-party to settle the claims of the Financial Creditor on behalf of the Corporate Debtor, more so, without any consent of the Corporate Debtor and in the teeth of opposition by the Financial Creditor. The Appellants could not produce any precedents in this regard".

Sintex Plastics Technology Ltd. Vs Mahatva Plastic Products and Building Materials Pvt. Ltd. & Ors

Judgment date: January 3, 2023| NCLAT, New Delhi

NCLT does not have the jurisdiction to comment on the illegality or appropriateness of any provision of IBC or Regulation framed thereunder.

There is no inconsistency between Section 12A and Regulation 30-A to make Regulation 30A unworkable.

NCLT can exercise its inherent jurisdiction under Rule 11 of NCLT Rules, 2016 for a situation not specifically covered under any provisions of IBC, 2016.

Held: *"NCLT does not have jurisdiction to comment on the illegality or appropriateness of any provision of IBC or Regulation framed thereunder. However, the observation that in appropriate cases, jurisdiction under Rule 11 of NCLT Rules 2016 can be exercised, is held to be correct. We do not subscribe to the view of the Adjudicating Authority that Regulation 30-A is inconsistent with Section 12A of IBC. Regulation 30-A has been made to give effect to the provisions of IBC and Regulation 30-A has to be read harmoniously with the provisions of IBC. The provision of Regulation 30-A has to be given effect to, unless it is contrary to any provisions of IBC. We do not find any inconsistency between Section 12A and Regulation 30-A so as to make Regulation 30A unworkable".*

Siddarth Intercrafts Pvt. Ltd.- Company Appeal (AT) (Insolvency) No. 1017 of 2022

Judgment date: February 6, 2023|NCLAT Principal Bench, New Delhi

When the Suspended Director submitted the Settlement Agreement and requested the closure of proceedings, the Adjudicating Authority should have taken the application into consideration.

"I.A. No. 310 of 2021 filed by the Suspended Director bringing on record Settlement Agreement and praying for closure of the proceeding, the Adjudicating Authority ought to have considered the said Application. The mere fact that Resolution Professional has not filed the Application although Settlement Agreement required his dues to be paid by the Operational Creditor does not inhibit the Adjudicating Authority to exercise its jurisdiction under Rule 11 of NCLT Rules, 2016. We thus are of the view that ends of justice will be served in disposing of Appeal directing the Adjudicating Authority to take a final decision on I.A. No. 310/2021, no further step needs to be taken in pursuance of the Order dated 22nd July, 2022 whose implementation was already stayed by this Tribunal on 20th September, 2022".

Vinay Gupta Vs. Ashika Credit Capital Ltd. & Anr. - Company Appeal (AT) (Insolvency) No. 92 of 2023

Judgment date: January 27, 2023| NCLAT Principal Bench, New Delhi

Revival of Section 7 application upon default in settlement

"Present is a case where application under Section 7 was filed by the Financial Creditor claiming its financial debt. On said application, Corporate Debtor entered into settlement due to which the application was withdrawn with liberty to revive if any default is committed. The revival of the application under Section 7 was consequent to the liberty granted by the Court. When the application was revived, the application which was filed initially by the Financial Creditor was restored and treated to be the original Section 7 application. It cannot be said that what is to be considered was only the default under the settlement agreement. Default in settlement agreement is only a byproduct which has permitted revival of Section 7 application but in no manner affect the claim in the original application which is financial debt under Section 7 application."

Manish Kumar Bhagat, IRP Pankaj Events and Celebrations Pvt. Ltd.- Corporate Debtor- Pankaj Events and Celebrations Pvt. Ltd.- IA No. 338 of 2023 in CP (IB) 838 of 2019

Judgment date: August 9, 2023 |NCLT, Ahmedabad

Termination of CIRP where all Financial Creditors and Operational Creditors withdrew their claims.

"In the circumstances, when the financial and operational creditors have withdrawn their claims, neither the operational creditor nor the financial creditors, nor the corporate debtor are responding/interested in the conducting CIRP and there being no realizable assets with the corporate debtor, we deem it appropriate to terminate the CIRP of the Corporate Debtor. In view of the above, by exercising our jurisdiction under Section 60(5) of IBC, 2016 along with inherent power under Rule 11 of the NCLT Rules, 2016, we hereby terminate the CIRP of the Corporate Debtor with

immediate effect and release the Corporate Debtor from the rigors of the CIRP and also discharge the IRPMr. Manish Kumar Bhagat from his duties of IRP .

Issue a show cause notice, under Rule 59 of the National Company Law Tribunal Rules, 2016 to the Operational Creditor through its Directors as to why penalty as stipulated under Section 65(1) of IBC, 2016 should not be imposed on it."

Hem Singh Bharana v. Pawan Doot Estate (P) Ltd.- Company Appeal (AT) (Insolvency) No. 1481 of 2022

Judgment date: January 5, 2023|NCLAT Principal Bench, New Delhi

Settlement Proposal under Section 12A of IBC cannot be entertained deferring consideration of approval of Resolution Plan by the NCLT

"Had it intended that 12A Application can be entertained even after Resolution Plan is approved by the CoC, the proviso would not have confined to issue invitation for Expression of Interest, rather, it could have been conveniently mentioned that after approval of Resolution Plan Applicant should justify withdrawal. It was never intended that after approval of Resolution Plan by CoC, Application under Section 12A can be entertained. Hence, the Regulation is framed in that manner.

In Ebix Singapore (P) Ltd. v. Educomp Solutions Ltd., 2021, the Supreme Court laid down that the timelines provided in the Code have to be adhered to and held that the approval of a Resolution Plan by the CoC is not in the realm of contract but is insulated by the Scheme under the Code and thus bind both the SRA as well as CoC. The Supreme Court further held that after approval of Resolution Plan by the CoC, CoC itself is bound by its decision and cannot be allowed to go back from its decision and pass any other resolution."

INFORMATION MEMORANDUM

Gaurav Katiyar, RP of Earthcon Universal Infratech Pvt. Ltd. Vs. Nisus Finance and Investment Managers LLP. - Company Appeal

Judgment date: January 25, 2023| NCLAT Principal Bench, New Delhi

Once the Resolution Plan is approved by CoC, Financial Creditors are estopped from seeking any Amendments/Modifications in the Information Memorandum

"The Hon'ble Supreme Court in Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors stresses on the timelines within which the Resolution Process is to take place and that it is a beneficial Legislation which aims to put the Corporate Debtor back to its feet maximising the interest of all Stakeholders and is not a mere recovery Legislation. This Tribunal in Kalinga Allied Industries India Pvt. Ltd. Vs. Committee of Creditors (Bindals Sponnge Industries Ltd.) Punjab National Bank & Anr., has reiterated the importance of timelines and the effect of CoC seeking withdrawal of an already approved Resolution Plan which would have identical repercussions to the findings given by the Hon'ble Apex Court in Ebix Singapore Pvt. Ltd. Vs. Committee of Creditors of Educomp Solutions Ltd., in which the Hon'ble Apex Court discussing modifications and withdrawals by Successful Resolution Applicant (SRA) has observed that a submitted Resolution Plan is binding and irrevocable as between the CoC and SRA in terms of the provisions of the Code. Placing reliance on Ebix Singapore Pvt. Ltd., this Tribunal in Kalinga Allied Industries India Pvt. Ltd., has further observed that the Commercial Wisdom of the CoC is not justiciable until and unless any material irregularity, which in the instant case, we are of the considered view that the submissions made by the Financial Creditors do not fall within the provisions of the Section 30(2) of the Code.

Having observed so, at the cost of repetition, it is noted that any modification after approval of the CoC and submission to the Adjudicating Authority, irrespective of the content of the terms envisaged by the Resolution Plan, would only lead to further delay and defeat the very scope and objective of the Code."

STATUS OF DUES OF STATUTORY AUTHORITIES

Mrs. C.G. Vijyalakshmi Vs. Shri Kumar Rajan, RP Hindustan Newsprint Ltd.

Judgment date: June 21, 2023 | NCLAT, Chennai Bench

PF and Gratuity is to be paid in full as per the provisions of EPF and NP Act,1952 and payment of Gratuity Act, 1972

"In the Jet Aircraft Maintenance Engineers Welfare Association Vs. Ashish Chhawchharia, Resolution Professional of Jet Airways (India) Ltd. & Ors. judgment, a clear direction was given to the Successful Resolution Applicant to make payment of the admitted claims towards Provident Fund dues and the same was upheld by the Hon'ble Apex Court in Jalan Fritsch Consortium Vs. Regional Provident Fund Commissioner & Anr. The Hon'ble Apex Court has laid down that the share of workmen dues shall be kept outside the Liquidation assets and the concerned workmen/Employees shall have to be paid the same, out of such Provident fund, Gratuity Fund, if any available. The words, 'if any available', cannot be read to mean that the workmen and empolyees are not entitled for Provident fund, Gratuity Fund, Pension fund, if not available with the Liquidator. As ratio of the Judgement in Jet Aircraft Maintenance Engineers Welfare Association (supra) of this Tribunal was upheld by the Hon'ble Apex Court, this Tribunal is of the earnest view that both Provident Fund and Gratuity Fund is to be paid in full as per the Provisions of EPF and NP Act, 1952 and Payment of Gratuity Act, 1972."

Office of the Assistant Commissioner of Central Tax & Anr. Vs. Mr. Rakesh Singala, Liquidator of M/s. Apple Industries Ltd- Company Appeal (AT) No. 1215 of 2022

Judgment date: January 4, 2023

Refund of amount to Corporate Debtor- Requirement of filing of application for refund- Provisions of Section 11B of the Central Excise Act, 1944

"We do not find any conflict with Section 33 (5) and Section 11B. Section 11B is enabling provision which entitles the Corporate Debtor to make an Application for refund of duty. The Moratorium which becomes operative after liquidation order has been passed is for the purpose for protecting the Corporate Debtor from any legal proceeding. Present is not a case where any legal proceeding has been initiated against the Corporate Debtor under the Central Excise Act, 1944. Present is a case where for refund, to which the Corporate Debtor is entitled, whether the Application is required to be made by the Corporate Debtor in accordance with the Central Excise Act, 1944 or not. The statutory provision of the Central Excise Act, 1944 does not contemplate automatic refund of any duty to which company may be entitled. Section 11B of the Central Excise Act, 1944 contemplates a procedure for availing refund and we do not see any inconsistency in Section 11B of the Central Excise Act, 1944 with Section 33(5) of the IBC. Section 238 of the IBC provides that the provisions of the Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

The Assistant Commissioner of Central Tax Vs. Mr. Sreenivasa Rao Ravinuthala RP Samyu Glass Pvt. Ltd. - Company Appeal (AT) (CH) No. 346/2021

Judgment date: August 2, 2023 |NCLAT, Chennai Bench

Central Excise cannot be treated as a Secured Creditor under IBC

"The ratio laid down by the Hon'ble Apex Court in the matter on State Tax Officer Vs. Rainbow Papers Ltd., is with respect to whether the provisions of the IBC, in particular, Section 53 thereof, overrides Section 48 of the GVAT Act, 2003.

Section 11E of the Central Excise Act, 1944 is distinct from the provisions of GVAT Act, 2003.

It is also pertinent to mention that the Master Circular No.1053/02/2017-CX, issued by the

Ministry of Finance, Department of Revenue, Central Board of Excise and Customs specifies that dues under Central Excise Act, 1944 would have first charge only after the dues under the Provisions of the Code are recovered.

Keeping in view, the Section 11E of the Central Excise Act, 1944 is quite different from the

GVAT Act, 2003 and Clause 20 of the aforenoted Circulation, this Tribunal is of the considered view that the Appellant herein, cannot be treated as a Secured Creditor."

COMPUTATION OF LIMITATION PERIOD FOR FILING OF APPEALS

Sridhar Cherukuri Vs. Dr. G.V. Narasimha Rao – IA No. 34 in Company Appeal (AT) (CH) (INS) No. 13 of 2023 and Company Appeal (AT) (CH) (INS) No. 13 of 2023

Judgment date: January 27, 2023|NCLAT, Chennai Bench

Computation of limitation period for filing appeal before the NCLAT

"Circular dated 21.10.2022 had clearly mandated that 'All concerned shall ensure that Appeals are presented as per Rule 22 of the NCLAT Rules, 2016, within the period of Limitation at the Filing Counter.

As per Section 61 (2) of the I & B Code, 2016, every `Appeal', under sub-section 1 of Section 61 (1), shall be filed by `any person', aggrieved by the `Order' of the `Adjudicating Authority', within 30 days before the `National Company Law Appellate Tribunal'. In reality, the `Appellate Tribunal', shall `condone the delay beyond 30 days', but shall not exceed 15 days, provided sufficient cause was shown, for not filing the `Appeal', of course, `after the expiry of 30 days from the date of passing of the order', by an `Adjudicating Authority'.

The period of Limitation as per `Order' of this Tribunal dated 21.10.2022, shall be `calculated' from the presentation of the `Appeal', in the instant case, the `Appeal', having been presented by the `Appellant', (submission of `Appeal papers', through physical mode (on 12.12.2022), on the `47th day', which is beyond the `45 days' (30 + 15 days), clearly `barred' by `Limitation'.

