





**SINGH &
ASSOCIATES**

FOUNDER MANOJ K SINGH
ADVOCATES & SOLICITORS

Insolvency Round Up

 E-337, East of Kailash, New Delhi -110065, India

 +91 11 4666 7000 | +91 11 4666 7001

 india@singhassociates.in

 www.singhassociates.in

Contributors to the Issue

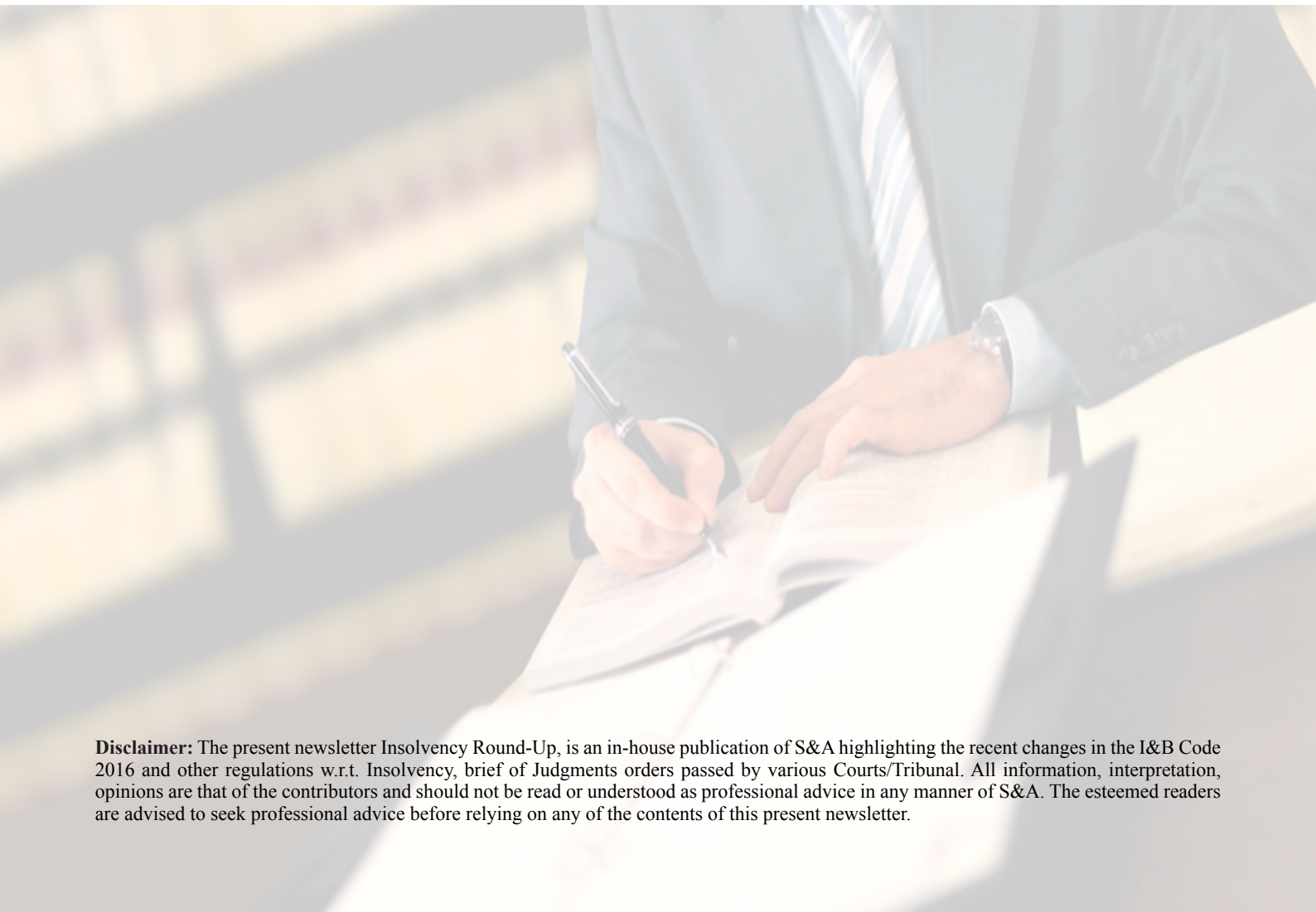
Manoj K. Singh

Daizy Chawla

Kumar Deep

Jatin Kapoor

Neha Mittal

A photograph of a person in a grey suit and striped tie, sitting at a desk and writing in a notebook with a pen. The background is blurred, showing what appears to be a library or office setting with bookshelves.

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



CIRCULARS/NOTIFICATIONS ISSUED BY IBBI

1. The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2020:

The Insolvency and Bankruptcy Board of India (“IBBI”) vide notification dated 07.08.2020 has notified the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2020 (“Amendment Regulations”) to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“Principal Regulation”) as per below:

(i) **Amendment in Regulation 4A which provides a choice of an authorized representative for a certain class of creditors:**

The Principal Regulations provides an Authorised Representative (“AR”) appointment by the Adjudicating Authority to represent financial creditors in a class, like allottees under a real estate project, in the creditors’ committee. For this purpose, the Regulations require the Interim Resolution Professional (“IRP”) to offer a choice of 3 Insolvency Professionals (“IP”) in the public announcement, and the creditors in a class to choose one of them to act as their authorized representative.

Now, a new clause (aa) has been inserted after clause (a) in Regulation 4A(2) vide this Amendment Regulation, which provides that the 3 IPs offered by the IRP must be from the State or Union Territory, which has the highest number of creditors in the class as per records of the corporate debtor. This will facilitate ease of coordination and communication between the AR and the creditors in the style he represents.

(ii) **Amendment in Regulation 16A(9) relating to voting instructions from creditors in a class by an authorized representative:**

As per Principal Regulations, the authorized representative shall seek voting instructions from creditors in a class at two stages, namely, (i) before the meeting; and (ii) after the circulation of minutes of the meeting.

Now, the Amendment Regulation provides that the authorized representative shall seek voting instructions only after circulation of minutes of meeting and vote accordingly. He shall, however, circulate the agenda and may seek preliminary views of creditors in the class before the meeting, to enable him to participate in the meeting effectively.

(iii) Amendment in Regulation 39, which provides a process for approval of resolution plan:

As per Principal Regulations, the Committee of Creditors (“CoC”) shall evaluate all compliant resolution plans per the evaluation matrix to identify the best of them and approve it.

Now, the Amendment Regulation provides that after evaluating all compliant resolution plans as per the evaluation matrix, the CoC shall simultaneously vote on all compliant resolution plans. The resolution plan, which receives the highest votes, but not less than 66% of voting share, shall be considered approved. Further, in the case where two or more resolution plans receive equal votes, but not less than requisite votes, then the CoC shall approve any one of them, as per the tie-breaker formula announced before voting. However, if there is a case where none of the resolution plans receives requisite votes, then the CoC shall again vote on the resolution plan that received the highest votes, subject to the timelines under the I&B Code.

