Price per issue: INR 440

Vol. 17
PART 1
March 2021

IBC REPORTER

Insolvency and Bankruptcy Code Reporter

INDIA'S LEADING MONTHLY JOURNAL FOR INSOLVENCY LAW PRACTITIONERS

Reporting judgments and orders of the NCLT, NCLAT, High Courts and the Supreme Court of India, pertaining to Corporate Insolvency under

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IBC REPORTER

Insolvency and Bankruptcy Code Reporter

A leading monthly law journal reporting judgments and orders of the National Company Law Tribunals (NCLTs), National Company Law Appellate Tribunal (NCLAT), High Courts and the Supreme Court of India, pertaining to Corporate Insolvency under Insolvency laws, along with Statutory Amendments, Government Orders, Circulars and Notifications, Legal Articles, and Legal Updates and Snippets.

Chief Editor

Mrs. R. Gupta

IBC Reporter is published in 12 monthly parts and 4 volumes yearly.

ANNUAL SUBSCRIPTION FOR 2021

INR 5,280/- (including delivery charges), payable in advance.

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IBC Reporter is published on the 7th of every month containing the judgments of preceding months.

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List of Cases Reported

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Briefs of Cases

Gujarat Urja Vikas Nigam Limited v. Amit Gupta and Others --------- ***SC 585***

- ***Citation - REED 2021 SC 03533***

The Apex Court has observed that the desirability of Parliament providing its legislative voice on the broader validity of ipso facto clauses. Lack of a legislative vision on the issue of validity of ipso facto clauses will lead to confusion and reduced commercial clarity. The Supreme Court considered the validity of ipso facto clauses. The Bench observed that NCLT has jurisdiction to adjudicate contractual disputes, which arise solely from or which relate to the insolvency of the Corporate Debtor, held that to keep the Corporate Debtor as a going concern, Power Purchase Agreement (PPA) cannot be terminated during its CIRP.

Companies Act, 2013-Section 25, Section 29

Insolvency and Bankruptcy Code, 2016-Section 3(27), Section 5(26), Section 10, Section 12, Section 14, Section 31, Section 25, Section 60, Section 60(5), Section 61, Section 238

Electricity Act, 2003-Section 61, Section 62, Section 86, Section 7, Section 10, Section 2(4), Section 38(2)(d), Section 40, Section 42, Section 63

Sick Industrial Companies Act, 1985-Section 22

A. Navinchandra Steels Private Limited v. SREI Equipment Finance Limited and Other ---------- ***SC 681***

- ***Citation - REED 2021 SC 03531***

It was observed that a petition either under Section 7 or Section 9 of the IBC is an independent proceeding which is unaffected by winding-up proceedings that may be filed by the same company. It was further observed, a discretionary jurisdiction under the fifth proviso to Section 434(1)(c) of the Companies Act, 2013 cannot prevail over the undoubted jurisdiction of the NCLT under the IBC once the parameters of Section 7 and other provisions of the IBC have been met. Only when a company in winding up is near corporate death that no transfer of the winding up proceeding would then take place to the NCLT to be tried as a proceeding under the IBC. Short of an irresistible conclusion that corporate death is inevitable, every effort should be made to resuscitate the corporate debtor in the larger public interest. In the present case, nothing can be said to have become irretrievable.

Companies Act, 1956-Section 391, Section 392, Section 393, Section 446, Section 529, Section 529A, Section 529(1)
Companies Act, 2013-Section 230(1), Section 279, Section 290, Section 434, Section 434(1)
Insolvency And Bankruptcy Code, 2016-Section 7, Section 9, Section 10, Section 11, Section 238
SARFAESI Act, 2002-Section 13(2), Section 13(4), Section 35, Section 37, Section 41
Sick Industrial Companies (Special Provisions) Act, 1985-Section 32
State Financial Corporations Act, 1951-Section 29, Section 31, Section 46B
Tea Act, 1953-Section 16G(1)

Kridhan Infrastructure Private Limited v. Venkatesan Sankaranarayan and Others ---------- ***SC 699***

- ***Citation - REED 2021 SC 03530***

Supreme Court observed that despite the grant of sufficient time, the appellant has not been able to comply with the terms of the Resolution Plan. Time is a crucial facet of the scheme under the IBC. To allow such proceedings to lapse into an indefinite delay will plainly defeat the object of the statute. As a consequence of this order, the management shall revert to the liquidator for taking steps in accordance with law.
Insolvency and Bankruptcy Code, 2016-Section 33-NCLAT Rules, 2016-Rule 11

Jaypee Kensington Boulevard Apartments Welfare Association and Others v. NBCC (India) Limited and Others ---------- ***SC 705***

- ***Citation - REED 2021 SC 03527***

Supreme Court ordered for Immediate release of the applicant (interim resolution professional) and the Investigating Officer (IO) was directed to not take any coercive action against the applicant in connection with the F.I.R until further orders. Further, IO was ordered to file a personal affidavit explaining the position for taking such drastic actions.
Insolvency and Bankruptcy Code, 2016-Section 233-Constitution of India, 1950-Article 32

Committee of Creditors of EMCO Limited v. Mrs. Mary Mody and Another ---------- ***NCLAT Del 709***

- ***Citation - REED 2021 NCLAT Del 03511***

Keeping in view the ratio of the Supreme Court in K. Sashidhar v. Indian Overseas Bank and Others, REED 2019 SC 02502that the commercial or business decision of the CoC is non-justiciable, and at best, the Adjudicating Authority may cause an enquiry on limited grounds, but does not have Jurisdiction to undertake scrutiny of the justness of the opinion expressed by the CoC when it has voted by a majority share.
Insolvency and Bankruptcy Code, 2016-Section 5(13), Section 5(15), Section 7, Section 9, Section 13(e), Section 20(2)(c), Section 25, Section 25(2)(c), Section 28, Section 28(1), Section 28(1)(a), Section 28(3), Section 28(4), Section 30(2)(a), Section 30(4), Section 31(1), Section 33, Section 53, Section 61, Section 188

IBBI (Insolvency Resolution Process for Corporate Person) Regulation, 2016-Regulation 31, Regulation 32, Regulation 33, Regulation 34

Vidharbha Industries Power Limited v. Axis Bank Limited ---***NCLAT Del 720***

- ***Citation - REED 2021 NCLAT Del 03509***

No proceedings pending before any other Forum can be used to stall a petition under Section 7 of the IBC as the admissibility of Application under Section 7 is solely governed by the provisions of the Code. It is relevant to notice that besides the Respondent (Financial Creditor) there are five Public Sector Banks who are lenders to the Appellant and with delay in admission of the Application, their fate is hanging in balance. The Adjudicating Authority, upon determination of default, is bound to admit the Application and commence CIRP initiated by the Financial Creditor by filing Application under Section 7 of IBC.

Insolvency and Bankruptcy Code, 2016-Section 7, Section 7(4), Section 7(5), Section 7(6)

Vijay Sitaram Dandnaik v. Punjab National Bank and AnotherNCLAT Del 727

- ***Citation - REED 2021 NCLAT Del 03512***

In the present case, all the 'Balance and Security Confirmation Letter' relied upon by the Respondents were beyond three years of the date of NPA and does not fall within the provisions of Section 18 of the Limitation Act, 1963. Accordingly, Appellate Authority observed that the Application under Section 7 was barred by limitation. Further, it was observed that there is nothing on record to suggest that the Appellant has acknowledged the debt 'within three years' and has agreed to pay the debt. As the scope and objective of the Code was not to give a fresh lease of life to time barred debts, the appeal was allowed.

Insolvency and Bankruptcy Code, 2016-Section 7, Section 9, Section 30(4), Section 61, Section 238, Section 238A
Limitation Act, 1963-Section 18, Article 62, Article 137
Companies Act, 1956-Section 433
Bankers' Book Evidence Act, 1891-Section 2A

India Resurgence ARC Private Limited v. Amit Metaliks Limited and Another ----------***NCLAT Del 738***

- ***Citation - REED 2021 NCLAT Del 03515***

Considerations including priority in scheme of distribution and the value of security are matters falling within the realm of the Committee of Creditors. Such considerations, being relevant only for purposes for arriving at a business decision in exercise of commercial wisdom of the CoC cannot be the subject of judicial review in appeal within the parameters of Section 61(3) of IBC. While it is true that prior to amendment of Section 30(4) the CoC was not required to consider the value of security interest obtaining in favour of a Secured Creditor while arriving at a decision in regard to feasibility and viability of a Resolution Plan, legislature brought in the amendment to amplify the scope of considerations which may be taken into consideration by the CoC while exercising their commercial wisdom in taking the business decision to approve or reject the Resolution Plan

Insolvency and Bankruptcy Code 2016-Section 3(10), Section 6(b), Section 30(4), Section 36(2), Section 53, Section 61(3)
IBBI (Insolvency Resolution process for Corporate Persons) Regulations, 2016-Regulation 39(4)

N. Subramanian v. Aruna Hotels Limited and Another ---------- SC 748

- ***Citation - REED 2021 SC 03547***

Supreme Court observed that it is a clear fact that from the date of the last *acknowledgement till the date on which the petition before the NCLT was filed, three years have not been elapsed. Therefore, at least to the extent of an acknowledgement made by the then Managing Director of the Corporate Debtor, the arrears of salary due for a period of at least 3 years prior to 30.09.2014 would certainly be within limitation, and therefore payable to the Appellant. This being the case, that the NCLT judgment is correct in admitting the Section 9 application by the Appellant. Since it is clear that there is an acknowledgement of liability, which shows that there is no "dispute" as to amounts owed to the Appellant. The impugned NCLAT judgment is accordingly set aside. Consequently, the NCLT judgment is restored to the file*.

Insolvency and Bankruptcy Code, 2016-Section 8, Section 9, Section 14

Ayan Mallick and Another v. State Bank of India and Others----------Cal 754

- ***Citation - REED 2021 Cal 03549***

The High Court observed that the section 14 of IBC has to be read in scope of operation of the resolution professional. Continuance of proceedings of the borrowing company falls within the purview of moratorium under section 14 of IBC. As such the petitioners cannot interfere in the functioning of the company. Immunity cannot be extended to directors in matter with the affairs of the company. Thus, the petitioners cannot claim immunity under section 14 of the IBC the doctrine of piercing of corporate veil has to be lifted as per the guidelines of the RBI. Hence the writ petition to be dismissed.

Insolvency and Bankruptcy Code, 2016-Section 14, Section 14(1), Section 14(1)(a), Section 14(1)(c), Section 14(3), Section 14(3)(b), Section 17, Section 17(1), Section 18, Section 20, Section 23, Section 25
RBI Guidelines dated 1 July 2015-Clause 2.4, Clause 2.5, Clause 3(a), Clause 3(b), Clause 3(c), Clause 4.1, Clause 4(1)(a), Clause 4(1)(c), Clause 4.2(i)

Arun Kumar Jagatramka v. Jindal Steel and Power Limited and Another---------- SC 760

- ***Citation - REED 2021 SC 03546***

The Supreme court observed that a promoter, who is barred under section 29A of IBC from bidding for his company undergoing insolvency proceeding, cannot also take control of the company back by using the provision of scheme of arrangement under Section 230 of the Companies Act, 2013.

Companies Act, 1956-Section 391
Companies Act, 2013-Section 230, Section 231, Section 232
Constitution of India 1949-Article 14, Article 19, Article 21, Article 32

IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016-Regulation 30A, Regulation 36A
Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016-Rule 8
Insolvency Bankruptcy Code, 2016-Section 7, Section 9, Section 10, Section 12A, Section 29A, Section 35, Section 36, Section 196, Section 238, Section 240
IBBI (Liquidation Process) Regulations, 2016-Regulation 32, Regulation 44

Alok Kaushik v. Mrs. Bhuvaneshwari Ramanathan and Others ------- ***SC 813***

- ***Citation - REED 2021 SC 03551***

The Supreme Court observed that the Adjudicating Authority is sufficiently empowered under Section 60(5)(c) of the IBC to make a determination of the amount which is payable to an expert valuer as an intrinsic part of the CIRP costs. Regulation 34 of the IRP Regulations 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.

IBBI (Insolvency Resolution Process for Corporate Persons)-Regulations, 2016-Regulation 16A(7), Regulation 27, Regulation 30A(2), Regulation 30A(2)(a), Regulation 30A(2)(b), Regulation 30A(7), Regulation 31, Regulation 32, Regulation 33, Regulation 34
Insolvency and Bankruptcy Code, 2016-Section 5(13), Section 12A, Section 14(1)(d), Section 25A, Section 60, Section 60(5)(c), Section 62, Section 12 (A), Section 217, Section 218, Section 220
Constitution of India, 1950-Article 142

Laxmi Pat Surana v. Union Bank of India and Another ---------- ***SC 825***

- ***Citation - REED 2021 SC 03571***

The Financial Creditor had extended a credit facility to a proprietorship firm, which failed to repay the amount. The credit was guaranteed by a company. The Financial Creditor filed an application under section 7 for CIRP of the Corporate Debtor (guarantor company). The application was contested on the ground that the principal borrower was not a corporate person. The Adjudicating Authority admitted the application as the Corporate Debtor was coextensively liable to repay the debt, and the NCLAT confirmed it. While dismissing the appeal, the Apex Court observed that the principal borrower may or may not be a corporate person, but if a corporate person extends guarantee for the loan transaction concerning a principal borrower not being a corporate person, it would still be covered within the meaning of expression 'corporate debtor' under section 3(8) of the Code. In law, the status of the guarantor, who is a corporate person, metamorphoses into Corporate Debtor the moment principal borrower, regardless of not being a corporate person commits default in payment of debt which has become due and payable.

Insolvency and Bankruptcy Code, 2016-Section 2, Section 2(f), Section 2(haa), Section 3(6), Section 3(7), Section 3(8), Section 3(10), Section 3(11), Section 3(12),

Section 3(37), Section 4(1), Section 5(7), Section 5(5A), Section 5(8), Section 7, Section 30(4), Section 60, Section 238A
Companies Act, 1956-Section 125, Section 127, Section 137
Limitation Act, 1963-Section 3, Section 5, Section 18, Article 62Article 137
Recovery of Debts Due to Banks and Financial Institutions Act, 1993-Section 19
Indian Contract Act, 1872-Section 128

Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund *(earlier known as Kotak India Venture Limited)* ***and Others*** ---------- ***SC 850***

- ***Citation - REED 2021 SC 03573***

Once an insolvency resolution application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 is admitted, any application made thereafter under Section 8 of the Arbitration Act becomes non-maintainable. Further, even in a case where the petition under Section 7 of IBC is yet to be admitted, and an application under Section 8 of the Arbitration Act is kept alongside for consideration, the NCLT has to first consider the application under the IBC and adjudicate the same. Only if the petition under IBC is rejected, the parties will be at their discretion to secure appointment of the Arbitral Tribunal in appropriate proceedings as contemplated in law and the need for the NCLT to pass any orders on such application under Section 8 of Arbitration Act would not arise. The Adjudicating Authority would necessarily have to determine the question relating to the existence of a default, which would in turn bring out the true nature of the dispute.

Arbitration and Conciliation Act, 1996-Section 8, Section 11, Section 11(3), Section 11(4)(a), Section 11(12)(a)
Insolvency and Bankruptcy Code, 2016-Section 3(6), Section 3(8), Section 3(11), Section 3(12), Section 5(7), Section 7, Section 7(1), Section 7(2), Section 7(3), Section 7(4), Section 7(5), Section 7(5)(a), Section 7(5)(b), Section 7(6), Section 61, Section 238
Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements), Regulations 2018-Regulation 5(2)

Kuldeep Verma, Resolution Professional K.S Oils Ltd. v. State Bank of India and Others ----------***NCLAT Del 871***

- ***Citation - REED 2021 NCLAT Del 03576***

The Appellate Authority observed that even after the lapse of 981 days and repeated compliance by the RP, the Adjudicating Authority has not yet considered initiation of liquidation as per section 33 of the IBC. The court further noted that whatever power vests in the Adjudicating Authority is always available to the Appellate Authority. It passed the order for liquidation.

Insolvency and Bankruptcy Code, 2016-Section 7, Section 12, Section 14, Section 21(1), Section 30(6), Section 31, Section 33, Section 33(1), Section 34(8), Section 35-50, Section 52, Section 53, Section 54, Section 56, Section 61-Companies Act, 2013-Section 230, Section 232
IBBI (Liquidation Process) Regulations, 2016-Regulation 2B, Regulation 32

Other Important Case Laws on Insolvency and Bankruptcy Laws in the month of March 2021

(available online for the online research module subscribers)

Supreme Court

1. P. Mohanraj and Others v. Shah Brothers Ispat Private Limited

   https://www.reedlaw.in/case-laws/p.-mohanraj-and-others-v.-shah-brothers-ispat-private-limited

2. In Re: Cognizance for extension of Limitation

   https://www.reedlaw.in/case-laws/in-re%3A-cognizance-for-extension-of-limitation

3. Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another

   https://www.reedlaw.in/case-laws/kalpraj-dharamshi-and-another-v.-kotak-investment-advisors-limited-and-another

4. Sesh Nath Singh and Another v. Baidyabati Sheoraphuli Co-operative Bank Limited and Another

   https://www.reedlaw.in/case-laws/sesh-nath-singh-and-another-v.-baidyabati-sheoraphuli-co-operative-bank-limited-and-another

5. Small Scale Industrial Manufactures Association (Regd.) v. Union of India and Others

   https://www.reedlaw.in/case-laws/small-scale-industrial-manufactures-association-(regd.)-v.-union-of-india-and-others

NCLAT

1. Ravi Sankar Deverakonda v. Committee of Creditors of Meenakshi Energy Limited

   https://www.reedlaw.in/case-laws/ravi-sankar-deverakonda-v.-committee-of-creditors-of-meenakshi-energy-limited

THE GAZETTE OF INDIA

EXTRAORDINARY

PART III, SECTION 4

PUBLISHED BY AUTHORITY

NEW DELHI, 4th MARCH, 2021

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

NOTIFICATION

New Delhi, the 4th March, 2021

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

No. IBBI/2020-21/GN/REG069.—In exercise of the powers conferred by clause (t) of subsection (1) of section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations further to amend the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, namely: -

1. (1) These Regulations may be called the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2021.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (hereinafter referred to as 'the principal regulations'), in regulation 31,

(i) for sub-regulation (2), the following sub-regulation shall be substituted, namely: -

"(2) The liquidator shall file the list of stakeholders with the Adjudicating Authority within forty-five days from the last date for receipt of the claims."

(ii) in sub-regulation (5), after clause (c), the following clause shall be inserted, namely:-

"(d) filed on the electronic platform of the Board for dissemination on its website:

Provided that this clause shall apply to every liquidation process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2021.";

(Dr. M. S. Sahoo)

Chairperson

[ADVT.- .....]

Note: The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 were published *vide* notification No. IBBI/2016-17/GN/REG005 dated 15th December, 2016 in the Gazette of India, Extraordinary, Part III, Section 4, *vide* No. 460 on 15th December, 2016 and were last amended by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Fourth Amendment) Regulations, 2020 *vide* notification No. IBBI/2020-21/GN/REG067 dated the 13th November, 2020 in the Gazette of India, Extraordinary, Part III, Section 4, *vide* No. 490 on 13th November, 2020.

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

9th March 2021

The Securities and Exchange Board of India (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018, [Regulations] provide for appointment of Insolvency Professionals (IPs) as Administrators for the purposes specified therein. A copy of the said Regulations is at 'Annexure A'. These Guidelines have been prepared in consultation with SEBI to facilitate appointment of IPs as Administrators.

Guidelines

2. The IBBI and the SEBI have mutually agreed upon to use a Panel of IPs for appointment as Administrators for effective implementation of the Regulations. The IBBI shall prepare a Panel of IPs keeping in view the requirements of SEBI and the Regulations and the SEBI shall appoint the IPs from the Panel as Administrators, as per its requirement in accordance with the Regulations. A Panel shall be valid for six months and a new Panel will replace the earlier Panel every six months. For example, the first panel under these Guidelines will be valid for appointments during April 2021 - September, 2021, the next panel will be valid for appointments during October 2021 - March, 2022 and so on.

3. An IP will be eligible to be included in the Panel of the Ips if-

a) there is no disciplinary proceeding, whether initiated by the IBBI or the IPA of which he is a member, pending against him;
b) he has not been convicted at any time in the last three years by a court of competent jurisdiction;
c) he expresses his interest to be included in the Panel for the relevant period; and
d) he undertakes to discharge the responsibility as an Administrator, as and when he may be appointed by the SEBI.
e) he has made the compliance under Regulation 7(2)(ca) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 for the year 2019-20.
f) he holds an Authorisation for Assignment (AFA), which is valid on the date of expression of interest.

4. The Panel shall have Zone wise list of IPs. An IP will be included in the Panel against the Zone where his registered office (address as registered with the IBBI) is located. For example, an IP located in the city of Surat (Gujarat) will be included in Ahmedabad Zone, which covers the State of Gujarat. The areas covered in different Zones are as under:

Zone	A	
New Delhi	1	Union territory of Delhi
Ahmedabad	1	State of Gujarat
	2	Union Territory of Dadra and Nagar Haveli
	3	Union Territory of Daman and Diu
Allahabad	1	State of Uttar Pradesh
	2	State of Uttarakhand
Amravati	1	State of Andhra Pradesh
Bengaluru	1	State of Karnataka
Chandigarh	1	State of Himachal Pradesh
	2	State of Punjab
	3	State of Haryana
	4	Union Territory of Chandigarh
	5	Union Territory of Jammu and Kashmir
	6	Union Territory of Ladakh
Cuttack	1	State of Chhattisgarh.
	2	State of Odisha
Chennai	1	State of Tamil Nadu
	2	Union Territory of Puducherry
Guwahati	1	State of Arunachal Pradesh
	2	State of Assam
	3	State of Manipur
	4	State of Mizoram
	5	State of Meghalaya
	6	State of Nagaland
	7	State of Sikkim
	8	State of Tripura
Hyderabad	1	State of Telangana
Indore	1	State of Madhya Pradesh
Jaipur	1	State of Rajasthan
Kochi	1	State of Kerala
	2	Union Territory of Lakshadweep
Kolkata	1	State of Bihar
	2	State of Jharkhand
	3	State of West Bengal
	4	Union Territory of Andaman and Nicobar
Mumbai	1	State of Goa
	2	State of Maharashtra

Expression of Interest

5. The IBBI shall invite expression of interest from IPs in 'Form A' to act as Administrator by sending an e-mail to IPs at their email addresses registered with it and hosting the guidelines on its website. The expression of interest must be received by the IBBI in Form A in the manner and date as specified. For example, the IBBI shall invite expression of interest by 9th March 2021 from IPs for inclusion in the Panel for April, 2021 – September, 2021. The interested IPs shall express their interest by 17th March 2021. The IBBI will send the Panel to SEBI by 27th March 2021. This process will be repeated every six months.

6. It must be explicitly understood that an IP, who is included in the Panel based on his expression of interest, must not:

a) withdraw his interest to act as an Administrator; or
b) decline to act as Administrator, if appointed by SEBI; or
c) surrender his registration to the IBBI or membership or AFA to his IPA; during the validity of the Panel; or

7. It must also be explicitly understood that:

a) an IP in the Panel will be appointed as Administrator, at the sole discretion of SEBI;
b) the submission of expression of interest in accordance with these guidelines, is an unconditional consent by the IP to act as Administrator in accordance with the Regulations; and
c) an IP who declines to act as Administrator, on being appointed by SEBI, shall not be included in the Panel for the next five years, without prejudice to any other action that may be taken by the IBBI.

Inclusion of IPs in the Panel

8. The IBB shall include the IPs, who have expressed their interest, in the Panel based on the three parameters the weights of which are as under:

Sl. No.	P	Weight (%)
1	Number of Ongoing Processes (A)	40
2	Number of Completed Processes as IRP / RP (B)	20
3	Number of Completed Processes as Liquidator / Bankruptcy Trustee (C)	40

A] Ongoing Processes (40% Weightage)

9. The IP, who has the lowest volume of ongoing processes, will get a score of 100. The IP who has the highest volume of ongoing processes will get a score of 0. The difference between the highest volume and the lowest volume will be equated to 100 and other IPs will get scores between 0 and 100 depending on volume of their ongoing processes.