Dealing with the plea of the Appellant, that the ingredients of Section 10 of the General Clauses Act, 1897, will apply, to the facts of the present case, because of the fact that the period of Limitation, came to an end on 10.12.2022 (Court Holiday Date) and that the physical copies of the Appeal Paper(s), were furnished to the Registry on 12.12.2022, the next working day of this Tribunal, and hence the instant Company Appeal, is well within the period of Limitation, this Tribunal, has succinctly and unerringly point out that, in view of the Circular dated 21.10.2022 was in force and the same was not annulled, varied or superseded and was alive and in existence, the falling back upon of Section 10 of the General Clauses Act, 1897, is nothing, but an exercise in futility, as held by this Tribunal, against the Appellant."

ADMISSION OF SECTION 7/9 APPLICATIONS

Nileshbhai Shantilal Patel Vs. Westin Resins and Ploymers Pvt. Ltd. & Anr - Company Appeal (AT) (Insolvency) No. 627of 2022 & IA No. 4706 of 2022

Judgment date: January 31, 2023 |NCLAT Principal Bench, New Delhi

Whether IRP (became IRP after admission of the CIRP) who had served the notice under Section 8 of the Code is a related party in terms of Section 5(24)(h) of the Code.

"A close scrutiny of the aforesaid provision would show, firstly, that it relates to the Corporate Debtor and not to the Operational Creditor and secondly the Appellant was to lead evidence that the Director, Partner or Manager was accustomed to act on the directions or instructions of the said IP. Therefore, in our considered opinion, Section 5(24)(h) of the Code is not at all applicable to the facts and circumstances of the present case and thus the arguments raised in this regard, is hereby rejected. Since, we are dictating the order in the court, Sr. counsel for the Appellant has then referred to Section 5(24-A)(h) of the Code to submit that the related party in relation to an individual should also be looked into in regard to Section 5(24-A)(h). We have also referred to that provision but the same is not applicable because the dispute is between two corporate entities and not in respect of the individuals."

Nitin Pannalal Shah Vs. Vipul H Raja - Company Appeal (AT) (Insolvency) No. 379 of 2021 & IA No. 2204 of 2021

Judgment date: Decided on September 11, 2023| NCLAT Principal Bench, New Delhi

A Stock Broker registered with SEBI and Trading Member of NSE is a Financial Service Provider as per Section 3(17) of IBC and by virtue of Section 3(7) read with Section 3(8) and Section 227 of the Code, Section 7 CIRP application is not maintainable

"The SEBI is Financial Sector Regulator. The Stock Brokers and Sub-Brokers under the SEBI (Stock-Brokers and Sub-Brokers) Regulations, 1992 are required to be compulsorily registered under Section 3. Regulation contains details of obligation and responsibilities of the Stockbrokers. Schedule-II Regulation, 1992 provides for 'Code of Conduct for Stock Brokers'. The Stock Brokers under heading "B" – Duty to the Investor includes – Investment Advice in publicly accessible media.

The Stock Brokers, who are covered by the Regulation 1992 are subject to various obligation and duties towards Investors and from the nature of activities as contained in the Memorandum of Association of both the Corporate Debtors, they clearly fall within the definition of 'Financial Service Provider'.

Memorandum of Association of both the Corporate Debtors, they clearly fall within the definition of 'Financial Service Provider'. (iii) Section 5(8)(g) has to be read harmoniously with Section 7 and Section 5(7) and 5(8). Section 5(8)(g) cannot be read in any manner that financial service providers are also covered under Section 5(8)(g)."

State Bank of India Vs. N.S. Engineering Projects Pvt. Ltd. - Company Appeal (AT) (Insolvency) Nos. 978, 1000 of 2022 and 1039 of 2022 & I.A. No. 3015 of 2022

Judgment date: May 23, 2023 |NCLAT Principal Bench, New Delhi

IBC Section 7 application cannot be rejected on the ground that certain portion of sanction amount of financial facilities could not be disbursed by the Financial Creditors

"The Adjudicating Authority while rejecting Section 7 Application filed by the State Bank of India and Punjab National Bank by its order dated 28.06.2022. The Adjudicating Authority after noticing the respective submissions of the parties, in paragraph 5.7 has observed that there was no reason for the Financial Creditor not to disburse the amounts in terms of the sanction letters.

The Adjudicating Authority has further relied on the Suit filed by the Corporate Debtor in the Calcutta High Court, which according to the Adjudicating Authority will result in determination of the default inasmuch as there will be an adjudication also on whether the Corporate Debtor has discharged from its obligations.

From the judgment of the Adjudicating Authority as noticed above in State Bank of India's case, it is clear that Adjudicating Authority has based its decision of rejecting Section 7 Application on the ground that the default committed by the Corporate Debtor in restructuring its debt, there is contributory negligence by the State Bank of India as well as Punjab National Bank. The fact that certain portion of sanction amount of financial facilities could not be disbursed by the Financial Creditors can be ground for rejecting Section 7 Application has already been answered by the Hon'ble Supreme Court in its judgment in Innoventive Industries Limited (supra)."

Priyal Kantilal Patel Vs. IREP Credit Capital Pvt. Ltd. & Anr - Company Appeal (AT) (Insolvency) No. 1423 of 2022 & I.A. No. 4457 of 2022

Judgment date: February 1, 2023 |NCLAT Principal Bench, New Delhi

The mere fact that instead of reviving company petition, a fresh company petition has been filed under section 7 shall not be reason to reject the company petition.

"The mere fact that in earlier company petition, consent terms was arrived, which consent terms was breached by the corporate debtor, the financial debt which was claimed by the financial creditor would not be wiped out nor the nature and character of financial debt shall be changed on account of breach of the consent terms. Permitting such interpretation shall be giving premium to the corporate debtor who breach the consent terms."

Priyal Kantilal Patel Vs. IREP Credit Capital Pvt. Ltd. & Anr - Company Appeal (AT) (Insolvency) No. 950 of 2022

Judgment date: January 12, 2023 |NCLAT Principal Bench, New Delhi

In absence of an agreement between Financial Creditors and Corporate Debtor, Financial Debt can be proved from other documents.

"NCLAT held that it is true that deduction of TDS and deposit by the Corporate Debtor does not itself prove that there is any financial debt but deduction of TDS and deposit in Form 16-A under Section 194-A of Income Tax Act clearly proves that the deduction which was deposited was TDS relating to "Interest other than interest on securities". Form 16-A which was filed by the Financial Creditor along with Section 7 Application at least support the case of the Financial Creditors that loan which was granted to the Corporate Debtor was with interest. Further when we look into the definition of transaction as contained in Section 3(33) of the Code,the definition is an inclusive definition and the provision does not lead to the conclusion that unless there is written transaction between the parties incorporating the terms and conditions of the loan, no transaction can come within the meaning of Section 5(8) of the Code. Financial Debt can be proved from other documents as contemplated in Column 8 of Part-V of Form 1 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 as noted above."

Mudhit Madanlal Gupta Vs. Supreme Constructions and Developers Pvt. Ltd.- Company Appeal (AT) (Insolvency) No. 920 of 2023

Judgment date: July 26, 2023|NCLAT Principal Bench, New Delhi

Date of Default in case of Guarantee

"When the Financial Creditor has invoked the corporate guarantee of the corporate guarantor by the notice dated 16.10.2020 and asked the corporate guarantor to make the payment within seven days from the receipt of the notice, the default has occurred during the 10A period and the default dated 02.07.2019 which is default alleged against the Principal Borrower can not be put to a default for corporate guarantor. Liability of corporate guarantor although is coextensive of the Principal Borrower but when the Guarantee requires invocation of the guarantee deed, default on the guarantor shall be the date when corporate guarantee has been invoked."

Wave Megacity Centre Pvt. Ltd. Vs. Rakesh Taneja & Ors.- Company Appeal (AT) (Insolvency) No. 918 of 2022

Judgment date : January 5, 2023|NCLAT Principal Bench, New Delhi

Section 65 of IBC has to be read as enabling provision to reject an application even on proving of debt and default Section 10 Application is not to be obligatorily admitted

"When finding recorded by the Adjudicating Authority is that Section 10 Application has been initiated fraudulently and maliciously, even if there is debt and default, the Adjudicating Authority is not obliged to admit Section 10 Application. Section 10 and Section 65, which are part of the same statutory scheme needs to be read together to give effect to the legislative scheme of the Code. In event CIRP is initiated by a corporate applicant fraudulently with malicious intent for any purpose other than the resolution of insolvency, holding it that it is obligatory for the

Adjudicating Authority to admit Section 10 Application, will be contrary to the statutory scheme under Section 65. In event conditions under Section 65 are fulfilled, Section 10 Application can be rejected, even if debt and default is proved.

Thus, Section 65 has to be read as enabling provision to reject an application even on proving of debt and default Section 10 Application is not to be obligatorily admitted. The present is a case where it has been held that Application under Section 10 has been maliciously and fraudulently initiated for the purpose other than for the resolution of insolvency.

The Hon'ble Supreme Court in (2010) 14 SCC 38 – Ramjas Foundation and Anr. vs. Union of India and Ors. has held that a person is not entitled to any relief, if he has not come to the Court with clean hand, which principle is also applicable to the cases instituted in other Courts and judicial Forums. In paragraph 21, following has been laid down:

"21. The principle that a person who does not come to the court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have a bearing on adjudication of the issue(s) arising in the case."

Venkat Rao Marpina Vs. Vemuri Ravi Kumar- COMPANY APPEAL (AT) (CH) (INS.) No. 134/2022 (IA No 319/2022)

Judgment date: September 4, 2023 |NCLAT, Chennai Bench

Advances given by Property Buyers to Real Estate Developer is a borrowing and such amounts raised from allottees falls within the scope of Section 5(8)(f) of the IBC

"The Code is thus a beneficial legislation which can be triggered to put the corporate debtor back on its feet in the interest of unsecured creditors like allottees, who are vitally interested in the financial health of the corporate debtor, so that a replaced management may then carry out the real estate project as originally envisaged and deliver the flat/apartment as soon as possible and/or pay compensation in the event of late delivery, or non- delivery, or refund amounts advanced together with interest. Thus, applying the Shayara Bano v. Union of India (2017) 9 SCC 1 test, it cannot be said that a square peg has been forcibly fixed into a round hole so as to render Section 5(8)(f) manifestly arbitrary i.e. excessive, disproportionate or without adequate determining principle. For the same reason, it cannot be said that Article 19(1)(g) has been infracted and not saved by Article 19(6) as the Amendment Act is made in public interest, and it cannot be said to be an unreasonable restriction on the Petitioner's fundamental right under Article 19 (1) (g). Also, there is no infraction of Article 300-A as no person is deprived of its property without the authority of a constitutionally valid law.

Further, interpreting the Explanation added to Section 5(8)(f) of the Code, the Court further held that allottees/homebuyers were included in the main provision, i.e. Section 5(8)(f) with effect from the inception of the Code. The advances given by Property buyers to real estate developer will be considered as a 'borrowing' and such amounts raised from allottees falls within the scope of Section 5(8)(f) of the Code. "

Madras Chemicals & Polymers Vs. Vijay Aqua Pipes Pvt. Ltd.- Company Appeal (AT) (CH) (INS.) No. 298 / 2021

Judgment date: August 28, 2023 |NCLAT, Chennai Bench

An Agent who has paid to Principal Supplier the outstanding amount due from Corporate Debtor is an Operational Creditor, an application u/s 7 is not maintainable

"Agents are not normally liable for the dues from the Creditors and such liability will arise only if the Agent is a Del Credere Agent. It cannot be forgotten that the true relationship of Agent and the Principal is to be gathered from the nature of the Contract, its terms and conditions, and the terminology used by the parties is not decisive of the legal relationship, as per decision of the Hon'ble Supreme Court of India in Snow White Industrial Corporation, Madras v. Collector of Central Excise, Madras, AIR 1989 SC 1555.

Going by the objective and scheme of the IBC, this Tribunal on the basis of surrounding facts and circumstances of the instant case in the teeth of Clause 15 of the `Del Credere Agency Agreement' and keeping in mind of a prime fact that the default which took place pertaining to the supply of goods comes within the definition of Operational Debt as per Section 5(21) of the Code, 2016 and hence, Section 9 of the Code, 2016 attracts in an unambiguous manner. Viewed in that perspective, the debt in the present case, cannot be termed as Financial Debt, as per Section 5 (8) of the Code, 2016, in the considered opinion of this Tribunal."

Agarwal Polysacks Ltd. Vs. K. K. Agro Foods and Storage Ltd.- Company Appeal (AT) (Insolvency) No.1126 of 2022

Judgment date: September 11, 2023 | NCLAT Principal Bench, New Delhi

Whether to prove a Financial Debt a Financial Creditor has to enter into a 'written' Financial Contract?

"NCLT, New Delhi, Bench-V rejected Section 7 application holding that Financial Creditor failed to show the nature of transaction between the parties and the amount which has been paid comes under definition of Financial Debt.

Held: A bare perusal of Part V indicates that particulars of financial debt, several documents, records and evidence of default has been referred to which documents are contemplated to be particulars of financial debt.

CIRP Regulation 8(2) clears that Regulation do not contemplate existence of all documents. Use of word "or" in Regulation 8(2)(a) indicate by any of the documents referred to in Sub-regulation (2) existence of debt can be proved.

A financial contract supported by financial statements as evidence of the debt is one of the documents contemplated in Regulation 8(2) but that is not exclusive requirement for proving existence of debt. Financial contract thus can very well be furnished to prove the financial debt but a plain reading of Regulation 8(2) indicate that it is not mandatory that existence of financial debt has to be proved by a financial contract. For example: records available with an information utility can very well be used as proof for existence of financial debt. Further, financial statements showing that the debt has not been paid is also one of the clauses in Regulation 8(2) by which existence of debt can be proved.