2. Insolvency and Bankruptcy Board of India (Liquidation Process) (Third Amendment) Regulations, 2020:

The Insolvency and Bankruptcy Board of India (“IBBI”) vide notification dated 05.08.2020 has notified the Insolvency and Bankruptcy Board of India (Liquidation Process) (Third Amendment) Regulations, 2020 (“**Amendment Regulations**”) to amend the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (“**Principal Regulation**”) in the following manner:

(i) Insertion of Clarification after the Table under Regulation 4(2)(b) which provides provisions relating to Liquidator’s fee:

As per extant regulations, in the liquidation process, the fee payable to the Liquidator has to be fixed by the Committee of Creditors (CoC). Further, if the fee has not been fixed by the CoC, then the Liquidator’s fee has to be fixed as a percentage of the amount realized and the amount distributed by the Liquidator. However, there have been instances where a liquidator realizes the amount while another liquidator distributes the same to stakeholders. Accordingly, the newly inserted Clarification provides that where a liquidator realizes any amount but does not distribute the same, he shall be entitled to a fee corresponding to the amount realized. Similarly, where a liquidator distributes any amount, which is not realized by him, he shall be entitled to a fee corresponding to the amount distributed by him.

(ii) Amendment in the table of Model timeline for the liquidation process.

The Amendment Regulation provides amendment in the Model timeline for the liquidation process provided under Regulation 47 of the Principal regulation. Now, the amendment provides that in serial number 4, in column 2, for “Section 38 (1) and (5), Reg. 17, 18 and 21A”, the following shall be substituted, namely: - “Section 38 (1), Reg. 17, 18, 19, 20 and 21A”. Accordingly, the timeline for withdrawal/modification of

claim by a creditor under section 38(5) of the I&B Code has been deleted from serial number 4. The same has already been given in serial number 5. Further, in the serial number 4, the timelines of 30 days for Regulation 19 (Claims by workers and employees) and Regulation 20 Claims by other stakeholders) has also been inserted in the Amendment Regulation. In addition, the Amendment Regulation also provides that in serial number 18, in column 4, for the word “disclosure,” the word “disclaimer” shall be substituted. Accordingly, the notice to persons interested in the onerous property or contract may be given at least seven days before making an application to the Adjudicating Authority for disclaimer.

3. The Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Second Amendment) Regulations, 2020:

The Insolvency and Bankruptcy Board of India (“IBBI”) vide notification dated 05.08.2020 has notified the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Second Amendment) Regulations, 2020 to amend the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 by substituting Regulation 5 which provides provisions relating to the appointment of Liquidator. The amended regulation 5 provides that the corporate person may replace the Liquidator by appointing another insolvency professional as Liquidator by a resolution of members or partners, or contributories, as the case may be.

4. Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Second Amendment) Regulations, 2020

The Insolvency and Bankruptcy Board of India (“IBBI”) vide notification dated 30.06.2020, introduced an amendment in Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (“Regulations”) wherein in Regulation 12 “Recognition of Insolvency Professional Entities” sub-regulation (1), clause (a) has been substituted to read as

“12 (1) A company, a registered partnership firm or a limited liability partnership may be recognized as a professional insolvency entity, if–

(a) its sole objective is to provide support services to insolvency professionals”.

Before the amendment, the clause read as *“its sole objective is to provide support services to insolvency professionals, who are partners or directors, as the case may be.”*

Hence, now Insolvency Professional Entities (“IPEs”) can provide support services to not only their directors or partners but also to any other IPs as well, thus expanding their area of operation and role of the IPEs.



CIRCULARS ISSUED BY OTHER AUTHORITIES

1. Circulars/Notifications by Reserve bank of India

Fair Practices Code for Asset Reconstruction Companies

The Reserve Bank of India (“**RBI**”) vide notification dated 16.07.2020 issued guidelines on the Fair practice code for Asset Reconstruction Companies (ARCs), which inter alia includes that, to enhance transparency in the process of the sale of secured assets, the spirit of Section 29A of Insolvency and Bankruptcy Code, 2016 may be followed by ARCs in dealing with prospective buyers. Further, the ARCs are advised to put in place Fair Practices Code (FPC) duly approved by their Board.

2. Circulars/Notifications by Reserve bank of India

Securities And Exchange Board Of India (Issue Of Capital And Disclosure Requirements) (Second Amendment) Regulations, 2020

Vide notification dated 22.06.2020, SEBI introduced Regulation 164A “Pricing in the preferential issue of shares of companies having stressed assets” in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018.

As per the amendment, under sub-regulation (3) of Regulation 164A, conditions to be met by the issuer company making the preferential issue have been laid down, one of which states that the preference issue shall not be made to a person who is an undischarged insolvent in terms of the Insolvency and Bankruptcy Code, 2016. In addition to that, preference issue shall also not be made to a person who has been convicted for any offense punishable with imprisonment for two years or more under any Act specified under Twelfth Schedule XII of I&B Code. Some of the Acts under the abovementioned Schedule are the Reserve Bank of India Act, 1934, the Income-Tax Act, 1961, the Foreign Exchange Management Act, 1999, I&B Code, etc.



ORDERS UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016 WRT CORPORATE PERSONS

1. The Adjudicating Authority has the discretion to provide several opportunities for settlement of the debt.

Mr. Rakesh Wadhwan, Shareholder (Housing Development & Infrastructure Ltd.) Vs. Bank of India and Anr.

CA (AT)(Insolvency) No. 906 of 2019

The present appeal has been filed by Mr. Rakesh Wadhwan (“**Appellant**”), a shareholder of Housing Development & Infrastructure Ltd. (“**Corporate Debtor**”), to challenge the Order dated 20.08.2019 passed by the National Company Law Tribunal, Mumbai Bench (“**NCLT**”) whereby the NCLT has admitted the application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“**I&B Code**”) filed by Bank of India (“**Financial Creditor**”) against Corporate Debtor.

Before filing this present application, the Financial Creditor, in the year 2018, has filed application under Section 7 of the I&B Code for the initiation of the Corporate Insolvency Resolution Process (“**CIRP**”) of the Corporate Debtor. The said petition was withdrawn on the corporate debt proposal to settle the matter by One Time Settlement (OTS). However, the Corporate Debtor failed in making payment as per terms of OTS and committed default again. Due to which the Financial Creditor had revoked the OTS and called upon the Corporate Debtor to pay off the debt. Consequently, the Financial Creditor has filed this application second time, which has been admitted by the NCLT vide Order dated 20.08.2019. The Appellant has

challenged the admission of the application by the NCLT mainly on the ground that the impugned Order is in violation of the principles of natural justice by not allowing the Appellant Company to submit its Reply to the Company Petition/Application.

The NCLAT, after hearing both the parties, observed that the NCLT had granted several opportunities to the Corporate Debtor for arriving at a settlement, and the second application was filed after the non-adherence to the terms of OTS with the Financial Creditor. Further, in the second application, the NCLT has provided several opportunities to the Corporate Debtor considering the settlement's scope. However, after the failure of any hope of settlement, the Order of admission of the application for initiation of the CIRP of the Corporate Debtor has been passed by the NCLT. The NCLAT also observed no provision under the I&B Code, which provides several opportunities to Corporate Debtor in the hope of the settlement. However, in the present case, NCLT has tried his best to afford ample opportunity for both parties to settle the matter amicably. Therefore, the NCLAT held that the contention of the Appellant that the NCLT Order has been passed without affording an opportunity for filing Reply, in violation of the principle of natural justice, is without any basis. Hence, the appeal was dismissed.

