TEXT AND CASE COMMENTS ON INSOLVENCY AND BANKRUPTY LAWS

ABOUT THE BOOK

It is with immense pleasure that we present this compilation on "Text and case comments on Bankruptcy and Insolvency Laws". This material consists of selected landmark cases on the subject with an analysis by the student members of the Alliance Centre for Corporate and Commercial Laws.

Bankruptcy and Insolvency Act which came in the year 2016 has completely remodelled the corporate insolvency framework in India. Since its inception, the act has been subject to multiple amendments and several interpretations of the rights and liabilities enshrined in the Act. This compilation is the first step towards the creation of a wholesome commentary that will shed light on the positions of law on issues arising out of the act. We believe that this compilation will be useful for students and professionals alike for reference on the subject concerned.

We wish to congratulate all the contributors and thank the leadership of Alliance University for all the support in this endeavour. We also wish to extend our sincerest gratitude to Dr. Kiran D. Gardner, Dean, School of Law, Alliance University for her support and encouragement.

CASE NO: 1

INDIA RESURGENCE ARC PVT. LTD. V. AMIT METALIKS LIMITED AND ANOTHER

- Thota Raghavendra[1]

INTRODUCTION

The Supreme Court in the case of India Resurgence ARC Pvt. Ltd. v Amit Metaliks Ltd. has stated the role of committee of creditors and their involvement in the process of applying for a resolution plan on the corporate debtor. The case mostly focuses on the secured creditors of the corporate debtor and their part in the decisions made in CoC and the rights over the security interest available to a dissenting financial creditor over the assets of the corporate debtor.

CASE BRIEF

Amit Metaliks limited, who is a respondent to the case and also financial creditor to VPS Udyog Private Limited (Respondent 2). Amit Metaliks has submitted a resolution plan before Committee of Creditors asking for their approval to file an application of resolution plan against the VPS Udyog Pvt. Ltd. (corporate debtor). India Resurgence Arc Pvt. Ltd. (Appellant) was the assignee of the rights, title and interest carried by ReligareFinvest Ltd. as secured financial creditor of the corporate debtor. Also, the appellant is having a 3.94% of voting share in Committee of Creditors (CoC). The Resolution plan submitted by Amit Metaliks (Respondent) to CoC got approved with

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95.35% votes. But the appellant was not with committee to approve the resolution plan. The primary reason for appellant to oppose the resolution plan was the applicant of the resolution plan had offered the appellant a meager amount of about 2.026crs in Indian rupees, without even evaluating the securities held by appellant. After the approval from the CoC, Amit Metaliks Ltd submitted the application for the resolution plan before the NCLT and it got approved. The appellant who was not in support with this resolution plan has appealed at NCLAT, by stating that the CoC has failed to consider the priorities and value of the securities interest of creditors. But NCLAT rejected this appeal. Aggrieved by the decision, India Resurgence Arc Pvt. Ltd has approached the supreme court of India.

PROCEDURAL HISTORY (PRECEDENT OF THE CASE):

1. Committee of Creditors of Essar steel India Ltd v Satish Kumar and others.
2. Swiss Ribbons ltd. V Union of India. The case deals with the constitutional validity of the laws in IBC. In this judgement the court said that the code is still incomplete but has been improving with amendments. The code is a very important legislative for the economy of India.
3. Jaypee Kensington boulevard apartments welfare association v NBCC
4. K. Shashidhar v Indian overseas bank, for this case the court addressed the issues in the corporate insolvency process and the decisions taken on them by NCLT.

ISSUES:

1. Whether secured creditor can suggest a higher amount to be paid to it with reference to its security interest?
2. Does a dissenting secured creditor has the power to appeal the order given by adjudicating authorities to the Supreme court?

HOLDINGS (THE APPLIED RULE OF LAW):

1. The Insolvency and Bankruptcy Code, 2016 (IBC):

a) Section 6 – Persons who may initiate corporate insolvency resolution process.

b) Section 30(4) – Submission of resolution plan and approval of resolution plan by committee of creditors voting process.

c) Section 36(2) – The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

d) Section 53 – Distribution of assets.

e) Section 61(3) – grounds on which can an appeal be made on the order given by adjudicate authority.

2. IBBI Regulations, 2016:

a) Section 39 – Approval of resolution plan

RATIO DECIDENDI:

The supreme court held that it is not in the good interest of court or judicial system by appealing cases which dissatisfied one's interest. By such acts the court losses it valuable time, which it can spend on dealing with much more important cases.

In the case of India resurgence arc v Amit metallics, all the mandatory requirements were fulfilled to get the resolution plan passed and the adjudicate authority has also given its approval for the plan. But a dissenting financial creditor approached the supreme court for a judicial review and the reason for his appeal was his own dissatisfaction from the decision given by NCLT. Due to such acts, the court will lose its valuable time which could have spent on a reasonable appeal or case. So, the court also stated in its judgement that, every dissatisfaction cannot be a legal grievance and a merit for an appeal in court.

CASE ANALYSIS

NCLAT Decision:

The appellant has contented before the NCLAT, that after the amendment of sec 30(4) of IBC, which states that the CoC may approve a resolution plan by ensuring that the distribution among the creditors and their best interest in the security interests of a creditor. and challenged the NCLT order given for the resolution plan, saying that the

order is not in line with the existing law.

For the appeal by the Indian Resurgence, NCLAT referred to a case named Essar steel India v Satish Kumar Gupta and stated that the code protects the interests of a creditors, and it is also essential that the creditors are protected. But the code is not just for the benefits of a creditors, the code never meant to give a creditor the higher right than the other party and vice versa. Further, the court held that by keeping the judgement in essar steel India case, it's not a fair to give one party higher rights than other and rejected the appellant's arguments. And the order given by the NCLT in the case of resolution plan of VPS Udyog Pvt. Ltd. Was within the existing legal system. It needs hardly any emphasis that if the propositions suggested on behalf of the appellant were to be accepted, the result would be that rather than insolvency resolution and maximization of the value of assets of the corporate debtor, the processes would lead to more liquidations, with every secured financial creditor opting to stand on dissent. Such a result would be defeating the very purpose envisaged by the Code; and cannot be countenanced. We may profitably refer to the relevant observations in this regard by this Court in Essay Steel as follows: -

"Indeed, if an "equality for all" approach recognizing the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivized to vote for liquidation rather than resolution, as they would have better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved. This would defeat the entire objective of the Code which is to first ensure that resolution of distressed assets takes place and only if the same is not possible should liquidation follow.

" Viewed from any angle, the submissions made on behalf of the appellant do not merit acceptance and are required to be rejected. For what has been discussed hereinabove, this appeal fails and stands dismissed.

ISSUES:

The appellant was aggrieved by the NCLAT order, approached the supreme court. The

main issue that the court has to look into to come to a judgement is, can a secured creditor suggest a higher amount to be paid to him with reference to the security interest he has. As the appellant is a secured creditor of the corporate debtor.

India resurgence arc again contented that after amendment to section 30(4), which states that the CoC should ensure that the amount received by the creditors after the resolution should be in value with the security interests of the secured creditor. he contented with the same argument at the NCLAT bench, which was rejected. He also stated that the resolution applicant (Amit Metallics) and the CoC has not followed the requirements to pass a resolution plan. Here the appellant also admitted that the primary reason for not agreeing with the plan in the CoC and the appeals is that the applicant of the Resolution plan has offered a meager amount of approx. 2crs, which was not near to the value of his security interests.

The supreme court then stated that the appeal by India resurgence arc pvt. ltd. was did not have any merit in the arguments it was making against the CoC, NCLT decisions on the resolution plan. The court also stated that, it was clear that the approval of resolution plan fell within the power of the commercial wisdom of the CoC, and the areas of judicial review was limited to the four corners of Section 30(2), read with Section 61(3) of the IBC. Further the court referred a case named Jaypee Kensington v NBCC, which says that areas of judicial reviews on the orders given by the adjudicate authorities are limited few only. If the court is satisfied with the requirement, then the court has no objection with the decisions given by the adjudicating authorities. Once the mandatory requirements are found then the court is satisfied and can agree with the decisions made by the NCLT.

The court after verifying said that the decisions given by the NCLT was right and within the existing law. And the approval given by the CoC was also considerably within its power, as the voting was 95.35% in approval of submission of the Resolution of plan. Further, the court went on to state that the proposal made by the applicant was also in the limits, as the proposal was in equitable to all the creditors. And if the court agrees with the appellant’s argument, it will lead to a liquidation of the assets rather than an

insolvency resolution. So, the court dismissed the appeal.

CONCLUSION

This case and decision given by the Supreme Court is important because this judgement interprets the main aim of the IBC. The Primary aim of IBC is reviving the corporates from their debts and bringing them back on their feet. If every financial creditor given much of the power or rights, then it won't be equitable in nature, and it would be in sync with IBC principle.

CASE NO: 2

LALIT KUMAR JAIN V. UNION OF INDIA AND ORS, TRANNSFER CASE CIVIL NO. 245/2020

-Sri Varshini[2]

INTRODUCTION

The judgment brings a relief to creditors to initiate proceedings against the personal guarantors under the Insolvency and Bankruptcy Act (IBC). This case upheld the constitutional validity of the notification issued under the Ministry of Corporate Affairs (MCA). The court establishes the nature and extent of the liability of the personal guarantor. This landmark case is regarded as a milestone for the Insolvency and Bankruptcy Code.

FACTS

In 2019, the Ministry of Corporate affairs issued a notice in Part III of the Insolvency and Bankruptcy Code (IBC) which brought changes to the personal guarantors to a corporate debtor. The notification enabled financial institutions and banks to take up insolvency proceedings against the personal guarantor. This notification was intended to make the directors managing directors' chairpersons and promoters liable for the debt taken by their firm on personal guarantee. These provisions stated in the notifications were challenged before various courts.

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The petitioner Lalit Kumar Jain and others give personal guarantees to banks and other financial institutions as promoters, managing directors or their persons. After the notifications were released by the ministry, multiple petitions were filed on the Petitioners. The petitioners challenge the provisions of the notification contending that the notification was *ultra-virus*[3] of the powers delegated to the central government and the government could not apply the provisions of the IBC selectively on Personal Guarantors. The Petitioners challenged the notification issued under the IBC and other provisions in it, upholding the validity of the notification.

PROCEDURAL HISTORY

State Bank of India v. V. Ramakrishnan[4],- The court held that the resolution plan that states the claims free personal guarantee on account of subrogation shall be extinguished but cannot be applied to the guarantees furnished by the directors of corporate debtor. In Lalit Kumar case the court held that the approval of a resolution plan does not change the fact discharged by a personal guarantor.

Swiss Ribbons Private Ltd. v. Union of India[5], The Court observed that the IBC was enacted with an objective to ensure that the corporate debtor keeps on going concern by maximizing their assets and balancing interests of the stakeholders. In this case the petitioner argued that the notification it is ultra vires to the objects and purpose of the IBC and that the object of the IBC is to ensure a company's revival by protecting from its management and, as far as feasible, to save it from liquidation, thereby maximizing its value.

Rajendra K. Bhuta v. Maharashtra Housing & Area Development Authority[6], the Court held that the insolvency process is to be applied distributive which implies insolvency resolution process that applies to corporate guarantors. In this case the court held that the

[3]Any acts that lie beyond the authority of a corporation to perform.
[4] *State Bank of India v. V. Ramakrishnan*(2018) 17 SCC 394
[5] *Swiss Ribbons Private Ltd. v. Union of India* (2019) 4 SCC 17

[6]*Rajendra K. Bhuta v. Maharashtra Housing & Area Development Authority,* Civil Appeal No. 7260 of 2018

insolvency and bankruptcy proceeding applies to the personal guarantors who cannot be subjected to liquidation.

ISSUES

1. Whether the notification issued by the Ministry of Corporate Affairs was valid and *ultra vires* of the powers and authority of the government?

2. Whether the sanction of a resolution plan of a corporate debtor discharges the personal guarantor to the corporate debtor?

HOLDING

The Hon'ble Supreme Court upheld the validity of the notification issued by the Ministry of Corporate Affairs. The court with the support of various cases, directed that there is no need for constitutional requirements to implement a law at once. The court observed that the notification issued is not compulsive in the IBC. The notification is not ultra-virus of the powers and authority of the government under section 1(3) of the IBC. The Hon'ble Supreme Court also stated the connection between the corporate debtors and the personal guarantors. The court held that it sought to bring together all the stakeholders and the creditors to consider the nature of the assets during the corporate debtor's insolvency proceeding and facilitating the creditors buy framing real resolution plans keeping in mind the prospects of the creditors due from personal guarantors. The court also held that approval of a resolution plan relating to a corporate debtor does not operate to discharge

the liabilities of personal guarantors. It takes into consideration the implementation of the IBC since its inception and the nature of the legislature was never that the IBC should be made applicable to personal guarantors. The Supreme Court has ruled that the notification is valid and not *ultra vires* of the IBC.

Taking into consideration the judgment of *State Bank of India v. V. Ramakrishnan*[7], the Hon'ble Supreme Court held that the resolution plan does not ipso facto discharge a personal guarantor of a corporate debtor in his or her liabilities under the contract act. The court further added that the sanction of the resolution plan is imparted by section 31 (1) of the IBC and it does not operate as a discharge on the personal guarantor's liability. Section 31 (1) of the IBC makes it clear that any members of the board of directors who are directors are very interested in a resolution plan. The court pointed out that the discharge of a principal borrower from the debt owned by it to its creditor is by an involuntary process.It further helps in considering the assets available and it enhances the committee of creditors by framing realistic plants by keeping in mind the creditor's dues from personal guarantors.The Supreme Court has ruled that the Notification issued is legal and not *ultra vires* the Insolvency and Bankruptcy Code. Thus, the writ petitions, transferred cases and transfer petitions were dismissed.

OTHER CONSIDERATIONS

The hon'ble Supreme Court took note of all the provisions of the insolvency and bankruptcy code at various stages of the proceeding. The notification the personal guarantees accountable for extending guarantees. It observed the amendments brought in the IBC against the personal guarantors of the corporate debtor. It observed the nature and extent of the liability of the personal guarantors. It clears the position of the personal guarantor by extending the existing provisions of the code.

CASE ANALYSIS

[7] Ibid 2

The Hon'ble Supreme Court upheld the validity of the notification issued by the Ministry of Corporate Affairs. The honorable Supreme Court held that the notification issued by the Ministry of Corporate Affairs is valid. The court further added that the notification was not ultra-virus of the powers and authority of the government. Although the hon'ble court did not emphasis on the constitutional validity of the delegated legislation. The court emphasized the time in manor for a law to be determined and applied in the country. The resolution plan submitted by the resolution application, once approved by the creditors it becomes binding on the corporate debtor, personal guarantors and other members involved in the resolution plan. The court added that the objective of the IBC is to ensure that personal guarantor is not allowed to invade once the resolution plan is approved by the creditors. The balance between the right of the personal guarantor and interest of the corporate debtor was also discussed.

CONCLUSION

The Supreme Court held that the notification issued by the MCA is legal and valid. This judgment has opened several insolvencies against personal guarantors. It further extended the provisions of the IBC by giving more options to the creditors to initiate proceedings against the personal characters and recover their dues. This judgment holds personal guarantors accountable, make them cautious while giving guarantees. Hence, the Hon'ble Supreme court dismissed the petition challenging the notification issued by the Ministry of corporate affairs.

CASE NO: 3

ALOK KAUSHIK V. MRS BHUVANESHWARI RAMANATHAN & ORS, CIVIL APPEAL NO 4065 OF 2020

- Tehleel Tahir Raina[8]

INTRODUCTION

The decision in this case has clarified the question of why the professional's fee approval is not considered commercial wisdom by the CoC. The Hon'ble Supreme Court ruled that even after the CIRP[9] has been set aside, the NCLT has competence to award insolvency expenditures for its monetary claim to the expert appointed by the Resolution Professional. Therefore, it clearly demonstrates NCLT's competence as an inherent part of CIRP expenses to determine the amount payable to the valuer.

FACTS

The application was filed by M/s. Dena Bank who is a financial creditor[10] in this case by inter alia seeking to initiate CIRP in respect of M/s. Kaweri Telecom Infrastructure

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[9]The Corporate Insolvency Resolution Procedure is a time-bound procedure, which provides for the recovery of monetary dues from a debtor by a creditor in accordance with the provisions as laid down in the Code. The initiation of CIRP against a corporate debtor by an operational creditor under Section 9 of the Code.

[10] Section 5(7) of the Insolvency and Bankruptcy Code states, "*financial creditor*" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

Limited & others who is a corporate debtor, on the ground that it has committed a default for an amount of Rs. 69,18,44,425.03/- and was admitted by the Adjudicating Authority, by initiating CIRP and appointing Mr. B. Hariharin as IRP, moratorium etc.

However, the COC has changed the said Insolvency Resolution Professional and instead nominated Mrs. Bhuvaneshwari Ramanathan as the Resolution Professional and the same was approved by Adjudicating Authority.[11] Subsequently, the Resolution Professional appointed two registered valuers namely Mr. AlokKaushik (appellant) for Plant and machinery and Prateek Mittal for Securities and Financial Assets, by interalia putting condition that whole valuation work to be completed within 30 days from the order. The appellant's appointment fee Rs 7.50 lakhs plus applicable GST and other expenses were approved by the Committee of Creditors at its meeting, which was chaired by the second respondent.

The registered valuer (appellant) asked for information in terms of fixed assets register, agreements, contact details, site access authority etc. from the Resolution Professional. The Resolution Professional did not have information at one time and shared with the valuer over a period of time with the last information in terms of agreements being shared. The valuer kept updating the resolution professional in terms of the site visits, findings, information and access requirements and other aspects of the valuation exercise for the wide array of sites across country. The Resolution Professional was appreciative of the work done by the valuer. In order to meet day to day expenses, the valuer sought an advance amount.

The Resolution Professional[12] shared the billing details and GST details to raise the advance invoice. The Valuer raised invoice for 30% of the total professional fees of Rs. 6,50,000/- plus GST. The valuer deposited the GST heavy operating expenses and hiring services of professional at different places.

[11]Section 60 of IBC, 2016, Adjudicating Authority for corporate persons, The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate persons located.

[12] Section 22(3)(a) of IBC states the appointment of interim resolution professional as resolution professional. Resolution Professional means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional.

The Resolution Professional shared further details of agreements as an input to the valuation exercise. However, in December 2019, she sent a communication that since Hon'ble NCALT, has set aside the CIRP, she was cancelling the appointment of valuers. The Resolution Professional assured the valuer that the Professional fees of the valuers have already been ratified by the COC as provided in the appointment letter. She also mentioned that she would make a representation to the Hon'ble NCLT regarding the payment of fees.

The Applicant was under such undue pressure agreed for his own valuation fees at 75% of the ratified fees plus actual expenses with a hope to get his hard-earned dues. It is alleged that the Resolution Professional kept the applicant valuer in dark insisting that she was talking to the COC bank for release of fees. However, in March 2020, the Resolution Professional wrote to the applicant valuer that the bank has not taken into consideration the valuation report considering that the CIRP period was over and since Hon'ble NCLAT has set aside the CIRP. She seems to have deliberately not informed Tribunal about the fees and expenses of the valuers in the CIRP, who were appointed by herself only and completed their work in the CIRP.

The registered valuer (appellant) then petitioned the NCLT under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 to challenge the non-payment of the fees. The NCLT, however, dismissed the application, concluding that it had become functus officio. The NCLAT rejected the appellant's contention in its appeal, noting that a sum of Rs. 50,000 had already been paid over. The appellant filed an appeal with the Supreme Court under Section 62 of the IBC, challenging the NCLAT's decision.

PROCEDURAL HISTORY

Gujarat UrjaVikas Nigam Limitedv. Amit Gupta and Ors,[13] the hon’ble Supreme Court has clarified that it has the competence to adjudicate disputes arising solely from and relating to the insolvency of the corporate debtor under Section 60(5)(c)[14] of the IBC.

[13]*Gujarat UrjaVikas Nigam Limited v. Amit Gupta and Ors, (2021) SC 194*

[14] Application under section 60(5)(c) of the IBC, 2016 is only maintainable in the situation when CIRP is initiated against the company, or the company is under liquidation.

The Court observed that the case of AlokKaushik would fall within the competence and that the NCLT was mistaken to state that it had become a functus office.

K. Sashidhar v. Indian Overseas Bank &Ors,[15]the SC submitted that, if a purely commercial or commercial decision is an opposition to the proposed resolutions plan, the same non-justiciable decision does not open to appeal before, or in that respect to, the Adjudicator Authority (NCLT) (NCLAT). In addition, the Court held that the legislature did not consider challenging the "commercial and business decision" of the financial creditors, as the case may be, collectively or individually. In the case of AlokKaushik, the SC stressed this CoC decision concerning various matters which were considered to constitute a commercial wisdom of the CoC, as such not justiciable.

Committee of Creditors of LEEL Electricals Ltd. v. Leel Electricals Ltd,[16]NCLAT's IRP, Arvind Mittal, ruled that the appointment of a Resolution Professional is governed by Section 22, which states that the first meeting of the CoC must be held within 7 days of the CoC's formation, and the CoC must resolve to appoint the IRP as a Resolution Professional or to replace the IRP with another Resolution Professional by a majority vote of not less than 66 percent of the voting share of Financial Creditors.The decision to appoint IRP as RP or to replace IRP with another RP that is within the scope of Section 22 of the I&B Code is based on CoC's business acumen and is not subject to judicial scrutiny, as was clarified in the case of AlokKaushik.

ISSUES

1: Whether the jurisdiction of NCLT to determine the costs, charges, expenses, and professional fees are payable to a registered valuer appointed after the initiation of the CIRP under the IBC, in a situation where the CIRP is eventually set aside by the NCLT or NCLAT.

2: Whether the approval of the fees of a professional by CoC during CIRP is to be treated as commercial wisdom of the CoC and not justiciable or is justiciable as ordered by

[15]*K. Sashidhar v. Indian Overseas Bank &Ors, (2019) SC 257*
[16]*Committee of Creditors of Leel Electricals Ltd. v. Leel Electricals Ltd, (2021)*

NCLAT in the above referred case.

3: Who is required to pay the CIRP cost in case the National Company Law Appellate Tribunal (NCLAT or Appellate Authority) set aside the initiation of CIRP against the Corporate Debtor?

HOLDING

The Supreme Court in exercise of its jurisdiction under Article 142 of the constitution, ordered and directed that in a situation such as the present case, the AA is sufficiently empowered under Section 60(5)(c) of the Code, to make a determination of the amount which is payable to an expert valuer as an intrinsic part of the CIRP costs. It noted that recently in Gujarat urja case, it was clarified that the NCLT under Section 60(5)(c) of the IBC has jurisdiction to adjudicate disputes, which arise solely from, or which relate to the insolvency of the Corporate Debtor. So, in the present case, though the CIRP was set aside later, the claim of the Appellant as registered valuer related to the period when he was discharging his functions as a registered valuer appointed as an incident of the CIRP. Hence, the Adjudicating Authority was sufficiently empowered under Section 60(5)(c) of the IBC to decide the amount which is payable to an expert valuer as an intrinsic part of the CIRP costs. Further, Regulation 34 of the IRP Regulations also defines 'insolvency resolution process cost' to include the fees of other professionals appointed by the RP. Whether any work has been done as claimed and if so, the nature of the work done by the valuer is something which need not detain this Court, since it is purely a factual matter to be assessed by the Adjudicating Authority.

The Supreme Court also held that the availability of a grievance redressal mechanism under sections 217-220 of the IBC against an insolvency professional does not divest the NCLT of its jurisdiction under Section 60(5)(c) of the IBC to consider the amount payable to the Appellant as the purpose of such a grievance redressal mechanism is to penalize errant conduct of the RP and not to determine the claims of other professionals which form part of the CIRP costs.

Accordingly, the impugned judgment of the NCLAT was set aside and the proceedings

were remitted back to the NCLT for determining the claim of the Appellant for the payment of the professional charges as a registered valuer appointed by the RP in pursuance of the initiation of the CIRP.

The decisions of CoC on various matters had been held as commercial wisdom of the CoC, as such not justiciable in the case of K. Sashidhar. It was held however, if the opposition to the proposed resolution plan is purely a commercial or business decision, the same, being nonjusticiable, is not opened to challenge before the Adjudicating Authority (NCLT) or for that matter the Appellate Authority (NCLAT). The legislature has not envisaged challenge to the "commercial / business decision" of the financial creditors taken collectively or for that matter their individual opinion. The Supreme Court noted that in the case S3 Electricals, it held that a bare reading of Regulation 33(3) indicates that the applicant is to bear expenses incurred by the RP, which shall then be reimbursed by the Committee of Creditors to the extent such expenses are ratified. They were informed no Committee of Creditors was ever appointed as the interim resolution process did not reach that stage. In these circumstances, it is clear that whatever the Adjudicating Authority fixes as expenses will be borne by the creditor who moved the application

OTHER CONSIDERATIONS

Though the CIRP was ultimately overturned, the appellant's claim as a registered valuer related to the time when he was performing his duties as a registered valuer assigned as an occurrence of the CIRP, according to the SC. It further observed that the Code does not specifically make provision for entertaining claim in such circumstance, wherein the CIRP is set aside by the NCLAT. However, it agreed that there must be a forum, within the ambit and purview of the Code, which has the jurisdiction to make a determination on a claim of the present nature. The observation of the NCLT, as being rendered functus officio to entertain application of RV, is an incorrect reading of the jurisdiction of NCLT as an Adjudicating authority under the code.

CASE ANALYSIS

Despite the fact that the CIRP was eventually overturned in this instance, the Appellant's claim as a registered valuer related to the time when he was performing his duties as a registered valuer assigned as an incident of the CIRP. As a result, under Section 60(5)(c) of the IBC, the Adjudicating Authority has sufficient authority to determine the amount payable to an expert valuer as an integral part of the CIRP costs.

The Supreme Court rightly pointed out that the existence of a grievance redressal mechanism under sections 217-220 of the IBC against an insolvency professional does not absolve the NCLT of its jurisdiction under Section 60(5)(c) of the IBC to consider the amount payable to the Appellant, because the purpose of such a grievance redressal mechanism is to punish the RP's errant conduct, not to determine the amount payable to the Appellant.

According to the CIRP regulation, it is clearly seen that even IRP fees set by the Adjudicating Authority must be ratified by the CoC in order to be recognised as Insolvency Resolution Process Cost. As a result, AA has no role in determining the fees of professionals and cannot pass judgement on the fees of professionals fixed/approved by CoC.

CONCLUSION

The SC correctly stated that the NCLT had made an error in declaring it functusoffico. Furthermore, the NCLT does not divest because to the existence of a grievance resolution mechanism before the IBBI. The Court reversed the impugned judgement and remanded the case to the NCLT for determination of the appellant's expenses.

CASE NO: 4

IDEAL SURGICALS V. NATIONAL COMPANY LAW TRIBUNAL

-Thota Raghavendra[17]

INTRODUCTION

The insolvency and bankruptcy act, 2016 has provided the parties involved in corporate world with 3 different authorities namely, NCLT, NCLAT and an appeal in Supreme Court under sec 62 of IBC. NCLT has the powers to approve resolution plan or can settle the dispute in any other given under the code. Whereas NCLAT, is an appellant authority to take appeals from the parties who has not satisfied by the order given by NCLT and NCLAT review the order. Even if the parties don't aggrieve with the order given by NCLAT, then the code provides a law which gives the party to approach the supreme

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court of India. In the present case, the operational creditor has filed petition at the high court under article 226. In this comment we will be discussing about is the maintainability of the petition.

CASE BRIEF

The IBC, 2016 is one unified code for all the laws relating to insolvency and bankruptcy law. The code also provided 2 authorities namely, National company law tribunal which acts as an adjudicating authority and National company law appellant tribunal which is an appellant authority. In the case of ideal surgical v NCLT, the petitioner ideal surgical, who is also the operational creditor of the PVS Memorial Hospital (corporate debtor) has appealed about the resolution plan approved by the NCLT on 22nd February 2021 to NCLAT. And the operational creditors have also filed a petition in high court as the appeal and the stay order was not yet taken by the NCLAT. In meanwhile, the resolution plan was continued, but if the resolution plan continues and it may get finished with procedure before the NCLAT's decision. So, the petitioner approved the High court of Kerala under article 226 with a writ petition asking for a stay order for the resolution process of the corporate debtor.

PRECEDENT CASES

1. Sulochana Gupta and others v. RBG Enterprises Pvt. Ltd and others. In this case the court has ruled that the high courts don't have the jurisdiction on the writs on an order given by NCLT. So, the petition filed under article 226 of Indian constitution has no maintainability.
2. Swiss Ribbons Pvt. Ltd and another v. Union of India and others. The case deals with the constitutional validity of the laws in IBC. In this judgement the court said that

the code is still incomplete, but has been improving with amendments. The code is a very important legislative for the economy of India.

3. Ghanashyam Mishra and Sons Private Ltd v. Edelweiss Asset Reconstruction Company. The court held that once a resolution plan has been approved by the NCLT, no one is entitled to recover the claim.

ISSUES

1. Whether a petition filed under Article 226 of Indian constitution can be maintainable with the code?
2. Whether asking for a stay order of the resolution plan is within the law or does it go against the objective of the code?

HOLDINGS (THE APPLIED RULE OF LAW):

1. Indian constitution

a) Article 226 - Power of High Courts to issue certain writs

2. Insolvency and Bankruptcy code, 2016

a) Section 30(6) - The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.

b) Section 31(1) - Approval of resolution plan.

c) Section 62 - Appeal to Supreme Court.

CASE COMMENT

In the case of ideal surgical v NCLT. There were petitions filed under article 226 of Indian constitution in High court of Kerala. The reason to file petitions was because the NCLAT has not taken the appeal and stay order on the order given by the NCLT on the resolution plan on the corporate debtor. The court taking the petition, passed an interim stay on the order given by the NCLT.

The respondents of the case have challenged the maintainability of the petition against an order of NCLT. They went on say that there was another remedy for the creditor under the section 61 of the IBC. The section 61 of IBC talks about the appeal before the appellant authority. The respondent contented his arguments with stated the judgement of the case named, Sulochana Gupta and others v. RBG Enterprises Pvt. Ltd and others[18], the judgement of this case ruled that the high courts don't have the jurisdiction on the writs on an order given by NCLT. So, the petition filed under article 226 of Indian constitution has no maintainability. The petitioner stated that the appeals were not accepted by the NCLAT. And the NCLAT has also given the reason for not accepting the appeal as the appeal was having some defaults.

Even after the NCLAT accepted the appeal. The petitioner contented that in meantime, if the resolution plan continuous, the appeal will be useless. So, the petitioner stated that under article 226 the high court should issue an interim stay on the plan, in interest of the justice. The court in accordance to the following case and the issue of maintainability of the petitions under article 226, referred the precedent cases like, Swiss Ribbons Pvt. Ltd and another v. Union of India and others. This case looks into the constitutionality of the code. After referring to several other supreme court judgements the court finally dismissed all the petitions saying they are not maintainable under article 226 of Indian constitution.

According to the existing law I agree with court's decision in the case of Ideal surgical v NCLT. As the code already gave an authority to deal with the appeals of a party, which is NCLAT under section 61. And, the party can appeal in SC under Section 62 of IBC. As the code already given the party with 2 remedies. And there is no written in the code that the party can appeal before the high court or article 226 is admissible with IBC and the objective of code will also be ignored if the petition was maintainable. The court's decision was a fair.

Whereas, in case of Swiss Ribbon case the judgement stated that code is still incomplete and is improving with the amendments. And the code is a very beneficial legislation, and

[18] 2019 SSC online SC 73

we cannot ignore it, as the court stated. And, the article 226 gives the power to issue petitions on any legal right a person has (excluding fundamental rights). Interpreting both these an amendment on the maintainability of the petition under article 226 can be possible and beneficial for the corporate bodies.

CONCLUSION

The insolvency and bankruptcy code, 2016 has been amended many a time in a short span of time. This indicates that the code is incomplete in nature, but also the code is very important aspect for the stable growth of the economy, so we cannot avoid it. The code will improve with the changes. The present case judgement was fair within the existing laws. But it would be a beneficial to corporate bodies to the change/amendment if the petition under article 226 is maintainable.

CASE NO: 5

BIKRAM CHATTERJI & ORS. V. UNION OF INDIA & ORS.

- Thota Raghavendra[19]

INTRODUCTION

The real estate industry is one of the recognized industries in business sector, even the

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growth of this industry is marginally increasing around the world. In India, the real estate industry is one of the major industries which is contributing the growth and development of the country, as the real estate industry is said to be one the most employment generator among others. - This case also tries to shed light on the homebuyers and the difficulties faced by them around India.

CASE BRIEF

In 2011, a real estate company named Amrapali has started a project of constructing 42,000 flats in Noida and greater Noida. Amrapali group has promised that they finish this project after 36months. Buyers signed the buyer's agreement with Amrapali groups for the possession of property. They also paid an amount of 40% consideration in advance. But the buyers are still had their worries regarding few clauses in the agreement. Clause 15 in the agreement authorizes the builder to keep full authority over flat depriving allotees any lien or interest despite full payment. There were should clauses in the buyer's agreement which put the buyer in a state of worry. After 36months, they failed to deliver the possession of flats. With all the loses the buyers had faced, the buyers approached the NCDRC by filing consumer complaint. On the other hand, Bank of Baroda approached the NCLT for CIRP under section 7 of IBC. For which NCLT has approved and appointed an interim resolution professional and under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 declared moratorium. So, the buyers filed a petition in supreme court by stating that, this decision by NCLT will affect many buyers.

PROCEDURAL HISTORY (PRECEDENT OF THE CASE):

1. **Jaypee Kensington Boulevard Apartments Welfare Association &Ors. Vs. NBCC.** If, within its limited jurisdiction, the Adjudicating Authority finds any shortcoming in the resolution plan vis-à-vis the specified parameters, it would only send the resolution plan back to the Committee of Creditors, for re-submission. The court also

clarified that, it is made clear that the IRP shall not entertain any expression of interest by any other person nor shall be required to issue any new information memorandum.

ISSUES

1. What is the validity of the charges being claimed by the Authorities and Banks over the projects developed by Amrapali Group?
2. Whether the RERA Registration obtained by the Amrapali Group under the RERA (Real Estate Regulatory Authority) Act, 2016 was liable to be canceled?
3. What relief can be provided to the homebuyers in light of the present facts and circumstances?

HOLDINGS

1. Constitution of India

a) Article 21 - Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law

2. The Consumer protection act, 1986

a) Section 12(1) - A complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District Forum by one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum, on behalf of, or for the benefit of, all consumers so interested.

3. IBC,2016

a) Section 7 - Initiation of corporate insolvency resolution process by financial creditor.

b) Section 53 - Distribution of assets

CASE COMMENT

Before the supreme court the homebuyers contented that the dues of the homebuyers should be treated with highest priority than the dues of the authorities. The homebuyers also stated that the authorities were very linear and did not take any strict action against the Amrapali group despite of many rules violation the real estate company committed

during the time being. Under Article 21 of the constitution the authorities had a duty of promoting welfare of public and acting in interest of public by conducting their jobs fairly and reasonably to protect the public interest. But the authorities are failed at this and breached the public trust doctrine[20] by not taking any proper action against the Amrapali groups. By stating these arguments, the homebuyers asked the court to cancel the lease deeds given by the authorities. Even the banks were also negligent at their part. Banks blindly sanctioned loans to Amrapali groups despite there was no development in the project. And also, the banks ignored the Amrapali money diversions.

Later, the authorities came with their arguments by stating that, there is no applicability of the public trust doctrine in this case as there was no breach of trust in the matter of on-going case. Further, the authorities stated that they were regularly looking into the Amrapali projects and sending them the notices for premium installments payment. They also stated that taking any steps in matter of the Amrapali group by cancelling the lease deed, it would have been a drastic one, which was unnecessary. Even, the banks argued that they were doing their duty very attentively. According to the terms in the deed, the banks have all the charges over the project till the loan amount is repaid. The banks also stated that the homebuyers are not considered to be a financial creditor, so they no rights on the basis of allotment through flat buyer agreement.

After hearing the arguments of all the parties, the court stated that, the public trust doctrine is applicable to the present case and the authorities had failed do their duty and did not monitored the functions of Amrapali groups and the homebuyers has the right to ask and know about it. And it was authority's duty to take an action on Amrapali group as they were violating rules repeatedly, but the authorities did nothing about it. The court went on to say that, even the banks were negligent with their duties, by sanctioning the Amrapali groups the loans with checking the records. All the arguments by the bank and the authorities were not in their favor. The arguments made by homebuyers were legally right and morally agreeable. Even through the homebuyers were not considered as a

[20]The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes.

creditor. the supreme court judgement in this following case gave the homebuyers the status of creditor. Considering a homebuyer as a creditor is arguable. But to protect the homebuyers from their misery and in protecting the public interest was the main focus in this case. But the court didn't ignore the banks entirely.

Finally. After analyzing the facts and arguments presented by the parties, the court held that, the RERA registration of Amrapali groups under RERA act should be cancelled and the projects under Amrapali group should be finished by the NBCC. The lease deeds permitted by authorities to Amrapali groups should stand questioned and cancelled. The banks and authorities should have no right on the assets of this project, but they can recover their dues from using other properties of Amrapali groups. A court receiver was appointed to look after the project and hand the possession to homebuyers.

CONCLUSION

The case of Bikram Chatterjee v UOI, is one of the landmark cases in real estate industry. Also, this case is not similar to other insolvency and bankruptcy cases. As this case also sees into the morals by taking the homebuyers into consideration as creditors and also the banks got their due with other properties of the Amrapali group. The court may have considered the homebuyers as a secured creditor in this case, but the court also did not ignore the banks entirely by allowing the banks to use the other properties of Amrapali group.

CASE NO: 6

TATA STEEL BSL LTD V VARSHA W/O AJAY MAHESHWAR

Muskaan Jain[21]

Mohammed Rizwanullah Farooqui [22]

INTRODUCTION

A recovery litigation filed by an operating creditor against former Bhushan Steel, which was taken over by Tata Steel in May 2018, has been stayed by the Supreme Court. Bhushan Steel was taken over by Tata Steel in May 2018 after being forced into insolvency by State Bank of India in July 2017 for owing lenders Rs 44,000 crore. BSL owed over Rs 57,000 crore in debt.

An SC Bench led by Justice Navin Sinha issued the stay order in response to an appeal filed by Tata Steel BSL (formerly known as Bhushan Steel) challenging the HC's decision last year dismissing its plea and allowing the recovery suit filed by Parijat Enterprises through its proprietor Varsha to proceed before a Nagpur court.

Tata argued in its appeal that the recovery suit could no longer be maintained after BSL was taken over, and that the lower court and the HC erred in dismissing its motion for dismissal of the recovery claim. “Such claim has been finally settled and extinguished under the resolution plan that was accepted and approved by NCLT and affirmed by NCLAT under IBC,” Tata said, stressing that the HC erred in ruling that the claims are subject to trial court decision.

The IBC has overriding power over other laws, according to Tata's senior lawyer AM Singhvi, and once the corporate insolvency resolution process has been launched, all procedures, including the recovery litigation, are not maintainable and liable to be dismissed. According to the corporation, it set aside Rs 1,200 crore for OCs in its approved RP, which was executed within a year of the new management's arrival.