Take an Example

IP	Volume of Ongoing Proces	Difference between the highest volume and the lowest volume of ongoing Processes of the IP	Formula	Score
1	20	100	100 /100	100
2	40	80	80 / 100 *	80
3	60	60	60 / 100 *	60
4	80	40	40 / 100 *	40
5	100	20	20 / 100 *	20
6	120	0	00/ 100 *	0

The volume of ongoing processes shall be arrived as under:

Sl. No.	Ongoing Processes	Volume
1	IRP of a Corporate Insolvency Resolution Process	05
2	RP of a Corporate Insolvency Resolution Process	10
3	IRP of a Fast Track Process	03
4	RP of a Fast Track Process	06
5	Liquidator of a Liquidation / Voluntary LiquidationProcess	25
6	RP of an Individual Insolvency Resolution Process	01
7	Bankruptcy Trustee of a Bankruptcy Process	25

B] Completed Processes as IRP / RP (20% Weightage)

10. The IP, who has the highest experience of resolution, will get a score of 100. The IP who has the least experience will get a score of 0. The difference between the highest and the lowest experience will be equated to 100 and other IPs will get scores between 0 and 100 depending on their experience.

Take an Example

IP	Volume of Completed Processes as IRP / RP	Difference between the lowest volume and highest volume of completed processes of The IP	Formula	Score
1	120	1	100 /100 *100	100
2	100	8	80 / 100 * 100	80
3	80	6	60 / 100 * 100	60
4	60	4	40 / 100 * 100	40
5	40	2	20 / 100 * 100	20
6	20	0	00/ 100 * 100	0

The volume of completed processes shall be arrived as under:

Sl. No.	Completed Processes	Volume
1	IRP of a Corporate Insolvency Resolution Process	05
2	RP of a Corporate Insolvency Resolution Process	10
3	IRP of a Fast Track Process	03
4	RP of a Fast Track Process	06
5	Individual Insolvency	01

C] Completed Assignments as Liquidator / Bankruptcy Trustee (40% weightage)

11. The IP, who has the highest experience of liquidation and bankruptcy, will get a score of 100. The IP, who has the least experience, will get a score of 0. The difference between the highest and the lowest experience will be equated to 100 and other IPs will get score between 0 and 100 depending on their experience.

Take an Example

IP	Volume of Completed Processes as Liquidator / Bankruptcy Trustee	Difference between the lowest volume and highest volume of completed processes	Formula	Score
1	120	100	100 /100 *100	100
2	100	80	80 / 100 * 100	80
3	80	60	60 / 100 * 100	60
4	60	40	40 / 100 * 100	40
5	40	20	20 / 100 * 100	20
6	20	0	00/ 100 * 100	0

The volume of completed processes shall be arrived as under:

Sl. No.	Completed Processes	Volume
1	Liquidation / Voluntary Liquidation	25
2	Bankruptcy Trustee	25

12. The score of an IP will be the sum total of the three scores as calculated at Paras 9 to 11 above. IPs will be placed in the list as per order of their scores. The IP with higher score will be placed above the IP securing lower score. Further. where two or more IPs get the same score, they will be placed in the Panel in order of the date of their registration with the IBBI. The IP registered earlier will be placed above the IP registered later.

13. The above process will be undertaken by a team of officers of the IBBI, as may be identified by a Whole-Time Member.

Review

14. These guidelines will be reviewed by the IBBI, in consultation with the SEBI, from time to time.

15. These Guidelines shall come into effect for appointments as Administrator with effect from 1st April 2021.

* * *

Form A – For Reference Only

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

1	Name of Insolvency Professional			
2	Registration Number			
3	a. No. and Date of Issue / Renewal of b. Date of Expiry of AFA c. Name of IPA which has issued AFA			
4	Address and contact details, as registered with the IBBI: a. E-mail b. Mobile c. Address			
5	Number of Processes as on date:		Ongoing	Completed
	a.	As IRP of CIR Process		
	b.	As RP of CIR Process		
	c.	As IRP of Fast Track Process		
	d.	As RP of Fast Track Process		
	e.	As Liquidator of Liquidation/ Voluntary Liquidation Process		
	f.	As RP of Individual Insolvency Resolution Process		
	g.	As Bankruptcy Trustee		
6	Whether IP has been convicted at any time in the last three years by a court of competent jurisdiction? (Give details)			
7	Whether IP is serving a suspension or debarment from serving as an IP? (Give details)			
8	Whether any disciplinary proceeding, whether initiated by the IBBI or the IPA, is pending against the IP? (Give details)			

Declaration: I hereby: -

a. confirm and declare that the information given herein above is true and correct to the best of my knowledge and belief and express my interest to act as Administrator, if appointed by SEBI.

b. undertake that if my name is included in the Panel, I shall abide by Guidelines for Appointment of Insolvency Professionals as Administrators under the Securities and Exchange Board of India (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018 [**Guidelines**].

c. undertake that submission of this form is my unconditional consent to act as Administrator at the sole discretion of SEBI during the validity period of the Panel under the Guidelines

(i.e. 1st April, 2021 – 30th September, 2021).

d. undertake that I shall not decline to act as Administrator, on being appointed by SEBI.

Signature of Insolvency Professional

Place :

Date :

THE GAZETTE OF INDIA
EXTRAORDINARY
PART III - Section 4
PUBLISHED BY AUTHORITY
New Delhi, Friday, March 15, 2021

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA NOTIFICATION

New Delhi, 15th March, 2021

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2021.

No. IBBI/2020-21/GN/REG070.—In exercise of the powers conferred by clause (t) of sub- section (1) of section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations further to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, namely: -

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2021.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as the principal regulations), after regulation 12, the following regulation shall be inserted, namely: -

"12A. Updation of claim.

A creditor shall update its claim as and when the claim is satisfied, partly or fully, from any source in any manner, after the insolvency commencement date."

3. In the principal regulations, in regulation 40B, after sub-regulation (1), the following sub- regulation shall be inserted, namely: -

"(1A) Where any activity stated in column (2) of table below is not complete by the date specified therein, the interim resolution professional or resolution professional, as the case may be, shall file Form CIRP 7 within three days of the said date, and continue to file Form CIRP 7, every 30 days, until the said activity remains incomplete-:

Sl.	Activity requiring filing of Form CIRP 7, if not completed by the specified date	Timeline for filing Form CIRP 7 for the first time	Timeline for subsequent filing of Form CIRP 7
(1)	(2)	(3)	(4)
1	Public announcement is not made by T+3rdday	Date specified in column (2) + 3 days	X+30th day, X+60th day, X+90th day, and so on, till the activity is completed.
2	Appointment of RP is not made by T+30th day		
3	Information memorandum is not issued within 51 days from the date of public announcement		
4	RFRP is not issued within 51 days from the date of issue of information memorandum		
5	CIRP is not completed by T+180th day		

T = Insolvency commencement date, and
X = Date of filing of Form CIRP 7 for the first time under column (3).

Provided that subsequent filing of Form CIRP 7 shall not be made until thirty days have lapsed from the filing of an earlier Form CIRP 7.
Clarification: Only one Form CIRP 7 shall be filed at any time whether one or more activity is not complete by the specified date.

Illustration

(a) If public announcement is not made by T+3rd day, Form CIRP 7 shall be filed by T+6th day. Thereafter, if public announcement is made on T+16th day, no further Form CIRP 7 will be filed. However, if public announcement is not made till T+33rd day, Form CIRP 7 shall be filed on T+36th day.

(b) If public announcement is not made by T+3rd day, Form CIRP 7 shall be filed by T+6th day. Thereafter, if public announcement is made on T+16th day, no further Form CIRP 7 will be filed. However, if RP is not appointed by T+30th day, though Form CIRP 7 becomes due by T+33rd day, it shall be filed on 30th day from the filing of first Form CIRP 7, that is, on T+36th day.

(c) If public announcement is not made by T+3rd day, Form CIRP 7 shall be filed by T+6th day. Thereafter, if either public announcement is not made till T+33rd day or RP is not appointed by T+30th day, Form CIRP 7 shall be filed on T+36th day."

4. In the Schedule to the principal regulations, Form C shall be substituted with the following:

"FORM C

SUBMISSION OF CLAIM BY FINANCIAL CREDITORS

(Under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)

[Date]

From

[*Name and address of the financial creditor, including address of its registered office and principal office*]

To

The Interim Resolution Professional / Resolution Professional

[Name of the Insolvency Resolution Professional / Resolution Professional] [Address as set out in public announcement]

Subject: **Submission of claim and proof of claim.**

Madam/Sir,

[Name of the financial creditor], hereby submits this claim in respect of the corporate insolvency resolution process of [name of corporate debtor]. The details for the same are set out below:

Relevant Particulars		
(1)	(2)	(3)
1.	Name of the financial creditor	
2.	Identification number of the financial creditor (If an incorporated body, provide identification number and proof of incorporation. If a partnership or individual provide identification records* of all the partners or the individual)	
3.	Address and email address of the financial creditor for correspondence	
4.	Details of claim, if it is made against corporate debtor as principal borrower: (i) Amount of claim (ii) Amount of claim covered by security interest, if any (Please provide details of security interest, the value of the security, and the date it was given)	

	(iii) Amount of claim covered by guarantee, if any (Please provide details of guarantee held, the value of the guarantee, and the date it was given) (iv) Name and address of the guarantor(s)	
5.	Details of claim, if it is made against corporate debtor as guarantor: (i) Amount of claim (ii) Amount of claim covered by security interest, if any (Please provide details of security interest, the value of the security, and the date it was given) (iii) Amount of claim covered by guarantee, if any (Please provide details of guarantee held, the value of the guarantee, and the date it was given) Name and address of the principal borrower	
6.	Details of claim, if it is made in respect of financial debt covered under clauses (h) and (i) of sub-section (8) of section 5 of the Code, extended by the creditor: (i) Amount of claim (ii) Name and address of the beneficiary	
7.	Details of how and when debt incurred	
8.	Details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim	
9.	Details of the bank account to which the amount of the claim or any part thereof can be transferred pursuant to a resolution plan	
(Signature of financial creditor or person authorised to act on its behalf) [Please enclose the authority if this is being submitted on behalf of the financial creditor]		
Name in BLOCK LETTERS		
Position with or in relation to creditor		
Address of person signing		

*****PAN, passport, AADHAAR Card or the identity card issued by the Election Commission of India.

DECLARATION

I, [Name of claimant], currently residing at [insert address], do hereby declare and state as follows: -

1. [Name of corporate debtor], the corporate debtor was, at the insolvency commencement date, being the……..day of……..20……., actually indebted to me for a sum of Rs. [insert amount of claim].
2. In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below: [Please list the documents relied on as evidence of claim].
3. The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed therefrom.
4. In respect of the said sum or any part thereof, neither I, nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:

   [Please state details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim].
5. I undertake to update my claim as and when the claim is satisfied, partly or fully, from any source in any manner, after the insolvency commencement date.
6. I am / I am not a related party of the corporate debtor, as defined under section 5 (24) of the Code.
7. I am eligible to join committee of creditors by virtue of proviso to section 21 (2) of the Code even though I am a related party of the corporate debtor.

Date:
Place: (Signature of Claimant)

VERIFICATION

I, [Name] the claimant hereinabove, do hereby verify that the contents of this proof of claim are true and correct to my knowledge and belief and no material fact has been concealed therefrom.

Verified at … on this …… day of ……., 20….

(Signature of claimant)

[Note: In the case of company or limited liability partnership, the declaration

and verification shall be made by the director/manager/secretary/designated partner and in the case of other entities, an officer authorised for the purpose by the entity.]"

Dr. M. S. SAHOO
Chairperson
[ADVT.-.....]

Note: The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 were published *vide* notification No. IBBI/2016- 17/GN/REG004, dated 30th November, 2016 in the Gazette of India, Extraordinary, Part III, Section 4, No. 432 on 30th November, 2016 and were last amended by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020 published *vide* notification No. IBBI/2020-21/GN/REG066, dated the 13th November, 2020 in the Gazette of India, Extraordinary, Part III, Section 4, No. 489 on 13th November, 2020.

* * *

Insolvency and Bankruptcy Board of India
7th Floor, Mayur Bhawan, Connaught Place, New Delhi-110001

CIRCULAR

No.: IBBI/CIRP/41/2021 **18th March, 2021**

To
All Registered Insolvency Professionals
All Recognised Insolvency Professional Entities
All Registered Insolvency Professional Agencies
(By mail to registered email addresses and on website of the IBBI)

Dear Madam / Sir,

Sub: Reporting of status of ongoing corporate insolvency resolution processes (CIRPs) through Form CIRP 7

Regulation 40A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ('CIRP regulations') provides a model timeline for carrying out various activities envisaged in a corporate insolvency resolution process (CIRP).

2. Regulation 40B of the CIRP regulations require an interim resolution professional (IRP) / resolution professional (RP) to file a set of forms (CIRP 1 to CIRP 6) within seven days of completion of specific activities to enable monitoring progress of CIRP. This implies that a Form (CIRP 1 to CIRP 6) would not be filed until the related activity is not completed for whatever reason. This makes monitoring of progress difficult. Regulation 40B of CIRP regulations require filing of Form CIRP 7 within three days of due date of completion of any activity stated in column (2) of the table below is delayed, and continue to file Form CIRP 7 every 30 days, until the said activity remains incomplete.

3. Subsequent filing of Form CIRP 7 shall not be made until thirty days have lapsed from the filing of an earlier Form CIRP 7. Only one Form shall be filed at any time whether one or more activity is not completed by the specified date.

4. The Form CIRP 7 shall be available for filing three days prior to the due date. The format for Form CIRP 7 is at Annexure A.

Sl. No.	Activity requiring filing of Form CIRP date	Timeline for filing Form CIRP 7 for the first time	Timeline for subsequent filing of Form CIRP
(1)	(2)	(3)	(4)
1	Public announcement is not made by T+3	Date specified in	X+30th day,
2	Appointment of RP is not made by	Date specified in column (2) + 3 days	X+30th day, X+60th day, X+90th day, and so on, till the activity is completed.
3	Information memorandum is not issued		
4	RFRP is not issued within 51 days from the date of issue of information		
5	CIRP is not completed by T+180th day		

5. This circular is applicable for all the processes ongoing as on the date of this circular.

T = Insolvency commencement date, and

X = Date of filing of Form CIRP 7 for the first time under column (3).

6. This is issued in exercise of the powers under clauses (aa), (g), (h), (k) of sub-section (1) of section 196 of the Insolvency and Bankruptcy Code, 2016, and regulation 40B of the CIRP Regulations.

Yours Faithfully,
Sd/-
(Dr. Kokila Jayaram)
Deputy General Manager
Email: kokila.jayaram@nic.in

Annexure-A

Form CIRP 7

(To be submitted to the Board by the IRP/RP online when there are delays in specified activities during a CIRP)

A. Details of IP

1. Name of IP
2. Registration Number

B. Corporate Debtor/ Assignment

1. Name of Corporate Debtor -
2. CIN/LLPIN of Corporate Debtor -
3. Insolvency Commencement Date –
4. Capacity (IRP/RP): IRP, IRP acting as RP under section 16(5), RP
5. Date of appointment of IRP/RP –
6. Name of bench of Adjudicating Authority -

C. Status of CIRP

1. Days from ICD –
2. Last CIRP form filed – CIRP 1/2/3/4/5
3. Why is Form - CIRP 7 being filed?
   a. Public announcement not made within 3 days of appointment of IRP.
   b. RP not appointed within 40 days of commencement of insolvency.
   c. IM not issued to CoC within 51 days of Public Announcement.
   d. RFRP not issued within 51 days of issue of IM.
   e. CIRP not completed within 180 days of commencement of insolvency.

D. Reasons for delay

1A. Reasons /Status
   a. Admission order received late
   b. Stay by any court/authority
   c. Any other: _____

1B. Reasons /Status
   a. Resolution not passed by CoC for appointment
   b. AA order not received
   c. Any Other: _____

1C. Reasons /Status
   a. Non -cooperation by suspended directors/KMPs etc.
   b. Stay by any court/authority
   c. Any Other: _____

1D. Reasons /Status

a. RFRP not approved by CoC
b. EOI not received
c. EOI received but no prospective resolution applicant
d. Stay by any court/authority
e. Any Other: _____

1E. Reasons /Status

a. CoC yet to approve for resolution/liquidation/withdrawal
b. CoC approved for Withdrawal but approval from AA not received
c. CoC approved for Resolution but approval from AA not received
d. CoC approved for Liquidation but approval from AA not received
e. Stay by any court/authority
f. Any Other: _____

2. Whether any form CIRP 7 for the same event was filed? (Y/N)

E. Remarks to be provided by IRP/RP

IRP/RP to provide brief details for reason for delay quoted under Section D above
100 words limit.

F. Relevant order:

Upload order of the AA/Court if the reason of the delay is its order.

Declaration

I, [Name of IP] having IP registration number [Registration no.], being appointed as an Interim Resolution Professional / Resolution Professional for the insolvency resolution process of [Name of CD], hereby declare that the contents of this form are true and correct to the best of my knowledge and belief, and nothing material has been concealed.

This form is being filed:

1. within the stipulated time.
2. being filed with payment of the applicable fee of Rs._____.

***To be digitally signed/e-signed by IP**

* IP Registration number:

Date:

Place:

Insolvency and Bankruptcy Board of India

7th Floor, Mayur Bhawan, Connaught Place,
New Delhi – 110001

CIRCULAR

No.IBBI/LIQ/40/2021 **4th March, 2021**

To

All Registered Insolvency Professionals

All Recognised Insolvency Professional Entities

All Registered Insolvency Professional Agencies

(By mail to registered email addresses and on website of the IBBI)

Dear Madam / Sir,

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

The Insolvency and Bankruptcy Code read with the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Liquidation Process Regulations) require that the liquidator shall verify every claim as on the liquidation commencement date, and thereupon prepare a list of stakeholders, with specified details. The list of stakeholders shall be filed with the Adjudicating Authority and the same may be modified, with its approval. The list of stakeholders shall, *inter-alia*, be displayed on the website, if any, of the corporate debtor.

2. Clause (d) of sub-regulation (5) of regulation 31 of the Liquidation Process Regulations inserted vide Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2021 requires that the liquidator shall file the list of stakeholders on the electronic platform of the Board for dissemination on its website. The purpose of this requirement is to improve transparency and enable stakeholders to ascertain the details of their claims at a central platform. This requirement is applicable to every liquidation process (a) ongoing as on the date of notification of Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2021, and (b) commencing on or after the said date.

3. In pursuance of the above, the Board has made available an electronic platform at www.ibbi.gov.in for filing of list of stakeholders as well as updating

it thereof. The platform permits multiple filings by the liquidator as and when the list of stakeholders is updated by him. The format of list of stakeholders, as finalised in consultation with the insolvency professional agencies, is placed as **Annexure**.

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

5. The insolvency professionals are further advised to use the aforesaid format for filing the list of stakeholders with the Adjudicating Authority under sub-regulation (2) of regulation 31 of the Liquidation Process Regulations.

6. This Circular is issued in exercise of the powers under clause (aa) of sub-section (1) of section 196 of the Insolvency and Bankruptcy Code, 2016.

Yours sincerely,

Sd/-

(A. Subrahmanyam)
Chief General Manager
Tel: 011-2436 2869
Email: subrahmanyam.a@ibbi.gov.in

Encl: As above.

Annexure

Filing under clause (d) of sub-regulation (5) of regulation 31 of the IBBI (Liquidation Process) Regulations, 2016

Name of the corporate debtor: ……; Date of commencement of liquidation: ……..; List of stakeholders as on: ……

(Amount in ₹)

Sl. No.	Category of stakeholders	Summary of claims received		Summary of claims admitted		Amount of contingent claims	Amount of claims rejected	Amount of claims under verification	Details in Annexure	Remarks, if any
		No. of claims	Amount	No. of claims	Amount					
1	Unpaid insolvency resolution process costs								NA	
2	Liquidation costs incurred till date								NA	
3	Secured financial creditors								1	
4	Unsecured financial creditors								2	
5	Operational creditors (Workmen)								3	
6	Operational creditors (Employees)								4	
7	Operational creditors (Government Dues)								5	
8	Operational creditors (other than Workmen, Employees and Government Dues)								6	
9	Other stakeholders, if any (other than financial creditors and operational creditors)								7	
Total										

Annexure-1

Name of the corporate debtor: ……; Date of commencement of liquidation: ……; List of stakeholders as on: ……

List of secured financial creditors

(Amount in ₹)

Sl. No.	Name of creditor	Identification No.	Details of claim received		Details of claim admitted							Amount of contingent claim	Amount of any mutual dues, that may be set off	Amount of claim rejected	Amount of claim under verification	Remarks, if any
			Date of receipt	Amount claimed	Amount of claim admitted	Nature of claim	Amount covered by security interest	Whether security interest relinquished? (Yes/No)	Details of Security Interest	Amount covered by guarantee	% share in total amount of claims admitted					

Annexure-2

Name of the corporate debtor: ……; Date of commencement of liquidation: ……; List of stakeholders as on: ……

List of unsecured financial creditors

(Amount in ₹)

Sl. No.	Name of creditor	Identification No.	Details of claim received		Details of claim admitted				Amount of contingent claim	Amount of any mutual dues, that may be set off	Amount of claim rejected	Amount of claim under verification	Remarks, if any
			Date of receipt	Amount claimed	Amount of claim admitted	Nature of claim	Amount covered by guarantee	% share in total amount of claims admitted					

Annexure-3

Name of the corporate debtor: ……; Date of commencement of liquidation: ……..; List of stakeholders as on: ……

List of operational creditors (Workmen)

(Amount in ₹)

Sl. No.	Name of authorised representative, if any	Name of workman	Identification No.	Details of claim received		Details of claim admitted				Amount of contingent claim	Amount of any mutual dues, that may be set off	Amount of claim rejected	Amount of claim under verification	Remarks, if any
				Date of receipt	Amount claimed	Total amount of claim admitted	Amount of claim for the period of twenty-four months preceding the liquidation commencement date	Nature of claim	% share in total amount of claims admitted					

Annexure-4

Name of the corporate debtor: .....; Date of commencement of liquidation: .....; List of stakeholders as on: .....

List of operational creditors (Employees)

(Amount in ₹)

Sl. No.	Name of authorised representative, if any	Name of employee	Identification No.	Details of claim received		Details of claim admitted				Amount of contingent claim	Amount of any mutual dues, that may be set off	Amount of claim rejected	Amount of claim under verification	Remarks, if any
				Date of receipt	Amount claimed	Total amount of claim admitted	Amount of claim for the period of twelve months preceding the liquidation commencement date	Nature of claim	% share in total amount of claims admitted					

Annexure-5

Name of the corporate debtor: ……; Date of commencement of liquidation: ……; List of stakeholders as on: ……

List of operational creditors (Government Dues)

(Amount in ₹)

Sl. No.	Details of Claimant			Details of claim received		Details of claim admitted					Amount of contingent claim	Amount of any mutual dues, that may be set off	Amount of claim rejected	Amount of claim under verification	Remarks, if any
	Department	Government	Identification No.	Date of receipt	Amount claimed	Amount of claim admitted	Nature of claim	Amount covered by lien or attachment pending disposal	Whether lien / attachment removed? (Yes/No)	% share in total amount of claims admitted					

Annexure-6

Name of the corporate debtor: ……; Date of commencement of liquidation: ……; List of stakeholders as on: ……

List of operational creditors (other than Workmen, Employees and Government Dues)

(Amount in ₹)

Sl. No.	Name of creditor	Identification No.	Details of claim received		Details of claim admitted						Amount of contingent claim	Amount of any mutual dues, that may be set off	Amount of claim rejected	Amount of claim under verification	Remarks, if any
			Date of receipt	Amount claimed	Amount of claim admitted	Nature of claim	Amount covered by lien or attachment pending disposal	Whether lien / attachment removed? (Yes/No)	Amount covered by guarantee	% share in total amount of claims admitted					

Annexure-7

Name of the corporate debtor: ……; Date of commencement of liquidation: ……; List of stakeholders as on: ……

List of other stakeholders, if any (other than financial creditors and operational creditors)

(Amount in ₹)

Sl. No.	Name of stakeholder	Category of stakeholders (preference shareholders / equity shareholders / partners / others)	Identification No.	Details of claim received		Details of claim admitted						Amount of contingent claim	Amount of any mutual dues, that may be set off	Amount of claim rejected	Amount of claim under verification	Remarks, if any
				Date of receipt	Amount claimed	Amount of claim admitted	Nature of claim	Amount covered by lien or attachment pending disposal	Whether lien / attachment removed? (Yes/No)	Amount covered by guarantee	% share in total amount of claims admitted					

REED 2021 SC 03533

Gujarat Urja Vikas Nigam Limited v. Amit Gupta and Others

SUPREME COURT OF INDIA

8 March 2021

The Apex Court has observed that the desirability of Parliament providing its legislative voice on the broader validity of ipso facto clauses. Lack of a legislative vision on the issue of validity of ipso facto clauses will lead to confusion and reduced commercial clarity. The Supreme Court considered the validity of ipso facto clauses. The Bench observed that NCLT has jurisdiction to adjudicate contractual disputes, which arise solely from or which relate to the insolvency of the Corporate Debtor, held that to keep the Corporate Debtor as a going concern, Power Purchase Agreement (PPA) cannot be terminated during its CIRP.