When we look into the statutory scheme as reflected in the Application to Adjudicating Authority Rules, 2016 and CIRP Regulations, 2016, it is clear that financial debt can be proved from other relevant documents and it is not mandatory that written financial contract can be only basis for proving the financial debt. We, thus, answer Issue No.1 holding that it is not necessary that written financial contract be the only material to prove the financial debt."

Kalpesh Ramniklal Shah Vs. Mundara Estate Developers Ltd.- Company Appeal (AT) (Insolvency) No. 71 of 2023

Judgment date: July 14, 2023| NCLAT Principal Bench, New Delhi

The allegation of violation of Section 295 of the Companies Act, 1956, does not help the Appellant to deny the loan transaction and the disbursement of the amount.

"The Hon'ble Supreme Court in in Innoventive Industries Ltd. vs. ICICI Bank and Anr. [2017] while dealing with the Scheme under Section 7 of the Code has held that when a default of financial debt is committed, the Adjudicating Authority has merely to see the records of the information utility and other evidence produced by the Financial Creditor to satisfy itself that a default has occurred. The law laid down in Innoventive Industries Ltd. by the Hon'ble Supreme Court has been reiterated by the Hon'ble Supreme Court in M. Suresh Reddy vs. Canara Bank & Ors.

Further the submission of learned Counsel for the Appellant that loan transaction was in violation of Section 295 of the Companies Act, 1956, does not help the Appellant to deny the loan transaction and the disbursement of the amount. Even if, the allegation of violation of Section 295 of the Companies Act, 1956 may be there, that does not in any manner inhibit filing of Section 7 Application and take appropriate proceedings under the IBC. The purpose and object of the IBC is entirely different. The violation of provisions of Companies Act, 1956, for example Section 295 has different consequences, which consequences in law can take effect and remedial measures can be taken under Section 295, when the ingredients of Section 295 are proved, but that itself cannot be a ground to reject Section 7 Application filed by the Financial Creditor, where debt and default is proved."

Rohit Motawat Vs. Madhu Sharma Proprietor Hind Chem Corporation & Anr.- Comp. App. (AT) (Ins) No. 1152 of 2022

Judgment date: February 3, 2023| NCLAT Principal Bench, New Delhi

The application under Section 9 of the Code was not maintainable as the spirit of the legislation of the Code is for resolution of debt and not for recovery.

"An application filed by Operational Creditor under Section 9 of the IBC for default of Rs. 15,10,151/- (Principal amount Rs. 9,97,122 and Interest amount Rs. 5,13,029) has been admitted by Adjudicating Authority and CIRP against Shubh Aluminium Pvt. Ltd., has been initiated. During the pendency of this proceedings, the principal amount of Rs. 9,97,122/- was paid by the Appellant by way of Cheque and Demand Draft dated 06.01.2021.

NCLAT held that the impugned order is patently illegal and deserves to be set aside. The question which has been raised by the Appellant, is hereby answered in favour of the Appellant in view of the decision taken by this Court in case of S.S. Polymers Vs. Kanodia Technoplast Ltd. [2019, Permali Wallace Pvt. Ltd. Vs. Narbada Forest Industries Pvt. Ltd. (2023) as well as the decision of the Hon'ble Karnataka High Court in the case of Jyothi Limited Vs. Boving Fouress Ltd. in Company Petition No. 48 of 1998 decided on 01.12.2000. Before parting, we are constrained to observe that the Adjudicating Authority has erred in not looking into the facts that the principal amount has entirely been paid and the issue was only regarding to interest for which the application under Section 9 of the Code was not maintainable as the spirit of the legislation of the Code is for resolution of debt and not for recovery."

Rajeev Srivastva Suspended Director of M/s Assotech Milan Resorts Pvt. Ltd. Vs. Ahluwalia Contracts (India) Ltd.- Company Appeal (AT) (Ins.) No. 976 of 2022

Judgment date: February 21, 2023 | NCLAT Principal Bench, New Delhi

Whether after transfer of winding up proceeding as per the Companies (Transfer of Pending Proceedings) Rules, 2016, a notice under Section 8 of the Code is mandatory

"Consequently, the first question is answered to the effect that after the transfer of winding up proceedings as per Rules 2016 read with amendments made in Section 434 of the Act, 2013 as applicable to the Code by Act 26 of 2018, if the winding up petition has been filed on the ground that the Company is unable to pay its debt, for treating the application under Section 9 of the Code, notice under Section 8 of the Code is not necessary or mandatory and a petition under Section 9 shall be maintainable without service of notice under Section 8 of the Code."

MORATORIUM

Mr. P. Eswaramoorthy Liquidator of M/s. Senthil Papers and Boards Pvt. Ltd. Vs. The Deputy Commissioner of Income Tax (Benami Prohibition)- Comp. App (AT) (CH) (INS.) No. 188 of 2022 with Comp. App (AT) (CH) (INS.) No. 189 of 2022

Judgment date: March 13, 2023| NCLAT, Chennai Bench

Moratorium under Section 14 of IBC does not affect the provisional attachment order passed under the Prohibition of Benami Property Transactions Act, 1988. Further, the attachment cannot be a subject matter of proceedings under Section 60(5) of IBC

"Attachment effected, under The Prohibition of Benami Property Transactions Act, 1988, is to be assailed under the relevant provisions of the said Act, 1988, and in fact, the I & B Code, 2016, only pertains to questions concerning the Insolvency Resolution or Liquidation Proceedings of the Corporate Debtor. Viewed in that perspective, the attachment made as per Section 24(3) of The Prohibition of Benami Property Transactions Act, 1988, cannot be a subject matter of proceedings, under Section 60(5) of the I & B Code, 2016, in the considered opinion of this Tribunal.

To put it differently, the Adjudicating Authority (NCLT) is not the proper FORA to determine the controversies, revolving around the attachment of the Property, under The Prohibition of Benami Property Transactions Act, 1988, as held by this Tribunal. As such, it is held by this Tribunal, that the filing of the instant Comp. App. by the Liquidator, per se are not maintainable in the eye of Law.

Principle of Election: Where there is no repugnancy or inconsistency, between the two remedies, Principle of Election, will not Apply, in the considered opinion of this Tribunal.

Income Tax Dues: The Income Tax Dues, are like Crown Debts, as per decision of the Hon'ble Supreme Court of India in Principal Commissioner of Income Tax v. Monnet Ispat and Energy Ltd. (2018) 211 Comp Cas 99 (SC)."

Sunil Kumar Agrawal RP, GSS Procon Pvt. Ltd. Vs. New Okhla Industrial Development Authority- Company Appeal (AT) (Ins.) No. 622 of 2022

Judgment date: January 12, 2023 |NCLAT Principal Bench, New Delhi

If the Adjudicating Authority has rightly applied the explanation under Section 14(1)(d) of the Code i.e. directing the Appellant to pay the lease premium amount and the lease rent to the Respondent

"Section 14 of the Code deals with the moratorium and Section 14(1)(d) of the Code says that there would be a prohibition from the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor. However, explanation appended to Section 14(1) (d) says that with the prohibition of recovery of any property by an owner or lessor, a license, permit, registration, quota, concession, clearance or a similar grant or right either given by the Central Govt., State Govt. local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency but there would be a condition for its continuation if there is no default in payment of the dues of such license, permit, registration, quota, concession, clearance or a similar grant or right during the moratorium

period. The similar grant or right has to be read in respect of the licence, permit, registration, quota, concession, clearance but it cannot be read as the premium amount or lease rent which has been so ordered by the Adjudicating Authority to be paid by the Appellant to the Respondent."

Mr. Arun Kumar Vs. Ms. Sripriya Kumar- Company Appeal (AT) (CH) (Ins.) No. 431/2022 (IA Nos. 1088, 1089, 1090/2022 & 322, 323/2023)

Judgment date: August 8, 2023| NCLAT, Chennai Bench

Moratorium u/s 14 of IBC does not impose any restriction on charging of any interest/Penal Interest during the CIRP period and it is not in the domain of the IBC, 2016 to decide any contractual interest liability.

Code does not contemplate any kind of preference to be given to an MSME Promotor by the CoC while accepting a Resolution Plan.

Project wise CIRP

"The ratio in Central Bank of India Vs. Ravindra and Ors. (2002) 1 SCC 367 cannot be made applicable to the facts of this case as this Tribunal under the provisions of IBC, 2016 does not have the jurisdiction or the discretion to either award any interest or reduce or increase any rate of interest which is the subject matter of a contract between the Financial Creditor and the Promotor of the Corporate Debtor. This Tribunal is of the considered view that as far as penal interest is concerned, the Appellant is bound by the terms of the Settlement Agreement
Section 14 does not impose any restriction on charging of any interest till the amount is paid.

The right which vested with the Kotak Bank / The Financial Creditor by virtue of the Loan Agreement / Settlement Agreement cannot be interfered by the Code. It is mainly for this reason that the non obstante clause, in the widest terms possible is contained in Section 238 of the Code, so that any vested right of either the Corporate Debtor or the Creditor, under any other law for the time being in force, cannot come in the way of the Code. The whole scheme and objective of the Code is to bring the defaulter Companies back on their feet, but at the same time cannot fiddle with the terms of the Contract as far as interest / penal interest or any other terms of the Agreement or Contract is concerned.

There is no provision in the Code that enables the Corporate Debtor or a Guarantor to seek remission in the interest claims from the Financial Creditors solely on the basis that there is a Resolution Plan.

It is borne from the record that there is no 12A Application, filed by the Appellant herein, seeking any kind of settlement. The Promotor being an MSME is given an opportunity under the Provisions of the Code to present a Plan. At the same time, the Code does not contemplate any kind of preference to be given to an MSME Promotor by the CoC while accepting a Resolution Plan."

PROHIBITION UNDER SECTION 29A

Kanti Mohan Rustagi Vs. Redbrick Consulting Pvt. Ltd.- Company Appeal (AT) (Ins.) No. 1176 & 1177 of 2022

Judgment date: February 6, 2023 | NCLAT Principal Bench, New Delhi

If the successful e-auction purchaser is an MSME, he/she cannot claim benefit under section 240-A. Backdoor entry of erstwhile management is not permissible.

"In the judgment in Bank of Baroda v. MBL Infrastructures Ltd., the Hon'ble Supreme Court as held that a 'purposive interpretation' of section 29-A is required when the primary aim is to restart the corporate debtor, which is also the case in the present appeal since the corporate debtor is being sold as a 'going concern'. This judgment, in addition, also clarifies that the management which has ran the company aground, because of which the company has gone into insolvency resolution/liquidation, cannot be allowed to return in a new avatar as a resolution applicant. This judgment also lays down that the erstwhile promoter of a corporate debtor has no vested right to bid for the property of the corporate debtor in liquidation. Such a purposive interpretation of section 29-A also permeates the provisions of section 35 (1)(f) of the IBC and, therefore, a similar prohibition is applicable to a successful auction purchaser so that backdoor entry of erstwhile management is not permissible.

It also held that the successful auction purchaser Redbrick Consulting Pvt. Ltd. did not produce any Udyam Registration Certificate when the e-auction of the corporate debtor as a 'going concern' took place on 16.6.2021. The notification dated 26.6.2020 of the Ministry of Micro, Small and Medium Enterprise was in existence on the date of e-auction, and therefore, it was incumbent upon the successful auction purchaser Redbrick Consulting Pvt. Ltd. to have obtained and submitted such a certificate to the liquidator to claim benefit under section 240-A."

Some of the important cases referred to in the judgment:

Supreme Court -Silpi Industries v. Kerala State Road Transport Corporation and Anr- "to claim the benefit retrospectively from the date on which appellant entered into contract with the respondent. The appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of MSMED Act 2006, by submitting memorandum to obtain registration subsequent to entering into the contract and supply of goods and services. If any registration is obtained, same will be prospective and applies for supply of goods and services subsequent to registration but cannot operate retrospectively. Any other interpretation of the provision would lead legislation."

NCLAT- Ashish Mohan Gupta v. Liquidator of Hind Motorshe – " time of arguments, now effort is being made to take benefit of Section 240A of IBC calling upon this Tribunal to go into the definitions of Micro, Small and Medium Enterprise and hold the Company to be Micro or Medium Industry."

NCLAT- Nikhil Tandon v. Sanjeev Bindal-"We, thus, are of the opinion that the appellant is a Registered MSME within the meaning of act, 2006 and the filing of Entrepreneurs' Memorandum in Part II which was acknowledged on 30.01.2007 is sufficient to treat the Appellant as a Registered MSME.]"

DBS Bank India Ltd. Vs. Kuldeep Verma, Liquidator of Eastern Gases Ltd.- Company Appeal (AT) (Insolvency) No. 1048 of 2022

Judgment date: February 6, 2023 | NCLAT Principal Bench, New Delhi

Whether the secured creditor's claim must be confined to the amount of principal and interest as claimed in Form D, in case of realization of Security Interest u/s 52(1)(b) of IBC

"When a claim is filed in Form D where interest and principal have been included up to the date of liquidation commencement date, claimants cannot be allowed to claim any further amount in addition to the amount which they have claimed in their Form D.

