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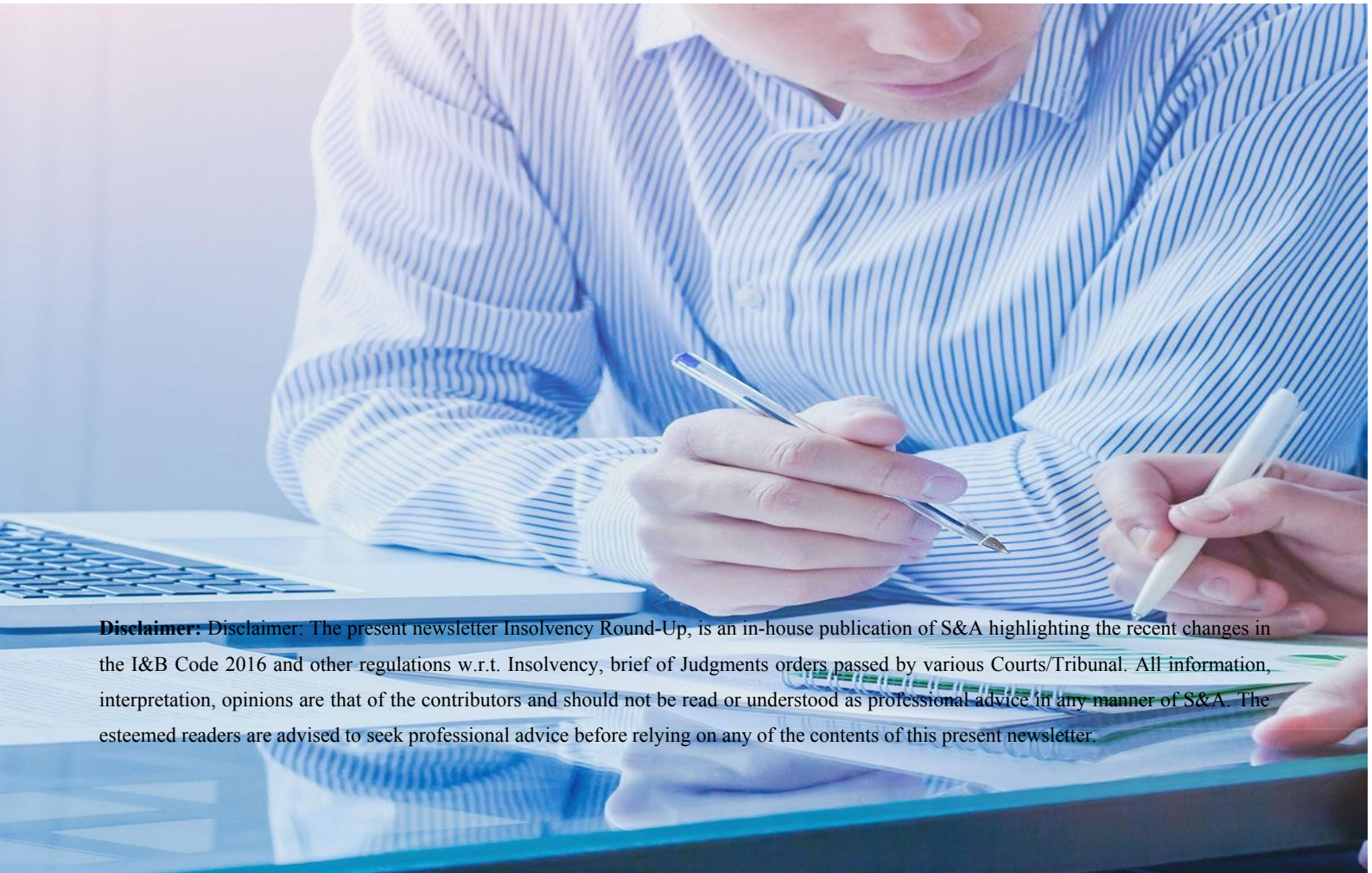
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Regulation 40B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations") require an interim resolution professional (IRP) / resolution professional (RP) to file a set of forms (CIRP 1 to CIRP 6) within 7 days of completion of specific activities to enable monitoring progress of CIRP. However, since no form is required to be filed until the related activity is completed, hence to make the monitoring of the progress of CIRP easier, IBBI vide its Circular dated 18th March 2021 has provided under Regulation 40B of CIRP Regulations for filing of Form CIRP 7 within 3 days of the due date of completion of any activity if the said activity is delayed, and continue to file Form CIRP 7 every 30 days until the said activity remains incomplete.

It is to be noted that subsequent filing of Form CIRP 7 shall not be made until 30 days have lapsed from the filing of an earlier Form CIRP 7.

3. Insolvency and Bankruptcy Board of India (Insolvency Professional) (Amendment) Regulations, 2021

Insolvency and Bankruptcy Board of India ("IBBI") vide Notification dated April 27, 2021, has amended Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. It has now provided that the Insolvency Professional shall pay the fee for the financial year 2020-21 till June 30, 2021. Also, a proviso has been inserted that when an individual ceases to be its director or partner, as the case may be, on and from the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2021 and ending on December 31, 2021, the insolvency professional entity shall inform the Board, within thirty days of such cessation. Further, when an individual joins as its director or partner, as the case may be, on and from the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) (Amendment) Regulations, 2021 and ending on December 31, 2021, the insolvency professional entity shall inform the Board, within thirty days of such joining.

4. Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) (Second Amendment) Regulations, 2021

Insolvency and Bankruptcy Board of India ("IBBI") vide Notification dated April 27, 2021, has amended Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016.

In Regulation 12A, which provides for Authorization for Assignment:

- A.** In sub-clause 5, another proviso has been inserted that states that for an application that has been received between the period of the commencement of these Amendments till 31.10.2021, if the authorization for assignment is not issued, renewed, or rejected by the Agency within 30 days of the date of receipt of an application, then the authorization shall be deemed to have been issued or renewed by the Agency.
- B.** In sub-clause 7, the period for appeal to the Membership Committee by an applicant aggrieved by an order of rejection of his application by the Agency has been increased from 7 days to may within 15 days from the date of receipt of the order.