Case Analysis

Bench/ Coram	Dr. D.Y. Chandrachud, J. M.R. Shah, J.
Citation	REED 2021 SC 03533
Case Number	Civil Appeal No. 9241 of 2019
Subject	Corporate Insolvency
Keywords	contractual dispute, jurisdiction, residuary jurisdiction, ppa, termination, contractual dispute, genesis, electricity, npa, force majeure, notice, going concern, public interest, withdrawal, locus, moratorium, essential goods, services, sanctity of contracts, third party, operation of law, resolution plan, spirit, object, factual matrix, harmonious interpretation, intention of the legislature.
Legislation Cited	Companies Act, 2013 Section 25, Section 29. Insolvency and Bankruptcy Code, 2016 Section 3(27), Section 5(26), Section 10, Section 12, Section 14, Section 31, Section 25, Section 60, Section 60(5), Section 61, Section 238. Electricity Act, 2003

Section 61, Section 62, Section 86, Section 7, Section 10, Section 2(4), Section 38(2)(d), Section 40, Section 42, Section 63

Sick Industrial Companies Act, 1985
Section 22

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ArcelorMittal India Private Limited v. Satish Kumar Gupta
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[2011] 3 W.L.R. 521 : [2011] Bus LR 1266 : [2012] 1 AC 383

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(1985) 2 SCC 77

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Northern Securities Company v. United States
1904 SCC OnLine US SC 63 : 24 S.Ct. 436

P. Mohanraj v. Shah Brothers Ispat Private Limited
REED 2021 SC 03526

Rai Sahib Ram Jawaya Kapur v. State of Punjab
(1955) 2 SCR 225

Remdeo Chauhan v. Bani Kant Das
(2010) 14 SCC 209

Renu Sagar Power Co. Ltd. v. General Electric Company
(1984) 4 SCC 679

S. Sukumar v. The Secretary, Institute of Chartered Accountants of India
(2018) 14 SCC 360

Sudharshan Chits (I) Ltd. v. O Sukumaran Pillar
(1984) 4 SCC 657

Swiss Ribbons Private Limited v. Union of India
REED 2019 SC 01504

Thampanoor Ravi v. Charupara Ravi
(1999) 8 SCC 74

Union of India v. R. Gandhi, President, Madras Bar Association
(2010) 11 SCC 1

REED 2021 SC 03533

SUPREME COURT OF INDIA

Bench / Coram:

Dr. Dhananjaya Y. Chandrachud, J.
M. R. Shah, J.

Gujarat Urja Vikas Nigam Limited—*Appellant*

Versus

Mr. Amit Gupta and Others—*Respondent*

Civil Appeal No. 9241 of 2019

8 March 2021

JUDGMENT

Dr. Dhananjaya Y. Chandrachud, J.—This judgment has been divided into sections to facilitate analysis. They are:

A The appeal

B The genesis of the PPA

C Initiation of CIRP

D Termination of the PPA

E Proceedings before NCLT and NCLAT

F Proceedings by the Successful Resolution Applicant

G Submissions of counsel

G. 1 Submissions on behalf of the appellant

G. 2 Submissions on behalf of the respondents

H Issues arising from the dispute

I Jurisdiction of the NCLT/NCLAT over contractual disputes

I.1 Section 60(5)(c): “arising out of” and “in relation to”

I.2 Jurisdiction of NCLT and GERC

I.3 Residuary jurisdiction of the NCLT under Section 60(5)(c)

PART A

The appeal

1. By its judgment dated 29 August 2019, the National Company Law Tribunal[1] stayed the termination by the appellant of its Power Purchase Agreement[2] with Aston field Solar (Gujarat) Private Limited[3]. The order of the NCLT was passed in applications[4] moved by the Resolution Professional of the Corporate Debtor[5] and Exim Bank[6] under Section 60(5) of the Insolvency and Bankruptcy Code, 2016[7]. On 15 October 2019, the NCLAT dismissed the appeal by the appellant[8] under Section 61 of the IBC. The decision by the NCLAT is called into question.

2. The appellant assails the order dated 15 October 2019 of the NCLAT on, inter alia, two broad grounds: first, that the NCLT and NCLAT do not possess jurisdiction under the IBC to adjudicate on a contractual dispute between the appellant and the Corporate Debtor; and second, in any event, the termination of the PPA was validly made under Article 9.2.1(e) and Article 9.3.1 of the PPA.

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1. "NCLT" or "Adjudicating Authority"
2. "PPA"
3. "third respondent" or "Corporate Debtor"
4. CA No. 701/2019 (first respondent); CA No. 700/2019 (second respondent)
5. "first respondent" or "RP"
6. "second respondent"
7. "IBC"
8. "appellant" or "GUVNL"

PART B

The genesis of the PPA

3. The narrative of this case begins with the Government of Gujarat notifying the Solar Power Policy, 2009[1] on 6 January 2009, for development of Solar Power projects in the state. The appellant, a Government of Gujarat undertaking, is a successor to the Gujarat Electricity Board, and is also the holding company of all the State Power Utilities in Gujarat.

4. On 1 August 2009, the Government of Gujarat allocated a 25-megawatt capacity to the Corporate Debtor for developing and setting up a solar photovoltaic based power project in the State of Gujarat. The Corporate Debtor expressed its desire to setup a 'Solar Photovoltaic Grid Interactive Power Plant'[2] of 10-megawatt capacity and exercised its option for sale of the entire electrical energy produced from the plant to the appellant for commercial purposes.

5. In exercise of its powers under Sections 61(h), 62 and 86 of the Electricity Act, 2003[3], the Gujarat Electricity Regulatory Commission[4] published a draft tariff order for purchase of solar energy, inviting comments and suggestions from members of the public and stakeholders. Public hearings were held by the State Commission on the price at which power could be procured.

6. After the process of public hearings and consultations, a Tariff Order dated 29 January 2010[5] was issued by the State Commission for procurement of power by the appellant from power producers, under Section 86(1)(a) of Electricity Act. The tariff was determined on the basis of the then prevailing capital and financing costs, and debt equity ratio. It was envisaged that the PPA will be for 25 years, with higher tariffs in the first 12-15 years, and a scaled-down tariff for the remaining years. The tariff was to be applicable to solar projects commissioned within the control period of the First Tariff Order, *i.e.*, from 29 January 2010 to 28 January 2012.

7. The appellant filed a petition before the State Commission on 28 May 2013, seeking initiation of proceedings for re-determination of the capital cost and tariff fixed under the First Tariff Order. This petition was filed on the basis that subsequent incentives given to power producers on 27 February 2010 had brought down their cost of capital and, as a consequence, the tariff fixed under the First Tariff Order should be revised. This petition was dismissed by the State Commission on 8 August 2013. An appeal against the order was dismissed by

1. "Policy"
2. "Plant"
3. "Electricity Act"
4. "State Commission" or "GERC"
5. "First Tariff Order"

the Appellate Tribunal for Electricity[1] on 22 August 2014. An appeal[2] against APTEL's decision is pending before this Court, with notice having been issued on 28 November 2014.

8. The appellant and the Corporate Debtor entered into a PPA on 30 April 2010, in accordance with which the appellant has to purchase all the power generated by the Corporate Debtor. The PPA was amended by two Supplementary Agreements dated 7 August 2010 and 13 April 2011, due to an increase in the capacity of the Plant and a change in its location.

9. Article 9.1 of the PPA provides that it would remain in force for 25 years, from the 'Commercial Operation Date' which, in accordance with Article 1.1 is "the date on which the Solar Photovoltaic Grid Interactive power plant is available for commercial operation (certified by GEDA) and such date as specified in a written notice given at least ten days in advance by the [Corporate Debtor] to GUVNL".

10. Article 5.2 of the PPA stipulates that in case the commissioning of the Plant is delayed beyond 31 December 2011, the appellant shall pay the tariff as determined by the State Commission for Solar Projects effective on the date of commissioning of the Plant or the tariff provided under the clause, whichever is lower. Article 5.2 provides that Rs 15 per unit is payable for the first 12 years and Rs 5 per unit is payable from the 13th to the 25th year.

11. While the Corporate Debtor was in the process of commissioning the Plant, the State Commission, in exercise of its powers under Sections 62 and 86 of the Electricity Act, issued the Tariff Order dated 27 January 2012[3] for procurement of power from solar energy developers by distribution licensees in the State of Gujarat. The tariff was to be applicable to solar projects commissioned within the control period of the Tariff Order, *i.e.*, from 29 January 2012 to 31 March 2015.

12. Having signed the financing documents and attained financial closure with the second respondent and Power Finance Corporation in terms of the PPA, and established the Plant as defined in it, the Corporate Debtor commissioned 1.296 MW on 11 December 2012 and 10.212 MW on 20 December 2012. Accordingly, the PPA was to remain in force until December 2037.

13. Since it was commissioned within the applicable period of the Second Tariff Order, the tariff applicable was Rs 9.98 per unit for first 12 years and Rs 7 per unit for next 13 years.

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1. "APTEL"
2. Civil Appeal No. 10301 of 2014
3. "Second Tariff Order"

PART C

Initiation of CIRP

14. The initial years of the operation alization of the PPA appear to have been relatively calm. The first major issue arose between July to December 2015. During this period, there was heavy rainfall and floods in the State of Gujarat, due to which the Plant was shut down for two months. The Plant was severely damaged due to the floods, and the generation of electricity was temporarily paused. By December 2015, normalcy was restored in the generation of electricity and the Plant was generating electricity at 70% of its total generating capacity.

15. During June and July 2017, Gujarat was again affected by floods due to heavy rainfall. The Plant was severely damaged due to the floods. Resultantly, it was only able to operate at 10-15% of its original capacity.

16. Due to the financial stress caused by the disruptions and damage, for which insurance claims remained pending, the Corporate Debtor was unable to fully service its debt to the Financing Parties (the second respondent and Power Finance Corporation), who proposed to declare the Corporate Debtor a nonperforming asset ("NPA").

17. On 15 February 2018, in accordance with Article 8.1 of the PPA, the Corporate Debtor intimated the appellant regarding the impact of the rainfall and floods on the Plant, and the measures adopted by it in this regard. The Corporate Debtor requested the appellant to treat the letter as a formal communication regarding cause for failure in the performance of the Corporate Debtor's obligations under the PPA, and to confirm that this event may be treated as a 'Force Majeure Event' in accordance with Article 8.1.

18. On 4 May 2018, the second respondent declared the Corporate Debtor to be an NPA. On 20 November 2018, the NCLT admitted a petition[1] filed by the Corporate Debtor under Section 10 of the IBC. NCLT commenced the Corporate Insolvency Resolution Process[2] in respect of the Corporate Debtor, issued an order of moratorium and the first respondent was appointed as the Interim Resolution Professional[3].

19. The second respondent and Power Finance Corporation Limited, filed an appeal[4] challenging the order dated 20 November 2018. The appeal was dismissed by the NCLAT on 4 December 2018, holding that the right of the Corporate Debtor's shareholders to vote on the initiation of the CIRP under

1. CIRP petition, C.P. (I.B.) No. 940(ND)/2018
2. "CIRP"
3. "IRP"
4. Company Appeal (Insolvency) No. 754 of 2018

Section 10 of the IBC was not curtailed by the Deed of Pledge of Securities dated 28 March 2013 entered into between the Corporate Debtor, the second respondent and Power Finance Corporation Limited. The first respondent was confirmed as the RP by the NCLT on 1 February 2019.

PART D

Termination of the PPA

20. The appellant issued two notices of default to the Corporate Debtor on 1 May 2019, which were received by the first respondent on 8 May 2019:

(i) The basis of the First Notice is that under Article 9.2.1(e) of the PPA, the Corporate Debtor undergoing CIRP under the IBC amounts to an 'event of default'. The appellant called upon the Corporate Debtor to remedy this default within 30 days from the date of receipt of the said notice, failing which the appellant stated that it shall terminate the PPA by issuing a termination notice; and

(ii) The basis of the Second Notice is that under Article 9.2.1(a) of the PPA, there was a default in the operation and maintenance of the Plant. Once again, the appellant called upon the Corporate Debtor to remedy the O&M default within 90 days from the receipt of the notice, failing which the appellant stated that it shall terminate the PPA by issuing a termination notice.

21. The first respondent issued his replies to both the notices on 10 May 2019. The replies are summarized below:

(i) The reply to the First Notice states that the Corporate Debtor's PPA with the appellant is its only PPA, and hence they are heavily dependent on it for reaching a resolution under the IBC. In case the appellant terminates the PPA, prospective resolution applicants[1] who had submitted their expression of interest for the Corporate Debtor might not submit a resolution plan, which would eventually lead to liquidation of the Corporate Debtor, defeating the main object of the IBC; and

(ii) The reply to the Second Notice states that since the Corporate Debtor is undergoing CIRP under the IBC, the operations at the Plant were severely affected due to *force majeure* events in terms of the PPA. Thus, the conditions of the PPA could not be said to have been breached.

22. On 21 May 2019, a meeting was scheduled between the first respondent and the General Manager (IPP) of the appellant. During this meeting, the first respondent emphasized that if the PPA was to be terminated, revival of the Corporate Debtor will be at stake, since prospective resolution applicants may

1. "PRAs"

not submit resolution plans or may withdraw the resolution plans, if submitted, citing termination of the PPA. Declining to accede to this position, the appellant made it clear that in accordance with a legal opinion obtained by them, they will be terminating the PPA under Articles 9.2.1(e) and 9.3.1 under the First Notice, since the Corporate Debtor is under CIRP. However, the appellant confirmed that the O&M default stood cured, and hence it would not act upon the Second Notice. It may also be noted at this stage that the appellant has not pressed the issue of the O&M default either before this Court or before the NCLAT/NCLT.

PART E

Proceedings before NCLT and NCLAT

23. In May 2019, the first and second respondents filed applications under Section 60(5) of the IBC before the NCLT in regard to the Notices issued by the appellant to the Corporate Debtor, and sought an injunction restraining the appellant from terminating the PPA. By an interim order dated 31 May 2019, NCLT restrained the appellant from terminating the PPA till the next date of hearing.

24. While the interim order was in operation, the appellant wrote to the first respondent on 7 June 2019, stating that the notice period for curing the default had expired. The appellant claimed that Corporate Debtor had failed to cure the default, as a result of which the appellant was entitled to issue the final termination notice under Article 9.3.1 of the PPA. However, since the NCLT had provided an interim protection to the Corporate Debtor till the next date of hearing (12 June 2019), the appellant stated that it was not issuing the final termination notice at the present.

25. On 29 August 2019, the NCLT issued its final order through which it allowed the applications filed by the first and second respondents, thereby restraining the appellant from terminating the PPA and setting aside the First Notice. The NCLT's reasoning is premised on the following:

(i) The clauses of the PPA cannot be placed on a higher pedestal than the provisions of the IBC, in the context of drawing a timeline for completion of the CIRP. The fact that the CIRP has not concluded within 30 days from the receipt of the notice of default cannot be construed as an event of default since the time limit for the CIRP under the IBC is 330 days; and

(ii) The PPA is an 'instrument' within the meaning of Section 238 of the IBC. The clauses of the PPA are inconsistent with the provisions of the IBC, and stand overridden.

However, in paragraph 35 of its order, the NCLT held that the appellant could terminate the PPA, in the event that liquidation proceedings are initiated against the Corporate Debtor. Paragraph 35 reads thus:

"35. It is however, made clear that if due to any reason, the Corporate Debtor goes into liquidation, the Respondent Company will be at liberty to terminate the Power Purchase Agreement."

26. The NCLAT by its judgment dated 15 October 2019 dismissed the appeal against the NCLT's order. The NCLAT noted that the appellant attempted to terminate the PPA on the sole ground that the CIRP has been initiated for the Corporate Debtor. It observed that during the CIRP, the first respondent has to maintain the Corporate Debtor as a 'going concern' and the termination of its sole PPA, under which it supplied electricity only to the appellant, would render the Corporate Debtor defunct. Hence, the NCLAT held that the appellant could not terminate the PPA solely on the ground of the initiation of CIRP of the Corporate Debtor, which was supplying power to the appellant during the period of the CIRP. Further, it restrained the appellant from terminating the PPA even in the event that the Corporate Debtor underwent liquidation, by setting aside the observations made by the NCLT in paragraph 35 of the order dated 29 August 2019.

27. The NCLAT thereafter directed the appellant to pay the dues for power supplied by the Corporate Debtor during the CIRP period. On 12 June 2020, the appellant, as an interim measure but without prejudice to its rights, agreed to release an ad-hoc payment of Rs 50 lakhs to the Corporate Debtor. However, the appellant informed the first respondent that this payment to the Corporate Debtor is conditional, and the Corporate Debtor must submit an undertaking on stamp paper stating that the amount released by the appellant will be refunded to them with interest, in case this Court allows the present appeal. The first respondent furnished the undertaking sought on 18 June 2020, following which the appellant released an ad-hoc payment of Rs 50 lakhs to the Corporate Debtor on 1 July 2020. Since then, the appellant has paid a further amount of Rs 1.07 crores to the Corporate Debtor, against a similar written undertaking given by first respondent dated 27 January 2021.

PART F

Proceedings by the Successful Resolution Applicant

28. During the course of these hearings, the court has been informed of parallel proceedings initiated against the respondents by M/s Kundan Care Products Limited[1], whose Resolution Plan in relation to the Corporate Debtor was approved by 99.28% of voting shares of the Committee of Creditors[2].

1. "Successful Resolution Applicant.
2. "CoC"

29. An application[1] under Section 31 of the IBC was filed by the first respondent on 15 November 2019 before the NCLT seeking approval of the Resolution Plan approved by the CoC. This application is currently pending adjudication before the NCLT, due to the present appeal filed by the appellant before this Court.

30. However, on 20 December 2019, the Successful Resolution Applicant filed an application[2] under Section 60(5) of the IBC before the NCLT, seeking withdrawal of their Resolution Plan submitted for the Corporate Debtor. Further, on 16 January 2020, the Successful Resolution Applicant filed an interlocutory application[3] before this Court in the present appeal, seeking certain reliefs from this Court or, in the alternative, seeking permission of this Court to allow them to withdraw their Resolution Plan dated 12 November 2019. This Court allowed the Successful Resolution Applicant to withdraw the interlocutory application filed in the present appeal on 20 July 2020.

31. The NCLT by an order dated 3 July 2020, dismissed the application filed by the Successful Resolution Applicant, thereby refusing to grant them permission to withdraw the Resolution Plan. Thereafter, the NCLAT by a judgment dated 30 September 2020, dismissed the appeal filed by the Successful Resolution Applicant against NCLT's order dated 3 July 2020.

32. The Successful Resolution Applicant has since filed an appeal[4] before this Court challenging NCLAT's judgment dated 30 September 2020. By an order dated 16 November 2020, this Court granted a stay against the NCLAT's judgment dated 30 September 2020.

PART G - Submissions of counsel

G.1 Submissions on behalf of the appellant

33. The case of the appellant has been presented initially in the articulate and carefully reasoned submissions made by Ms Ranjitha Ramachandran, learned counsel. Mr Shyam Diwan, learned senior counsel has then urged his submissions. The following submissions were urged in relation to the jurisdiction of the NCLT/NCLAT under section 60(5) of the IBC:

(i) Section 60(5) must be interpreted in the context of Section 25(2)(b) of the IBC, which provides that the RP has to "exercise the rights for the benefit of the corporate debtor in judicial, quasi judicial or arbitration proceedings." Hence, if NCLT is conferred with the exclusive jurisdiction in relation to the Corporate Debtor, this section would be rendered redundant. This Court in *Embassy Property Developments (Private) Limited* v. *State of Karnataka,* **REED 2019 SC**

1. C.A. No. 1526 of 2019
2. C.A. 1679 of 2019
3. I.A. No. 9682 of 2020
4. Civil Appeal No. 3560 of 2020

12501 : (2020) 13 SCC 308; hereinafter referred to as "Embassy Property" has held that the RP cannot sidestep the jurisdiction of other authorities and approach the NCLT for the enforcement of the Corporate Debtor's rights. Although this judgment was in the context of a renewal of a mining lease by a statutory authority, the interpretation of Section 60(5) would not be limited to statutory authorities particularly in the backdrop of Sections 18 (duties of interim resolution professional) and 25(2)(b). In the present case, Article 10.4 of the PPA has granted jurisdiction to the State Commission, the regulatory authority under the Electricity Act, to entertain disputes relating to the PPA. Article 10.4 provides:

"In the event that such differences or disputes between the Parties are not settled through mutual negotiations within sixty (60) days, after such dispute arises, then it shall be adjudicated by the Commission in accordance with Law."

(ii) Section 86(1)(f) of the Electricity Act provides that the State Commission shall discharge the function of adjudicating "the disputes between the licensees, and generating companies and to refer any dispute for arbitration". Therefore, any issue in relation to the PPA must be raised before the State Commission, and not the NCLT. Further, the second respondent has no *locus* to file a petition before the NCLT in relation to the PPA;

(iii) The NCLT cannot preclude the appellant from exercising its contractual rights under the PPA read with the Electricity Act;

(iv) If Section 60(5) is given a broad interpretation to include contractual disputes, it would disrupt the streamlined and time bound process under the IBC. Although the NCLT, being conscious of its limitations, has not proceeded to adjudicate on whether the termination of the PPA was valid, or dwelt on the interpretation of the PPA, it has still erroneously set aside the termination of the PPA by the appellant without any basis under the IBC;

(v) Even if it is assumed that NCLT has jurisdiction over disputes relating to the PPA, the adjudication of such disputes should be in accordance with the PPA. The sanctity of the contracts must be upheld unless there is a statutory provision interdicting such contracts. There can be no exercise of any inherent or residual power by the NCLT to set aside the termination of a contract absent a statutory interdict. The Resolution Applicant or NCLT have no powers to modify the PPA through a resolution plan. The formation, novation or alteration of the contract must be in accordance with Section 30(2)(e) of the IBC, which provides that the Resolution Plan cannot contravene any provision of law which is in force. The provisions of the Indian Contract Act, 1872 ("Contract Act"), require mutual agreement of the parties for such a modification;

(vi) The submission of the respondents that 'property' under Section 3(27) of the IBC includes an actionable claim and hence the dispute falls under the

jurisdiction of the NCLT is erroneous in view of the judgement in *Embassy Property*, **REED 2019 SC 12501**;

(vii) The contention of the respondents that there is a direct connection between the termination of the PPA by the appellant and the insolvency resolution process should be rejected because the issue in the present case is not of interpretation of the insolvency resolution process but of the PPA, and only the State Commission has the jurisdiction to interpret the PPA; and

(viii) The respondents have relied on judgments under other statutes like the Companies Act, 1956[1], Banking Regulation Act, 1949[2] and Provincial Insolvency Act, 1920[3] with provisions corresponding to Section 60(5). However, these statutes do not contain any provisions equivalent to Sections 18 and 25 (2) (b) of IBC. The interplay between these provisions and Section 60(5) must be considered for the purpose of determining NCLT's jurisdiction. Further, the facts of these judgements are also distinguishable from the present case.