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Parijat had filed a claim against BSL for the delivery of magnetite powder to its Dhenkanal business in Odisha, seeking roughly Rs 38.90 lakh in damages. BSL, on the other hand, challenged the payment, claiming that the material given was of poor quality and unsatisfactory.

Tata Steel purchased BSL while the recovery suit was pending. In October 2018, the Tata's motion for dismissal of the recovery suit before the trial court was denied on the grounds that the IBC proceedings did not have the effect of destroying an OC's right to continue its recovery litigation against BSL.Tata said that because the proprietary firm had participated in CIRP and failed to question the authorized RP, it had no legal standing to pursue its recovery litigation.

Parijat, on the other hand, argued that the RP provided for a specific identified fund to fulfil the liability of OCs like it, and that the suit must proceed to its logical conclusion in order to crystallize the exact sum payable by Tata to it.

STATEMENT OF FACTS

The respondent, a proprietary concern, filed suit for recovery of amount of Rs. 38, 89, 674.14 against M/s. Bhushan Steel Ltd. and General Manager of the Company for supply of magnetite powder to the factory of the said Company at Meramandali, District Dhenkanal, Odisha (formerly Orissa), which was disputed by Bhushan Steel Ltd. on the ground that the quality of the material supplied was not satisfactory and it was substandard. The recovery suit was still pending when IBC was enacted in the year 2016.

The State Bank of India, one of the main creditors of Bhushan Steel Ltd., filed an application under section 7 of the IBC for initiation of corporate insolvency resolution process. Mr. Vijay Kumar Iyer, a resolution professional, was appointed. Under the IBC procedure, upon initiation of the process, public announcements to invite applications from creditors, both financial creditors and operational creditors for their claim before the resolution professional. Respondent was an operational creditor recognized under section 5 (20) of the IBC had applied for claim and the resolution professional had included respondent in the list of operational creditors.

Tata Steel BSL Ltd, the petitioner and the resolution applicant, submitted its resolution plan to the resolution professional as per the provisions of IBC. The resolution professional considered the material provided and submitted a resolution plan to the National Company Law Tribunal which dealt with the claims of financial creditors as well as operational creditors, including the claim of respondent and was approved by the Committee of Creditors and then by the National Company Law Tribunal on 15/05/2018.

On 10/08/2018, the National Company Law Appellate Tribunal dismissed all appeals from various parties made under the provisions of IBC that challenged the order. The petitioner's resolution plan was accepted and Tata Steel BSL Ltd. took over all the assets and liabilities of Bhushan Steel Ltd.

On 11/09/2018, the petitioner filed an application to dismiss the respondent's pending recovery suit before the trial court due to the orders of the Appellate Authority under the provisions of IBC of approving the resolution plan submitted by the resolution professional.

On 25/10/2018, the Trial Court rejected the petitioner's application and held that the proceedings undertaken as per the provisions of the IBC did not have the effect of extinguishing the right of respondent to continue to prosecute the suit for recovery filed against Bhushan Steel Ltd. and now the petitioner. The present writ petition challenges the order passed by the Trial Court.

ISSUES

1. Whether the petitioner is justified in contending that upon process of corporate insolvency resolution being triggered under the Insolvency and Bankruptcy Code, 2006 (IBC) and respondent having participated in the same, the suit for recovery of amount filed by respondent could no longer survive and that the Court of Joint Civil Judge, Senior Division, Nagpur (Trial Court) committed an error in rejecting the application filed by the petitioner for dismissal of the suit.

2. Whether an operational creditor like respondent could be deprived of amounts due to it, only because a civil suit initiated before the Civil Court is still pending and the dues, if any, are yet to be crystallized.[23]

FINDINGS

The petitioner contended that the resolution plan stipulated no amount payable to the respondent, the operational creditor, and that the petitioner's liability to pay due to the respondent stood extinguished as the respondent had participated in the corporate insolvency resolution process under the IBC and it had failed to challenge the resolution plan approved by the Appellate Authority, it had no right to continue with the suit for recovery filed against the petitioner. The IBC has an overriding effect over other laws and thus, due to the initiation of the corporate insolvency resolution process, all proceedings like the suit filed by respondent are not maintainable and liable to be dismissed.

The respondent opposed by relying on the resolution plan and contending that the respondent's recovery suit was maintainable and not liable to be dismissed as the resolution plan provided a specific identified fund for payment due to the operational creditors like the respondent and so, the suit must reach its logical end for crystallizing the exact amount payable by the petitioner to respondent.

The petitioner's counsel submitted interpretations of the provisions and section 63 and 238 of the IBC which shows that the Trial Court was not justified in rejecting the application filed by the petitioner and that the suit filed by respondent could not survive in the face of the orders passed by the National Company Law Tribunal and the National Company Law Appellate Tribunal. It was contended that as the orders were passed on the petitioner's resolution plan, the respondent, who participated as an operational creditor in the corporate insolvency resolution process, could not pursue the recovery suit. Once the process begins under the IBC, no litigation before Civil Court could survive. As the

[23]M/S Tata Steel Bsl Ltd. vs Varsha W/O Ajay Maheshwari on 28 March, 2019

resolution plan was approved by the Adjudicating Authority and upheld by the Appellate Authority, the respondent, as an operational creditor, could not prosecute the civil suit filed before the Trial Court.

The respondent contended that order passed by the Trial Court was in consonance with law and that no interference was warranted by this Court, exercising writ jurisdiction. The petitioner's interpretation of the provisions of the IBC was based on misconception as the provisions had demonstrated that the recovery suit filed by the respondent could not be dismissed just because of the corporate insolvency resolution process. In case of relevant clauses of the resolution plan, the respondent's recovery suit is required to be taken to its logical end and based on the court's decision, the respondent can recovery the amount from the operational creditor's settlement fund of the resolution plan. The petitioner was deliberately misinterpreting the same in order to escape its liability. The enactment and proceedings of IBC did not extinguish the right of the operational creditors to pursue its recovery suit. If the petitioner's interpretation was accepted, it would be a travesty of justice against the genuine claims of respondent and so the writ petition deserved to be dismissed.

The corporate insolvency resolution process was initiated under section 7 of IBC through the application made by the State Bank of India, who was of the financial creditors. The process was made public and applications inviting financial creditors, operational creditors and others were recorded. The management of affairs of the corporate debtor, Bhushan Steel Ltd., were appointed to the resolution professional for the process of preparing a resolution plan. Respondent, who was an operational creditor, produced relevant documents to the resolution professional to claim the due amount from the corporate debtor.

The petitioner, who is the resolution applicant under section 5(25) of the IBC, placed its resolution plan for approval. The plan was approved by committee of creditors and then by the Adjudicating Authority i.e., the National Company Law Tribunal, under section 5 (1) of the IBC. Aggrieved parties approached the National Company Law Appellate Tribunal to challenge the order, but their appeals were rejected by the said Appellate

Authority. Thus, the resolution plan attained finality.

According to the petitioner, the resolution plan extinguished the claims of the operational creditors and once the resolution plan attained finality, under section 63 and 238 of IBC, the Trial Court cannot continue the recovery suit filed by the respondent.

The respondent opposed this interpretation and contended that a proper resolution plan would have an operational creditor's settlement fund of Rs. 1200 crore for the payment of amount due to the operational creditors like the respondent after the amount was calculated by the decree of the civil court.

The respondent's name is specifically mentioned in the list of operational creditors (excluding employees and workman) in the resolution plan pertaining to the claims that are sub judice and as an operational creditor, the respondent cannot be deprived from filing recovery suit for claim against the original corporate debtor. The respondent's sub judice claim was taken into consideration under the resolution plan, but the amount was not finalized by the civil court, so it was shown as an admitted amount of INR 1. As the claim as not finalized in the court, the exact amount was not shown in the resolution plan, although liability to make payment to respondent, the operational creditor, has been preserved. The respondent was to be paid from the operational creditor's settlement amount, which was Rs 1200, after the amount was finalized in the pending civil suit.

The petitioner's counsel emphasized on section 14 of IBC, but the moratorium cannot prove error in the order passed by the Trial court. Upon the commencement of the insolvency process, there shall be moratorium on institution of suit or continuation of pending suits, but the moratorium does come to an end upon completion of the corporate insolvency resolution process. Moratorium does not mean that the pending suits, like that of the respondent, would be liable to be dismissed once the resolution process begins.

The petitioner's emphasis on section 63 and 237 of IBC for dismissing the recovery suit is wholly misplaced because the Civil court's jurisdiction is barred under section 63 of IBC in any related matters on which the National Company Law Tribunal or the National Company Law Appellate Tribunal have jurisdiction under the IBC pertaining to the

corporate insolvency resolution process. Section 238 of IBC specifies that in matters relating to corporate insolvency resolution process, IBC has an overriding effect.

As the respondent participated in the resolution and was recognized as an operational creditor, the recovery suit pending before the trail court would be justified in determining the amount due from the petitioner to be paid from the Rs 1200 crore set apart for operational creditors settlement amount. The Appellate Authority, under the provisions of IBC, cannot decide the objection raised by the petitioner before the trial court regarding the supply of sub-standard goods by respondent for denying its liability to pay dues. Therefore, the pending civil suit cannot be extinguished due to the initiation of resolution plan. The respondent's claim as operational creditor is within the knowledge of the petitioner, who is the resolution applicant, and thus, the claim cannot be extinguished as there was Rs 1200 crore set aside in the resolution plan for the operational creditor's settlement fund.

PRECEDENTS

The learned counsel relied upon judgments of the Hon'ble Supreme court in the case of *Swiss Ribbons Pvt. Ltd. vs Union of India*[24], *Mobilox Innovations Private Limited vs Kirusa Software Private Limited*[25], *Innoventive Industries Ltd. vs ICICI Bank and another*[26], *K. Sashidhar vs Indian Overseas Bank and others*[27], *Metals & Electricals Employees Organization vs Jaipur Metals & Electricals Ltd.*[28] and judgment of this Court in the case of *Murli Industries Ltd. vs Primo Pick N Pack Private Limited and others*[29] and judgment of Delhi High Court in the case of *Liberty House Group Pte. Ltd. vs State Bank of India and others*[30].

[24] Swiss Ribbons Pvt. Ltd. v. Union of India 2019 SCC OnLine SC 73
[25]Mobilox Innovations Private Limited v. Kirusa Software Private Limited (2018) 1 SCC 353
[26]Innoventive Industries Ltd. v. ICICI Bank and another (2018) 1 SCC 407
[27] K. Sashidhar v. Indian Overseas Bank and others, Civil Appeal Nos.10673, 10719, 10971 and 29181 of 2018 decided on 05/02/2019
[28] Metals & Electricals Employees Organization v. Jaipur Metals & Electricals Ltd., 2018 SCC OnLine SC 2801
[29] Murli Industries Ltd. v. Primo Pick N Pack Private Limited and others (Company Application No.10 of 2017 in Company Petition No.6 of 2012) decided on 02/11/2018
[30] Liberty House Group Pte. Ltd. v. State Bank of India and others, 2019 SCC OnLine Del 7256

Swiss Ribbons Pvt. Ltd. vs Union of India[31]

In this case, the Hon'ble Supreme Court has considered the constitutional validity of various provisions of the IBC and has taken into consideration the objectives of the IBC and found that the approach of addressing the issue of insolvency has undergone a paradigm shift by enactment of the IBC and that its provisions could not be held to be invalid only because a different policy approach was adopted. The Hon'ble Supreme Court took into consideration various provisions of the IBC to emphasize that the concern of the operational creditors had been given due consideration in the IBC, particularly upon amendment of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, whereby amount due to the operational creditors under a resolution plan has been given priority in payment over financial creditors. On this basis, the Constitutional validity of various provisions of the IBC has been upheld. This judgment would not assist the petitioner's claim that the suit filed by respondent, in the facts of the present case, was required to be dismissed upon finalization of the resolution plan.

Mobilox Innovations Private Limited vs Kirusa Software Private Limited[32]

In this case, the Hon'ble Supreme Court was concerned with the question of existence of a dispute or a suit or other proceedings. The Hon'ble Supreme court has held that the dispute, existence of which is claimed ought not to be spurious, mere bluster, plainly frivolous or vexatious and that such a pre-existing dispute could be pursued. In the present case, suit was filed by respondent way back in the year 2011, wherein the liability was disputed by the petitioner on the ground that sub-standard quality of goods were supplied by respondent. Such a dispute, which not only existed but stood recognized as a sub judice claim for which an inbuilt mechanism was incorporated in the resolution plan, could not be extinguished, merely because corporate insolvency resolution process had been undertaken. Respondent is justified in relying upon the said judgment in support of its contention.

[31] Swiss Ribbons Pvt. Ltd. v. Union of India 2019 SCC OnLine SC 73
[32]Mobilox Innovations Private Limited v. Kirusa Software Private Limited (2018) 1 SCC 353

Innoventive Industries Ltd. vs ICICI Bank and another[33]

In this case, while distinguishing between initiation of corporate insolvency process by financial creditors under section 7 of the IBC and insolvency resolution process by operational creditors under section 8 of the IBC, it has been held that when insolvency resolution is by an operational creditor, the moment there is existence of dispute, the operational creditor gets out of clutches of the IBC. In the present case, although the resolution process was initiated by a financial creditor under section 7 of the IBC, the resolution plan prepared under the provisions of the IBC and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, recognized the claim of respondent as an operational creditor and under Regulation 38 of the aforesaid Regulation of 2016, priority is given to the amount due to respondent as an operational creditor over the dues of financial creditors. Thus, when the resolution plan provides for the dues payable to respondent, subject to the pending suit, it cannot be said that any error was committed by the Trial Court in passing the impugned order.

HOLDING

The court held that the suit filed by respondent cannot be dismissed as claimed by the petitioner in the application. According to the Bombay High Court, the adjudicating authority had authorized a resolution plan that targeted a fixed amount to pay disputed claims that had been ostensibly admitted. When a resolution plan earmarks a sum for the settlement of such claims, the Court held that the creditor's claim can only be fulfilled from that amount. The resolution plan provides Rs 1200 crore for operational creditor's settlement fund which would pay dues of the operational creditors. Therefore, no error can be attributed in the trial court's order, thus, rejecting the writ petition for dismissal of suit filed on behalf of the respondent.

CONCLUSION

The fact of the case demonstrates that the petitioner had attempted to escape liability of

[33]Innoventive Industries Ltd. v. ICICI Bank and another (2018) 1 SCC 407

paying dues to the respondent, the operational creditor, which was shot down by the order passed by the trial court. The resolution plan specified that an operational creditor cannot be entitled to obtain orders for execution of decrees or judgments or take any steps to cause distress to the petitioner, but it does not mean that a pending legal proceeding in a civil court would be terminated upon the finality of the resolution plan.

CASE NO: 7

JIGNESH SHAH V. UNION OF INDIA, (2019) 10 SCC 750

- Tehleel Tahir Raina[34]

INTRODUCTION

Writ Petition and Civil Appeal was filed by Shri Jignesh Shah and Smt. Pushpa Shah respectively, both are the shareholders of La-Fin Financial Services Pvt. Ltd. assailing the order of the NCLT, Mumbai Bench, admitting a winding up petition that was filed by IL&FS Financial Services Ltd. against La-Fin before the High Court of Judicature at Bombay which was transferred to the NCLT and then heard under the Insolvency and Bankruptcy Code, 2016.

FACTS OF THE CASE

In Aug 2009, a share purchase agreement was executed between Multi-Commodity Exchange India Limited, MCX Stock Exchange Limited and IL&FS, whereby IL&FS agreed to purchase 442 lakh equity shares of MCX-SX from MCX. Pursuant to this agreement, La-Fin, as a group company of MCX, issued a 'Letter of Undertaking'[35] to IL&FS, stating that La-Fin or its appointed nominees would offer to purchase from IL&FS the shares of MCX-SX after a period of one year, but before a period of three years, from the date of investment. And, IL&FS, therefore, exercised its option to sell its

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[35] An undertaking letter or a letter of undertaking is a formal document, but not necessarily a contract that provides assurance from one party to another to fulfil an obligation.

entire holding of shares in MCX-SX, and called upon La-Fin to purchase these shares in accordance with the Letter of Undertaking. La-Fin replied that it was under no legal or contractual obligation to buy the aforesaid shares. Thereafter, correspondence between the parties continued, until finally, IL&FS filed a suit in the Bombay High Court for specific performance of the Letter of Undertaking by La-Fin or, in the alternative, for damages.

In Oct 2014, Bombay High Court passed an injunction order restraining La-Fin from alienating its assets pending disposal of the suit, subject to attachments of La-Fin's properties that had been made by the Economic Offences Wing of the Mumbai Police during the pendency of the suit. An appeal against this order was dismissed by a Division Bench of the Bombay High Court. In Nov 2015, a statutory notice under Section 433[36] and 434[37] of the Companies Act, 1956 was issued by IL&FS to La-Fin and stating that La-Fin was obviously in no financial position to pay the sum of INR 232,50,00,000/- which, according to IL&FS, was owing to them.

A reply was promptly given by La-Fin to the aforesaid notice referring to the pending suit, and stoutly disputing the fact that any amount was due and payable. The reply went on to state that La-Fin was otherwise commercially sound and that the statutory notice[38] issued under Sections 433 and 434 of the Companies Act, 1956 was only a pressure tactic.

In 2016, a winding up petition[39] was then filed by IL&FS against La-Fin in the Bombay

[36]Section 433 in The Companies Act, 1956 states circumstances in which company may be wound up by Court. A company may be wound up by the Court, if the company has, by special resolution, resolved that the company be wound up by the Court, if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting, if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year, if the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two, if the company is unable to pay its debts, if the Court is of opinion that it is just and equitable that the company should be wound up.

[37]Section 434 of the Companies Act, 1956 states that company when deemed unable to pay its debts if a company shall be deemed to be unable to pay its debts

[38]The minimum amount of time under statute or law which notice is required to be provided.

[39]As per Section 272 of the Companies Act 2013, a winding-up petition is to be filed in the prescribed forms 1,2 or 3 whichever is applicable and is to be submitted in 3 sets. The petition can be presented by the following persons:The Company, The Creditors, Any Contributory/Contributories, The Central/State Government, The Registrar authorized by central govt for that purpose.

High Court under Section 433(e)[40] of the Companies Act, 1956. The Code came into force in Dec 2016 and as a result, as per the Insolvency and Bankruptcy Rules, 2016, the Winding up Petition was transferred to the NCLT as a Section 7 application under the Code. The statutory form under these Rules, namely, Form-1 was filled up by IL&FS indicating that the date of default was Aug 2012.

In 2018, the Winding up Petition was admitted by the NCLT as an application under Section 7 of the Code, stating on a reading of the share purchase agreement and the Letter of Undertaking that a financial debt had, in fact, been incurred by La-Fin. The National Company Law Appellate Tribunal dismissed the appeal filed by Shri Jignesh Shah against the aforesaid admission order, agreeing with the NCLT that the aforesaid transaction would fall within the meaning of "financial debt" under the Code, and that the bar of limitation would not be attracted as the Winding up Petition was filed within three years of the date on which the Code came into force, Dec 2016.

A Writ Petition was filed by Smt. Pushpa Shah against these orders in the Bombay High Court, challenging certain provisions of the Code. Writ Petition was then filed in this Court challenging the constitutionality of certain provisions of the Code, as well as the NCLT and NCLAT orders, after which the Civil Appeal was also filed against the NCLAT order under Section 62 of the Code.

PROCEDURAL HISTORY

B.K Educational Services (P) Ltd. v. Parag Gupta and Associates[41], it has been clarified that Article 137 of the Limitation Act, 1963[42] applies to all applications of section 7 filed in accordance with the code. Consequently, when a default occurs, the right to sue." If the default occurred over three years from the date of filing of the request the request would be prohibited by Article 137 of the limitation law, except where, in the facts of the case, the delay in submitting such an application may be requested by section 5 of the

[40]Section 433 states that the provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be.
[41]*B.K Educational Services (P) Ltd. v. Parag Gupta and Associates,* (2019)
[42]Article 137: Any other application for which no period of limitation is provided elsewhere in this Division, period of limitation is 3 years

limitation act. The court cited this case in the matter of Jignesh Shah, holding that the legislature did not intend for a creditor who has allowed the statute of limitations to run to allow such delayed claims through the mechanism of this code.

State of Kerala v. V.R. Kalliyanikutty,[43] the court found that it is possible to recover a time-barred debt through recourse to recovery proceedings. Section 17(3) of the Kerala Review Recovery Act 1968 clearly stated that a protester payer is entitled to file an action to reimburse the full or part of the amount he pays under protest. Also, it was held that when the right to file such a suit is expressly preserved, there is a necessary implication that the shield of limitation available to a debtor in a suit is also preserved, so a wide interpretation of the expression "amount due to include time-barred debts would destroy an important defence available to a debtor in a suit against him by the creditor, and may tall foul of Article 14 of the Constitution of India[44].

ISSUES

1: Whether the winding-up petition initiated by IL&FS against La-Fin, was time-barred and could it be proceeded with any further in the light of Article 137 of the Limitation Act?

2: Whether a transaction of the above nature would constitute a “financial debt” under Section 5(8) of the IBC.

HOLDING

The Hon'ble Supreme Court rejected the arguments of the Respondent that cause of action for the purposes of limitation would include the commercial insolvency or the loss of substratum of the company and held that "The trigger for limitation is the inability of the company to pay its debts. Undoubtedly, this trigger occurs when a default takes place, after which the debt remains outstanding and is not paid. It is this date alone that is relevant for the purpose of triggering the limitation for the filing of a winding-up petition.

[43]*State of Kerala v. V.R. Kalliyanikutty,* (1999) 3 SCC 657

[44]Article 14 of the Indian constitution guarantees, equality among equals (provided they are equal), otherwise there cannot be a right to equality. Equal protection before law simply means that Equality among equals provided, they are equal. What this means is that everybody has different potential and calibre.

Though it is clear that a winding-up proceeding is a proceeding 'in rem'[45] and not a recovery proceeding, the trigger of limitation, so far as the winding-up petition is concerned, would be the date of default. Questions as to commercial insolvency arise in cases covered by Sections 434(1) (c) of the Companies Act 1956, where the debt has first to be proved, after which the Court will look to the wishes of the other creditors and commercial solvency of the company as a whole. The stage at which the Court, therefore, examines whether the Company is commercially insolvent is once it begins to hear the winding-up petition for admission on merits. Limitation attached insofar as petitions filed under Section 433 (e) are concerned at the stage that default occurs for, it is at this stage that the debt becomes payable."

The Hon'ble Court further relied on the judgment in *Softsule (P) Ltd*. in *Mediquip Systems (P) Ltd. v. Proxima Medical System*,[46] which states the law on winding-up petitions filed under Section 433 (a) of the Companies Act, 1956 correctly. The primary test is set out in which it states that a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bonafide disputed by the company. Absent such dispute, the petition may be admitted. Equally, where the debt is bonafide disputed, there cannot be 'neglect to pay' within the meaning of Section 434 (1) (a) of the Companies Act, 1956, so that the deeming provision does not come into play. Also, the moment there is a bonafide dispute, the debt is then not 'due'. The High Court also correctly appreciates that whether the Company is commercially solvent is one of the considerations in order to determine whether the Company is able to pay its debts or not.

It is clear therefore, that even on facts, the company's substratum disappearing, or the commercial insolvency of the company has not been pleased. Whereas, upon transfer of the winding-up proceedings to the NCLT, what is correctly stated is that the date of default makes it clear that three-years from the date had long since elapsed when the Winding-up Petition under Section 433 (e) was filed.

Further to the second issue, La-Fin contended that the Letter of Undertaking was a mere letter of comfort and there was no disbursement against consideration for time value of

[45] In Rem means a lawsuit against an item of property, not against a person (in personam)
[46] *Mediquip Systems (P) Ltd. v. Proxima Medical System,* (2005) 7 SCC 42

money made by IFIN to La-Fin. The NCLAT upheld the judgment of the NCLT, reiterating that the amount had been raised for economic gain and has the commercial effect of borrowing, given that the terms of the transaction included not only the purchase of shares but also the date by which the amount was to be repaid.

Consequently, the Civil Appeal was allowed, and the Writ Petition was disposed of by the Hon'ble Court by holding that the winding-up petition filed, being beyond the period of 3 years mentioned in Article 137 of the Limitation Act is time-barred and cannot, therefore, be proceeded with any further. Accordingly, the impugned judgment of the NCLAT and the judgment of the NCLT was set aside, thereby quashing the insolvency proceedings against Jignesh Shah and Pushpa Shah's La-Fin Financial Services.

CASE ANALYSIS

In the present civil appeal, the Hon'ble Supreme Court correctly answered the matter in favour of the Appellant-Shareholder. Furthermore, as learned Senior Advocate for Appellant Shareholders properly pointed out, the statutory notification makes no mention of La-Fin's insolvency. The statutory notice exclusively refers to the court proceedings and attachment by the Mumbai Police's Economic Offences Wing, which occurred in 2013. As a result, there is no factual basis for the legal arguments advanced by the learned Senior Advocate for Respondent-IL & FS.

Furthermore, the company's commercial Insolvency had not been pleaded in the petition or based on the facts. When the winding-up petition under Section 433(e) was submitted in 2016, the statutory Form-1 plainly stated that the date of default, and hence 3 years from that date, had long passed. In view of all of the facts, documents on file, and authorities cited by the Hon'ble Court, it is evident that the statute of limitations for bringing a winding-up petition begins only on the day of default.

CONCLUSION

The La-Fin Judgments established a significant precedent under the IBC in terms of the definition of "financial debt" and the types of transactions that may be covered by it. With regard to the present civil appeal, the Hon'ble Supreme Court correctly replied to

this question in the appellant's favour. Furthermore, it was held that the statutory notification only refers to the court proceedings and attachment So, there is no factual basis for the legal arguments advanced by the respondent. The Supreme Court overturned the La-Fin decisions based exclusively on the issue of limitation.The Supreme Court did not examine, touch on, or express an opinion on the La-Fin Judgments' analysis and findings on whether debt obligations arising from put-option agreements are considered "financial debt" under the IBC.

CASE NO: 8

SUNIL KUMAR AGGARWAL VS NEW OKHLA INDUSTRIAL DEVELOPMENT AUTHORITY & ORS

- Muskaan Jain[47]

INTRODUCTION

The present case is filed by the petitioner, Mr. Sunil Kumar Aggarwal, who was aggrieved by the order passed by the National Company Law Tribunal, New Delhi. The Interim Resolution Professional (IRP) had rejected the respondent's resolution application due to the limitation period and status of creditor of the respondent. The court and the Adjudicating Authority (National Company Law Tribunal) held that the applicant's claim cannot be rejected.

Under the IBC, claim is a very important factor in the Corporate Insolvency Resolution Process (CIRP), which is to be decided in the Resolution plan for the Corporate Debtor. The code protects the interests of the creditors while undergoing CIRP in a time-bound manner. Under the provisions of Section 18 and Section 25 of the IBC, it is the duty of

[47] BBA.LLB. 2nd Year Student, Alliance School of Law, Alliance University, Bangalore

the IRP and the RP to collate the claims of the creditors after the public announcement of CIRP. However, these sections do not give IRP/RP to verify and admit or reject a claim. Like in the present case, the IRP had rejected the applicant's claim without any adjudicating authority.

STATEMENT OF FACTS

The petitioner of the present case is Mr. Sunil Kumar Aggarwal, who is the authorized representation of home buyers of the company Granite Gate Properties Pvt. Ltd. The petitioner filed this appeal against the order passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi.

New Okhla Industrial Development Authority is the respondent and the resolution applicant who had filed a claim before the Interim Resolution Professional (IRP). The IRP in an unwarranted manner had refused to consider the claim of the resolution applicant due to the limitation period and the nature of the lease given by the applicant which disregarded the applicant as a financial creditor.The court directed the IRP to examine the applicant's claim and held that the claim cannot be rejected on the ground that it is time barred or that the claim is made by another entity other than the Financial Creditor. The Adjudicating Authority had agreed with the court's decision.

ISSUES

1. Whether the disputed land is under first charge, and if so, does the limitation period of three years apply.
2. Whether the respondent's claim can be rejected on the basis of limitation period.
3. Whether the resolution applicant's claim can be rejected on the basis of the creditor status of the respondent.

FINDINGS

The Interim Resolution Professional (IRP), who is responsible for collating the claim of the resolution applicant, had rejected the claim. The IRP had refused to consider the claim of the resolution applicant in an unwarranted manner with an attitude of an

adversarial litigant.

It was found that under the provisions of article 137 of the Limitation Act, 1963, which gives a limitation period of three years, would not be applied as the disputed piece of land is under the first charge. Instead, the provisions of article 62 of the Limitation Act, 1963, would be applied which would provide 12 years of limitation period.

It was then contended that the nature of lease given by the respondent was not a financial lease with regards to the Indian Accounting Standards, thus, the respondent cannot be regarded as a financial creditor. The respondent's counsel had argued that the respondent has to be regarded as a Financial Creditor under the Section 5 (8) (d) of the IBC, who is entitled to the amount of liability as per the lease agreement. With reference to clause 62 of AS-19 and clause 8 of AS-17 of Indian Accounting Standards, the nature of the respondent's lease of the land is regarded as a financial lease. New Okhla Industrial Development Authority, the respondent and the resolution applicant, had already been considered as a Financial Creditor in the report submitted by the Resolution Professional. Therefore, the status of the respondent as a Financial Creditor cannot be changed to any other type of creditor by the Authority.

PRECEDENT

In the case of ***Sanghvi Movers Ltd. vs Tech Sharp Engineers Pvt. Ltd.***[48]***,*** the NCLAT, while relying upon Section 137 of the Limitation Act, 1963 concluded that the Appellant had approached an appropriate forum for relief in time and hence the application was not barred by limitation.

In the case of ***Ramchandra D. Choudhary Resolution Professional Of Maharashtra Shetkari Sugar Limited vs Committee Of Creditors Of Maharashtra Shetkari Sugar Limited***[49]***,*** the Court held that the Promoters had neither handed over the records of the management which are required for the process of CIRP of the CD to the IRP nor to the

[48] Sanghvi Movers Ltd. v. Tech Sharp Engineers Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 118 of 2019, NCLAT, Date: 23.07.2019

[49] Ramchandra D. Choudhary Resolution Professional Of Maharashtra Shetkari Sugar Limited v. Committee Of Creditors Of Maharashtra Shetkari Sugar Limited, Company Appeal (AT) (Insolvency) No. 633 OF 2019, NCLAT, Date: 24.07.2019

RP and to exclude 90 days for the purpose of counting the period of CIRP of 270 days in place of 145 days to enable the RP/ CoC to complete the CIRP at an early date preferably within 45 days.

In the case of ***B.K Educational Services Pvt Ltd vs Parag Gupta And Associates***[50], the court held that Limitation Act is applicable to applications filed under Section 7 and Section 9 of the Code from the inception of the Code, Article 137 of the Limitation Act is attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing the application, the application would be barred by Section 137, except in cases where delay can be condoned under Section 5 of the Limitation Act.

HOLDING

The court directed the IRP to examine the resolution applicant's claim and held that the claim cannot be rejected on the ground that it is time barred or that it is a claim by an entity other than the 'Financial Creditor'.[51]

CONCLUSION

The duty of the Interim Resolution Professional is to collect, consider and analyse the claims of the applicants. The Court and the Adjudicating Authority were right in directing the IRP to examine the respondent's claim. As the court and the Adjudicating Authority held, an applicant's claim cannot be rejected due to the limitation period and the status of the creditor. Thus, this provides the creditors of the corporate debtor with an opportunity to apply for claims regardless of the creditor status, and such claim must be examined by the IRP. The IBC was created with the objective of safeguarding the stakeholder's interests and providing painless revival mechanism for entities dealing with insolvency. There are no express powers granted to the IRP to adjudicate the claim during the CIRP, like that of a liquidator, who verifies and decides whether to admit or reject a creditor's claim. The IRP is responsible for deciding which claim and how many claims of a

[50] B.K Educational Services Pvt Ltd vs Parag Gupta And Associates, CIVIL APPEAL NO.23988 OF 2017
[51] Sunil Kumar Aggarwal vs New Okhla Industrial Development, Company Appeal (AT) (Insolvency) No. 775 of 31 July, 2019

creditor can be admitted or rejected during the CIRP. Like in the present case, the rejection of the applicant's claim should be justifiable and in accordance with the law, however it is not the IRP's duty to adjudicate the claim.

CASE NO: 9

GAURI SHANKAR JAIN VS PUNJAB NATIONAL BANK

- Pari Agarwal[52]

INTRODUCTION

After the enactment of the Insolvency Bankruptcy Code, 2016 (IBC)[53], the rights and liabilities of the guarantors have been the most interesting matter. In the case Gauri Shankar Jain vs Punjab National Bank[54], the Hon'ble Court held that the liability of a guarantor of a corporate debtor's debt does not end if an insolvency resolution plan in

[52] BBA.LLB. 3rd Year Student, Alliance School of Law, Alliance University, Bangalore.
[53] *The Insolvency and Bankruptcy Code, 2016,* MINISTRY OF LAW AND JUSTICE, (July 14th, 2021, 7:01 PM) URL: https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf
[54] *Gouri Shankar Jain v/s Punjab National Bank & Another,* LAWYER SERVICES, (July 14th, 2021, 7:06 PM) URL: https://www.lawyerservices.in/Gouri-Shankar-Jain-Versus-Punjab-National-Bank-and-Another-2019-11-13

respect of the corporate debtor in question has been approved under the IBC.

STATEMENT OF FACTS

Gauri Shankar, the petitioner, was the guarantor of facilities enjoyed by the Divya Jyoti Sponge Iron Private Limited, the Corporate Debtor, from the Punjab National Bank, the first respondent, and the Financial Creditor. The bank initiated a Corporate Insolvency Resolution Process (CIRP) against the company before the National Company Law Tribunal (NCLT) by applying Section 7 of the IBC. NCLT, through an order, approved the resolution plan where the liabilities of the company against the bank were dealt.

The resolution plan proposed a payment of Rs. 34.25 crores to the bank against their claim amount of Rs. 76.21 in full and final settlement of all the dues. Moreover, the applicant paid the bank in terms of the plan. However, the plan did not deal with a personal guarantee by Gauri Shankar to the bank.

In March 2019, the bank issued a notice under Section 13 (2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) to the petitioner based on the guarantee. She then came to know that she was posted with Credit Information Bureau India Limited (CIBIL) for alleged default of Rs. 12,62,11,278 towards the bank.

Due to this, the petitioner was named as a defaulter in the list of defaulters as maintained by CIBIL, also known as TransUnion CIBIL Limited. The petitioner had sought to remove her name from the list of defaulters.

PROCEDURAL HISTORY:

1. Maharashtra State Electricity Board Bombay vs Official Liquidator High Court, Ernakulam (1982 Vol 3 SCC 258)[55]

[55] Maharashtra State Electricity Board Bombay v. Official Liquidator High Court, Ernakulam (1982 Vol 3 SCC 258)

The Supreme Court in this case held that a discharge, which the principal debtor may secure by operation of law in the bankruptcy or liquidation proceedings in the case of a company, does not absolve the liabilities the surety of his liabilities. Further, the court considered the interplay of Section 128 and 134 of the Indian Contract Act 1872. It also stated that the fact that the company, which is the principal debtor, had gone into liquidation would not have any effect on the guarantor's liability.

2. United Bank of India vs Modern Stores (India) Ltd. (AIR 1988 Cal 18)[56]

The court applied the ratio of Maharashtra State Electricity Board Bombay vs Official Liquidator High Court, Ernakulam in this particular case and considered the interplay of Section 134 and 137 of the Indian Contract Act, 1872. The court held that mere omission to sue or to proceed against the principal debtor does not operate as a discharge of the surety's liabilities.

3. Industrial Finance Corporation of India Ltd. vs Canonnore Blending and Weaving Mills Ltd. (AIR 2002 SC 1814)[57]

The Supreme Court, in this case, considered the discharge of the liability of a guarantee under Section 141 of the Indian Contract Act, 1872. It held that a definite violation on the part of the creditor is required to take place for the guarantor to be discharged under Section 141 of the act. It also held that the liability of the guarantor cannot be stated to be a strict liability even if the principal debtor is discharged from his liability, unless such discharge is through the act of the creditor, without the consent of the surety, the creditor's right of action against the surety is preserved.

4. State Bank of India vs Ramakrishnan (2018 Volume 17 SCC 394)[58]

The Supreme Court, in this case, considered the issue "Whether Section 14 of the IBC, 2016 would apply to a personal guarantor of a corporate debtor?". It was held that Section 14 of the IBC does not apply to a personal guarantor and that the object of the

[56] United Bank of India v. Modern Stores (India) Ltd. (AIR 1988 Cal 18)
[57] Industrial Finance Corporation of India Ltd. v. Canonnore Blending and Weaving Mills Ltd. (AIR 2002 SC 1814)
[58] State Bank of India v. V. Ramakrishnan (2018 Volume 17 SCC 394)

IBC is not to allow personal guarantors to escape from an independent and coextensive liability.

ISSUE:

1. Whether the liability of a guarantor of a debt of a corporate debtor stands reduced upon an insolvency resolution plan in respect of the corporate debtor, being approved under the IBC?
2. To what relief (s) are the parties entitled to?

HOLDINGS:

The Insolvency Bankruptcy Code, 2016:

1. Section 7 – Initiation of the corporate insolvency resolution process (CIRP) by financial creditor[59]
2. Section 14 – Moratorium[60]
3. Section 31 – Approval of resolution plan[61]

The Indian Contract Act, 1872[62]:

1. Section 128 – Surety's liability[63]
2. Section 140 – Rights of surety on payment or performance[64]

[59]*Section 7 of the IBC, 2016,* INDIAN CODE, (July 14th, 2021, 7:15 PM) URL: https://www.indiacode.nic.in/show-data?actid=AC_CEN_2_11_00055_201631_1517807328273&sectionId=786&sectionno=7&orderno=7
[60]*Section 14 of the IBC, 2016,* INDIA CODE, (July 14th, 2021, 7:16 PM) URL: https://www.indiacode.nic.in/show-data?actid=AC_CEN_2_11_00055_201631_1517807328273&sectionId=793&sectionno=14&orderno=16
[61]*Section 31 of the IBC, 2016,* INDIA CODE, (July 14th, 2021, 7:17 PM) URL: https://www.indiacode.nic.in/show-data?actid=AC_CEN_2_11_00055_201631_1517807328273&sectionId=810&sectionno=31&orderno=35
[62]*The Indian Contract Act, 1872,* INDIA CODE, (July 14th, 2021, 7:20 PM) URL: https://www.indiacode.nic.in/handle/123456789/2187?locale=en
[63]*Section 128 of the Indian Contract Act, 1872,* (July 14th, 2021, 7:22 PM) URL: https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_20_00035_187209_1523268996428&sectionId=38684&sectionno=128&orderno=129
[64]*Section 140 of the Indian Contract Act, 1872,* (July 14th, 2021, 7:21 PM) URL: https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_20_00035_187209_1523268996428&sectionId=38696&sectionno=140&orderno=141

3. Section 145 – Implied promise to indemnify the surety[65]

Petitioner's Arguments:

The liability of a guarantor is co-extensive with that of the corporate debtor. The corporate debtor, not having any liability to the bank, following acceptance and approval by the financial creditor, the payment in terms of the resolution plan as full settlement of the total claim and after the adjudicating officer's approval, the same becomes final.