Further, another proviso inserted provides for an appeal to the Membership Committee within 30 days from the date of receipt of order, in case an application for issue of authorization for an assignment has been rejected by an insolvency professional agency between the period from the date of commencement of these Amendments till 31.10.2021.

5. Insolvency and Bankruptcy Board of India (Information Utilities) (Amendment) Regulations, 2021

Insolvency and Bankruptcy Board of India (“**IBBI**”) vide Notification dated April 13, 2021, has amended Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017. The amendments are as follows:

- A.** Regulation 15(3) provides for the bye-laws for the functioning of the Information Utilities consistent with the I&B Code.

The IBBI has inserted the following clause after Regulation 15(3)(b):

(ba) minimum service quality standards, including timelines

for - (i) registration of users,

(ii) issuance of record of default, and

(iii) issuance of an annual statement to registered users.

(bb) adoption of quality standards and quality standards certifications

B. Further, Regulation 27(1) has been substituted to provide that a user, who has submitted information in Form C of the Schedule (the Form has also been substituted by a new Form C) to an information utility, shall submit the information updated as on the last day of every month, in the first week of the following month, on the condition that information of default shall be updated within seven days of the occurrence of default.

C. Regulation 36A has been inserted which provides for publication of quarterly statistical information by an information utility relating to debt-related information in its possession. The statistics in sub-regulation (1) shall provide the distribution of debts in terms of currency, geography, sector, size, tenor, type, lending arrangement, and incidence of default.

6. Guidelines for Appointment of Insolvency Professionals as Administrators under the Securities Exchange Board of India (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018

The IBBI and the SEBI have mutually agreed to use a Panel of IPs for appointment as Administrators for effective implementation of the Regulations. The IBBI shall prepare a Panel of IPs keeping in view the requirements of SEBI and the Regulations and the SEBI shall appoint the IPs from the Panel as Administrators, as per its requirement in accordance with the Regulations.

The guidelines specify the eligibility for Insolvency Professional (IPs) to be appointed in the Panel of IPs. The following is the eligibility criteria:

- i. There is no disciplinary proceeding, whether initiated by the IBBI or the IPA of which he is a member, pending against him;
- ii. He has not been convicted at any time in the last three years by a court of competent jurisdiction.
- iii. He expresses his interest to be included in the Panel for the relevant period;
- iv. He undertakes to discharge the responsibility as an Administrator, as and when he may be appointed by the SEBI;

- v. He has made compliance under Regulation 7(2) (ca) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 for the year 2019-20
- vi. He holds an Authorization for Assignment (AFA), which is valid on the date of expression of interest.

7. Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2021

Insolvency and Bankruptcy Board of India (IBBI) vide notification dated 4th March 2021 has amended IBBI (Liquidation Process) Regulations, 2016. As per the amendment, the liquidator shall now file the list of stakeholders with the Adjudicating Authority within forty-five days from the last date for receipt of claims. Further, the list of stakeholders shall now be filed on the electronic platform of the Board for dissemination on its website.

8. Filing of the list of stakeholders under clause (d) of sub-regulation (5) of Regulation 31 of the IBBI (Liquidation Process) Regulations, 2016

The IBBI vide Circular dated 04.03.2021 has issued the format and guidelines for the filing of List of stakeholders under Regulation 31(5)(d) of IBBI (Liquidation Process) Regulations, 2016.

Clause (d) of sub-regulation (5) of regulation 31 of the Liquidation Process Regulations inserted vide Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2021 requires that the liquidator shall file the list of stakeholders on the electronic platform of the Board for dissemination on its website. The purpose of this requirement is to improve transparency and enable stakeholders to ascertain the details of their claims at a central platform. This requirement applies to every liquidation process (a) ongoing as on the date of notification of Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2021, and (b) commencing on or after the said date. In pursuance of the above, the Board has made available an electronic platform at <http://www.ibbi.gov.in> for filing a list of stakeholders as well as updating it thereof. The platform permits multiple filings by the liquidator as and when the list of stakeholders is updated by him. The format of the list of stakeholders, as finalized in consultation with the insolvency professional agencies, is placed as Annexure. The insolvency professionals are directed to file the list of stakeholders of the

respective corporate debtor under liquidation and modification thereof, in the aforesaid format, within three days of the preparation of the list or modification thereof, as the case may be. The filings due as on the date of the circular shall be filed within 15 days of this circular.

9. Virtual hearing by NCLT Benches w.e.f. 12.04.2021

National Company Law Tribunal (NCLT) vide order dated 23.02.2021 had allowed that all the NCLT Benches shall start regular Physical hearing w.e.f. 01.03.2021. However, due to a sharp increase in Covid-19 cases throughout the country, the NCLT benches have taken up regular hearing through Virtual Conference w.e.f 12.04.2021.

10. Providing copy of the application to the Board, as mandated under Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019.

IBBI vide Circular dated 2nd February 2021 has provided that Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 mandates an applicant to provide a copy of the application filed under section 94

(1) and section 95 (1) of the Insolvency and Bankruptcy Code, 2016 (Code) for initiation for insolvency resolution process of a personal guarantor to a corporate debtor, inter-alia, to the Board for its record.

In order to make it convenient for the applicants, the Board has made available a facility on its website at <https://ibbi.gov.in/intimation-applications/iaaa-personal-one> for providing a copy of the application online to the Board. The format has been shown under Annexure A and its step-by-step guidelines in Annexure B. On the rightful submission of the online application, the applicant shall get an acknowledgment.



CIRCULAR/NOTIFICATIONS ISSUED BY OTHER AUTHORITIES

RESERVE BANK OF INDIA (“RBI”)

Resolution Framework 2.0 – Resolution of Covid-19 related stress of Micro, Small and Medium Enterprises (MSMEs)

In view of the uncertainties created by the resurgence of the Covid-19 pandemic in India in recent weeks, RBI has decided to extend the facility for restructuring existing loans without a downgrade in the asset classification.