34. However, assuming but not conceding that the NCLT could have had jurisdiction over the dispute, the appellants argue that there is no embargo under the IBC on exercise of contractual rights by the appellant, which does not include this termination:

(i) Except for the moratorium stipulated under Section 14 of IBC, there is no other bar in the scheme of the IBC to intervene in contractual arrangements that the Corporate Debtor has entered with a third party. In the present case, the NCLT/NCLAT did not hold that the termination of the PPA was prohibited under Sections 14(1) and (2) of IBC. Sections 14(2) and (2A) deal with supply of essential/critical goods and services to the Corporate Debtor, and do not mandate the third party to purchase any goods and services from the Corporate Debtor. Section 14(2) provides for continued supply of essential goods and services to the Corporate Debtor. However, there is no bar on termination of other agreements. Section 14(2A) was introduced after the issuance of the default notice by the appellant and, in any event, it does not prohibit the termination of the PPA. Parliament has chosen not to include any provision to this effect despite the multiple amendments that have been made to the IBC;

(ii) The Explanation to Section 14(1) of the IBC, which was introduced by an amendment in December 2019, covers licenses or approvals granted by a government authority. However, no reference has been made there to contracts such as PPAs;

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1. "CA 1956"
2. "BRA"
3. "PIA"

(iii) The respondents are attempting to resurrect the regime under Section 22(3) of the Sick Industrial Companies (Special Provisions) Act, 1985[1], which empowered the Board to suspend the operation of all or any of the contracts to which the sick industrial company was a party. In *Swiss Ribbons Private Limited* v. *Union of India,* **REED 2019 SC 01504** : (2019) 4 SCC 17; hereinafter referred to as *"Swiss Ribbons",* this Court held that the IBC was introduced because the regime under SICA and Board for Industrial and Financial Reconstruction[2] had failed. Under the IBC, there is no such power to suspend contracts. Hence, when the legislature has wilfully omitted something or in a situation of a casus omissus, this Court cannot introduce what has been omitted by way of interpretation, analogy or implication;

(iv) The termination of the PPA cannot be set aside based on the objective of the IBC to ensure that the Corporate Debtor remains a 'going concern', in the absence of a specific provision under the IBC. The objective of the IBC cannot be understood to mean that the vested rights of parties can be interfered with or extinguished except to the extent contemplated under Section 14 of the IBC. While in the United States there are specific provisions providing for non-enforcement of ipso facto clauses such as Article 9.2.1(e) of the PPA, no such provisions exist under the IBC. Hence, such a bar cannot be read into the legislation by reference to the object of the IBC or duties of the RP. The parties cannot wish away a contractual right because it is not suitable to them by way of a narrow understanding of "public interest". The public interest lies in preserving the sanctity of contracts and for the contractual bargains to play out;

(v) The duty of the RP to preserve the Corporate Debtor as a going concern and the definition of resolution plan do not bind third parties to act in favour of the Corporate Debtor. The NCLAT has stressed that the Corporate Debtor would become defunct if the PPA is terminated because it supplies power exclusively to the appellant. However, the Corporate Debtor chose to supply power solely to the appellant. The Corporate Debtor was empowered under Sections 7 and 10 of the Electricity Act to sell electricity to any licensee or consumer. The power producing company can convey electricity to any part of the country using the transmission network under Sections 2(4), 38(2)(d), 39(2)(d), 40(c) and 42(2) of the Electricity Act. Hence, the Corporate Debtor is free to supply power to any other licensee or consumer after the termination of the PPA. The only difference would be that the Resolution Applicant would have to supply electricity at a lower cost;

(vi) The second respondent and Power Finance Corporation Limited were aware that the appellant can terminate the PPA under Article 9.2.1(e). They are vested with the right to assign the rights and obligations under the PPA to a third party,

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1. "SICA"
2. "BIFR"

in the event of a default committed by the Corporate Debtor, under the financing documents under Article 12.9 of the PPA. Hence, the second respondent could have exercised its power to assign prior to the initiation of the CIRP on 20 November 2018. Instead, it declared the account of Corporate Debtor as an NPA. Then, when the Corporate Debtor applied for the initiation of the CIRP under Section 10 of the IBC, which was admitted by the NCLT through its order dated 20 November 2018, it challenged the order before in an appeal, which was dismissed by the NCLAT on 4 December 2019. Therefore, the appellant has the right to terminate the PPA under Article 9.2.1(e), irrespective of whether any assignment has taken place under Article 12.9;

(vii) The first respondent cannot rely on the resolution plan to prevent termination of the PPA since the resolution plan or process does not modify the terms of the contract of the Corporate Debtor with third parties. Each party took a calculated risk to enter into the contract with the knowledge that the appellant is entitled to terminate the PPA;

(viii) The PPA is not an instrument under Section 238 of IBC, since the phrase used in the section – "instrument having effect by virtue of any such law" - does not cover commercial bilateral agreements between a corporate debtor and a third party laying down the terms of an executory contract entered between them. It only applies to a statutory contract or an instrument entered into by operation of law that is inconsistent with the IBC;

(ix) No provision of the PPA is inconsistent with the IBC. Article 9.3.1 which specifies a period of 30 days for the Corporate Debtor to remedy a default, and gives the appellant the right to terminate the contract in case of a failure to do so, is not inconsistent with the time limit provided in section 12 of the IBC to complete the insolvency resolution process. Article 9.3.1 obliges the Corporate Debtor to ensure that the proceedings initiated against it come to an end within 30 days by an act of the Corporate Debtor and does not govern the resolution process undertaken under the IBC;

(x) The right to terminate the PPA in accordance with Article 9.3.1 has accrued to the appellant, since an event of default has occurred within the meaning of Article 9.2.1(e):

(a) Article 9.2.1(e) of the PPA provides that if the Corporate Debtor "becomes voluntarily or involuntarily, the subject of a proceeding in any bankruptcy or insolvency laws", it would be considered as an event of default. Article 9.2.1(e) also lists other events of default like dissolution, liquidation and the appointment of a receiver. Each of these eventualities is independent. The clause may have referred to the legislation which preceded the IBC since the PPA was entered into in 2010. However, each of these laws related to companies that were bankrupt/insolvent. The exception under Article 9.2.1(e) covers voluntary

reconstruction and merger undertaken under the Companies Act, 2013[1], leading to a dissolution of the company without liquidation or winding up. The exception is limited to dissolution undertaken for the above purposes and does not contemplate a dissolution in relation to an insolvency or bankruptcy proceeding. There is no dissolution in the present case. Respondents have contended that the third "or" under the Article 9.2.1(e) should be changed into "and" or other situations should be read into the exception which is only for dissolution. The interpretation of "or" as "and" would mean that initiation of proceedings under any bankruptcy or insolvency laws would constitute an event of default only if the company goes into liquidation. The usage of words "or" and "and" are deliberate. The interpretation proposed by the respondents would exclude liquidation taking place for reasons other than insolvency/bankruptcy, which could not have been the intent of the parties. In absence of any ambiguity or uncertainty in the clause, the court cannot imply any term or interpret the clause contrary to its plain meaning;

(b) Clauses such as Article 9.2.1(e) are standard clauses in agreements of this nature. Even after the notification of the IBC, similar provisions continue in PPA formats notified by the Government of India as part of the Standard Bid Documents for Tariff Based Competitive Bid Process under Section 63 of the Electricity Act for conventional power. Similar provisions are found in the PPAs being drafted as per Guidelines for Tariff Based Competitive Bidding Process for renewable energy sources; and

(c) The bargain between the parties was fair and not one sided. The same default clause has been provided under the appellant's defaults in Article 9.2.2(c), and a corresponding right to terminate has been provided under Article 9.3.2. Similar clauses are provided under the standard PPAs issued by the Government of India for competitive bidding under Section 63 of the Electricity Act. Therefore, the clauses cannot be said to be unreasonable or unconscionable.

35. In summing up their submissions, the appellants have raised two more arguments:

(i) The NCLAT's observations in relation to the termination of the PPA if the Corporate Debtor goes into liquidation were incorrect:

(a) In the appeal filed by the appellant against the order of the NCLT dated 29 August 2019, the appellant had not challenged the determination of the NCLT that the PPA can be terminated in the event of the initiation of a liquidation proceeding against the Corporate Debtor. It is a settled principle of law that the courts cannot go beyond the pleadings or the prayer put forth by the parties; and

1. "CA 2013".

(b) NCLAT erroneously proceeded on the basis that there is no difference between the liquidation and resolution process. On the commencement of liquidation proceedings, the corporate debtor is no longer a going concern. The assets of the corporate debtor are sold for recovery of money. However, agreements with third parties are not assets. The appellant cannot be compelled to continue the agreement with a new person or entity for the benefit of the creditors of the Corporate Debtor.

(ii) NCLAT's direction to the appellant to pay for the electricity injected by the Corporate Debtor was flawed:

(a) The appellant was entitled to terminate the PPA from 7 June 2019, and cannot be compelled to procure and pay for power to preserve the value of the Corporate Debtor. The injection of electricity from 7 June 2019 is due to the orders of the court and not under the PPA. Under the principle of "actus curiae neminem gravabit", the act of the court cannot prejudice any party. The court is under an obligation to undo the wrong caused to a party due to its actions. The appellant cannot be made to suffer on account of the erroneous injunctions granted by NCLT/NCLAT when it could have procured electricity at a lower cost from other solar power projects;

(b) The appellant has paid the Corporate Debtor an amount of Rs 50 lakhs and Rs 1.07 crores pending the present appeal and against the undertaking that the amount would be returned with interest if the appeal is decided in its favour. Additionally, under Article 9.3.1 of the PPA, the compensation for termination of the PPA is Rs 55.80 crores; and

(c) The issues relating to tariff determination and replacement of solar panels raised by the respondents were not considered by the NCLT/NCLAT, and are not relevant for the interpretation of the PPA and provisions of the IBC.

G.2 Submissions on behalf of the respondents

36. Mr C U Singh and Mr Nakul Dewan, learned Senior counsel appearing on behalf of the first respondent, have argued that NCLT had the jurisdiction to consider the validity of the termination of the PPA by the appellant on the sole ground of the initiation of the insolvency proceedings of the Corporate Debtor and that the jurisdiction was rightly exercised by the NCLT, in the present case. Mr C U Singh has made the following submissions on the jurisdiction of the NCLT:

(i) The application for staying the termination of the PPA was filed by the first respondent before the NCLT under Section 60(5) of the IBC. Section 60(5)(c) confers upon the NCLT complete jurisdiction to decide any application by or against the Corporate Debtor on any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution of the Corporate Debtor, notwithstanding any other law for the time being in force. Hence, notwithstanding the provisions of the Electricity Act, the NCLT has jurisdiction to

consider an application filed by the RP which may not specifically relate to a particular section of the IBC (such as Section 14), provided the application involves any question of law or facts, arising out of or in relation to the insolvency resolution of the third respondent;

(ii) Relatedly, since the jurisdiction vested in the NCLT under Section 60(5)(c) is of a residuary character, even where a question of law or fact is not specifically covered under Section 14, the NCLT would have the jurisdiction to consider such a question of law or fact, provided it arises out or is in relation to the insolvency resolution process of the corporate debtor. Any other interpretation of Section 60(5) would render it otiose;

(iii) A narrow interpretation of Section 60(5) is neither warranted from the language of the section, nor is it in line with judicial precedents which have interpreted similar provisions in other insolvency laws. Provisions similar to Section 60(5)(c) have been read in an expansive way. In this regard, reliance is placed on the interpretation of Section 446(2) of the CA 1956, Section 4(1) of the PIA and Section 45-B of the BRA;

(iv) The expressions used in Section 60(5)(c), *i.e.*, 'relating to' and 'arising out of' have been interpreted as words of the widest amplitude. The expression 'relating to' has been held to be equivalent to or synonymous with 'as to,' 'concerning with,' and 'pertaining to'. In view of the broad scope of these terms, an interpretation divesting the NCLT of the power to injunct the termination of the PPA should not be countenanced in this case;

(v) The first respondent is not advocating for the adoption of an absolute rule about what falls within and beyond the NCLT's jurisdiction under Section 60(5)(c). Rather, it submits that this determination must be made on the facts of each case;

(vi) The termination of the PPA in the present case is sought solely on the ground of insolvency. The cause of action for termination is therefore alleged to be the insolvency of the Corporate Debtor and the contention that the Corporate Debtor is no longer 'reliable' on account of the insolvency resolution process. There would be no termination of the PPA but for the initiation of the CIRP against the Corporate Debtor. Hence, the cause of action arises out of and is in relation to the insolvency resolution of the Corporate Debtor. This case is materially different from cases in which termination of the PPA is sought for reasons independent of the insolvency of the Corporate Debtor (for instance where termination is sought for non-supply of electricity);

(vii) The fact that Sections 20(2)(e) and 25 of the IBC are couched in terms of a duty, does not necessarily mean that the NCLT does not have jurisdiction to decide matters that arise from the duty of the RP to preserve the assets or maintain the Corporate Debtor as a 'going concern'. On the contrary, NCLT is

the only forum which has the jurisdiction to oversee the resolution process of the Corporate Debtor which necessarily includes the continuation of the Corporate Debtor as a going concern and its successful resolution;

(viii) The facts of this case are different from those of *Embassy Property*, **REED 2019 SC 12501** and *Municipal Corporation of Greater Mumbai (MCGM) v. Abhilash Lal and Others,* **REED 2019 SC 11503** : (2020) 13 SCC 234; hereinafter referred to as "*Abhilash Lal*". Unlike *Abhilash Lal* (supra), the property in this case (long term contractual right under the PPA) is the property of the Corporate Debtor and not the property of a statutory authority. Further, there was no violation of law when NCLT injuncted the appellant from terminating the PPA on the ground of the initiation of the CIRP of the Corporate Debtor. In addition, the facts in *Abhilash Lal* (supra) dealt with the public duty of Municipal Corporation in respect of the construction of a hospital. Further, there were existing defaults and a show cause-notice was issued in this regard prior to the commencement of the CIRP of the company. As opposed to this, in the present case, termination by the appellant is not on grounds of default but solely on the ground of the initiation of the insolvency resolution process of the Corporate Debtor and, that too, nearly six months after the admission of the application under Section 10 of the IBC; and

(ix) In *Embassy Property*, **REED 2019 SC 12501**, what was at issue in was whether the NCLT has jurisdiction over a matter which is in the realm of public law. In the present case, the decision of the appellant to terminate the PPA is not a decision taken by the Government or by a statutory authority in relation to a matter which is in the realm of public law. The decision of the appellant to terminate the PPA is only because the Corporate Debtor is undergoing insolvency resolution. The Corporate Debtor has not defaulted in supplying solar power to the appellant and is otherwise not in breach of its obligations under the PPA.

37. Assuming that the NCLT has jurisdiction, the following submissions were made by Mr C U Singh in relation to the interpretation of the PPA:

(i) Article 9.2.1 of the PPA, read with Article 9.3.1, which allows the appellant to terminate the PPA if the third respondent commits an event of default, must be read with other provisions of the PPA. In this regard, our attention was drawn to:

(a) The recitals to the PPA state that the Power Producer will include its successors and assignees;

(b) Article 4.1(iii) of the PPA provides that the Corporate Debtor shall sell the power produced by it to the appellant on first priority basis and is not allowed to sell to any third party;

(c) Article 4.1(x) of the PPA provides for the eventuality of an equity dilution of the power producer;

(d) Article 9.1 of the PPA provides for the term of the agreement, *i.e.*, 25 years from the commercial operation date;

(e) Article 9.3.1 of the PPA provides that in case of a default of the Corporate Debtor, it shall have the liability to make payments towards compensation to the appellant which is equivalent to three years billing based on the first year tariff considered on normative PLF while determining the tariff by GERC, within 30 days from the termination notice;

(f) Article 12.9 of the PPA specifically provides that the financing parties may cause the power producer to assign its interest, rights and obligations to a third party; and

(g) The PPA contemplates the financing of the project and that there could be financial defaults by the Corporate Debtor. Hence, the PPA specifically allowed financing parties to step in and change the identity of the power producer provided the successor was capable of and willing to assume the obligations of the power producer under the PPA. Article 9.2.1(e) must be read in light of this background.

(ii) In relation to the interpretation of Article 9.2.1(e), it was submitted:

(a) When the PPA was entered into in 2010, the IBC was not in existence. The contract was a standard form contract. While the clause refers to insolvency or bankruptcy proceedings, the intent of Article 9.2.1(e) could only have been to cover liquidation proceedings as contemplated under the CA 1956. The CA 1956 did not contemplate ‘insolvency' or ‘bankruptcy' proceedings. Insolvency at the time of the drafting of the clause was understood to include individual insolvency. Hence, Article 9.2.1(e) could not have intended to cover ‘insolvency resolution' proceedings under the IBC as a trigger for an event of default;

(b) If the term ‘insolvency' proceedings in Article 9.2.1(e) of the PPA, which was entered into in 2010, is sought to be applied to the ‘insolvency resolution' proceedings contemplated under the IBC then the exception in the clause, in the form of ‘reorganization' will also necessarily need to be applied in light of the updated understanding. Read thus, the term must extend to any form of reorganization because of which the company does not go into liquidation or winding-up. Read in this manner, Article 9.2.1(e) must be interpreted to exclude the reorganization proceedings under the IBC; and

(c) Assuming, arguendo, that Article 9.2.1(e) of the PPA is ambiguous, it ought to be interpreted in favour of the power producer. The PPA is a standard form contract. The third respondent and the appellant do not stand on a footing of equality. The application of the rule of contra preferentum is well settled and an interpretation of the contract which favours the party with lesser bargaining power is preferred. Applying that rule here, any ambiguity in the interpretation of Article 9.2.1(e) must be resolved in favour of the third respondent.

38. Submissions were also urged by Mr C U Singh in relation to Sections 14 and 238 of the IBC:

(i) In relation to the application of Section 238 of the IBC to the PPA, it was submitted that:

(a) Under Article 9.3.1 of the PPA, the third respondent is required to remedy the default (if any) within 30 days of service of the default notice. If read in this manner, on the receipt of a default notice during the pendency of the CIRP, the third respondent would be required to complete the reorganization process within 30 days so as to obviate the consequence of the PPA getting terminated. The IBC provides a period of 330 days for the completion of the CIRP. There is a dichotomy between the provisions of the PPA and the IBC. The timelines under the PPA for curing a default are inconsistent with those under the IBC for completing the CIRP with respect to the third respondent. In view of the non-obstante clause in Section 238, the provisions of the IBC would override those of the PPA;

(b) The argument that the PPA is not an "instrument" under the IBC is incorrect. Since the term "instrument" has not been defined in the IBC, it may bear a meaning drawn from the definition in other statutes. The PPA is approved by the GERC and has the force of law under the Electricity Act. The PPA sets out the rights and liabilities of the parties and is an instrument for the purposes of Section 238. Being an "instrument", which is inconsistent with the provisions of the IBC, the latter would have overriding effect over the former, in view of Section 238 of the IBC. Therefore, the right to terminate would only arise in case the third respondent fails to cure the default, i.e., resolve itself in accordance with the IBC; and

(c) In view of Section 238, the IBC overrides the provisions of the Electricity Act. Section 63 of the IBC provides that "No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under IBC." NCLT's jurisdiction excludes that of the GERC.

(ii) In relation to the legislative intent underlying Section 14 of the IBC, it was submitted that:

(a) The Notes on Clauses to the Insolvency and Bankruptcy Bill, 2015 and the Insolvency Law Committee Report dated 20 February 2020 suggest a clear legislative intent of Section 14 that, an *ipso facto* clause allowing a party to terminate the contract if the counterparty enters into some form of insolvency resolution process must either be declared void or be suitably read down in order to ensure that the objective of the IBC in keeping the company as a going

concern is met. If in the facts of a given case, the relevant authorities find that to preserve the assets of the Corporate Debtor and to keep it as a going concern, certain contracts need to be protected, they ought to be invalidated or read down; and

(b) The nature of the third respondent and its business renders the PPA a valuable asset, and its termination would have the effect of running the third respondent to the ground. Therefore, in view of the legislative intent, and reading the provisions of the PPA as a whole, Article 9.2.1 (e) must be read to exclude reorganization proceedings under the IBC as an event of default.

39. Supplementing these submissions, Mr. Nakul Dewan, learned Senior Counsel made the following additional submissions:

(i) The Resolution Plan submitted by the Successful Resolution Applicant and approved by the CoC was dependent on the continuation of the PPA:

(a) The following aspects of the resolution plan need to be highlighted: (i) the significance of the PPA to the continued commercial viability of the corporate debtor; (ii) the reason for the initiation of the CIRP including the nature of the debts; (iii) the experience of the RP in reviving the Corporate Debtor including the revival plan; (iv) the summary of the resolution plan, including the _haircut' being taken by the creditors in order to ensure that the Corporate Debtor is restructured; (v) the relevant rates pertaining to solar tariff; (vi) the business plan; (vii) the financial plan; and (viii) the potential risks and mitigation measures;

(b) The Corporate Debtor was put into financial difficulty on account of the force majeure events which transpired in 2015 and 2017. The first respondent had started putting the Corporate Debtor back on its track, and along with the Resolution Applicant had formulated a plan under which the Corporate Debtor would be revived. The resolution plan was dependent on the continuation of the PPA; and

(c) If the termination is permitted, the Corporate Debtor would not be able to revive in terms of the resolution plan which has been agreed upon by the lenders, even though it continues to be able to perform its obligations under the PPA.

(ii) In relation to the interpretation of Article 9.2.1(e):

(a) The term 'law', in Article 9.2.1(e) must be interpreted in a dynamic sense. The interpretation of Article 9.2.1(e) must be considered at the point of time it was sought to be invoked in order to ascertain whether there was an event of default. The exception under which "reorganization" is excluded as an event of

default, would apply to the proceedings which were initiated under section 10 of the IBC for the sole purpose of the reorganization of the Corporate Debtor; and

(b) The invocation of Article 9.2.1(e) on the ground that proceedings under Section 10 of the IBC had been commenced was both erroneous and premature. It was erroneous because at the time of commencement of the proceedings, the Corporate Debtor was looking at the reorganization of its affairs. It squarely fell within the exception to Article 9.2.1(e). It was premature because unless and until the appellant was sure that after a reorganization the resulting entity would not have the financial standing to perform its obligations or as to its lack of creditworthiness, it had no basis to terminate the PPA on the ground that it constituted an event of default under Article 9.2.1(e).

(iii) In relation to the jurisdiction of the NCLT, it was submitted that:

(a) The NCLT's jurisdiction with respect to Section 60(5) was invoked to seek quashing of the default notice issued by "taking insolvency proceedings as Event of Default." Therefore, the application filed before the NCLT was within the realm of its jurisdiction under Section 60(5) of the IBC;

(b) The appellant's submission about GERC having jurisdiction should not be accepted. Instead, this Court should adopt the position that, should the commencement of proceedings under the IBC be used as a ground to terminate a contract, then the matter ought to be determinable by the NCLT. This is further bolstered by the exclusion of the jurisdiction of civil courts under Section 231 of the IBC; and

(c) IBC, being a special law, enacted after the Electricity Act, the NCLT and NCLAT have exclusive jurisdiction to govern all questions of fact and law relating to the insolvency process of the corporate debtor.

40. Mr V Giri, learned senior counsel on behalf of the second respondent, made the following submissions in support of the arguments made by the first respondent:

(i) Once an application under sections 7, 9 or 10 of the IBC is admitted by the NCLT, it is conferred with the jurisdiction to deal with matters relating to the insolvency of the corporate debtor;

(ii) Both the Electricity Act and the IBC are special legislations, which have been enacted to deal with electricity related issues and insolvency, respectively. In *Ashoka Marketing* v. PNB, 1990 (4) SCC 406 this court held that a harmonious construction of two special laws containing non-obstante clauses can be undertaken by looking at the purpose of both the laws. This Court was also mindful of the principle that a special law enacted at a later date prevails over

the earlier special law. In this regard, the non-obstante clause under Section 174 of the Electricity Act would be overridden by Section 238 of IBC in case of a conflict of jurisdiction to resolve a dispute;

(iii) The NCLT can exercise its jurisdiction under Section 60(5) of the IBC to ensure that the Corporate Debtor survives as a 'going concern'. It would not be possible to enter into another PPA with the same terms and conditions as the current PPA;

(iv) The second respondent as a lender bank may not be able to initiate a dispute resolution process under Section 86(f) of the Electricity Act since it contemplates the resolution of disputes between a generator and a trading licensee;

(v) Section 60(5)(c) of the IBC provides that the NCLT can entertain or dispose of any event or action arising out of, in relation to, effecting or hampering the insolvency resolution process. NCLT has the jurisdiction to intervene to the extent of removing any obstacle in the CIRP process for it to reach its logical end, which is approval of the resolution plan or liquidation. The contours of Section 14 of the IBC must be determined under such an understanding of Section 60(5)(c);

(vi) The moratorium under Section 14 of IBC is not exhaustive because:

(a) The object of section 14 is protection of the Corporate Debtor during the CIRP;

(b) The preamble of the IBC provides for preserving the maximum value of the assets of the Corporate Debtor; and

(c) Section 14(3) only excludes certain kinds of agreements and transactions from moratorium under Section 14(1), as notified by the Central Government in consultation with the financial regulator or any other authority. The NCLT has the power to impose moratorium or status quo in the interest of protecting the corporate debtor and the CIRP in addition to the protections enumerated in Section 14(1);

(vii) Maintaining the Corporate Debtor as a 'going concern' is the soul of the CIRP. Section 14(2A) provides that a supply of goods or services which an IRP or RP considers critical for protecting and preserving the value of the Corporate Debtor, and managing its operation as a going concern cannot be terminated, suspended or interrupted. Section 20(1) imposes a duty on the IRP to protect and preserve the value of the Corporate Debtor and manage the operations as a 'going concern'. The 'Resolution Plan' has been defined under Section 5(26) of the IBC as a plan proposed by the resolution applicant for insolvency resolution

of the Corporate Debtor as a 'going concern'. The termination of the PPA would push the Corporate Debtor towards a corporate death, namely, liquidation;

(viii) The Explanation to Section 14(1) clarifies that, inter alia, "a similar grant of right given by the Central government, State government, local authority, sectoral regulator or any other authority shall not be terminated on the ground of insolvency". This indicates the intent of the legislature that no right conferred on the Corporate Debtor can be taken away due to the initiation of the CIRP;

(ix) Article 9.2.1(e) must be read with Article 12.9 of the PPA, which provides that if a default is committed under the financing documents, lenders have a right to assign the rights and obligations of the Corporate Debtor under the PPA to a third party. Hence, the PPA contemplates a situation where the Corporate Debtor may go through a reorganization. The present proceedings under the IBC are in the nature of a reorganization. Hence, the CIRP cannot be construed as event of default under the PPA;

(x) The lenders extended the loan based on the: (a) right of assignment granted under Article 12.9 of the PPA; (b) purchase of electricity as a fixed tariff; and (c) term of the PPA for a period of 25 years. The financial projections on the loan and its repayment were made on the above terms. The default notice is in violation of the terms of the PPA and the understanding reached between the parties;

(xi) Article 9.3.1 of the PPA is inconsistent with the IBC, since the PPA grants a time of 30 days to remedy the insolvency whereas the IBC provides a timeline of 180 days, which is extendable up to 330 days. Section 238 of IBC ensures that the IBC will prevail over the PPA. The phrase "instrument" in Section 238 can be interpreted in light of Section 2(14) of the Indian Stamp Act, 1899 and Section 2(b) of the Notaries Act, 1952 which provide that an "instrument", "includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded." Hence the PPA qualifies as an instrument;

(xii) Section 14(1)(d) provides for protection of the property of the Corporate Debtor. The expression "property" would include the PPA in terms of its definition in Section 3(27) of the IBC. Paras 8.1 to 8.3 of the Third Insolvency Committee Report dated 20 February 2020 indicate that the intent of the IBC is to ensure that the Corporate Debtor remains a going concern and contracts cannot be terminated by way of ipso facto clauses relating to insolvency; and

(xiii) The appellant terminated the PPA not due to the default *per se* but due to a commercial decision to negotiate and reduce the purchase price of electricity under tariff. It is not the intent of the IBC to allow an entity to take the benefit of the CIRP to negotiate a better price for a contract and in effect reduce the value of the Corporate Debtor.