The petitioner has no liability towards the bank under Section 128 of the Indian Contract Act, 1872 and the liability of the petitioner ended. Also, the personal guarantee given by the petitioner ended after the resolution plan was approved. The Guarantor contended that even if the respondent did not agree to the resolution plan, it shall still be binding to the respondent, and thus, no amount can be claimed from the petitioner.

Further, the petitioner contended that the creditor had made a debt structure due from the principal debtor and this discharged the petitioner. Moreover, once the resolution plan was approved, the guarantor stood discharged.

The petitioner relied upon Sections 133 to 135, 139, and 145 of the Indian Contract Act, 1872 and on Shri KundanmalDabriwala vs Haryana Financial Corporation (MANU/PH/3320/2011)[66], Commercial Bank of Tasmania vs Jones (1893 Appeal Cases page 313)[67], and Webb vs Hewitt (1957 (3) Kay and Johnson page 438)[68] to support her arguments.

Respondent's Arguments:

The respondent contended that approval of the resolution plan ipso facto does not discharge the liability of the guarantor in respect of the guarantee given by her to secure the claim of the respondent. Approval of the resolution plan does not extinguish the

[65]*Section 145 of the Indian Contract Act, 1872,* (July 14th, 2021, 7:21 PM) URL: https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_20_00035_187209_1523268996428&sectionId=38701&sectionno=145&orderno=146
[66]KundanmalDabriwala v. Haryana Financial Corporation (MANU/PH/3320/2011)
[67] Commercial Bank of Tasmania v. Jones (1893 Appeal Cases page 313)
[68] Webb v. Hewitt (1957 (3) Kay and Johnson page 438)

liability of the guarantor. Moreover, the resolution plan is an involuntary act done by the creditor and thus, it cannot discharge the petitioner's liability.

The respondent relied on Sections 128, 133 to 135 of the Indian Contract Act, 1872 as well as Sections 2(e), 5(5A), 5(22), 14(3), 30(4), 60(2) and 238 of the IBC, 2016 and relied on cases such as Maharashtra State Electricity Board Bombay vs Official Liquidator High Court, Ernakulam (1982 Vol 3 SCC 258), United Bank of India vs Modern Stores (India) Ltd. (AIR 1988 Cal 18), and Industrial Finance Corporation of India Ltd. vs Canonnore Blending and Weaving Mills Ltd. (AIR 2002 SC 1814).

The respondent argued that as per Section 14 (3) of IBC, there will be no moratorium regarding the proceedings against the guarantor during the CIRP of a corporate debtor while a moratorium against the corporate debtor is in progress. Further, he contended that according to Section 60 (2) of the IBC, proceedings against the guarantors may be started even when the Insolvency Resolution process or liquidation process against the corporate debtor is pending before the National Company Law Tribunal (NCLT).

JUDGMENT:

The Hon'ble Court relied on the judgment given by Supreme Court in the case Maharashtra State Electricity Board Bombay vs Official Liquidator High Court, Ernakulam. It was, in this case, held that a discharge secured by operation of law by the principal debtor in a bankruptcy or liquidation proceedings does not absolve the surety of his liability.

The aforementioned ratio was also applied by Calcutta High Court's division bench in the case United Bank of India vs Modern Stores (India) Ltd. In this case, it was held that mere omission to sue or to proceed against the principal debtor does not operate as a discharge of the surety's liabilities.

Further, the court also relied on the judgment of SC in the case Industrial Finance Corporation of India Ltd. vs Canonnore Blending and Weaving Mills Ltd. It was held inter alia that if the principal debtor is discharged of his liability by the creditor with the consent of the guarantor, then the creditor's right of action against the guarantor stays

protected.

Lastly, the court depended on the SC's judgment in the case State Bank of India vsVS Ramakrishnan. In this case, it was held that Section 14 of IBC does not apply to a personal guarantor and the object of IBC was not to allow them to escape from their independent and co-extensive liability with the corporate debtor.

The court concluded by stating that the approval of the resolution plan concerning a corporate debtor would not reduce or ends the liability of a guarantor of the corporate debtor.

ANALYSIS:

The liability of the guarantor is co-extensive with that of the principal debtor. Thus, if the principal debtor's liability is scaled down or ended in whole or in part, the liability of the surety also is pro tanto reduced or ended.

The Indian Contract Act, 1872 defines the liabilities and rights of the guarantors. One such right of the guarantor is the subrogation right, i.e., to recover the same from the principal debtor. The concept of subrogation provided under the Indian Contract act states that the rights of a person can be transferred to another person only if the latter is instrumental in finishing the debt of the borrower.

Another argument that will rise would be whether the two parties, the corporate debtor and the resolution applicant, should be permitted to take away the rights of a third party, the personal guarantor, who is not even the party to the contract.

CONCLUSION:

Even Companies Act, 2013[69] provides a similar mechanism under Sections 230 to 231, wherein debt of a company can be reduced or cut off with the consent of creditors under a scheme of arrangement. Thereafter, with the approval of the NCLT, the same can be confirmed.

Further, Section 145, along with Section 140 of the Indian Contract Act, 1872, deals with the right of the guarantor. It stated that the surety, on discharging a debt would get all the rights that the creditor had against the principal debtor.

Thus, if a creditor is not able to recover any portion of debt from the principal debtor, then the surety would also not be able to recover that portion of the debt. This would be very unjust on the part of the surety as this can land him into unexpected loss if the creditor is allowed to recover the scaling down amount.

CASE NO: 10

BRAND REALTY SERVICES LTD. VS SIR JOHN BAKERIES INDIAN PVT.

[69] *The Companies Act, 2013,* MINISTRY OF CORPORATE AFFAIRS, (July 14th, 2021, 7:26 PM) URL: http://ebook.mca.gov.in/default.aspx

LTD.

- Pari Agarwal[70]

INTRODUCTION:

The National Company Law Tribunal (NCLT) Delhi, in the case Brand Realty Services Ltd. vs Sir John Bakeries Indian Pvt. Ltd.[71], explained that the unpaid dues under a settlement agreement cannot be considered as an operational debt under Section 5 (21) of the Insolvency and Bankruptcy Code, 2016 (IBC). It further stated that NCLT is not a recovery court.

BRIEF FACTS:

M/s Brand Realty Services Ltd., the appellant, and the operational creditor was a consultant cum investor with the Sir John Bakeries Indian Pvt. Ltd., the respondent, and the corporate debtor. The appellant also provided advisory services on various matters of business promotions, marketing, etc.

The respondent approached the debtor asking for investment and consultancy services on setting up a new retail outlet. Accordingly, the appellant invested an amount and provided consultancy services for the outlets.

Later, the appellant and the respondent entered into an agreement in 2014 which was later ratified by an Account Settlement Agreement in 2018. As per clause 2 of the agreement, the respondent agreed to pay the remaining commission of Rs. 33,94,000 via Post Dated Cheques (PDCs). It was further agreed under Clause 3 of the agreement that the respondent will pay a fixed commission of Rs. 56,500 per month from April 2018 for 66 months and thereby issued 66 PDCs to the appellant.

The respondent assured that the cheques will be honored as and when they are presented by the appellant, inter alia, the respondent has the financial capability to honor the

[70] BBA.LLB. 2nd Year Student, Alliance School of Law, Alliance University, Bangalore.
[71] M/s Brand Realty Services Ltd. v. M/s Sir John Bakeries Indian Pvt. Ltd. (IB) 1677(ND)/2019

cheques, and the situation of default in making payments does not arise.

Accordingly, the appellant served a legal notice asking the respondent to comply with the terms of the agreement. However, the latter did not respond to the served legal notice. The appellant was restricted to send a demand notice under the provisions of IBC, 2016 demanding payment of unpaid debt. The respondent replied to the legal notice after 10 days of the stipulated date.

The appellant submitted that no part of the claim was barred by the law of limitation. The cause of action arose in favor of and against the appellant and the respondent, respectively, to pay the amount of Rs. 56,500 per month from April 2018 when the debt became due and payable. Moreover, the cause of action arose in February 2019 when the cheques were dishonored.

Thus, the appellant filed an application against the respondent under Section 9, read along with Rule 6 of the IBC, 2016 to initiate Corporate Insolvency Resolution Process (CIRP) for the pending dues under the Account Settlement Agreement.

PROCEDURAL HISTORY:

1. M/s Delhi Control Devices (P) Limited vs M/s Fedders Electric and Engineering Ltd. (IB)343/ALD/2018[72]

It was decided in this case that unpaid instalment, as per the settlement agreement, cannot be treated as operational debt as per Section 5 (21) of the IBC, 2016. The failure or breach of such settlement cannot be a ground to trigger CIRP against a corporate debtor under the provisions of IBC and the remedy may not necessarily lie with the adjudicating authority.

ISSUE:

[72] Delhi Control Devices (P) Ltd. v. Fedders Electric and Engineering Ltd. Company Petition No. (IB)343/ALD/2018

1. Whether the terms and conditions of the Settlement Agreement would come under the definition of the 'Operational debt' under the IBC?

HOLDINGS:

The Insolvency and Bankruptcy Code, 2016[73]:

1. Section 5 – Definitions[74]
2. Section 8 – Insolvency Resolution by the operation creditor[75]
3. Section 9 – Application for initiation of the corporate insolvency resolution process by operational creditor[76]

Appellant's Arguments:

The appellant contended that under Clause 9 of the settlement agreement, the respondent agreed to pay him an amount equivalent to 5% of the sales, subject to a minimum of Rs. 75,000 per month. Accordingly, 100 PDCs for an amount of Rs. 56,500 were also agreed to be issued to the appellant every month, starting from June 2015.

He further stated that the respondent sought to settle the debt of Rs. 25,00,000 by making a payment of Rs. 21,66,511 and he agreed to this settlement and accepted the cheque given by the respondent. However, it turned out that the cheque was forged as it was not signed by the appellant.

He relied on the Hon'ble Apex Court's judgment on the case of K.C. Kapoor vs Radhika Devi (1981 AIR 128)[77] and submitted that the pleadings are not to be construed as a hyper-technical matter.

Respondent's Arguments:

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[73]*Insolvency and Bankruptcy Code, 2016,* MINISTRY OF LAW AND JUSTICE, (July 18th, 2021, 6:58 PM) URL: https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf
[74]*Section 5 of the IBC, 2016,* INDIA CODE, (July 18th, 2021, 6:59 PM) URL: https://www.indiacode.nic.in/show-data?actid=AC_CEN_2_11_00055_201631_1517807328273&sectionId=784&sectionno=5&orderno=5
[75]*Section 8 of the IBC, 2016,* INDIA CODE, (July 18th, 2021, 7:00 PM) URL: https://www.indiacode.nic.in/show-data?actid=AC_CEN_2_11_00055_201631_1517807328273&sectionId=787&sectionno=8&orderno=8
[76]*Section 9 of the IBC, 2016,* INDIA CODE, (July 18th, 2021, 7:01 PM) URL: https://www.indiacode.nic.in/show-data?actid=AC_CEN_2_11_00055_201631_1517807328273&sectionId=788&sectionno=9&orderno=9
[77] K.C. Kapoor v. Radhika Devi (1981 AIR 128)

The corporate debtor, on the receipt of the summons, replied to the demand notice by stating that he was not liable to pay any amount to the appellant as the required documents were not enclosed.

The respondent contended that he had never admitted any debt being due to the appellant. Further, Mr. Kamal Manchanda, director of the respondent's company, had access to sign cheques, important documents, etc. of the appellant's company and the cheques belong to the bank, where Mr. Kamal was an authorized signatory at that time. Also, the cheques were stolen by Mr. Kamal to use them.

Moreover, he submitted that the account of the appellant was settled by another settlement letter in December 2017 and thus, nothing remained due and payable to the appellant. He added that there was a pre-existing dispute between the parties in respect of a personal debt, which remained unsettled due to the uncleared cheques, earlier issued by the respondent's representative.

He relied on the judgment given in the cases of Mobilox Innovations Pvt. Ltd. vs Kirusa Software Pvt. Ltd. (2018 1 SCC 353)[78], Transmission Corporation of Andhra Pradesh Ltd. vs Equipment Conductors and Cables Ltd. (2018 14 SCALE 176)[79], Innoventive Industries Ltd. vs ICICI Bank (2018 1 SCC 407)[80], Atul Roy vs M/s Technofac Contract Pvt. Ltd. (2018 OnLine NCLAT 218)[81], and Nisheet Ranjan vs Letstark Tech Pvt. Ltd. [CP(IB) No. 32/CHD/HRY/2018][82].

JUDGMENT:

NCLT admitted to the case of the appellant that the application was filed for breach of the terms and conditions of the settlement agreement which both the parties entered into. It further found that this agreement was to settle the amount, which, according to the appellant, was due in terms of the agreement. Thus, the application was not against the

[78]Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd. (2018 1 SCC 353)
[79] Transmission Corporation of Andhra Pradesh Ltd. v. Equipment Conductors and Cables Ltd. (2018 14 SCALE 176)
[80]Innoventive Industries Ltd. v. ICICI Bank (2018 1 SCC 407)
[81] Atul Roy v. M/s Technofac Contract Pvt. Ltd. (2018 OnLine NCLAT 218)
[82]Nisheet Ranjan v. Letstark Tech Pvt. Ltd. [CP(IB) No. 32/CHD/HRY/2018]

invoice raised in the terms and conditions of the agreement, rather, it was a breach of the terms and conditions of the account settlement agreement.

Further, from the respondent's reply to the demand notice, the court observed that the reply to the demand notice was not sent within the time prescribed under Section 8 (2) of the IBC, 2016 and thus, it considered that the respondent failed to raise the dispute within the time prescribed.

The court further considered the question "whether the terms and conditions of the settlement agreement would come under the definition of the operational debt under the IBC?" and considered the definitions of operational debt under Section 5 (21), default under Section 3 (11), and debt under Section 3 (12).

Upon reading the three definitions together, it is evident that debt, as defined under IBC, does not mean operational debt. Rather, it includes financial debt, as well as liability or obligation towards a claim due from any person and default, means non-payment of debt.

However, to trigger Section 9 of the IBC, an operational creditor is required to establish a default for non-payment of the operational debt. Operational debt means a claim of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law. If a person fails to establish this, then they cannot initiate CIRP under Section 9 of the IBC.

NCLT, on considering this case, found that the settlement agreement does not come under the definition of operational debt. It relied on the NCLT Allahabad Bench's decision in M/s Delhi Control Devices (P) Limited vs M/s Fedders Electric and Engineering Ltd.

The bench, in this case, held that unpaid instalment, as per the settlement agreement, cannot be treated as operational debt as per Section 5 (21) of the IBC, 2016. The failure or breach of such settlement cannot be a ground to trigger CIRP against a corporate debtor under the provisions of IBC and the remedy may not necessarily lie with the adjudicating authority.

Thus, the court considered that default of instalment of the settlement agreement does not come under the definition of operational debt, thus, dismissed the application.

ANALYSIS:

If a narrow interpretation of operational debt is maintained by the court, then those parties entering into agreements in good faith, having extinguished or reduced their liability towards their original operational debt, will then lose the right to trigger the CIRP as an operational creditor under the Insolvency and Bankruptcy Code, 2016 against the defaulting party.

CONCLUSION:

It was a settled principle of law that the National Company Law Tribunal (NCLT) is not a recovery court, rather when a default of either financial debt or operational debt occurs, in that case, financial creditor or operational creditor may file an application initiating CIRP under Section 7 or 9, respectively.

This decision was previously laid down by the Supreme Court in Mobilox Innovations (P) Ltd. vs Kirusa Software (P) Ltd., and Innoventive Industries Ltd. vs ICICI Bank for the determination of operational debt.

However, the decision by the NCLT leaves out bona fide creditors entering into settlement agreements for unpaid debts, and this may prevent parties from entering into such agreements. Thus, there remains a loophole in the provisions of the IBC and courts much interpret the definition and scope of operational debt to remove such voids.

Legislation, lower courts, and tribunals must also ensure that interpretation given to operational debt by the NCLT must not be extended to financial debt.

CASE NO: 11

KAUTILYA INDUSTRIES PRIVATE LIMITED V. PARASRAMPURIYA SYNTHETIC LIMITED AND OTHERS

-Pendyala Rajesh Prabhath[83]

INTRODUCTION

Insolvency and Bankruptcy Code, 2016 was enacted to solve issues regarding reorganization and insolvency resolution of corporate persons. The main aim of the Insolvency and bankruptcy code is to save the corporate debtors through the corporate resolution insolvency process. The sole purpose of this process is to revive the companies which are in debt and going for liquidation. When there is no option left, the financial creditors or operational creditors will apply for liquidation through the resolution professional. Here, an official liquidator is appointed by the tribunal and the liquidator is the most important person in the entire liquidation process. There are some cases where the decision is left to the liquidator by the tribunal, and this is such a case.

FACTS OF THE CASE

- This appeal has been filed by Kautilya Industries Private Limited, one of the Resolution Applicants against the order dated 15th February 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Jaipur, whereby application under Section 33(2) of the Insolvency and Bankruptcy Code, 2016 filed by the Resolution Professional for liquidation of M/s. Parasrampuriya Synthetic Limited has been approved.
- Learned counsel appearing on behalf of the Appellant submitted that the order of liquidation was passed on the ground that 270 days have already been completed on 10th February2019, but the Adjudicating Authority failed to notice that there was an interim order passed by the Hon'ble High Court of Judicature for Rajasthan, Bench at Jaipur, on

[83] BBA.LLB. 3rd Year Student, Alliance School of Law, Alliance University, Bangalore.

27th September 2018 which was vacated on 3rd January 2019. Therefore, according to the Appellant, further revised 'Resolution Plan' submitted by the Appellant on 4th February 2019 could have been re-considered if the period between 27th September 2018 to 3rd January 2019 i.e, 97 days is excluded to count the period of 270 days.

- Learned counsel appearing on behalf of the 2nd respondent submitted that financial creditors having voting shares of 68% are agreeable to re-consider the revised plan if the aforesaid period is excluded. However, such submission has been opposed by the learned counsel appearing on behalf of 3rd, 13th, 4th, 7th, respondents.
- From the record,it is said that the 'Committee of Creditors' with its voting shares of 88.92 percent decided that the 'Resolution Professional' should apply for liquidation under Section 33(2). Now some of them want exclusion to again re-consider one or other revised plans purported to have been submitted by the Appellant a week before 270 days.
- The record shows that the Hon'ble High Court of Judicature for Rajasthan, Bench at Jaipur, by the impugned order dated 27th September 2018 passed order of winding-up in Company Petition No. 28/1999, and an 'Official Liquidator' was appointed to take over the possession of the assets. No order of prohibition was made specifically prohibiting the 'Committee of Creditors' not to consider the 'Resolution Plan'.
- On 3rd January 2019, the Hon'ble High Court of Judicature for Rajasthan, Bench at Jaipur, taking into consideration the fact that the 'Resolution Professional' has been appointed under the 'I&B Code' by the Adjudicating Authority on 17th May 2018, recalled the earlier order and disposed of all the Company Petitions to enable the 'Resolution Process' to continue.

ISSUE

1. Whether the period of 97 days which is from 27th September 2018 – 3rd January 2019 is excluded to count the period of 270 days or not?

From the facts given above, it appears that there was no specific prohibition on the Committee of Creditors for considering one or other Resolution Plan. They held several meetings after the first order of the honorable high court. The resolution plan submitted by the appellant was not accepted. The tribunal held that no case is made out for

exclusion of any of the period to count 270 days which stands completed on passing the impugned order of liquidation. The tribunal made it clear that they have not decided what arrangement or Scheme is to be considered by accepting anyone or other particular plans, which depends on members of the creditors or members of the Corporate Debtor to decide in consultation with the Liquidator. The appeal stands disposed of.

PRECEDENT CASES

1. S.C. Sekaran v. Amit Gupta & others.[84]
2. Y. Shivram Prasad v. S. Dhanapal& others.[85]

Similar orders were passed by the tribunal in the above cases. The tribunal left it open to the liquidator and the committee of creditors to decide on what arrangement or scheme to approve. It is said that during the liquidation process, steps should be taken to revive the company and the last stage should be the death of the corporate debtor by liquidation, which should be avoided.

The tribunal held that the liquidator is required to act in terms of the directions of the Appellate Tribunal and take steps under Section 230 of the Companies Act. If the members of the Corporate Debtor or the creditors or a class of creditors like Financial Creditor or Operational Creditor approach the company through the liquidator for compromise or arrangement by proposing payment to all the creditors, the Liquidator on behalf of the company will move an application under Section 230 of the Companies Act, 2013 before the Adjudicating Authority in terms of the observations as made in above. On failure, steps should be taken for an outright sale of the Corporate Debtor to enable the employees to continue.

CASE ANALYSIS

The order passed by the tribunal, in this case, is completely appropriate and it confirms

[84] S.C. Sekaran v. Amit Gupta &ors., [Company appeal (AT) (Insolvency) No. 495 & 496 of 2018]
[85] Y. Shivram Prasad v. S. Dhanapal&ors., [Company appeal (AT) (Insolvency) No. 224 of 2018]

with the existing law. The tribunal is consistent in giving the reasoning as they gave similar orders in the previous cases. In this case, the appeal made by the appellant was to exclude 97 days to count 270 days, but the appeal got dismissed because, in the interim order, the high court passed the order of winding up the company and appointed an official liquidator. However, it never made any specific prohibition on the committee of creditors not to consider the resolution plans given by resolution applicants. So, the work of the resolution process was never brought to a halt, and they held meetings on various occasions to discuss the resolution plans. The resolution plans given by the appellant on these occasions were not accepted. The tribunal left it open to the liquidator to decide on what to do, at the same time it said that the liquidator must ensure that the corporate debtor remains a going concern. In my opinion, the liquidator must primarily try to revive the corporate debtor but not just continue the liquidation process. According to section 230 of the companies act, a liquidator has the power to make compromises or arrangements, or schemes. As observed and held in Swiss Ribbons Pvt. Ltd. &Anr. V. Union of India &Ors.[86] The Insolvency and Bankruptcy code is a beneficial legislation that puts the corporate debtor back on its feet, not being mere recovery legislation for creditors. As there would be so many families depending on the corporate debtor.

CONCLUSION

As said above, the liquidator plays the most important role in the entire process. He must verify all the claims of the creditors and take the assets, property under control and carry on the business of the corporate debtor for its beneficial liquidation. As mentioned in this case, he must follow all the provisions of sections 35, 36, 37, 38, 39, 40 of the Insolvency and Bankruptcy Code and section 230 of the companies act, 2013. In case there is no arrangement or scheme is approved, he must sell the company as a going concern along with employees.

[86] Swiss Ribbons Pvt. Ltd. &Anr. V. Union of India &Ors. [Writ petition (civil) No.99 of 2018]

CASE NO: 12

E. C. JOHN VS JITENDER KUMAR JAIN

- Pari Agarwal[87]

INTRODUCTION:

In E. C. John vs Jitender Kumar Jain[88], the National Company Law Tribunal (NCLT), held that even if Section 33 (5) of the Insolvency and Bankruptcy Code, 2016 (IBC) bars the institution of suits against the corporate debtor, the adjudicating officer does not have the power to quash the civil proceedings once a liquidation order has been passed.

Furthermore, it clarified that the liquidator could decide to move the concerned Civil Court pointing out the provision of IBC or to move the District Court in the hierarchy for quashing of the Suit concerned.

BRIEF FACTS:

Jitender Kumar Jain, the liquidator, and the respondent filed an appeal in NCLT. The court accepted the application of the liquidator and directed the appellant, who claimed to have a part of the property of the corporate debtor on basis of a letter, to not disturb the possession of the liquidator or to create obstruction. By the same order, the adjudicating authority of NCLT directed Police to arrest the appellant for threatening and obstructing the liquidator.

The appellant said that the letter was issued by Vinod Gurbux Motwani. He claimed that by this letter, Vinod Motwani, the director of the corporate debtor, handed over possession of the part of the property of the corporate debtor to him, and thus, he has been in possession since August 2002.

[87] BBA.LLB. 2nd Year Student, Alliance School of Law, Alliance University, Bangalore.
[88] E. C. John v. Jitender Kumar Jain Company Appeal (AT) (Ins) no. 249 of 2020

The appellant claimed that the school, teachers, and staff's quarters, including the factory, were handed over by the Trustee to undertake education and charitable activities as per the objective of Motwani Education Trust. The appellant also constructed a wall around the property and even paid the property tax, and thus claims the right to protect his possession.

The copy of MA filed by the Liquidator pointed out that the CIRP process was initiated concerning Roofit Industry Ltd. in June 2017. Further, Respondent No.1 sent an Expression of Interest to purchase the property. The Liquidator was appointed in January 2018 and when he visited the property, he came to know that the wall had been constructed to let the Appellant and GurbukGyanchand Motwani use the property. The Liquidator claimed that he had asked the Appellant and other Respondents, not the trespass the property of the Corporate Debtor.

The Liquidator also claimed that the Appellant sent an e-mail showing interest in part of the property but the same did not materialize and the property was e-auctioned to a third party in November 2019. Thereafter, Respondent No.1 filed an appeal seeking an injunction against the Corporate Debtor to the Wada property and the Liquidator received Summons from Civil Court in January 2020.

Thus, he moved the Application against the Appellant and others claiming that Civil Court has no jurisdiction under Sections 33(5), 60(5), 63(3), 231, and 238 of IBC, 2016 and sought reliefs that Respondent No.1 should remove goods from the Wada property, and he should also be directed to pay rent for using the property. Further reliefs were sought to protect the property, by asking the Police to act on his Complaint.

ISSUE:

It is appropriate for the Adjudicating Authority to quash the concerned suit filed in the Civil Court?

HOLDINGS:

The Insolvency and Bankruptcy Code, 2016[89]:

1. Section 33 (5) – Initiation of liquidation[90]
2. Section 60 (5) – Adjudicating Authority for corporate reasons[91]
3. Section 63 (3) – Civil Court not to have jurisdiction[92]
4. Section 231 – Bar of jurisdiction[93]
5. Section 238 – Provisions of this Code to override other laws[94]

JUDGMENT:

The court did not find any error in the Impugned Order where it directs that the Appellant will not disturb or obstruct the possession of Liquidator about the property concerned. However, it was believed that the direction passed by the Adjudicating Authority quashing Civil Suit is not legal.

The Adjudicating Authority referred to Section 33(5) of the IBC, 2016. Even if such a bar is there, it is not appropriate for the Adjudicating Authority to quash the concerned suit which is filed in the Civil Court. It would be for the Liquidator to move the concerned Civil Court pointing out the provision of IBC or to move the District Court in the hierarchy for quashing of the Suit concerned.

As argued by the appellant that the Liquidator has in the MA claimed rent in the prayer and so the Liquidator accepts that the Appellant should be treated as a person liable to pay rent. From the company appeal, it appeared that the Liquidator claimed that the Appellant should pay the rent for use of the Wada property. This is more saying that

[89]*Insolvency and Bankruptcy Code, 2016,* MINISTRY OF LAW AND JUSTICE, (July 18th, 2021, 6:58 PM) URL: https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf
[90]*Section 33 of the IBC, 2016,* INDIA CODE, (July 30th, 2021, 7:01 PM) URL: https://www.indiacode.nic.in/show-data?actid=AC_CEN_2_11_00055_201631_1517807328273&sectionId=812&sectionno=33&orderno=38
[91]*Section 60 of the IBC, 2016,* INDIA CODE, (July 30th, 2021, 7:03 PM) URL: https://www.indiacode.nic.in/show-data?actid=AC_CEN_2_11_00055_201631_1517807328273&sectionId=839&sectionno=60&orderno=65
[92]*Section 63 of the IBC, 2016,* INDIA CODE, (July 30th, 2021, 7:03 PM) URL: https://www.indiacode.nic.in/show-data?actid=AC_CEN_2_11_00055_201631_1517807328273&sectionId=842&sectionno=63&orderno=68
[93]*Section 231 of the IBC, 2016,* INDIA CODE, (July 30th, 2021, 7:05 PM) URL: https://www.indiacode.nic.in/show-data?actid=AC_CEN_2_11_00055_201631_1517807328273&sectionId=1010&sectionno=231&orderno=236
[94]*Section 238 of the IBC, 2016,* INDIA CODE, (July 30th, 2021, 7:06 PM) URL: https://www.indiacode.nic.in/show-data?actid=AC_CEN_2_11_00055_201631_1517807328273&sectionId=1017&sectionno=238&orderno=244

profits should be paid. Such a claim by the liquidator does not create the right of the lessor or lessee. One cannot cling to such words to create a title as such.

ANALYSIS:

It is not appropriate for the Adjudicating Authority to quash the suit filed in the civil court. The liquidator can decide if he wants to move to the concerned civil court pointing out the IBC, 2016, or to the district court in the hierarchy for quashing of the concerned suit.

Further, the appellant argued that the impugned order directed that the police should arrest him. The court stated that it was directed so because the appellants threatened the liquidator with life and obstructed him. Thus, he directed police to not arrest the appellant and take suitable action as per the law.

CONCLUSION:

The Adjudicating Authority should not have passed an order quashing civil suit since it has no power to do so, as provided under the IBC, 2016, as its jurisdiction does not extend to orders passed by the civil courts. Rather, it should have directed the liquidator to approach the civil court by bringing to its attention relevant provisions of the Code barring jurisdiction of civil courts during liquidation or corporate insolvency resolution process. Based on the outcome, the liquidator could have approached higher courts, including the filing of a writ petition before the High Court. Seemingly, even the liquidator was ill-advised.

Further, even NCLT should not have directed the police for the appellant's arrest as it cannot do so under the IBC. Appellate Tribunal modified the NCLT's order and directed the Police to act as may be warranted under law. NCLT's approach did not reflect judicial wisdom as expected which is critical to the success of the IBC. Though subtle, the course correction by Appellate Tribunal was desirable.

CASE NO: 13

BABULAL VARDHARJI GURJARV. VEER GURJAR ALUMINUM INDUSTRIES PVT. LTD.

- Thota Raghavendra[95]
Pari Agarwal[96]

INTRODUCTION

The Insolvency and bankruptcy code is a beneficial law for both corporate debtor and financial creditor.The IBC is not just a money recovery law, the code's main aim is to help the corporate debtor to get back on their feet. The case we are discussing deals with IBC and Limitation act. The supreme court has discussed the limitation period for application of CIRP and when it is time-barred under the limitation act. Also, the court addressed sec 18 of the limitation act which talks about acknowledgment and extension of the limitation period.

BRIEF FACTS:

Babulal, the appellant, worked as the Director of VeerGurjar Alum. Industries, respondent no. 1. Various financial creditors sanctioned loans to the corporate debtor Veer Gurjar Aluminum Industries Pvt. Ltd. Later since the company failed to pay its debts, recovery proceedings were filed against it in Debts Recovery Tribunal in 2011.

However, in 2018, during the pendency of the case, one of the financial creditors of the

[95] BA.LLB. 3rd Year Student, Alliance School of Law, Alliance University, Bangalore.
[96] BBA.LLB. 2nd Year Student, Alliance School of Law, Alliance University, Bangalore.

company, JM Financial Assets Reconstruction Company Pvt. Ltd, respondent no. 2applied Section 7 of IBC, 2016 seeking initiation of the corporate insolvency resolution process (CIRP). National company law tribunal (NCLT) admitted the application of CIRP and appointed an interim resolution professional at Veer Gurjar Aluminum industries.

Later, BabulalGurjar filed an appeal before National Company Law Appellant Tribunal (NCLAT) alleging that the debt is time-barred as the date of default was 08.07.2011. But NCLAT rejected his appeal stating that:

a) The right to initiate an application under section 7 came into force when IBC, 2016 was introduced,
b) the period of limitation for recovery of the mortgaged property is 12 years.

Challenging this order, Babulal filed an appeal before the Supreme Court.

PROCEDURAL HISTORY (PRECEDENT OF THE CASE):

1. B. K. Educational Services Pvt. Ltd. v. Para's Gupta &Associates (AIR 2018 SC 5601)
2. K. Sashidhar v. Indian Overseas Bank. For this case, the court addressed the issues in the corporate insolvency process and the decisions taken on them by NCLT.
3. Jignesh Shah and Anr. v. Union of India and Anr. (2019 SCC Online 254). In this case, the court held that the date of default is alone relevant to trigger the limitation for filing of winding up petition against a company.
4. Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. &Anr. (2019 10 SCC 158)
5. Sagar Sharma &Anr. v. Phoenix Arc Pvt. Ltd. &Anr. (2019 10 SCC 353)

ISSUES:

1. Whether the triggering point for initiating application under the IBC would be
a) Only the date of default, or
b) The date the code came into force or date of default, whichever is earlier?

2. What is the period of limitation for an application filed under the code in case the property had been mortgaged by the debtor?

3. Whether section 18 of the Limitation Act, 1963 could be used in this case to extend the limitation period?

HOLDINGS (THE APPLIED RULE OF LAW):

3. The Insolvency and Bankruptcy Code, 2016 (IBC):

a) Section 7 – Initiation of corporate insolvency resolution process by financial creditor

b) Section 62 – Appeal to Supreme Court

4. The Limitation Act, 1963:

a) Article 18 – Effect of acknowledgment in writing

b) Article 62 – To enforce payment of money secured by a mortgage or otherwise charged upon immovable property

c) Article 137 –Any other application for which no period of limitation is provided elsewhere in this division

RATIO DECIDENDI:

The Supreme Court rejected both the findings of NCLAT while relying on the landmark judgment B. K. Educational Services v. Para's Gupta. While upholding its judgment in the case of B. K. Educational Services v. Para's Gupta & Associates, held that for an application for initiation of the CIRP under Section 7 of the IBC, the limitation period of three years from the date of default, is only extendible under Section 5 of the Limitation Act, 1963 only if an appropriate case for condonation of delay is made. It also relied on the Insolvency Committee Report of 2018 for the same.

The court further observed that the date of acknowledgment of debt may extend the limitation under section 18 of the limitation act, 1963. However, the same is relevant only for recovery suits and not for the initiation of CIRP under the IBC.

ISSUE 1:

The respondents argued that as the right to apply to the IBC accrued only in December 2016, the limitation period should be taken as three years from the same date. Thus, the application was not time-barred as the application was filed in March 2018 and three years since the enforcement of IBC had not elapsed. The SC highlighted that the intent of IBC could not be to give a new lease for life to time-barred debts. An interpretation favoring the limitation period to commence from the enforcement date of IBC would be invalid due to the following reasons:

- It would provide a fresh opportunity to the creditors who did not exercise their rights within the prescribed limitation period to file under the IBC.
- The objective of the limitation act to prevent disturbances arising out of a party's negligence would be defeated.
- It would reopen the rights of the claimants to file time-barred debts which might constitute a part of a resolution plan.

Thus, the triggering point for applying section 7 of the IBC is the date of default, irrespective of whether it is before or after the enforcement of the IBC.

ISSUE 2:

The respondents argued that according to article 62 of the Limitation Act, 1963, the limitation period in the case would be 12 years because the application of insolvency was filed for enforcing the payment of money secured by the mortgage.

While relying on the case Sagar Sharma v. Phoenix Arc Pvt. Ltd., the SC observed that an application to initiate insolvency cannot be equated to a suit filed for enforcing payment of such money. It also stated that article 62 applied to suits and not applications.

Thus, an application under section 7 of IBC falls under the scope of residuary applications for which the limitation period is 3 years as provided under article 137.

ISSUE 3:

Section 18 of the Limitation Act, 1963 states that a fresh limitation period starts when the debtor accepts the existence of liability in writing. The respondents inter alia argued that

the application filed in DRT served as an acceptance of debt and thereby kept the debt active.

The SC rejected this argument as a separate recovery proceeding under DRT cannot affect the limitation period of the insolvency application in question.

CASE ANALYSIS:

According to the supreme court, the 12-year limitation period for the application was not within the law and rejected the argument from the respondent. Here, the court was correct with its decision. Because the respondent argued that according to Article 62 of Limitation Act, 1963 the limitation period for a mortgaged property is twelve years and the insolvency application was filed for enforcing payment of money secured by the mortgage. But Article 62 of the limitation act only implies the suits.

In the case of Gaurav Hari Govind Bhai Dave v Assets Reconstruction Company[97], the court held that Article 62 of the limitation act applies to only suits, and the applications are governed under Article 137 of the limitation act. The current case is an appeal on an application filed by a financial creditor on a corporate debtor, so the limitation period for application is governed by Article 137 of the limitation act, which is 3 years from the date default. This shows us that the judgment from the court was relevant to the existing laws.

The respondents also had an additional argument up their sleeves for the limitation period of the application of the company insolvency resolution process. They contended that according to Article 18 of the limitation act, the extension of a limitation period can happen with an acknowledgment of the debt by a debtor in writing and signed, so the limitation period starts again from the date of the acknowledgment to the expiration date. This argument was stronger than the previous one because this law also applies to the applications.

The respondent also mentioned that the debtor has mentioned the debt in their balance

[97](2019) 10 SCC 572

sheets, which can be considered as an acknowledgment of their debt to the respondent, this argument can keep the debt alive. But all these facts are oral arguments, which the respondent did not mention in their plea. The respondent should mention all relevant facts in their plea. So, the court rejected their arguments stating that these facts were not mentioned in the plea as they should have been.

According to Order 6 Rule 7 of CPC,[98] the court cannot consider the facts that are not mentioned in the plea. This is because the addition of the facts in the middle of the hearing causes inconvenience in court proceedings. But according to Order 6 Rule 17, the court may allow either party to amend their plea. In this current case, as per the sources, we do not know that the court did allow or did not allow the parties to amend their plea. If the court allowed the amend of their plead and if the respondent included the facts of the debtor acknowledging the debt by noting them in their balance sheet, then Article 18 of the limitation act gets applied to the case and the application for CIRP is not time-barred, which also leads to the court to give a judgment in favor of the financial creditor (respondent).

But all the date of defaults in the plea was 08.07.2011 and there was no mention of acknowledgment in the plea. This means that the application for CIRP is time-barred and orders by NCLT and NCLAT have no effect. Hence, the supreme court stated the same and gave a judgment in favor of the appellant.

CONCLUSION

On analyzing the decision, it appears that the date of default is of utmost importance for computing the limitation period and no subsequent action would extend this period for instituting proceedings under the IBC. The court only considered Section 18 of the Limitation Act.However, the logical sequitur of this ruling is that all provisions of the Limitation Act which grant additional time for computing limitations, as under Section 16 and 17, would not apply to proceedings in IBC.Further, for bona fide cases, an exception remains under Section 5 of the Limitation Act, the NCLT has the power to

[98]no pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

condone the delay in applying appropriate facts and circumstances.

CASE NO: 14

COL. VINOD AWASTHY V. AMR INFRASTRUCTURE LIMITED

Pendyala Rajesh Prabhath [99]

INTRODUCTION:

Operational creditors under Insolvency and Bankruptcy code means any person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. Operational creditors are also as important as financial creditors for a company to run. To claim to be an operational creditor, the person must come under the scope of the definition of an operational creditor under IBC. Sometimes, even though the corporate debtor owes a debt to someone, they might not fall under the scope of the definition of an operational creditor or a financial creditor. This is such a case where NCLT had to clearly explain the meaning of an operational creditor.

FACTS OF THE CASE:

- The petitioner booked a flat for a total consideration of 19,80,000/- in the project known as i-homes which was to be completed by December 2013 and paid an advance amount of Rs. 9,87,284/-.
- On 18.10.2011 an MOU was executed between the petitioner and respondent company. It is also asserted that under the provisions of the MOU, the respondent company had undertaken to pay a sum of Rs.9,050/- every month with effect from 15.11.2011 to the petitioner as 'assured return' till the date of possession on the amount of Rs.9,87,284/- which was the advance amount paid.
- The respondent paid the assured return up to December 2013 but failed to pay the same thereafter despite a repeated request by the petitioner which resulted in demand for the refund of the entire booking amount.