- A. The above shall be subject to the following conditions:
- i The borrower should be classified as an MSME as on 31.03.2020
 - ii The borrowing entity is GST-registered on the date of implementation of the restructuring.
 - iii The aggregate exposure, including non-fund-based facilities, of all lending institutions to the borrower does not exceed INR 25 crores as of 31.03.2021.
 - iv The borrower's account was a 'standard asset' as of 31.03.2021.
 - v The borrower's account was not restructured in terms of the circulars previously issued MSME restructuring circulars.
 - vi The restructuring of the borrower account is invoked by 30.09.2021 and the decisions on applications received by the lending institutions shall be communicated in writing to the applicant by the lending institutions within 30 days of receipt of such applications.

- vii The restructuring of the borrower account is implemented within 90 days from the date of invocation.
 - viii If the borrower is not registered in the Udyam Registration portal, such registration shall be required to be completed before the date of implementation of the restructuring plan for the plan to be treated as implemented.
 - ix Upon implementation of the restructuring plan, the lending institutions shall keep the provision of 10% of the residual debt of the borrower.
 - x Lending institutions shall put in place a Board approved policy on the restructuring of MSME advances, not later than a month from the date of this circular.
- B. Asset classification of borrowers classified as Standard may be retained.
- C. Accounts categorized as NPA 01.04.2021 and date of implementation may be upgraded as 'standard asset', as on the date of implementation of the restructuring plan.
- D. In respect of accounts of borrowers which were restructured in terms of the MSME restructuring circulars, lending institutions are permitted, as a one-time measure, to review the working capital sanctioned limits and/or drawing power and decide in this regard by 30.09.2021.

ORDERS UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016 WRT CORPORATE PERSONS

ORDERS UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016

1. Initiation of Application under Section 7 of I&B Code would prevail against Guarantor which is a Corporate Person through Principal Borrower who is not a Corporate Person

Laxmi Pat Surana Vs. Union Bank of India & Anr. (Supreme Court) [Civil Appeal No. 2734 of 2020]

The Hon'ble Supreme Court (“**SC**”) vide its judgment dated March 26, 2021, upheld the findings of the National Company Law Tribunal (“**NCLT**”) dated December 12, 2019, and National Company Law Appellant Tribunal (“**NCLAT**”) dated March 19, 2020, observing that the liability of the guarantor is co-extensible with the defaulting principal borrower even though such principal borrower is outside the purview of the corporate person defined under I&B Code. Further, the SC also affirmed the view of NCLT & NCLAT that a fresh period of limitation is required to be computed from the date of a written acknowledgment of the liability by the principal borrower and in particular the corporate guarantor.

In the present appeal, there were two important issues before the SC, to decide whether an action under Section 7 of the Code can be initiated by the Financial Creditor (Bank) against a Corporate Person (being a Corporate Debtor) concerning corporate guarantee offered by it in respect of a loan account of the Principal Borrower, who had committed default and is not a Corporate Person within the meaning of the Code? Also, whether an application under Section 7 of the I&B Code filed after three years from the date of declaration of the loan account as NPA, being the date of default, not barred by limitation?

Hon'ble Supreme Court negated the contentions of the appellant by asserting that a corporate person would be treated as Corporate Debtor when a corporate person assuming the status of the corporate debtor having offered guarantee, if and when the principal borrower/debtor (be it a corporate person or otherwise) commits default in payment of its debt. This would mean that a Financial Creditor can initiate action under Section 7 of I&B Code for commencing the Corporate Insolvency Resolution

Process against a corporate person vis-à-vis guarantee offered by it in respect of a loan account of the principal borrower, who had committed default, even if the principal borrower is not a corporate person.

Additionally, the Hon'ble Apex Court while settling the other issue in hand i.e. whether an application under Section 7 of the Code was filed after three years from the date of declaration of the loan account as a Non-performing Asset, being the date of default, is not barred by limitation. In this context, the apex court affirmed that a fresh period of limitation (as prescribed in Section 18 of the Limitation Act) is required to be computed from the time when the acknowledgment is signed by the principal borrower or the corporate guarantor as the case may be, provided the acknowledgment is before the expiration of the prescribed period of limitation, even if such acknowledgment has been sent without prejudice.

2. Supreme Court explains how NCLT ought to proceed when Section 8, Arbitration Act application is filed

Indus Biotech Private Limited vs. Kotak India Venture Limited & Ors. (Supreme Court)

ARBITRATION PETITION (CIVIL) NO. 48/2019

In the above matter, the Hon'ble Supreme Court clarified that in any proceeding which is pending before the Adjudicating Authority under Section 7 of I&B Code, if such petition is admitted upon the Adjudicating Authority recording the satisfaction with regard to the default and the debt is due from the corporate debtor, any application under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act, 1996) made thereafter will not be maintainable. In a situation where the petition under Section 7 of the I&B Code is yet to be admitted and, in such proceedings, if an application under Act, 1996 is filed, the Adjudicating Authority is duty-bound to first decide the application under Section 7 of the I&B Code by recording a satisfaction with regard to there being default or not, even if the application under Arbitration and Conciliation Act, 1996 is kept along for consideration. In such an event, the natural consequence of the consideration made therein on Section 7 of the I&B Code application would befall on the application under the Act, 1996.

The matter stated that the Petitioner Company and Respondent had a dispute during the negotiations which were held between them relating to the calculation and

conversion formula that was to be applied in converting the preference shares of the Respondents into equity shares.

The Respondents demanded the amount from the Petitioner but the said amount was not paid. As a result, the Respondents filed the Application under Section 7 of IBC before the NCLT, Mumbai seeking the appointment of a Resolution Professional. Wherein, the Petitioner has also moved an application under Section 8 of the Act of 1996 seeking a direction to refer the Parties to Arbitration which was allowed by the NCLT, Mumbai vide its order dated 09.06.2020. As a result, the petition under Section 7 of the I&B Code filed by the Respondents was dismissed. The matter was referred for Arbitration.