PART H

Issues arising from the dispute

41. The following two issues arise for determination:

(i) Whether the NCLT/NCLAT can exercise jurisdiction under the IBC over disputes arising from contracts such as the PPA; and

(ii) Whether the appellant's right to terminate the PPA in terms of Article 9.2.1(e) read with 9.3.1 is regulated by the IBC.

PART I

Jurisdiction of the NCLT/NCLAT over contractual disputes

42. The primary issue upon which the outcome of this appeal would turn is the nature of the jurisdiction which is exercised by the NCLT under Section 60(5) of the IBC. The provision reads thus:

"(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of-

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code."

43. Sub-section (1) of Section 60 provides the NCLT with territorial jurisdiction over the place where the registered office of the corporate person is located. NCLT shall be the adjudicating authority "in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors". The NCLT has been constituted under Section 408 of the CA 2013 "to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force"[1].

1. **"Section 408.** The Central Government shall, by notification, constitute, with effect from such date as may be specified therein, a Tribunal to be known as the National Company Law Tribunal consisting of a President and such number of Judicial and Technical members, as the Central Government may deem necessary, to be appointed by it by notification, to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force."

44. NCLT owes its existence to statute. The powers and functions which it exercises are those which are conferred upon it by law, in this case, the IBC.

45. The NCLT in its decision dated 29 August 2019 did not specifically examine the issue of its jurisdiction under Section 60(5)(c) of the IBC. It prohibited the termination of the PPA on the ground that it is an "instrument under Section 238; Articles 9.2.1(e) read with 9.3.1 of the PPA are inconsistent with the provisions of the IBC; and the latter overrides an instrument having effect by virtue of law. One of the considerations which weighed with the NCLT while coming to its determination was that termination of the PPA would prejudice the status of the Corporate Debtor as a "going concern", and lead to the failure of the CIRP. The NCLT observed:

"30. …the CIR process in the instant case was triggered on 20.11.2018, which was further extended by 90 days on 16.05.2019 and the default notices were issued by the Respondent Company on 01.05.2019. That termination of PPA at this stage may have adverse consequences on the status of the Corporate Debtor as "going concern" and eventually, may jeopardise the entire CIR Process. While elaborating on the objectives of IBC as enshrined in the Preamble, the Hon'ble Supreme Court, had held in the matter of *Swiss Ribbons Pvt. Ltd.* v. *Union of India,* **REED 2019 SC 01504** : 2019 SCC Online SC 73:

" ..... What is interesting to note is that Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plan submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern"."

46. In appeal, the NCLAT by its order dated 15 October 2019, upheld the exercise of jurisdiction by the NCLT. The NCLAT held:

"Taking into consideration the nature of the case, we are of the view that to keep the 'Corporate Debtor' a going concern, which is generating electricity and supplying only to 'Gujarat Urja Vikas Nigam Ltd.', the Adjudicating Authority rightly asked 'Gujarat Urja Vikas Nigam Ltd.' not to terminate the 'Power Purchase Agreement' dated 30th April, 2010.

We may make it clear that the 'Gujarat Urja Vikas Nigam Limited', being purchaser of the electricity cannot terminate the 'Power Purchase Agreement' solely on the ground that the 'Corporate Insolvency Resolution Process' has been initiated against 'Astonfield Solar (Gujrat) Pvt. Ltd.' (Corporate Debtor) which is generating electricity and supplying it and there is no default in supplying electricity and during the 'Corporate Insolvency Resolution Process'…"

However, like the NCLT, the NCLAT did not give any specific finding on whether it or the NCLT can exercise its jurisdiction under section 60(5)(c) over a dispute

arising out of the termination of the PPA. In this regard, the task falls on this Court to enumerate the contours of the jurisdiction that can be exercised under Section 60(5)(c) of the IBC.

I.1 Section 60(5)(c) : "arising out of" and "in relation to"

47. It has been submitted before us on behalf of the appellant that the NCLT does not have any inherent powers, and its exercise of jurisdiction is circumscribed by the provisions of the IBC. As such, it does not have the jurisdiction to entertain all disputes or all issues related to the Corporate Debtor. On the other hand, the respondents have made a limited submission that while the NCLT may not have jurisdiction to adjudicate upon contractual disputes that arise independent of the insolvency of the Corporate Debtor, it has the sole jurisdiction to decide a dispute that arises from or relates to the insolvency of the Corporate Debtor or where the property of the Corporate Debtor (in this case its rights under the PPA) is sought to be taken away on the ground of insolvency. For their argument, the respondents have relied on Section 60(5)(c) to submit that NCLT is vested with a wide jurisdiction to consider questions of law or fact "arising out of" or "in relation to" insolvency resolution proceedings.

48. In varying contexts, this Court has expansively construed the expressions "relating to‖ and "arising out of" in its previous decisions. The respondents have relied on some of these judgments to buttress their submissions in regard to the width of Section 60(5)(c). In *Renu Sagar Power Co. Ltd.* v. *General Electric Company,* (1984) 4 SCC 679, a two judge Bench while interpreting the words "arising out of" or **"**related to" in an arbitration clause held as follows, speaking through Justice V.D. Tulzapurkar.

"25…(2) Expressions such as "arising out of" or "in respect of" or "in connection with" or "in relation to" or "in consequence of" or "concerning" or "relating to" the contract are of the widest amplitude and content…"

49. In *Mansukhlal Dhanraj Jain* v. *Eknath Vithal Ogale,* (1995) 2 SCC 665 another two judge Bench of this Court emphasized the comprehensive nature and wide sweep of the term "relating to" in the context of the Small Causes Courts Act, 1887. Justice S B Majumdar held:

"16. It is, therefore obvious that the phrase —relating to recovery of possession‖ as found in Section 41(1) of the Small Cause Courts Act is comprehensive in nature and takes in its sweep all types of suits and proceedings which are concerned with the recovery of possession of suit property from the licensee and, therefore, suits for permanent injunction restraining the defendant from effecting forcible recovery of such possession from the licensee-plaintiff would squarely be covered by the wide sweep of the said phrase. Consequently in the light of the averments in plaints under consideration and the prayers sought for therein, on the clear language of Section 41(1), the conclusion is inevitable that

these suits could lie within the exclusive jurisdiction of Small Cause Court, Bombay and City Civil Court would have no jurisdiction to entertain such suits."

50. In *Doypack System (P) Ltd.* v. *Union of India,* (1988) 2 SCC 299 a two judge Bench held that the expression "in relation to" is broad and is equivalent to the expressions "concerning with" and "pertaining to", with the latter also being expansive in ambit. Justice Sabyasachi Mukharji (as the learned Chief Justice of India then was) observed:

"50. The expression "in relation to‖ (so also "pertaining to"), is a very broad expression which presupposes another subject matter. These are words of comprehensiveness which might have both direct significance as well as indirect significance depending on the context [internal citation omitted]. Assuming that the investments in shares and in lands do not form part of the undertaking but are different subject matters, even then these would be brought within the purview of the vesting by reason of the above expressions. In this connection reference may be made to 76 Corpus Juris Secundum at pages 620 and 621 where it is stated that the term "relate" is also defined as meaning to bring into association or connection with. It has been clearly mentioned that "relating to" has been held to be equivalent to or synonymous with as to "concerning with" and "pertaining to". The expression "pertaining to" is an expression of expansion and not of contraction." (emphasis supplied)

51. While the phrases "arising out of" and "relating to" have been given an expansive interpretation in the above cases, words can have different meanings depending on the subject or context. Words are after all, a vehicle for communicating ideas, thoughts and concepts. A one-size-fits-all analogy may not always hold good when we construe similar words in entirely distinct settings. Justice G.P. Singh in his authoritative commentary on the interpretation of statutes, Principles of Statutory Interpretation, has noted that the same words used in different sections of the same statute or used at different places in the same clause or section can have different meanings[1]. Therefore, it is necessary to bear in mind the context in which the phrases have been used. Justice G.P. Singh has stated in his commentary that[2]:

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1. St G.P. Singh, Principles of Statutory Interpretation (1 edn., Lexis Nexis 2015)
2. Ibid.

"(2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of- (a) any suit or proceeding by or against the company; (b) any claim made by or against the company (including claims by or against any of its branches in India); (c) any application made under section 391 by or in respect of the company; (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company; whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the

"When the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. The context here means, the statute as a whole, the previous state of the law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy."

52. Bearing in mind the above caution, it may be of relevance to discuss the interpretation of similar provisions in other insolvency laws. Textually, the provisions of Section 60(5) bear a flavor of resemblance to the provisions which were contained in sub-Section 2 of Section 446[1] of the CA 1956, which correspond now to Section 280[2] of CA 2013.

53. A textual comparison of the provisions of Section 60(5) of the IBC with Section 446(2) of CA 1956 would reveal some similarities of expression, with textual variations. For the purposes of the present proceedings, it suffices to note that clause (c) of Section 60(5) confers jurisdiction on the NCLT to entertain or dispose of "any question of priorities or any question of law or facts arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the Code". Section 446(2)(d) of CA 1956 and section 280(d) of CA 2013 use the expression any question of priorities or any other question whatsoever whether of law or fact. These words bear a striking resemblance to the provisions of section 60(5) (c) of the IBC. But textually similar language in different enactments has to be construed in the context and scheme of the statue in which the words appear. The meaning and content attributed to statutory language in one enactment cannot in all circumstances be transplanted into a distinct, if not, alien soil. For, it is trite law that the words of a statute have to be construed in a manner which would give them a sensible meaning which accords with the overall scheme of the statute, the context in which the words are used and the purpose of the underlying provision. Therefore, while construing of section 60(5), a starting point for the analysis must be to decipher Parliamentary intent based on the object underlying the enactment of the IBC. The Statement of Objects and Reasons leading up to

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order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960."

1. Sub-section 2 of section 446 provides as follows:

2. Section 280 of the CA 2013 provides as follows:

"280. Jurisdiction of Tribunal.—The Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of,— (a) any suit or proceeding by or against the company; (b) any claim made by or against the company, including claims by or against any of its branches in India; (c) any application made under section 233; (d) any scheme submitted under section 262; (e) any question of priorities or any other question whatsoever, whether of law or facts, including those relating to assets, business, actions, rights, entitlements, privileges, benefits, duties, responsibilities, obligations or in any matter arising out of, or in relation to winding up of the company, whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made or such scheme has been submitted, or is submitted, before or after the order for the winding up of the company is made."

the enactment to the IBC conveys a strong sense of the intent of the legislature. According to it:

"There is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provide for creation of multiple for a such as Board of Industrial and Financial Reconstruction (BIFR), Debts Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the Courts. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.

2. The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

3. The Code seeks to provide for designating the NCLT and DRT as the Adjudicating Authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy. The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India (Board) for regulation of insolvency professionals, insolvency professional agencies and information utilities. Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code. Information Utilities would collect, collate, authenticate and disseminate financial information to facilitate such proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code."

54. The salient aspects which emerge from the state of the law prior to the enactment to the IBC can be formulated thus:

(i) There was a multiplicity of legislation dealing with insolvency and bankruptcy;

(ii) Multiplicity of statutes led to the creation of multiplicity of for a;

(iii) Provisions relating to insolvency and bankruptcy of companies were embodied in the SICA, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993[1], the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002[2] and the CA 2013;

(iv) The above statutes provided for the establishment of multiplicity of adjudicating bodies including the BIFR, Debt Recovery Tribunal[3], NCLT and the Appellate Tribunal;

(v) While the liquidation of companies was adjudicated upon by the High Courts exercising company jurisdiction, individual insolvency was governed by the Presidency-Towns Insolvency Act, 1909 and the PIA;

(vi) The multiplicity of statute and fora in the regime prior to the IBC led to a framework for insolvency and bankruptcy which was inadequate and ineffective, and resulted in undue delay;

(vii) The underlying purpose and object of enacting the IBC was to ensure a timely resolution of insolvency and bankruptcy which would:

(a) Maximize of the value of assets;

(b) Promote entrepreneurship;

(c) Facilitate the availability of credit;

(d) Support the development of credit markets; and (e) Balance interests of all stake-holders.

(viii) Bearing the above aspects in mind, the IBC, which is a consolidating and amending statute, came to be enacted; and

(ix) The IBC, in a clear departure from the past, separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects.

55. In the decision of this Court in *Swiss Ribbons*, **REED 2019 SC 01504**, where the challenge was to the constitutional validity of some provisions of the IBC, the judgment by Justice RF Nariman contains a section titled “Prologue: the preexisting state of the law”. The problems which arise from multiplicities of

1. “RDDB”
2. “SARFAESI”
3. “DRT”

statutes and fora in the erstwhile regime were noticed in the report of the Bankruptcy Law Reforms Committee (2015) ("BLRC"):

"14. …The current state of the bankruptcy process for firms is a highly fragmented framework. Powers of the creditor and the debtor under insolvency are provided for under different Acts…

It is problematic that these different laws are implemented in different judicial for a. Cases that are decided at the tribunal/BIFR often come for review to the High Courts. This gives rise to two types of problems in implementation of the resolution framework. The first is the lack of clarity of jurisdiction. In a situation where one forum decides on matters relating to the rights of the creditor, while another decides on those relating to the rights of the debtor, the decisions are readily appealed against and either stayed or overturned in a higher court. Ideally, if economic value is indeed to be preserved, there must be a single forum that hears both sides of the case and makes a judgment based on both. A second problem exacerbates the problems of multiple judicial fora. The fora entrusted with adjudicating on matters relating to insolvency and bankruptcy may not have the business or financial expertise, information or bandwidth to decide on such matters. This leads to delays and extensions in arriving at an outcome, and increases the vulnerability to appeals of the outcome…a matrix of fragmented and contrary outcomes,…"

A "debtor and creditor led process of corporate insolvency" had resulted in a matrix of fragmented and contrary outcomes rather than "coherent and consistent.… precedents".

56. The BLRC noted that speed is of the essence for the working of a bankruptcy code. From the point of the view of creditors, a good realization can be obtained when a firm is sold as a going concern. The decisions of this Court in Madras Petrochem*, Madras Petrochem Limited* v. *BIFR,* (2016) 4 SCC 1, *Innoventive Industries* v. *ICICI Bank,* **REED 2017 SC 08563** : (2018) 1 SCC 407; hereinafter referred to as "Innoventive Industries", and *ArcelorMittal India Private Limited* v. *Satish Kumar Gupta,* **REED 2018 SC 10541** : (2019) 2 SCC 1; hereinafter referred to as "ArcelorMittal" emphatically advert to the failure of the statutory resolution machinery in the regime prior to the IBC. It was in this backdrop that the IBC was enacted to provide for a timely resolution of the CIRP. The primary focus of the IBC is to ensure the revival and continuation of the corporate debtor. The interests of the corporate debtor have been bifurcated and separated from the interests of persons in management. The timelines which are prescribed in the IBC are intended to ensure the resuscitation of the corporate debtor.

57. The enactment of the IBC is in significant senses a break from the past. While interpreting the provisions of the IBC, care must be taken to ensure that

the regime which Parliament found deficient and which was the basic reason for the enactment of the new legislation is not brought in through the backdoor by a process of disingenuous legal interpretation. However, this is not to say that the interpretation given to the statutory provisions that existed prior to the enactment IBC is to be rejected in toto. The interpretation given to such statutory provisions that are textually similar to Section 60(5)(c) may be relevant, provided that such interpretation is in tandem with the objective of enacting the IBC, that is, inter alia, avoidance of multiplicity of for a and a timely resolution of the insolvency process.

58. In *Sudharshan Chits (I) Ltd.* v. *O Sukumaran Pillar*, (1984) 4 SCC 657, a three judge Bench of this Court held that the object of Section 446(2) of CA 1956 was to enlarge the jurisdiction of the Company Court to avoid a multiplicity of proceedings, delay and expensive litigation. The Court was speaking through Justice D.A Desai held:

"8..Sub-Section (2) was introduced to enlarge the jurisdiction of the court winding up the company so as to facilitate the disposal of winding-up proceedings…To save the Company which is ordered to be wound up from this prolix and expensive litigation and to accelerate the disposal of winding-up proceedings, the Parliament devised a cheap and summary remedy conferring jurisdiction on the court winding up the company to entertain petitions in respect of claims for and against the company. This was the object behind enacting Section 446(2) and therefore, it must receive such construction at the hands of the court as would advance the object and at any rate not thwart it"

59. Section 4(1) of the PIA used similar words in relation to the jurisdiction of the insolvency court as Section 60(5) of the IBC. Section 4(1) of the PIA provided:

"Section 4 - *Power of Court to decide all questions arising in insolvency.*-(1) Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case." (emphasis supplied)

60. Another three judge Bench of this Court, in *Thampanoor Ravi* v. *Charupara Ravi,* (1999) 8 SCC 74, held that a High Court does not have the jurisdiction to determine whether a person is an undischarged insolvent in an election petition filed under the Representation of People Act, 1951, in view of the exclusive jurisdiction conferred upon an insolvency court constituted under the PIA. Justice S. Rajendra Babu, held:

"11…..The Insolvency Act is a complete code and determination of all questions regarding insolvency including a question as to whether (1) a person is an insolvent or not, or (2) an insolvent be discharged or not and subject to what conditions, can be decided by the court constituted under that Act alone…..

13. In the present case, as we have explained earlier the scheme of the provisions of the Insolvency Act, the exclusive jurisdiction to deal with any question relating to insolvency could be adjudicated upon only by the court constituted under that Act. In such a situation, it would not be possible to hold that the High Court had, while dealing with an election petition, jurisdiction to decide a question as to whether a person is an un-discharged insolvent or not. Admittedly, in this case, there is no such adjudication. Hence the High Court could not declare the appellant to be an 'un-discharged insolvent'."

61. Section 45-B of the BRA uses language similar to Section 60(5) of the IBC. Section 45-B of the BRA provides:

"Section 45B. *Power of High Court to decide all claims in respect of banking companies.*-The High Court shall, save as otherwise expressly provided in section 45C, have exclusive jurisdiction to entertain and decide any claim made by or against a banking company which is being wound up (including claims by or against any of its branches in India) or any application made under section 39 of the Companies Act, 1956 by or in respect of a banking company or any question of priorities or any other question whatsoever, whether of law or fad [sic fact] which may relate to or arise in the course of the winding up of a banking company, whether such claim or question has arisen or arises or such application has been made or is made before or after the date of the order for the winding up of the banking company or before or after the commencement of the Banking Companies (Amendment) Act, 1953 (52 of 1953)."

(emphasis supplied)

62. In *Dhirendra Chandra Pal* v. *Associated Bank of Tripura Ltd.,* AIR 1955 SC 213, a four judge Bench of this Court examined the scope of Section 45-B. Justice B. Jagannad has observed:

"4. It is to be remembered that section 45-B is not confined to claims for recovery of money or recovery of property, movable or immovable, but comprehends all sorts of claims which relate to or arise in the course of winding up."

63. The above judgements were undoubtedly in relation to the jurisdiction of courts in relation to winding up and insolvency proceedings under distinct statutes. But considerations such as avoiding multiplicity of for a, speedy disposal and litigation costs would also be germane to the establishment of an

exclusive body under the IBC to adjudicate matters arising from or in relation to the insolvency resolution process.

64. In this context, it would be useful to trace the history of the NCLT and NCLAT, which are empowered to deal with all issues relating to insolvency, specifically with the aim of avoiding a multiplicity of for a. The Justice Eradi Committee was constituted by the Department of Company Affairs to make recommendations on reforming the existing law on winding up of companies to increase transparency and reduce delays in the liquidation of companies. The Report of the High Level Committee on Law relating to Insolvency and Winding Up of Companies (2000) stated that:

"…there is a need for establishing a National Tribunal as a specialized agency to deal with matters relating to rehabilitation, revival and winding up of companies. With a view to avoiding multiplicity of fora, the National Tribunal. should be conferred with jurisdiction and powers to deal with matters under Companies Act, 1956 presently exercised by the Company Law Board; jurisdiction, power and authority relating to winding up of companies vested with High Courts and power to consider rehabilitation and revival of companies presently vested in the BIFR. This suggestion of the Committee will involve amending the provisions of Part VU of Companies Act, 1956 besides repeal of Sick Industrial Companies (Special Provisions) Act, 1985 and amending section 10E of the Companies Act relating to the present Company Law Board. All the existing cases pending with the High Courts and the Company Law Board may be transferred to the Tribunal and the pending references before BIFR/ AAFIR shall abate."

(emphasis supplied)

65. The above report was discussed in the decision of this Court in *Union of India* v. *R. Gandhi, President, Madras Bar Association,* (2010) 11 SCC 1. A Constitution Bench noted that the recommendations of the Committee were accepted by the Government, which established the NCLT and NCLAT to transfer the functions being performed by High Courts, Company Law Board, BIFR and Appellate Authority for Industrial and Financial Reconstruction to a single forum to avoid long drawn litigation before multiple for a. Justice R.V. Raveendran observed:

"3. (…) The Committee found that multiplicity of court proceedings is the main reason for the abnormal delay in dissolution of companies. It also found that different agencies dealt with different areas relating to companies, that Board for Industrial & Financial Reconstruction (BIFR) and Appellate Authority for Industrial & Financial Reconstruction (AAIFR) dealt with references relating to rehabilitation and revival of companies, High Courts dealt with winding-up of companies and Company Law Board (CLB) dealt with matters relating to prevention of oppression and mismanagement etc. Considering the laws on corporate insolvency prevailing in industrially advanced countries, the Committee recommended various amendments in regard to the provisions of

Companies Act, 1956 for setting-up of a National Company Law Tribunal which will combine the powers of the CLB under the Companies Act, 1956, BIFR and AAIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 as also the jurisdiction and powers relating to winding-up presently vested in the High Courts.

4. It is stated that the recommendations of the Eradi Committee were accepted by the Government and Company (Second Amendment) Act, 2002 was passed providing for establishment of NCLT and NCLAT to take-over the functions which are being performed by CLB, BIFR, AAIFR and the High Courts. It is submitted that the establishment of NCLT and NCLAT will have the following beneficial effects: (i) reduce the pendency of cases and reduce the period of winding-up process from 20 to 25 years to about two years; (ii) avoid multiplicity of litigation before various fora (High Courts and quasi-judicial Authorities like CLB, BIFR and AAIFR) as all can be heard and decided by NCLT; (iii) the appeals will be streamlined with an appeal provided against the order of the NCLT to an appellate Tribunal (NCLAT) exclusively dedicated to matters arising from NCLT, with a further appeal to the Supreme Court only on points of law, thereby reducing the delay in appeals; and (iv) with the pending cases before the Company Law Board and all winding-up cases pending before the High Courts being transferred to NCLT, the burden on High Courts will be reduced and BIFR and AAIFR could be abolished." (emphasis supplied)

66. The IBC was a reform which was distilled through many committee reports, most importantly the Report of the BLRC, which recommended that the earlier institutional framework relating to the winding up and liquidation of the companies should continue under the IBC. The Report stated:

"4.2.2 Territorial jurisdiction

...