Statutory scheme provides submission of claim on a liquidation commencement date which is a fixed connotation. When a statute provides for liquidation commencement date as a date up to which claims can be filed and proved, no claim thereafter can be entertained by the Liquidator. The amount of interest which was retained by the Appellant claiming to be interest in addition to the claim as filed by it in Form D till the date of realization of receipt of the sale, cannot be permitted to be retained by the Appellant and the Adjudicating Authority has rightly passed the order allowing application filed by the Liquidator to hand over the additional amount to the Liquidator. Learned Counsel for the Appellant submits that out of Rs. 1.84 Crores, amount of Rs. 20 Lakhs have already been paid."

PERSONAL INSOLVENCY

Bhavesh Gandhi Vs. Central Bank of India - Company Appeal (AT) (Insolvency) No. 923 of 2022

Judgment date: February 7, 2023 | NCLAT Principal Bench, New Delhi

When an application is filed against a Personal Guarantor can another Lender of the same transaction proceed against the Personal Guarantor by filing another application under Section 95 of IBC

"The interim moratorium under Section 96 (1)(b)(ii) creates a prohibition on the creditors of the debtor from initiating any legal action in respect of any debt. The use of expression 'any debt' also clearly indicate that debt on basis of which moratorium has commenced is not contemplated by the expression 'any debt'. With regard to all debts of debtor i.e. Personal Guarantor in the present case, no proceeding can be initiated by virtue of Section 96(1)(b). The application filed by the Central Bank of India on 12.10.2021, thus, was clearly hit by Section 96(1)(b)(ii) and the Adjudicating Authority could not have proceeded with the said application and appointed the Resolution Professional. The order dated 13.06.2022 impugned in this Appeal is clearly unsustainable.

After admission of application under Section 100, moratorium commences in relation to all the debts under Section 101 and thereafter public notice is issued and claims from creditors are invited under Section 102. Section 103 provides for registering of claims by creditors. Section 104 provides for preparation list of creditors and thereafter repayment plan is contemplated under Section 105. Thus, when an insolvency resolution process commences against the Personal Guarantor all creditors of the Personal Guarantor are taken care of in the proceedings under Chapter-III.

The scheme of Code does not contemplate manifold applications against same Personal Guarantor by different lenders. Multiplicity of applications against same Personal Guarantor is not contemplated under Chapter III. When the insolvency resolution process commences against a Personal Guarantor, claims of all creditors are taken care of under the scheme of the Code."

Mahendra Kumar Agarwal Personal Guarantor of Gati Infrastructure Bhamsey Power Pvt. Ltd. Vs. PTC India Financial Services Ltd.- Company Appeal (AT) (CH) (INS.) No. 8 of 2023

Judgment date: August 1, 2023 | NCLAT, Chennai Bench

NCLT has the jurisdiction to initiate insolvency u/s 95 of IBC against a Personal Guarantor even if the CIRP against the Corporate Debtor is pending (not admitted) or withdrawn

"It cannot be again said that the pendency of the CIRP proceedings, against the Corporate Debtor is not a condition precedent for initiation of insolvency proceedings against the Personal Guarantor. Therefore, it is crystalline clear that the insolvency proceedings can be initiated against the Personal Guarantor of a Corporate Debtor, even if, no insolvency proceedings are pending against the Corporate Debtor.It is well settled by now, that the insolvency Proceedings can be initiated against the Personal Guarantor, even when no proceedings are pending against the Corporate Debtor. The Adjudicating Authority has jurisdiction to entertain/initiate the insolvency proceedings of the Personal Guarantors even when no CIRP proceedings is pending against the Corporate Debtor and in any event, the CIRP proceedings is pending and continued to be pending, against the Corporate Debtor."

RESOLUTION PROFESSIONAL /LIQUIDATOR

Venus India Asset-Finance Pvt. Ltd. Vs. Suresh Kumar Jain, RP of MK Overseas Pvt. Ltd.- Company Appeal (AT) (Ins.) No. 1395 of 2022 & I.A. No.4539 of 2022

Judgment date: February 9, 2023 | NCLAT, Principal Bench, New Delhi

Decision of the CoC to replace the Resolution Professional is not subject to judicial review

"It is well settled that the IBC does not postulate jurisdiction for the Adjudicating Authority to undertake scrutiny of the justness of the majority opinion expressed by financial creditors by way of voting. The insolvency regime introduced under the IBC has placed fetters on the power of interference by the Adjudicating Authority. Applying this principle in the instant case, we are of the view that the Adjudicating Authority being a creature of IBC Code and the statutory provisions therein not having invested jurisdiction and authority upon it to review the decision exercised by the CoC to replace the Resolution Professional, the rejection of the application for the replacement of the Resolution Professional is a transgression of jurisdiction and therefore deserves to be set aside."

Shri Guru Containers Vs. Jitendra Palande - CA (AT) (Ins.) No. 106 of 2023

Judgment date: February 22, 2023 | NCLAT, Principal Bench, New Delhi

Shifting the entire blame on Resolution Professional on grounds of nonperformance of duty and making him the scapegoat does not appear to be justified

"NCLAT held that though the scope of CIRP related work became limited and restricted by the fact that progress got stonewalled due to lack of flow of information and lack of claims, diligence on the part of the IRP in proceeding with the CIRP cannot be found to be wanting. Shifting the entire blame on the IRP on grounds of non-performance of duty and making him the scapegoat does not appear to be justified. It is equally important for the creditors to play a catalytic role in the insolvency resolution process given the present regime of creditor-driven IBC. The rigours of similar standards of discipline should also apply on the creditors.

This is clearly a case where the CIRP process was being hindered due to want of cooperation and participation from the creditors. The conduct of the Operational Creditor in the present case is deprecatory in that once the CIRP process had commenced, the Operational Creditor went into a sleeping mode. This position has been further aggravated by the fact that it was the Appellant/Operational Creditor who had triggered this judicial process and then abdicated himself from all responsibilities. That the Operational Creditor did not seem interested in resolution of the Corporate Debtor is evident from the fact that till date no claim has been filed with the IRP."

Pankaj Khetan (Erstwhile RP of Kushal International Ltd.) Vs. Jammu & Kashmir Bank Ltd.- Company Appeal (AT)(Insolvency) No. 515 of 2022

Judgment date: February 28, 2023 | NCLAT, Principal Bench, New Delhi

Fee of Resolution Professional from date of order of Liquidation to date of appointment of liquidator

"It is the case of the Respondent that since no liquidator was appointed at the time of passing of liquidation order, the Resolution Professional therefore continued in the position of Resolution Professional, only technically, and hence he cannot be allowed to claim fees/expenses without performing the obligatory duties of a liquidator. The application filed by the Resolution Professional demanding payment of fee for the period 28.02.2019, being the date of order of liquidation, till 20.12.2021, being the date of appointment of liquidator, the Adjudicating Authority has reduced the claimed amount.

NCLAT held that this was not in order since the fees of the Resolution Professional and that of a liquidator cannot be equated as their duties are different and therefore the matrix for evaluating the reasonability of their fees would also differ. NCLAT concurred in the directions of the Adjudicating Authority as contained in the impugned order with respect to the determination of the fees of the Resolution Professional; expenses incurred by him on site visits; fees of the legal advisor and salary of the security guards and direct that the same shall be paid by the CoC within ten days from the date of uploading of this order. Further all the adverse observations made on the conduct of Resolution Professional in the impugned order is expunged."

Ritu Tandon Vs. M/s Rain Automotive India Pvt. Ltd.- Company Appeal (AT) (Ins) No. 980 of 2022

Judgment date: July 3, 2023 |Principal Bench, New Delhi

Benefit under Liquidation Regulation 29 cannot be claimed during Liquidation Process where the due amount was demanded by the Resolution Professional during the CIRP but not paid

"During the CIRP, the RP requested the Appellant to refund the amount of security deposit as it was the part of the estate of the Corporate Debtor and could not have been retained by the Appellant in view of prohibition contained in Section 14(1)(c) of the Code but the Appellant did not abide by it nor claim a set off in Form B which was submitted by her to the RP. Therefore, it was only an afterthought on the part of the Appellant who had perhaps waited for the initiation of the liquidation proceedings and at that time the claim of set off, in terms of the provisions of Liquidation Regulation 29 of the Regulations, as alleged was raised.

NCLAT held that had it been a case where the RP had not even asked for the amount of security to be returned as it could not have been retained by the Appellant in view of Section 14(1)(c) of the Code or a case where RP had not gone to the Adjudicating Authority in a case where the Appellant had claimed a set off despite the provisions of Section 14(1)(c) then the matter would have been altogether different and perhaps the Appellant might have been right in its approach because there is no dispute that the rigours of Section 14 would come to an end as soon as the liquidation order is passed but the Appellant cannot be allowed to take advantage of its own wrong."

Vinod Kumar Kothari Liquidator of Nicco Corporation Ltd. Vs. Sneha Techno Equipments Pvt. Ltd.- Company App. (AT) (Ins) No. 316 of 2023 & I.A. No. 1079 of 2023

Judgment date: September 27, 2023 |NCLAT Principal Bench, New Delhi

Liquidator is required to follow the terms and conditions of Clause 12 of Schedule 1 of the Liquidation Process Regulations, 2016

"In the present case, EOI was issued by the liquidator (Appellant) on 08.07.2020, i.e. after the date of amendment of period for payment of balance sale consideration to 90 days in Liquidation Regulations(amended on 25.07.2019). In the EOI issued on 08.07.2020, the period was mentioned to be 15 days by the liquidator, whereas applicant sought extension up to 90 days from the date of demand in terms of the amendment dated 25.07.2019.

The very fact that the circular dated 26.08.2019 has already been withdrawn and that the amendment dated 25.07.2019 was in vogue as on 08.07.2020, it was incumbent upon the Liquidator to have followed the provisions of Regulation 33 much less Schedule 1 (Clause 12) of the Regulations which has not been followed and the terms and conditions have been provided by the Liquidator on its own in the EOI overlooking the terms and conditions as envisage in Schedule 1.(p15)

In such circumstances, the action of the Liquidator is totally unsustainable, therefore, we do not find any error in the order under challenge in which all the factors of this case have been thoroughly appreciated."

RESOLUTION PLAN

Jindal Stainless Ltd. Vs. Mr. Shailendra Ajmera, RP of Mittal Corp Ltd. & Ors., - Company Appeal (AT) (Insolvency) NO. 1058 of 2022

Judgment date: January 18, 2023 | NCLAT Principal Bench, New Delhi

Following the adoption of the Swiss Challenge Method to identify the optimal plan, it is not permissible for a Resolution Applicant to submit a revised plan.

"NCLAT set aside the impugned order of NCLT and held that there can be no fetter on the power of the CoC to cancel or modify any negotiation with the Resolution Applicant including a Challenge Process but it is the wisdom of the CoC to take a decision in that regard. CoC, in the facts of the present case, did not take any decision to disregard the Challenge Process completed in 13th CoC meeting held on 15.07.2022 and it decided to vote on the plan which voting process has begun.

Hon'ble Supreme Court judgment in Ngaitlang Dhar Vs. Panna Pragati Infrastructure Pvt. Ltd. & Ors. fully supports the case of the Appellant that after adoption of Swiss Challenge Method to find out the best plan one Resolution Applicant cannot be allowed to submit a

revised plan. It is well settled that the timeline in the IBC has its salutary value and it was the wisdom of the CoC which decided to vote on the Resolution Plan after completion of Challenge Process and not to proceed to take any further negotiation or further modification of the plan, that decision ought not to have been interfered with."

Soneko Marketing Pvt. Ltd. Vs. Girish Sriram Juneja & Ors.

Judgment date: September 18, 2023 | NCLAT Principal Bench, New Delhi

Requirement of approval by Competition Commission of India (CCI), prior to the approval of Resolution Plan by the CoC, is mandatory or directory under the proviso to Section 31(4) of IBC

"Looking to the timeline provided in the Code and that of the Competition Act and to hold that prior approval of CCI is required prior to approval of Plan by the CoC, mandatorily will lead to adverse effect on the CIRP. We may, however, observe that even if the requirement of approval by the CCI, prior to approval by the CoC is held to be 'directory', that does not mean that provision of Section 31(4) is not to be complied with. The proviso to Section 31(4) is clear as to what was contemplated was approval by the CCI prior to approval of CoC. Hence, in all cases the law has to be complied with. It cannot be held that since provision is there, approval by CCI has to be obtained prior to approval of Plan by the Adjudicating Authority. We have noticed above the judgments of this Tribunal where it has been laid down that approval by CCI, prior to approval by the CoC is 'directory' because there is no consequences provided for non-compliance of Section 31(4) proviso.

Section 31, sub-section (4) proviso has to be read to mean that though the approval by the CCI is 'mandatory', the approval by the CCI prior to approval of CoC is 'directory'."

Mr. Ramneek Goel Vs. Mr. Sunil Bajaj - Company Appeal (AT) (Insolvency) No. 845 of 2023

Judgment date: August 8, 2023 | NCLAT Principal Bench, New Delhi

Whether CoC can take the decision to re-publish Form G(EOI) prior to expiry of 330 days of CIRP time limit even if one Resolution Plan is available for consideration

"There can be no dispute to the law laid down by the Hon'ble Supreme Court in Essar that 330 days is the maximum period provided by the Code for the completion of CIRP. The present is a case where 300 days were expiring on 15.04.2021 and prior to expiry of the 300 days period, a decision was taken to re-publish Form-G. The CoC has reason to take a decision since they received an email from Respondent No.1 offering higher value. The objective of the IBC is to maximize the value of the Corporate Debtor and decision taken by the CoC to re-publish Form-G cannot be faulted in the facts of the present case.