The issue before the Supreme Court was whether the NCLT was justified in dismissing the insolvency proceedings and referring the matter for Arbitration.

The Supreme Court held that any proceeding which is admitted by the Adjudicating Authority under Section 7 of the IBC deciding the presence of default and the debt is due from the Corporate Debtor then an Application under Section 8 of the Act, 1996 will not be maintainable.

It is observed that in the event where the Application under Section 7 of the IBC is yet to be admitted and if meanwhile an Application under Section 8 of the Act of 1996 is filed then it is the duty of the Adjudicating Authority to first decide the Application under Section 7 of the IBC.

The Supreme Court reconsidered the observations recorded in the NCLT order dated 09.06.2020 and upheld the said order in view of the fact that by dismissing the Application under Section 7 of the I&B Code, the NCLT has decided that there is no default caused by the Petitioner.

In this view, the Supreme Court proceeded to constitute the Arbitral Tribunal for adjudication of the disputes between the parties.

3. THE INTENTIONS OF THE LEGISLATOR WAS NOT TO KEEP THE TAX AUTHORITIES IN BEELINE TO RECOVER TAX DUES OF THE CORPORATE DEBTOR

Ruchi Soya Industries Ltd., Vs Union of India and others

[W.P.No.31090 of 2015 and M.P.No.2 of 2015]

Ruchi Soya Industries Ltd (“**the Petitioner**”) submitted that since the Customs Department (“**the Respondent**”), being one of the creditors did not come forward with its claim after the advertisement being released by the Resolution professional, hence, that would result in its rights being extinguished to claim at a later stage. Accordingly, the resolution plan which is approved by the Adjudicating Authority will also be binding on the Central/ State government or any local authority to whom a debt or dues are payable, including tax authorities.

The Court after hearing observed that the entire tax administration of the country is now in a pell-mell. All the tax authorities will have to make a beeline before the National Company Law Tribunal every time to recover tax dues if under any circumstances proceedings are initiated against the corporate debtor under I&B Code and observed that this was not the intention when the I&B Code was enacted. Further, the court stated that "tax" which is considered as sovereign debts cannot be altered whether increased or decreased by any authority, whether by the Court or under a private arrangement or as the case may be approved by creditor, shareholders, or by the committee of creditors under the Companies Act, 2013 or I&B Code. Corporate restructuring of financial debt under the I&B Code does not mean a waiver of the extinguishing of sovereign debts.

The Court referred to the recent Supreme Court judgment delivered on 13.04.2021 in the matter of Ghanashyam Mishra and Sons Vs. Edelweiss Asset Construction and how the Apex Court had held a different view in this regard. Being bound by this judgment by the Supreme Court, the High Court, Madras partly accepted the contention of the Petitioner in so far as issue relating to the extinguishment of the rights of the respondent customs department to claim the customs duty was considered and held that the petitioner can approach the Adjudicating Authority to obtain the appropriate clarification regarding the debts and the respondent can proceed with recovery in accordance with the law, after the completion of the notice period given to the petitioner and subject to the clarifications given by the adjudicating authority.

4. Doors Shut for Ineligible Promoters to Propose Compromise or Arrangement Schemes under Section 230 Of The Companies Act, 2013

Arun Kumar Jagatramka versus Jindal Steel and Power Ltd. & Anr.

[Writ Petition (C) No. 269 of 2020 and with Civil Appeal No. 2719 of 2020]

The Hon'ble Apex court upheld the order passed by NCLAT stating that a Promoter who is not eligible to submit a Resolution Plan under Section 29A of the Code, is barred from filing an Application under Sections 230 to 232 of the Companies Act 2013.

The Hon'ble Apex court while dismissing the writ petition, observed that

- a. Ineligibility during the resolution process and liquidation - Section 29A has to be construed as a crucial link in ensuring that the objects of the IBC are not defeated by allowing "ineligible persons", including but not confined to those in the management who have run the company aground, to return in the new avatar of resolution applicants. The purpose of the ineligibility under Section 29A is to achieve a sustainable revival and to ensure that a person who is the cause of the problem either by a design or a default cannot be a part of the process of solution
- b. Interplay: IBC liquidations and section 230 of the Act of 2013 - Section 230 of the Companies Act 2013 is wider in its ambit in the sense that it is not confined only to a company in liquidation or to a corporate debtor which is being wound up under Chapter III of the IBC. In the present case a harmonious construction between the two statutes would ensure that while on the one hand a scheme of compromise or arrangement under Section 230 is being pursued, this takes place in a manner that is consistent with the underlying principles of the IBC because the scheme is proposed in respect of an entity which is undergoing liquidation under Chapter III of the IBC. As such, the company has to be protected from its management and corporate death. It would lead to a manifest absurdity if the very persons who are ineligible for submitting a resolution plan, participating in the sale of assets of the company in liquidation, or participating in the sale of the corporate debtor as a 'going concern', are somehow permitted to propose a compromise or arrangement under Section 230 of the Act of 2013.
- c. Constitutional Validity of Regulation 2B - Liquidation Process Regulations - Even in the absence of Regulation 2B, a person ineligible under Section 29A read with Section 35(1)(f) is not permitted to propose a scheme for revival under Section 230, in the case of a company which is undergoing liquidation under the IBC. In the case of a company that is undergoing liquidation pursuant to the provisions of Chapter III of the IBC, a scheme of compromise or arrangement proposed under Section 230 is a facet of the liquidation process. The same rationale which permeates the resolution process under Chapter II (by virtue of the provisions of Section 29A) permeates the liquidation process under Chapter III (by virtue of the provisions of

Section 35(1)(f)). That being the position, there can be no manner of doubt that the proviso to Regulation 2B is clarificatory in nature.