2. Application filed under Section 7 of the I&B Code is barred by Article 137 of the Limitation Act; the Period of limitation commences from the date of default and not from the I&B Code's date of commencement.

Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Private Limited & Anr.

[Civil Appeal No. 6347 of 2019]

In a very recent judgment delivered by the hon'ble Supreme Court set aside an order passed by the National Company Law Appellate Tribunal ("NCLAT"), whereby NCLAT had rejected the plea of bar of limitation on the application filed by the Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code"), wherein the date of default was 08.07.2011.

The NCLAT order was based on two considerations, that is (i) that the right to apply under Section 7 of the I&B Code accrued to the respondent financial creditor only on 01.12.2016 when the I&B Code came into force and (ii) the period of limitation for recovery of possession of the mortgaged property is twelve years based on Article 61(b) of the Limitation Act, 1963, instead of Article 137. The Supreme Court observed that had failed to record any specific finding of the effect of these factors as well as the pendency of the application under Section 19 of The Recovery of Debts Due to the Banks and Financial Institutions Act, 1993 and the fact that corporate debtor had made a prayer for OTS in July 2018.

The judgment referred to various judgments and orders passed by the Hon'ble Supreme Court itself, the NCLAT, and the National Company Law Tribunal ("NCLT"), including *BK Educational Services Pvt. Ltd. v. Paras Gupta & Associates*. The Hon'ble Supreme Court held in the aforesaid judgment that the Limitation Act shall apply to applications made under Section 7 and 9 on and from the commencement of the I&B Code on 01.12.2016. The Supreme Court, through this judgment, clarified that proceedings under the I&B Code could not be initiated based on time-barred claims.

The court further went on to observe:

“The question as to whether the date of enforcement of the Code (i.e.,01.12.2016) provides the starting point of limitation for an application under Section 7 of the Code and hence, the application in question, made in the year 2018, is within limitation, is not even worth devoting much time. A bare look at paragraph 21 of the impugned Order leaves nothing to guess that the Appellate Tribunal’s observations had only been assumptive without any foundation. Without any basis, There is nothing in the Code to even remotely indicate if the period of limitation for an application under Section 7 is to commence from the date of commencement of the Code itself. Similarly, nothing provided in the Limitation Act could be taken as the basis to support the proposition, so stated by the Appellate Tribunal. Such observations had been in the teeth of law declared by this court in B. K. Educational Services (supra).”

On a conjoint reading of Section 238-A, inserted vide amendment and the decision in B. K. Educational Services, the Supreme Court reiterated that the limitation provided in Article 137 governs the application under Section 7 of the I&B Code. It was erroneous on the part of the NCLAT to apply any other Article of Limitation Act for Section 7 application. The Supreme Court hence rejected the Section 7 application being barred by limitation. It lifted the moratorium, giving way to the stalled proceedings to be taken up and dealt with by the respective Courts/Tribunals/Authorities.

3. NCLT orders direct dissolution of the corporate debtor in the absence of any assets to satisfy claims

Mr. Prakash Tekwani, Liquidator of M/s Swayam Metals Limited

[IA 371 of 2020 in CP (IB) No. 500/7/NCLT/AHM/2019]

Pursuant to an interim application filed by the Liquidator, the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad (“NCLT”), ordered the direct dissolution of the corporate debtor without appointing any auditor to verify any transaction or any valuer, to avoid any extra financial burden on the corporate debtor, as pleaded by the Liquidator. Since there was only one unsecured financial creditor of the corporate debtor and there were no assets to satisfy their claims, nor was the company performing any operations for almost 8-10 years, hence based on the above and the submission of the report of the Liquidator of the whole affairs, the NCLT order the dissolution of the Corporate Debtor and instructed the Liquidator to be intimate the ROC.

4. Resolution Plan leading to retention of Promoter and Managing Director’s shareholding and control in the management amount to back door access

Bank of Baroda, On behalf of Committee of Creditors of Veda Biofuel Ltd. v. Mr. Sisir Kumar Appikatla, Resolution Professional for Veda Biofuel Ltd. & Ors

[Company Appeal (AT) (Insolvency) No. 579 of 2020]

A Restructuring Plan based on an agreement between Mr. Madhusudhan (one of the Resolution Applicants) and Mr. P. Vijay Kumar, the erstwhile Promoter and Managing Director of the Veda Biofuel Ltd (“**Corporate Debtor/CD**”), was approved as the Resolution Plan by the Committee of Creditors (“**CoC**”) thus leading Mr. P. Vijay Kumar to continue to hold a substantial stake in the new management under the Restructuring Plan. The said approval was viewed by the National Company Law Tribunal, Amaravati Bench (“**NCLT**”) as a method of seeking backdoor access and non-compliant with the requirements of Section 30(2) of the I&B Code. NCLT held that the restructuring plan was disguised into a Resolution Plan to retain the majority shareholding and effective control of Mr. P Vijay Kumar in the corporate debtor and hence declined to approve the Resolution Plan passed the Order of liquidation of the CD.

In this appeal filed on behalf of the CoC, the National Company Law Appellate Tribunal (“**NCLAT**”), in light of the provision of Section 29A, observed that the Successful Resolution Applicant should not be ineligible to submit Resolution Plan and the approved Resolution Plan must comply with Section 30(2) of I&B Code.

NCLAT further observed that a promoter or a person in the management or control of the business of the corporate debtor during the implementation of the Resolution Plan falls within the expression ‘connected person’ and persons who contribute to the default of company must be excluded from submitting a Resolution Plan or acquiring the assets of the CD when pushed into liquidation. Hence, in view of the above, NCLAT refused to interfere with the Order of NCLT and dismissed the appeal.

5. NCLT reserves the right to order further valuation to satisfy itself

Asset Reconstruction Company (India) Ltd. Vs. Corporation Ltd. & Ors.

[CA (AT)(Ins) No. 418/2020]

While dismissing an appeal filed against the Order of the Ld’ National Company Law Tribunal (“**NCLT**”), directing fresh valuation before approving or rejecting the Resolution Plan approved by the Committee of Creditors (“**COC**”), the Hon’ble National Company Law Appellate Tribunal (“**NCLAT**”) observed that they did not find any need to interfere with the impugned Order, since no party has a right to question whether the NCLT should go for further valuation. The NCLT has all the rights to satisfy itself of the Resolution Plan approved by the COC.

6. NCLT orders liquidation against Corporate Debtor despite pending proceedings under PMLA, 2002

M/s. Nathella Sampath Jewelry Private Limited

[MA/1147/2019 & MA/547/2018 in CP/129/IB/CB/2018]

In the given matter, an application filed by the Resolution Professional (“**RP**”) before the National Company Law Tribunal, Division bench, Chennai (“**NCLT**”) for Order of liquidation of the Corporate Debtor (“**CD**”) was pending owing to other proceedings pending before the authorities under Prevention of Money

Laundering Act, 2002 wherein the Enforcement Directorate had ordered attachment of 37 properties of the CD, directors, guarantors after initiation of the Corporate Insolvency Resolution Process. The RP filed an MA before the NCLT to order liquidation since the CIRP period of 330 days had already expired, and the proceeding under the PMLA had also come to a standstill. The NCLT on RP's request ordered the liquidation of the CD, deeming it to be a fit case for liquidation and further observed that such an Order of liquidation shall not affect the proceedings pending under the PMLA and the defaulting management of the CD.