The Appellant was only a Resolution Applicant and cannot have any vested right that it is his application alone, which should be voted and approved. The CoC has ample jurisdiction under the IBBI Regulations, 2016.

The Adjudicating Authority had not committed any error in granting extension of 90 days period after expiry of 300 days to complete the process. Exclusion of time granted by Adjudicating Authority in the facts of the present case cannot be held to be erroneous and uncalled for."

Ocean Capital Market Ltd. Vs. Uday Narayan Mitra Former RP of Arss Infrastructure Projects Ltd.- Company Appeal (AT) (Insolvency) No.514 of 2023

Judgment date: August 9, 2023 | NCLAT Principal Bench, New Delhi

The Adjudicating Authority possesses the requisite jurisdiction to return the Resolution Plan to the Committee of Creditors (CoC) for reevaluation of the amendments that the Successful Resolution Applicant had requested to be implemented.

"The present is a case where the Corporate Debtor is sought to be revived by a Resolution Plan which was approved by the majority. The Appellant's Resolution Plan value is Rs.432.90 Crore where the liquidation value of the Corporate Debtor was only Rs.147.11 Crores. The Successful Resolution Applicant has proposed an excess amount of Rs.285.79 Crores. The Resolution Applicant having himself expressed not insist for assignment of Personal and Corporate Guarantees and to be continued with the Dissenting Financial Creditors, the Adjudicating Authority ought not to have rejected the Resolution Plan and accepting the request of the Dissenting Financial Creditor ought to have remitted the plan to the CoC for reconsideration."

Noble Marine Metals Co WLL Vs. Kotak Mahindra Bank Ltd.- Company Appeal (AT) (Insolvency) No. 653 of 2022

Judgment date: February 9, 2023 | NCLAT Principal Bench, New Delhi

Send back a Resolution Plan to CoC for carrying out changes.

"The IDBI Bank who have approved the Resolution Plan was directed by the Adjudicating Authority to file an Affidavit in response to which Affidavit was filed on 22nd March, 2022 and further filed IA. No. 1507 of 2022 seeking permission of the Adjudicating Authority for placing Resolution Plan before the CoC for withdrawal of consent to Clause 4(b) and sub-clause 4(iii) of the Resolution Plan dealing with relinquishment of the rights of the secured creditor to enforce personal guarantee. The Adjudicating Authority has held that it is open to CoC to deliberate the Plan in accordance with law which directions cannot be faulted with more so when the Resolution Applicant himself consented before the Adjudicating Authority.

NCLAT held that the Adjudicating Authority if finds on given set of facts that parameters under Section 30(2)(e) have not been kept in view, the Resolution Plan can be sent back to the CoC to review such plan after satisfying the parameters. The above is the only situation provided by Hon'ble Supreme Court where the plan can be sent back.

Present is a case where reconsideration is being asked only with regard to clause which was included in the Resolution Plan relating to release of personal guarantee of the promoters which according to Committee of Creditors is not in accordance with law. The Adjudicating Authority has held that it is open to CoC to deliberate the Plan in accordance with law which directions cannot be faulted with more so when the Resolution Applicant himself consented before the Adjudicating Authority."

Express Resorts and Hotels Ltd. Vs. Amit Jain, RP, Neesa Leisure Ltd.- Company Appeal (AT) (Insolvency) No.1158 of 2022

Judgment date: February 9, 2023 |NCLAT Principal Bench, New Delhi

After approval by the CoC, any subsequent offer by any entity, who did not participate in the process earlier, cannot be entertained.

"When a Resolution Plan, has been approved after due deliberations, in exercise of commercial wisdom of the CoC, it has to be accepted that Corporate Debtor was decided to be revived by the Resolution Plan. The mere fact that certain other offers have been received after the approval of the Resolution Plan, CoC cannot have a change of heart and start clamoring before the Adjudicating Authority that they have no objection to sending back the Resolution Plan for reconsideration. This will be permitting an unending process, since by passing of time situation keeps on changing. After coming to know about the financial offer in a Plan, which has been approved by the CoC, any subsequent offer by any entity, who did not participate in the process earlier, cannot be entertained.

The CoC being satisfied that financial offer given by the Applicant is satisfactory, exercise their commercial wisdom, even CoC cannot be allowed to change its view, since it is bound by its own decision taken in approving the Resolution Plan."

Vistra ITCL (India) Ltd. Vs. Torrent Investments Pvt. Ltd. & Ors.- Company Appeal (AT) (Insolvency) No. 132, 133, 134 & 139 of 2023

Judgment date: March 2, 2023 | NCLAT Principal Bench, New Delhi

Even after completion of the Challenge Mechanism under CIRP Regulation 39(1A)(b), the CoC can retain its jurisdiction to negotiate with one or other Resolution Applicants, or to annul the Resolution Process and reissue RFRP

"The consideration by the CoC comes after the Plan is examined by Resolution Professional and presented before the CoC and thereafter, the deliberation by CoC begins in the presence of Resolution Applicants. The process of negotiations, thus, can commence only after Plan comes for consideration, when the Resolution Applicants are also present. The modification of Plan not more than once and improvement of Plan under Regulation 39(1A) completes before deliberation on the Plan. Thus, it can neither foreclose, nor prohibit negotiations. The Clauses in RFRP as noticed above reserve right to the CoC to negotiate and interact with one or all Resolution Applicants, which obviously is subsequent act, after Plan is received under Regulation 39(1A). Hence, Regulation 39(1A) cannot prohibit any negotiation or any further steps of the CoC. The view of the Adjudicating Authority that "no negotiation or value maximizatioin exercise can be individually undertaken by the CoC dehors the mandate of Regulation 39(1A)" is contrary to the Scheme delineated by the Code and CIRP Regulations."

Jaydip Ghosh, Director of suspended Board of Directors of Castal Extrusion Pvt. Ltd. Vs. Niraj Agarwal, RP of Castal Extrusion Pvt. Ltd.- Company Appeal (AT) (Ins) No.839/2022 with Company Appeal (AT) (Ins) No. 861/2022

Judgment date: July 24, 2023 |NCLAT Principal Bench, New Delhi

Change of business of the Corporate Debtor by the Successful Resolution Applicant is permissible in Resolution Plan

"Law is settled on the point that the suspended Board of Directors have got no locus to file an appeal against the approval of the plan by CoC and finally approved by the adjudicating Authority. It has already been held that an unsuccessful resolution plan applicant has got no vested right and also settled that acceptance of plan is commercial wisdom of the CoC. The provision particularly Section 5(26) of the IBC permits a resolution plan that entails restructuring. Similarly Regulation 37(ba) also permits restructuring, whereas Regulations 37(a) and (b) even permit for transfer of all or part of the assets and also sale of all or part of the assets of the CD. Only requirement is to see whether situation permits to do the same in the interest of the concerned creditors. It was commercial wisdom of the CoC to accept the plan which has been noticed by way of change of the business of the CD."

Vinay Jain Vs. AVJ Developers (India) Pvt. Ltd.- Company Appeal (AT) Insolvency No. 846 of 2023

Judgment date: August 23, 2023 | NCLAT Principal Bench, New Delhi

Resolution Plan approval application and PUFE/avoidance transaction applications

"The legislative intent is very clear that avoidance application is not to affect the proceedings in the CIRP. PUFE Applications are a different scheme of proceedings which has to be concluded to its logical act which shall have its consequences as contemplated in the statute. The Adjudicating Authority is well within jurisdiction to consider both the Resolution Plan Approval Application as well as PUFE Application but the Adjudicating Authority erred in observing that the consideration of Plan Approval Application has to be deferred and can be taken only after PUFE Applications are decided."

SVA Family Welfare Trust & Anr. Vs. Ujaas Energy Ltd. & Ors.- Company Appeal (AT) (Insolvency) No. 266 of 2023

Judgment date: August 21, 2023|NCLAT Principal Bench, New Delhi

Can Personal Guarantee be discharged in a Resolution Plan?

"While considering the provisions of the Code and the Regulations 2016, the Hon'ble Supreme Court in Vijay Kumar Jain vs. Standard Chartered Bank and Ors. noticed that the members of the erstwhile Board of Directors, who are often guarantors, are vitally interested in a Resolution Plan as such Resolution Plan then binds them. It was further observed that such plan may scale down the debt of the principal debtor, resulting in scaling down the debt of the guarantor as well.

The Hon'ble Supreme Court again in Lalit Kumar Jain v. Union of India (2021) held that sanction of a resolution plan does not per se operate as a discharge of the guarantor's liability. It was held that approval of a resolution plan does not ipso facto discharge a personal guarantor. The use of expressions 'per se' and 'ipso facto' clearly indicate that by approval of the Resolution Plan, personal guarantors are not per se and ipso facto discharge from its obligation which may arise of the guarantee given to the Financial Creditor. The use of above expressions conversely indicates that there may be situations and circumstances, for example, relevant clauses in the Resolution Plan by which personal guarantors may be discharged. The judgment of the Hon'ble Supreme Court in Lalit Kumar's case cannot be read to mean as laying down law that personal guarantee never can be discharged in a Resolution Plan.

There can be no dispute that Moratorium under Section 14 is not applicable on the personal guarantors. Non-applicability of the Moratorium on personal guarantor is with different object and purpose. Personal guarantors are liable along with the principal borrower and can be proceeded with for recovery of dues by the Financial Creditor but the question as to whether personal guarantee given to the Financial Creditor can be extinguished in a Resolution Plan is a question which is a separate question and was not under consideration by the Hon'ble Supreme Court in State Bank of India vs. V. Ramakrishnan and Anr. There is no error in the consideration of the CoC of the Resolution Plan and the commercial wisdom of the CoC by approving the Resolution Plan has to be given due weightage.

In the recent judgment in Edelweiss Asset Reconstruction Company Ltd. Vs. Mr. Anuj Jain RP (2023) the Financial Creditor of the Corporate Debtor aggrieved by the approval of the Resolution Plan has filed the Appeal. The grievance of the Appellant was that Appellant has security interest in land of the Corporate Debtor which was proposed to be sold in the Resolution Plan. The submission of the Appellant was negated by this Tribunal and it was held that such security interest by the Corporate Debtor could have been very well dealt in the Resolution Plan. The above judgment fully supports the submissions of the Appellant that security interest of dissenting Financial Creditor by virtue of personal guarantee of the ex-director of the Corporate Debtor could have been very well dealt in the Resolution Plan.

Each Financial Creditor has personal guarantee in their favour to secure the loan extended by them. All Financial Creditors has assented for relinquishment of such security except Bank of Baroda which had only 5.83% vote share. The decision of the CoC to accept the value for relinquishment of personal guarantee was a commercial decision of the CoC which cannot be allowed to be impugned at the instance of dissenting Financial Creditor. The present is a case where Financial Creditors have decided to relinquish personal guarantees given to secure the financial assistance granted to the Corporate Debtor by the Financial Creditors on payment of a particular value in the Resolution Plan."

Anil Kumar, Suspended Director, SK Elite Industries India Ltd. Vs. Jayesh Sanghrajaka, RP, SK Elite Industries India Ltd.- Company Appeal (AT)(Insolvency) No. 513 of 2023 & IA No.1666 of 2023 with Company Appeal (AT)(Insolvency) No. 753 of 2023

Judgment date: August 3, 2023 |NCLAT Principal Bench, New Delhi

Withdrawing liquidation application and allowing a Resolution Plan after decision to liquidate the Corporate Debtor without issuing fresh EOI

"Quite apart from the fact that no consequence of non-compliance to CIRP Regulation 36A has been provided for in the statutory construct of IBC, we are cognizant of the fact that the Resolution Professional did not rush in for consideration of the resolution plan but did so only after apprising the CoC and taking the approval of the Adjudicating Authority. Additionally, the language of CIRP regulation has to be read along with mandate and objective of the Code which clearly emphasizes reorganization and insolvency resolution of corporate debtor in a time bound manner.)

In terms of Section 31 of IBC, the scope of enquiry by the Adjudicating Authority is confined to scrutinizing whether Section 30(4) has been complied with or not. The decision as to whether the Corporate Debtor is to be revived or not by acceptance of a particular resolution plan is essentially a business decision and hence should be left to the CoC so long as it musters more than 66% vote share. Further the IBC provides that a plan which meets the conditions laid down in Section 30(2) and is approved by the CoC can be submitted to the Adjudicating Authority for its approval.

And it is here that primacy of the commercial wisdom of the CoC comes into play. The Adjudicating Authority must work within the framework of IBC which broadly aims at timely resolution of the Corporate Debtor for realising the maximum value while respecting the commercial wisdom of the CoC. The supremacy of commercial wisdom of the CoC has been reaffirmed time and again by the Hon'ble Supreme Court."

Hero Fincorp Ltd. Vs. M/s Hema Automotive Pvt. Ltd.- Company Appeal (AT) (Insolvency) No.1540 of 2022

NCLT is obligated to direct for liquidation only when decision of the CoC is in accordance with the IBC

"No doubt that in Section 33, sub-sections (1) and (2) legislature has used the expression "shall". However, the obligation of the Adjudicating Authority to direct for liquidation shall rise only when decision of the CoC is in accordance with the Code. Judicial review of the decision of the CoC in a particular case is not precluded. In Sreedhar Tripathy, it has been clearly held that judicial review of the decision of the CoC is not precluded and it depends on facts of each case."