5. Kalparaj Dharamshi & Anr. Vs. Kotak Investment Advisors Ltd. & Anr.

[Civil Appeal nos. 2943-2944 of 2020]

In the present matter, the resolution plan was approved by the Committee of Creditors (COCs) and thereafter approved by the Adjudicating Authority. The approved resolution plan was challenged and the Adjudicating Authority had directed certain modifications to the resolution plan. The present appeal was filed against the order of NCLAT, New Delhi directing changes to the approved resolution plan on the basis of lack of jurisdiction and power of Hon'ble Adjudicating Authority to order changes in an already approved plan.

The Hon'ble Supreme Court held that the equity underlying section 14 of the Limitation Act, 1963 (Limitation Act) would be applicable to the parties for exclusion of time while counting the period within which time an appeal can be filed under the Code if it were bonafide prosecuting in a wrong forum. Furthermore, the Hon'ble Court also held that the respondent bidder has not waived or asserted its rights of filing an objection against the approved resolution plan just by agreeing to submit a revised resolution plan and the commercial wisdom of the Committee of Creditors (CoC) holds primacy in the matters of approval of resolution plan.

The Hon'ble Supreme Court in the above matter has categorically laid down the Applicability of Section 14 of the Limitation Act. The Court in this matter observed that the equity underlying Section 14 should be applied to its fullest extent and time have taken diligently pursuing a remedy, in a wrong court, should be excluded. When a litigant bona fide under a mistake litigates before a wrong forum, he would be entitled to exclusion of the period, during which he was bona fide prosecuting such a wrong remedy.

Further, it was also observed that in the above matter there was an exercise of writ jurisdiction. The High Court could have exercised jurisdiction under Article 226 of the Constitution in as much as, the grievance was regarding the procedure followed by NCLT to be in breach of principles of natural justice. This would come within the limited area earmarked by the Hon'ble Supreme Court for the exercise of extraordinary jurisdiction under Article 226 despite the availability of the alternate remedy.

The Hon'ble Supreme Court also held in the above matter the Waiver and Acquiescence of Right by Kotak Investment Advisors Limited (KIAL). The contention held in this regard was that the Courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract entered into between the parties who are not equal in bargaining power. The court is of the opinion that the above-mentioned principle will apply where a man has no choice, or rather no meaningful choice but to give his assent to a contract or to sign in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be.

It was further held that in case of establishing waiver, it will have to be established that a party expressly or by its conduct acted in a manner, which is inconsistent with the continuance of its rights. However, it is stated that mere acts of indulgence will not tantamount to waiver.

The court also held that for mere constituting acquiescence or waiver it must be established that, though a party knows the material facts and is conscious of his legal rights in a given manner but fails to assert its rights at the earliest possible opportunity as it creates an effective bar of waiver against him. Whereas, acquiescence would be conduct where a party is sitting by when another is invading his rights. The acquiescence must be such as to lead to the interference of a license sufficient to create a new right in the defendant.

The Hon'ble Court categorically specified that the Waiver is an intentional relinquishment of a right. It is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. Thus the appeal was allowed.

6. NCLT has jurisdiction to adjudicate contractual disputes solely arising from corporate debtor's insolvency

Gujarat Urja Vikas Nigam Limited v. Mr. Amit Gupta & Ors. (Civil Appeal No. 9241 of 2019)

In this significant judgment passed by the Hon'ble Supreme Court (“**SC**”), the primary issue of the appeal was with regard to the nature of the jurisdiction exercised by the National Company Law Tribunal (“**NCLT**”) under Section 60(5) by staying the termination of the Power Purchase Agreement (“**PPA**”) between Astonfield Solar (Gujarat) Private Limited (“**Corporate Debtor/CD**”) and Gujarat Urja Vikas Nigam Limited (“**Appellant**”).

In the present case, the Appellant had served notice to the CD for termination of the PPA owing to the PPA provisions whereby Article 9.2.1 enumerates the Events of Default by the CD, pursuant to which if the CD voluntarily or involuntarily becomes the subject of a proceeding in any bankruptcy or insolvency laws, it shall constitute an Event of Default.

The NCLT vide its judgment in the matter, had ordered a stay on the termination notice of the PPA by the Appellant and thereafter in the appeal filed against the NCLT judgment was dismissed by the National Company Law Appellate Tribunal (“**NCLAT**”).

The present appeal before the SC against the NCLAT order was filed, *inter alia*, on the following grounds:

- a. The NCLT and NCLAT do not possess jurisdiction under the I&B Code to adjudicate on a contractual dispute between the appellant and the Corporate Debtor
- b. The termination of the PPA was validly made under Article 9.2.1(e) and Article 9.3.1 of the PPA.

W.r.t the first issue, the SC observed that Section 60(1) provides the NCLT with territorial jurisdiction over the place where the registered office of the CD is located. It further observed that under Section 60(5)(c), NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the CD and the jurisdiction of the NCLT under Section 60(5)(c) of the I&B Code cannot be invoked in matters where termination may take place on grounds unrelated to the insolvency of the CD. It was observed that the Resolution Professional could approach the NCLT for adjudication of disputes that are related to the insolvency resolution process. However, for adjudication of disputes arising outside the insolvency of the CD, the RP must approach the relevant competent authority. SC opined that without going into the commercial aspects of the PPA, NCLT/NCLAT can exercise jurisdiction under Section 60(6)(c) of the I&B Code to stay termination of PPA only on account of CIRP being initiated against the CD.

As regards the stay of termination of the PPA, the SC relied upon the findings of NCLT and NCLAT holding that the purpose and objective of the I&B Code and stated that termination of PPA could have adverse consequences on the status of the Corporate Debtor as "*going concerned*" and may jeopardize the entire CIRP. SC was of the view that to keep the CD as a going concern it was important not to terminate the PPA solely on the ground that the CIRP has been initiated against the CD and that the PPA was essential for CD's existence and subsistence.

7. The High court cannot overlook the undermining of a statutory dictate in exercising its power under Section 482 “to secure the ends of justice”: Supreme Court of India.

SANDEEP KHAITAN, RESOLUTION PROFESSIONAL FOR NATIONAL PLYWOOD INDUSTRIES LTD. Vs. JSVM PLYWOOD INDUSTRIES LTD. & Anr.