7. Simultaneous proceedings allowed under SARFAESI Act, 2002, as well as under the I&B Code.

Punjab National Bank v. M/s Vindhya Cereals Pvt. Ltd.

[CA (AT) (Ins) No. 854/ 2019]

An appeal was preferred against the Order of the Adjudicating Authority, which stated that the Financial Creditor has already initiated parallel proceedings under the SARFAESI Act, 2002 while filing the present proceedings under the I&B Code, which amounts to forum shopping and directed the Financial creditor to show cause as to why it should not be penalized under section 65 of the I&B Code

Questions considered before NCLAT:

1. Whether Financial Creditor can initiate parallel proceedings under SARFAESI Act, 2002 as well as under I&B Code
2. Whether filing of similar proceedings attracts proceedings under Section 65 of the I&B Code.

NCLAT held that the Financial Creditor could proceed simultaneously under SARFAESI Act, 2002, and under I&B Code. However, in view of section 238, the provisions of the I&B Code shall have an overriding effect over other laws. The Financial Creditor has initiated parallel proceedings against the Corporate Debtor in SARFAESI Act as well as Code, only on this ground it cannot be inferred that proceedings against the Corporate Debtor are fraudulent or malicious. Accordingly, the Order passed by the Adjudicating authority was set aside.

8. Liabilities claimed after the entire resolution plan has been implemented cannot be admitted.

State of Haryana through Excise & Taxation Officer-cum-Assessing Authority Mewat Vs. Uttam Strips Ltd and ors

[Company Appeal (AT) (Insolvency) No. 319 of 2020]

Present appeal is filed against the Order of the Adjudicating Authority whereby it has passed an order stating that the claims of the Applicant is highly belated and cannot be looked into at the stage where the entire Resolution Plan has been implemented

In the present case, the Appellant, i.e. (Excise & Taxation Officer-cum-Assessing Authority), came to know about the CIRP initiated against the Assessee/Corporate Debtor subsequently it served the Assessment order, along with the tax demand notice, upon the corporate debtor. The Appellant could not file the claims before the NCLT within the prescribed time limit due to the IRP's non-cooperation and the declaration of Legislative Assembly Elections in Haryana. Subsequently, it filed an application under Section 60(5) of the I&B Code seeking directions against the Resolution Professional to accept its claim as an Operational Creditor and modify the Resolution Plan by incorporating the statutory dues of the Appellant, but the Adjudicating Authority dismissed the said application

NCLAT observed that the statutory dues are operational debts. Once the NCLT approves a resolution plan, the treatment of all stakeholders, including Operational Creditors, is to be determined as per the terms of the approved Resolution Plan and further, it was of the view that the Appellant had not properly filed its claim before the Resolution Professional up to the prescribed time limit. Since the Appellant failed to submit its claim before the Resolution Professional and the approved Resolution Plan was implemented. Accordingly, it upheld the adjudicating authority's Order and dismissed the present application with no cost.

9. Restoration of an e-way facility for filing of GST returns

Abhijit Guhathakurta R.P. for the 13 Videocon Group Vs. Central Goods & Services Department

[MA-4048/2019 In CP No. 02/I&BC/NCLT/MB/MAH/2018]

This application was filed by the Resolution Professional of the Corporate Debtor for seeking directions to the Central Goods and Services Department with regard to

1. Restore the e-way facility to enable the Applicant to file Central Goods and Servicing Department returns on behalf of the Corporate Debtor.
2. Accept the manual/physical filing of Central Goods and Services Department returns; and
3. Refrain from taking any coercive actions, including the cancellation/suspension of the registration and/or blockage of an e-way facility to file GST Department returns of the Corporate Debtor.

The Adjudicating Authority observed that while the GST laws do not restrict GST's deposition for a month if the prior GST dues are not paid, the online portal restricts the same. It directed the GST Department to accept manual monthly returns along with physical GST deposits for the moratorium period and restore the e-way facility for the ling of the GST returns. So that it ensures the compliance of the Corporate Debtors of the GST Laws

10. Without proper authorization, in the board resolution, CIRP cannot be initiated against the corporate debtor.

Rushabh Civil Contractors Private Limited Vs. Centrio Lifespaces Limited

[CP (IB) 2161/MB/C-IV/2019]

This present application is filed under section 7 of I&B Code by Rushabh Civil Contractors Private Limited (“the Financial Creditor”), represented by its Director, Mr. Easwaran Viswanathan Iyer, based on a Board Resolution dated 14.05.2019 seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Centrio Lifespaces Limited (“the Corporate Debtor”).

The aforesaid Board Resolution on which CIRP was initiated states that the Financial Creditor’s Board never authorized the Director to initiate CIRP against the Corporate Debtor but to represent the company, concerning the business affairs to the property of the company. The Corporate Debtor has rightly argued that the present petition is filed without any authority. This Bench has consistently taken the stand that for initiating CIRP against the corporate debtor, specific board resolution is required rather than a general one. It is in the interest of justice that consistency in approach is maintained. Therefore, we are of the considered opinion that without proper authorization, CIRP cannot be initiated against the Corporate Debtor.

11. One-sided invoices or e-mails cannot be a substitute for a mutual agreement

Logwell Logistics & Aviation Services (OPC) Limited Vs. Velankani Electronics Private Limited

[CP (IB) No. 10/BB/2020]

This present application is filed under section 7 of I&B Code by Logwell Logistics & Aviation Services (OPC) Limited (“the Operational Creditor”), under section 9 of I&B Code seeking initiation of CIRP against Velankani Electronics Private Limited (Corporate Debtor)

After hearing through Video Conference, the adjudicating authority observed a delay in making payment to the Operational Creditor. But there were no such documents that specify the existence of any agreement between the parties regarding the terms of the payment. Similarly, with reference to the Invoices, there was nothing to specify that the Corporate Debtor had agreed to pay 24% interest in case of any delay in payment. In the absence of any specific Agreement and expressly laid out terms, there cannot be a default for delayed or non-payment of the amounts raised through invoices. The operational creditor does not have the right to charge interest as per their choice. One-sided Invoices or E-mails cannot be considered as a mutual agreement. Further, it is also well settled that the provisions of the I&B Code cannot be invoked for the recovery of outstanding amounts but can be invoked to initiate CIRP for justified reasons as per the I&B Code.

In the present case, adjudication observed that the operational creditor has attempted to use the I&B Code only to recover its amounts from a solvent company. Accordingly, considering the facts, the application was dismissed as it is clearly against the spirit of the I&B Code.