CLAIMS

Peter Beck and Partner Vermoegensverwaltung GMBH Vs. Sharon Bio-medicine Ltd. & Ors. - Company Appeal (AT) (Insolvency) No. 912 of 2023

Judgment date: August 14, 2023| NCLAT Principal Bench, New Delhi

Assenting Financial Creditors are entitled for payment as proposed in Resolution Plan and the Dissenting Financial Creditor is entitled as the minimum amount prescribed in Section 30(2)(b) of IBC

"A dissenting Financial Creditor has submitted that there cannot be any discrimination in the payment to the unsecured Financial Creditors on the basis of their 'assent' and 'dissent'. The legislative history of the IBC and the amendments made therein indicate that legislature never intended any discrimination between one class of Financial Creditor. Liquidation value in the present case is nil.

It was held that the statute clearly contemplates that minimum payment to such creditor who do not vote in favour of the Resolution Plan as payable to such creditor in accordance with sub-section (1) of Section 53 in the event of a liquidation of the Corporate Debtor.

The priority in payment is a different aspect than the amount to which the creditor who does not vote in favour of the plan is entitled. The submission of the Appellant that there cannot be any discrimination with the payment to unsecured financial creditors who did not vote in favour of the plan and those who voted in favour of the plan cannot be accepted. Assenting financial creditors entitled for payment as proposed in the plan and dissenting financial creditor is entitled as per the minimum entitlement as per Section 30(2)(b)."

Vijay Kumar Gupta Vs. Canara Bank - Company Appeal (AT) (Ins.) No. 1015 of 2021

Judgment date: January 12, 2023 |NCLAT Principal Bench, New Delhi

Once a claim is admitted and submitted by the Liquidator to Adjudicating Authority, he shall have no jurisdiction to reject or make any modification in the claims

"There is no quarrel with the scheme provided under Section 38 to 42 of the Code about consolidation of claims, verification, rejection of claims and the appeal against the decision of the Liquidator but once the claim is admitted and submitted by the Liquidator to the Adjudicating Authority, if he receives any information, then he shall have no jurisdiction to reject or make any modification in the claims which has already been admitted in terms of Section 40 of the Code and has to approach the Adjudicating Authority for the purpose of its modification which precisely has been done in the present case by the Liquidator."

Jagdish Kumar Parulkar, RP of M/s Tayal Foods Pvt. Ltd. Vs. Vinod Agarwal Ex Director, M/s Tayal Food Pvt. Ltd.- Company Appeal (AT) (Insolvency) No.483 of 2022

Judgment date: February 16, 2023 | NCLAT Principal Bench, New Delhi

CIRP Regulations 35A is not mandatory

"Regulation 35-A requires a Resolution Professional to form an "opinion" if the corporate debtor has been subjected to an avoidance transaction. Such opinion is to be followed by a "determination" by the Resolution Professional qua such avoidance transaction. The idea behind the Resolution Professional to form an opinion and make a determination reflects that the Resolution Professional has to apply his mind to the suspicious avoidance transactions. In case the Resolution Professional determines that the corporate debtor is subject to the aforesaid transaction then it shall make an application to the Adjudicating Authority

It is commonsensical axiom that the time taken by a Resolution Professional to determine an avoidance transaction is dependent on a multitude of factors, including availability of information, co-operation from the erstwhile directors of the Corporate Debtor, cooperation from parties to the avoidance transactions, analysis by the transaction auditor, etc. Such factors often being outside the control of the Resolution Professional, there is therefore a distinct possibility of delay in making a determination, beyond the timelines specified in the CIRP Regulations."

Mr. Vijay Kumar Garg, Liquidator of Lance Vidarbha Thermal Power Ltd. Vs. Deputy Commissioner of Customs, Division-I, Nagpur- Company Appeal (AT) (CH) (Insolvency) No. 259 of 2023

Judgment date: August 18, 2023| NCLAT, Chennai Bench

Section 14(3)(b) allows for invocation of BGs.

"ABG Shipyard vs. Central Board of Indirect Taxes and Customs (2022) is distinguished on the basis that in the present case, the customs authorities are not recovering any amount on the basis of assessed customs/import duty, but the issue in the appeal is about invocation of the BG and FDRs. In the light of the judgment in the matter of V. Ramakrishnan & Anr. (supra) and of in the matter of Bharat Aluminium Co. Ltd. vs. M/s. J.P. Engineers Pvt. Ltd. & Anr.(supra), it is clear that section 14(3)(b) allows for invocation of BGs."

Deputy Commissioner, UTGST, Daman Vs. Rajeev Dhingra IRP for Radha Madhav Corporation Ltd.

Judgment date: September 14, 2023 |Principal Bench, New Delhi

After extended period of 90 days of the Insolvency Commencement Date, the IRP/RP is not obliged to accept the claim

"From a plain reading of the CIRP Regulation 12, RP can accept the claim as per extended period as provided in CIRP Regulation 12(2). After extended period of 90 days of the insolvency commencement date, the IRP/RP is not obliged to accept the claim. Prima-facie, the said CIRP regulation has not provided any discretion to RP for admitting their claim after the extended period.

When a resolution plan has already been received and approved by the CoC, we are inclined to agree that if the claims of creditors are accepted at a belated stage after the stipulated time provided for submitting claims, then the possibility of resolution plan failing to materialize becomes very high and tantamount to defeat the objectives of IBC making the CIRP a time bound process.

The Adjudicating Authority cannot substitute its views with the commercial wisdom of the CoC nor deal with the merits of Resolution Plan unless it is found it to be contrary to the express provisions of law and against the public interest."

Rohit Jindal Vs. Fanendra Harakchand Munot RP of Shree Siddhi Vinayak Ispat Pvt. Ltd. & Ors - Company Appeal (AT) (Insolvency) NO. 97of 2023

Judgment date: January 30, 2023 |NCLAT Principal Bench, New Delhi

Option for an aggrieved party is to approach Adjudicating Authority at the relevant time for challenging

"The promoters if they were aggrieved by the valuation taken by the IRP/RP and the valuation received before the CoC, the course open for the promoters was to approach the Adjudicating Authority questioning the valuation at the relevant time when the question could have been gone into and examined before Form-G was issued and Form-H has been submitted by the Resolution Professional on the basis of the valuation undertaken in the process. At this stage, appellant cannot be allowed to raise the question of valuation.

The statutory authorities have not come up in the appeal raising question with regard to their treatment as Operational Creditors. The judgment of Hon'ble Supreme Court was in the background that when the statutory authorities were questioning the treatment of the statutory authority as not secured creditors, the Hon'ble Supreme Court went into the issue and held that they are entitled to be treated as secured creditors. We, thus, at the instant of the appellant (the appeal was filed by promoter of the CD), cannot permit the appellant to assail the approval of the plan on the said ground."

V.K. Abdul Rahim Vs. Jasin Jose, RP/ Liquidator- Company Appeal (AT) (CH) (INS.) No. 299 of 2023

Judgment date: September 26, 2023 |NCLAT, Chennai Bench

Liquidator cannot accept belated Claims

"This Tribunal, is of the considered view that IBC is a time bound process and the Liquidator cannot accept a belated Claim, which would go against with the provisions of the IBC, 2016 as well as the scope and objective of the `Code'. It is also seen from the record that the Appellant had made every effort to derail the process and this Tribunal, does not find any substantial grounds to interfere with the well-reasoned order of the Adjudicating Authority."

AVOIDANCE APPLICATIONS

Arvind Garg Liquidator of Carnation Auto India Pvt. Ltd. Vs. Jagdish Khattar & Ors.- Company Appeal (AT) (Insolvency) No. 743 of 2020 & I.A. No. 258, 3473, 4401, 4361 of 2022

Judgment date: January 20, 2023 | NCLAT Principal Bench, New Delhi

Limitation Period for bringing LRs on record

LRs, including the widow of the deceased Promoter/Director of Corporate Debtor should be impleaded as a party in application under Section 43, 45, 50 & 66 of the IBC for avoidance of transactions

"In normal circumstances, as per the provision of Article 120 of the Limitation Act, 1963, after the death of Respondent No. 1 on 26.04.2021 the application for impleadment for LRs could have been filed up to 26.07.2021 but in the present case the death of Respondent was not

within the knowledge of the Appellant (Liquidator) and it cannot also be presumed that he knew about his death until and unless some cogent evidence is produced rather the factum of the death was brought before the Tribunal as well to the notice of the Applicant for the first time on 12.07.2021 without disclosing the details of LRs of the Respondent No. 1.

According to the aforesaid provision, a person who in law represents the estate of a deceased person and the person who intermeddles with the estate of the deceased are the LRs. The widow Ms. Kiran Khattar definitely represent the estate of the deceased in view of the fact that she is in class I heir as per schedule-I of Section 8 of the Hindu Succession Act, 1956 and insofar as Section 66 and 67 of the Code are concerned, the impact of the said provision about the transfer of the estate arising out of the fraudulent transaction is to be seen only after impleadment."

Mr. Shibu Job Cheeran, Suspended Director of CD Vs. Mr. Ashok Velamur Seshadri, iquidator of M/s. Archana Motors Ltd.- Company Appeal (AT) (CH) (Ins.) No. 350 of 2021 & IA No.727/2021

Judgment date: March 1, 2023 |NCLAT, Chennai Bench

Application under Section 66 of IBC- it must be shown that the Ex-Directors of the Corporate Debtor knew that the Company was insolvent but continued to run business with dishonest intentions

"Section 66 of the I & B Code, 2016, gives powers to the Adjudicating Authority to pass suitable orders, if it is found that any person has carried on the business of the Corporate Debtor with an intention to defraud its Creditors or other stakeholders. Section 66 also give powers to the Adjudicating Authority to give directions for making contribution to the assets of the Corporate Debtor. This also includes Directors of the Corporate Debtor, and their personal liability towards contribution, provided such Directors did not exercise due diligence or failed to take reasonable steps to minimize potential losses to the creditors when there was no possibility of avoiding the commencement of CIRP. However, a director can be deemed to have exercised due diligence, if such diligence was exercised as expected reasonably of a director carrying out a business in ordinary course of business."

Jagdish Kumar Parulkar, Liquidator for Kapil Steels Ltd. Vs. M/s Indore Steel & Alloys Pvt. Ltd.- Company Appeal (AT)(Insolvency) No. 802 of 2022

Judgment date: March 21, 2023 | NCLAT Principal Bench, New Delhi

Application under Sections 43, 45, 49 and 66 of IBC- negligence on the part of Corporate Debtor not to have executed the lease deed cannot be allowed to become a ruse for fraudulent transaction.

Mere possibility of a potential collusion without material on record is not sufficient to persuade this Bench to record any finding on preferential or fraudulent transaction.

"The Liquidator has therefore a fiduciary and legal responsibility to the Corporate Debtor, the creditors and the Court. Be that as it may, the Liquidator being an officer of the Court also has to display high level of professional maturity and a modicum of balance, fairness and restraint in the conduct of liquidation process and is not expected to show overzealousness or overreach in detecting traces of preferential/fraudulent/undervalued transactions in respect of interest in the property owned by a person who has acquired such interest from a public authority in good faith and for value. Since the Respondent No. 1 had secured the lease of the subject land from MPIDCL directly and in a transparent manner hence it cannot be said to be putting any person in a beneficial position or being prejudicial to the interests of the corporate debtor. The negligence on the part of the Corporate Debtor not to have executed the lease deed cannot be overlooked and cannot be allowed to become a ruse for fraudulent transaction. Mere possibility of a potential collusion without material on record is not sufficient to persuade this Bench to record any finding on preferential or fraudulent transaction."

Mr. Saptarshi Nath Vs. Kapil Dev Taneja, RP of Exit 10 Marketing Pvt. Ltd.- Company Appeal (AT) (Insolvency) No. 1356 of 2022

Judgment date: September 18, 2023 | NCLAT Principal Bench, New Delhi

After transactions were deemed preferential, could the directive for contributions to the Former Directors, as specified in the Challenged Order, have been legitimately issued under Section 44(1)(d) of the Code?

"Provisions of Section 66 of the Code provides that the Adjudicating Authority may ask any person who were knowingly parties to the carrying on fraudulent trading or wrongful trading liable to make such contribution to the corporate debtor as the Adjudicating Authority may deem fit. Thus under Section 66 of the Code the Adjudicating Authority can very well direct the Erstwhile Management/Directors to make contribution to the assets of the Corporate Debtor to any preferential transaction.

Hon'ble Supreme Court has occasion to consider provisions of Section 43, 44 of the Code in Anuj Jain IRP, Jaypee Infratech Ltd. Vs. Axis Bank Ltd.. the Hon'ble Supreme Court has held that under Section 44, the Adjudicating Authority may pass such orders as to reverse the effect of an offending preferential transaction.

Section 44(1)(d) contemplates a direction requiring any person to pay such sums in respect of benefits received by him from the Corporate Debtor. Thus direction can be given to a person who has received benefits from the Corporate Debtor."

Ashique Ponnamparambath Vs. Vibin Vincent, Liquidator of Koyenco Autos-Company Appeal (AT)(CH) (Ins.) No. 195/2023

Judgment date: September 21, 2023 |NCLAT, Chennai Bench

If the transfer of a property of the corporate debtor is made for the benefit of a creditor or a surety or a guarantor, such transaction would be 'preferential transaction', if it puts such creditor or surety or guarantor in a beneficial position and if such transactions are made within the 'relevant period'.