[Criminal Appeal No. 447 of 2021 arising out of SLP (Crl.) No. 1549 of 2021]

The Hon'ble Supreme Court ("SC") vide its judgment dated April 22nd, 2021 observed that the words 'to secure the ends of justice in Section 482 of Cr. P.C cannot mean to superintend the undermining of a statutory dictate, which in the present case is the provisions of Section 14, and Section 17 of the I&B Code.

In the present case, the appeal was directed against an order passed by the Hon'ble High Court of Guwahati. In the impugned order, the High Court had allowed an interlocutory application filed by the Respondent to allow it to operate its bank account maintained with the ICICI Bank Bhubaneswar and to unfreeze the bank account of its creditors over which the lien has been created and the accounts were frozen pursuant to the lodging of an FIR by the appellant. A moratorium came to be passed by the order of NCLT within the meaning of Section 14 of the I&B Code. The Appellant came to be appointed as the Resolution Professional by the same order of NCLT. In the meantime, Respondent No.1 claiming to be an operational creditor lay the claim for the amounts due to it from the Corporate Debtor before the Appellant vides communication. It would appear that the former Managing Director of the Corporate Debtor challenged the order of the NCLT, Guwahati, admitting the application under Section 7. The NCLAT by order dismissed the appeal inter alia holding that the application under Section 7 was not barred by limitation.

The Appellant appealed that the former Managing Director of the Corporate Debtor in conspiracy with Respondent No.1 engaged in an illegal transaction to the tune of INR 32.50 lakhs without authority from the Appellant and in violation of Section 14 of the I&B Code.

The Hon'ble Apex court held that "The words 'to secure the ends of justice in Section 482 of Cr. P.C. cannot mean to overlook the undermining of a statutory dictate, which in the present case is the provisions of Section 14 and Section 17 of the IBC."

The Hon'ble Supreme Court concluded by holding that, The Respondent (Operational Creditor in the present case) is allowed to operate its account subject to first remitting into the account of the Corporate Debtor, the amount of INR 32.50 lakhs which stood paid to it by the management of the Corporate Debtor. Further, the assets of the Corporate Debtor shall be managed strictly in accordance with the terms of the provisions of the IBC. Furthermore the Appellant i.e. the Resolution Professional will bear in mind the provision of Section 14 (2A) and the core object of IBC.

8. Spectrum License is subject to Insolvency proceedings/liquidation proceedings if outstanding dues are cleared by the telecom companies to the Union of India/Department of Telecom- NCLAT.

Union of India vs. Vijaykumar V. Iyer

[Batch of 10 Company Appeal (AT) (Insolvency) No. 733 of 2020 & ors.]

The Hon'ble National Company Law Tribunal ("NCLAT") vide its judgment dated April 13th, 2021, while hearing the batch of 10 appeals has ruled that spectrum is an intangible asset that can be subjected to insolvency proceedings/liquidation proceedings and the dues of Central Government/ Department of Telecom (DOT) under spectrum license fall within the ambit of operational dues under the Insolvency and Bankruptcy Code (IBC).

In its finding, Hon'ble NCLAT observed that debt-ridden telecom companies undergoing insolvency proceedings cannot claim rights to their spectrum, which is a natural resource unless requisite spectrum usage payments have been made to the government/DOT. Though a telecom service provider (telecom Companies) has the right to use spectrum under the license granted to them, the appellate tribunal noted that however, they cannot be said to be the owners in possession but only in occupation of the right to use spectrum. According to the Hon'ble appellate tribunal, spectrum is a 'natural resource' and the government is holding it as a 'cestui que trust' (beneficiary) and it would not be available to use without payment of requisite dues.

It further observed that triggering of Corporate Insolvency Resolution Process (CIRP) by any telecom company with the object of wiping off of dues towards spectrum usage charge, 'not being for insolvency resolution, but with a malicious or fraudulent intention, would be strictly impermissible. Thus, according to the said judgment, the defaulting licensees/ telecom Companies cannot be permitted to wriggle out of their liabilities by resorting to triggering CIRP.

It has been held in the judgment that "*... not for purposes of resolution but fraudulently and with the malicious intent of withholding the huge arrears payable to the government, obtaining moratorium to abort government's move to suspend, revoke or terminate the licenses and in the event of a resolution plan being approved, subjecting the central government to have contended with the peanuts offered to it as 'operational creditor' within the ambit of distribution mechanism contemplated under Section 53 of I&B Code,*"

In the proceedings before the Appellate Authority, creditors of Aircel had argued that spectrum is an asset of the telecom companies and can be part of the insolvency process. However, DoT had contended that it cannot be traded and that spectrum cannot be subject to moratorium during the insolvency proceedings.

Hon'ble NCLAT pronounced that the relationship amongst the licensor (DoT), licensee (Telecom Companies/operators), and the lender are governed by the tripartite agreement which envisages priority to the dues of DoT (Department of Telecommunication) over dues of other creditors, be they secured or unsecured creditors. In its ruling, it clearly held that '... the lender has been permitted to cause assignment of license and change of licensee with permission of DoT on conditions including payment of dues owed to DoT. Such tripartite agreement cannot be overridden and nullified,'.

Having said that, it is pertinent to note here that UV Asset Reconstruction Company (UVARCL) has emerged as a successful bidder for spectrum assets of Aircel and Reliance Communications. It has offered to pay ₹150 crore upfront for the Aircel spectrum and another ₹6,630 crores over the next five years to the financial creditors. The firm has offered to pay around ₹14,000 crores for acquiring spectrum holding of Reliance Communications and its subsidiaries. The resolution plan of RCom and RTL has been duly approved by 100 percent of lenders and is awaiting approval of NCLT, Mumbai since March 2020. Therefore, the above NCLAT judgment will also have an impact on the debt resolution of RCom and Reliance Telecom (RTL) as well.