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- On 28.03.2014 an allotment agreement was signed stipulating that possession of a fully furnished flat would be handed over by December 2014, however, no possession was given to date.
- On 26.09.2016 a notice under section 433 etc of Companies act, 1956 was duly served at the registered office of the respondent company calling upon it to pay due and admitted amount of Rs.12,76,884/- along with interest within 21 days.
- On 25.01.2017 statutory notice under the code was issued which had been duly served on the respondent.

ISSUES:

1. MAINTAINABILITY OF THE PETITION:

A perusal of section 9 of the code would show that to maintain an application as an 'operational creditor' the petitioner has to satisfy the requirements of section 5(20) and section 5(21) of the code. According to section 9(1), a petition like this could be maintained only by an 'operational creditor' against the 'corporate debtor'. Section 5 (20) and (21) of the code read thus:

"5. In this part, unless the context otherwise requires, -

(20) operational creditor" means a person to whom an operational debt is owed and includes a nay person to whom such debt has been legally assigned or transferred

(21) operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the central government, any state government or any local authority"

It is evident from the perusal of the aforesaid definition of 'operational debt' that it is a claim in respect of the provision of goods or services including dues on account of employment or a debt in respect of repayment of dues arising under any law for the time being in force and payable to the Centre or state government or local authority. It is thus clear that debt may arise out of those 4 categories. However, in the present case, the debt

has not arisen out of the provisions of goods or services. The debt has also not arisen out of employment or the dues which are payable under the statute to the Centre or state government or local body. The refund sought to be recovered is necessarily associated with the delivery of the possession of immovable property which has been delayed.

2. WHETHER THE PETITIONER COULD BE REGARDED AS 'OPERATIONAL CREDITOR' WITHIN THE MEANING OF SECTION 5(20):

The operational creditors are those persons to whom the corporate debt is owed and whose liability from the entity comes from a transaction on operations. The petitioner in the present case has neither supplied any goods nor has rendered any service to acquire the status of an operational creditor. Given the timeline in the code, it is not possible to construe section 9 read with section 5(20) and (21) of the code so widely to include within its scope even the cases where dues are on account of advance made to purchase the flat or a commercial site from a construction company like the respondent in the present case especially when the petitioner has a remedy available under the consumer protection act and the general law of the land. Therefore, the petition is dismissed.

PRECEDENT AND SIMILAR CASES:

- Sajive Kanwar v. AMR Infrastructure[100]
- Mukesh Kumar v. AMR Infrastructure limited[101]
- Pawan Dubey and another v. J.B.K Developers private limited[102]

The tribunal has passed similar orders in all these cases. In Sajive Kanwar case, the learned counsel for the petitioner has argued that the expression 'corporate debtor' means a person who owes a debt to any person as per section 3(5) of IBC. It is further emphasized that the expression 'debt' means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. However, part II specifically deals with "insolvency resolution and liquidation" and it has its definition enumerated in section 5 of IBC. Therefore, the definition enumerated in

[100]Sajive Kanwar v. AMR Infrastructure (C.P. NO.(ISB) -03(PB)/2017)
[101]Mukesh Kumar v. AMR Infrastructure limited, (C.P. NO.(IB) -30(PB)/2017)
[102]Pawan Dubey and another v. J.B.K Developers private limited, (C.P. NO.(IB) -19(PB)/2017)

section 5 of IBC is to apply the expressions used in sections 7 and 9 of IBC and therefore, the expression used in section 3 of IBC cannot be exclusively read to interpret various words used in section 5 of IBC. Therefore, the petition is dismissed. Similarly with the other two cases as well.

CASE ANALYSIS:

The order passed by the tribunal, in this case, is appropriate and it confirms with the existing law. The meanings of 'operational creditor' and 'operational debt' are clearly explained by the tribunal. The tribunal clearly stated the requirements that the petitioner has to satisfy to maintain the case. The tribunal was consistent in giving the orders as they are similar in all the subsequent cases. In this case, it is said that the debt has arisen neither out of the provision of goods or services nor out of employment or the dues which are payable under the statute to the central or state government or any local body. Rather it is associated with the delivery of the possession of immovable property which was delayed. In the present order, the tribunal said that there are remedies available for the petitioner in the Consumer protection act. According to IBC the order passed was correct as the petitioner does not come under the scope of the definition of 'operational creditor'. However, let us see the remedies available to the buyers for the delay in possession of their property because if we observe, this is the case of delay in possession of a property.

CONSUMER PROTECTION ACT:

When a person faces any issue regarding the delay in possession of the property, he can file a complaint against the seller under the consumer protection act. So, there are 3 procedures for the remedy available depending on the amount of compensation. They are:

1. The District Consumer Dispute Resolution Committee – For the claims under 20 lakh rupees.
2. The State Consumer Dispute Resolution Committee – For the claims between 20 lakh and 2 crore rupees.

3. The National Consumer Dispute Resolution Committee – For the claims above 2 crore rupees.

REAL ESTATE REGULATION ACT, 2016:

The RERA is a regulating authority that addresses the issues in the real estate sector. The act provides remedies for the disputes which occur in the real estate sector. If there is any issue regarding the property like delaying in giving the possession or any other issue, the home buyer can claim the refund of the amount which has been paid for the property. RERA completely focuses on the protection of the buyers and punishes the real estate agents with imprisonment if the agents violated the order of the appellate tribunal.

CONCLUSION:

The NCLT in this case had decided that home buyers cannot be operational creditors. However, they are always at risk of delay in possession of the property. Generally, there are remedies available for homebuyers in Insolvency and Bankruptcy as well but in this case, the petition filed was wrong. As discussed above, the consumer protection act and the Real estate regulation act (RERA) provides remedies for them.

CASE NO: 15

M. RAVINDRANATH REDDY V. G. KISHAN AND ORS

Pendyala Rajesh Prabhath[103]

INTRODUCTION

Insolvency and Bankruptcy Code, 2016, has provisions where both corporate debtor and creditors (financial and operational) are treated equally, and the laws make sure that no one is at loss. To initiate a corporate interim resolution process against a company or a firm, it must be either a financial creditor or an operational creditor. However, debts may arise for various reasons. But, to initiate a CIRP against a company the debt must fall under the scope of the definition of financial debt or operational debt under IBC, 2016. Corporate debtor owing debt other than either financial debt or operational debt, the creditor will not qualify to apply under sections 7-9. The nature of the debt is very important. The appeals will not stand even if there is a pre-existing dispute. This is one such case where the adjudicating authority set aside the CIRP process and declared it illegal.

FACTS OF THE CASE

- This appeal has been filed against the order dated 21st January 2019 passed by the National Company Law Tribunal, Hyderabad Bench, whereby the petition filed under Section 9 of the Insolvency and Bankruptcy Code, 2016, has been admitted against the Corporate Debtor Respondent No. 5, M/S. Walnut Packaging Private Limited.
- Respondents are the Lessors and the Corporate Debtor - M/s. Walnut Packaging Private Limited is the Licensee of Industrial Premises consisting of land measuring about 1667 sq. Yards, situated at Kukatpally, Hyderabad.
- That tenancy of the Appellant was yearly, and the rent payable for the period from July 2011 to June 2017 was Rs. 85,67,290/- and the Corporate Debtor / Appellant is stated to

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be making part payments of lease rent from July 2011 until December 2016, totaling to Rs. 49,96,728/-, after deduction of Rs. 5,55,192/- as TDS.

- The aggregate credit to the Corporate Debtor's account was Rs. 55,51,920/-. The Corporate Debtor stopped making the payment from January 2017, after the last part payment was made, which was adjusted towards rental dues. The dues against the Corporate Debtor at the end of June 2017 was Rs. 30,15,370/-.
- After that, the Respondent /Petitioner issued a legal notice dated 15-06-2017 to handover the property back to the Petitioners, but the Corporate Debtor failed to vacate the property. After that, an eviction suit was filed against the Corporate Debtor before the jurisdictional Civil Court.
- The learned counsel for the Respondent / Petitioner further submitted that the Demand Notice U/S 8 of I&B Code 2016 dated 18-01-2018 was also issued against the Corporate Debtor demanding Rs. 49,51,605/-, which was duly served on the Corporate Debtor.
- The Corporate Debtor/Appellant submitted that he had paid the rent until December 2017, and no amount is due to the Petitioner. It is further stated that due to slowdown in the Operations of the Corporate Debtor during the period from April 2012 to July 2012 Petitioner/Respondent agreed on a moratorium for no yearly enhancement of rent for six years.
- The Adjudicating Authority held that the Corporate Debtor had taken the property of the Petitioners on rent, and they were paying rent up to June 2017. But the Corporate Debtor failed to pay the rent from July 2017 onwards.
- The adjudicating authority stated that though the corporate debtor says the moratorium was accepted by the petitioners, there is no documentary proof. So, the initiation of CIRP was accepted.

ISSUES

1. Whether a landlord by providing lease, will be treated as providing services to the corporate debtor, and hence, an operational creditor within the meaning of Section 5(20) read with Section 5(21) of the 'Insolvency and Bankruptcy Code, 2016?

The Insolvency and Bankruptcy Code (“Code”) recognizes two types of debt to enable the creditors to make an application for initiating insolvency proceedings against the

corporate debtor- financial debt and operational debt. If there is a debt, other than a financial debt or an operational debt, the creditor will not qualify to apply under Sections 7 or 9. Hence, the determination of the nature of the claim/debt is an important step while considering the admission of an application under the Code. In the present case, the debt arisen did not fall under the scope of the definition of operational debt.

2. Whether the petition filed U/S 9 of the Insolvency and Bankruptcy Code 2016 is not maintainable on account of 'pre-existing dispute'?

In this case, the respondent before issuing demand notice had issued a legal notice under section 106 of the Transfer of property act, 1882. Thus, it is clear that the landlord, who applied to the recovery of alleged enhanced lease rent, cannot be treated as an operational creditor within the meaning of Section 5(20) read with Section 5(21) of the 'Insolvency and Bankruptcy Code, 2016.

PRECEDENT CASES

1. Jindal Steel & Power Ltd. v. DCM International Ltd.[104]
2. Parmod Yadav &Anr v. Divine Infracon (P) Ltd.[105]
3. Col. Vinod Awasthy v. AMR Infrastructure Ltd.[106]

In Jindal steel & power ltd., the court held as follows: "Admittedly, the Appellant is a tenant of Respondent- Even if it is accepted that a Memorandum of Understanding has been entered between the parties regarding the premises in question, the Appellant being a tenant, having not made any claim in respect of the provisions of the goods or services and the debt in respect of the repayment of dues does not arise under any law for the time being in force payable to the Central Government or State Government, we hold that the Appellant tenant does not come within the meaning of 'Operational Creditor' as defined under sub-section (20) read with sub-Section (21) of Section 5 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to 'I&B Code') for triggering Insolvency and Bankruptcy Process under Section 9 of the 'I&B Code. Similar judgments were

[104] Jindal steel and power ltd. V. DCM International ltd. [Company appeal (AT) (Insolvency) No.288 of 2017]
[105]Parmod Yadav and Anr v. Divine Infracon (P) ltd.
[106] Col. Vinod Awasthy v. AMR Infrastructure ltd.

passed in Parmod Yadav and Col. Vinod Awasthy cases.

CASE ANALYSIS

The order passed by the tribunal, in this case, is completely appropriate and it confirms with the existing law. The tribunal is consistent in giving the reasoning as they gave similar orders in the previous cases. The interpretation of the law is also very appropriate. In this case, the appeal was allowed, and all the orders and actions made by Interim resolution professionals were declared illegal and set aside by the NCLAT. The corporate debtor, in this case, was released from all the proceedings and is allowed to function independently with its board of directors. The adjudicating authority rightly passed the order by following the precedent cases. Although the legislation had not completely adopted the Bankruptcy law reforms committee reports. We cannot point out the order passed as there was a pre-existing dispute. When there is a pre-existing dispute, the creditor will not come under the scope of the definition of an operational creditor. This order contrasts with cases such as SarlaTantia v. Nadia Health Care Ltd., and India Bulls Real Estate Co. Pvt. Ltd. v. Crest Steel & Power Pvt. Ltd. where pending amounts of rent were considered as an operational debt. However, the only reason why the appeal was allowed was because of a pre-existing dispute.

CONCLUSION

In the present order, there is no remedy available for the respondent under the Insolvency and Bankruptcy Code, 2016. In my opinion, the creditor in the present case is also somehow contributing to the corporate debtor to run. The debt owed to the creditor must be recovered. So, if there is an agreement made, the creditor can invoke it or file a civil suit for the recovery under the appropriate court.

CASE NO: 16

JAYPEE INFRATECH INSOLVENCY CASE

- Sakshi Nathani[107]
- Muskaan Jain[108]

INTRODUCTION

In the present case, the Supreme Court clarified the intention of the legislature to define financial creditors and the secured creditors who invest in the investments formed and created by JAL. In addition to seeking the intervention of the Supreme Court in the insolvency resolution process of JP and has challenged the constitutional validity of various sections of the IBC and the regulations framed thereunder. The court held that money lenders who act as third-party security should be called as called secured creditors and shall not be called financial creditors. The present case is a classic and landmark decision under the IBC introducing a new class of creditors and securing the rights and interests of homebuyers.

STATEMENT OF FACTS

Jaypee Infratech, the holding company (JAL) Jaypee Prakash Associates Limited (JAL) issued letters to homebuyers, and payments were diverted into their respective bank accounts by Jaypee Infratech Limited (JIL), amounting to 25, 000 cores for their “Wish Town” project. JIL had mortgaged certain properties to JAL's lenders and other financial institutions as collateral security. JAL, on the other hand, was a public listed company that owned 71.64% of JIL's share value. The properties provided by JIL in favour of JAL's financial institutions shall constitute a "Third-party" standing, with no Debtor relationship with JAL's lenders.

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[108] BBA.LLB. 2nd Year Student, Alliance School of Law, Alliance University, Bangalore.

Following an investigation, it was discovered that the funds had been diverted by Jaypee Infratech groups for the promotion of the Yamuna Express development. Aggrieved, the homebuyers filed a complaint with the National Consumer Disputes Redressal Commission (NCDRC), but the case was not adjudicated. Furthermore, the application was referred to the Apex Court as a PIL following the hearing through the NCLT, as a matter of sub-judice.

The Interim Resolution Professional (IRP) rejected JAL lenders' claims to be admitted as financial creditors upon the start of the Corporate Insolvency Resolution Process (CIRP) because they did not fall under the definition of Section 5(7) of the IBC. The NCLT denied JIL's avoidance of certain mortgaged claims in favor of JAL's lenders, ruling that the preferential transactions were fraudulent and undervalued. The adjudicating authority reversed the NCLT verdict on appeal, favoring JAL's lender for their inclusion as Financial Creditors. However, on further appeal, the Supreme Court overruled the NCLAT orders by reinforcing the NCLT pronouncement based on Section 29A. The court emphasized its stance on "inclusion and recognition of Financial Creditors" under Section 5(8) of the IBC.

The fourth bidding process is currently underway, with lenders and homebuyers submitting their bid amounts in the meeting of CoC, while the Supreme Court has ordered NBCC and Suraksha group to submit a new bid amid the Corona crisis.

The IRP, one of the Corporate Debtor's financial creditors (IIFCL), and the associations of homebuyers in Corporate Debtor's projects filed the set of appeals before the Supreme Court that resulted in the current judgment, challenging the common impugned order of NCLAT dated August 1, 2019.

PRECEDENTS

In *Swiss Ribbons Pvt. Ltd. vs. Union of India,*[109] the Supreme Court upheld the validity of the Insolvency Bankruptcy Code 2016 and emphasized that a "default" in the financial debt owned is sufficient to trigger the Insolvency Procedure.

[109]*Swiss Ribbons Pvt. Ltd. vs. Union of India*, 2019 SCC Online SC 73.

"The inclusion of real estate Allottees as financial creditors under section 5(8)(f) is permissible enough to trigger insolvency proceedings against the real estate project owners, as well as eligible to be included in Committee of Creditors (CoC) by their authorised representatives," the Supreme Court held while rectifying the IBC Amendment 2018.

K. Sashidhar vs Indian Overseas Bank case[110], in this Court, analyzed the entire scheme of the Code, particularly concerning the resolution plan and its approval by the Committee of Creditors and then by the Adjudicating Authority; and held that the percentage of voting share was not a directory and in the light of the provisions contained in the Code and the CIRP Regulations, the approving votes must fulfill the requisite percentage of voting share. The Court also held that the amendment to Section 30(4), prescribing a new qualifying standard for approval of resolution plan was neither retrospective in operation nor was having retroactive effect. The Court also rejected the suggestion for different percentages of voting share.

In the *Chitra Sharma*[111] case, Court held that the Corporate Insolvency Resolution Process should be revived, and the Council of Creditors reconstituted as per the amended provisions to include the home buyers. The IRP is permitted to invite fresh expression of interest for submission of resolution plans and the Court disallowed JIL/JAL to participate in the CIRP.

In the *Essar Steel case*[112], Court laid down that if the Adjudicating Authority would find that the requisite parameters had not been kept in view, it may send the resolution plan back to the Committee of Creditors to resubmit the same after satisfying the parameters. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate

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[110]K. Sashidhar vs Indian Overseas Bank, *2019 SCC Online SC 257.*

[111]*Chitra Sharma &Ors. v. Union of India and Ors, W.P. (C) 744 of 2017.*
[112]*Committee of Creditors of Essar Steel India Limited (through authorized signatory) v.Satish Kumar Gupta and Others,* (2020) 8 SCC 531.

debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximize the value of its assets; and that the interests of all stakeholders including operational creditors have been taken care of. Further, Court in Essar Steel makes it clear that the interests of dissenting financial creditors are duly taken care of, while providing for the minimum amount they are entitled to and, for that matter, in priority over the assenting financial creditors.

Maharashtra Seamless Limited vs. Padmanabhan Venkatesh &Ors.,[113]the court held that there is no requirement that the resolution plan should match the maximized asset value of the corporate debtors. Reiterating the principle laid down in the case of ***Essar Steel*****,** the Hon'ble Supreme Court held that once a resolution plan is approved by the committee of creditors (CoC), the Adjudicating Authority has limited power of judicial review.

Pradumna Kumar Jain v. U.P. Secondary Education Service Commission, Allahabad, and Ors. [114], the court held that the power to approve or disapprove includes the power to modify, and it has been strongly argued that the power to modify is inherent in the power of approval in terms of Section 31 of the Code.
Embassy Property[115] case, the court stated that the assets belonging to a third party cannot be utilized towards the resolution of a corporate debtor remain fundamental and beyond cavil.

Pioneer Urban Land and Infrastructure v Union of India[116]("**Pioneer**") upheld the constitutional validity of the Insolvency Code (Second Amendment) Act of 2018 and rightly dealt with the issue of 'dissenting homebuyers'

ISSUES

1. Whether transactions involving the creation of mortgage by the Corporate Debtor over its properties, as collateral securities for the loans and advances made to the

[113]Maharashtra Seamless Limited vs. Padmanabhan Venkatesh &Ors.*Civil Appeal No. 4242 of 2019.*
[114]Pradumna Kumar Jain v. U.P. Secondary Education Service Commission, Allahabad and Ors. (1997) 30 ALR 339.
[115] M/S Embassy Property v. The State Of Karnataka, Civil Appeal No S. 9170-9172 of 2019.
[116]*Pioneer Urban Land and Infrastructure v Union of India,* 2019 SCC Online SC 1005.

Holding Company, are avoidance transactions for being preferential, undervalued, and fraudulent, in terms of Sections 43, 45, and 66 of the Code?

2. Whether the lenders of JAL, could be categorized as the financial creditors of JIL, on the strength of mortgage created by JIL for securing the debt of JAL?

HOLDING

The Supreme Court held that the debts in question being in the form of third-party security having been given by the Corporate Debtor for securing the loans obtained by Holding company from the respondent-lenders, the said debt could not be considered as a '*financial debt*' due and payable by the Corporate Debtor within the meaning of Section 5(8) of the Code and hence, the respondent-lenders of the Holding company were not the financial creditors of the Corporate Debtor, under Section 5(7) of the Code. The Court further observed that though the lenders of Holding Company, on the strength of the mortgages in question created by the Corporate Debtor, may fall in the category of secured creditors, such mortgages being neither towards any loan, facility, or advance to the Corporate Debtor nor towards protecting any facility or security thereof, it cannot be said that the Corporate Debtor owes any financial debt within the meaning of Section 5(8) of the Code to the respondent-lenders of the Holding Company.

Accordingly, the Court set aside the impugned order of NCLAT dated August 1, 2019, and upheld the order of Adjudicating Authority dated May 16, 2018, which had ruled that the transactions in question were preferential within the meaning of Section 43 of the Code and passed directions for the avoidance of such transactions. The Court also upheld the respective orders of Adjudicating Authority recording the findings that the lenders of JAL could not be categorized as the financial creditors of the Corporate Debtor

FINDINGS

The decision of the Supreme Court in the Jaypee case led to various changes. The notion attributed to IBC law was significantly diverted to protect the interest of homebuyers. The Supreme Court has reiterated that Section 43 which deals with preferential transactions in the IB code should be interpreted strictly with the parameters set by

precedents. The court had considered JIL mortgage to be considered as a preferential transaction because the JIL Mortgage benefitted JAL, by allowing it to raise debt from the JAL Lenders. Since JAL was an existing creditor of JIL, such benefit to JAL was in respect of 'antecedent debt' owed by JIL to JAL. The creation of the JIL Mortgage had the power to deprive them of accessing the mortgaged assets and had the effect of reducing their recovery under a Section 53 distribution of JIL's assets. There was a direct flow of benefits arising from JIL mortgage to JAL, a related party of JIL. Since the creation of the JIL Mortgage was not in JIL's ordinary course of business (and hence was not an Excluded Transaction) given that JIL was a 'special purpose vehicle' SPV created by JAL only for the construction and operation of the Yamuna Expressway.

However, the court identified all the elements of what constitutes a preferential transaction, but in the Jaypee, case the court has not correctly accessed if JIL Mortgage had met all the desired prerequisites. The court had failed to connect the direct flow of interest and benefits the JAL arose from JIL Mortgage and the expansive interpretation of section 43 (a) of the IBC is required, which is not supported in the present case. Additionally, Supreme Court did not explain whether the JIL Mortgage was also avoidable under Sections 44 or 66 of the IBC and left the question open.

Nevertheless, the decision of SC has confirmed that the third-party security could not be considered as financial debt. The court based its finding regarding the meaning of financial debt on a very narrow interpretation as set out in Section 5(8) of the IBC based on which, it concluded that for a debt to be considered as 'financial debt', it should represent the distribution of certain amounts to the corporate debtor (against the consideration of time value of money) or at the very least, fall within one of the components of financial debt set out under Section 5(8). The court has also held that while the JIL Mortgage may well constitute 'mortgage debt', it would not qualify as a 'financial deb' owed by it to the JAL Lenders.

As far as the ruling is concerned, the guidelines given in the present case carries far-reaching implication in the future course of a dispute. The court has significantly supported all the contentions raised by the Creditors, homebuyers, related parties, and

others. The ruling possessed a mirror image of how the Indian market responds to the insolvency proceedings and the magnificent role of the creditors' community.

CONCLUSION

The present landmark judgment of the Supreme Court in *Jaypee Infratech* has not only put to rest the legal issues revolving around third-party mortgage, in case they are avoidance transactions for being preferential in terms of Section 43 of the Code, but also clarified that the mortgagees in such third-party mortgage transactions cannot be considered as the financial creditors of the third party mortgagor, in the absence of disbursal of loans to such mortgagor against the consideration for the time value of money.

CASE NO: 17

GHANASHYAM MISHRA AND SONS PVT. LTD. V. EDELWEISS ASSET RECONSTRUCTION COMPANY LTD.

- Sakshi Nathani[117]

INTRODUCTION

The present case has clarified all the doubts surrounding the approval of NCLT to pass the resolution plan and its validity whether it can be challenged in other alternative forums. The court stated that once the NCLT approves the resolution plan it automatically gets binding all the creditors including Central or State government or local authority.

FACTS

The company named Orissa Manganese & Minerals Limited (referred to as "Corporate Debtor" or "OMML") was engaged in the business of mining iron ore, graphite, manganese ore and agglomerating iron fines into pellets through its facilities in Orissa and Jharkhand. The Corporate Insolvency Resolution Process was initiated in respect of the Corporate Debtor by an application under Section 7 of I&B Code filed by the State Bank of India before the National Company Law Tribunal, Kolkata Bench, Kolkata

ShriSumitBinani was appointed as Interim Resolution Professional ("IRP"). Upon

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admission of the said Company Petition, CIRP was initiated with effect from 3.8.2017. The appointment of IRP was confirmed by the Committee of Creditors ("CoC") in their meeting held on 4.9.2017. Professional (RP) continued with the resolution process by inviting Expression of Interest and applications for resolution plan in accordance with the provisions of the I&B Code and the Regulations.

The initial period of CIRP of 180 days expired on 29.1.2018. At the request of CoC, RP moved an application for extension of CIRP period, which came to be extended by 90 days i.e. till 29.4.2018.6. In response to the invitation, three Resolution Plans were received by RP each from, Edelweiss Asset Reconstruction Company Limited, respondent No.1 herein, Orissa Mining Private Limited and Ghanshyam Mishra & Sons Private Limited (GMSPL), the appellant herein, respectively.
Later, NCLT by an elaborate order dated 22.6.2018 approved the Resolution Plan of GMSPL, which was duly approved by CoC by voting share of more than 89.23%. Being aggrieved by the order passed by NCLT, EARC preferred Company Appeal being Company Appeal (AT) (Insolvency before the National Company Law Appellate Tribunal, New Delhi.

The common facts in all the appeals were that despite approval of the resolution plan by the NCLT, proceedings were sought to be initiated in alternative forums for recovery of dues not provided for in the resolution plan.

ISSUES`

(i) As to whether any creditor including the Central Government, State Government or any local authority is bound by the Resolution Plan once it is approved by an adjudicating authority under subsection (1) of Section 31 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code')?

(ii) As to whether the amendment to Section31 by Section 7 of Act 26 of 2019 is clarificatory /declaratory or substantive in nature?

(iii) As to whether after approval of resolution plan by the Adjudicating Authority a creditor including the Central Government, State Government or any local authority is entitled to initiate any proceedings for recovery of any of the dues from the Corporate Debtor, which are not a part of the Resolution Plan approved by the adjudicating authority?

PRECEDENTS

In *KalprjDharamshi and Another vs. Kotak Investment Advisors Limited and Another*[118], herein court held that the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan "as approved" by the requisite per cent of voting share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan is in reference to matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements. Further, the Court held that the commercial wisdom the commercial wisdom of the CoC is not to be interfered with, excepting the limited scope provided under Sections 30 and 31 of the I&B Code.

In *State Bank of India vs. V. Ramakrishnan and Another*,[119] the Hon'ble Supreme Court has held the amendment to certain provisions of the I&B Code to be clarificatory in nature. it is clear, that once NCLT grants approval to the Resolution Plan, all proceeding spending insofar as the Corporate Debtor is concerned, which are not included in the Resolution Plan shall stand automatically stayed.

In case of *Innoventive Industries Ltd. vs. ICICI Bank &Anr*,[120] in this case Supreme Court has elaborately discussed the scheme of the various provisions of the I&B Code. Further, court held that the scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. The term default is defined in Section 3(12) of the Code and when it comes to a financial creditor triggering the process, Section 7 becomes relevant.

[118]KalprjDharamshi and Another vs. Kotak Investment Advisors Limited and another, Civil Appeal Nos. 29432944 of 2020.
[119]State Bank of India vs. V. Ramakrishnan and another, Civil Appeal No. 3595 and 4553 of 2018.
[120]Innoventive Industries Ltd. vs. ICICI Bank &Anr., Civil a\Appeal Nos. 8337-8338 OF 2017

The Allahabad High Court subsequently took a differing view in *SanjeevShriya v. SBI*[121], by applying moratorium to enforcement of guarantee against personal guarantor to the debt. The rationale being that if a CIRP is going on against the corporate debtor, then the debt owed by the corporate debtor is not final till the resolution plan is approved, and thus the liability of the surety would also be unclear. The Court took the view that until debt of the corporate debtor is crystallized, the guarantor's liability may not be triggered. It mean that surety's liabilities are put on hold if a CIRP is going on against the corporate debtor.

Further, in *SBI v. V. Ramakrishnan*[122] , where Supreme Court, after referring to the selfsame Insolvency Law Committee Report, held that the amendment made to Section 14 of the Code, in which the moratorium prescribed by Section 14was held not to apply to guarantors, was held to be clarificatory, and therefore, retrospective in nature, the object being that an overbroad interpretation of Section 14ought to be set at rest by clarifying that this was never the intention of Section 14 from the very inception.

In *AkshayJhunjhunwala&Anr. v.. Union of India through the Ministry of Corporate Affairs &Ors.,*[123] herein Court has also taken a view, that the claim of operational creditor will also include a claim of a statutory authority on account of money receivable pursuant to an imposition by a statute.

Then, in *Export Import Bank of India vs. Resolution Professional JEKPL Private Limited*[124]*,* wherein court held that vocation of corporate guarantee has no nexus with filing of the claim pursuant to public announcement made under Section 13(1) (b) read with Section 15(1) (c) of the I&B Code and also for collating the claim under Section 18(1) (b) or for updating claim under Section 25(2) (e).

HOLDING

In the present case, Supreme Court held that once a resolution plan is duly approved by

[121]SanjeevShriya v. SBI, 2017 SCC Online All 2717.
[122]SBI v. V. Ramakrishnan, (2018) 17SCC 394]
[123]Akshay Jhunjhunwala&Anr. v. Union of India through the Ministry of Corporate Affairs &Ors., W.P. No. 672 of 2017.
[124] Export Import Bank of India vs. Resolution Professional JEKPL Private Limited, Company Appeal (AT) (Insolvency) No. 254 Of 2017

the Adjudicating Authority under subsection (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors, and other stakeholders.

Further, court stated that the 2019 amendment to Section 31 of I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect. Consequently, all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under Section 31 could be continued.

CONCLUSION

The decision of court in present case is very appropriate ad states the objective of legislature to solve all the IBC matter under simple and profound manner. The NCLT being quasi-judicial body hold the power to approve all the resolution plan passed by majority and consent. However, the court is very particular to mark that the matters not listed under the resolution cannot be carried further once the resolution is approved and hence carries no further implication in the proceedings.

FINDINGS

The decision of Supreme Court in reiterating the validity of resolution passed by the Adjudicating Authority and its applicability in the further proceedings solved the various questions raised in different cases. The case has clarified all the ambiguities raised around the initiation of any proceedings after the successful resolution process. The Court's decision stands appropriate as the decisions makes the fundamental procedure established under section 31 of IBC very clear and directive. It has further been held, that the commercial wisdom of CoC has been given vital status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the I&B Code.

Further, the decision has significantly influenced the existing law by interpreting the

provisions contained under sections 30 and 31 of I&B Code in very deliberate and precise manner. Court has distinguishingly provided the intention of legislature to bring certain amendments and provide viability to the insolvency procedure as per declared law under the Code. It further observed that the court has clearly stated the meaning of 'operational debt', 'operational creditor' and 'financial creditor' with reference to various precedents. Court had observed that the operational debt owed to central Government, any State Government or any local authority would come within the ambit of 'Operational Creditor'. Similarly, a person to whom a debt is owned would be covered by the definition of creditor.

Moreover, the Court observed that under section 31 of IBC, once the resolution plan is approved by the AA, after it is satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in section 30(2), it shall be binding on the corporate debtor, its employees, creditors, members, guarantors and also includes Central Government, any State Government or any local authority. Additionally, court clarifies that position that once such resolution was approved by the AA, all such claims / dues owned to the Central Government, any State government or any local authority including tax authorities, which were part of the resolution plan shall stand extinguished.

Henceforth, to prevent belated and recurring proceeding after a successful process as well as to provide fresh start to the corporate debtor, the Court held that no creditors including statutory bodies can initiate any proceedings regarding pre-CIRP dues against the corporate debtor. However, the CIRP framework need to be modified in a manner which ensures that the statutory dues are not left unaddressed. Thus, in such situation the IRP should be required to take cognizance of the dues as per the books of accounts, and in case if statutory dues are not included in the resolution plan, then there is an immediate need to address such problem for determining the statutory dues before the approval of the resolution plan. In order to solve this issue, a separate notice to the government departments with the amount acknowledged form the accounts books shall be sent.

CASE NO: 18

PHOENIX ARC PRIVATE LIMITED V. SPADE FINANCIAL SERVICES LIMITED & ORS.

Pendyala Rajesh Prabhath[125]

INTRODUCTION

Insolvency and Bankruptcy Code, 2016 was enacted to solve issues regarding reorganization and insolvency resolution of corporate persons. The main aim of the Insolvency and bankruptcy code is to save the corporate debtors through the corporate resolution insolvency process. At the same time, the code must ensure that financial creditors do not suffer losses. So, IBC has made some provisions to prevent fraud against legitimate financial creditors. The provisions make sure the transactions of the financial

[125] BBA.LLB. 3rd Year Student, Alliance School of Law, Alliance University, Bangalore.

creditors are legitimate but not collusive. This is such a case where the Supreme court dismissed the case by passing the order that the transactions involved are collusive.

FACTS OF THE CASE

- The brief facts of the case are that CIRP has been initiated against the Corporate Debtor on 18 April 2018 on an application filed by an operational creditor, Mr. Hari Krishan Sharma, under Section 9 of IBC.
- During the CIRP, claims were invited by the Interim Resolution Professional ("IRP"). Spade filed its claim in Form C as a financial creditor for a sum of Rs. 52,96,00,000 on 10 May 2018. Thereafter, Spade filed a revised Form C for a sum of Rs. 109,11,00,000 on 20 May 2018. Spade had filed the form based on an alleged Memorandum of Understanding dated 12 August 2011 executed with the Corporate Debtor, which stated that Inter Corporate Deposits ("ICDs") of Rs. 26,55,00,000 have been granted to the Corporate Debtor by Spade bearing interest of 24% repayable in terms of the mutual agreement between the parties. However, Spade has submitted before this Court that it has granted ICDs of Rs. 66,00,00,000 (approx.) to the Corporate Debtor between June 2009 and January 2013. Out of this amount, Spade is claiming a principal amount of Rs. 23,00,00,000. The balance amount of Rs 43,06,00,000 was credited in the account of AAA, which is a wholly owned subsidiary of Spade. The total claim of Spade has increased to Rs. 109,11,00,000 in 7 years on account of interest at the rate of 24%.
- AAA filed its claim before the IRP in Form F as a creditor other than a financial creditor or operational creditor for a sum of Rs. 93,90,00,000 on 10 May 2018. Thereafter, AAA filed a revised claim in Form C as a financial creditor for a sum of Rs. 109,72,00,000 on 23 May 2018. It had entered into a Development Agreement dated 1 March 2012 with the Corporate Debtor for a sale consideration of Rs. 32,80,00,000 to purchase development rights in a project. On 25 October 2012, the Development Agreement was terminated and an Agreement to Sell, along with a Side Letter, was executed between AAA and the Corporate Debtor for the purchase of flats. The sale consideration for the Agreement to Sell was enhanced to Rs. 86,01,00,000 from Rs. 32,80,00,000 under the Development Agreement. AAA paid a sum of Rs. 43,06,00,000 as advance payment under the Agreement to Sell. This amount was adjusted out of the

ICDs payable to Spade as noted above. The claim of AAA is for the principal amount of Rs. 43,06,00,000, which along with interest at the rate of 18% increased to Rs. 109,72,00,000 in 5 years.

- The CoC was constituted on 22 May 2018. On 25 May 2018, the IRP rejected the claim of Spade, inter alia, on the ground that the claim was not like a financial debt in terms of Section 5(8) of IBC since consideration was absent for the time value of money, i.e., the period of repayment of the claimed ICDs was not stipulated. The IRP also rejected the claim of AAA on the ground that its claim as a financial creditor in Form C was filed after the expiry of the period for filing such a claim.
- Aggrieved by the rejection of their claim as financial creditors, AAA and Spade filed applications before the NCLT to be included in the CoC. The NCLT by its order dated 30 May 2018 allowed the applications. However, none of the other financial creditors, such as Phoenix and YES Bank, were parties to these proceedings. The NCLT observed that AAA's original claim in Form F was filed on time, and it has only amended its claim as one under Form C. The NCLT further observed that the amount given by Spade in the form of ICDs has been received as a deposit and is attracting interest as reflected in Form '26 AS', deducting TDS on interest. Thus, NCLT allowed Spade and AAA to submit their claims as financial creditors with a direction to the IRP to consider the claims.
- Phoenix is also a financial creditor of the Corporate Debtor and is a part of CoC. Its claim is based on a registered Deed of Assignment in its favor dated 28 December 2015, according to which, Karnataka Bank Limited had assigned the non-performing assets relating to the credit facilities granted to the Corporate Debtor. The voting share of Phoenix was reduced to 4.28% on account of AAA and Spade being included in the CoC.
- On 1 June 2018, a meeting of the CoC took place, which was attended by YES Bank and Phoenix, and also by the newly approved financial creditors, AAA and Spade. Following the meeting, YES Bank and Phoenix filed applications in the NCLT for the exclusion of AAA and Spade from the CoC on the ground that they are related parties.
- The ultimate decision of NCLT was to exclude Spade and AAA from the CoC. The NCLAT held that admittedly they are financial creditors of the corporate debtor but rejected their claim on the basis that they are related parties. Finally concluded that the Adjudicating Authority had rightly excluded both Spade and AAA from participation in

the CoC since Mr. Anil Nanda, in concert with Mr. Arun Anand and his family, had created a web of companies which were related parties to the Corporate Debtor and was now trying to gain a backdoor entry into the CoC through them.

ISSUES

1. Whether spade and AAA are financial creditors of the corporate debtor?

AAA's claim of being a financial creditor was dishonest and was filed only to manipulate the voting percentage of CoC. Spade had an unlawful claim as a financial creditor for an exaggerating amount without any basis. The court held that the transaction between the corporate debtor and Spade and AAA is not financial debt. So they are not financial creditors of the corporate debtor.

2. Whether spade and AAA are related parties of the corporate debtor?

Considering the facts where the promoter of spade and AAA had family as well as the business relationship with the corporate debtor. Court held that they are related parties which automatically disqualifies them from being represented, participating, or voting in the CoC.

3. Whether spade and AAA have to be excluded from the CoC?

The court held that it is evident that they were related when the financial debt arouse. While their status as related parties may no longer stand, it would affect the other independent financial creditors if they are allowed in the CoC.

PRECEDENT CASES

1. Pioneer urban land and infrastructure limited v. Union of India[126]
2. Snook v. London and west riding investments limited[127]
3. Prem Chand Tandon v. Krishna Chand Kapoor[128]

The Supreme court rightly explained the meanings of some specific terms and interpreted

[126] (2019) 8 SCC 416
[127] [1967] 2 QB 786
[128] (1973) 2 SCC 366

them which helped pass the present judgment. With the help of these cases, the court interpreted the meaning of collusive and sham transactions.