"We note that the transactions which are the subject of the Impugned Order were made during the period 18.11.2019 to 30.9.2021. Out of these, the transactions made between 22.6.2021 to 30.9.2021 which total Rs. 7,81,352 were all made within a period of two years immediately preceding the insolvency commencement date which is 6.10.2021. Therefore, and quite clearly, all these transactions are within the 'relevant period'. We further note that in the absence of any reason provided by the Appellant as to why such transfers were made in his favour from the account of the corporate debtor, it would be a safe and logical conclusion that he considers that the corporate debtor owed him these amounts. Therefore, in accordance with clause (a) of sub-section (2) of section 43, such transactions are clearly 'preferential transactions'. Further, the exception that is carved out in clause (a) of sub-section (3) of section 43 that if the transfer is made in the 'ordinary course of business' of the corporate debtor, such transactions would be considered outside the ambit of 'preferential transactions'. The Appellant in his reply before the Adjudicating Authority has not given any clarity or reason as to why such transactions were made and therefore, the benefit of this exception of the transactions having been made in the 'ordinary course of business' cannot be provided to the Appellant."

CONDONATION OF DELAY

Employees Provident Fund Organisation Vs. Nethi Mallikarjuna Setty- Comp App (AT)(CH)(Ins) No.49/2023 & IA No. 170 & I.A. No.171 of 2023 & I.A. No.172/ 2023

Judgment date: March 13, 2023 |NCLAT, Chennai Bench

Delay of 289 days as afforded by the Petitioner/Appellant from 10.03.2022 to 23.12.2022 in filing the instant Company Appeal cannot be condoned as there is no power to enjoin upon this Appellate Tribunal to condone not even a single day beyond the condonable period prescribed as per Section 61 of the Insolvency and Bankruptcy Code, 2016.

"Delay of 289 days as afforded by the Petitioner/Appellant from 10.03.2022 to 23.12.2022 in filing the instant Company Appeal cannot be condoned as there is no power to enjoin upon this Appellate Tribunal to condone not even a single day beyond the condonable period prescribed as per Section 61 of the Insolvency and Bankruptcy Code, 2016."

SECTION 10A

Nitin Chandrakant Desai Vs. Edelweiss Asset Reconstruction Ltd. & Anr.- Company Appeal (AT) (Insolvency) No. 1022 of 2023

Judgment date: August 1, 2023 |NCLAT Principal Bench

Default committed during the Section 10A period cannot be held to bar the CIRP application which is filed on the basis of default prior to Section 10A and subsequent to Section 10A period.

"The Adjudicating Authority has noticed and returned a finding that the default recorded in the NESL is 31.01.2020. The default on 31.01.2020 is obviously prior to the Section 10 A period. When default has been committed by the Corporate Debtor prior to Section 10A period, any default committed during the Section 10A period can not be held to bar the application which is filed on the basis of default prior to Section 10A and subsequent to Section 10A period."

Carissa Investments LLC Vs. Indu Techzone Pvt. Ltd.- Company Appeal (AT) (CH) (Ins) No.124/2022 (IA Nos. 289, 290, 291 & 941/2022)

Judgment date: August 8, 2023 | NCLAT, Chennai Bench

Whether the date of default admittedly being 31.03.2020, is in direct contravention to Section 10A, which in no uncertain terms prohibits an Application from being filed in respect of any default within a period of one year, i.e., from 25.03.2020 to 24.03.2021.

"The Hon'ble Apex Court in Ramesh Kymal versus M/s. Siemens Gamesa Renewable Power Pvt. Ltd, concluded that the embargo in Section 10A must receive a purposive construction which will advance the contention of the Learned Senior Counsel for Respondent No.2 that though the date of default is on 31.03.2020, Section 10-A will not be applicable is unsustainable in the light of the observations made by the Hon'ble Apex Court in the aforenoted Judgment.

The object of the legislation was to suspend the operation of Sections 7, 9 and 10 in respect of defaults arising on or after March 25th 2020 when the lockdown was disrupting normal

business operation. This Tribunal is of the considered view that the 'Explanation' removes any doubt by clarifying that the provisions of the Section shall not apply in respect of any default committed prior to 25.03.2020. In the instant case, admittedly, the date of default is 31.03.2020 and the ratio of the Hon'ble Apex Court in Ramesh Kymal (supra) regarding Section 10-A of the Code the object of which was sought to be achieved by enacting the Provision, is squarely applicable to the facts of this case. NCLAT concluded that for the aforegoing reasons this Appeal is allowed and the Impugned Order dated 07.02.2022 in CP (IB) No.207/7/HDB/20201 is set aside and consequently the admission of the Section 7 Petition is also set aside. The 3rd Respondent has filed the Status Report."

Narayan Mangal Vs. Vatsalya Builders & Developers Pvt. Ltd.- Company Appeal (AT) (Ins.) No. 294 of 2023

Judgment date: August 18, 2023 | NCLAT Principal Bench, New Delhi

Whether interest payments accrued during CIRP suspension period, as per Section 10A of IBC is to be deducted while computing the threshold limit of INR 1 crore as per Section 4 of IBC

"If the default is committed prior to Section 10A period and default continues there is no prohibition in initiating proceedings under Section 7 and we are not persuaded to accept the submission of the counsel for the respondent that the liability of interest which accrued during Section 10A period should be ignored or should not be computed in the amount while finding the threshold. Liability to pay interest which default committed prior to Section 10A period continues and is not obliviated by Section 10A."

Beetel Teletech Ltd. Vs. Arcelia IT Services Pvt. Ltd.- Company Appeal (AT)(Insolvency) No. 1459 of 2022

Judgment date: September 11, 2023 | NCLAT Principal Bench, New Delhi

Interest accrued during the CIRP suspension period as per Section 10A of IBC can be included in the threshold limit of INR 1 crore if the default was committed prior to the Section 10A period.

"A plain reading of Section 10A signifies that no application/ proceedings under Sections 7, 9 and 10 can be initiated for any default in payment which is committed during Section 10A period. Thus, what is essentially barred is initiation of CIRP proceedings when the Corporate Debtor commits any default during the Section 10A period. However, if the default is committed prior to the Section 10A period and continues in the Section 10A period, this statutory provision does not put any bar on the initiation of CIRP proceedings.

The aim and objective of Section 10A was to protect a Corporate Debtor from the filing of any insolvency application against it for any default committed during the period when Covid-19 pandemic was prevailing. It was never intended to cover any default which occurred before Section 10A period and continuing thereafter.

Since the default was committed prior to Section 10A period and the liability to pay interest having clocked prior to Section 10A period, we are of the considered opinion that the view taken by the Adjudicating Authority that the liability of interest which accrued during Section 10A period should be ignored or should not be computed for triggering CIRP is misconceived."

Raghavendra Joshi, Director of Khadkeshwar Hatcheries Ltd. Vs. Axis Bank Ltd. Company Appeal (AT) Insolvency No. 914 of 2023

Judgment date: 18th August 2023 | NCLAT Principal Bench, New Delhi

Corporate Debtor cannot avail the benefit of Section 10A of IBC where the date of default prior to 25.03.2020 and OTS proposal was withdrawn during the CIRP suspension period

"The focus of the law which was brought by Section 10A was that when the Corporate Debtor suffers default on account of Covid-19, they should be protected from the filing of any Insolvency Application in the default committed during the said period. 10. Section 10A never intended to cover the default which is continuing before Section 10A period. The present is a case where admittedly default has been committed by the Corporate Debtor since 2016.

Admittedly NPA was declared on 19th July, 2016. Learned Counsel for the Respondent has rightly referred to acknowledgement made by the Corporate Debtor in its balance sheets for the financial year 2018-19, 2019-20 and 2020-21 where the dues were clearly acknowledged. Thus, the present is the case where default was committed prior to commencement of Section 10A period."

[Judgement of the Hon'ble Supreme Court in Civil Appeal No. 4050 of 2020, "Ramesh Kymal Vs. M/s. Siemens Gamesa Renewable Power Pvt. Ltd., relied upon]

Pradeep Madhukar More Suspended Director of Syntex Trading & Agency Pvt. Ltd. Vs. Central Bank of India- Company Appeal (AT) (Insolvency) No.837 of 2023

Judgment date: September 26, 2023 | NCLAT Principal Bench, New Delhi

When event of default under the One Time Restructuring Agreement happens, the said event of default shall form the foundation of any legal action for the purpose of Section 10A of IBC

"When we look into Section 7 Application filed by the Corporate Debtor, the Application is not filed on a default under 10A period, rather it was filed on event of default, which has occurred under the One Time Restructuring Agreement dated 21.05.2021, which default occurred on 31.03.2022, when the Corporate Debtor failed to pay interest installments as well as principal installments, which were due by that time.

As per Clause 48 of the RBI Circular dated 06.08.2020, the asset classification of the borrower shall be downgraded to NPA with effect from 29.12.2020, which was an earlier date on which borrower has been classified as NPA. Clause 48 thus is with regard to asset classification of the borrower and as per Clause 48, even if default is committed under the Post Implementation Performance under the One Time Restructuring Agreement, the asset classification has to be downgraded as NPA from the date of default, which was committed before implementation of the Plan. In the present case, there was default committed before implementation of the Plan, as NPA was declared on 29.12.2020. Hence, in the present case, asset classification of the borrower has to be treated to be downgraded with effect from 29.12.2020. Clause 48, is thus only to be read with regard to downgrading to NPA for the relevant date and this Clause 48 is not relevant to find out event of default, which occurred under the One Time Restructuring Agreement and which is foundation of Section 7 Application."

CHANGE OF MANAGEMENT OF SUBSIDIARY

Amit Goel Vs. Piyush Colonizers Ltd. & Anr.- Comp. App. (AT) (Ins.) No.981 of 2023

Judgment date: August 7, 2023| NCLAT Principal Bench

Change of Management of subsidiary during pendency of application under Section 66 of IBC

"Power under Section 28(1)(j) of the IBC Code is a power vested with the Committee of Creditors with regard to the change in management of the subsidiary also. The fact that an Application under Section 66 is pending may not be a reason to prohibit the Committee of Creditors to take a decision as per the statute. We only observe that when IA 2425 of 2021 is heard and decided, the Adjudicating Authority shall not be influenced by the decision of the CoC taken on 09.07.2022 and applications shall be independently decided."

SHARING OF INFORMATION

Dauphin Cables Pvt. Ltd. Vs. Mr. Praveen Bansal, RP Abloom Infotech Pvt. Ltd.- Company Appeal (AT) Insolvency No. 971, 972 & 973 of 2023

Judgment date: September 11, 2023 |NCLAT Principal Bench, New Delhi

Adjudicating Authority is fully empowered to issue any direction to the Resolution Professional or any other party to give any information or evidence. The scheme of IBC does not indicate that all information collected by Resolution Professional has to be shared with Shareholders.

"There is statutory requirement that information shall not be shared with third party. Sub-Regulation 3 of Regulation 36 of CIRP Regulations, 2016 provides that a member of the Committee may request the Resolution Professional for further information of the nature described in this Regulation which Resolution Professional is obliged to provide. Further, Information Memorandum is shared to the Member of CoC after receiving an undertaking from the member of the committee that such member shall maintain confidentiality of the information and shall not use such information.

The scheme of IBC thus does not indicate that all information collected by the Resolution Professional has to be shared with Shareholders who asks for the information."

CONSOLIDATION OF CIRP

Girira Giriraj Enterprises v. Regen Powertech Pvt. Ltd. and Anr.

Judgment date: August 31, 2023 |NCLAT, Chennai Bench

Whether the businesses of RPPL and RISPL are intertwined and integrated and whether the criteria required for consolidation of these two CIRPs is met. Consolidation of CIRPs cannot be construed as an Equity Jurisdiction

"Keeping in view that the parameters set out in 'Radico Khaitan Ltd. vs. BT & FC Pvt. Ltd. & 6 Ors.' (Supra), 'Oase Asia Pacific Pte Limited Vs. Axis Bank and other Financial Creditors' (Supra) 'for Consolidation' with respect to common control, common directors, common liabilities, Interdependence and intricate links between the Companies (Para 58 of this Order) is largely and satisfactorily met; RPPL and RISPL can be treated as a single economic unit; the approval by CoC of RISPL, and having regard to the Report of the Mediator, Hon'ble Justice K. Kannan, appointed by the 'Adjudicating Authority', the recommendations dated 23/09/2019 of the WG constituted by IBBI; the extract of the Executive Summary dated 18/01/2023, published by the Ministry of Corporate Affairs, this Tribunal is of the considered view that Consolidation of the CIRPs be allowed and the Impugned Order of the 'Adjudicating Authority' dated 01/11/2021 is set aside.

A Resolution Plan of a parent Company necessarily deals with the assets of the parent Company which would include its shares in the Subsidiary Companies, so much so that a Successful Resolution Applicant would also receive the control of the Securities. Insolvency Jurisprudence is still evolving in India and there are situations where the destiny of one Company is linked with another and if such linked Companies are resolved together there may be maximisation of value of assets and the possibility of revival could be much higher."

[Cases referred:

Scottish Cooperative Society [1959] AC 324', in support of his case that it is the obligation of the holding company to take care of the interest of the subsidiary company.