Spectrum is the only main asset of both Aircel and RCom. The debt due to DoT is an operational debt being the government dues and comes after the financial creditor for getting the claim. Now pursuant to the NCLAT judgment, in case the Aircel and RCom will have to first clear dues of the DoT then financial creditors would have nothing to recover, and the resolution plan of UV Asset Reconstruction Company Ltd. (UVARCL) for Aircel, which was approved in June 2020, will be unworkable and Aircel may lead towards liquidation.

9. CONSOLIDATION OF CIRP OF TWO CORPORATE DEBTORS

Radico Khaitan Ltd. Vs. M/s BT & FC Pvt. Ltd.

[Company Appeal (AT) (Insolvency) No. 909/2020]

The Hon'ble National Company Law Appellate Tribunal (“**NCLAT**”) vide its order dated 26.03.2021, set aside the findings of the Adjudicating Authority, Bengaluru Bench (“**NCLT**”) which stated that the applicant being the Operational Creditor has no *locus standi* to file an application and interfere in the CIRP of the Corporate Debtor and seek for consolidation of CIRP of two Corporate Debtors contending that both companies are controlled and managed by the same family.

Hon'ble Appellate Authority minutely examined the records and facts of the present case and in light of the Ld. Adjudicating Authority Mumbai Bench order in the case of SBI Vs Videocon Industries Ltd [(2018) SCC Online NCLT 13182] decided on 08.08.2019 determining the eight

parameters while considering the consolidation of CIRP, observed that, the two Corporate Debtors in the present appeal aptly fulfilled and satisfied the 8 parameters namely, (i) Common Control (ii) Common Directors (iii) Common Assets (iv) Common Liabilities (v) Inter-dependence (vi) Pooling of Resources (vii) Intricate links between the Companies (viii) Common Financial Creditors. Accordingly, the Hon'ble Appellate Authority decided that CIRP of both the Corporate Debtors can be consolidated and directed the Adjudicating Authority to appoint a single common Resolution Professional/Liquidator to assume the duties and perform the functions in accordance with I&B Code for the Consolidated CIRP.

10. An existing obligation to pay a sum of money is the sine qua non of a 'financial debt':

NCLAT

Mr. Mohanlal Dhakad Vs. BNG Global India Limited

COMPANY APPEAL (AT)(Insolvency) No.684 of 2020

In the present case, the Corporate Debtor (“CD”) had floated two investment schemes with a tenure of 3 years to 10 years and collected investment from individual investors hailing from small towns and villages in India. The Corporate Debtor had promised to provide the investors' interest on their investment amount at the time of maturity along with the investment amount, however, the CD failed in its commitment to offer the allotment and/ or the possession of the plots of land as promised by it or pay the 'Assured Returns' or repay the amounts collected by it along with interest on the maturity of the schemes. Hence, the Joint Application under Section 7 was filed by the investors before the NCLT.

The NCLT had rejected the application of the Applicants on the basis that the claim did not fall within the ambit of Section 5(8) of the Insolvency & Bankruptcy Code, 2016 (“I&B Code”) or any Clause(a) to (i), because of the fact that all the Applicants therein is that they deposited the said amount under 'scheme' and they had not given 'Debt' to the 'Corporate Debtor', in as much as they are entitled to get a refund under the Companies Act, 2013.

The Applicants thereafter filed an appeal before the NCLAT wherein it was observed that the NCLT had failed to take into consideration that the amount paid by the Applicants to the CD was a 'Financial Debt'. The NCLAT relied upon the definition of "debt" and "default" under the I&B Code. The definitions are reproduced here for reference:

Section 3(11) of the Code defines 'Debt' meaning, a liability or obligation in respect of 'claim' which is due from any person and includes a 'financial debt' and 'operational debt'.

Section 3(12) of the Code defines 'default meaning, non-payment of debt when the whole of any part or installment of the amount of debt has become due and payable and is not (paid) by the debtor or the corporate debtor, as the case may be.

In view of the above, NCLAT observed that the existence of 'debt' and 'default' are to be met for 'admission' of an 'Application' under section 7 of the 'Insolvency and Bankruptcy Code and hence as per the I&B Code, a 'Debt' is/was recoverable from the 'Corporate Debtor'.

The NCLAT thus admitted the appeal made by the Appellants holding the conclusions of NCLT as invalid and incorrect and made the following observations:

"...Respondent/'Corporate Debtor' failed in its commitment to offer the allotment and/ or the possession of the 'Plots of Land' as promised by it or pay the assured returns, or repay the sums collected by it along with interest on the maturity of the schemes, etc, this 'Tribunal' comes to a consequent conclusion that the 'Appellant's position is that of a 'Financial Creditor' as per Section 5(7) read with Section 5(8) of the 'Insolvency & Bankruptcy Code and that there is a default in payment of the accepted amounts by the 'Respondent/'Corporate Debtor'. In short, the 'Respondent/'Corporate Debtor' squarely comes within the ambit of the definition of 'Financial Debt'.

11. NCLT is only empowered to either admit or reject the application as given under Section 9 of the I&B Code

**Sodexo India Services Pvt. Ltd. Vs. Chemizol Additives Pvt. Ltd. Comp.
[App. (AT) (Insolvency) No. 1094 of 2020]**

In the present case, NCLAT set aside the NCLT order merely disposing of the application filed by the Operational Creditor under Section 9 of the I&B Code but neither accepted nor rejected the application.

NCLAT held that NCLT only has the power to admit the application if it satisfies the following requirements:

- a. if the same is complete,
- b. there is no payment of the unpaid operational debt,
- c. the invoice or notice for payment has been delivered to the Corporate Debtor and
- d. no notice of dispute has been received by the Operational Creditor or there is no record of dispute in the information utility.

In case any of the criteria is not fulfilled, then the application is liable to be rejected. The same was considered to be contradictory to Section 9 (5) of the I&B Code by NCLAT, and it was held that NCLT has the two options as mentioned above either to admit the application or to reject. However, the NCLT wrongly observed that since the Corporate Debtor had not responded to the Demand Notice sent by the Operational Creditor hence the mere acceptance of the debt in question by the Respondent would not automatically entitle the Appellant to invoke the provisions of the I&B Code, unless the debt and default are undisputed and proved to the satisfaction of NCLT.