Further, following from current law, once a liquidation or bankruptcy order has been made, leave of the NCLT or DRT would be necessary to proceed with any pending suit or proceeding or to file any fresh suit or proceeding by or against the debtor firm or individual. This will ensure the sanctity of the liquidation or bankruptcy process. The NCLT or DRT should also have jurisdiction to entertain and dispose of any pending or fresh suit or legal proceeding by or against the debtor company or individual; question of priorities or any other question, whether of law or facts, in relation to the liquidation or bankruptcy. By bringing all litigations that may have a monetary impact on the economic value of debtor firm or individual's assets within the jurisdiction of the NCLT, the liquidation or bankruptcy process will be made streamlined and efficient...

4.21 *Tribunals Jurisdiction on firm insolvency and liquidation.*-Under Companies Act, 2013, the National Company Law Tribunal (NCLT) has jurisdiction over the

winding up and liquidation of companies. NCLAT has been vested with the appellate jurisdiction over NCLT. Similarly, the Limited Liability Partnership Act, 2008 also confers jurisdiction to NCLT for dissolution and winding up of limited liability partnerships, while appellate jurisdiction is vested with NCLAT. The Committee recommends continuing with this existing institutional arrangement. NCLT should have jurisdiction over adjudications arising out of firm insolvency and liquidation, while NCLAT will have appellate jurisdiction on the same." (emphasis supplied)

67. The institutional framework under the IBC contemplated the establishment of a single forum to deal with matters of insolvency, which were distributed earlier across multiple for a. In the absence of a court exercising exclusive jurisdiction over matters relating to insolvency, the corporate debtor would have to file and/or defend multiple proceedings in different for a. These proceedings may cause undue delay in the insolvency resolution process due to multiple proceedings in trial courts and courts of appeal. A delay in completion of the insolvency proceedings would diminish the value of the debtor's assets and hamper the prospects of a successful reorganization or liquidation. For the success of an insolvency regime, it is necessary that insolvency proceedings are dealt with in a timely, effective and efficient manner. Pursuing this theme in *Innoventive*, **REED 2017 SC 08563** this court observed that "one of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process". The principle was reiterated in *ArcelorMittal*, **REED 2018 SC 10541** where this court held that "the non-obstante Clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings‖. Therefore, considering the text of Section 60(5)(c) and the interpretation of similar provisions in other insolvency related statutes, NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the Corporate Debtor. However, in doing do, we issue a note of caution to the NCLT and NCLAT to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and for a when the dispute is one which does not arise solely from or relate to the insolvency of the Corporate Debtor. The nexus with the insolvency of the Corporate Debtor must exist.

68. It is appropriate to refer to the observations in the Report of the BLRC, wherein it noted the role of the NCLT, as the Adjudicating Authority for the CIRP, in the following terms:

"*An adjudicating authority ensures adherence to the process.-*At all points, the adherence to the process and compliance with all applicable laws is controlled by the adjudicating authority. The adjudicating authority gives powers to the

insolvency professional to take appropriate action against the directors and management of the entity, with recommendations from the creditors committee. All material actions and events during the process are recorded at the adjudicating authority. The adjudicating authority can assess and pen alise frivolous applications. The adjudicator hears allegations of violations and fraud while the process is on. The adjudicating authority will adjudicate on fraud, particularly during the process resolving bankruptcy. Appeals/actions against the behaviour of the insolvency professional are directed to the Regulator/Adjudicator."

As such, it is important to remember that the NCLT's jurisdiction shall always be circumscribed by the supervisory role envisaged for it under the IBC, which sought to make the process driven by trained resolution professionals.

69. In the present case, the PPA was terminated solely on the ground of insolvency, since the event of default contemplated under Article 9.2.1(e) was the commencement of insolvency proceedings against the Corporate Debtor. In the absence of the insolvency of the Corporate Debtor, there would be no ground to terminate the PPA. The termination is not on a ground independent of the insolvency. The present dispute solely arises out of and relates to the insolvency of the Corporate Debtor.

70. Ms Ramachandran and Mr Diwan have contended that CA 1956, PIA and BRA do not contain any provisions equivalent to Sections 25(2)(b) and 18(f)(vi) of the IBC which empower the RP to exercise rights for the benefit of the Corporate Debtor in certain adjudicatory proceedings. They submit that Section 60(5)(c) of the IBC must be read in consonance with Sections 25(2)(b) and 18(f)(iv), which would be rendered nugatory if NCLT becomes the exclusive forum for the enforcement of all the Corporate Debtor's rights. Section 25(2)(b) of the IBC provides:

—Section 25 - *Duties of resolution professional.*—(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:—

….

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;"

Section 18(f)(vi) provides:

"Section 18 - *Duties of interim resolution professional.*—The interim resolution professional shall perform the following duties, namely:—

……

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

…….

(vi) assets subject to the determination of ownership by a court or authority;"

71. We are inclined to agree with the submission made by Mr Singh that merely because a duty has been imposed on the IRP or the RP, it does not mean that the jurisdiction of the NCLT is circumscribed under section 60(5)(c) of the IBC. In *Embassy Property* **REED 2019 SC 12501**, it was argued that the term "property" under Section 3(27) of the IBC includes a mining lease granted by government and the IRP is duty bound under Section 20(1) of the IBC to preserve the value of the property of the Corporate Debtor. Hence, the submission was that the RP can invoke the jurisdiction of the NCLT to adjudicate upon a dispute relating to non-extension of the lease. However, Justice V. Ramasubramanian, speaking for this Court, observed that "the said argument cannot be sustained for the simple reason that the duties of a resolution professional are entirely different from the jurisdiction and powers of NCLT"[1].

72. Therefore, we hold that the RP can approach the NCLT for adjudication of disputes that are related to the insolvency resolution process. However, for adjudication of disputes that arise dehors the insolvency of the Corporate Debtor, the RP must approach the relevant competent authority. For instance, if the dispute in the present matter related to the non-supply of electricity, the RP would not have been entitled to invoke the jurisdiction of the NCLT under the IBC. However, since the dispute in the present case has arisen solely on the ground of the insolvency of the Corporate Debtor, NCLT is empowered to adjudicate this dispute under Section 60(5)(c) of the IBC.

I.2 Jurisdiction of NCLT and GERC

73. It has been urged on behalf of the appellant that in terms of Article 10.4 of the PPA, GERC is entitled to entertain the disputes relating to the PPA.

74. Our attention has also been drawn to Section 86(1)(f) of the Electricity Act, which provides that GERC shall discharge the function of adjudicating "the disputes between the licensees, and generating companies and to refer any dispute for arbitration". It has been submitted that, therefore, any issue in relation to the PPA must be raised before the GERC and not the NCLT.

75. Reliance has also been placed on the judgement of this Court in *Embassy Property*, **REED 2019 SC 12501**, where this Court held that the NCLT and

1. **Embassy Property, REED 2019 SC 12501**, para 39.

NCLAT did not have jurisdiction over a dispute arising under the Mines and Minerals (Development and Regulation) Act, 1957, in relation to the refusal of the State of Karnataka to extend a mining lease. The primary consideration which weighed with this Court while coming to its decision was that NCLT cannot have jurisdiction on matters of public law. This Court held:

"37….Clause (c) of Sub-section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase "arising out of or in relation to the insolvency resolution" appearing in Clause (c) of Sub-section (5)…"

In the present case the decision to terminate the PPA has not been taken by any governmental or statutory authority acting within the domain of its public law functions. The decision has been simply taken by a contracting party solely on account of the initiation of insolvency proceedings against the Corporate Debtor in terms of an agreement between the parties.

76. Ms Ramachandran and Mr Diwan have also relied on the judgment of this Court in *Abhilash Lal*, **REED 2019 SC 11503** which concerned taking the approval of the Municipal Corporation of Greater Mumbai ("MCGM") for implementing a resolution plan. The Corporate Debtor in that case had committed defaults prior to the initiation of the CIRP, in relation to its obligation to construct a hospital on a land owned by the MCGM, subsequent to which a lease deed was to be executed. It had also apparently failed to pay annual lease rentals. In this context, Justice S. Ravindra Bhat, speaking for this Court held that:

"47….. Section 238 cannot be read as overriding the MCGM's right – indeed its public duty to control and regulate how its properties are to be dealt with. Further, this Hon'ble Court held that "in the absence of approval in terms of Section 92 and 92A of the MMC Act, the adjudicating authority could not have overridden MCGM's objections and enabled the creation of a fresh interest in respect of its properties and lands….Nevertheless, the authorities under the Code could not have precluded the control that MCGM undoubtedly has, under law, to deal with properties and land in question, which undeniably are public properties. The resolution plan, therefore, would be a serious impediment to MCGM's independent plans to ensure that public health amenities are developed in the manner it chooses, and for which fresh approval under the MMC Act may be forthcoming for a separate scheme formulated by that corporation (MCGM)"

In other words, the statutory powers entrusted to the Municipal Corporation to exercise control over its own properties are not overridden by Section 238 of the IBC. Once again, the present situation is distinguishable. The contract in

question in *Abhilash Lal* (supra) was terminated due to defaults unrelated to the insolvency of the corporate debtor. In the present case, the sole default attributed by the appellant to the Corporate Debtor was that it was undergoing an insolvency resolution process, which makes the present dispute amenable to the jurisdiction of the NCLT under Section 60(5)(c) of the IBC.

77. Section 238 of the IBC stipulates that IBC would override other laws, including an instrument having effect by virtue of any such law. The NCLT in its decision dated 29 August 2019 gave detailed findings on the issue of whether the PPA is an instrument within the meaning of section 238 of the IBC. Section 238 of the IBC provides:

“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.”

The findings of the NCLT are extracted below:

“19. That from the plain reading of Section 238, it is evident that the aforesaid Section is applicable to an 'instrument' too. However, we find that the term 'instrument' has not been defined anywhere under IBC 2016.

20. To know, whether the Power Purchase Agreement (PPA) is an 'instrument' or not, we referred to the provisions of Section 3 (37) of the Code, which is reproduced as below:

"Section 3(37) : Words and expressions used but not defined in this Code but defined in the Indian Contract Act, 1872, the Indian Partnership Act, 1932, the Securities Contract (Regulation) Act, 1956, the Securities Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Limited Liability Partnership Act, 2008 and the Companies Act, 2013, shall have the meanings respectively assigned to them in those Acts."

21. However, in the definition clauses of all these enactments and of General Clause Act 1897, we failed to find a definition of the term 'instrument'.

22. For interpretation of the term 'instrument', we, therefore, thought it proper to check how the Legislature has defined the term 'instrument' in other enactments.

23 . Finding that the PPA has been executed on a Stamp Paper, we referred to the Section 2(14) of the Indian Stamp Act, 1899, which reads as follows:

"Section 2(14): "Instrument" - "instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded".

24. That near similar definition of the term 'instrument' is provided under Section 2(b) of Notaries Act, 1952 :

"Section 2(b): "instrument" includes every document by which any right or liability is, or purports to be, created, transferred, modified, limited, extended, suspended, extinguished or recorded;"

25. Further, the Bombay Stamp Act, 1958 defines the term 'instrument' in Section 2(1) as follows :

"Section 2(1): instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded, but does not include a bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of insurance, transfer of share, debenture, proxy and receipt;"

26. That the Merriam-Webster Dictionary defines the word 'instrument', inter alia, as:

"a formal legal document (such as a deed, bond or agreement)"

27. Since, the rights and liabilities of parties have been created in the Power Purchase Agreement and such an agreement is enforceable by law and the word 'instrument' inter alia, includes an 'agreement', we are of the view, that the Power Purchase Agreement i.e., PPA is an 'Instrument' for the purpose of Section 238 of IBC 2016."

78. It has been urged on behalf of the appellant that Section 238 does not apply to a bilateral commercial contract between a Corporate Debtor and a third party and only applies to statutory contracts or instruments entered into by operation of law. The basis of this submission is that the word "instrument" should be given a meaning ejusdem generis to the provision "contained in any other law". We do not find force in this argument. Section 238 does not state that the "instrument" must be entered into by operation of law; rather it states that the instrument has effect by virtue of any such law. In other words, the instrument need not be a creation of a statute; it becomes enforceable by virtue of a law. Therefore, we are inclined to agree with the view taken by the NCLT. Section 238 is prefaced by a non-obstante clause. NCLT's jurisdiction could be invoked in the present case because the termination of the PPA was sought solely on the ground that the Corporate Debtor had become subject to an insolvency resolution process under the IBC.

79. Section 63 of the IBC provides that "no civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code".

I.3 Residuary jurisdiction of the NCLT under section 60(5)(c)

80. The respondents have relied upon the decision of this Court in *Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta,* **REED 2019 SC 11505** : (2020) 8 SCC 531; hereinafter referred to as "Satish Kumar Gupta"*,* where this Court held that section 60(5)(c) of the IBC "is in the nature of residuary jurisdiction vested in the NCLT so that NCLT may decide all questions of law or fact arising out of or in relation to insolvency or liquidation under the Code"[1]

81. At this stage we may visit some of the precedents emanating from this court where a statutory conferment of residuary powers has been analyzed. A two-judge Bench of this Court discussed the contours of the residuary power in *Remdeo Chauhan* v. *Bani Kant Das,* (2010) 14 SCC 209, while interpreting sub-Section (j) of Section 12 of the National Human Rights Commission Act, 1993 which confers NHRC with "such other functions as it may consider necessary for the promotion of human rights". While construing the provision, this Court held that:

"45….It is not necessary that each and every case relating to the violation of human rights will fit squarely within the four corners of Section 12 of the 1993 Act for invoking the jurisdiction of the NHRC. One must accept that human rights are not edicts inscribed on a rock. They are made and unmade on the crucible of experience and through reversible process of human struggle for freedom. They admit of a certain degree of fluidity. Categories of human rights, being of infinite variety, are never really closed. That is why the residuary clause in Sub-section (j) has been so widely worded to take care of situations not covered by Subsections (a) to (i) of Section 12 of the 1993 Act.

46. The jurisdiction of NHRC thus stands enlarged by Section 12(j) of the 1993 Act, to take necessary action for the protection of human rights. Such action would include inquiring into cases where a party has been denied the protection of any law to which he is entitled, whether by a private party, a public institution, the government or even the Courts of law. We are of the opinion that if a person is entitled to benefit under a particular law, and benefits under that law have been denied to him, it will amount to a violation of his human rights."

(emphasis supplied)

82. In *D.R. Kohli* v. *Atul Products Ltd.,* (1985) 2 SCC 77, a three judge Bench of this Court differentiated between the power of Central Excise authorities for recovery of monies due to the Government under two provisions, one of them being a residuary provision:

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[1]. Ibid, para 69

"14. The next question relates to the appropriate provision of law under which action could have been taken in this case by the Central Excise authorities. This question was not decided by the High Court in view of its finding on the liability of the respondent to pay excise duty on the products manufactured by it. Since we have not agreed with the decision of the High Court on this point, it has become necessary for us to decide this question in this appeal. While the Department asserts that it was open to it to proceed under Rule 10-A of the Rules, the respondent contends that even if there was any short levy, the proper Rule applicable to its case was Rule 10 and not Rule 10A. Rule 10 and Rule 10-A of the Rules during the relevant period ran as follows :

10. Recovery of duties or charges short-levied, or erroneously refunded: When duties or charges have been short-levied through inadvertence, error, collusion or misconstruction on the part of an officer, or through misstatement as to the quantity, description or value of such goods on the part of the owner, or when any such duty or charge, after having been levied/has been owing to any such cause, erroneously refunded, the person chargeable with the duty or charge, so short-levied, or to whom such refund has been erroneously made, shall pay the deficiency or pay the amount paid to him in excess, as the case may be, on written demand by the proper officer being made within three months from the date, on which the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund.

10-A. *Residuary powers for recovery of sums due to Government:*-Where these Rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the Central Government under the Act or these Rules, such duty, deficiency in duty or sum shall, on a written demand made by the proper officer, be paid to such person and at such time and place, as the proper officer may specify.

15. The points of difference between the above two Rules were that (i) whereas Rule 10 applied to cases of short levy through inadvertence, error, collusion or misconstruction on the part of an officer, or through misstatement as to the quantity, description or value of the excisable goods-on the part of the owner Rule 10-A which was a residuary clause applied to those cases which were not covered by Rule 10 and that (ii) whereas under Rule 10, the deficit amount could not be collected after the expiry of three months from the date on which the duty or charge was paid or adjusted in the owners account-current or from the date of making the refund, Rule 10-A did not contain any such period of limitation." (emphasis supplied)

83. Hence, the residuary jurisdiction conferred by statute may extend to matters which are not specifically enumerated under a legislation. While a residuary

jurisdiction of a court confers it wide powers, its jurisdiction cannot be in contravention of the provisions of the concerned statute. In *A. Deivendran* v. *State of T.N.,* (1997) 11 SCC 720, a two judge Bench of this Court, while determining the limitations of the residuary jurisdiction under Section 465 of the Code of Criminal Procedure, 1973[1], held that a residuary jurisdiction cannot be invoked when there is a patent defect of jurisdiction or an order is passed in contravention of any mandatory provision of the CrPC. Speaking through Justice G.B. Pattanaik, this Court observed that a competent court is vested with the power to exercise residuary jurisdiction under section 465 of the CrPC in the following terms:

"15. We may notice also the arguments advanced by Mr Mohan, learned counsel appearing for the State, that the conviction and sentence against the appellants should not be interfered with in view of the provisions of Section 465 of the Code, inasmuch as there has been no failure of justice. We are unable to accept this contention. Section 465 of the Code is the residuary section intended to cure any error, omission or irregularity committed by a Court of competent jurisdiction in course of trial through accident or inadvertence, or even an illegality consisting in the infraction of any provisions of law. The sole object of the Section is to secure justice by preventing the invalidation of a trial already held, on the ground of technical breaches of any provisions in the Code causing no prejudice to the accused. But by no stretch of imagination the aforesaid provisions can be attracted to a situation where a Court having no jurisdiction under the Code does something or passes an order in contravention of the mandatory provisions of the Code. In view of our interpretation already made, that after a criminal proceeding is committed to a Court of Sessions it is only the Court of Sessions which has the jurisdiction to tender pardon to an accused and the Chief Judicial Magistrate does not possess any such jurisdiction, it would be impossible to hold that such tender of pardon by the Chief Judicial Magistrate can be accepted and the evidence of the approver thereafter can be considered by attracting the provisions of Section 465 of the Code. The aforesaid provision cannot be applied to a patent defect of jurisdiction. Then again it is not a case of reversing the sentence or order passed by a Court of competent jurisdiction but is a case where only a particular item of evidence has been taken out of consideration as that evidence of the so-called approver has been held by us to be not a legal evidence since pardon had been tendered by a Court of incompetent jurisdiction. In our opinion, to such a situation the provisions of Section 465 cannot be attracted at all. It is true, that procedures are intended to subserve the ends of justice and undue emphasis on mere technicalities which are not vital or important may frustrate the ends of justice. The Courts, therefore, are required to consider the gravity of irregularity and whether the same has caused a failure of justice. To tender pardon by a Chief Judicial

1. "CrPC"

Magistrate cannot be held to be a mere case of irregularity nor can it be said that there has been no failure of justice. It is a case of total lack of jurisdiction, and consequently the follow up action on account of such an order of a Magistrate without jurisdiction cannot be taken into consideration at all. In this view of the matter the contention of Mr Mohan, learned Counsel appearing for the State in this regard has to be rejected." (emphasis supplied)

84. In *Johri Lal Soni* v. *Bhanwari Bai,* (1977) 4 SCC 59 : hereinafter, referred to as *"Johri Lal Soni" ("Johri Lal Soni"),* a two judge Bench of this Court had to determine whether an insolvency court can scrutinize the validity of a transfer made seven years before the transferor was adjudged as insolvent, when Section 53 of the PIA classified only those transfers as voidable against the receiver, where the transferor was adjudged insolvent on a petition presented within two years after the date of transfer. This Court, in view of the wide discretion granted in terms of Section 4, held that the insolvency court will have the jurisdiction to determine the validity of void transfers undertaken at any point of time. While Section 53 was applicable only to voidable transactions, this Court was of the view that Section 4 provides a discretion to an insolvency court to decide all questions which arise in a case of insolvency and an interpretation which allowed the court to examine void transfers undertaken at any point of time would be in consonance with the object of the provision. The Court held:

"4. We now proceed to interpret the provisions of s. 4 itself, the relevant part of which may be extracted thus:

4. (1) Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

5. It would be seen that the section has been couched in the widest possible terms and confers complete and full powers on the Insolvency Court to decide all questions of title or priority, or of any nature whatsoever, which may arise in any case of insolvency. The only restriction which is contained in Section 4 is that these powers are subject to the other provisions of the Act. In other words, the position is that where any other section of the Act contains a provision which either runs counter to Section 4 or expressly excludes the application of Section 4, to that extent Section 4 would become inapplicable. Counsel for the respondent strongly relied on the provisions of Section 53 which runs thus:

53. Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged

insolvent on a petition presented within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court."

(emphasis supplied)

It is relevant to note that unlike Section 4 of the PIA, Section 60(5)(c) of the IBC is not subject to other provisions of the statute. Hence, Section 60(5)(c) of the IBC has been worded more expansively than Section 4 of the PIA.

85. In respect of the interplay between Sections 53 and 4 of the PIA, in *Johri Lal Soni* (supra), this Court further held:

"6. It was submitted that the effect of Section 53 of the Act clearly is that it bars the jurisdiction of the Insolvency Court to determine the validity of any transfer made beyond two years of the transferor being adjudged insolvent. It is no doubt true that the words "within two years after the date of the transfer" being voidable as against the receiver does fix a time-limit within which the transfer could be annulled by the Court. But a plain construction of Section 53 would manifestly/indicate that the words "within two years after the date, be voidable as against the receiver and shall be annulled by the Court" clearly connote that only those transfers are excepted from the jurisdiction of the Court which are voidable. The section has, therefore, made a clear distinction between void and voidable transfers-a distinction which is well known to law. A void transfer is no transfer at all and is completely destitute of any legal effect: it is a nullity and does not pass any title at all. For instance, where a transfer is nominal, sham or fictitious, the title remains with the transferor and so does the possession and nothing passes to the transferee. It is manifest, therefore, that such a transfer is no transfer in the eye of the law. Such transfers, therefore, clearly fall beyond the purview of Section 53 of the Act which refers only to transfers which are voidable. It is well settled that a voidable transfer is otherwise a valid transaction and continues to be good until it is avoided by the party aggrieved. For instance, transfers executed by the transferor to delay or defraud his creditors may be avoided under Section 53 of the Transfer of Property Act. Similarly transfers made under coercion, fraud or undue influence may be avoided by the party defrauded. It is only such transfers which, if they take place beyond two years of the date of transfer, cannot be enquired into by the Court by virtue of Section 53 of the Act. This appears to us to be the plain and simple interpretation of the combined reading of Sections 4 and 53 of the Act. Indeed, if a different interpretation is given, it will render the entire object of the section [4] nugatory, because the Court would be powerless to set at naught transfers which are patently void, merely because they had been made at a particular point of time."

(emphasis supplied)

86. The decision in *Johri Lal Soni* (supra) gave an expansive interpretation to the powers of an insolvency court under Section 4 of the PIA, which is similar to Section 60(5)(c) of the IBC. This Court held that an insolvency court was

empowered to consider the validity of void transfers under Section 4 of the PIA, which did not explicitly fall under Section 53 of the PIA. However, this Court's decision was premised on the finding that Section 53 of the PIA only dealt with voidable transfers. This Court noted that the jurisdiction of an insolvency court will be restricted in matters where a voidable transfer has taken place beyond the time-limit stipulated under Section 53 within which the transfer could be annulled by the court. Hence, in the name of exercising a residuary jurisdiction, a court cannot cloak itself with jurisdiction which is contrary to the provisions of a statute. However, at the same time, as held by this Court in *Johri Lal Soni* (supra), an interpretation which renders the objective of a residuary jurisdiction nugatory cannot be upheld by this Court. A fine line has to be drawn between ensuring that a residuary jurisdiction is not rendered otiose due to an excessively restrictive interpretation, as well as, guarding against usurpation of power by a court or a tribunal not vested in it.