12. Section 7 application liable to be accepted in case of “determination of default.”

The Jammu & Kashmir Bank Limited v. Vinayak Rathi Steels Rolling Mills Private Limited

[(IB) 1295 (ND)/2019]

The National Company Law Tribunal, New Delhi (“NCLT”), admitted the application under Section 7 of the I&B Code submitted by the financial creditor (“FC”) of the Corporate Debtor (“CD”), as the CD had failed to repay the credit facility. In the given case, the CD accepted that the facility was extended, and the CD had failed to repay. However, it was contended by the CD that the FC had taken possession of the property mortgaged against the said facility (“**said property**”) and leased out the said property on rent and started realizing monthly rental. Further, the CD argued that if the said property were sold then, the sale proceeds would be sufficient to liquidate the debt. The NCLT refused to accept the contentions of the CD and admitted the insolvency application of the FC. The NCLT observed that the moment it was established that there is the default in payment of the financial debt by the CD and other conditions under the I&B Code are fulfilled. The Adjudicating Authority must admit the application on account of the determination of default by the CD.

13. Sealing of Corporate Debtor’s property by Municipal Corporation after imposition of the moratorium violates I&B Code

Clutch Auto Ltd.

[CA-1432(PB)/2019 & CA-1433(PB)/2019 in (IB)- 15(PB)/2017]

The Hon’ble National Company Law Tribunal (“NCLT”) ordered the Municipal Corporation to de-seal the Corporate Debtor property since the Corporation sealed the property during the continuance of moratorium in violation of the moratorium imposed under Section 14 of I&B Code. The NCLT further asked the Liquidator to consider the claim application of the Corporation w.r.t tax unpaid by the corporate debtor.

In another application filed by the Liquidator, a request was made to the NCLT for directions to be issued to the respondent to relinquish their security interest over the corporate debtor’s assets to the liquidation estate. The NCLT, while dismissing the application, held that since the respondents did not have any intentions of relinquishing their security interest and chose to opt out of Section 53 of the I&B Code, hence the Liquidator was liable to consider their claim in the manner as provided under Section 52.

14. Resolution Plan approved by NCLT can be challenged only as per Section 61(3) of I&B Code, 2016

Kundan Care Products Ltd. v. Surya Kanta Satapathy & Ors.

[CA(AT)(Ins) No. 11 & 75/2020]

The Hon’ble National Company Law Appellate Tribunal (“NCLAT”) rejected the appeal filed by the Appellant (another Resolution Applicant) against the Ld’ National Company Law Tribunal (“NCLT”)

approving the Resolution Plan for the Corporate Debtor submitted by the Successful Resolution Applicant. The Appellant submitted that the Resolution Applicant did not allow them to submit a revised and financially enhanced Resolution Plan. The evaluation process was conducted by the RP in a closed, non-transparent manner without affording an opportunity of hearing to the Appellant. However, the RP and the Successful Resolution Applicant contended that the Resolution Applicant did not have any right for renegotiation or further negotiation. After submission of the Resolution Plan, if it is found in Order and according to Section 30(2), it must be placed before the Committee of Creditors.

The NCLAT held that since the Resolution Plan approved by the Adjudicating Authority can be challenged only on the ground as mentioned in Section 61(3) and the Appellant did not have any cause of action under the said provision; hence the Resolution Plan was duly approved by the Committee of Creditors and required no intervention.

15. Employees not entitled to gratuity, if no fund created by the Employer

Mr. Savan Godiwala Vs. Mr. Apalla Siva Kumar

[CA (AT)(Ins) No. 1229/2019]

In the given matter, the Liquidator filed an appeal before the Hon'ble National Company Law Appellate Tribunal ("NCLAT") against the Order of the Ld' National Company Law Tribunal ("NCLT") which had observed and ordered that the Liquidator could not avoid the liability to pay gratuity to the employees on the ground that the Corporate Debtor ("CD") didn't have separate funds for payment of gratuity and further directed the Liquidator to provide sufficient provision for payment of gratuity, according to the eligibility of the employees.

The employees contended that Section 36(4)(a)(iii) of the I&B Code excluded the gratuity dues of the employees from the liquidation estate assets. Hence, under Section 53 of the I&B Code, the waterfall mechanism would not apply to the payment of gratuity dues, and such payment of the same should be paid in priority to any payment made under the waterfall mechanism. Whereas it was the argument of the Liquidator that the CD did not maintain a separate fund for payment of gratuity to its employees. Thus it could not be paid from the running accounts of the CD and that out of the many employees who had applied, most of them had left the organization, much before the commencement of the insolvency resolution process period, thus ripping them off of their eligibility to avail gratuity.

NCLAT, while ruling in favor of the Liquidator, held that the Gratuity funds did not form part of the Liquidation Estate and since there was no fund created by the company towards payment of gratuity hence, the Liquidator could not be directed to make the payment to the employees because the Liquidator had no domain to deal with the properties of the CD which are not part of the liquidation estate.

16. Managing Director of Corporate Debtor liable to face the trial in his capacity for an offense under tax laws

Mr. Savan Godiwala v. Mr. Apalla Siva Kumar

[CA (AT)(Ins) No. 715/2020]

In the given matter, a criminal case was filed by the Income Tax Office against the Corporate Debtor (“CD”) and the Managing Director (“MD”) of the CD, as he was the person responsible and in charge of day to day affairs of the CD and hence liable for the offense of deduction of TDS but not depositing the tax deducted to the Government account within the stipulated period. The MD sought directions to be issued to the Liquidator to keep on priority the funds required for payment of compounding fees on behalf of the CD before concerned authorities and filed an appropriate application for either closing of proceedings pending or permitting MD to pursue and prosecute the Criminal Complaint and further directions to the Liquidator to reimburse compounding fees to the MD. However, the Hon’ble National Company Law Appellate Tribunal held that since the prosecution was launched against the CD before the initiation of CIRP as well as against the Managing Director in his capacity, therefore, even after the liquidation proceedings had been started, the MD had to face the trial in his capacity and be punished as ordered by the Income Tax Authorities.

17. HC stays Order of NCLT admitting insolvency application against MSME for want of meeting the threshold of the default amount.

Pankaj Aggarwal v. Union of India

[W.P.(C) 3685/2020 & CM APPLs. 13194/2020, 13195/2020, 13196/2020]

The writ petition was filed by the Corporate Debtor (“CD”) against whom the National Company Law Tribunal (“NCLT”) had admitted the insolvency application. The two contentions of the CD were that it is a company registered under the Micro, Small and Medium Enterprises Act, 2006, and the insolvency application was admitted by NCLT on the basis that the default amount was more than INR 1 lakh. The CD argued that the minimum amount of default was increased from INR 1 lakh to INR 1 crore, and thus the NCLT had exceeded its jurisdiction.

The Hon’ble High Court of Delhi stayed the Order passed by the NCLT and observed that the purpose of the amendment was to ensure that SMEs and MSMEs are not subjected to insolvency proceedings during the lockdown or immediately after that as they may have faced a setback to their businesses. The CD was required to make the deposit of the default amount with the Registrar General of the Court.

18. The Appellate Authority cannot interfere with the wisdom of CoC in approving a resolution plan.

Maharashtra State Electricity Transmission Company Limited v. Sri City Private Limited & Ors.