In Pioneer urban land and infrastructure limited v. Union of India case, the court has interpreted the term “disbursal”. The expression "disbursed" refers to money that has been paid against consideration for the "time value of money". In short, the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilizes the money.

In Snook v. London and west riding investments limited case, the court elaborated the term “sham transaction” as acts done or documents executed by the parties to the “sham” which are intended by them to give to third parties or the court the appearance of creating between the parties’ legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.

ANALYSIS

The supreme court’s decision was appropriate, and the decision confirms the existing law. The reasoning of the case is consistent as in the previous cases. The court adequately justified its reasoning. The supreme court rightly overturned the order passed by the NCLAT in which it referred to spade and AAA as the financial creditors of the corporate debtor which was wrong. Collusive and sham transactions are never encouraged, and the IBC strictly forbids them. These kinds of transactions might seem like normal debts but the intentions behind are unfair as it would affect the legitimate financial creditors. The supreme court rightly explained the concept of collusive transactions and held that due to the collusive nature of transactions, the transactions, in this case, cannot be considered as financial debt. So, spade and AAA are not financial creditors of the corporate debtor. As said above, the sole purpose of the Insolvency and Bankruptcy Code, 2016 is to not only revive the corporate debtor from corporate death but to create a balance between financial creditors and corporate debtors where both should not go in losses. Collusive transactions are always a threat to a company. In this case, they tried to manipulate the voting percentage of other independent financial creditors of the corporate debtor which could

have affected them and benefit the corporate debtor and other parties involved.

CONCLUSION

As mentioned earlier, the Insolvency and Bankruptcy Code has provisions where both financial creditors and corporate debtors are equally given importance, and nobody is at loss. This decision by the court ensured that the committee of creditors was not damaged by the corporate debtor which tried to manipulate the voting percentage and tried to enter unlawfully into the committee of creditors through collusive and sham transactions.

CASE NO: 19

VIJAY KUMAR JAIN V. STANDARD CHARTERED BANK & ORS

Sakshi Nathani[129]

INTRODUCTION

In this present case the members of the erstwhile Board of Directors, being vitally interested in resolution plans that may be discussed at CoC meetings, insisted to that they must be given a copy of such plans as part of the documents to be furnished along with the notice for such meetings. The present case was argued to deliver the confidential documents to all the related parties who have chief interest in the affairs of the company which included suspended Board of directors also.[130]

FACTS

Standard Chartered Bank Limited (Financial Creditor) filed an application to NCLT under Section 7 of insolvency and bankruptcy code against Ruchi Soya Industries Ltd. (Corporate Debtor), another application was filed by DBS Bank limited (financial creditor) against Ruchi Soya Industries limited. It is said to be a profit-making company in the business of processing of oilseeds and refining crude oil for edible use of which Vijay Kumar Jain is the director and shareholder. Both the petitions were admitted by the NCLT. ShriShailendraAjmera of Ernst and Young was appointed as the Interim Resolution Professional in both of the petitions.

The Committee of creditors was constituted under Section 21 of the Insolvency and Bankruptcy Code, 2016 and Vijay Kumar Jain being a member of the suspended Board of Directors was given notice and the motive for the first Committee of creditors meeting held on 12.01.2018 and was permitted to attend the aforesaid meeting. He alleges, which was disputed by the respondents, that the subsequent meetings of the Committee of creditors were held in which he was denied participation. As a result, the appellant filed

[129] BBA.LLB. 3rd Year Student, Alliance School of Law, Alliance University, Bangalore.
[130] Vijay Kumar Jain v. Standard Chartered Bank &Ors., Civil Appeal No.8430 of 2018

an application under which he should be permitted immediately to attend those subsequent meetings and also of sharing resolution plans which was dismissed by NCLT, and the appellant was only permitted to attend those meetings.

Against this order appellant filed an appeal in appellate tribunal which states that permission is to be given to the appellant to attend and participate in committee of creditors meetings, but the appellant's appeal was denied accessing the resolution and related plans.

NCLT on August 1, 2018, held that directors have the right to attend CoC meetings (Section 24 of the IBC). However, directors could not receive information that is considered confidential by the resolution professional or the CoC, including the resolution plans. In the first appeal, the NCLT decision was upheld by NCLAT 1 on August 9, 2018. The director then moved the Supreme Court of India in challenge to the NCLAT decision.

ISSUES

1. Whether members of the suspended Board of Directors of a corporate debtor have a right to receive insolvency resolution plans submitted before the Resolution Professional, to effectively participate in CoC meetings?
2. Whether an appeal over an order of dismissing winding up against corporate debtor would have any bearing on the Adjudicating Authority passing an order under section 7 of the IBC Code?[131]

PRECEDENTS

In *Mobilox Innovations Private Limited v. Kirusa Software Private Limited*,[132] court held that for the proposition Notes on Clauses are important parliamentary material that may be relied upon to understand the object of the Section in question. They also relied strongly upon Regulation 7(2) (h) of the Insolvency and Bankruptcy Board of India

[131]LIVE LAW, https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2019/Feb/order%202_2019-02-01%2010:57:52.pdf, (last visited July 20, 2021).
[132]Mobilox Innovations PrivateLimited v. Kirusa Software Private Limited, (2018) 1 SCC 353.

(Insolvency Professionals) Regulations, 2016, read with the First Schedule thereto, which made it clear that confidential information can only be shared with the consent of the relevant parties. Further, the confidential information contained in proposed resolution plans can only be shared with members of the committee of creditors after receiving an undertaking from them under the Regulations.

Further in, Surendra Trading Company v. JuggilalKamlapat Jute Mills Company Limited and Others,[133] in this case court held that Time frame for ascertaining the existence of default. After the filing of the application, the National Company Law Tribunal shall ascertain the existence of adefault from the records of an information utility or on the basis of other evidence furnished by the financial creditor within fourteen days of the receipt of the application.

Wherein Essar Steel India Limited vs. Satish Kumar Gupta &ors[134], the Hon'ble Supreme Court while upholding the constitutional validity of the Code made, inter -alia, important ruling with regard to the role of the Committee of Creditor in the CIR process. It had emphasized the primacy of the commercial wisdom of the CoC in the resolution process as to whether to rehabilitate the corporate debtor or not by accepting a particular resolution plan. It also states that prior to approving the resolution plan, the Committee is required to assess the "feasibility and viability" of the resolution plan, which takes into account "all the aspects of the resolution plan, including the manner of distribution of funds among various class of creditors." In this regard, the Committee is free to negotiate with the resolution applicant by suggesting modifications in the commercial proposal on a case-to-case basis.

In *Swiss Ribbons Private limited &Anr. v. Union of India*[135]*,* the court however, did read down the bar on 'related persons', to mean only persons who have a business connection with the resolution applicant, with an aim towards increasing the number of participants.

[133]Surendra Trading Company v. JuggilalKamlapat Jute Mills Company Limited and Others, CIVIL APPEAL NO.8400 of 2017.
[134]Essar Steel India Limited vs. Satish Kumar Gupta &Ors, CIVIL APPEAL NO. 8766-67 OF 2019.
[135] Swiss Ribbons Private limited &Anr. V. Union of India, WRIT PETITION (CIVIL) NO. 99 OF 2018

HOLDING

The Supreme Court expressly rejected the argument based on Notes on Clauses to Section 24 of the Code and noted that every participant is entitled to a notice of every meeting of the committee of creditors. Such notice of meeting must contain an agenda of the meeting, together with the copies of all documents relevant for matters to be discussed and the issues to be voted upon at the meeting vide Regulation 21(3) (iii). Court said the expression "documents" is a wide expression which would certainly include resolution plans. The judgment also clarified that the RP could take an undertaking from the erstwhile director to maintain confidentiality of the information.[136]

"Members of the erstwhile Board of Directors, being vitally interested in resolution plans that may be discussed at CoC meetings, must be given a copy of such plans as part of "documents" that have to be furnished along with the notice of such meetings."

FINDING

The present case has resolved various issues pertaining to the status and rights of the suspended or erstwhile Board of Directors in order to participate in the CoC meetings. The Supreme Court held that members of the suspended Board of Directors are permitted to participate in CoC meetings only for the purpose of giving information regarding the financial status of the debtor. The decision is appropriate in its very nature to clarify the rights and the duties of each participant to proceed with the meeting and access to all the official documentations required to be discussed. The court also clarified that the Notes on Clauses to section 24 of the IBC contained erroneous stipulations and reiterated that the resolution professional does not seek information at a meeting of the CoC, nor does he prepare a resolution plan as is mentioned in the Notes: he only prepares an information

[136]ICSI CORPORATE RESTRUCTURING, INSOLVENCY, LIQUIDATION AND WINDING-UPhttps://www.icsi.edu/media/webmodules/CRILW.pdf, (last visited on 20th July 2021).

memorandum which is to be given to the resolution applicants.

The court also observed that every participant who hold keen interest in the affairs of the company is entitled to a notice of every meeting of CoC, and that such notice must contain an agenda for the meeting, together with copies of all documents relevant for matters that will be discussed, and issues that will be voted upon. The court also clarified that under the proviso to Section 21(2), it is only a director who is accounted as a financial creditor who is a related party of the corporate debtor that shall not have any right of representation, participation, or voting in a meeting of the CoC.
It was urged that the resolution plans should be given to the board of directors as they can provide better information to the committee of creditors regarding their debts. Moreover, section 24 of the Code clearly stated that the suspended board of directors are regarded as the party to the meeting with CoC. Thus, by giving resolution plans to the former BOD will increase the efficiency and clarity as they hold indeed information of company's performance and related matters.

Also, former directors comes within the definition of "related party" in the Code and related parties are excluded from the COC even if they are creditors of the company so there has been taken away. However, there is one loophole that suspended directors will include promoter nominated directors. Under this sharing of resolution plans to the promoter may give rise to the conflict of interest.

CONCLUSION

The present case has clearly stated the role and rights of the suspended directors and why their presence is important to hold the resolution process. Court subsequently held that the appellants will be given the copy of documents submitted to Committee of creditors within two weeks after the judgment has been passed. After that, a meeting will commence with resolution professional and COC which includes the appellant as the participants. Further with a majority of COC the resolution plan may be approved or reject, and the further procedure is to be followed which is given in the code and the decision of NCLT be set aside. The court decision in present case is factual suspended directors are the participants under the code who needs to be provided with all the

documents relating to the resolution plan and may involve in the meeting. As they can provide with correct information and may help the creditors to save the company with best interest as after all the company belongs to the director and they will suggest the plans with best of their knowledge.

CASE NO: 20

PANDURANG GANPATI CHAUGULE VS VISHWASRAO PATIL MURGUD SAHAKARI

- Sakshi Nathani[137]

INTRODUCTION

In this case the Supreme Court has overruled the decision held in greater Bombay case and clarified various unsolved question pertaining to the multi-state co-operative banks and their right to cover dues from faulty borrowers without any intervention of court. the Court opined that as the definition of 'banking company' under the BR Act includes co-operative banks, the provisions of the SARFAESI Act are to automatically apply to co-operative banks as the SARFAESI Act inherits the definition of 'banking company' from the BR Act itself. In other words, co-operative banks shall be considered as 'banks' for the purposes of applicability of the SARFAESI Act.

STATEMENT OF FACTS

The present case was filed on 13.8.2008, Pandurang Ganpati Chougule – appellant, questioned the action of VishwasraoPatilMurgudSahakari Bank Limited under the SARFAESI Act. The matters have been referred to a larger bench given conflicting decisions in Greater Bombay Co-op. Bank Ltd. vs. United Yarn Tex. Pvt. Ltd. and Ors. The question relates to the scope of the legislative field covered by Entry 45of List I viz. 'Banking' and Entry 32 of List II of the Seventh Schedule of the Constitution of India, consequentially power of the Parliament to legislate. The moot question is the applicability of the Securitization and Reconstruction of Financial Assets and

[137] BBA.LLB. 3rd Year Student, Alliance School of Law, Alliance University, Bangalore.

Enforcement of Security Interest Act, 2002 (for short, 'the SARFAESI Act') to the co-operative banks. The Parliament's competence to amend Section 2(c) of the SARFAESI Act by adding sub clause (via) a multi- State cooperative bank has also been questioned.

PRECEDENTS

NarendraKantilal Shah v. Joint Registrar, Cooperative Societies,[138]and a Full Bench of the Bombay High Court opined that term 'banking company' also means cooperative bank within the meaning of Section 2(d) of the RDB Act, 1993. Hence, with effect from the date of constitution of Debts Recovery Tribunal under RDB Act, 1993, the courts and authorities are under the Maharashtra Cooperative Societies Act, 1960, as also the MSCS Act would cease to have jurisdiction to entertain the applications submitted by the co-operative banks for recovery of their dues.

However, the decision held in NarendraKantilal case was set aside in the case of Greater Bombay Coop. Bank Ltd. v. M/s. United Yarn Tex. Pvt. Ltd. & Others[139], wherein Court opined that the cooperative banks established under the Maharashtra Cooperative Societies Act, 1960 and Andhra Pradesh Cooperative Societies Act, 1964, transacting the business of banking do not fall within the meaning of 'banking company' as defined in Section 5(c) of the BR Act, 1949. Therefore, the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, now renamed as The Recovery of Debts and Bankruptcy Act, 1993 (for short, 'the RDB Act, 1993'), by invoking the doctrine of incorporation do not apply to the recovery of dues by cooperative banks from their members. The field of cooperative societies cannot be said to have been covered by the Central legislation by reference to Entry 45 of List I of the Seventh Schedule of the

[138]NarendraKantilal Shah v. Joint Registrar, Cooperative Societies, AIR 2004 Bom 166.

[139] Greater Bombay Coop. Bank Ltd. v. M/s. United Yarn Tex. Pvt. Ltd. & Others, (2007) 6 SCC 236

Constitution of India. Cooperative banks constituted under the Cooperative Societies Acts enacted by the respective States would be covered by 'cooperative societies' by Entry 32 of List II of the Seventh Schedule of the Constitution of India.

Later on, Gujarat High Court in *Neel Oil Industries v. Union of India*[140], rejected the challenge to the Constitutional validity of clause (iva) 'multi-State cooperative bank' inserted by way of Amendment Act, 2013.

In *RustomCavasjee Cooper v. Union of India*[141] in which this Court held that 'banking' under Entry 45did not include 'banker' or 'bank.' Banking is an activity. Entry pertains to the activity of banking alone. Section 5(b) read with Section 6(1) of the BR Act, 1949, recognizes two kinds of activities that a bank may undertake: (1) the banking business, i.e., 'core banking business'; and (2) any other business as provided in Section 6(1).

Further, in *Mahaluxmi Bank Ltd. v. Registrar of Companies, West Bengal,*[142] in which the court considered the meaning of 'banking,' and held that the essence of banking was the relationship brought into existence, i.e., the core of banking.

Further in, *ICICI Bank Limited v. Official Liquidator of APS Star Industries Limited and Ors.*[143]*,* wherein it was emphasized that even if a company was doing different businesses in addition to clause (a) to (o) of Section 6(1), it would remain a banking company as long as it was performing the core banking functions under Section 5(b). The core banking function is the sine qua non for being regulated by the BR Act, 1949. Therefore, 'banking' in Entry 45 of List I is essentially meant to be confined to 'core banking business'. At the time when the Constitution of India was promulgated, a well-defined and well established meaning of the expression 'banking' prevailed in the form of the definition of 'banking' under Section 5(b) of the BR Act, 1949.The same expression was borrowed by the Framers of the Constitution of India, and same meaning was to be given to the expression 'banking' in the Entry as defined in the BR Act, 1949 as observed by

[140]*Neel Oil Industries v. Union of India,* AIR 2015 Gujarat 171.
[141]RustomCavasjee Cooper v. Union of India, (1970) 1 SCC 248.
[142]Mahaluxmi Bank Ltd. v. Registrar of Companies, West Bengal, AIR 1961 Calcutta 666.
[143] ICICI Bank Limited v. Official Liquidator of APS Star Industries Limited and Ors., (2010) 10 SCC 1.

this Court in The State of Madras v. Gannon Dunkerley& Co., (Madras)Ltd.[144] and *Diamond Sugar Mills Ltd. and Anr. v. State of Uttar PradeshandAnr.*[145]

The amendment incorporated is a colorable exercise. The notification dated 28.1.2003 is ultra vires in view of the decisions in *K.C. Gajapati Narayan Deo and Ors. v. State of Orissa*[146] and *State of Tamil Nadu and Ors. v. K. Shyam Sunder and Ors*.[147] Once entities are excluded by Entry 43, the Union of India cannot control it by an indirect method. The Multi State Cooperative Bank is a primary cooperative bank that is, in turn, a cooperative society. The Apex court in *Cooperative Bank of Urban Bank of Maharashtra & Goa Ltd. v. Maharashtra State Cooperative Bank Ltd. and Ors.,*[148] it was observed that cooperative societies are in the purview of the State List.

ISSUES

1. Whether 'co-operative banks', which are co-operative societies, also, are governed by Entry 45 of List I or by Entry 32 of List II of the Seventh Schedule of the Constitution of India, and to what extent?

2. Whether 'banking company' as defined in Section 5(c) of the BR Act, 1949 covers cooperative banks registered under the State Cooperative Laws and also multi State cooperative societies?

3. Whether cooperative banks both at the State level and multi-State level are 'banks' for applicability of the SARFAESI Act?

4. Whether provisions of Section 2(c) (iva) of the SARFAESI Act on account of inclusion of multi State cooperative banks and notification dated 28.1.2003 notifying cooperative banks in the State are ultra vires?

HOLDINGS

[144] Madras v. Gannon Dunkerley& Co., (Madras)Ltd, AIR 1958 SC 560.
[145]Diamond Sugar Mills Ltd. and Anr.v. State of Uttar PradeshandAnr., AIR 1961 SC 652.
[146]K.C. Gajapati Narayan Deo and Ors.v. State of Orissa, AIR 1953 SC 375.
[147]State of Tamil Nadu and Ors.v. K. Shyam Sunder and Ors., (2011) 8 SCC 737.
[148] Cooperative Bank of Urban Bank of Maharashtra & Goa Ltd. v. Maharashtra State Cooperative Bank Ltd. and Ors., (2003) 11 SCC 66.

In present case the Supreme Court opined following decision and provided guidelines to process with multi state cooperative banks-

Firstly, the cooperative banks registered under the State legislation and multistate level cooperative societies registered under the MSCS Act, 2002 concerning 'banking' are governed by the legislation relatable to Entry 45 of List I of the Seventh Schedule of the Constitution of India.

Secondly, the cooperative banks cannot carry on any activity without compliance of the provisions of the Banking Regulation Act, 1949 and any other legislation applicable to such banks relatable to 'Banking' in Entry 45 of List I and the RBI Act relatable to Entry 38 of List I of the Seventh Schedule of the Constitution of India.

Thirdly, the cooperative banks under the State legislation and multistate cooperative banks are 'banks' under section 2(1)(c) of SARFAESI Act, 2002. The recovery is an essential part of banking; as such, the recovery procedure prescribed under section 13 of the Act, legislation relatable to Entry 45 List I of the Seventh Schedule to the Constitution of India, is applicable.

Lastly, the Parliament has legislative competence under Entry 45 of List I of the Seventh Schedule of the Constitution of India to provide additional procedures for recovery under Section 13 of the SARFAESI Act, 2002 concerning cooperative banks. The provisions of Section 2(1)(c)(iva), of the Act, adding "ex abundanticautela", 'a multistate cooperative bank' and the notification dated 28.1.2003 issued with respect to the cooperative banks registered under the State legislation are not ultra vires.[149]

FINDINGS

The present case has deliberately solved all the issues pertaining to the power of Centre and State to legislate in the matters of cooperative banks, its procedure to be followed and clarified the intention of legislature to bring the amendment under the Act and its effect

[149] . PandurangGanpatiChaugule vs. VishwasraoPatilMurgudSahakari, Appeal No. Civil Appeal No. 5674 Of 2009, LIVE LAW, (Dated on 28th July 2021) (https://www.livelaw.in/pdf_upload/pdf_upload-374240.pdf).

on other related Statutes. A long-standing issue regarding the status of co-operative banks *vis-a-vis* other banks in relation to applicability of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESIAct) has finally been settled by the Supreme Court in present case. In this Supreme Court has adopted a very wide and deliberate view to understand the status of cooperative banks and its validity under the various acts. In the earlier decision in **Greater Bombay Case**, a three-judge bench of the Supreme Court had conclusively restricted co-operative banks from approaching the Debts Recovery Tribunal under the Recovery of Debts and Bankruptcy Act, 1993 (RDB Act) for recovery of their dues. However, in the present case Court adopted the view that co-operative banks fall under Entry 32 of List II (State List) of the Seventh Schedule (Entry 32 of List II) of the Constitution of India, 1950 (Constitution**)** and therefore the Parliament is not competent to legislate about co-operative banks under Entry 45 of List I (Union List) of Seventh Schedule (Entry 45 of List I**).** Based on this reasoning, the Court arrived at the conclusion that a co-operative bank cannot be considered as a 'banking company' under the Banking Regulation Act, 1949 (BR Act**)** and hence, the provisions of the RDB Act cannot be employed by such banks to recover their dues.

In the present case the court applied the pith and substance doctrine to observe the Entry 45 of List I, i.e., 'banking' which is considered under the preview of co-operative banks including recovery of loans. On such reasoning, the Supreme Court held that the Amendment and the Notification can at best be termed as an 'incidental encroachment' on Entry 32 of List II, which is permissible in law.

The constitutional bench overruled the Greater Bombay case decision in order to rectify all the flaws observed in the decisions and thereby creating problem of conflict of interest. The Court solved the similar question *whether the provisions of SARFAESI Act would apply to co-operative banks'* and upheld the inclusion of co-operative banks under the purview of SARFAESI Act.

CONCLUSION

The Supreme Court by upholding the applicability of the SARFAESI Act to co-operative banks, the Court has cleared a long-standing controversy which would resolve the ambiguity surrounding the same. More importantly, the Pandurang Judgment clears the hurdles which were created by earlier conflicting judgments on this subject, to pave the way for co-operative banks to expeditiously recover their dues from defaulting borrowers without the intervention of courts.

On the other hand, the Pandurang Judgment seems to allow 'incidental encroachment' on State legislations by Central legislations, which may result in courts taking a biased approach when faced with questions pertaining to an overlap between a Central Act and a State Act, which may be unfairly tilted in favor of Central legislations. Also, the decision has allowed co-operative bank to approach the Debt Recovery Tribunal under the RBD Act to recover the pending dues.

CASE NO: 21

SESH NATH SINGH VS BAIDYABATI SHEORAPHULI CO.

- Muskaan Jain[150]

INTRODUCTION

The case of ***Sesh Nath Singh vs Baidyabati Sheoraphuli Co***[151] is a leading case of limitation for filing an insolvency application under the IBC before the Adjudicating Authority (NCLT) and exclusion of time of procedure under Section 14 of the Limitation Act. Before the establishment of Section 238A of the IBC, there was no provision for limitation in the IBC 2016, but after that, in its second amendment, it stated that the Limitation Act will apply to proceedings or appeals before the adjudicating authority, NCLT, NCLAT, DRT, DART.

Following the implementation of Section 238 of the IBC 2016, it is evident that the law of limitation will now apply to proceedings under the IBC, but the Limitation Act makes no provision for how or which elements of the Limitation Act will apply to proceedings under the IBC.

STATEMENT OF FACTS

The Appellant (Corporate Debtor) was engaged in export business of textile and garments. On 8th February 2012, the Corporate Debtor requested Respondent (Financial

[150] BBA.LLB. 2nd Year Student, Alliance School of Law, Alliance University, Bangalore
[151] *Sesh Nath Singh &Anr. Vs. BaidyabatiSheoraphuli Co-Operative Bank Ltd. and Anr, Civil Appeal No. 9198 of 2019*

Creditor) for a cash credit facility of INR 1 Crore which was granted by the Financial Creditor by a letter of sanction on 15th February 2012. After the sanction, a cash credit account was opened in the name of the Corporate Debtor and a security interest was created in favour of the Financial Creditor vide a hypothecation agreement dated 17th February 2012.

In the month of May 2012, the Corporate Debtor defaulted in payment of the debt in respect of the cash credit facility and the cash credit account became irregular which later on declared as Non-Performing Asset (NPA) by the Financial Creditor on 31st March 2013. The Financial Creditor issued a notice to the Corporate Debtor under Section 13(2) of the SARFAESI Act 2002, demanding to clear all the dues of the Financial Creditor along with interest within sixty days from the date of receiving of the notice or else the Financial Creditor will take action under section 13(4) the SARFAESI Act 2002, against the Corporate Debtor.

Against the notice of the Financial Creditor, the Corporate Debtor sent a notice of representation dated 3rd March 2014 under section 13(3A) of the SARFAESI Act 2002, which was rejected by the Financial Creditor vide a letter dated 15th July 2014 and demanded the Corporate Debtor to clear all its dues within 15 days from the date of receiving of this letter. Then the Financial Creditor sent a notice dated 13.12.2014 under Section 14(4) of the SARFAESI Act 2002, to the Corporate Debtor for taking possession of the secured immovable property failing of which the Financial Creditor will take the assistance of the District Magistrate (DM).

The Corporate Debtor challenged the notices sent by the Financial Creditor under Section 13(2) & 13(4) of the SARFAESI Act 2002, before Calcutta High Court by filing a writ petition under Article 226 of the Indian Constitution on 19.12.2014, stating that during the pendency of the writ petition before High Court, the authorized officer of the Financial Creditor issued a notice on 24.12.2014 that it has taken possession of the secured asset of the Corporate Debtor. The DM Hooghly had also issued an order dated 11.05.2017 under SARFAESI Act 2002, for taking possession of the secured asset of the Corporate Debtor by the Financial Creditor.

That the High Court vide its order dated 24th July 2017 passed an interim restraining order against the Financial Creditor from taking any step against the Corporate Debtor. The High Court is of the opinion that being a Credit Cooperative Bank the Financial Creditor cannot proceed under the provisions of SARFAESI Act 2002. Thereafter the Financial Creditor filed an application under Section 7 of IBC 2016, on 10th July 2018 before the NCLT Kolkata Bench for initiation of Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor.[152]

ISSUES

1. Whether a delay beyond a period of 3 years can be condoned by filing a Section 5 application under Limitation Act?

2. Whether the exclusion of time under Section 14 of the Limitation Act will be applicable in the case of Section 7 application? If applicable, will it only come into force after the suit in the wrong jurisdiction ends[153]

FINDINGS

In response to the first issue, the court decided that there is no statutory requirement that a formal application be made for a delay condonation. According to the Court, the lack of an application does not preclude the court from allowing a delay if there are adequate reasons disclosed in the records on file. In response to the second issue, the Court stated that Section 14 of the Limitation Act of 1963 can be used in this case. As a result, the time spent by the financial creditor in connection with the previously launched SARFAESI process could be eliminated, allowing the IBC application to be filed on time.

In response to the extra issue posed in response to the second question, the Court

[152]*Sesh Nath Singh &Anr. Vs. BaidyabatiSheoraphuli Co-Operative Bank Ltd. and Anr, Civil Appeal No. 9198 of 2019*
[153]*Sesh Nath Singh &Anr. Vs. BaidyabatiSheoraphuli Co-Operative Bank Ltd. and Anr, Civil Appeal No. 9198 of 2019*

determined that it is not essential to wait for the improper forum's proceedings to be concluded before claiming the benefit under Section 14 of the Limitation Act of 1963.

The court correctly noted that Section 5 does not mention any application, but it does authorize the Court to acknowledge an application or to hear an appeal if the applicant convinces the Court that he had good reason for not completing the application and/or favouring the appeal within the time limit.

Section 5 of the Limitation Act states that an application in writing is not required before aid can be granted under the following section. It would have read that the Court may excuse the applicant's delay beyond the time period prescribed by limitation for filing an application or appeal if the Court is satisfied that the applicant had sufficient cause for not favouring the appeal or making the application within such time period after deliberation of the applicant's application for condonation of delay.

Alternatively, a provision may have been included to Section 5, which requires the applicant to submit a request for a delay condonation or excuse. The bench went on to say that a court can order and expect an application or an affidavit showing cause for the delay to be filed on a regular basis, and that no applicant can claim the condonation of delay under Section 5 of the Limitation Act as a matter of right without first filing an application.

Although Section 5 of the Limitation Act does not require an application, it is common practice to file one. It is entirely up to the discretion of the NCLT or NCLAT to allow a delay without an application under Section 5 of the Act.

In this case, the application under Section 7 of the IBC was clearly time barred. The account was declared NPA in 2013, however the Section 7 application was only filed in 2018. At the time it admitted the application under Section 7, IBC, the Adjudicating Authority appeared to have overlooked the question of limitation. The Adjudicating Authority's approach violated the requirement imposed by Section 3 of the Limitation Act of 1963. Even if no objection is presented, the Court is required by Section 3 to address the question of limitation. Even if no objection was lodged on the issue, the

Adjudicating Authority was required to hold that a subject was time barred. When the issue of limitation was finally addressed in court, the NCLAT refused to hear the case since the appropriate objection had not been brought before the Adjudicating Authority.

The Court has not addressed this aspect of Section 3 of the Limitation Act in the current case. Rather, it has decided that, even if the IBC application was time-barred, the delay could be excused in the absence of a condonation application. This is contrary to the intent of Sections 3 and 5 of the Limitation Act of 1963. The court shall only dismiss the lawsuit if the matter is time barred. Without even a formal prayer, there is no equivalent mandate in Section 5 to excuse the delay. In reality, if the application for condonation is properly lodged, such an interpretation deprives the corporate debtor of the opportunity to appropriately dispute the creditor's argument. Because there is no application for condonation, determining sufficient reason for condonation is a roving examination.

The law of limitation will apply to NCLT, NCLAT, DRT, and DART after the implementation of Section 238A of the IBC. Because the Limitation Act does not specify a time restriction for IBC, Article 137 of the Limitation Act will apply. The time limit for filing an application under IBC Sections 7 and 9 is three years. According to Article 137, if the limitation term is not specified in the Act, the time will be three years.

Section 14 of the Limitation Act should be read as a whole, and a complete reading of Sub-sections 1, 2, and 3 of Section 14 gives a clear overview that a party who proceeded a civil proceeding in good faith but was unable to proceed it further due to jurisdictional error or any other similar cause will benefit under Section 14 of the Act. Section 14 of the Act does not say that it will take effect only when the previous action is completed.

Section 14 refers to a diligent pursuit of a civil action against the same defendant for the same relief in a court of first instance, or an appeal or revision. It envisions the exclusion of time when a court is unable to hear a case due to a lack of jurisdiction or other similar reason.

The Court has ruled that the District Magistrate, operating under Section 14 of the SARFAESI Act, acts as a Civil Court/Executing Court, and those proceedings under the

SARFAESI Act are thus deemed to be civil proceedings before a Court. As a result, the appellant's contention those proceedings under the SARFAESI Act would not be eligible for exclusion under Section 14 of the Limitation Act because they were not held in a Civil Court could not be maintained.

PRECEDENT

In the case of ***Asset Reconstruction Company (India) Limited vs Bishal Jaiswal &Anr***[154], the Supreme Court considered the applicability of Section 18 and held that "Section 18 of the Limitation Act, which extends the period of limitation depending upon an acknowledgement of debt made in writing and signed by the Corporate Debtor, applies to proceedings under the IBC".

In the case of ***Sanghvi Movers Ltd. vs Tech Sharp Engineers Pvt. Ltd.***[155]**,** the NCLAT, while relying upon Section 137 of the Limitation Act, 1963 concluded that the Appellant had approached an appropriate forum for relief in time and hence the application was not barred by limitation.

The Supreme Court with reference to ***B.K. Educational Services Private Limited vs Parag GuptaAssociates and Ors***[156] held that a proceeding beyond the period of limitation can be entertained by the NCLT/NCLAT if the proper cause of delay can be shown by the party and it is totally upon the discretion of the NCLT/NCLAT to entertain such.

With reference to ***Babulal Vardharji Gurjar vs Veer GurjarAluminium In- dustries Pvt. Ltd. and another***[157], the Supreme Court held that the limitation period under Article 137 can be extended under the provision of Section 5 of Limitation Act.

HOLDING

The Hon'ble Supreme Court held that there is no bar or barrier to exercise by the Court or Tribunal of its judgment to condone delay under Section 5 of the Limitation Act, where

[154] *Asset Reconstruction Company (India) Limited v. Bishal Jaiswal &Anr Civil Appeal No.323 of 2021*
[155] *Sanghvi Movers Ltd. v. Tech Sharp Engineers Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 118 of 2019, NCLAT, Date: 23.07.2019*
[156] *B.K Educational Services Pvt Ltd vs Parag Gupta And Associates, CIVIL APPEAL NO.23988 OF 2017*
[157] *Babulal VardharjiGurjar v. Veer Gurjar Aluminium In- dustriesPvt. Ltd. and another (2020) 15 SCC 1*

formal application is not present. The Court can always order and expect that an application or an affidavit showing cause for the delay be filed, the bench comprising Justices Indira Banerjee and Hemant Gupta observed. It affirmed the impugned judgement dated 22.11.2019 of the NCLAT in the case as correct and overruled the NCLAT's larger bench judgement dated 12.03.2020 in Ishrat Ali case as incorrect.

The Supreme Court held that since the proceeding before the High Court is pending on the date of filing of Section 7 application the entire period of proceedings under SARFAESI Act 2002, could be excluded and after the exclusion, the application is well within time. Even after the exclusion of time from the date of issue of notice under Section 13(2) of the SARFAESI Act 2002, till the stay of proceeding by the High Court, the application under Section 7 will still be well within time.[158]

CONCLUSION

The Supreme Court's present judgment affirms Sesh Nath's decision over Ishrat Ali. Considering Article 141 of the Constitution, the current judgment has broader implications, not just for IBC cases, but for all civil cases that are subject to the application or interpretation of the Limitation Act or SARFAESI.

After the implementation of Section 238A of the IBC, the law of limitation will apply in proceedings before the NCLT, NCLAT, DRT, and DRAT. The time period for filing section 7 and 9 applications under the IBC is three years. Condonation of delay can be granted without filing a Section 5 application because it is entirely up to the Adjudicating Authority's discretion whether or not to grant it.

It was also mentioned that when exercising their authority under the SARFAESI Act, Magistrate Courts shall be treated as civil courts. Because the SARFAESI Act's proceedings are civil in nature, therefore they will benefit from the exclusion of time provided by Section 14 of the Limitation Act, if applicable.

[158] *Sesh Nath Singh &Anr. Vs. BaidyabatiSheoraphuli Co-Operative Bank Ltd. and Anr, Civil Appeal No. 9198 of 2019*

CASE NO: 22

COMMITTEE OF CREDITORS OF ESSAR STEEL INDIA LIMITED THROUGH AUTHORISED SIGNATORY V. SATISH KUMAR GUPTA & ORS, CIVIL APPEAL NO. 8766-67 OF 2019

Sri Varshini[159]

Tehleel Tahir Raina[160]

INTRODUCTION

The judgment of the Essar steel has paved a way in the Insolvency and Bankruptcy Code (IBC). The ultimate goal of the IBC is to resolve insolvent debtor's stressed assets in a timely way. The Hon'ble Supreme Court's decision in the case marks a significant milestone for the IBC's key principles. This landmark case is arguably regarded as a milestone for India's evolving insolvency jurisprudence.

FACTS

Essar Steel private limited is a flat carbon steel manufacturing company in India. In July 2017, a petition was initiated for insolvency by the National Company law Tribunal (NCLT)[161]; Ahmadabad after the Reserve bank of India identified 12 insolvent accounts

[159] BBA.LLB. 4th Year Student, Alliance School of Law, Alliance University, Bangalore.
[160] BBA.LLB. 2nd Year Student, Alliance School of Law, Alliance University, Bangalore.
[161] Section 408 of the Companies Act, 2013 states that an NCLT or Tribunal is a quasi-judicial authority that is created to handle corporate civil disputes.

which were responsible for 25% of Non-Performing Assets (NPA) on the company's balance sheet. Later the company resolved 8 insolvency disputes. In October 2017, Mr. Satish Kumar Gupta was appointed as the Resolution Professional (RP). Essar steel owed Rs. 54,500 crore to its creditors. The RP opened public bid for Essar steel. In March 2019, the global steel giant Arcelor Mittal and NumetalLimitedapplied for the resolution applicants in the corporate insolvency resolution process of Essar steel. After duly analyzing their plans, Mittal's and Numetal'splans were disqualified and declared ineligible under the section 29A of the IBC 2016[162]. Mittal's plans were disqualified because he was found to be the promoter of Uttam and KSS Petron. Numetal'splan was disqualified because one of the shareholders fathers (Ruias) was a promoter of the Essar Steel. Both the applicants move to the NCLT challenging the rejection. The NCLT orders the RP to give sufficient time to cure the applicant's disabilities in the resolution plan in accordance to Section 29A of the IBC. Mittal and Numetal move to the National Company Law appellate tribunal (NCLAT)[163] against the disqualification of first round of the bid. The NCLAT gives three days' time to both the applicants to cure their disabilities. NCLAT hold Numetal to cut ties with Ruias and Mittal to clear dues of Rs. 7000 crores of Uttam and KSS Petron. Both applicants challenge the decision of the NCLAT. The Hon'ble Supreme court gives 2 weeks to clear disabilities and allows bidding for Essar steels; the Committee of Creditors (CoC)[164] to decide on basis of resolution plans within 8 weeks.

In October 2018, the CoC approved Arcelor Mittal's resolution plan and they were held eligible to acquired Essar steel. The CoC approved the resolution plan offered by Arcelor Mittal; the plan offered an advanced cash payment of Rs. 42,000 crores to the financial creditors[165] of Essar steel. The operational creditors[166] claimed they must get similar treatment as compared to the financial creditors on the principle of equity and fairness.

[162] This Section states the persons who are not eligible to be a resolution applicant.
[163] Section 408 of the Companies Act, 2013 states that an NCLAT or "Appellate Tribunal" is an authority provided for dealing with appeals arising out of the decisions of the Tribunal.
[164]Section 21(2) of the Insolvency and Bankruptcy Code in 2016 states that Committee of creditors shall comprise *all financial creditors of the corporate debtor.*
[165] Section 5(7) of the Insolvency and Bankruptcy Code states, "*financial creditor*" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.
[166] Section 5(20) of the Insolvency and Bankruptcy Code defines "*operational creditor*" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred

The NCLT suggested the CoC to offer 85% of the advanced cash payment to the financial creditors and the remaining 15% to the operational creditors. This decision of the NCLT was challenged before the National Company Law appellate tribunal (NCLAT).

In July 2019, the NCLAT approved Arcelor Mittal's resolution plan but held that the payment of dues must be equally distributed between the financial creditors and the operational creditors. The NCLAT suggested that financial creditors and operational creditors with a claim below Rs. 1 crore can recover 100% of their dues and creditors with more than Rs. 1 crore are allowed to recover 60.7% of dues. The CoC appealed against the direction of the NCLAT in the Supreme Court stating that the CoC cannot be directed on how to distribute the financial package offered by Arcelor Mittal's resolution plan.

PROCEDURAL HISTORY

K. Sashidhar v. Indian Overseas Bank,[167] the hon'ble Supreme Court made it clear that the Committee of Creditors has nothing to do with the distribution of amount infused by the Resolution Applicant. It also added that the CoC is to determine the resolution applicant. The bench amplified this rule in the Essar steel case, the CoC is the ultimate decision maker with regards to the Resolution applicant. The CoC should also comply by the rules of the IBC.