87. The residuary jurisdiction of the NCLT under Section 60(5)(c) of the IBC provides it a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. If the jurisdiction of the NCLT were to be confined to actions prohibited by Section 14 of the IBC, there would have been no requirement for the legislature to enact Section 60(5)(c) of the IBC. Section 60(5)(c) would be rendered otiose if Section 14 is held to be the exhaustive of the grounds of judicial intervention contemplated under the IBC in matters of preserving the value of the corporate debtor and its status as a 'going concern'. We hasten to add that our finding on the validity of the exercise of residuary power by the NCLT is premised on the facts of this case. We are not laying down a general principle on the contours of the exercise of residuary power by the NCLT. However, it is pertinent to mention that the NCLT cannot exercise its jurisdiction over matters *dehors* the insolvency proceedings since such matters would fall outside the realm of IBC. Any other interpretation of Section 60(5)(c) would be in contradiction of the holding of this Court in *Satish Kumar Gupta* (supra).

PART J

Validity of *ipso facto* clauses

88. Before we proceed to analyze the validity of the termination of the PPA by the appellant under Articles 9.2.1(e) and 9.3.1 in the present case, it is important to contextualize it within the larger debate on this issue. Globally, *ipso facto* clauses arise in a variety of contracts. Ipso facto clauses are contractual provisions which allow a party ("terminating party") to terminate the contract with its counterparty ("debtor") due to the occurrence of an 'event of default'. In the context of insolvency law, in some of these *ipso facto* clauses, the 'event of default' includes applying for insolvency, commencement of insolvency proceedings, appointment of insolvency representative, et al. The United Nations

Commission on International Trade Law[1] released its *Legislative Guide on Insolvency Law* in 2004[2]. This guide defines *ipso facto* clauses in the following terms:

"114. Many contracts include a clause that defines events of default giving the counterparty an unconditional right, for example, of termination or acceleration of the contract (sometimes referred to as —ipso facto‖ clauses). These events of default commonly include the making of an application for commencement, or commencement, of insolvency proceedings; the appointment of an insolvency representative; the fact that the debtor satisfies the criteria for commencement of insolvency proceedings; and even indications that the debtor is in a weakened financial position…"

The validity of such *ipso facto* clauses has been considered in a global perspective by international organizations and in the domestic jurisdictions of nation-states in their national insolvency laws. In order for us to assess their validity in India, we must first understand the global trends in contemporary jurisprudence. We can attempt to extrapolate our experiential learning from comparative law. As India develops into a responsive member of the international community, our laws cannot afford to be inward-looking.

J.1 Position of international and multilateral organizations

89. The UNCITRAL Guide notes that insolvency laws across various jurisdictions either uphold ipso facto clauses or invalidate them. It notes the arguments of both sides thus:

"115. The approach of upholding these types of clauses may be supported by a number of factors, including the desirability of respecting commercial bargains; the need to prevent the debtor from selectively performing contracts that are profitable and rejecting others (an advantage that is not available to the counterparty); the effect on financial contract netting of not upholding an automatic termination provision; the belief that, since an insolvent business will generally be unable to pay, delaying the termination of contracts potentially only increases existing levels of debt; the need for creators of intellectual property to be able to control the use of that property; and the effect on the counterparty's business of termination of a contract, especially one with respect to an intangible.

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1. "UNCITRAL"
2. "UNCITRAL Guide"; Available at <https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/05-80722_ebook.pdf> accessed 18 February 2021. The UNITRAL Guide was created with the intent that it would be used —as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations‖

116. Under a different approach, the insolvency law overrides those clauses, making them unenforceable. Where the clause provides, for example, for termination on the occurrence of the defined event, the contract can be continued over the objection of the counterparty. Although the approach of overriding such clauses can be regarded as interfering with general principles of contract law, such interference may be crucial to the success of the proceedings. In reorganization, for example, where the contract is a critical lease or involves the use of intellectual property embedded in a key product, continued performance of the contract may enhance the earnings potential of the business; reduce the bargaining power of an essential supplier; capture the value of the debtor's contracts for the benefit of all creditors; and assist in locking all creditors into a reorganization."

90. In finding a pragmatic solution to a vexed issue such as the validity of ipso facto clauses, the law acknowledges the inherent tension between the primary arguments on both sides of the debate. One the one hand there is a need of ensuring that the debtor remains as a _going concern` throughout the insolvency process. On the other hand, the law has to respect the freedom to enter upon contracts and the sanctity of enforcing contractual remedies. Controlling the ambit of ipso facto clauses does give rise to arguments of infringing upon the parties' freedom to enter into and enforce their contracts. The UNCITRAL Guide offers guidance to national authorities by concluding that it is desirable that their national insolvency laws override such *ipso facto* clauses, subject to limited exceptions, since the continued performance of the terminated contracts is often crucial to the success of the insolvency process. The UNCITRAL Guide states this in the following terms:

"118. Although some insolvency laws do permit these types of clause to be overridden if insolvency proceedings are commenced, this approach has not yet become a general feature of insolvency laws. There is an inherent tension between promoting the debtor's survival, which may require the preservation of contracts, and injecting unpredictability and extra cost into commercial dealings by creating a variety of exceptions to general contract rules. While this issue is clearly one that may require a careful weighing of the advantages and disadvantages, there are, nevertheless, circumstances where the ability of the insolvency representative to ensure that a contract continues to be performed will be crucial to the success of reorganization and also, but perhaps to a lesser extent, liquidation where the business is to be sold as a going concern. For these reasons, it is desirable that an insolvency law permit such clauses to be overridden. Any negative impact of a policy of overriding these types of clauses can be balanced by providing compensation to creditors who can demonstrate that they have suffered damage or loss as a result of the contract continuing to be performed after commencement of insolvency proceedings, or including exceptions to a general override of these clauses for certain types of contracts,

such as contracts to lend money and, in particular, financial contracts (see below, paras. 208-215)." (emphasis supplied)

91. The World Bank, in its Principles for Effective Insolvency and Creditor/Debtor Regimes published in 2016[1], notes that ipso facto clauses should be overridden, subject to limited exceptions. It states thus:

"C10 Treatment of Contractual Obligations

...

C10.2 To gain the benefit of contracts that have value, the insolvency representative should have the option of performing and assuming the obligations under those contracts. Contract provisions that provide for termination of a contract upon either an application for commencement or the commencement of insolvency proceedings should be unenforceable subject to special exceptions."

92. While assessing the position adopted by supranational organizations, we note that the European Parliament issued Directive (EU) 2019/1023 on 20 June 2019[2] in relation to the restructuring and insolvency framework in the European Union, thereby amending the previous Directive. The EU Directive notes in its Recitals the issues which can arise for a Corporate Debtor undergoing restructuring when its suppliers terminate contracts based on *ipso facto* clauses. The Recitals state as follows:

"(40) When a debtor enters an insolvency procedure, some suppliers can have contractual rights, provided for in so called ipso facto clauses, entitling them to terminate the supply contract solely on account of the insolvency, even if the debtor has duly met its obligations. Ipso facto clauses could also be triggered when a debtor applies for preventive restructuring measures. Where such clauses are invoked when the debtor is merely negotiating a restructuring plan or requesting a stay of individual enforcement actions or invoked in connection with any event connected with the stay, early termination can have a negative impact on the debtor's business and the successful rescue of the business. Therefore, in such cases, it is necessary to provide that creditors are not allowed to invoke ipso facto clauses which make reference to negotiations on a restructuring plan or a stay or any similar event connected to the stay.

(41) Early termination can endanger the ability of a business to continue operating during restructuring negotiations, especially when contracts for essential supplies such as gas, electricity, water, telecommunication and card

1. Available at <http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-CreditorDebtor-Regimes-2016.pdf> accessed 18 February 2021.
2. "EU Directive"

payment services are concerned. Member States should provide that creditors to which a stay of individual enforcement actions applies, and whose claims came into existence prior to the stay and have not been paid by a debtor, are not allowed to withhold performance of, terminate, accelerate or, in any other way, modify essential executory contracts during the stay period, provided that the debtor complies with its obligations under such contracts which fall due during the stay. Executory contracts are, for example, lease and licence agreements, long term supply contracts and franchise agreements." (emphasis supplied)

93. Thereafter, the EU Directive recommends that the member States of the European Union shall ensure that creditors are not allowed to terminate contracts based on ipso facto clauses when the 'event of default' is a Corporate Debtor undergoing restructuring. Article 7 of the Directive states as follows:

"Article 7

Consequences of the stay of individual enforcement actions

...

5. Member States shall ensure that creditors are not allowed to withhold performance or terminate, accelerate or, in any other way, modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of:

(a) a request for the opening of preventive restructuring proceedings;

(b) a request for a stay of individual enforcement actions;

(c) the opening of preventive restructuring proceedings; or

(d) the granting of a stay of individual enforcement actions as such."

J.2 National jurisdictions

94. As we begin assessing the positions of national jurisdictions, it is apposite that we begin by analyzing the contradictory positions adopted by the United States and the United Kingdom before looking at European and other nations with civil law traditions, and thereafter at nations with common law roots.

J.2.1 United States

95. In the US, Section 365(e) of the United States Bankruptcy Code, 1979 ("US Bankruptcy Code") renders ipso facto clauses unenforceable when they are present in an executory contract or an unexpired lease. Section 365(e) stipulates:

"(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may

not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on-

(a) the insolvency or financial condition of the debtor at any time before the closing of the case;

(b) the commencement of a case under this title; or

(c) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement"

96. A related provision, Section 541(c)(1)(B) of the US Bankruptcy Code provides that "an interest of the debtor in property becomes property of the estate‖ in spite of any "agreement, transfer instrument, or applicable non bankruptcy law‖ which "gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property". However, even so, the US Bankruptcy Code does allow *ipso facto* clauses in certain contracts (swap agreements, securities, forwarding, et al) to be enforceable.

97. Further, there have been instances where District Bankruptcy Courts in United States have invalidated ipso facto clauses in contracts other than executory contracts or unexpired leases based on broad considerations relating to the purpose of the US Bankruptcy Code. The *ipso facto* provisions in such contracts may not be *per se* invalid, but they may be set aside where "any such default would deprive the debtor of the advantages of the Code's liquidation procedures"[1]. For instance, the District Court for the District of Delaware has noted "the general trend of the federal courts that the prohibition against *ipso facto* clauses is not limited to actions [involving executory contracts or unexpired leases]", while invalidating an ipso facto clause premised on bankruptcy filing[2]. Similarly, in another case, an *ipso facto* clause in a non-executory contract was held to be invalid because "it would defeat the purposes of the [US] Bankruptcy Code‖ and "cannot be enforced by a court of equity"[3]. The Bankruptcy Court reasoned that:

"Under the Bankruptcy Code, there is no statutory mandate that bankruptcy-default clauses are valid and enforceable. The only Congressional statement is clear that in most, if not all, instances, such clauses are not enforceable. Also,

1. Riggs National Bank of Washington, D.C. v. John Gillis Perry, Jr., in Re John Gillis Perry, Jr., Debtor, 729 F.2d 982 (4th Cir. 1984)n(Court of Appeals for the Fourth Circuit).
2. In re W.R. Grace & Co., 475 B.R. 34, 154 (D. Del. 2012).
3. In the Matter of James Margaret Rose Jr., Debtors 21 B.R. 272 (Bankr. D.N.J. 1982) (United States Bankruptcy Court, D. New Jersey).

cf. Sections 363(l) and 541(c)(1)(B) of the Bankruptcy Code, where bankruptcy-default clauses are not given effect. Thus, there is simply no reason to assume that Congress intended to make these clauses enforceable only in non-executory contracts. Such an assumption would be directly contrary to the spirit and purposes of the Bankruptcy Code. One of the objectives of bankruptcy laws is to enable debtors to make a fresh start."[1]

However, it is important to note that District Court of New York has taken a contrary position, holding that the text of Section 365(e) of the US Bankruptcy Code is clear and limits its prohibition only to executory contracts and unexpired leases[2]. Hence, the position in relation to this issue seems to be unsettled even in the US.

J.2.2 United Kingdom

98. Coming to the position of law in the UK, we must first acknowledge that the insolvency regime there is governed not just by legislation but also through common law doctrine. The important common law doctrine is the _anti-deprivation rule', which seeks to prevent the improper removal of an asset from the debtor's estate, which would reduce the debtor's overall net asset value, which would in turn reduce the size of the pie. Hence, the rule seeks to prevent the debtor's assets from being reduced before they can become subject to the insolvency process. As such, it has been argued that ipso facto clauses could be in violation of the anti-deprivation rule since they allow a party to terminate a contract upon commencement on insolvency, which then takes away the debtor's valuable asset (i.e., the contract).

99. The scope of the anti-deprivation rule was clarified by the UK Supreme Court[3] in the case of *Belmont Park Investments Pty Ltd and others* v. *BNY Corporate Trustee Services Ltd and another (Revenue and Customs Comrs and another intervening),* [2011] 3 W.L.R. 521;[4] The facts of this case have been succinctly summarized in an article by Adrienne Ho in the McGill Law Journal: the reproduction below is from the footnoted article [5]:

(i) Lehman Brothers set up special purpose vehicles ("Issuer"), which in turn issued Notes to investors ("Note holders"), including the respondents. The Issuer used the Notes' proceeds to purchase secure investments ("Collateral") while simultaneously entering into credit default swap agreements ("Agreements")

1. Ibid
2. In Re General Growth Properties, Inc., 451 B.R. 323 (Bankr. S.D.N.Y. 2011) (United States Bankruptcy Court, S.D. New York).
3. "UKSC"
4. hereinafter referred to as "Belmont Park"
5. As noted in Adrienne Ho, The Treatment of Ipso Facto Clauses in Canada, (2015) 61:1 McGill LJ 139.

with Lehman Brothers Special Financing (“LBSF”). LBSF agreed to pay the Issuer premiums in exchange for the latter's credit protection on loans owned by Lehman Brothers. The premiums the Issuer received from LBSF were then paid to the Note holders. The Agreement was governed by English law;

(ii) On the basis that Lehman Brothers‘ and LBSF's Chapter 11 filings (i.e., for bankruptcy in the US) in 2008 were ‘Events of Default‘ as outlined in the Agreements, the Note holders directed the Trustee to terminate the Agreements. The Collateral, which was held by the Trustee, provided security for the Issuer's obligations to the Note holders and LBSF. Although the latter had priority to the Collateral, the Agreements contained a provision (“flip clause”) that would reverse the priorities in favour of the Note holders if an Event of Default occurred; and

(iii) LBSF argued the flip clause was invalid for two reasons: first, it deprived LBSF of property that it would have been otherwise entitled to in its bankruptcy; and second, the clause offended the anti-deprivation rule by reversing LBSF's and the Note holders' respective priorities on the basis of LBSF's bankruptcy.

100. The UKSC in this case was considering the contours of the anti-deprivation rule, which protects against the dilution of the debtor‘s value. This is quite distinct from a situation where the effect of the concerned clause would be the failure of the insolvency resolution process in its entirety. Writing the majority opinion, Lord Collins upheld the flip clause on the basis that it was “a complex commercial transaction entered into in good faith‖ and that the provisions were not used deliberately to evade the application of insolvency law, which was a key requirement for the application of the anti-deprivation rule. The learned judge held thus:

“102. It would go well beyond the proper province of the judicial function to discard 200 years of authority, and to attempt to re-write the case law in the light of modern statutory developments. The anti-deprivation rule is too well-established to be discarded despite the detailed provisions set out in modern insolvency legislation, all of which must be taken to have been enacted against the background of the rule.

103. As has been seen, commercial sense and absence of intention to evade insolvency laws have been highly relevant factors in the application of the anti-deprivation rule. Despite statutory inroads, party autonomy is at the heart of English commercial law. Plainly there are limits to party autonomy in the field with which this appeal is concerned, not least because the interests of third-party creditors will be involved. But, as Lord Neuberger stressed [2010] Ch 347, para 58, it is desirable that, so far as possible, the courts give effect to contractual terms which parties have agreed. And there is a particularly strong

case for autonomy in cases of complex financial instruments such as those involved in this appeal.

104. No doubt that is why, except in the case of a blatant attempt to deprive a party of property in the event of liquidation (*Folgate London Market Ltd* v *Chaucer Insurance plc,* [2011] EWCA Civ 328; The Times, 13 April 2011), the modern tendency has been to uphold commercially justifiable contractual provisions which have been said to offend the anti-deprivation rule: *Money Markets International Stockbrokers Ltd* v *London Stock Exchange Ltd,* [2002] 1 WLR 1150; *Lomas* v *JFB Firth Rixson Inc*, [2011] 2 BCLC 120; and the judgments of Sir Andrew Morritt C and the Court of Appeal in these proceedings. The policy behind the anti-deprivation rule is clear, that the parties cannot, on bankruptcy, deprive the bankrupt of property which would otherwise be available for creditors. It is possible to give that policy a common sense application which prevents its application to bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy."

(emphasis supplied)

101. Lord Mance in his concurring opinion, expressed a similar view:

"177. However, Mr Snowden advanced propositions which would mean that any provision for termination on bankruptcy, which would deprive the trustee or liquidator of the opportunity of continuing the contract and so the bankrupt estate of future potential advantage, would infringe the principle. There is in my opinion no basis for any such rule. Where a contract provides for the performance in the future of reciprocal obligations, the performance of each of which is the quid pro quo of the other, I see nothing objectionable or evasive about a provision entitling one party to terminate if the other becomes bankrupt." (emphasis supplied)

As such, it was understood that bona fide commercial contracts entered into by parties which contained ipso facto clauses would not violate the anti-deprivation rule.

102. Lord Mance also discussed the parallel proceedings in the US and the legislative invalidation of ipso facto clauses there. Noting the difference between the position in the UK and the US, he concluded by holding that a similar invalidation of ipso facto clauses in the UK should be done legislatively, and not through a common law development. He held thus:

"173. It is relevant to note that the American bankruptcy rule invalidating ipso facto termination clauses is a product of legislation: section 365(e) of the Bankruptcy Code 1978…

174. The anti-deprivation principle recognised in English case law finds a parallel in section 541. But the English case law has to date focused on deprivation of

property, and has not recognised any equivalent principle to that enacted in section 365(e). Further, section 365(e) is itself qualified by the "safe harbor" provisions of section 560, which specifically protect a non-defaulting swap participant's contractual rights to liquidate, terminate or accelerate a swap agreement because of a condition of the kind specified in section 365(e)(1), that is the insolvency or financial condition of the debtor and the commencement of a bankruptcy case... What it does suggest is that any general rule invalidating ipso facto termination clauses ought to be a matter for legislative attention, rather than novel common law development".

(emphasis supplied)

103. The decision in *Belmont Park* (supra) has been followed by the Chancery Division in *Fibria Celulose S/A* v *Pan Ocean Co Ltd* v. *Fibria Celulose S/A Chancery Division,* dated 30 June 2014 [2014] Bus. L.R. 1041; hereinafter referred to as "Pan Ocean Co Ltd" Morgan J held thus:

"12 In some jurisdictions, a clause which allows a party to a contract to terminate the contract by reason of the insolvency of the counterparty is called an ipso facto clause. In certain jurisdictions in the United States of America such clauses are automatically invalid. In Canada, the court has power to stay the exercise of rights under such clauses. Later in this judgment, I will consider how such clauses are treated under Korean insolvency law.

13. There was no dispute before me as to the efficacy in English law of the provisions in clause 28.1 of the contract which allow termination by reason of an insolvency event. It was accepted that those provisions are valid in English law. In particular, it was accepted that the rule of insolvency law, known as the anti-deprivation rule, does not strike down those provisions.

14. Although there was no argument as to the approach of an English court to the insolvency provisions in clause 28.1 of the contract, it is helpful for present purposes to understand why those provisions do not infringe the anti-deprivation rule or any other rule of English insolvency law. The scope of the anti-deprivation rule has been considered recently by the Supreme Court in *Belmont Park Investments Pty Ltd* v. *BNY Corporate Trustee Services Ltd (Revenue and Customs Comrs intervening),* [2011] Bus LR 1266; [2012] 1 AC 383…"

(emphasis supplied)

104. In his treatise, Principles of Corporate Insolvency Law[1], Professor Roy Goode has discussed the effect of the decision in *Belmont Park* (supra) on the validity of *ipso facto* clauses. Professor Goode does so in the following terms:

1. 5th ed (London: Sweet & Maxwell, 2018), paras 7-24 and 7-29.

"As explained above, the validity of provisions for the termination of contracts by reason of one party's entry into insolvency proceedings has long been assumed, and appears to have been accepted by Lord Mance in Belmont. Such provisions do not escape the rule because they effect no deprivation of property (in substance, they do), but because they are commercially sensible or (in Lord Mance's language) have a legitimate commercial basis.

...

The statute law of some jurisdictions prohibits counterparties from relying on clauses in contracts that permit termination on another party's entry into insolvency proceedings (so-called ipso facto clauses). Absent statutory control, such clauses allow a counterparty to terminate even in circumstances where the debtor is ready, willing and able to perform their part of the bargain so that creditors can enjoy the benefit of performance by the counterparty. Such clauses can also be wielded as leverage to extract concessions from the debtor, as where the counterparty agrees to keep the contract on foot on the proviso that any outstanding debts owing by the company to it are discharged.

English law has traditionally taken a generous approach to such clauses. The common law anti-deprivation rule does not invalidate termination clauses, there being "nothing objectionable or evasive about a provision entitling one party to terminate it [a bilateral contract] if the other becomes bankrupt". As David Richards J explained in the Football Creditors case:

"In the absence of specific statutory provision, insolvency law does not compel a party to continue to deal with a company in administration or liquidation, nor does it prohibit a party from stipulating that all future dealings shall be on terms that not only future debts but also existing debts are paid in full. It is then for the administrator or liquidator to decide whether to accept these terms.' (emphasis supplied)

105. On the legislative side, the insolvency regime in the UK is governed by the Insolvency Act, 1986[1], which does not invalidate *ipso facto* clauses. However, the UK Act was recently amended by the Corporate Insolvency and Governance Act 2020[2], which came into force on 26 June 2020. Amongst other changes, it introduced Section 233B into the UK Act. Section 233B reads thus:

"*Protection of supplies of goods and services.*—(1) This section applies where a company becomes subject to a relevant insolvency procedure.

(2) ...

1. "UK Act"
2. "CIGA"

(3) A provision of a contract for the supply of goods or services to the company ceases to have effect when the company becomes subject to the relevant insolvency procedure if and to the extent that, under the provision—

(a) the contract or the supply would terminate, or any other thing would take place, because the company becomes subject to the relevant insolvency procedure, or

(b) the supplier would be entitled to terminate the contract or the supply, or to do any other thing, because the company becomes subject to the relevant insolvency procedure.

(4) Where—

(a) under a provision of a contract for the supply of goods or services to the company the supplier is entitled to terminate the contract or the supply because of an event occurring before the start of the insolvency period, and

(b) the entitlement arises before the start of that period, the entitlement may not be exercised during that period.

(5) Where a provision of a contract ceases to have effect under subsection (3) or an entitlement under a provision of a contract is not exercisable under subsection (4), the supplier may terminate the contract if—

(a) in a case where the company has become subject to a relevant insolvency procedure as specified in subsection (2)(b), (c), (e) or (f), the office-holder consents to the termination of the contract,

(b) in any other case, the company consents to the termination of the contract, or

(c) the court is satisfied that the continuation of the contract would cause the supplier hardship and grants permission for the termination of the contract.

(6) Where a provision of a contract ceases to have effect under subsection (3) and the company becomes subject to a further relevant insolvency procedure, the supplier may terminate the contract in accordance with subsection (5)(a) to (c).

(7) The supplier shall not make it a condition of any supply of goods and services after the time when the company becomes subject to the relevant insolvency procedure, or do anything which has the effect of making it a condition of such a supply, that any outstanding charges in respect of a supply made to the company before that time are paid.

(8) ...

(9) ...

(10) …" (emphasis supplied)

106. The Legislative Comment to the introduction of Section 233B reads as follows:

"*Ipso facto (termination) clauses.*—A permanent change to the use of termination clauses in supply contracts is introduced by the Bill. In circumstances where a company has entered an insolvency or restructuring procedure, or obtains a moratorium, the company's suppliers will not be able to rely on contractual terms to stop supplying the company or vary the contract terms (e.g. by increasing the price of supplies).