NCLAT finally observed that in absence of any dispute contemplated under Section 8(2) having been raised by the Corporate Debtor as a pre-existing dispute or that the claim of Operational Creditor had been satisfied, NCLT should have admitted the application, as no dispute had been raised before it, justifying its disinclination to admit the Application., 2018 claim could not be held to be undisputed since the Corporate Debtor had not raised any disputes

12. NCLAT refuses to admit a fresh application by the same Operational Creditor for the same cause of action when the earlier application was withdrawn by the creditor himself

**Suri Rajendra Rolling Mills Vs. Bengani Udyog Pvt. Ltd.
Company Appeal (AT) (Insolvency) No. 334 of 2020**

In the present case, the Operational Creditor filed a fresh application under Section 9 of the I&B Code to recover the same dues for which he had earlier filed a Section 9 application and later withdrawn the same apprehending a settlement between him and the Corporate Debtor. However, NCLAT held that the fresh application to initiate CIRP was not maintainable as a similar application was filed by the same Operational Creditor for the same cause of action before NCLT and had withdrawn the application without reserving any liberty to file a fresh application. NCLAT also observed that the claim made by the Operational Creditor was disputed by the Corporate Debtor and due to the pre-existing dispute between the parties, the application was not liable to be admitted.

13. Section 53 of the Code shall have an overriding effect on the provisions of the Section 194 IA of the IT Act

**Om Prakash Agarwal Vs. Chief Commissioner of Income Tax
[Company Appeal (AT) (Insolvency) No. 624 of 2020]**

Hon'ble NCLAT in the present matter dealt with the issue: *Whether the provisions of u/ s 194-IA of the Income Tax Act, 1961 are inconsistent with Section 53 (1) (e) of the Insolvency and Bankruptcy Code, 2016?"*

NCLAT relying upon the provisions of Section 194-IA of the Income Tax Act and Section 53 of the I&B Code and observed that as per Section 194 IA of the IT Act 1% TDS is recovered on priority to other creditors of the transferor, which is partial capital gain tax, whereas, Section 53(1)(e) of the Code in waterfall mechanism provides that the Government dues comes fifth in order of priority. Thus, in regard to recovery of the Government dues (including Income Tax) from the Company in Liquidation under the I&B Code, there is an inconsistency between Section 194IA of the IT Act and Section 53(1)(e) of the I&B Code, therefore, by virtue of Section 238 of the Code, Section 53 (1) (e) of the Code shall have an overriding effect on the provisions of the Section 194 IA of the IT Act.

NCLAT also held that in view of the above, the purchasers of the property under liquidation are exempted from remitting TDS to the Income Tax Department. It was further observed that no provisions under the IT Act or the I&B Code suggest for Liquidators to file an Income Tax Return and consequently, a Liquidator is not duty-bound to prepare the financial statements. Since deduction of tax at source under Section 194IA of IT Act is by nature an advance capital gain tax and liquidators are not required to file Income Tax Return, no question of claiming refund of TDS deducted under Section 194IA of the IT Act arises.

14. Resolution professional does not have adjudicatory powers and is not empowered to decide whether a claim is liable to be admitted or not

Avil Menezes Resolution Professional of AMW Auto Component Ltd. Vs. Shah Coal Pvt. Ltd.

[Company Appeal (AT) (Insolvency) No. 63 of 2021]

In the present matter, the NCLAT Tribunal held that the Resolution Professional is not vested with any adjudicatory powers and he is only supposed to collate the claims which imply a comparison with the record and verification and Resolution Professional being a part of the CIRP mechanism, all such actions taken by him are subject to the control of the Adjudicating Authority.

15. TUF Metallurgical Pvt. Ltd. Vs. Impex Metal & Ferro Alloys Ltd. – NCLAT February 3, 2021

In the present matter, Hon'ble NCLAT discussed in length as to whether the advance paid to Corporate Debtor for the supply of goods during Corporate Insolvency

Resolution Plan (CIRP), on failure to supply part goods, during CIRP – can be treated as CIRP costs or not. It was held that in a process of managing the business operations of the Corporate Debtor if advance payment for supply of goods is received, the same shall not be treated as raising interim finance. It is considered an advance for payment of goods which the Corporate Debtor is manufacturing and for this purpose if the goods are not supplied, the purchaser cannot be made to run for his money. Meaning thereby that either the goods have to be delivered or the amount has to be returned.

The Hon'ble Tribunal further opined that if such approach is not inculcated, it will become difficult for the Corporate Debtors to continue as going concerned and any such amount received as an advance payment for the supply of goods during the CIRP would have to be treated as CIRP costs. Accordingly, both the appeals filed before the Tribunal emanating from a common order were disposed of.

16. NCLAT does not have powers to review its own order

Adish Jain Vs. Sumit Bansal

[Review Application No. 13 of 2020 in COMPANY APPEAL (AT) (Insolvency) No. 379 of 2020]

Hon'ble NCLAT in the present case deliberates upon the scope of inherent powers to "Review" its own Order. The Hon'ble Tribunal stated that there is no express provision under the I&B Code for "Review" and such powers must be conferred by law either specifically or by necessary implication. It further observed that the untenable ambit of Rule 11 of the NCLAT Rules, vested powers of the Tribunal can only be exercised to enhance the cause of justice or prevent abuse of process and any error showcasing in the said regard must be a 'patent error' which is 'manifest' and 'self-evident'. Since no 'apparent mistake from the record' was observed in the said case, no re-hearing was permitted.

NCLAT observed that the Applicant was trying to seek rehearing of the Appeal in regard to any finding which would amount to sitting in an Appeal in disguise. In the

garb of this Review Application, the Applicant was attempting to re-argue the matter and hence the review application was dismissed as impermissible in law.



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