[CA (AT)(Ins) No. 1401/2019]

Maharashtra State Electricity Transmission Company Limited (“**Appellant**”) has filed the appeal before the National Company Law Appellate Tribunal (“**NCLAT**”) against the Order dated 17.10.2019 passed by the National Company Law Tribunal, Hyderabad Bench (“**NCLT**”). The NCLT vide this Order has approved the Resolution Plan submitted by a consortium of Sri City Private Limited and KCR Enterprises LLP (“**Resolution Applicants**”) in the Corporate Insolvency Resolution Process (“**CIRP**”) of Sai Wardha Power Generation Limited (“**Corporate Debtor**”) initiated by Indian Opportunities III Pte Limited under the Insolvency and Bankruptcy Code, 2016 (“**I&B Code**”).

The Appellant submitted that the Appellant had entered into a Bulk Power Transmission Agreement (“**BPTA**”) with the Corporate Debtor on 28th February 2012 for allocation of 135.15 MW of Transmission Capacity Rights through the transmission network of the Appellant for 25 years as per Maharashtra State Electricity Regulatory Commission (“**MERC**”) Transmission Open Access Regulation, 2005. As the approved Resolution Plan provides provisions relating to termination of the long term BPTA between the Appellant and Corporate Debtor, the Appellant has filed this appeal challenging the Order on the ground that termination of the said agreement ex-parte and arbitrary. The Appellant also claimed that the MERC is the only and appropriate forum to adjudicate matters pertaining to Energy Agreements, including termination of the BPTA.

The NCLAT, after hearing all the parties and relying on the judgment of the Hon’ble Supreme Court in the matter of Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta (C.A. No.8766-67 of 2019 dated 15th November 2019) observed that in case Resolution Plan which has been accepted by the Committee of Creditors (“**CoC**”) in its commercial wisdom cannot be found fault even if such Plan includes termination of the long time agreement. NCLAT also referred Section 238 of the I&B Code, which provides that provisions of I&B Code override other laws. Accordingly, the NCLAT dismissing the appeal held that there would be no fault if the resolution plan approved by the CoC provides provision of the termination of BPTA between the Appellant and Corporate Debtor.

19. A decree passed by DRT or any suit is not an acknowledgment of debt for limitation.

Sh G Eswara Rao v. Stressed Assets Stabilisation Fund & Anr.

[CA (AT)(Ins) No. 1097/2019]

The present appeal has been filed before the National Company Law Appellate Tribunal (“**NCLAT**”) to challenge the Order dated 1st October 2019 passed by the National Company Law Tribunal, Amaravathi Bench, Hyderabad (“**NCLT**”), which admitted the application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“**I&B Code**”) filed by Stressed Assets Stabilisation Fund (“**Financial Creditor**”).

to initiate the Corporate Insolvency Resolution Process (“**CIRP**”) against Saritha Synthetics and Industries Ltd. (“**Corporate Debtor**”).

Mr. G Eswara Rao, Shareholder & Director of the Corporate Debtor (“**Appellant**”), has filed this appeal to challenge the Order of the NCLT on the ground that Application under Section 7 of I&B Code was barred by limitation. However, NCLT was of the view that the application was not barred by limitation due to the reason that the Debts Recovery Tribunal-I, Hyderabad (“**DRT**”) has allowed the application of recovery of debt with pendent lite and future interest at the rate of 12% per annum vide order dated 17th August 2018.

The issues that have been raised before the NCLAT in this appeal was to consider whether the application under Section 7 of the I&B Code was barred by limitation and whether the Order of decree passed by the DRT on 17th August 2018 can be taken into consideration to hold that application under Section 7 of I&B Code is within three years as prescribed under the provisions of Limitation Act, 1963.

The NCLAT, after heard Appellant and Respondents, observed that in the present case, the Corporate Debtor had defaulted to pay the dues prior to 2004, due to which application before DRT had been filed by the Financial Creditor and decree, was passed by the DRT. NCLAT was of the view that the judgment and decree passed by DRT only suggest that debt becomes due and payable, and it does not shift forward the date of default as decree has to be executed within a specified period. The NCLAT also referred to the case of Binani Industries Limited vs. Bank of Baroda & Anr. [Company Appeal (AT) (Insolvency) No.82 of 2018] wherein it was held that CIRP is not a recovery proceeding. Further, the NCLAT also of the view that by filing an application under Section 7 of the I&B Code, a decree cannot be executed. Hence, NCLAT set aside the Order of the NCLT and held that decree passed by DRT or any suit is not an acknowledgment of debt.

20. The Corporate Debtor would not be liable for any offense committed prior to the commencement of the CIRP.

Tata Steel BSL Limited & Anr. v. Union of India & Anr.

[WP (CRL) 3037/2019]

The present petition has been filed before the High Court of Delhi at Delhi by Tata Steel BSL Limited, formerly known as Bhushan Steel Limited (“**Petitioner**”) to quash the impugned Order dated 16.08.2019 passed by the Trial Court in the matter of ‘Serious Fraud Investigation Office v. Bhushan Steel Limited,’ whereby the Trial Court had taken cognizance of the offenses punishable under the Companies Act, 2013; offenses punishable under the Companies Act, 1956 and; certain offenses under the Indian Penal Code, 1860. The Petitioner also impugned the summons dated 21.08.2019, issued by the learned ASJ to the Petitioner.

It has been submitted that the Petitioner (which was Corporate Debtor) has been acquired by Tata Steel Limited in the Corporate Insolvency Resolution Process (“**CIRP**”) initiated on an application filed by a financial creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“**I&B Code**”) and as per

Resolution Plan of Tata Steel Limited approved by the Committee of Creditors on 20.03.2018 and by National Company Law Tribunal (“NCLT”) vide its Order dated 15.05.2018. It is also submitted that in terms of the Resolution Plan, the management of the Petitioner has been taken over by new promoters, which are not connected with the previous management. In this regard, the Petitioner further submitted that in terms of Section 32A of the I&B Code, the Petitioner must be discharged from the aforesaid proceedings.

The High Court observed that in terms of the express language of the provisions of Section 32A of I&B Code, a Corporate Debtor would not be liable for any offense committed prior to commencement of the CIRP. Thus, Corporate Debtor would not be prosecuted if a resolution plan has been approved by the NCLT. Accordingly, the High Court allowed the petition and set aside the impugned Order and summons dated 16.08.2019 and 21.08.2019. The High Court has also clarified that this Order will not affect the prosecution of the erstwhile promoters or any of the officers who may be directly responsible for committing the offenses in relation to the petitioner company’s affairs.

21. The High Court is not obliged to intervene in each and every Order of the NCLT.

Kotak Investment Advisors Limited & Anr. v. Mr. Krishna Chamadia & Ors.

[WP (L) No. 3621/2019]

Kotak Investment Advisors Limited (“**Petitioner**”) filed a writ petition before the High Court of Bombay against the Order of the National Company Law Tribunal, Mumbai Bench (“**NCLT**”), which has approved the resolution plan submitted by a consortium of Kalparaj Dharamshi and Rekha Jhunjunwala in the Corporate Insolvency Resolution Process (“**CIRP**”) of Ricoh India Limited (“**Corporate Debtor**”) under the Insolvency and Bankruptcy Code, 2016 (“**I&B Code**”).