Pratap Technocrats (P) Ltd. Vs. Monitoring Committee of Reliance Infratel Ltd.' reported in [(2021) SCC OnLine SC 569

Arunkumar Jagatramka Vs. Jindal Steel and Power Ltd.' reported in [(2021) 7 SCC 474]

K. Sashidhar Vs. Indian Overseas Bank' reported in [(2019) 12 SCC 150]Kalparaj Dharamshi Vs. Kotak Investments Advisors Ltd. & Anr.' reported in 2021 (10 SCC 401)

Vallal RCK Vs. Siva Industries and Holdings Limited' reported in [(2022) SCC OnLine SC 717]

'Pratap Technocrats (P) Ltd. Vs. Monitoring Committee of Reliance Infratel Limited and Anr.' in Civil Appeal No. 676/2021 wherein the Hon'ble Apex Court has held that the 'Adjudicating Authority' does not have 'Equity jurisdiction'.]

MISCELLENOUS

State Bank of India Vs. India Power Corporation Ltd

Judgment date: October 4, 2023 | NCLAT, Chennai Bench

Additional factual assertions, which were not initially pleaded in the main petition and were introduced in the rejoinder I will not be considered.

"When the Appellant/Petitioner sets up a case in the application filed either under Section 7, 9 or 10 of the Code then as per Rule 41 of the Rules, the Respondent shall specifically admit, deny or rebut the facts stated by the Applicant in his petition or application and state such additional facts as may be found necessary in his reply whereas it is provided in Rule 42 of the Rules that where the respondent states such additional facts as may be necessary for the just decision of the case, the Bench may allow the petitioner to file a rejoinder to the reply pertaining to those additional facts but it cannot set up a new case altogether which has not been set up by the Applicant in the main application as it would again require a reply by the Respondent and further rejoinder by the Applicant and the process will go and shall never come to end."

Diwakar Sharma Vs. Anand Sonbhadra RP of Shubhkamna Buildtech Pvt. Ltd.- Company Appeal (AT) (Insolvency) No. 1182 of 2023 & I.A. No. 4088 of 2023

Judgment date: October 5, 2023 |NCLAT Principal Bench, New Delhi

If the entire CIRP process is concluded when the Resolution Plan has been approved – then - any direction on the prayers made by non-party for copy of the resolution plan is uncalled for and unnecessary.

"Suffice it to say that the Appellant was not part of the CIRP. He himself submitted that in 2014 he resigned as Director. In so far as his submission that he is shareholder of the Corporate Debtor, Resolution Plan having been approved what are the rights of different stakeholders is subject matter of the plan.

The observation made in Association of Aggrieved Workmen of Jet Airways (India) Ltd. vs. Jet Airways (India) Ltd. & Ors. with regard to claim of the workmen who wanted copy of the Resolution Plan after its approval. In the above case this Tribunal held that after approval of the plan they were entitled to access the Resolution Plan and Resolution Professional was directed to provide relevant portion of the Resolution Plan which was relevant for the workmen. The said judgment cannot come to the aid of the Appellant in the present case who was not stakeholder in the CIRP process."

Raiyan Hotels and Resorts Pvt. Ltd. Vs. Unrivalled Projects Pvt. Ltd.- Company Appeal (AT) (Insolvency) No. 1071 of 2023 & I.A. No.3694 of 2023 with Company Appeal (AT) (Insolvency) No. 588 of 2023 & I.A. No.1956 of 2023

Judgment date: October 11, 2023 | NCLAT Principal Bench, New Delhi

Whether limitation for filing an Appeal under Section 61 of the IBC shall commence from the date of the order or from the date when contents of the order are known to the aggrieved party i.e. the date when copy of the order is received by an aggrieved party

"It is undisputed that the order was pronounced on 08.05.2023. The order clearly notices the presence of the Counsel who appeared on the date physically/ video conferencing. It is not denied by the Appellant that the order was pronounced on 08.05.2023. The submission of the Appellant that he came to know about the contents of the order only when order was received by an e-mail dated 02.06.2023 as noticed above. The Hon'ble Supreme Court in "V. Nagarajan" (supra) and "Kalpraj Dharamshi vs. Kotak Investxment Advisors Ltd." (supra) already held that the limitation for filing an appeal under Section 61 shall commence from the date of the order. We have already held while considering Question No.(i) that the limitation shall not commence when aggrieved party or Appellant came to know of the contents of the order."

Regional Provident Fund Commissioner, Vatwa, Employees Provident Fund Organization Vs. Shri Manish Kumar Bhagat, RP of Perfect Boring Pvt. Ltd.- Company Appeal (AT) (Insolvency) No. 808 of 2022

Judgment date: October 11, 2023 | NCLAT Principal Bench, New Delhi

Treatment of damages of EPFO u/s 14B of EPF & MP Act, 1952 imposed prior to initiation of CIRP and during the moratorium u/s 14 of IBC and NCLT's power to recommend Central Board to waive the damages.

"The law is well settled that Provident Fund Dues ought to be paid in full.

The challenge to assessment orders, made by EPFO in exercise of jurisdiction under 1952

Act cannot be subject matter of challenge in the proceedings under IBC. It is not necessary in this proceeding to issue any direction for payment of the damages as imposed subsequent to CIRP imposition of moratorium. When Insolvency Resolution Process has been initiated against a Corporate Debtor and Resolution plan has been approved under IBC, power of Central Board to reduce or waive the damages can be exercised with regard to the damages imposed under Section 14B.

NCLT/NCLAT in an appropriate case can make a recommendation as contemplated in paragraph 32B of Employees Provident Fund Scheme 1952, to the Central Board to waive the EPFO damages imposed u/s 14B."

Chinar Steel Segments Centre Pvt. Ltd. Vs. Samir Kumar Agarwal, Liquidator of Bhaskar Shrachi Alloys Ltd. & Anr. - Company Appeal (AT) (Insolvency) No. 1355 of 2022

Judgment date: October 11, 2023 | NCLAT Principal Bench, New Delhi

Electricity Supplier cannot deny granting fresh/restoring connection of electricity to the Successful Bidder

"The law is settled that an application can be entertained only when it raises a question which arises or relates to the insolvency of the Corporate Debtor.

In view of the law laid down by the Hon'ble Supreme Court in "Tata Power Western Odisha Distribution Limited" (supra), submission advanced on behalf of the R2- Damodar Valley Corporation cannot be accepted. The R2 cannot insist that unless the arrears of the electricity dues which dues were payable by the Corporate Debtor prior to disconnection are paid by the Appellant only then communication can be issued. The stand taken by the R2 is contrary to the law laid down by this Tribunal as well as the Hon'ble Supreme Court as noted above."

Dheeraj Raikhy Vs. Raheja Developers Ltd.- Company Appeal (AT) (Insolvency) No.1336 of 2023 & I.A. No.4741 of 2023

Judgment date: October 17, 2023 | NCLAT Principal Bench, New Delhi

Status of the allottee does not change by becoming a Decree Holder

"In view of the law laid down by the Hon'ble Supreme Court in Civil Appeal No.3806 of 2023, Vishal Chelani & Ors. vs. Debashis Nanda, it is now well settled that the status of the party i.e. allottee does not change and therefore the Adjudicating Authority has rightly concluded that threshold being not met one allottee cannot trigger the insolvency. We are of the view that rejection of Section 7 application cannot be faulted. "

Beetel Teletech Ltd. Vs. Arcelia IT Services Pvt. Ltd.- Company Appeal (AT)(Insolvency) No. 1459 of 2022

Judgment date: September 11, 2023 | NCLAT Principal Bench, New Delhi

Interest accrued during the CIRP suspension period as per Section 10A of IBC can be included in the threshold limit of INR 1 crore if the default was committed prior to Section 10A period

"A plain reading of Section 10A signifies that no application/ proceedings under Sections 7, 9 and 10 can be initiated for any default in payment which is committed during Section 10A period. Thus, what is essentially barred is initiation of CIRP proceedings when the Corporate Debtor commits any default during the Section 10A period. However, if the default is committed prior to the Section 10A period and continues in the Section 10A period, this statutory provision does not put any bar on the initiation of CIRP proceedings.

The aim and objective of Section 10A was to protect a Corporate Debtor from the filing of any insolvency application against it for any default committed during the period when Covid-19 pandemic was prevailing. It was never intended to cover any default which occurred before Section 10A period and continuing thereafter.

Since the default was committed prior to Section 10A period and the liability to pay interest having clocked prior to Section 10A period, we are of the considered opinion that the view taken by the Adjudicating Authority that the liability of interest which accrued during Section 10A period should be ignored or should not be computed for triggering CIRP is misconceived."

Devi Trading & Holding Pvt. Ltd. Vs. Mr. Ravi Shankar Devarakonda RP of Meenakshi Energy Ltd.- Company Appeal (AT) (CH) (Ins.) No. 308/2023 (IA Nos. 945 & 946/2023)

Judgment date: October 16, 2023 |NCLAT, Chennai Bench

CoC Power to decide the distribution methodology where the Successful Resolution Applicant provided only Financial Package

"It is crystal clear from the aforenoted proposition that the distribution/amount to be paid to different classes or sub-classes of Creditors in accordance with the provisions of the Code essentially lies within the domain of the commercial wisdom of the CoC. Therefore, the question as to whether the proposed Resolution Applicant has suggested the distribution Plan or whether the CoC has proposed and decided the distribution pattern, is of no relevance as far as it is within the four corners of Section 30 (2) of the Code and is supported by the commercial wisdom of the CoC. Needless to add, the CoC in its 41st Meeting held on 22/11/2022 discussed that the distribution mechanism to be either based on the ratio of admitted Claims or as per Section 53 of the Code, taking into account the value and priority of security interest of each of the Creditors, as provided for under Section 30 (4) of the Code. It is pertinent to note that the Appellant who had been a part of the CoC meetings did not raise any objections regarding the distribution methodology even when the distribution mechanism was voted by a majority of 93.43 %, to be done as per Section 53 of the Code, on 13/12/2022.

A deliberated 'Business Decision' of the CoC includes deliberations on the feasibility and viability, the financial and operational aspects of the Corporate Debtor, and therefore, the question of only 'considering' the proposal put forth by the Resolution Applicant cannot be viewed in a 'rigid manner'. The CoC is a pivotal decision-making body which decides all critical decision-making functions regarding Resolution Plans, Liquidation, Management etc., essential to the success of the CIRP. Though the IBC does not have a specific Provision that uses the term 'Business Decision' of the CoC, the Code contains several provisions that detail the powers and functions of the CoC, which encompass various decision-making responsibilities relating to the Insolvency Resolution Process, which definitely includes distribution methodology of the Resolution Plan. To say that only the Resolution Applicant should 'propose' the distribution and the CoC can only 'consider' it, is viewing the 'Business Decision' making capacity of the CoC in its commercial wisdom, in a very 'narrow compass,' thereby defeating the very scope and objective of the Code."

Jeevan Birje Parashram Vs. M/s. Kamal Metal Corporation & Anr. - Comp. App. (AT) (Ins) No. 1007 of 2023 & I.A. No. 3439 of 2023

Judgment date: August 8, 2023 |NCLAT Principal Bench, New Delhi

Corporate Debtor failed to appear and file any defence - cannot be allowed to raise factual issues and question the findings recorded by Adjudicating Authority

"Adjudicating Authority issued notice to the Corporate Debtor and asked the Corporate Debtor to file Reply. Inspite of serving of the notice, the Corporate Debtor did not appear and Corporate Debtor sent an e-mail to the Operational Creditor that they are looking forward to settle the matter and are in a dialogue with the Banker to get financial assistance.

When the Corporate Debtor inspite of ample opportunities does not appear and file any defense, we are of the view that such Corporate Debtor cannot be allowed to raise factual issues and question the findings recorded by the Adjudicating Authority. It is clear that the Corporate Debtor sent an e-mail that he wants to settle the matter and on that ground the matter was adjourned. The Adjudicating Authority called the Corporate Debtor to appear and issued notice, which was duly served. The counsel for the Corporate Debtor appeared and even then he did not file any reply. We are of the view that such Corporate Debtor cannot be allowed to now raise factual issue and contend that the claim was less than INR 1 Crore."

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 author:

Mukesh Chand, Senior Counsel **– Email –** *MukeshChand@elp-in.com*

ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

MUMBAI

9th Floor, Mafatlal Centre
Vidhan Bhavan Marg
Nariman Point, Mumbai 400 021
T: +91 22 6636 7000

DELHI NCR

NEW DELHI

DR Gopal Das Bhawan, 16th Floor,
28, Barakhamba Road,
New Delhi – 110 001.
T: +91 11 41528400

NOIDA

9th Floor, Berger Tower, Sector 16 B,
Noida, Uttar Pradesh - 201301.
T: +91 120 6984 300

AHMEDABAD

C-507/508, 5th Floor, Titanium Square
Thaltej Cross Roads, SG Highway,
Ahmedabad - 380054
T: +91 79460 04854

PUNE

202, 2nd Floor, Vascon Eco Tower
Baner Pashan Road
Pune 411 045
T: +91 20 4912 7400

BENGALURU

6th Floor, Rockline Centre
54, Richmond Road
Bengaluru 560 025
T: +91 80 4168 5530/1

CHENNAI

No 18, BBC Homes, Flat-7 Block A
South Boag Road
Chennai 600 017
T: +91 44 4210 4863

GIFT CITY

GIFT CITY Unit No. 605,
Signature, 6th Floor Block 13B,
Zone – I GIFT SEZ, Gandhinagar 382355

elplaw.in

insights@elp-in.com

/elplaw.in

/ELPIndia

/company/economic-law-practice

https://elppodcast.buzzsprout.com/