Swiss Ribbons Pvt Ltd and Ors v Union of India and Ors,[168]the hon'ble Supreme Court relied on Article 14 of the Constitution of India, highlighting the equality issue. The court stated that all Creditors cannot be treated equally. The bench in Essar steel case relied on this case, highlighting the fact that all creditors are treated on the value of security. So, unequal treatment of creditors is permissible.

Innovation Industries Ltd v. ICICI Bank[169]&*Macquarie Bank Ltd v. Shilpi Cable*

[167]*K. Sashidhar v. Indian Overseas Bank*, *(2019) SC 257*
[168]*Swiss Ribbons Pvt Ltd and Ors v Union of India and Ors (2019) AIR SC 739*
[169]*Innovation Industries Ltd v. ICICI Bank (2018) 1 SCC 407*

Technologies Ltd [170]; the hon'ble court pointed out the purpose of appointing an interim resolution professional in matters of resolution plans. Also states that the RP should pass the resolution plan after the approval of the CoC. In Essar Steel case, while reiterating the court stated that although the RP does not have the authority to decide the violation of the resolution plan, it gives them the authority to approve the Resolution plan submitted by the Resolution applicant.

ISSUES

1.Whether the ineligibility of a resolution applicant under section 29A of the IBC attaches the date of commencement of the CRIP when the RP is submitted by the resolution applicant?

2.Whether the resolution applicant can challenge the rejection of the resolution plan by the Resolution Professional?

3.Whether the NCLAT was right in holding that Mittal was ineligible to submit the Resolution plan in accordance with Section 29A of the Code?

HOLDING

The Hon'ble Supreme Court held that the stage of ineligibility attaches when the resolution plan is submitted by the resolution applicant. As a result, it must be considered at the time of submission of the resolution plan, not at the time of application. The Supreme Court pointed out that Section 29A of the Code states that "a person shall not be eligible to submit a resolution plan." Hence, the stage of ineligibility begins when a resolution applicant submits a resolution plan, not when the CIRP begins. It was also clarified later in 2018 by an amendment. The SC stated that the principle of equity cannot be extended to treating non-equals equally as it weakens the very objective of the IBC. The Principle of equity is different with each creditor depending on the class, secured or unsecured, financial or operational and a resolution plan can therefore provide for differential payment to different classes as long as the provisions of the IBC.By

[170]*Macquarie Bank Ltd v. Shilpi Cable Technologies Ltd (2018) 2 SCC 674*

overturning the NCLAT judgment, the Supreme Court reaffirmed what had already been upheld in its Swiss Ribbons judgment,[171] albeit in different words, that only similarly situated creditors will be treated in the same way.

It was held that the RP, does not have the authority to reject the resolution plan, and that he must offer all the plans to the CoC for review. The Supreme Court held that the CoC cannot be directed on how to distribute the financial package.[172] In response to a challenge to the RP's rejection of the concerned resolution applicant's plan, the Supreme Court held that Section 30 (2) (e) of the Code does not give the RP the authority to "decide" whether the resolution plan violates the law. The RP must analyze the resolution plan given by various applicants to ensure that it is complete in all respects before submitting it to the CoC. The RP's role is to ensure that the resolution plans are complete before they are presented to the CoC, which may or may not accept them. Although it is not required for the RP to provide reasons when submitting a resolution plan to the CoC, it would be in the best interests of the situation if he attached his due diligence report for each of the resolution plans under consideration.

In terms of eligibility of Mittal, the SC ruled that Mittal had not paid their respective NPAs prior to submitting their resolution plans, hit by Section 29A, therefore were ineligible to submit their plans. The Supreme Court stated that any person who has an account, or is a promoter of, or in the management or control of, a corporate debtor who has an account, is ineligible to submit a resolution plan under Section 29A(c) of the Code. After evaluating the reasonable proximity of the circumstances, the Supreme Court concluded that there was no doubt that Mittal’s shares in Uttam Galva were sold solely to avoid the ineligibility described in Section 29A(c) of the Code. Therefore, the Supreme Court held that the financial creditors could enjoy supremacy over the operational creditors and finally Mittal can acquire Essar steel.

OTHER CONSIDERATIONS

[171] *Swiss Ribbons Pvt Ltd and Ors v Union of India (UOI) and Ors AIR SC 739of 2019*

[172] In *K. Sashidhar v. Indian Overseas Bank*, *(2019) SC 257*, the court made it clear that the CoC has nothing to do with the distribution of amount infused by the Resolution Applicant.

The apex court observed that the tribunals must come into picture only when the issue is settled by an RP and CoC. Also added that the tribunals should finalize only after the resolution process is completed and they should not jump in when the preceding is going on before the RP and CoC. The tribunals must not interrupt at every stage of the CRIP. The apex court brings into consideration the 'Clear Slate Theory' if a resolution plan is approved then no CoC can initiate a procedure to recover claims that are not part of the resolution plan.

CASE ANALYSIS

This decision is significant and will set a good precedent by stating that considerable care must be taken to ensure that those in charge of the corporate debtor for whom a resolution plan is prepared do not return in some other form to reclaim control of the company without first paying off their debts. The Supreme Court also goes into detail about the Code's applicable provisions in relation to the CIRP and the 180 + 90-day deadline. The Supreme Court, although strictly interpreting the Code's requirements, also directed the tribunals to conduct the proceedings in a timely way, saying that the time consumed by a tribunal should not be used to set aside the time restrictions within which the CIRP must take place. The Supreme Court also lambasted the RPs' autonomous power, ruling that they lack the authority to make any decision regarding the resolution plan and hence cannot reject or accept one without first presenting it to the CoC for review. Before the plans are presented to the CoC, the RP can only ensure that they are complete in every way.

The Supreme Court has tried to create the principle of equality between the creditors that are falling within the same class and contravening IBC as it lays down a totally different categories of how credit hours should be treated. In other words, the RP can only provide the CoC a prima facie opinion on any legal violation, including Section 29A of the Code. The judgment gives equal importance to the claims of the operational creditors and comparison to the claims of the financial creditors. The judgment has also provided utmost balance between the provisions of the IBC and the process of liquidation of an insolvent company. This judgment will provide significant amplification to revive other

corporate entities which are stressed. This judgment will set a landmark precedent for other insolvency and bankruptcy cases.

CONCLUSION

The Supreme Court judgment could not have come at a more opportune time. After the consolidation of multiple insolvency laws, the establishment of the IBC has made conducting business in India much easier. It encourages entrepreneurship while also attempting to balance the interests of diverse stakeholders. By transferring the control of Essar steels to Mittal, the Supreme Court has taken a big step in the working of the IBC. The judgment sets a precedent for other companies going through an insolvency procedure.

CASE NO: 23

MAHARASHTRA SEAMLESS LIMITED VS. PADMANABHAN VENKATESH & ORS, CIVIL APPEAL NOS. 4967-4968 OF 2019

Sri Varshini[173]

INTRODUCTION

The judgment of this case paved a way on the principle of commercial wisdom of

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creditors. It sets as a precedent for other liquidation value cases. The hon'ble Supreme Court justifies whether the value of a Resolution plan submitted by a Resolution Applicant be lower than the liquidation value. The judgment further states the aim and objectives of the Insolvency and Bankruptcy Code. This landmark case is regarded as a milestone for the principle of commercial wisdom.

FACTS

United Seamless Tubulaar Private Limited (USTPL) is a private company incorporated located in Telangana. In June 2017, the Indian Bank filed an application under Section 7 of the Insolvency and Bankruptcy Code (IBC) against United Seamless Tubular Private Limited (USTPL) in National Company Law Tribunal (NCLT),[174] Hyderabad. The Indian Bank is the financial creditor of corporate debtor[175] USTPL. The total debt of USTPL was Rs. 1897 crores of which Rs. 1652 were comprised of loans from DB International Limited and Deutsche Bank, Singapore branch. The remaining Rs. 245 crores were a debt on working capital which was borrowed from the Indian Bank. The Indian Bank initiated a Corporate Insolvency Resolution Process (CIRP) that was carried out by an Interim Resolution Professional (IRP) and Resolution Professional (RP)[176]. The RP's appointed registered valuers to evaluate the debt of the USTPL. The debt was valued at Rs. 618 crores and Rs. 513 crores. Due to large difference in valuation, a third valuer was appointed, and he valued the debt to be Rs. 352 crores. The final liquidation value of USTPL was Rs. 439 crores.

The RP received many Resolutions Plan,[177] Maharashtra seamless limited (MSL) a Resolution Applicant[178] also submitted a bid of Rs. 477 crore which was approved by the

[174]Section 408 of the Companies Act, 2013 states that an NCLT or Tribunal is a quasi-judicial authority that is created to handle corporate civil disputes

[175]Section 3(8) of the Insolvency and Bankruptcy Code states, corporate debtor means a corporate person who owes a debt to any person.

[176] Section 5(26) of the Insolvency and Bankruptcy Code states resolution professional, for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional.

[177] Section 5(26) of the Insolvency and Bankruptcy Code states resolution plan means a plan proposed by any person for insolvency resolution of the corporate debtor as a going concern in accordance with Part II;

[178] Section 5(25) of the Insolvency and Bankruptcy Code states resolution applicant means any person who submits a resolution plan to the resolution professional.

Committee of Creditors (CoC)[179] with 87.10% votes. The RP filed an application under section 30(6) and 31 of IBC, 2016 along with regulation 39 (4) of IBBI (Insolvency Resolution for Corporate Persons) and Rule 11 of NCLT Rules, 2016 for the approval of the Resolution plan of the MSL. The suspended board of directors of the company asserted the approval of resolution plan which contravened the IBC. Also, the company failed to re-determine the liquidation value of the corporate debtor. The other resolution applications were not given opportunity to submit their resolution plans after their revision. The RP also informed the tribunal about the order of the adjudicating authority[180] to re determine the liquidation value was complied, which was now at Rs. 597 crores as compared to previous amount of Rs. 439 crores. The RP contended that the adjudicating authority cannot sit in appeal over the commercial wisdom of the COC members in approving resolution plan. The National Company Law Appellant Tribunal (NCLAT)[181] held that since the amount provided in the resolution plan was lower than the average of the liquidation value arrived at by the valuers, therefore, the resolution plan approved by the Adjudicating Authority is against Section 30 (2) (b) of the IBC. The MSL filed an appeal before the Hon'ble Supreme Court seeking refund of the sum deposited in terms of the MSL Resolution Plan along with interest

PROCEDURAL HISTORY

Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta[182], The Supreme Court laid down the principles of commercial wisdoms committee of creditors and imposed some basic objectives of the IBC on the CoC. This case recognised the

[179]Section 21(2) of the Insolvency and Bankruptcy Code in 2016 states that Committee of creditors shall comprise *all financial creditors of the corporate debtor*

[180] Section 5(1) of the Insolvency and Bankruptcy Code states that Adjudicating Authority, for the purposes of this Part, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013.

[181]Section 408 of the Companies Act, 2013 states that an NCLAT or "Appellate Tribunal" is an authority provided for dealing with appeals arising out of the decisions of the Tribunal.

[182]*Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta*, in Civil Appeal Nos. 8766-8767 of 2019

principle of commercial wisdom. In the MSL case the court expanded the ambit of the principle of commercial wisdom by checking the numbers and balances of the CoC inherent under the IBC.

Swiss Ribbons Pvt Ltd &anr vs. Union of India &Ors[183], The Supreme Court observed that the IBC was enacted with an objective to ensure that the corporate debtor keeps on going concern by maximizing their assets and balancing interests of the stakeholders. The court in MSL case held that the corporate debtor needs to maintain and Going Concern during the insolvency resolution process that will ensure you to maximize the value of acids and the interest of operational creditors.

Arcelor Mittal India Private Limited vs. Satish Kumar Gupta[184], This case limits the judicial review vested on the adjudicating authority with respect to the resolution plan that was approved by the committee of creditors. In MSL case the court held that the resolution plan may not necessarily be equal or greater than the value of the liquidation value mentioned in the resolution plan.

ISSUES

1. Whether the scheme of the Code contemplates that the sum forming part of the resolution plan should match the liquidation value or not?
2. Whether Section 12-A is the applicable route through which a successful Resolution Applicant can retreat?

HOLDING

[183] *Swiss Ribbons Pvt Ltd &anr vs. Union of India &Ors* in Civil Writ Petition No. 99 of 2018
[184] *Arcelor Mittal India Private Limited vs. Satish Kumar Gupta* in civil appeal No 9402 – 9405 of 2018

The Supreme Court held that the resolution professionals cannot interfere with the decision of the committee of creditors. The committee of creditors should take due care the fact that the corporate debtor needs to keep on going concern, financial creditors[185] would have the opportunity to lend money and the operational creditors[186] will have to continue the business by job opportunities given to the workmen and employees to maximize the value of assets during the insolvency resolution process. All of this should be taken into consideration with the interest of the stakeholders. If the RP find any parameters that have not been taken care then the resolution plan must be sent back to the committee of creditors. The court also stated that the operational creditors should also be paid at par with the other creditors. The resolution applicant should clear the dues of both financial creditors and operational creditors.[187]

The apex court held that no provisions of the IBC, states that the bid bought by the resolution applicant has to match the liquidation value. Further added that the objectives behind such valuation process is to make sure the committee of creditors take proper decision on a resolution plan. After the approval of the resolution plan by the committee of creditors the adjudicating authority under section 31 of the IBC must make sure the resolution plan meets the requirements under section 30(2) and 30(4) of the IBC. The Supreme Court held that it did not find any breach of the provisions in the approval of the resolution plan by the adjudicating authority.

The Supreme Court held that section 12A of the IBC is not applicable to a resolution applicant. The procedure only applies to do the resolution applicants that invoke section 7, 9 and 10 of the IBC. The court ordered that MSL pay their dues to the operational creditors and the financial creditors. Also ordered the RP to take the position of the physical possessions of the corporate debtors and hand it over to Maharashtra seamless limited MSL within four weeks. The court after taking into consideration the judgment of the Essar Steel case and Swiss ribbon case held that the commercial wisdom of CoC cannot be questioned in the approval of the resolution plan and it upheld the order of the

[185]Section 5(7) of the Insolvency and Bankruptcy Code states, financial creditor means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.
[186]Section 5(20) of the Insolvency and Bankruptcy Code defines operational creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred to.
[187]*Ibid 9*

Adjudicating authority.

OTHER CONSIDERATIONS

The IBC does not have any provision which states that the bid of a resolution applicant has to be equal to or greater than the liquidation value of the corporate debtor. The approved of the final resolution plan is decided by the committee of creditors. If the asset value is below its liquidation value, then the court must rely on the commercial wisdom of committee of creditors. The main objective of the IBC is to maximize the value of assert and balance the interest of stakeholders.

CASE ANALYSIS

The apex court in its judgment stated that the Committee of Creditors can accept a resolution plan that is lower than the liquidation value. Also, it claimed that the operational creditors shall be considered in an insolvency process. The court emphasized on the preamble of the IBC which started that the act needed help in maximizing the value of assets of the corporate debtor. It also attached aims in balancing the interests of all stakeholders**.** The court also applied the principle of commercial wisdom committee of creditors. Further, the court analyzed the section 30 and 31 of the IBC. The fair value for the liquidation value is not disclosed to the resolution applicant therefore the resolution applicant must submit his resolution plan according to the market reality. The court also pointed out that the adjudicating authority should not act beyond its scope and objectives. The adjudicating authority's intervention is limited up to n certain extent. The adjudicating authority must make sure the resolution plan fulfills the objectives of the IBC before approving a resolution plan. Therefore, the commercial wisdom of committee of creditors was boundlessly expanded and explained in this case. Prima facie it might seem that accepting a resolution plan which is below the liquidation value is against the objectives of the IBC but there is a need to further elaborate or widen the scope of the IBC which would take all factors and stakeholders in the resolution process into account so as to ensure fair justice to all the parties involved. At the same time, it is very important to ensure that in widening the scope of power certain entities such as resolution professional and committee of creditors don't resort to a misuse of power.

CONCLUSION

The Supreme Court judgment resolves the issue on whether the resolution plan can be lower than the liquidation value. The assertion of liquidation value and the resolution value is not be determined by the adjudicating authorities or any other parties, it should be determined by the Committee of Creditors. The judgment states the importance of commercial wisdom of committee of creditors while deciding the viability of any resolution plan. This judgment sets a pavement on the principle of commercial wisdom of committee of creditors.

CASE NO: 24

B. K. EDUCATIONAL SERVICES PVT LTD V. PARAG GUPTA & ASSOCIATES CIVIL APPEAL NO. 23988 OF 2017

- Sri Varshini[188]

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INTRODUCTION

The judgment of the case brings clarity on the provisions of the limitation act which are applicable for the initiation of corporate insolvency resolution process. The court upheld the validity of the limitation act regarding the initiation of Insolvency process before the section 238A was amended. This landmark case is regarded as a milestone for the Insolvency and Bankruptcy Code.

FACTS

BK Educational Services Private Ltd is the corporate debtor. Parag Gupta & Associates, Chartered Accountants is the financial creditor. A dispute on liability arose between both the parties. The corporate debtor denied the financial liability and stated that all the financial claims were untrue to accept the immovable property allocated by Greater Noida industrial development authority. The corporate debtor alleged that the financial creditor's family and relatives manipulated and tempered all the records. All the amount claimed were time-barred debts. The record did not show anything that would extend the limitation to recover the amount.

The corporate debtor applied for a proceeding at the National Company Law Tribunal (NCLT).[189] The NCLT held that the respondent's application for the initiation of the Insolvency proceedings under Section 7 of the Insolvency and Bankruptcy Code (IBC) was rejected because it was time barred by Limitation. So, the financial creditor filed an appeal before The National Company Law Appellate Tribunal (NCLAT)[190] against the order of the NCLT. The NCLAT held that the limitation act will not play a role in the applicability to initiate the Corporate Insolvency Resolution Process (CIRP). Meanwhile, on 6 June 2018, through an

[189]Section 408 of the Companies Act, 2013 states that an NCLT or Tribunal is a quasi-judicial authority that is created to handle corporate civil disputes.
[190]Section 408 of the Companies Act, 2013 states that an NCLAT or "Appellate Tribunal" is an authority provided for dealing with appeals arising out of the decisions of the Tribunal.

amendment Section 238A[191] was inserted in the IBC, Thus, the present appeal was filed seeking clarification on whether the provisions of the Limitation Act would be applicable to the application filed under the IBC. Thus, this decision of the NCLAT was challenged by the corporate debtor before the hon'ble Supreme Court.

PROCEDURAL HISTORY

State of Kerala v. V.R. Kalliyanikutty,[192]In this case the court held that the IBC cannot extend the time period for the recovery of a time- barred debt. In the present case, the amendment of Section 238A of the IBC seeks applications to allow time- barred claims because the main objective of the Section 238A is retrospective in nature.

Mis. Deem Roll Tech Limited v. Mis. R.L. Steel & Energy Limited,[193] In this case the court held that the provisions of the Limitation Act would apply to proceedings under the Code. The hon'blesupreme court applied this judgment and held that the limitation act will be applicable in the IBC.

Bhimsen Gupta v. Bishwanath Prasad Gupta,[194]The Hon'ble supreme court cited this case and differentiated the expression "due and payable" and "due and recoverable". The court referred the expression "debt due" of the IBC which refers to the debts that are due and unpaid.

ISSUE

1. Whether Section 238A of the Code will apply to applications filed under Section 7 or Section 9 of the IBC from the inception of the IBC and prior to 6 June 2018?

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[191] *"238A. The provision of the Limitation Act, 1963 shall, as far as may be, apply to the proceedings or appeal before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be."*

[192] *State of Kerala v. V.R. Kalliyanikutty, (1999) 3 SCC 657*

[193] *Mis. Deem Roll Tech Limited v. Mis. R.L. Steel & Energy Limited, C.P. No. (lB)108(PB)/ 2017,*

[194] *Bhimsen Gupta v. Bishwanath Prasad Gupta, (2004) 4 SCC 95*

HOLDING

The Hon'ble Supreme Court held that the Provisions of the Limitation Act is applicable for the initiation of the Corporate Insolvency Resolution Preceding (CIRP). The court held that section 238A of the IBC is a clarification and is procedural in nature. The court further layed out the reasons for the introduction of section 238A of the IBC. It added that the IBC could not have given a new lease to time barred debts and a new opportunity for the creditors to get remedy within the limitation period. The court also held that section 238A will not serve unless its objects are constructed in a retrospective way. Any application seeking to resurrect any time barred claims will be allowed and it will not be governed by any law of limitation.

The Hon'ble Supreme Court observed that the companies act 2013 to determine the application of the limitation act as both the legislations have various case laws on a similar point. The period of limitation is procedural and is applied in a retrospective way even if the period of limitation is shorter then provided in the amendment. Such right to action has now become time barred under the new amended provision however it's settled the limitation bars of remedies and not the right. The Limitation act is applicable to the applications filed under section 7 and section 9 IBC. The expression 'Right to sue' does not agree with article 137 of the Limitation act because the expression is not mentioned anywhere in the article. The article is residual in nature, providing for a limited period of three years. The article is for applications which can be filed within three years, therefore when a default occurs, the application it would be barred by article 137, except in cases where a delay can be regarded under Section 5 of the Limitation Act. The court further held that NCLT is established under the companies act is the adjudicating authority under the IBC. Section 433 of the companies act allows the limitation act applicable to NCLT hence the limitation act will be able to conduct the proceeding. The court observed section 433 of companies act and section 238A of IBC and held that both the provisions make limitation act applicable with certain limitation periods and they could be overridden by the Act.

OTHER CONSIDERATIONS

The hon'ble apex court has taken note of all the provisions of the insolvency and bankruptcy code at various stages of the proceeding. The court observed the amended section 238A of the IBC and applied it retrospectively in the amended law. The court referred the expression "debt due" of the IBC which refers to the debts that are due and unpaid. The expression when read with section 3 (11) and 3(12) of the IBC, they become default and the debt is not barred by law of limitation.

CASE ANALYSIS

The law of limitation has been applied retrospectively in the amended law and the introduction of section 238A will not revive any remedy. The Hon'ble Supreme Court determined the applicability after limitation act with the companies act as both the legislations have similar case laws at various stages. The main aim of this legislation was to apply the limitation to the NCLAT and NCLT while deciding the applications filed under section 7 and section 9 of the IBC and their appeals. The court has laid down the time frame in which claims could be bought by the creditors. The judgment has restricted the number of claims made under the IBC. It has also restricted the ability to approach the civil courts in the law of limitation. The amendment of section 238A does not serve its objects unless it's construed retrospectively. Otherwise, applications seeking to resurrect time-barred claims will be allowed and will not be governed by the law of limitation. The judgment lays down the period of limitation of IBC with reference to the limitation act. The court also held the provisions of the limitation act in the applicability for the initiation of corporate insolvency resolution preceding.

CONCLUSION

The hon'ble Supreme Court has made it clear that the applications filed under section 7 and section 9 of the IBC will be applicable under the act as it attracts article 137 of the limitation act. The court has laid down the time frame in which claims could be bought by the creditors. This judgment has eased the burden of the NCLT and NCLAT in the time- barred claims. The judgment sets a precedent for other cases going through an insolvency process.

CASE NO: 25

VIJAY V IYER V. BHARTI AIRTEL LTD

Rachit Manuja[195]

Atul Balasubramaniyam[196]

RELEVANT FACTS:

In April 2016, the ‘Aircel Entities' (Corporate Debtor/Seller) entered into "Spectrum Trading Agreements" (STAs) with 'Airtel Entities' (Operational Creditor/Buyer) to transfer the right to use the spectrum by Aircel Entities in favour of Airtel Entities. The approval of Department of telecommunications (DoT)was required for implementing the STAs.

The DoT (Department of Telecommunications) demanded bank guarantees in relation to certain license dues and spectrum usage charges from Aircel Entities (Corporate Debtor/ Seller) as a condition for granting the requisite approval. The TDSAT passed an interim order dated 03.06.2016 affirming the DoT's condition.

Airtel Entities (Buyer) to submit bank guarantees of approx. 453.73 Crores to the DoT on behalf of the Aircel Entities (Seller) Under the said Lou, Airtel was required to pay the retained amount of approximately 453 crores only on fulfillment of the certain conditions.

That due compliance of the terms and conditions of Lou was made accordingly by the Airtel Entities (Buyer) and had procured Three Bank Guarantees for a total amount of 453.73 Crores from Axis Bank and tendered to DoT. The Aircel Entities owed a total of. INR 139.34 Crores to the Airtel Entities. The Aircel has been treated as 'Operational Creditor' in respect of Operational Debt of 139.3 Crores.

The Aircel Entities (Seller) is to pay a sum of 139.34 Crores to Airtel (Buyer) in respect of Unpaid-Invoices. The total amount owed by the Aircel entities was approximately INR 145.20 Crores.

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On one hand, Aircel had gone under Insolvency, simultaneously there was a fall out of the Spectrum Trading Arrangement (STA) TDSAT directed the DoT to return the bank guarantees within four weeks. The DoT did not return the Bank guarantees (BGs). It was ordered by TDSAT that in the event of failure on the part of the DoT to return the BGs, the BGs would stand cancelled, and the parties would not be able to use the BGs for any purpose whatsoever.

Airtel Entities (Buyer/ Operational Creditor) communicated their willingness to pay the BG amounts immediately upon the return of the BGs by the DoT and the release of their credit lines by Axis Bank, subject to their right to claim set off of the net undisputed principal amounts owed.

Airtel Entities retained 112 Crores out of the total claim of Crores which was to be paid by the Airtel to Aircel Entities. Out of this sum, the company had retained a sum of 112 crores and balance 341.80 Crores. This Application is moved with the purpose to get an affirmation order about the action of the Operational Creditor of adjustment on net payment to Corporate Debtor.

A letter dated 10.01.2019 was sent to the RP (Resolution Professional) of Corporate Debtor (Aircel Entities) apprising him of the remittance as also the Airtel Entities' legal and equitable right to claim the set off. In turn, the RP replied on 11.01.2019 denying the legal and equitable right of set off of Airtel Entities. This denial of RP is in question in the present MA.

Therefore, it is seen that the Airtel Entities (Buyer/Operational Creditor), on cancellation of bank guarantee, returned the balance after setting off the amount (under consideration) owed by Aircel Entities (Corporate Debtor/Seller) towards the unpaid invoices to Aire Entities. Thus, hereinabove summarily narrated the nature of the dispute to facilitate adjudication.

Thus, *prima facie* a question arises that whether the set appeal is allowable under Insolvency Proceeding?

Issues involved in the case:

1. Whether the said set-off was permissible under Insolvency and Bankruptcy Code 2016?
2. Whether the contention was to the nature of the set off amount?
3. What is the scope of moratorium?
4. Whether the set off amount can be paid off during the moratorium period?
5. Whether the Accounting Standards supersede the IBC?

The Appellant and the Respondents have submitted multiple case laws to supplement their cases/stands taken by them. We have gone through the various submission made including the various citations made by them and observed that whether during the period of Corporate Insolvency Resolution Process when Section 14 (Moratorium) of the I&B Code, 2016 is in operation& whether any dues can be set off as per Accounting Conventions when Moratorium is in force.

Court/ Tribunal Answers:

- The provisions of the I&B Code, 2016, particularly, Section 238 of the IBC, 2016 reads as follows:

"Section 238 Provisions of this Code to override other laws - The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law".

- Section 14 - Moratorium - (4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process. Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under Section 33, the

moratorium shall cease to have effect from the date of such approval or liquidation order.

- We have also observed that Accounting Conventions cannot supersede any express provisions of the laid down provisions of the specific law on the subject. The I&B Code, 2016 provides the mechanism of Moratorium during the CIRP till the Resolution Plan is approved or Liquidation order is passed. The I&B Code has a provision to override other Company Appeal (AT) (Ins) No.530& 700 of 2019 laws as enunciated above. Hence, even if there are some such provisions in any other Law, the I&B Code 2016 will prevail over that.

CONTENTIONS OF THE APPELLANT:

The Resolution Professional has submitted that the Respondent were obliged to return Rs.453Crores retained in terms of the Hon'ble Supreme Court order 08.01.2019 in IA No 180450/2018with Contempt Petition No.271/2018. However, the Respondents in breach of the orders of Hon'ble Supreme Court paid a sum of approx. Rs.341 Crores approximately and thereby illegally detained a sum of approx. Rs.112 Crores. The Appellant has also submitted that the Adjudicating Authority by permitting the present set off has granted the Respondents a preferential payment over other Operational Creditors and it is also against the objective of I&B Code and Article 14 of the Constitution.

CONTENTIONS OF THE RESPONDENT:

While the Respondent has submitted that they have released Rs.341.80 Crores to Aircel entities and has applied the balance amount of Rs.112 Crore approx. for set off against the dues owed by Aircel entities to Airtel entities only to the extent of undisputed principal amounts payable by Aircel entities to Airtel entities. After adjusting the amount, they notified the same to the Resolution Professional vide their letter dated 10.01.2019 & 11.01.2019. The Resolution Professional has sent a letter on 12.01.2019 to Airtel entities denying their right to set off.

The Respondent No.1 & 2 has submitted that the right of a party to apply set off is a well-known concept in accounting and have also submitted that such right has been recognized

for more than a century in the context of Insolvency /liquidation under Companies Act, Presidency Insolvency Act, and Provincial Insolvency Act, 1920 and have also submitted that this has been done based on mutual debits and credits and mutual dealings between the parties.

JUDGEMENT:

The NCLAT after going through judgement of the Appellate Tribunal in Company Appeal in the case of MSTC Vs. Adhunik Metaliks Ltd. &Ors. and Liberty House Group Pvt. Ltd. Vs. State Bank of India & Anr. decided that Having heard learned counsel for the parties, we find that the Adjudicating Authority rightly held that Section 14 of the 'I&B Code' will override any other provisions contrary to the same. Any amount due to the 'Operational Creditor' prior to the date of 'Corporate Insolvency Resolution Process' (Admission) cannot be appropriated during the moratorium period."

The court also observed that Accounting Conventions cannot supersede any express provisions of the laid down provisions of the specific law on the subject and that the IBC overrides any other law during the CIRP proceedings and the moratorium period.

Based on these pointers the court set aside the order that was given by the Mumbai NCLT on 01.05.2019 and directed Respondent 1 & 2 to pay the amount whatever has been set off by them to the Aircel Entities.

Appeal was allowed with the above directions.

RATIO DECIDENDI:

Accounting Conventions cannot supersede any express provisions of the laid down provisions of the specific law on the subject i.e. I&B Code. The IBC overrides any other law during the CIRP proceedings and the moratorium period. Section 14 of the 'I&B Code' will override any other provisions contrary to the same.

CASE ANALYSIS:

In this case the National Company Law Appellate Tribunal has decided in favor of the

appellant and held that the set off amount of 112 crores has to be returned to Aircel Entities. This is a case where the application of law specifically the IBC was questioned which makes this case very important in terms of a precedent.

After going through the background of the case and the sections cited we found that the same issue had been the contention between the parties for which they had appeared before the NCLT Mumbai bench where the set off amount of 112 crores were asked to be retained and it was held that this set off amount does not fall under the purview of the benefits of the moratorium period but later the same set off amount was asked to be returned to the Aircel entities by the NCLAT Delhi bench.

Both the verdicts were given for the same issues, but each verdict has different reasoning and different point of issue. In the earlier case appeared before the NCLAT Mumbai bench the issue was moratorium period when this appeared before the NCLAT Delhi bench the issue was pertaining to the accounting standards and conventions. Technically, the accounting standards and conventions were present even at the time when the parties appeared before the NCLAT Mumbai bench, but the issue focused by the bench and parties were the moratorium period and nature of the transaction, if all the issues were put forth and accounted for in the first hearing of the case in Mumbai then it wouldn't have led to the redundant hearing of the case in Delhi.

Further, looking at the case as a prospective precedent the researchers have found that the Tribunal had held that as per section 238 of the IBC 2016, Insolvency and Bankruptcy Code 2016, overrides any other provision contrary to the same. This verdict was arrived at with reference to the cases MSTC Ltd. Vs. Adhunik Metaliks Ltd &Ors. and Company Appeal (AT) (Ins)No.53 & 54 of 2019 Liberty House Group Pvt. Ltd Vs. State Bank of India &Anr.

In the background of the case, it was found that Aircel Entities had not paid the electricity bill of approx. 20 lakhs and the respective agency had filed a complaint against the Aircel Entities but since the Aircel entities were undergoing the CIRP the Tribunal asked the agency to keep providing the goods and services i.e., electricity as per the rules of moratorium period. This is an indication of the arbitrary nature of the moratorium period

which can be manipulated or misused.

After going through the case thoroughly it can be said that the Delhi tribunal's decision was appropriate, and it also conforms with the existing laws especially with reference to the IBC 2016. The reasoning for the judgment was similar to the previous cases in the same area of law and given that the overriding power of IBC is highlighted in the verdict it can be said that the verdict may be a prospective precedent.

CASE NO: 26

K. KISHAN VS M/S VIJAY NIRMAN COMPANY PVT. LTD.

-Rachit Manuja[197]

- Pranav Deepankar[198]

RELEVANT FACTS:

In the present case, Vijay Nariman Company Pvt. Ltd., Ksheerabad Constrictions Pvt.Ltd .and SDM Projects Pvt. Ltd. Entered a tripartite memorandum of understanding on 09.05.2008 for the purpose of extending the NH 67. During the project, disputes arose between the parties had the same was referred to an Arbitral Court where the award was in favour of the respondent.

KCPL, under section 34 of the Arbitration and Conciliation Act, 1996 challenged the aforesaid award. However, the NCLT dismissed the appeal. This was further appealed in the NCLAT, and the case met the same fate.

This case was then set for an appeal in the Supreme Court of India which brings us to the following arguments given by the appellant and respondent.

ISSUES:

1. The present appeals raise an important question as to whether the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code") can be invoked in respect of an operational debt where an Arbitral Award has been passed against the operational debtor, which has not yet been finally adjudicated upon.

CONTENTIONS MADE BY APPELLANT:

Mr. Gourab Banerji, learned Senior Advocate, appearing on behalf of the appellant has relied upon certain observations made in our judgement in Mobilox Innovations Private Limited vs. Kirusa Software Private Limited, (2018) 1 SCC 353 and argued that the

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object of the Code is not to replace debt adjudication and enforcement under other Acts including the Arbitration Act, 1996.

In the present case, according to him, the very fact that a Section 34 petition is pending is reflective of a real dispute between the parties, which was pre-existing, and which culminated in an Arbitral Award which has yet to attain finality.

He argued that all that is necessary is that there be a dispute in some form which would include cross claims made by the corporate debtor against the operational creditor.

CONTENTIONS MADE BY THE RESPONDENT:

Dr. P.V. Amarnadha Prasad, learned Advocate, appearing on behalf of the respondent has argued in reply that according to the law in the United Kingdom, and Practice Directions thereunder, an insolvency process does not get stultified because an application to set aside the judgement, order or decision is pending in an appeal or otherwise. He also referred to the law in Singapore and relied upon a judgement of the Singapore High Court to the effect that once it is found that there is a primary adjudication between the parties which indicates the existence of a debt, any further dispute which may be pending in appeal or otherwise over the debt could not be said to be bona fide disputed by the debtor.

COURT ANSWERS:

A reading of Section 9(5)(ii)(d) would show that an application under Section 8 must be rejected if notice of a dispute has been received by the operational creditor. In the present case, it is clear on facts that the entire basis for the notice under Section 108 of the Code is the fact that an Arbitral Award was passed on 21.07.2017 against the Appellant.

learned counsel appearing on behalf of the Respondent strongly relied on the fact that this is not an ordinary case because the amount of Rs.1.71 Crores which was awarded was admitted by Mr. Banerji's client in the arbitral proceedings to be a debt due, and that this being so, there can be no dispute regarding the same. We are afraid that we are unable to agree. As was correctly pointed out by Mr. Banerji, counter claims for amounts far exceeding this were rejected by the learned Arbitral Tribunal, which rejection is also the

subject matter of challenge in a petition under Section 34 of the Act. It is important to note that unlike counter claim nos. 1 and 2, which were rejected by the Arbitral Tribunal for lack of evidence, 11counter claim No.3 which amounts to Rs.19,88,20,475/- was rejected on the basis of a price adjustment clause on merits. Therefore, it is difficult to say at this stage of the proceedings, that no dispute would exist between the parties.

With respect to the High Court of Australia, we may only state that following Mobilex Innovations (supra), it would be very difficult to incorporate the Australian law into our law. This is for the reason that our judgement in Mobilex Innovations (supra) has made it clear that the insolvency process, particularly in relation to operational creditors, cannot be used to bypass the adjudicatory and enforcement process of a debt contained in other statutes. We are, therefore, of the view that the higher 20threshold of fraud, collusion, or miscarriage of justice laid down by the Australian High Court will have no application to the situation under our Code.

COURT CASES DISCUSSED:

Mr. Gourab Banerji, learned Senior Advocate, appearing on behalf of the appellant has relied upon certain observations made in our judgement in Mobilex Innovations Private Limited vs. Kirusa Software Private Limited, (2018) 1 SCC 353 and argued that the object of the Code is not to replace debt adjudication and enforcement under other Acts including the Arbitration Act, 1996. He has relied on para 51 under which, according to him, the moment there is a real dispute between the parties, which need not be a “bona fide dispute” which is likely to succeed in point of law, the Insolvency Code cannot be applied.

Mr. Banerji referred us to certain judgement of the English and Singapore Courts. In Re A Company - Victory House General Partner Ltd. vs. RGB P & C Ltd. [2018] EWHC 1143 (Ch), the Chancery Division of the High Court, in a situation where a debt has to be “bona fide” disputed in order to attract the winding up jurisdiction of the Courts in the UK, made it clear that even in a case where a judgement debt is no longer a disputed

debt, as it has been finally adjudicated upon, yet if there be a cross-claim which is being adjudicated upon, or which may not even have reached the adjudicatory process at all, would be sufficient to stave off a winding up order.

A recent judgment of the Singapore High Court, contained in Lim PohYeoh (alias Lim Aster) and TS Ong Construction 18Pte Ltd. [2016] SGHC 179, was also referred to by Mr. Banerji. Again, in a situation which demands a far higher threshold that has to be crossed before the Insolvency Law can be said not to apply, the Singapore High Court referred to Rule 98(2)(a) of the Rules made under the Bankruptcy Act.

It is important to note that both the Practice Directions referred to in the U.K. Judgement and the Singapore High Court judgement, referred to in LKM Investment Holdings Pte Ltd. vs. Cathay Theatres Pte Ltd. [2000] SGHC 13, are in situations where the debt needs to be bona fide disputed, which is not the situation under our Code. For this reason, it is not possible to agree with learned counsel for the Respondent that a pending proceeding challenging an award or decree of a tribunal or Court would not make the debt contained therein a debt that is disputed.

The Australian High Court judgement also relied upon by the respondent in Ramsay Health Care Australia Pty Ltd vs. Adrian John Compton [2017] HCA 28 was relied upon to show, in para 111 thereof, that where a judgement debt has been obtained after testing of the merits in adversarial litigation, then in the absence of some evidence of fraud, collusion, or miscarriage of justice, a court exercising bankruptcy jurisdiction will rarely have substantial reasons to investigate whether the debt which emerged in the judgement was truly owed.