The Petitioner submitted that the Committee of Creditors erred in approving the resolution plan submitted by Kalparaj Dharamshi and Rekha Jhunjunwala’s second-highest bid, whereas the Petitioner’s bid was higher. Further, the NCLT has approved the resolution plan without hearing the Petitioner’s objections and violating natural justice principles.

The High Court, after hearing the matter, has rejected the submission of the Petitioner citing a provision of Sections 32 and 61 of I&B Code, which provides that an aggrieved party can approach the National Company Law Appellate Tribunal (“**NCLAT**”) to file an appeal against an NCLT order approving a resolution plan. The High Court observed that it would be highly unsafe to allow an appeal in light of the efficacious remedy under these sections. The court also observed that the High Court’s scope to entertain writ jurisdiction in exceptional cases does not oblige it to consider appeals against all orders passed by the NCLT. Hence, the High Court dismissed the petition by holding that I&B Code provides an alternative and efficacious option to an aggrieved party for filing an appeal with the NCLAT.

22. The Appellate Authority is not liable to direct Promoters to provide clean money.

Shameek Breweries Pvt. Ltd. v. Manoj Kumar Agarwal & Anr.

[CA (AT)(Ins) No. 843/2019]

The National Company Law Tribunal, Mumbai Bench (“**NCLT**”) vide Order dated 10.04.2019 approved the withdrawal of application filed by ‘SREI Infrastructure Finance Ltd. (“**Financial Creditor**”) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“**I&B Code**”) against Sterling SEZ & Infrastructure Ltd. (“**Corporate Debtor**”). The application for withdrawal had been moved by the Promoters of the Corporate Debtor under section 12A of I&B Code, which has also been approved by the Committee of Creditors (“**CoC**”) with 92% voting share. Subsequent to the Order of withdrawal, the Ministry of Corporate Affairs (“**MCA**”) moved an application before the NCLT alleging that the promoters were absconding, and the Enforcement Directorate had also initiated proceedings against them. Considering various allegations leveled against the Promoters, the NCLT had recalled its earlier Order of withdrawal and restored the Corporate Insolvency Resolution Process (“**CIRP**”) of Corporate Debtor vide Order dated 26.04.2019.

In furtherance to the recall order passed by the NCLT, one of the Financial Creditors, namely, Shameek Breweries Pvt. Ltd. (“**Appellant**”) filed this present appeal before the National Company Law Appellate Tribunal (“**NCLAT**”) against the recall order with a prayer to direct the promoters to provide clean money as per the terms of withdrawal. The NCLAT has observed that the Promoters have not challenged the impugned Order dated 26th April 2019 and are not aggrieved against the Order of recall. Accordingly, NCLAT has dismissed the appeal by holding that it is not inclined to direct Promoters to provide clean money.

23. The allottees of the residential project are not allowed to fraudulently and maliciously initiate the CIRP with a purpose other than resolution.

Navin Raheja v. Shilpa Jain & Ors.

[Company Appeal (AT)(Ins) No. 864/2019]

The shareholder/ Promoter of the corporate debtor challenged the Order of Adjudicating authority before the Hon’ble National Company Law Appellate Tribunal (“**NCLAT**”) where pursuant to an application by two allottees in a residential project; the Adjudicating Authority vide its Order dated 20.08.2019 ordered and initiated Corporate Insolvency Resolution Process (“**CIRP**”) of the Corporate Debtor (“**CD**”).

The Appellant challenged the Order of Adjudicating Authority alleging fraudulent and malicious initiation of CIRP by the two allottees with a purpose other than resolution. The Hon’ble NCLAT, while deciding the case, noted that despite the flat being offered by the CD, the two allottees wanted a refund of the amount with more interest, and they refused to take the actual amount in terms of agreement between CD and allottees.

The Hon'ble NCLAT set aside the Adjudicating Authority's Order with an observation that the application filed by the allottees under section 7 of the I&B Code was fraudulent with malicious intent and allottees are liable to penalty under section 65 of I&B Code. However, in the facts and circumstances of the case, the appellate tribunal decided not to impose such penalty on allottees, who, even in the presence of this Appellate Tribunal, refused to accept the money in terms of the agreement and also refused to take possession of the flat.

Hon'ble Appellate Tribunal in its Order further observed that considering such fraudulent applications by some allottees, the recently promulgated Ordinance requires the application to be filed jointly by a not less than one hundred of such creditors in the same class or not less than ten percent of the total number of such creditors in the same class, whichever is less.

Before admitting such a case, it would be desirable to find out whether the allottees have come for a refund of the money or to get their apartment/ flat/ premises by way of resolution. Suppose the allottees' intention is only for the refund of money and not the possession of apartment/ flat/ premises. In that case, the 'Corporate Debtor' may bring it to the Adjudicating Authority's notice as held by the Hon'ble Supreme Court in "Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors".

24. An Insurer cannot terminate the Insurance of the Corporate Debtor as, during the CIRP, the Corporate Debtor is to continue as a going concern.

Shyam Pradhan & Anr. v. Ananda Chandra Swain

[Company Appeal (AT)(Ins) No.15/2020]

In the present case, the Hon'ble NCLAT while hearing the plea of the Appellant, being an Insurance Company, who had insured the corporate debtor and wanted to terminate the insurance merely because the Corporate Insolvency Resolution Process ("CIRP") has been initiated against the corporate debtor, upheld the Order of Adjudicating Authority and observed that as during the CIRP, the Corporate Debtor is to continue as a going concern; therefore the Adjudicating Authority has correctly vided its Order dated 27.11.2019 directed the insurer to continue with the insurance as the Corporate Debtor is to continue as a going concern. If any amount is payable during the 'Corporate Insolvency Resolution Process' towards the Insurer's installment, the 'Interim Resolution Professional' shall take care of the same.

25. The Adjudicating Authority in law is not empowered to order an investigation directly.

Vijay Pal Garg & Ors. v. Pooja Bahry

[Company Appeal (AT)(Ins) No. 949/2019]

In an instant case, an appeal was filed on being aggrieved against the Order of Adjudicating Authority dated 19.07.2019, which directed the Central Government to order an investigation into the affairs of the Corporate Debtor under Section 210(2) of the Companies Act, 2013. The Order was passed on the ground that

voluminous documents and vouchers have been filed by the parties in support of their contentions. It was held that the proceedings before the adjudicating authority are summary in nature. It is not possible for the adjudicating authority to conduct an in-depth investigation and examine the documents and averments' veracity. However, without an in-depth investigation, it would not be possible to arrive at a correct appraisal of the State of Affairs of the Corporate Debtor and adjudicate upon the RPRP's allegations.

The Learned Counsel for the Appellants challenged the Order of adjudicating authority before Hon'ble NCLAT stating that the Adjudicating Authority, exercising limited powers as per I&B Code, cannot direct an investigation into the affairs of a Company. It was also represented on behalf of the Appellants that the Adjudicating Authority's direction in the impugned Order was beyond the ambit of the relevant provisions invoked by the former Resolution Professional against the Appellants.

The Hon'ble NCLAT, after hearing the pleas of both the parties and keeping in mind a prime fact that the Tribunal/Adjudicating Authority is guided by the Principles of Natural justice and is to follow the procedure prescribed u/s 213(b) of the Companies Act observed that the Adjudicating Authority is not empowered to order an investigation directly to be carried out by the Central Government. The Tribunal as competent authority under section 213 of the Companies Act, 2013, has an option to issue a notice in regard to allegations leveled against the promoters and others (including the Appellants) after following the due procedure enshrined under section 213 of the Companies Act, 2013. In case a prima facie case is made out, the Adjudicating Authority may refer the matter to the Central Government for investigation by an inspector, based on which, if any action is required, the Government, through the SFIO, may proceed in accordance with the law. If an investigating authority, after completion of an investigation, concludes that any offense punishable in terms of section 213 read with 447 of Companies Act or under sections 68, 69, 70, 71, 72, 73 of I&B Code is/are made out, then, the Central Government may refer the matter to the Special Court itself or may even require IBBI or to authorize any person as per section 236(2) of I&B Code to file a complaint against the company.

In view of the above, the appellate authority varied the impugned Order dated 19.07.2019 passed by the Adjudicating Authority and referred the matter to the Central Government for investigation through any inspector. Accordingly, Hon'ble NCLAT referred the matter to the Secretary, Ministry of Corporate Affairs, Government of India, in investigating by the Inspector or Inspectors by following the due procedure as per Section 213 of the Companies Act, 2013, etc. If the matter needs to be examined by the 'Serious Fraud Investigation Office,' the Central Government may do so in the case of fraud is made out and proceed further in accordance with the law.

26. Provisions of Section 61(2) of the Insolvency & Bankruptcy Code shall override Section 5 of the Limitation Act.

Radhika Mehra v. Vaayu Infrastructure LLP & Ors.

[CA (AT)(Ins) No. 121/2020]

In the instant case post admission of CIRP against the Corporate Debtor by the Adjudicating Authority vide Order dated 30.08.2019, the Appellant, being one of the partners of Corporate Debtor, filed a writ petition before Hon'ble High Court challenging the Order of the Adjudicating Authority which initiated CIRP. The said writ petition was dismissed by Hon'ble High Court as withdrawn and granted liberty to the Petitioner to file an appeal and raise the contentions before the Hon'ble NCLAT.

Thereafter the Appellant filed an appeal before the Hon'ble NCLAT, with an application seeking exclusion of time of proceeding bona fide spent in court without jurisdiction under section 14 of the Limitation Act, 1963. The Hon'ble NCLAT, while hearing the Appellant, observed that Section 14 of the Limitation Act relates to the exclusion of time of proceeding bona fide in court without jurisdiction. Still, it relates to a period of limitation for any suit the time during which the plaintiff had been prosecuting with due diligence another civil proceeding. Also, the other provision of Section 14 of the Limitation Act cannot be made applicable in this appeal preferred under Section 61 of the I&B Code.

Further relying on provisions of section 238 of I&B Code, the Hon'ble NCLAT held that section 61(2) of the I&B Code should override section 5 of the Limitation Act. The Hon'ble Appellate Authority concluded that as the appeal was filed after 45 days from the date of receipt of the Order, according to Section 61(2) of the I&B Code, it has no jurisdiction to entertain the appeal.

27. Section 35(1)(f) of the I&B Code provides power to Liquidator to sell the property of the corporate debtor in liquidation by public Auction, Therefore, was no need for adjudicating authority to direct the Liquidator for considering the proposal of other bidders who have approached the Adjudicating Authority after the due date of finalization of Auction.

State Bank of India v. Maithan Alloys Limited

[Company Appeal (At) (Insolvency) No.1245 – 1247 Of 2019]

In the instant case before the Hon'ble Appellate Tribunal, the Appellant was the Financial Creditor of the Corporate Debtor (under liquidation). On account of the Corporate Insolvency Resolution Process having failed, the adjudicating authority directed the Corporate Debtor's liquidation to sell it as a going concern. Pursuant to which the Liquidator pushed an e-auction notice for going concern sale by calling for bids.

Respondent No. 1 in the present appeal came out to be the successful bidder in the second round of e-auction for purchase of Corporate Debtor as a going concern and paid 25% of the bid amount INR 68 crore.

Moving further Respondent No. 2 to Respondent No. 4 in the present appeal, who were not the participant in the e-auction, sometime later after the finalization of e-auction offered a higher INR amount 70 crores. Considering the higher bid in tune with the I&B Code's objectives, i.e., maximization of the value of assets of the corporate debtor, the Adjudicating Authority ordered the Liquidator to accept their offer.

In the meantime, the Respondent No. 1 made the statement that the successful bidder wants to withdraw their offer and purchase of the corporate debtor and requested the Liquidator to return the amount it had paid in the initial bid. The Adjudicating Authority, through a separate order, directed the Liquidator to return the amount with interest to Respondent No.-1.

This led to the financial creditor to make an appeal under section 61(1) of the I&B Code before the Hon'ble NCLAT challenging the orders of the Adjudicating Authority. The Hon'ble Appellate Authority, after hearing the plea of all parties, concluded that there was no need for the Adjudicating Authority to direct the Liquidator for considering the proposal/offers made by Respondent No. 2 to Respondent No. 4, who approached the Adjudicating Authority after the due date of finalization of e-auction. According to the provisions under Section 35 (1) (f) of the I&B Code, Liquidator has the power to sell the property of the corporate debtor in liquidation by public Auction, therefore there was no need for adjudicating authority to direct the Liquidator for considering the proposal of Respondent No. 2 to Respondent No. 4 who approached the Adjudicating Authority after the due date of finalization of Auction.

Further Hon'ble NCLAT observed no provision in the terms and conditions of Auction to withdraw from the auction process once agreed by the successful bidder (i.e., Respondent No.-1 in the present case. Therefore it is a case of unilaterally canceling the contract due to the involvement of R-2 to R-4 and which has thereby put the liquidation process into jeopardy.

The Hon'ble NCLAT allowed the appeal of financial creditor and directed Respondent No. 1 to complete the sale transaction and further imposed a fine of INR 10 lakh on Respondent No. 2 to Respondent No four each for hampering and derailing the liquidation process.

NOTES



SINGH & ASSOCIATES

FOUNDER MANOJ K SINGH
ADVOCATES & SOLICITORS



+91 11 4666 7000 | +91 11 4666 7001



india@singhassociates.in



www.singhassociates.in

NEW DELHI

E-337, East of Kailash
New Delhi – 110065, India

GURUGRAM

7th Floor, ABW Tower, MG Service Road
Sector 25, IFFCO Chowk
Gurugram – 122001, India

MUMBAI

Unit No. 101, 10th Floor
Sakhar Bhavan, Plot No. 230
Ramnath Goenka Marg
Nariman Point, Mumbai - 400021, INDIA

BENGALURU

Condor Mirage, 101/1, 3rd Floor
Richmond Road, Richmond Town
Bengaluru - 560025, INDIA