JUDGEMENT:

The court accepted Mr. Banerji's submission and gave that Section 238 of the Code would apply in case there is an inconsistency between the Code and the Arbitration Act. The court further gave that,"We are also of the view that the Appellate Tribunal, when it relied upon Form V Part 5 of the 2016 Rules to state that the operational debt would, therefore, be said to have been proved, missed the vital sub-clause (iii) in para 34 of

Mobilox Innovations. Even if it be clear that there be a record of an operational debt, it is important that the said debt be not disputed. If disputed within the parameters laid down inMobilox Innovations (supra), an insolvency petition cannot be proceeded with further."

For these above-mentioned reasons, the court gave that the judgements of the judgements of the appellate tribunals need to be set aside and reversed. Therefore, the appeal was allowed.

RATIO:

Section 238 of the Code would apply in case there is an inconsistency between the Code and the Arbitration Act.

ANALYSIS:

The Supreme Court of India ("Supreme Court") in K. Kishan v. M/s Vijay Nirman Company P. Ltd., has considered whether the Insolvency and Bankruptcy Code, 2016 ("the Code") can be invoked in respect of an operational debt where the arbitral award passed against the operational debtor creating such debt, is pending challenge under Section 34 of the Arbitration and Conciliation Act, 1996.

The judgement of the Supreme Court is laudable and gives lucidity on what comprises presence of question under the Code. In core, it has accentuated that an obligation isn't crystalized till the Arbitral Award containing such obligation accomplishes conclusiveness. This judgment has intensified the extent of past decisions in Mobilox and Annapurna to incorporate test to Arbitral Awards inside the significance of 'presence of debate' under Section 9 the Code.

Further, in the current case, the Award under challenge was an award tested under Section 34 of the Act. It will be intriguing to see the treatment of an unfamiliar honor being opposed implementation, which fundamentally doesn't qualify as a test to an Arbitral Award. Maybe, it would in any case be brought inside the ambit of 'existing question' till such time the Award is at long last authorized in India.

CASE NO: 27

LALIT KUMAR JAIN VS UNION OF INDIA

- Rachit Manuja[199]
- Pranav Deepankar[200]

RELEVANT FACTS:

The Hon'ble Supreme Court gave merit to the provisions of the Insolvency and Bankruptcy Code (IBC) in pertinence to the insolvency of the personal guarantors that came into force in 2019.

In addition to this, on 15.11.2019, a notification was issued which notified the provision of the IBC w.r.t. to the personal guarantors. The validity of the same, however, was challenged by the IBBI on 20.11.2019 which is confined to the impugned notification.

The petitioners provided bank and financial institutions with guarantees in their capacities as directors, promoters, chairman, and managing directors of the firms, and the guarantees have been invoked, and procedures against the companies with which they are affiliated are pending. The cases that are still outstanding, at various phases such as insolvency filing, resolution, etc. (Para 2 and 3 of the judgement to be referred).

The Petitioners claimed that the Union's power under Section 1(3) of the Code could not have been used to limit the Code's provisions to personal guarantors of corporate debtors. The impugned notification brought into force Section 2(e), Section 78 (except with regard to fresh start process), Sections 79, 94-187 (both inclusive); Section 239(2)(g), (h) & (i); Section 239(2)(m) to (zc); Section 239 (2) (zn) to (zs) and Section 249. (Para 4 of the judgement to be referred).

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ISSUES:

1. The common question which arises in all these cases concerns the vires and validity of a notification dated 15.11.2019 issued by the Central Government2 (hereafter called “the impugned notification”). Other reliefs too have been claimed concerning the validity of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 issued on 15.11.2019. Likewise, the validity of regulations challenged by the Insolvency and Bankruptcy Board of India on 20.11.2019 are also the subject matter of challenge. However, during the course of submissions, learned counsel for the parties stated that the challenge would be confined to the impugned notification.

2. All the writ petitioners challenged the impugned notification as having been issued in excess of the authority conferred upon the Union of India (through the Ministry of Corporate Affairs) which has been arrayed in all these proceedings as parties. The petitioners contend that the power conferred upon the Union under Section 1(3) of the Insolvency and Bankruptcy Code, 2016 (hereafter referred to as “the Code”) could not have been resorted to in the manner as to extend the provisions of the Code only as far as they relate to personal guarantors of corporate debtors. The impugned notification brought into force Section 2(e), Section 78 (except with regard to fresh start process), Sections 79, 94-187 (both inclusive); Section 239(2)(g), (h) & (i); Section 239(2)(m) to (zc); Section 239 (2)(zn) to (zs) and Section 249.

3. It is urged that the impugned notification is ultra vires the provisions of the Code in so far as it notifies provisions of Part III of the Code only in respect of personal guarantors to corporate debtors. Part III of the Code governs "Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms"

CONTENTIONS OF THE PETITIONERS:

1. Mr. Harish Salve, learned senior counsel appearing on behalf of the petitioners, urged that Section 1(3) of the Code authorizes or empowers the Central Government only to bring provisions of the Code into force on such date by a notification in the 9 Official

Gazette. The proviso to this Section categorically provides that different dates may be appointed for bringing different provisions into force. Section 1(3) is an instance of 'conditional legislation', where the legislature has enacted the law, and the only function assigned to the executive is to bring the law into operation at such time as it may decide.

2. It is argued that Part III of the Code does not create any distinction between an individual and a personal guarantor to a corporate debtor. Part III provides for "Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms", and thereafter refers to these two categories of persons simply as debtors. The impugned notification in substance modifies the text of the actual sections of Part III, despite the absence of any element of legislation/legislative authority having been conferred upon the Central Government.

3. The words "only in so far as they relate to personal guarantors to corporate debtors" forming a part of the impugned notification are attempted to be added like a rider to each of the sections mentioned in the impugned notification, clearly rendering such an exercise completely outside the scope and powers conferred under Section 1(3) of the Code.

4. It was argued that the Central Government mistakenly assumed that inclusion of personal guarantors in the definition provisions by amending Section 2 and inserting section 2(e) automatically results in amendment of section 1(3) of the Code. Section 2 provides that the Code applies to the entities enumerated in the various subsections.

5. Mr. P.S. Narasimha, learned senior counsel, who argued next, contended further that in several judgments, this court has ruled that conditional legislation is one where a legislative exercise is complete in itself, and the only power and/or function to be delegated to the authority (in this case the Central Government), is to apply the law to a specific area or to determine the time and manner of carrying into effect such law

6. The other counsel, viz. Mr. Rohit Sharma, Ms. Pruthi Gupta, Mr. Rishi Raj Sharma, and Mr. Manish Paliwal too, argued for other petitioners. Pointing to the distinction between provisions in Part II of the Code and those in Part III, it is argued that the procedure for initiation of insolvency resolution against personal guarantors to corporate debtors is the same as in relation to other individuals

7. It was further argued that the resolution plans, duly approved by the Committee of Creditors would propose to extinguish and discharge the liability of the principal borrower to the financial creditor. Therefore, the petitioners' liability as guarantors under the personal guarantee would stand completely discharged.

ARGUMENTS OF THE UNION AND THE RESPONDENTS:

1. Arguing for the Union of India, the Attorney General Mr. K.K. Venugopal submitted that the Code was amended in 2018. It substituted the pre-amended definition in Section 2(e) by introducing three different classes of debtors, which were personal guarantors to corporate debtors [Section 2(e)], partnership firms and proprietorship firms [Section 2 (f)] and individuals [Section 2(g)]. The purpose of splitting the provision and defining three separate categories of debtors was to cover three separate sets of entities.
2. It was argued that Parliament felt compelled to separate personal guarantors from other individuals such as partnership firms, proprietorships and individuals. It was felt that if this separation, achieved through the amendment of 2018 were not realized, the insolvency resolution process of corporate debtors would have to be dealt with separately and independently of its promoters, managing directors, and directors who had furnished their personal guarantees to secure debts of corporate debtors.
3. It was submitted that though the procedure to be adopted by the NCLT and rules of insolvency (in relation to personal guarantors, under Part III of the Code) might be different from that relating to corporate debtors, unifying both processes under one forum enables the adjudicating body to have a clear vision of the extent of debt of the corporate debtor, its available assets and resources, as also the assets and resources of the personal guarantor.
4. The Attorney General urged that what follows from the above decisions is that Section 1(3) of the IBC has to be interpreted to give flexibility to the Central Government to implement provisions of the Code to meet the objectives of the enactment. He highlighted that the Central Government has in fact been enforcing the provisions of the Code in a phased manner and brought to the Court's notice that the provisions were notified on 10 different dates.

5. The Attorney General submitted that the Amendment Act brought about a classification after detailed deliberations and in the light of the report of the Working Group on Individual Insolvency, Regarding Strategy and Approach for implementation of Provisions of the Code to Deal with Insolvency of Guarantors to Corporate debtors, and Individuals having business.

6. The Solicitor General further submitted that the liability of a guarantor is coextensive, joint and several with that of the principal borrower unless the contrary is provided by the contract.

7. It was urged that provisions of diverse nature have been characterized as conditional legislation by this court. The cases relied upon by the Petitioners related to a challenge to the validity of legislative provisions on the ground of excessive delegation of legislative power.

8. Mr. K.V. Vishwanathan, learned senior counsel appearing for some respondents, argued that an overall reading of the provisions of the Code would show that personal guarantors to corporate debtors are a distinct class of individuals (by virtue of Section 2 (e) and Section 60); the classification is not achieved through the impugned notification, but by the amending Act of 2018, by Parliament.

9. Mr. Ritin Rai, learned senior counsel appearing for some respondents, urged that there is an inter connectedness between corporate debtors and personal guarantors, which was recognized by the 2018 amendment, evidenced by its Statement of Objects and Reasons. He stated that the power under Section 1(3) of the Code has been properly exercised.

COURT FINAL JUDGEMENT:

It is held that the impugned notification is legal and valid. It is also held that approval of a resolution plan relating to a corporate debtor does not operate so as to discharge the liabilities of personal guarantors (to corporate debtors). The writ petitions transferred cases and transfer petitions are accordingly dismissed in the above terms, without order on costs.

RATIO:

Aapproval of a resolution plan relating to a corporate debtor does not operate so as to

discharge the liabilities of personal guarantors (to corporate debtors).

ANALYSIS:

Given the possibility of concurrent proceedings against both the guarantor and the principal debtor, an analysis of the insolvency regime for personal guarantors recommends greater implementation of guarantees, higher collections, and, presumably, significant leverage to creditors against erring guarantors. In its Financial Stability Report 2019, the RBI forecasted a 0.6 percent increase in the gross non-performing assets ratio for regulated financial institutions. A quicker compliance procedure for guarantees is a good improvement in a time when banks are burdened with bad loans. Personal guarantors, on the other hand, should exercise caution because they have lost their right to reclaim payments made under the guaranteed contract from the borrower. In order to preserve the framework's overall efficacy, many technical components of the enforcement mechanism must also be reviewed. Overall, this decision would benefit creditors by allowing them to collect debts more quickly, but it would be problematic for guarantors.

CASE NO: 28

ARUN KUMAR JAGATRAMKA VS JINDAL STEEL AND POWER LTD.

- Tarun Philip[201]
- Pranav Deepankar[202]

FACTS:

Arun Kumar Jagatramka had submitted a resolution plan for GNCL on November 1, 2017. The plan was to be put vote in a meeting of the Coc which was scheduled 23-24th November 2017.

Section 29A which was inserted with retrospective effect from 23 November 2017 provides a list of persons who are ineligible to be resolution applicants. Sub-section (g) of Section 29A disqualifies a person from being a resolution applicant if they have been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the NCLT under the IBC.

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Due to the insertion of Section 29A, Mr Arun Kumar Jagmatramka became ineligible to submit a resolution plan.

No further resolution plan was approved by the CoC due to the paucity of time. In the absence of a resolution plan.

NCLT had passed an order of liquidation on 11th January 2018 after the expiry of 270 days. This order of liquidation was challenged by Arun Kumar Jagatramka but the appeal was dismissed by NCLAT.

The dismissal of the appeal by NCLAT was assailed in front of the court which issued notice to GNCL on 19th July 2019.

Arun Kumar moved an application under Sections 230 to 232 of the Act of 2013 before the NCLT proposing a scheme for compromise and arrangement between the promoters and creditors. This application was allowed by the NCLT through its order dated 15 May 2018

An Appeal against the judgment of NCLAT dated 15th may, 2018was preferred by the creditor of GNCL also.

NCLAT allowed the appeal by its judgment dated 24th October 2019.

Subsequently the current appeal and the writ petition under Article 32 of the constitution were filed in the Hon'ble Supreme Court of India.

ISSUES:

1. Whether in a liquidation proceeding under IBC,2016 a scheme for compromise and arrangement can be made regarding Section 230 to 232 of the Companies Act, 2013?
2. If issue (1) is permissible, whether promoter is eligible to file application for compromise and arrangement while he is ineligible under Sections 29A of the IBC to submit a resolution plan?
3. Whether regulation 2B of Liquidation Process Regulations is constitutionally valid or not?

HOLDING OF THE COURT:

1. The Hon'ble Court in the appeal held that the prohibition placed by the parliament in Section 29A and Section 35(1) of the IBC has to attach itself to the Scheme for compromise and arrangement under Section 230 of the Companies Act of 2013 in the event the company is undergoing liquidation in respect to the provisions of the Insolvency and Bankruptcy Code rendering an answer to issue (2) in dispute since issue (1) has not been challenged by any party in the judgement of National Company Law Tribunal. The Court noted that IBC brought a fundamental change in the corporate governance structure by acting as an instrument to support development of credit market, entrepreneurship, ease of doing business as well as growth and development of economy.

(a) The court observes the purpose of introducing sections 29A and 35(1) explained in the statement of objects and reasons of the amendment as follows:

'Concerns have been raised that person who with their misconduct contributed to defaults of companies or are otherwise undesirable may misuse this situation due to lack of prohibitions or restrictions to participate in resolution or liquidation process and gain control of the corporate debtor. This may undermine the processes laid down by the code as the person would be rewarded at the expense of the creditors.'

(b) The report of the Insolvency Law Committee states the intent behind introducing Section 29A was to prevent unscrupulous persons from gaining control over the affairs of the company of which they were not worthy.

(c) The court referred to the judgement in Chitra Sharma v Union of India, where the Court held that Section 29A of the IBC has been enacted in the larger public interest and to facilitate effective corporate governance further emphasizing that the Parliament rectified a loophole in the Act which allowed backdoor entry in the resolution process.[203]

(d) The court also adverts to the decision of the court in ArcelorMittal case where the court held that Section 29A is an instance of a see-through provision so that one is able to arrive at persons who are actually in 'control' whether jointly or in concert with other persons.[204]

(e) Further emphasizing on the need for Section 29A and 35(1), the court referred to the decision in Swiss ribbons case where the court held that Section 29A continues to

[203] Chitra Sharma v Union of India (2018) 18 SCC 575

[204] Arcelormittal India Private Limited v Satish Kumar Gupta and Ors (2019) 2 SCC 1

permeate Section 35(1) when it applies not only to resolution applicants but also to the liquidation process itself.[205] The court went on to state that the cases are significant in establishing a purposive interpretation of Section 29A.

(f) The purpose of ineligibility under Section 29A is to achieve the goal of revival of the company and to ensure that a person responsible for the problem does not either by design or default be a part of the process of solution.

(g) In Miheer H Mafatlal v Mafatlal Industries ltd, the court held that in the situation a company is ordered to be wound up, the company court must necessarily see whether the scheme of compromise contemplates revival of the company.[206]

(h) The liquidation proceedings under chapter III of the IBC follow upon the whole of proceedings contemplated in the statute. One of the modes of revival in course of liquidation is contemplated in Section 230 of the Companies Act of 2013. The liquidator appointed by Section 34 of the IBC is to attempt revival of the corporate debtor to save it from corporate death.

(i) There is no provision in the IBC for carrying out a scheme for compromise and arrangement and since only provision is contained in Section 230 of the Companies Act, there is no inconsistency with the IBC.

(j) The liquidator exercises several functions of quasi-judicial nature. Section 35(1) states the power and duties of which are entrusted to the liquidator are subject to directions of the adjudicating authority.[207] The court notes that therefore the ineligibility prescribed under Sections 29A and 35(1) cannot be disregarded while considering an application for a scheme of compromise or arrangement under Section 230 of the Companies Act 2013 as that would only be the correct construction of the provisions of the law.

2. The Hon'ble Court in response to the writ petition [issue (3)] held that regulation 2B of the Liquidation Process Regulations is constitutionally valid.

[205] Swiss ribbons pvt ltd v Union of India (2019) SCC 73
[206] Miheer H Mafatlal v Mafatlal industries Ltd (1996) 8 JT 205
[207] Insolvency and Bankruptcy Code, 2016

(a) The IBBI discussed the applicability of Section 29-A of the IBC to a compromise and arrangement under Section 230 of the Companies Act 2013. It was noted in the discussion papers that 'There is no explicit prohibition on persons ineligible to submit resolution plans under Section 29A from proposing compromise or arrangement made under Section 230 of the Act of 2013 which will result in person ineligible under Section 29A acquiring control of the corporate debtor. This has created an anomaly that Section 29A I applicable during the stage before and the stage after compromise but not during compromise and arrangement. It was also noted that non-applicability of Section 29A at the stage of compromise or arrangement may undermine the process and may reward unscrupulous persons at the expense of creditors. Thus, there is a need to harmonize both provisions to level the playing field.'

(b) The court considered Section 196 of IBC which states that IBBI has power to:

A. Make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this code, including mechanism for time bound disposal of the assets of corporate debtor."

B. The court also took notice to Section 240 of IBC which empowers IBBI to make regulations in the following terms:

C. The board may by notification make regulations consistent with this code and the rules made thereunder to carry the provisions of this code."

D. Even in absence of regulation 2B a person ineligible under Section 29A read with Section 35(1)(f) is not permitted to propose a scheme for compromise and arrangement under Section 230. In the case of a company undergoing liquidation pursuant to chapter III of IBC, a scheme for compromise is a facet of the liquidation process.

E. The object of scheme for compromise is to revive the company. The same principle was enunciated in Meghal Homes case.[208] The same rationale which permeates the resolution process under chapter II permeates the liquidation process under chapter III. Thus, regulation 2B is only clarificatory in nature. Th court observed that there is no merit in the challenge to the validity of regulation 2B.

[208]Meghal Homes v Shree Niwas Girni(2007) 7 SCC 753

3. The Lordships after assessing the material before them concluded that there is no merit in the appeal and the civil appeal along with writ petition were dismissed.

CASE ANALYSIS:

1. Was the Courts decision appropriate?

Yes, the court's decision in this case is appropriate as it was done in order prevent unworthy people from gaining control over the corporate debtor. The main principle was that the people who were the cause of the insolvency of the corporate debtor should not be given a chance to regain control of the same. The liquidation process is taken as a whole and Section 29A of IBC is to be read with Section 230 of the Companies Act in order to prevent unscrupulous activity in the CIRP process.

2. Does this decision conform with existing law and was reasoning of the court consistent with previous similar cases?

Yes, the court's decision does conform with the existing law. In the instant case the court has rejected the appeals and the writ petition. This was done because the existing provisions in both the IBC and the Companies Act clearly define the rights and liabilities of parties in the insolvency process. The law is clear on preventing mischief in the resolution process and the revival of the company. The reasoning of the court in this case can be seen is synonymous with the decision of the court in previous cases such as Swiss ribbon case, Mafatlal industries case and Meghal Homes case all of which has been cited and submitted in the previous headings.

3. Did the court adequately justify its reasoning? Was its interpretation of the law appropriate or not?

Yes, the court has adequately justified its reasoning by clearly defining the provisions of the IBC as well as Companies Act of 2013. It has been justified by the court that regulation 2B is only clarificatory in nature and that the provision of regulation 2B an already established principle which was merely clarified through a legislation. Moreover, the court observed that the IBBI has been conferred powers to make rules and regulations

relating to the insolvency process and that there is no challenge to the validity of regulation 2B. The merging of provisions of Section 29A of IBC and Section 230 of the Companies Act is a well-established principle to prevent ineligible people from regaining control of the corporate debtor as well as to prevent unscrupulous activity in the insolvency and resolution process, which was also justified by the court as through previous cases and statutory interpretations.

CASE NO: 29

KUNDAN CARE VS AMIT GUPTA

- Tarun Philip [209]

FACTS

The appellant, Kundan Care was selected as the successful resolution applicant after submitting the resolution plan which was approved by the Committee of creditors. However, the resolution plan was still pending approval from the NCLT. The resolution

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plan submitted by Kundan Care was in the Corporate Insolvency Resolution Process of Aston field Solar Pvt Ltd. While pending approval from the NCLT, Kundan Care approached the NCLT to withdraw the resolution plan on the basis that the plan had been rendered commercially unviable due to delay in carrying out the CIRP and that the resolution plan so submitted had lost its significance in the said situation. The NCLT rejected the application by Kundan Care to withdraw the resolution plan following which an appeal was preferred by Kundan Care. The appellant argued that the Code (IBC) does not contain any provision to compel specific performance and thus an application to withdraw the resolution plan had to be permitted. The NCLAT refused to grant permission to withdraw the resolution plan and also held that the argument advanced by the appellant as to absence of provision regarding specific performance in the IBC has to be repelled.

ISSUES

- Whether the successful resolution applicant can be permitted to withdraw the resolution plan after approval by Committee of Creditors.

HOLDING OF THE COURT

It was held by the Hon'ble Court that before approval of a Resolution Plan by the Committee of Creditors the Corporate Insolvency Resolution Process ha to pass through various stages. Similarly after admission of the application under Section 7, 9 or 10 of the I&B Code, IRP is appointed, moratorium is slapped prohibiting activities enumerated in Section 14, public announcement is made, claims are invited, received and collated by the Interim Resolution Professional, Committee of Creditors is constituted and after appointment of Resolution Professional Expression of Interest is floated inviting Resolution Plans where after the Resolution Professional places all Resolution Plans before the Committee of Creditors. After preparation of Information examination of each Resolution Plan conforming the conditions laid down in Section 30(2) of the I&B Code, the Resolution Professional is required to present such compliant Resolution Plans to the Committee of Creditors for its approval. The Committee of Creditors may approve a Resolution Plan by a vote of not less than 66% of voting share of the Financial

Creditors after considering its feasibility and viability, the manner of distribution proposed, and other requirements as specified by IBBI. This process is to be concluded within 180 days and in the event of extension granted by the Adjudicating Authority for sufficient reasons, the CIRR period may extend to 270 days with maximum outer limit of 330 days including the period which may have been consumed by the judicial intervention during the CIRP process.

It was also held that I&B Code provides for insolvency resolution in a time bound manner, the object sought to be achieved, inter alia, being maximization of value of assets of corporate persons and balancing the interests of all stake holders. Primacy is given to the Committee of Creditors, who are empowered to take a business decision in regard to feasibility and viability of a Resolution Plan based on their commercial wisdom, which is not justiciable as by now well settled by a catena of rulings handed down by the Hon'ble Apex Court. Intervention by the Adjudicating Authority is limited to compliance of the Resolution Plan approved by the Committee of Creditors to requirements of Section 30(2) and by this Appellate Tribunal in Appeal to grounds embodied in Section 61(3) of the I&B Code. Reference in this regard may be made to law laid down by the Honb'le Apex Court in K Shashidhar vs. Indian Overseas Bank and Ors.

The court refused to grant permission to withdraw resolution plan and also observed that the argument advanced on behalf of the Appellant that there is no provision in the I&B Code compelling specific performance of Resolution Plan by the Successful Resolution Applicant has to be repelled on four major grounds:

(i) There is no provision in the I&B Code entitling the Successful Resolution Applicant to seek withdrawal after its Resolution Plan stands approved by the Committee of Creditors with requisite majority.

(ii) The successful Resolution Plan incorporates contractual terms binding the Resolution Applicant, but it is not a contract of personal service which may be legally unenforceable.

(iii) The Resolution Applicant in such case is estopped from wriggling out of the liabilities incurred under the approved Resolution Plan and the principle of estoppel by

conduct would apply to it.

(iv) The value of the assets of the Corporate Debtor is bound to have depleted because of passage of time consumed in Corporate Insolvency Resolution Process and in the event of Successful Resolution Applicant being permitted to walk out with impunity, the Corporate Debtor's depleting value would leave all stake holders in a state of devastation.

ANALYSIS OF THE CASE

The decision of the court in the instant case is in my opinion in the larger interest of justice but also not correct. The approval of the resolution plan by the Committee of Creditors is binding and the resolution applicant is subsequently expected to carry out the resolution plan thus submitted. The main reason or ratio behind the court's decision was that if the withdrawal of the resolution plan was to be permitted then it would result in drastic effects on the Corporate Debtor in a very negative way even at times forcing the corporate debtor into liquidation. The NCLAT also observed that the wisdom of the Committee of Creditors is to be preserved which would not be possible if the withdrawal of the resolution plan is permitted. Furthermore, the absence of provision for specific performance in the IBC also means that the NCLT lacks jurisdiction in terms of withdrawal of the resolution plan after it had been approved. However, in certain cases the withdrawal of the application becomes necessary such as in a situation where the resolution application is not able to follow up on the resolution plan due to a crash in the economy or loss of market etc and since liquidation is seen as a solution in such situations, the NCLT will instead of forcing the applicant to carry out the plan, will consider liquidation as an alternative remedy in the place of CIRP. It is also a fact that sale of assets in liquidation in a time bound manner is always more effective than to force the resolution applicant to implement the resolution plan. The concept of specific performance also would not apply in this case as there is no contract or parties involved and the resolution plan cannot be coined as a contract. Concluding, future decisions in the similar circumstances have to consider the gist of the matter and not just the disposal of cases without analyzing the proper data at hand. Each decision by the authority should consider all the parties and should reach a decision which is accepted by all both in the

logical and statutory sense.

CASE NO: 30

MOBILOX INNOVATIONS PRIVATE LIMITED VS KIRUSA SOFTWARE PRIVATE LIMITED

Atul Balasubramaniyam[210]

RELEVANT FACTS

The present appeal raises questions as to the triggering of the Insolvency and Bankruptcy Code, 2016 when it comes to operational debts owed to operational creditors. The appellant was engaged by Star TV for conducting tele-voting for the Nach Baliye program on Star TV. The appellant in turn sub- Reason: contracted the work to the respondent and issued purchase orders between October and December 2013 in favour of the respondent. In the Nach Baliye program, the successful dancer was to be selected on various bases, including viewers votes. For this purpose, the respondent was to provide toll free telephone numbers across India, through which the viewers of the program could cast their votes in favour of one or more participants. For this purpose, a software was customized by the respondent, who then coordinated the results and provided them to the appellant. Since the respondent obtained toll free numbers from telephone operators in terms of the purchase orders, the appellant was liable to make payment of rentals for the toll-free numbers, as well as primary rate interface rental to the telecom operators. The respondent provided the requisite services and raised monthly invoices between December 2013 and November 2014 the invoices were payable within 30 days from the date on which they were received. The respondent followed up with the appellant for payment of pending invoices through e-mails sent between April and October 2014. It is also important to note that a non-disclosure agreement (hereinafter referred to as the NDA) was executed between the parties on 26th December 2014 with effect from 1st November 2013.

More than a month after execution of the aforesaid agreement, the appellant, on 30th January,2015, wrote to the respondent that they were withholding payments against invoices raised by the respondent, as the respondent had disclosed on their webpage that they had worked for the Nach Baliye program run by Star TV, and had thus breached the NDA. The correspondence between the parties finally culminated in a notice dated 12th December 2016 sent under Section 271 of the Companies Act, 2013. Presumably because

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winding up on the ground of being unable to pay one's debts was no longer a ground to wind up a company under the said Act, a demand notice dated 23rd December 2016 was sent for a total of Rs.20,08,202.55 under Section 8 of the new Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the Code). By an e-mail dated 27th December 2016, the appellant responded to the aforesaid notice stating that there exist serious and bona fide disputes between the parties, that the notice issued was a pressure tactic, and that nothing was payable inasmuch as the respondent had been told way back on 30th January, 2015 that no amount will be paid to the respondent since it had breached the NDA.

ISSUES INVOLVED

- Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?
- Whether there is existence of a dispute between the parties or the record of pendency of a suit or arbitration proceeding filed before the receipt of demand notice of the unpaid operational debt in relation to such dispute?

CONTENTIONS OF FACT AND LAW ARGUED BY BOTH PARTIES

Appellant

Shri Mohta, learned counsel on behalf of the appellant, raised various contentions before us. According to learned counsel, the application should have been dismissed on the ground that the operational creditor did not furnish a copy of the certificate from a financial institution, viz. IDBI in the present case, that maintained accounts of the operational creditor, which confirmed that there is no payment of any unpaid operational debt by the corporate debtor under Section 9(3)(c) of the Code. This being so, the application ought to have been dismissed at the very threshold. Apart from this, the learned counsel took us through various committee reports and the provisions of the Code and argued that under Section 8 of the Code, the moment a corporate debtor, within 10 days of the receipt of a demand notice or copy of invoice, brings to the notice of the operational creditor the existence of a dispute between the parties, the Tribunal is obliged

to dismiss the application. According to him, under Section (8)(2)(a), the expression existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed must be read as existence of a dispute or record of the pendency of the suit or arbitration proceedings filed, i.e. disjunctively. According to the learned counsel, the definition of dispute under Section 5(6) of the Code is an inclusive one and the original draft bill not only had the word means instead of the word includes, but also the word bona fide before the words suit or arbitral proceedings, which is missing in the present Code. Therefore, learned counsel argued that the moment there is existence of a dispute, meaning thereby that there is a real dispute to be tried, and not a sham, frivolous or vexatious dispute, the Tribunal is bound to dismiss the application.

Respondent

Shri Jawaharlal, learned counsel appearing on behalf of the respondent, has argued in reply that the only notice given to rectify the defects by the Tribunal was an oral notice of 19th January 2017 and that too only to supply the notice of dispute by the appellant. This was done within time and the Tribunal, therefore, dismissed the application only on non-fulfilment of the conditions laid down in Section 9. No plea was ever taken before the Tribunal that the IDBI certificate was not furnished. This plea was taken for the first time only in appeal, and since the Tribunal did not think it fit to dismiss the application on a technical ground, this ground does not avail the appellants. The counsel then submitted that the expression dispute under Section 5(6) covers only three things, namely, existence of the amount of debt, quality of goods or services or breach of a representation or warranty and since what was sought to be brought as a defence was that the NDA was breached, it would not come within the definition of dispute under Section 5(6). He further went on to state that, at best, the breach of the NDA is a claim for unliquidated damages which does not become crystallized until legal proceedings are filed, and none have been filed so far. Therefore, there is no real dispute on the facts of the present case and the Tribunal was correct in its finding that the dispute was a sham one.

RATIO

In this case, section 5 (6) of the insolvency and bankruptcy code has been applied,

through which it has been identified that a dispute exists between the parties which has been overlooked by the tribunals before which the case was appeared before.

JUDGEMENT

Going by the aforesaid test of existence of a dispute, it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defence is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defence as vague, got-up and motivated to evade liability. Learned counsel for the respondent, however, argued that the breach of the NDA is a claim for unliquidated damages which does not become crystallized until legal proceedings are filed, and none have been filed so far. The period of limitation for filing such proceedings has admittedly not yet elapsed.

Further, the appellant has withheld amounts that were due to the respondent under the NDA till the matter is resolved. Admittedly, the matter has never been resolved. Also, the respondent itself has not commenced any legal proceedings after the e-mail dated 30th January 2015 except for the present insolvency application, which was filed almost 2 years after the said e-mail.

All these circumstances go to show that it is right to have the matter tried out in the present case before the axe falls. We, therefore, allow the present appeal and set aside the judgment of the Appellate Tribunal. There shall, however, be no order as to costs.

ANALYSIS

As per the provision of the code, the adjudicating authority is bound to reject the application if the conditions given under section 9 is not complied. In other words, if there is an existence of the dispute between the operational creditor and the corporate debtor then in that case the application filed under Section 9 of the Code shall be rejected by the adjudicating authority. The court further analysed the facts and came to the

conclusion that, the appellant has raised the contention regarding further investigation in the matter of existence of dispute. It was held that the appellate adjudicating authority was incorrect in giving order that the contention raised by the appellant was vague and inappropriate in nature. Here, there was an actual existence of dispute between the parties which the appropriate authority failed to recognise. As per the contention raised by the respondent, the breach of NDA was only for the unliquidated damages which will not become valid until the legal effect for the same will be there. The Hon'ble Supreme Court further held that one of the main objectives of enactment of the code was to finish the legal proceedings in a time bound manner. Hence holding this objective, the court held that if there is any delay in the filing of the appeal or filing of the application under the provisions of the code, then in that case the adjudicating authority shall not accept the application and reject the same. However, in the present case the application and the appeal filed by the respective parties are within the prescribed time period. Considering the facts, contentions and reasoning it can be said that the Supreme Court has given an appropriate verdict and it is well justified.

CASE NO: 31

P. MOHANRAJ & ORS. V. M/S SHAH BROTHERS ISPAT PVT LTD.

Mohammed Rizwanullah Farooqui [211]

FACTS

M/s Diamond Engineering Pvt. Ltd. (the company) owed INR 24,20,91,054 to the respondents (M/S Shah Brothers Ispat Pvt Ltd). The company (Corporate Debtor) issued 51 cheques to the respondents (Operational Creditor) which were returned dishonoured due to insufficient funds. As a result, the respondent issued a statutory notice under Sec. 138 r/w Sec. 141 of the Negotiable Instrument Act, 1881 calling the Company and its 3 directors, including P. Mohanraj (Appellants 1-3) to pay the debt. In addition to this, the Corporate Debtor also issued a notice under Sec. 8 of the Insolvency and Bankruptcy Code, 2016. The application was accepted by the Adjudicating Authority under Sec. 9 of the IBC directing the commencement of the Corporate Insolvency Resolution Process and a moratorium under Sec. 14 was passed with respect to the company. no.1-3 herein, to pay this amount within 15 days of the receipt of the notice. On 28.04.2017, two cheques for a total amount of INR 80,70,133/- presented by the respondent for encashment were returned dishonoured for the reason funds insufficient. A second demand notice dated 05.05.2017 was therefore issued under the selfsame Sections by the respondent, calling upon the company and the appellants to pay this amount within 15 days of the receipt of the notice. Since no payment was forthcoming pursuant to the two statutory demand notices, two criminal complaints, being Criminal Complaint No.SS/552/2017 and Criminal Complaint No. SS/690/2017 dated 17.05.2017 and 21.06.2017, respectively, were filed by the respondent against the company and the appellants under Section 138 read with Section 141 of the Negotiable Instruments Act before the Additional Chief Metropolitan Magistrate [ACMM], Kurla, Mumbai. On 12.02.2018, summons were issued by the ACMM to the company and the appellants in both the criminal complaints.

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ISSUES

A statutory notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 IBC] had been issued on 21.03.2017 by the respondent to the company, and as an order dated 06.06.2017 was passed by the Adjudicating Authority admitting the application under Section 9 of the IBC and directing commencement of the corporate insolvency resolution process with respect to the company, a moratorium in terms of Section 14 of the IBC was ordered. Pursuant thereto, on 24.05.2018, the Adjudicating Authority stayed further proceedings in the two criminal complaints pending before the ACMM. In an appeal filed to the National Company Law Appellate Tribunal [NCLAT], the NCLAT set aside this order, holding that Section 138, being a criminal law provision, cannot be held to be a proceeding within the meaning of Section 14 of the IBC. In an appeal filed before this Court, on 26.10.2018, this Court ordered a stay of further proceedings in the two complaints pending before the learned ACMM. On 30.09.2019, since a resolution plan submitted by the promoters of the company had been approved by the committee of creditors, the Adjudicating Authority approved such plan as a result of which, the moratorium order dated 06.06.2017 ceased to have effect. It may only be added that at present, an application for withdrawal of approval of this resolution plan has been filed by the financial creditors of the company before the Adjudicating Authority. Equally, an application to extend time for implementation of this plan has been filed by the resolution applicant sometime in October 2020 before the Adjudicating Authority. Both these applications have yet to be decided by the Adjudicating Authority, the next date of hearing before such Authority being 08.02.2021.

ARGUMENT

He further states that if the expression proceedings contained in Section 14 were to be construed so as to include criminal proceedings, it would render the first proviso to Section 32, which deals with institution of prosecution against a corporate debtor during the corporate insolvency resolution process, and the second proviso, which indicates pendency of criminal prosecution against those in charge of and responsible for the conduct of the corporate debtor, otiose. He relied on the judgment in AneetaHada v.

Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661 [AneetaHada] to buttress his submission that criminal liability can fall on Directors/persons in charge of and responsible for the conduct of the corporate debtor even where the corporate debt or may not be proceeded against P. Mohanraj vs M/S. Shah Brothers Ispat Pvt. Ltd. on 1 March, 2021 Indian Kanoon - http://indiankanoon.org/doc/97452657/ 5 by virtue of Section 14 or Section 32A. He lastly submits that Sections 81 and 101 of the IBC, in speaking of a moratorium in context of any debt also lend support to his contention that moratorium under the IBC only applies to civil proceedings within the realm of private law, and that since Section 138 proceedings are not proceedings for the recovery of a debt, they cannot fall within the moratorium provisions set out by Sections 14 or 81 or 101. What throws light on the width of the expression proceedings is the expression any judgment, decree or order and any court of law, tribunal, arbitration panel or other authority. Since criminal proceedings under the Code of Criminal Procedure, 1973 [CrPC] are conducted before the courts mentioned in Section 6, CrPC, it is clear that a Section 138 proceeding being conducted before a Magistrate would certainly be a proceeding in a court of law in respect of a transaction which relates P. Mohanraj vs M/S. Shah Brothers Ispat Pvt. Ltd. on 1 March, 2021 Indian Kanoon - http://indiankanoon.org/doc/97452657/ 8 to a debt owed by the corporate debtor. Let us now see as to whether the expression proceedings can be cut down to mean civil proceedings strictosensu by the use of rules of interpretation such as ejusdem generis and noscitur a sociis.“APPLICATION OF THE NOSCITUR A SOCIIS RULE OF INTERPRETATION” Held The Hon’ble Bench has declared that Continuation/ Institution of “Proceedings “under S 138/S 141 of the NI Act, shall be covered under the relief of the moratorium offered by S 14(1) (a) of the IBC. In other words, during the pendency of a CIRP process under IBC. Simultaneously, the judgment also held that this relief under S 14(1) (a) will not apply to the “natural persons “ in charge of the affairs of the Co (MD/Director /Manager, etc) but will only apply to the corporate entity or the artificial juristic person the natural persons manage. The proceedings under S 138/142 can continue against the natural persons. And in this current judgment, on the other hand, S 141 proceedings against the corporate entity have been delinked from the proceedings against the natural persons in charge of the Company. Proceedings against the former are eligible for the relief of moratorium per S 14 of IBC

but not the proceedings against the latter.Proceedings under Section 138 of the NI Act are not purely criminal in nature with the provision for incarceration and fine provided only to pressurise the accused debtor to repay the debt owed to the complainant. When all types of civil proceedings are suspended, allowing continuation of proceedings under Section 138 of the NI Act results in defeating the object of resolution process. Also, the resolution process and the resolution plan cater to the claims of all creditors since under Section 31 of the IB Code once a resolution plan is approved, it binds all the creditors. By allowing independent recovery process to the drawee complainant, the entire process of resolution stands diluted.

Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why P. Mohanraj vs M/S. Shah Brothers Ispat Pvt. Ltd. on 1 March, 2021 Indian Kanoon - http://indiankanoon.org/doc/97452657/ 24 Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor. These observations, when viewed in context, are correct. However, this case is distinguishable in that the difference between these provisions and Section 14 was not examined qua moratorium provisions as a whole in relation to corporate debtors vis-à-vis individuals/firms. Notwithstanding this, those persons who were responsible to the corporate debtor for the conduct of its business at the time of the commission of such offence, should continue to be liable for such an offence, vicariously or otherwise, regardless of the fact that the corporate debtors liability has ceased.

CONCLUSION

In conclusion, disagreeing with the Bombay High Court and the Calcutta High Court

judgments in Tayal Cotton Pvt. Ltd. v. State of Maharashtra, 2018 SCC OnLine Bom 2069 : (2019) 1 Mah LJ 312 and M/s MBL Infrastructure Ltd. v. Manik Chand Somani, CRR 3456/2018 (Calcutta High Court; decided on 16.04.2019), respectively, we hold that a Section 138/141 proceeding against a corporate debtor is covered by Section 14(1)(a) of the IBC. 79. Resultantly, the civil appeal is allowed and the judgment under appeal is set aside. However, the Section 138/141 proceedings in this case will continue both against the company as well as the appellants for the reason given by us in paragraph 77 above as well as the fact that the insolvency resolution process does not involve a new management taking over. We may also note that the moratorium period has come to an end in this case. P. Mohanraj vs M/S. Shah Brothers Ispat Pvt. Ltd. on 1 March, 2021 Indian Kanoon - http://indiankanoon.org/doc/97452657/ 65 Criminal Appeal arising out of SLP (Criminal) Diary No.32585 of 2019 1. Delay condoned. Leave granted. 2. Shri S. Nagamuthu, learned Senior Advocate appearing on behalf of the appellant, has made various submissions before us. Suffice it to state that his first submission is that as a moratorium is imposed against the corporate debtor w.e.f. 10.07.2017, the Section 138 complaint that was preferred on 19.09.2017 must be quashed. 3. On the facts of this case, three cheques for INR 25,00,000/- dated 31.05.2017, for INR 25,00,000/- dated 30.06.2017, and for INR 23,51,408/- dated 31.07.2017 were issued by the appellant in favour of the respondent. Before the cheques could be presented for payment, on 10.07.2017, the Adjudicating Authority admitted a petition by an operational creditor under Section 9 of the IBC and imposed a moratorium under Section 14. The three cheques were presented for payment, but were returned citing insufficient funds as the reason on 04.08.2017. The legal notice to initiate proceedings under Section 138 of the Negotiable Instruments Act was issued by the respondent on 12.08.2017. As no payment was forthcoming within the time specified, the respondent preferred a complaint against the corporate debtor alone on 19.09.2017. 4. The respondent did not dispute the aforesaid dates, only reiterating that the High Court was right in dismissing a quash petition filed by the appellant under Section 482 of the CrPC. 5. Since the complaint that has been filed in the present case is against the corporate debtor alone, without joining any of the persons in charge of and responsible for the conduct of the business of the corporate debtor, the complaint needs to be quashed, given our judgment in Civil Appeal No.10355

of 2018. The judgment under appeal, dated 02.04.2019, is therefore set aside and the appeal is allowed. Criminal Appeals arising out of SLP (Criminal) Nos.10587/2019, 10857/2019, 10550/2019, 10858/2019, 10860/2019, 10861/2019, 10446/2019. 1. Leave granted. 2. On the facts of these cases, all the complaints filed by different creditors of the same appellant under Section 138 read with Section 141 of the Negotiable Instruments Act were admittedly filed long before the Adjudicating Authority admitted a petition under Section 7 of the IBC and imposed moratorium on 19.03.2019. 3. Given our judgment in Civil Appeal No.10355 of 2018, the said moratorium order would not cover the appellant in these cases, who is not a corporate debtor, but a Director thereof. Thus, the impugned order issuing a proclamation under Section 82 CrPC cannot be faulted with on this ground. The appeals are therefore dismissed. Criminal Appeal arising out of SLP (Criminal) Nos.2246-2247 of 2020 P. Mohanraj vs M/S. Shah Brothers Ispat Pvt. Ltd. on 1 March, 2021 Indian Kanoon - http://indiankanoon.org/doc/97452657/ 66 1. Leave granted. 2. In this case, the two complaints dated 12.03. 2018 and 14.03.2018 under Section 138 read with Section 141 of the Negotiable Instruments Act were filed by the respondent against the corporate debtor along with persons in charge of and responsible for the conduct of business of the corporate debtor. On 14.02.2020, the Adjudicating Authority admitted a petition under Section 9 of the IBC against the corporate debtor and imposed a moratorium. The impugned interim order dated 20.02.2020 is for the issuance of non-bailable warrants against two of the accused individuals. 3. Given our judgment in Civil Appeal No.10355 of 2018, the moratorium provision not extending to persons other than the corporate debtor, this appeal also stands dismissed. Criminal Appeal arising out of SLP (Criminal) No.2496 of 2020 1. Leave granted. 2. In the present case, a complaint under Section 138 read with Section 141 of the Negotiable Instruments Act was filed by Respondent No.1 against the corporate debtor together with its Managing Director and Director on 15.05.2018. It is only thereafter that a petition under Section 9 of the IBC, filed by Respondent No.1, was admitted by the Adjudicating Authority and a moratorium was imposed on 30.10.2018. The impugned judgment dated 16.10.2019 held that a petition under Section 482, CrPC to quash the said proceeding would be rejected as Section 14 of the IBC did not apply to Section 138 proceedings. 3. The impugned judgment is set aside in view of our judgment in Civil Appeal No.10355 of 2018, and the

complaint is directed to be continued against the Managing Director and Director, respectively. Criminal Appeal arising out of SLP (Criminal) No.3500 of 2020 1. Leave granted. 2. The complaint in the present case was filed by the respondent on 28.07.2016. An application under Section 7, IBC was admitted by the Adjudicating Authority only on 20.02.2018 and moratorium imposed on the same date. The impugned judgment rejected a petition under Section 482 of the CrPC on the ground that Section 138 proceedings are not covered by Section 14 of the IBC. 3. The impugned judgment is set aside in view of our judgment in Civil Appeal No.10355 of 2018, and the complaint is directed to be continued against the appellant. Criminal

Appeal arising out of SLP (Criminal) No.5638-5651/2020, 5653-5668/2020 Leave granted. P. Mohanraj vs M/S. Shah Brothers Ispat Pvt. Ltd. on 1 March, 2021 Indian Kanoon - http://indiankanoon.org/doc/97452657/ In these appeals, the appellants have approached us directly from the learned Magistrates impugned orders. The learned Magistrate has held that Section 14 of the IBC would not cover proceedings under Section 138 of the Negotiable Instruments Act. As a result, warrants of attachment have been issued under Section 431 read with Section 421 CrPC against various accused persons, including the corporate debtor and persons who are since deceased. While setting aside the impugned judgments, given our judgment in Civil Appeal No.10355 of 2018, we remand these cases to the Magistrate to apply the law laid down by us in Civil Appeal No.10355 of 2018, and thereafter decide all other points that may arise in these cases in accordance with law. Writ Petition (Criminal) Nos.330/2020, 339/2020, Writ Petition (Civil) No.982/2020, Writ Petition (Criminal) Nos.297/2020, 342/2020, Writ Petition (Civil) No.1417/2020, 1439/2020, 18/2021, Writ Petition (Criminal) No.9/2021, 26/2021. 1. All these writ petitions have been filed under Article 32 of the Constitution of India by erstwhile Directors/persons in charge of and responsible for the conduct of the business of the corporate debtor. They are all premised upon the fact that Section 138 proceedings are covered by Section 14 of the IBC and hence, cannot continue against the corporate debtor and consequently, against the petitioners. 2. Given our judgment in Civil Appeal No.10355 of 2018, all these writ petitions have to be dismissed in view of the fact that such proceedings can continue against erstwhile Directors/persons in charge of and responsible for the conduct of the business of the corporate debtor.

CASE NO: 32

CENTRAL BANK OF INDIA VS RESOLUTION PROFESSIONAL OF THE SIRPUR PAPER MILLS LTD. & ORS.

- Sonu Gupta[212]
Naveena.N [213]

FACTS

It is an appeal which has been preferred by 'Central Bank of India', one of the 'Financial Creditor' against order dated 19th July 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad on the ground that the Resolution Plan approved by the

Adjudicating Authority is against the provisions of Regulation 38(1)(c) of 'The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations,

2016 (for short 'IBBI (IRPCP), Regulation') as the dissenting financial creditors have been provided with equal amount with those 'Financial Creditors' who has agreed with the Resolution Plan. The Appellate Tribunal in the case has observed the provisions of Regulation 38 of the

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016

This case basically talks about the Regulation 38(1)(b) and (c) of Insolvency and

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Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 20161 are inconsistent with the provisions of IBC and accordingly found to be void. The Hon'ble National Company Law Tribunal has additionally stated that any resolution plan which provides for the liquidation value to operational creditors or dissenting financial creditors without any other reason to discriminate between two set of creditors similarly placed such as financial creditors or operational creditors cannot be approved being illegal. Keeping the above in mind,

ISSUES

The issues were against the treatment of the differential Inter-se-Creditors. Learned counsel appearing on behalf of the Successful Resolution Applicant submits that the Successful Resolution Applicant has treated all the Financial Creditors equally at the same level and no discrimination has been made. It is further submitted that provisions have been made for upfront payment and 20 years' time granted for redemption of the preferential shares. Otherwise, no longer time has been suggested for payment of the dues of the creditors.

The issue was regarding the grant of liquidation value to any of the Creditor does not arise cannot be applied at the stage of 'Corporate Insolvency Resolution Process' while submitting the Resolution Plan, as Section 53 is applicable only at the stage of Liquidation.

The right to dissent has been provided under sub-section (4) of Section 30 of the Insolvency and Bankruptcy Code, 2016 (for short 'I&B Code'); a creditor who has dissented cannot be unsuited on the ground that he has dissented and eligible only for liquidation value. The question of grant of liquidation value to any of the Creditor does not arise cannot be applied at the stage of

'Corporate Insolvency Resolution Process' while submitting the Resolution Plan, as Section 53 is applicable only at the stage of Liquidation

Mandatory contents of the resolution plan.is sec 38 – (1) A resolution plan shall identify specific sources of funds that will be used to pay the –

insolvency resolution process costs and provide that the insolvency resolution process costs will be paid in priority to any other creditor;"

liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority: and

Liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.

The sub-clause (b) of Regulation 38(1) mandates making provision to pay liquidation value to the 'Operational Creditors' and sub-clause (c) of Regulation 38(1) which mandates making provision to pay liquidation value to the 'dissenting Financial Creditors' and to provide different amount for payment to the 'Financial Creditors' who voted in favour of such Resolution Plan, cannot be held to be valid. 7. Section 240 of I&B Code relates to power of Board to make regulations. Sub-section

(1) of Section 240 reads as follows:

Power to make regulations. Through sec 240(1) The Board may, by notification, make regulations consistent with this Code and the rules made thereunder, to carry out the provisions of this Code.

From the above-mentioned provisions of I&B Code it is clear that the Board may make regulation, but it should be consistent with the I&B Code and rules made therein (by Central Government) to carry out the provisions of the Code. Therefore, we hold that the provisions made by the Board cannot override the provisions of I&B Code nor it can be inconsistent with the Code. Clause (b) and (c) of Regulation 38(1) being inconsistent with the provisions of I&B Code, and the legislators having not made any discrimination between the same set of group such as 'Financial Creditor' or 'Operational Creditor',

Board by its Regulation cannot mandate that the Resolution Plan should provide liquidation value to the 'Operational Creditors' (clause (b) of regulation 38(1)) or liquidation value to the dissenting Financial Creditors (clause (c) of regulation 38(1)). Such regulation being against Section 240(1) cannot be taken into consideration and any Resolution

Plan which provides liquidation value to the 'Operational Creditor(s)' or liquidation value to the dissenting 'Financial Creditor(s)' in view of clause (b) and (c) of Regulation 38(1), without any other reason to discriminate between two set of creditors similarly situated such as 'Financial Creditors' or the 'Operational Creditors' cannot be approved being illegal.

HOLDING

In the present case, as the Successful Resolution Applicant has treated all the 'Financial Creditors' equally at the same level and made no discrimination, it cannot be interfered on the ground that it is in violation of Regulation 38(1)(c) of IBBI. Admittedly, the Central Bank of India is also a

Financial Creditor who is equally situated with other 'Financial Creditors' who are co-members of the Committee of Creditors. Therefore, the Central Bank of India cannot discriminate with those members who dissented with the Resolution Plan and on the ground that they have not agreed with the Central Bank of India. It has been clearly stated that the Board has not delegated with the power under I&B Code including Section 240 of I&B Code to decide as to what amount is to be paid to the 'Financial Creditor' or 'Operational Creditor' including the liquidation value, therefore, they should not pass any mandatory regulation forcing the Resolution Applicant(s) to discriminate between equals and also the provisions such as Section 53 of I&B Code, except for the purpose of finding out minimum amount to be noticed, as provided under Section 30(2)(b), cannot be relied upon at the stage of 'Corporate Insolvency Resolution Process', though it is open to the Board to issue guidelines as to how Section 53 is to be followed during the liquidation. And hence the appeal was dismissed with above-mentioned observations.

OBSERVATION OF THE JUDGEMENT

In the CIRP of Rave Scans Private Limited, the Supreme Court of India has, in the matter of Rahul Jain v. Rave Scans Pvt Ltd.1 allowed the appeal filed by the Resolution Applicant against the order of the National Company Law Appellate Tribunal ('NCLAT') whereby the NCLAT had modified the resolution plan which had been approved by the National Company Law Tribunal ('NCLT'), Delhi.

The matter was in relation to the Corporate Insolvency Resolution Process (CIRP) of Rave Scans Private Ltd. On October 17, 2018, the NCLT, Delhi had approved the resolution plan (passed by the Committee of Creditors by more than 75% vote) of the Resolution Applicant after rejecting Hero Fincorp Ltd's submission that the plan was discriminatory against it as against other secured financial creditors. The NCLT had found that the provision2 had provided for approval of resolution plan by the Committee of Creditors ('CoC') by at least 75%3 majority vote and the said requirement had been met.

Hero Fincorp Ltd., which was one of the secured financial creditors (and the dissenting creditor in the CoC), had appealed against the NCLT's approval of resolution plan before the NCLAT on the ground that the resolution plan had discriminated between the financial creditors as Hero Fincorp Ltd was provided with 32.34% of its admitted claim as against 45% of admitted claims given to other secured financial creditors.

The NCLAT, while relying on its own decisions in Central Bank of India v. Resolution

Professional of the Sirpur Paper Mills Ltd and Ors and Binani Industries Limited v. Bank of Baroada and Anr, had observed that it had held the unamended/old Regulation 38 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 as discriminatory and the same was substituted on October 5, 2018, whereby in sub-clause (c) of clause (1) of Regulation 38, the liquidation value payable to dissenting financial creditors had been deleted. The NCLAT further relied upon the judgment of the Supreme Court in Swiss Ribbons Private Limited v. Union of India whereby certain observations were made in the context of fair and equitable dealing of operational creditors' rights post

the amendment made in Regulation 38.

The NCLAT further held that the NCLT failed to notice that no Resolution Plan can be approved discriminating the dissenting Financial Creditor in terms with the amended Regulation 38 and also because the NCLAT had already declared the unamended/old Regulation 38(1)(c) as illegal. The NCLAT further held that the Resolution Plan in the instant case did not confirm the test of Section 30(2)(e) of the Code being discriminatory against the similarly situated 'Secured Creditors'. The

NCLAT further made an interesting observation that as per amended Section 30(2) (b) (ii) of the Code, 4 Resolution Applicant may treat the dissenting Financial Creditor but such treatment can be given in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of Section 53 of the Code, in the event of a liquidation of the Corporate Debtor.

The NCLAT held the Resolution Plan to be violative of Section 30(2) (e) of the Code and gave the Resolution Applicant an opportunity to provide similar treatment by providing 45% of admitted claim in place of 32.34% to Hero Fincorp Ltd.

In Appeal against the same by the Resolution Applicant, the Supreme Court observed:

Section 30 lays out the duties of the resolution professional and the various steps that she or he must take, as well as the considerations that are to weigh, in examining a resolution plan. The principle of fairness engrafted in the provision is that the plan should make a provision for repayment of debts of operational creditors having regard to the value, which shall not be less than what is prescribed by the Board (i.e., the Insolvency Board), repayable in the event of liquidation, spelt out in Section 53. Section 30(3) requires the resolution professional to present the resolution plan to the committee of creditors and Section 30(4) stipulates that approval shall be by a vote not less than 75% of the voting share of the financial creditors.

After noting the unamended/old Regulation 38 and the amended Regulation 38, the Supreme Court further held

In the present case, it is noticeable that no doubt, Hero was provided with 32.34% of its admitted claim as it has dissented with the plan. On the other hand, Tata Capital Financial Services Ltd. was provided with 75.63% of its admitted claim; other financial creditors (Indian Overseas Bank, Bank of Baroda and Punjab National Bank) were provided with 45% of their admitted claims. Given that the resolution process began well before the amended regulation came into force (in fact, January 2017) and the resolution plan was prepared and approved before that event, the wide observations of the NCLAT, requiring the appellant to match the pay-out (offered to other financial creditors) to Hero, was not justified. The court notices that the liquidation value of the corporate debtor was ascertained at Rs. 36 corers. Against the said amount, the appellant offered Rs. 54 crores. The plan was approved and, except the objections of the dissenting creditor (i.e., Hero), the plan has attained finality. Having regard to these factors and circumstances, it is held that the NCLAT's order and directions were not justified. They are hereby set aside; the order of the NCLT is hereby restored."

CASE NO: 33

M/S KUNTAL CONSTRUCTION PVT. LTD. V. BHARAT HOTELS LTD

- Tehleel Tahir Raina[214]

INTRODUCTION

M/s Kuntal Construction Pvt. Ltd. referred to as Operational Creditor[215] in this case, under section 61[216] of the Insolvency & Bankruptcy Code 2016, has filed this appeal challenging the impugned order of the National Company Law Tribunal, New Delhi Bench, referred to as Adjudicating Authority under section 9[217] of the I&B Code, for the

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[215] Section 5(20) of the IBC, 2016 defines *"operational creditor"* means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.
[216] Section 61 of the Insolvency and Bankruptcy Code, 2016 provides for appeals from the National Company Law Tribunal (NCLT) to the National Company Law Appellate Tribunal (NCLAT). However, section 61 does not mention, in express terms, any details regarding the mechanism for calculating the limitation period.
[217] Section 9 of IBC, 2016 states that application for initiation of corporate insolvency resolution process by operational creditor.

initiation of Corporate Insolvency Resolution Process against M/s Bharat Hotels Ltd. referred to as corporate debtor for the outstanding of amount of Rs. 14,89,966.

FACTS OF THE CASE

The Appellant is engaged in the business of civil works, carrying out structural work for all types of building and water & sewerage treatment plants renovation works besides other civil construction and has catered to a vast and diverse clientele all over India. The Corporate debtor approached the Operational Creditor for availing its services and work orders were issued for Rs. 47,50,000/- and Rs. 2,07,00,000/- respectively.

The averments were made by the operational creditor that it raised invoices and maintained a running account with the corporate debtor. Partial payments were received from the corporate debtor from time to time and post adjustment operational creditor is claiming that there is an outstanding liability of Rs. 14,89,967/- including retention amount of Rs. 6,74,247/- from the corporate debtor.

The Operational Creditor contended that the main issue arrived from the mutual settlement letter. Five certified bills are there, which are subject matter of settlement letter indicating Rs. 1,21,73,545. The Corporate Debtor has paid Rs. 18,67,489/- by four transections as per the terms and conditions of settlement letter but stopped from clearing the balance certified outstanding of Rs.14,89,964/- without any apparent reasons.

It is submitted that operational creditor issued demand notice under section 8[218] of I&B Code against the Corporate Debtor raising the outstanding dues of Rs. 14,89,967 including retention amount of Rs. 6,74,247 due from Corporate Debtor, the operational creditor filled the petition before the Adjudicating Authority for initiation of CIRP. It is further submitted on behalf of the operational creditor that after hearing both the parties the Adjudicating Authority passed the interim order after recording the submission stated in the reply of the corporate debtor to pay the retention amount.

[218]Section 8 of the IBC states that Insolvency resolution by operational creditor. An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

PROCEDURAL HISTORY

Mobilox Innovation Pvt. Ltd. vs. Kirusa Software Pvt. Ltd.[219], in this case, the Supreme Court elaborates and explains the definition of the word 'dispute' provided under the code. In this case, the Insolvency and Bankruptcy Code, 2016 was invoked in relation to operational debts owed to operational creditors, a question that was raised. There is a prior dispute in the case of Kuntal construction. The SC referred the case because the definition of dispute was well established in this case.

ISSUES

1: Whether full and final settlement of the claim was made or not?

2: Whether the Respondent was entitled to adjust the retention amount are disputed question of facts?

3: Whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence.

HOLDING

The Hon'ble Supreme Court stated that there is an existence of a prior dispute. The Corporate Debtor, prima facie has been able to corroborate the existence of a prior dispute which the petitioner has withheld. The factum of the retention amount being adjusted was also within the knowledge of the petitioner and therefore amounts to a prior dispute". The right to recover the retention money or any further outstanding liability being a contentious issue cannot be decided by this Bench in a Resolution petition. In view of pre-existing dispute resolution cannot be permitted. Prayer for initiating CIRP of the Respondent was rejected. The email correspondences clearly showed that the operational creditor was intimated about the retention money being adjusted on account of defects in the Work Order. It is clearly laid down by the Hon'ble Supreme Court that "IBC is not intended to be substitute to a recovery forum and whenever there is existence

[219]*Mobilox Innovations Private Ltd vsKirusa Software Private Ltd*, (2017)

of real dispute, the IBC provisions cannot be invoked".

The intent of Legislature is very vital for interpreting any law, which can be well deduced from the words of Section 8(2)(a) of I&B Code 'existence of a dispute if any'. It can be easily inferred that dispute shall not be limited to instances specified in the definition as provided under Section 5(6), as it has far arms, apart from pending Suit or Arbitration as provided Under Section 5(6) of IBC. The IBC is not a substitute for a recovery forum. Section 9 of the IBC makes it very clear for the Adjudicating Authority to admit the application "if no notice of dispute is received by the Operational Creditor and there is no record of the dispute in the information utility." Whereas, on the other hand, Section 9 also states that the Adjudicating Authority reject the application so filed "if the Operational Creditor has received a notice of a dispute from the Corporate Debtor. It was held that since there was a dispute existing prior to the issuance of Section 8 notice, the insolvency provisions cannot be invoked. The email communication of the Operational creditor dated 23.01.2016 states about operational creditor having knowledge of retention money being adjusted. Whether the corporate debtor was entitled to adjust the retention amount are disputed question of law and fact.

The court also clarified that no one could take recourse that they have not been communicated the Judgment. It should be the duty of the counsel to keep a track after the matter is reserved for pronouncement. This is not a valid ground for requesting the condonation of delay. There should be a sufficient cause for the delay, and no one can claim condonation as a matter of right. However, as we proceeded with the matter and heard both the parties in full length, the delay is impliedly condoned in this case. The court held that there is no merit so as to interfere in the impugned order passed by the adjudicating authority, so the appeal is dismissed.

OTHER CONSIDERATION

The Adjudicating Authority passed the interim order after recording the submission stated in the reply of the corporate debtor to pay the retention amount. This Interim order was not considered while delivering the final impugned order. This court has observed that there is an existence of a prior dispute. The Corporate Debtor, prima facie has been

able to corroborate the existence of a prior dispute which the petitioner has withheld. The factum of the retention amount being adjusted was also within the knowledge of the petitioner and therefore amounts to a prior dispute". The court also stated that the expression 'dispute' has been defined under Section 5(6) of I&B Code and includes the existence of the amount of debt. Further, under Section 8(1) of the I&B Code adequate room has been provided for the Adjudicating Authority to ascertain the existence of the dispute and under section 9(5)(d) of the I&B Code in case of notice/record of dispute, the Adjudicating Authority has the power to reject the application of the operational creditor. The Insolvency Resolution Process is not a civil recovery forum and if any alleged amount is payable to the Appellant the same needs to be tried in Arbitration/Civil Court as per the clauses of Work Order/Contract subject to limitation. The Judgment the Adjudicating Authority has considered the full and final settlement letter under which the operational creditor chose not to take recourse to Arbitration, if any claims/disputes were pending in terms of the Arbitration Clause stipulated in the Work Order, or any other legal proceedings.

CASE ANALYSIS

In this case, the operational creditor was informed about the retention money being adjusted due to errors in the work order, according to the email correspondences. The Hon'ble Supreme Court has categorically stated that "the IBC is not meant to be a substitute for a recovery forum, and the IBC rules cannot be applied whenever there is a real dispute." The insolvency provisions cannot be used since a disagreement existed previous to the issue of the Section 8 notice. The Operational Creditor's email message clearly mentions the Operational Creditor's awareness of the retention money being altered. The very important point cleared by the court in this case is, no one may claim that the Judgment was not communicated to them. After the matter has been reserved for pronouncement, it is the responsibility of the counsel to keep track of the situation. This is not a valid reason for requesting a delay be excused. There must be a good reason for the delay, and no one can expect forgiveness out of the blue.

CONCLUSION

It is clarified that the condonation of delay cannot be granted on the ground of non-communication of judgement. The insolvency provisions cannot be used if a dispute existed anterior to the issue of the section 8 notice. The operational creditor's email correspondence clearly shows that the operational creditor is aware of the retention money being altered. Nobody can claim that he or she has not been informed of the judgement. After the matter is reserved for pronouncement, it should be the duty of the lawyer to keep track of it. Unless there is a compelling reason, no one can claim a right to be excused.

CASE NO: 34

INDIA RESURGENCE ARC PRIVATE LIMITED VS. M/S. AMIT METALIKS LIMITED & ANR.

Sonu Gupta[220]

Naveena.N [221]

FACTS OF THE CASE

By way of this appeal under Section 62 of the Insolvency and Bankruptcy Code of 2016, the appellant had challenged the order of NCLAT where the appellate authority rejected the challenge to the order of NCLT Kolkata and approving the resolution plan of the corporate debtor. The appellant was the assignee of the rights, interest and title of the secured financial creditor of the corporate debtor. The assets of the Corporate Debtor were going to rest in a safer hand of the Resolution Professional, Mr. Raj Singhania who found out a Resolution Applicant, and who's Plans were being approved by the Committee of Creditors by the total of 95.35% voting share,

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even in these hard times of the COVID-19. All the provisions for the compulsory requirements were being compiled by the Resolution Applicant, and were being submitted by the Resolution Professionals. The resolution professionals makes provision for the payment of the debts of Operational Creditors, payment of the Insolvency Resolution Process, Management of the affairs of the Corporate Debtor, and also the provision related to the implementation and supervision of the Resolution Plan.

The appellant's foremost ground of the challenge to the resolution plan was that the CoC had wrongly approved the resolution plan which failed to consider the importance or priority and also the value of security interest of the creditors while determining the manner of distribution to each of the creditor. In the present case, the total admitted claim of the appellant was over around Rs.13.38 crores, whereas the Resolution Professional had offered the appellant an amount of about Rs. 2.026 crores which was very low while the valuation of the secured asset was more than Rs.12 crores.

ISSUE

The issue was regarding the approved resolution plan which failed the test of being 'feasible and viable' inasmuch as the value of the secured asset, on which security interest was created by the corporate debtor in its favor, was not taken into consideration. It was contended by the appellant that after the amendment to sub-section (4) of Section 30 of IBC, which came into effect from 16.08.2019, the CoC was to ensure that the manner of distribution takes into account the order of priority among the creditors as also the priority and value of the security interest of a secured and the resolution applicant and the CoC having failed to consider the existing security interest in its favour, approval of the Adjudicating Authority was not in accordance with law.

The primary reason for appellant's dissent to the resolution plan was that, as against total admitted claim of over INR 13.38 crores, the resolution applicant had offered the appellant a low amount of about INR 2.026 crores without even considering the valuation of the security held by the appellant, which admittedly had the valuation of more than INR 12 crores.

It was contended for the issue that after the amendment to sub-section (4) of Section 30 of IBC, which came into effect on and from 16th of august 2019 deal with the correct interpretation of

section 30(4) of the Code as amended is already given in the Essay Steel Case, wherein it was held that while exercising its discretion, the CoC may look into the considerations including different priorities and values of security interests only as a guideline in arriving at a business decision for acceptance or rejection of a resolution plan.

The COC failed to consider the priority and value of security interest of the creditors while deciding the manner of distribution to each creditor even though the legislature in its wisdom has amended Section 30(4) of the Code, requiring the CoC to take into account the order of priority amongst creditors as laid down in Section 53(1) of the Code, including the priority and value of the security interest of a secured creditor.

HOLDING

Taking into account the factual ground of the present case the bench depends upon numerous Supreme Court's Judgment and has observed that, the NCLAT was, right in observing that the amendment to sub-section (4) of Section 30 which only augmented in considerations for the Committee of Creditors while exercising in its commercial wisdom for taking an informed decision in regard to the viability and feasibility of the resolution plan, with the fairness of distribution amongst the similarly situated creditors; and also the business decision was taken in exercise of the commercial wisdom of Committee of Creditors which does not call for interference unless the creditors belonging to a class is being similarly situated are denied for the fair and an equitable treatment.

In this context it has been stated that it has not been the intention of the legislature that a security interest which is available to a dissenting financial creditor is over the assets of the corporate debtor and also gives him with some right above and over other financial creditors of the company so as to implement with the entire security interest and thereby bring about an unfair scenario for the creditors, by receiving extra or an excess amount, outside the receivable liquidation worth proposed for the same class of creditors."

So for the current case the Supreme Court held that, the amount which is to be paid to the different classes or sub-classes of the creditors is fundamentally the commercial wisdom of the Committee of Creditors; and the dissenting secured creditor like the appellant in this case cannot propose for

a higher amount to be paid to itself with the reference to the value of the security interest.

So consequently, the appeal was being dismissed on the merits that was found through the

arguments of applicability of the amended Section 30(4) of the IBC is entirely discretionary and not authoritative.

OTHER CONSIDERATIONS (SUCH AS DICTA) RATIO

The requirements of law, particularly in regard to the contentions sought to be advised on behalf of the appellant, are referred to the provisions contained in the Section 30 and 53 of IBC which is to be read along with the Regulation 38 of the CIRP Regulations, they would be provided that such liquidation value in the form of proportionate share in the equity of a special purpose vehicle proposed to be set up and with transfer of certain land parcels belonging to corporate debtor, is the consideration and approval by the Committee of Creditors, and its submission to the Adjudicating Authority for approval of sub-sections (2) and (4) of Section 30 of the Code, being relevant for the current purpose, could be usefully replicated, while omitting the other parts. Where section 53 is only being referred to in order so that a certain minimum figure to be paid to the different classes of operational and financial creditors. The contentions made for the extent of value receivable by the appellant is clearly given out in the resolution plan that is a sum of INR 2.026 crores which is in the same proportion and percentage as provided to the other secured financial creditors with reference to their respective admitted claims. Repeated reference on behalf of the appellant to the value of security at about INR 12 crores is wholly irrelevant. The limitation on the extent of the amount receivable by a dissenting financial creditor is given in Section 30(2) (b) of the Code and has been further exposited in the decisions above-mentioned. It has not been the intent of the legislature that a security interest available to a dissenting financial creditor over the assets of the corporate debtor gives him some right over and above other financial creditors so as to enforce the entire of the security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors. Thus, what amount is to be paid to different classes or subclasses of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.

CASE ANALYSIS

Through this judgment, the Court has once again repeated the supreme importance of commercial wisdom of the CoC and also it has limited the scope of the judicial interference in such business decisions. By clarifying the position with regards to the value of the security interest in regards to the entitlements and claims of the other stakeholders, the Court not only stressed on the flexibility given to the CoC under section 30(4) but it also emphasized the principle of the equal treatment of equally placed creditors. Preferential treatment on the basis of value of security interest would eventually lead to financial creditors opting to stand in opposition, therefore favoring with the liquidation and defeating with the purpose of the Code which objects for the insolvency resolution and not the death of the corporate debtor.

Taking into account the factual matrix of the present case the bench relied upon various SC Judgments and observed that,

The NCLAT was, therefore, right in observing that the amendment to sub-section (4) of Section 30 only amplified considerations for the Committee of Creditors while exercising its commercial wisdom so as to take an informed decision in regard to the viability and feasibility of resolution plan, with fairness of distribution amongst similarly situated creditors; and the business decision taken in exercise of the commercial wisdom of CoC does not call for interference unless creditors belonging to a class being similarly situated are denied fair and equitable treatment.

In this context, it was stated,

“It has not been the intent of the legislature that a security interest available to a dissenting financial creditor over the assets of the corporate debtor gives him some right over and above other financial creditors so as to enforce the entire of the security interest and thereby bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors.”

The Court held that, the amount to be paid to different classes or sub-classes of creditors is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.

Therefore, the appeal was dismissed as no merit was found viz. the argument of applicability of

amended Section 30(4) of IBC is entirely discretionary and not imperative.

Section 30(4) of IBC says:

The committee of creditors may approve a resolution plan by a vote of not less than 5[sixtysix] per cent. of voting share of the financial creditors, after considering its feasibility and viability, 6[the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor] and such other requirements as may be specified by the Board:

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A:

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section.]

[Provided also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

It needs hardly any emphasis that if the propositions suggested on behalf of the appellant were to be accepted, the result would be that rather than insolvency resolution and maximization of the value of assets of the corporate debtor, the processes would lead to more liquidations, with every secured financial creditor opting to stand on dissent. Such a result would be defeating the very

purpose envisaged by the Code; and cannot be countenanced. We may profitably refer to the relevant observations in this regard by this Court in Essay Steel as follows:-

Indeed, if an "equality for all" approach recognising the rights of different classes of creditors as part of an insolvency resolution process is adopted, secured financial creditors will, in many cases, be incentivised to vote for liquidation rather than resolution, as they would have better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved. This would defeat the entire objective of the Code which is to first ensure that resolution of distressed assets takes place and only if the same is not possible should liquidation follow.

Viewed from any angle, the submissions made on behalf of the appellant do not merit acceptance and are required to be rejected.

LIST OF CONTRIBUTORS

1. INDIA RESURGENCE ARC PVT. LTD. V. AMIT METALIKS LIMITED AND ANOTHER

By- Thota Raghavendra

2. LALIT KUMAR JAIN V. UNION OF INDIA AND ORS, TRANNSFER

By- Sri Varshini

3. ALOK KAUSHIK V. MRS BHUVANESHWARI RAMANATHAN & ORS

By- Tehleel Tahir Raina

4. **IDEAL SURGICALS V. NATIONAL COMPANY LAW TRIBUNAL**

By- Thota Raghavendra

5. BIKRAM CHATTERJI & ORS. V. UNION OF INDIA & ORS.

By- Thota Raghavendra

6. TATA STEEL BSL LTD V VARSHA W/O AJAY MAHESHWAR

By- Muskaan Jain and Mohammed Rizwanullah Farooqui

7. JIGNESH SHAH V. UNION OF INDIA

By- Tehleel Tahir Raina

8. SUNIL KUMAR AGGARWAL VS NEW OKHLA INDUSTRIAL DEVELOPMENT AUTHORITY & ORS

By- Muskaan Jain

9. GAURI SHANKAR JAIN VS PUNJAB NATIONAL BANK

By- Pari Agarwal

10. BRAND REALTY SERVICES LTD. VS SIR JOHN BAKERIES INDIAN PVT. LTD.

By- Pari Agarwal

11. KAUTILYA INDUSTRIES PRIVATE LIMITED V.

PARASRAMPURIYA SYNTHETIC LIMITED AND OTHERS

By- Pendyala Rajesh Prabhath

12. E. C. JOHN VS JITENDER KUMAR JAIN

By- Pari Agarwal

13. BABULAL VARDHARJI GURJARV. VEER GURJAR ALUMINUM INDUSTRIES PVT. LTD.

By - Thota Raghavendra and Pari Agarwal

14. COL. VINOD AWASTHY V. AMR INFRASTRUCTURE LIMITED

By- Pendyala Rajesh Prabhath

15. M. RAVINDRANATH REDDY V. G. KISHAN AND ORS

By- Pendyala Rajesh Prabhath

16. JAYPEE INFRATECH INSOLVENCY CASE

By- Sakshi Nathani and Muskaan Jain

17. GHANASHYAM MISHRA AND SONS PVT. LTD. V. EDELWEISS ASSET RECONSTRUCTION COMPANY LTD.

By- Sakshi Nathani

18. PHOENIX ARC PRIVATE LIMITED V. SPADE FINANCIAL SERVICES LIMITED & ORS.

By- Pendyala Rajesh Prabhath

19. VIJAY KUMAR JAIN V. STANDARD CHARTERED BANK & ORS

By- Sakshi Nathani

20 PANDURANG GANPATI CHAUGULE VS VISHWASRAO PATIL MURGUD SAHAKAR

By- Sakshi Nathani

21. SESH NATH SINGH VS BAIDYABATI SHEORAPHULI CO.

By- Muskaan Jain

22. COMMITTEE OF CREDITORS OF ESSAR STEEL INDIA LIMITED THROUGH AUTHORISED SIGNATORY V. SATISH KUMAR GUPTA & ORS

By- Sri Varshini and Tehleel Tahir Raina

23. MAHARASHTRA SEAMLESS LIMITED VS. PADMANABHAN VENKATESH & ORS

By- Sri Varshini

24. B. K. EDUCATIONAL SERVICES PVT LTD V. PARAG GUPTA & ASSOCIATES

By- Sri Varshini

25. VIJAY V IYER V. BHARTI AIRTEL LTD

By- Rachit Manuja and Atul Balasubramaniyam

26. K. KISHAN VS M/S VIJAY NIRMAN COMPANY PVT. LTD.

B**y-** Rachit Manuja and Pranav Deepankar

27. LALIT KUMAR JAIN VS UNION OF INDIA

By- Rachit Manuja and Pranav Deepankar

28. ARUN KUMAR JAGATRAMKA VS JINDAL STEEL AND POWER LTD.

By- Tarun Philip and Pranav Deepankar

29. KUNDAN CARE VS AMIT GUPTA

By- Tarun Philip

30. MOBILOX INNOVATIONS PRIVATE LIMITED VS KIRUSA SOFTWARE PRIVATE LIMITED

By- Atul Balasubramaniyam

31. P. MOHANRAJ & ORS. V. M/S SHAH BROTHERS ISPAT PVT LTD.

By- Mohammed Rizwanullah Farooqui

32. CENTRAL BANK OF INDIA VS RESOLUTION PROFESSIONAL OF THE SIRPUR PAPER MILLS LTD. & ORS.

By- Sonu Gupta and Naveena. N

33. M/S KUNTAL CONSTRUCTION PVT. LTD. V. BHARAT HOTELS LTD

By- Tehleel Tahir Raina

34. INDIA RESURGENCE ARC PRIVATE LIMITED VS. M/S. AMIT METALIKS LIMITED & ANR.

By- Sonu Gupta and Naveena. N