The customer is required to pay for any supplies made once the company is in the insolvency process, but is not required to pay outstanding amounts due for past supplies while it is arranging its rescue plan. Safeguards are contained in the Bill to ensure that suppliers can be relieved of the requirement to supply if it causes hardship to their business, and a temporary exemption will operate for small companies during the Coronavirus emergency." (emphasis supplied)

107. We can therefore conclude that while Section 233B invalidates *ipso facto* clauses, it does so only in relation to contracts where the terminating party is supplying goods and services to the Corporate Debtor, and does not cover those contracts where the Corporate Debtor was supplying to the terminating party. Further, Section 233B(5)(c) allows an exception even in relation to supplier contracts when it causes ―financial hardship‖ to the terminating party, and Section 233B(6) allows a termination if once after the terminating party is prevented from terminating, the Corporate Debtor goes through another insolvency proceeding. It has also been noted by certain commentators that, given the narrow scope of Section 233B, the decision in *BelmontPark* (supra) would still have been decided in the same way even under this new regime[1]. Finally, discussing the legislative process behind CIGA, Felicity Toube QC and Joanne Rumley have noted that the UK Parliament did not intend to use CIGA to bring UK in line with the US position on broad invalidation of *ipso facto* clauses, but rather their focus was on ensuring that the Corporate Debtor retains its supply of goods during the insolvency process[2].

J.2.3 Austria

108. A position similar to the US has been adopted in Austria where, after the insolvency regime reform which came into force on 1 July 2010, *ipso facto* clauses

1. 'Corporate Insolvency and Governance Act: Ipso Facto (Termination) Clauses' (Ashurst, 26 June 2020) <https://www.ashurst.com/en/news-and-insights/legal-updates/ciga---ipso-facto-termination-clauses/> accessed 18 February 2021.
2. Felicity Toube QC, Joanne Rumley 'A brave new world? Should the UK ban ipso facto clauses in nonexecutory contracts?' Insolvency Intelligence 2018

are broadly considered invalid in accordance with Section 25b(2) of the Austrian Insolvency Code[1]. This law renders unenforceable all such provisions in contracts which provide a party with termination rights, due to the opening of insolvency proceedings against the debtor. However, this is only so when the terminating party's interests are not unreasonably affected, *i.e.*, when a terminating party can show a good cause for termination, the termination shall not be rendered unenforceable. Further, contractual terminations due to other events of defaults mentioned in contracts remain valid[83].

J.2.4 France

109. This is also the position in France which, since its 2014 reform, in accordance with Articles L622-13[2], L631-14(I)[3] and L641-11[4] of the Commercial Code, categorically states that *ipso facto* clauses in executory contracts are invalid[5]. However, termination rights referring to breaches of executory contract, other than *ipso facto* clauses, remain valid due to events of default occurring both pre- and post-commencement of insolvency proceedings. Further, the insolvency administrator does not have to treat pre-insolvency claims arising out of an executory contract preferentially to continue the contract; however, she has to comply with the contract in the future to prevent termination[6].

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1. "Invalid Agreements. Section 25b. - (2) A contractual provision rescinding or terminating a contract in the event of the opening of insolvency proceedings shall be unenforceable, except for contracts pursuant to Section 20(4)." English Translation available at <https://www.rautner.com/wpcontent/uploads/2016/05/3645187_Austrian_Insolvency-Code_ENG.pdf> accessed 24 February 2021. 83 Jan Felix Hoffmann, 'Executory Contracts, Ipso Facto Clauses and Licensing Agreements in Cross-Border Insolvencies' (2018) 27 Int'l Insolvency Rev 300, 304; _International Comparative Legal Guides' (International Comparative Legal Guides International Business Reports) <https://iclg.com/practice-areas/restructuring-andinsolvency-laws-and-regulations/austria> accessed 18 February 2021.
2. "…Notwithstanding any legal rule or contractual term to the contrary, the indivisibility, termination or rescission of the contract may not result from the commencement of safeguard proceedings alone…" English Translation available at <https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr199en.pdf> accessed 24 February 2021.
3. "I - Articles L622-2 to L622-9 and L622-13 to L622-33 shall apply to reorganization proceedings.‖ English Translation available at <https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr199en.pdf> accessed 24 February 2021.
4. "The supervisory judge shall perform the duties entrusted to him by Articles L621-9, L623-2 and L631-11, the first paragraph of Article L622-13 and the fourth paragraph of Article L622-16.‖ English Translation available at <https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr199en.pdf> accessed 24 February 2021.
5. 'International Comparative Legal Guides' (International Comparative Legal Guides International Business Reports) <https://iclg.com/practice-areas/restructuring-and-insolvency-laws-and-regulations/france> accessed 18 February 2021.
6. Ibid at 305.

J.2.5 Germany

110. The German insolvency regime is governed by Insolvency Statute, 1999 (Insolvenzordnung)[1]. However, a change is forthcoming, since on 17 December 2020, the German Parliament passed the Act on the Further Development of Restructuring and Insolvency Law[2], which is expected to lead to a fundamental modification of the restructuring landscape in Germany. The SanInsFoG primarily serves to implement the EU Directive discussed above, and aims at introducing a comprehensive legal framework for out-of-court restructurings. The centerpiece of the SanInsFoG is the Act on the Stabilization and Restructuring Framework for Companies[3], which partially entered into force on 1 January 2021. In accordance with Section 46 of the StaRUG, during the moratorium period, the contracting parties of the debtor cannot terminate their contract with the debtor based on *ipso facto* clauses in a pending restructuring matter.

111. However, before the StaRUG came into effect, the validity of *ipso facto* clauses had been previously considered by German Courts. On 15 November 2012, the 9th Senate of the Federal Supreme Court of Germany issued a decision which overruled the lower courts' decisions and held that *ipso facto* clauses in contracts regarding the continuous delivery of goods or energy should be invalid if such termination is either triggered by a request for the opening of insolvency proceedings or the opening of insolvency proceedings over the assets of the other contractual party. The Federal Supreme Court also held that for such invalidation, it was irrelevant whether the trigger was institution of insolvency proceedings or filing of an insolvency petition. Briefly, the facts of the case were that a utility provider had entered into a long-term contract for providing electricity. The energy contract had an *ipso facto* clause which allowed for automatic termination if bankruptcy proceedings were instituted over the utility provider's customer or if the customer filed a petition for bankruptcy. The *ipso facto* clause was then given effect to by the terminating party.

112. The Federal Supreme Court based its decision on the purpose of the insolvency administrator's right to opt for the performance/non-performance of contracts, which protects the assets of the insolvent company and increases such assets in the interest of a settlement of creditor claims pari passu. Particularly, it was noted that the insolvency administrator has the right to choose which contracts of the insolvent debtor she will perform in accordance with Section 103 of the InsO. Hence, any contractual provision excluding or limiting this right is invalid in accordance with Section 119 of the InsO. Therefore, this would be obstructed if the contractual partner of the insolvent

1. "InsO"
2. "SanInsFoG"
3. "StaRUG"

debtor, just because of its insolvency, could terminate a contract which is in the interest and to the benefit of the insolvent debtor. Further, the Federal Supreme Court noted that the stay on termination based on *ipso facto* clauses did not lead to any disadvantage to the terminating party since they will then receive payment for their deliveries in full as so-called preferred estate liability[1].

113. However, to the extent the statutory law itself already provides for an *ipso facto* termination right, such termination rights have been held to be valid and enforceable. Accordingly, the *ipso facto* termination of a partnership contract has in the past been upheld by the Federal Supreme Court[2]. Further, in a 2016 decision, the 7th Senate of the Federal Supreme Court upheld an *ipso facto* clause contained in a construction contract, in favour of the terminating party. It held that such clauses are valid when the contracting party has a reasonable right to terminate the contract in insolvency, and the estate's interests are not unreasonably affected. Thus, the position of German law on the validity of such clauses was never entirely settled judicially[3].

J.2.6 Greece

114. Article 32 of the Bankruptcy Code (Law 3588/2007) states that there would be "no prejudice to the counter contracting party's rights to rescind the contract, based on a clause that allows the rescission in case of insolvency of the other party or subjection to collective execution proceedings"[4]. Hence, *ipso facto* clauses are legislatively provided validity in Greece.

J.2.7 Republic of Korea

115. The Republic of Korea follows the civil law tradition. Under Article 119(1) of the Debtor Rehabilitation and Bankruptcy Act of Korea[5], the custodian of a

1. 'Potential Invalidity of Insolvency-Related Termination Clauses under German Insolvency Rules' (Global Restructuring Watch, 17 September 2014) <https://www.globalrestructuringwatch.com/2014/09/potentialinvalidity-of-insolvency-related-termination-clauses-under-german-insolvency-rules/> accessed 18 February 2021.
2. Volker Gattringer, 'German Supreme Court renders ipso facto clauses invalid and unenforceable – Roma locuta, causa finita?' (K&L Gates, 27.02.2013).
3. Jan Felix Hoffmann, 'Executory Contracts, Ipso Facto Clauses and Licensing Agreements in Cross-Border Insolvencies' (2018) 27 Int'l Insolvency Rev 300, 305.
4. Christoph G Paulus and Stathis Potamitis and Alexandros Rokas and Ignacio Tirado, 'Insolvency Law as a Main Pillar of Market Economy - A Critical Assessment of the Greek Insolvency Law' (2015) 24 Int'l Insolvency Rev 1, 18.
5. "Article 119 (Options when Both Parties Fail to Fulfill Bilateral Contract) - (1) When the debtor and the other party to a bilateral contract have yet to complete performance of the contract at the time rehabilitation procedures commence, any custodian may cancel or terminate such bilateral contract and request the debtor to meet his/her obligations and require the other party to fulfill his/her obligations: Provided, That the custodian shall not cancel or terminate the bilateral contract after the assembly of related persons held to deliberate on a rehabilitation proposal or a

company undergoing rehabilitation may choose to cancel or terminate an unperformed bilateral contract. Article 119 appears to allow the custodian to require the other party to fulfil its obligations under such a contract. While some commentators have noted that this is believed to essentially be in the nature of a restriction on an *ipso facto* clause, others state that this position has not been adopted uniformly by all courts[1]. In fact, the International Monetary Fund issued a technical note in September 2020 on "Insolvency and Creditor Rights" while conducting a "Financial Sector Assessment Program" of Republic of Korea, in which they also noted this lack of clarity and recommended legislative guidance.[2]

116. A lack of this clarity is shown by a case where the predecessor of Article 119 was considered by the Korean Supreme Court in its decision dated 6 September 2007 in the case of *Allied Domecq (Holdings) plc* v. *The trustee of Jinro Co Ltd.*[3] This was noted in the decision of *Pan Ocean Co Ltd* (supra)[4], discussed above, where the Chancery Division was considering the *ipso facto* clause in a contract governed by English law, but where the party was undergoing insolvency proceedings in Republic of Korea. The Korean Supreme Court held in *Allied Domecq* (supra) that, in a case not governed by Article 119, an insolvency termination clause would be valid. It then considered the types of contract which came within Article 119, and referred to the nature of the obligations under the particular unperformed bilateral contract in that case. Ultimately, it held that the contract in that case was not governed by Article 119.

117. Further, *Pan Ocean Co Ltd* (supra) also discussed[5] a later decision of a Korean Court dated 24 January 2014 in *Trustee of Tongyang Networks Co Ltd* v. *Standard Chartered Bank Ltd,* which concerned a contract under which the debtor company was to provide services to the bank. The contract contained an insolvency termination clause and the bank gave, or purported to give, notice to terminate pursuant to that clause. The trustee of the debtor company argued that the bank's right to terminate should be considered null and void by reason of Article 119 or, alternatively, the bank should refrain from terminating the contract at least during the period of the rehabilitation. The court considered the

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decision is made to pass a written resolution on any case pursuant to the provisions of Article 240."

1. June Young Chung and Sy Nae Kim, —Korean Corporate Rehabilitation Proceedings and Cross-Border Insolvency - From the Perspective of the Hanjin Shipping Bankruptcy Casell <https://nysba.org/NYSBA/Sections/International/Events/2018/Seoul%20Regional%20Meeting/Course%20Materials/4_Korean%20Corporate%20Rehabilitation%20Proceedings%20and%20Cross-border%20Insolvency_....pdf> accessed 24 February 2021.
2. Footnote 26 at Page 16, available at <https://www.imf.org/~/media/Files/Publications/CR/2020/English/1KOREA2020003.ashx> accessed 24 February 2021.
3. "Allied Domecq"
4. Para 49.
5. Para 52.

earlier decision in *Allied Domecq* (supra) and held that to achieve a proper balance between the purpose of rehabilitation and the principle of freedom of contract and the counterparty's need to be able to trust the debtor company, it was necessary to look at all the circumstances, such as the nature of the contract, the necessity to protect the debtor and the counterparty and allied relevant factors. The Court then conducted a detailed examination of what it regarded as the relevant factors, and held that Article 119 did not render the insolvency termination clause null and void. However, the Chancery Division in *Pan Ocean Co Ltd* (supra) did note that this decision may have been appeal in RepublicofKorea.

J.2.8 Canada 118. Legislatively, in Canada, Sections 65.1[1], 66.34[2] and 84.2[3] of the Bankruptcy & Insolvency Act[4] and provisions of the Companies' Creditors Arrangement Act[5] invalidate *ipso facto* clauses in both commercial and consumer

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1. "Certain rights limited 65.1 (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that:
(a) the insolvent person is insolvent; or
(b) a notice of intention or a proposal has been filed in respect of the insolvent person.
...
Provisions of section override agreement
(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to subsections (1) to (3) is of no force or effect."
2. "Certain rights limited 66.34 (1) If a consumer proposal has been filed in respect of a consumer debtor, no person may terminate or amend any agreement, including a security agreement, with the consumer debtor, or claim an accelerated payment, or the forfeiture of the term, under any agreement, including a security agreement, with the consumer debtor, by reason only that:
(a) the consumer debtor is insolvent, or
(b) a consumer proposal has been filed in respect of the consumer debtor until the consumer proposal has been withdrawn, refused by the creditors or the court, annulled or deemed annulled.
...
Provisions of section override agreement
(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to subsections (1) to (3) is of no force or effect."
3. "Certain rights limited
84. 2(1) No person may terminate or amend — or claim an accelerated payment or forfeiture of the term under "any agreement, including a security agreement, with a bankrupt individual by reason only of the individual's bankruptcy or insolvency.
...
Provisions of section override agreement
(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect."
4. "BIA"
5. "CCAA"

restructurings, and are intended to protect consumer debtors from the deleterious consequences of provisions that trigger upon bankruptcy. These provisions also clarify that any contractual clause that, in substance, is contrary to the provisions as a whole is of no force or effect. However, their prohibition on *ipso facto* clauses does not apply to agreements such as commodities and forward contracts. Further, the terminating party, including utilities, can apply for a court order that these provisions do not apply, or only apply to an extent determined by the court, if they can demonstrate that the operation of these provisions will cause it significant hardship[1].

119. On the other hand, judicially, in a split decision on 2 October 2020, the Supreme Court of Canada[2] upheld the Alberta Court of Appeal's majority decision in *Chandos Construction Ltd.* v. *Deloitte Restructuring Inc.,* 2020 SCC 25 in its capacity as Trustee in Bankruptcy of Capital Steel Inc., a bankrupt (Chandos). Briefly, the facts of the case were that:

(i) Chandos had subcontracted a project's steel work to Capital Steel. The subcontract included a term under which Capital Steel agreed to forfeit ten percent of the contract price if it became insolvent "as a fee for the inconvenience of [Chandos] completing the work using alternate means and/or for monitoring the work" ("Insolvency Clause"); and

(ii) Capital Steel completed most of its work under its subcontract with Chandos before making an assignment in bankruptcy. Deloitte was appointed as trustee of the estate of Capital Steel and Capital Steel ceased operations at that time. As a result, Chandos had to complete the steel work at its own cost. Even after costs of completion were accounted for, Chandos owed a balance to the estate of Capital Steel based on the remaining unpaid contract price. However, Chandos took the position that it could rely on the Insolvency Clause to deduct 10% of the contract price (almost $140,000) as an 'inconvenience fee' and that, once deducted, Chandos owed nothing to Capital Steel. The trustee brought an application seeking a judicial determination of whether the Insolvency Clause was enforceable.

120. The majority opinion of the SCC held that the present clause violated the common law doctrine grounded in the _anti-deprivation rule', which invalidates provisions that are "engaged by a debtor's insolvency and remove value from the debtor's estate to the prejudice of creditors‖. Further, it reasoned that the anti deprivation rule continues to exist at common law; that it was part of Canadian law, and was neither judicially nor legislatively excluded. It further continued to exist even though it was not fully codified in the BIA. Since this rule voids contractual terms that prevent property from passing to the bankruptcy

1. See Adrienne Ho, The Treatment of Ipso Facto Clauses in Canada, (2015) 61:1 McGill LJ 139.
2. "SCC"

trustee, the non-application of this rule would also go against the purpose of section 71 of the BIA. The majority opinion ultimately relied on the 'effects-based' test for understanding the anti-deprivation rule, noting it was in consonance with the BIA, thereby holding that any clause which had the 'effect' of removing a debtor's estate would be invalid as being against the anti-deprivation rule. On the contrary, the dissenting opinion relied on the 'bona fide commercial transaction test' as enunciated by the UKSC in *Belmont Park* (supra), and noted that the codification of the invalidity of *ipso facto* clauses in BIA was unrelated to the principles behind anti-deprivation rule since '*ipso facto* provisions are aimed at protecting debtors; the anti-deprivation rule, by contrast, protects creditors"[1].

121. Some commentators note that the practical effect of this decision is that if a contracting party enters insolvency proceedings, certain contractual clauses that are triggered by insolvency and remove value from the debtor's estate are void and will not be given effect by Canadian courts. Further, they believe that the SCC rejected the UK Supreme Court's more lenient view of the anti-deprivation rule and aligned more closely to the policy underlying the anti-ipso facto clause provisions in the US Bankruptcy Code[111].

J.2.9 Australia

122. Recently in Australia, the Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act, 2017[2] amended the Corporations Act, 2001, which governs the insolvency regime. Under this new regime, during the period of a specified restructuring or insolvency procedure, a right in a contract, agreement or arrangement will not be enforceable, and 'self-executing provisions' will not apply, by reason only of "[t]he company entering the specified procedure; the company's financial position; a prescribed reason; or a reason that is in substance contrary to the above".

123. Before this amendment, termination of contracts based on *ipso facto* clauses was permitted[3]. The new regime also applies to contracts entered into on or after 1 July 2018, *i.e.*, its application is prospective only. However, certain contracts and contractual rights have been excluded from the operation of the stay under this new regime. Critically, in respect of financing arrangements, the ipso facto reforms will not apply to (amongst other things) syndicated loans,

1. Para 118. 111 _Chandos Upheld by Supreme Court of Canada: The Anti-Deprivation Rule in Canada' (Norton Rose Fulbright, January 2021) <https://www.nortonrosefulbright.com/en-ca/knowledge/publications/db4bb7a6/chandos-upheldby-supreme-court-of-canada> accessed 18 February 2021.
2. "Amending Act."
3. 'The Impact of Insolvency on Licence Agreements' (2015) 254 Managing Intell Prop 31, 32.

securities, bonds, promissory notes, financial products, derivatives, and certain contracts involving special purpose vehicles. The excluded contractual rights do not depend on the type of contracts in which they are embodied.

124. However, according to the Explanatory Memorandum to the Amending Act, the stay is not intended to restrict a counterparty from enforcing a right (or disapply self-executing provisions) for any other reason, such as a breach involving non-payment or non-performance. Further, the *ipso facto* provisions also allow the relevant insolvency administrator to apply for an order expanding the stay to prohibit the exercise of rights (for example, a right to terminate for convenience), even where the right does not expressly operate on the basis of one of the prohibited reasons set out above, if the court is satisfied that a counterparty is likely to exercise those rights for a prohibited reason[1].

J.2.10 Singapore

125. In Singapore, *ipso facto* clauses are prohibited in accordance with Section 440[2] of the Insolvency, Restructuring and Dissolution Act, 2018 ("IRDA"), which came into force on 30 July 2020. This provision limits the exercise of *ipso facto* clauses which are triggered by reason only of the insolvency of a contracting

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1. 'Australia's New Ipso Facto Regime Is Now Live: Are Your Contractual Rights Affected?' (Herbert Smith Freehills | 2 July 2018) <https://www.herbertsmithfreehills.com/latest-thinking/australia%E2%80%99s-new-ipsofacto-regime-is-now-live-are-your-contractual-rights-affected> accessed 18 February 2021.
2. "Certain contractual rights limited
440."(1) No person may, at any time after the commencement, and before the conclusion, of any proceedings by a company—

(a) terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement (including a security agreement) with the company; or

(b) terminate or modify any right or obligation under any agreement (including a security agreement) with the company, by reason only that the proceedings are commenced or that the company is insolvent.

(2) …

(3) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

(4) On an application by a party to an agreement, the Court may declare that this section does not apply, or applies only to the extent declared by the Court, if the applicant satisfies the Court that the operation of this section would likely cause the applicant significant financial hardship. (5) Subsection (1) does not apply in respect of any legal right under "(a) any eligible financial contract as may be prescribed;

(b) any contract that is a licence, permit or approval issued by the Government or a statutory body; (c) any contract that is likely to affect the national interest, or economic interest, of Singapore, as may be prescribed;

(d) any commercial charter of a ship;

(e) any agreement within the meaning of the Convention as defined in section 2(1) of the International Interests in Aircraft Equipment Act (Cap. 144B); or

(f) any agreement that is the subject of a treaty to which Singapore is party, as may be prescribed. (6)…"

party or the commencement of corporate rescue proceedings, namely proceedings for judicial management and schemes of arrangement[1]. However, this provision may not restrict a contracting party from terminating the contract if there are other events of default, for instance: (a) failure to pay outstanding sums; (b) appointment of a receiver; or (c) passing of a resolution for the winding up of the debtor. Further, section 440 does not apply retroactively, and only applies to contracts entered into after 30 July 2020[2].

126. In addition, two legislative safeguards have been built into the IRDA to balance the contractual interests of stakeholders:

(i) Certain types of contracts are exempted from these restrictions. These are the following: (a) derivatives contracts, margin lending agreements or securities contracts; (b) master netting agreements, securities/commodities lending or repurchase agreements, or spot contracts, that contain a netting or set-off arrangement; (c) covered bond or connected agreements; (d) debentures or connected agreements; (e) any agreement to clear or settle transactions relating to a derivatives contract; and (f) business rules of an approved exchange, a licensed trade repository, an approved or recognized clearing house or a recognized market operator; and

(ii) Exclusion from this provision can also be sought, in accordance with section 440(4), if the injunction of the ipso facto clause would "likely cause the applicant significant financial hardship"[3].

127. It is also important to note the background to this legislative reform. In 2013, Singapore's Insolvency Law Committee recommended against the adoption of such restrictions on ipso facto clauses. It noted the benefits in favour of restricting such clauses, which included: (a) keeping key contracts alive; and (b) protecting the interests of different contract holders and incentivizing the management to bring the defaulting company back on track. Further, it also noted the disadvantages of such restrictions, which included: (A) existing counterparties would be locked-in to unfavourable contracts, and compelled to perform their contractual obligations even where there may be no hope of being paid; and (B) a legislative provision would be too static for the dynamic character

1. 'Singapore - Restructuring: Ipso Facto Clauses, Distressed Debt Market Update And DIP/Rescue Finance | Conventus Law' <https://www.conventuslaw.com/report/singapore-restructuring-ipso-facto-clauses/> accessed 18 February 2021.
2. 'Ipso Facto Clauses under the New Insolvency, Resolution & Dissolution Act' (Rajah Tann & Asia, July 2020) <https://eoasis.rajahtann.com/eoasis/lu/pdf/2020-07_Ipso-Facto-Clauses.pdf> accessed 18 February 2021.
3. 'Ipso facto clauses under the Insolvency, Restructuring and Dissolution Act' (White and Case LLP | 20 August 2020) <https://www.whitecase.com/publications/alert/ipso-facto-clauses-under-insolvency-restructuring-anddissolution-act> accessed on 18 February 2021.

of modern-day commercial transactions in this domain. It therefore advised against legislative intervention to restrict such clauses. However, having taken note of these criticisms, Singapore nevertheless followed the examples of Australia and the UK in legislating such restrictions on ipso facto clauses[1].

J.2.11 Analysis

128. On the basis of our discussion of the above-mentioned jurisdictions, the following conclusions emerge:

(i) Many jurisdictions follow the US model of legislatively invalidating *ipso facto* clauses. Interestingly, this shift has been far more prominent in the last decade even though the US Bankruptcy Code has had this position since 1979;

(ii) Some of the recent jurisdictions to follow the US model, such as Australia and Singapore, invalidate *ipso facto* clauses prospectively, *i.e.*, *ipso facto* clauses contained in the contracts entered into before the laws came into effect will not be invalidated;

(iii) The UK, through the CIGA, only invalidates *ipso facto* clauses in supplier contracts, which is similar to the effect of Section 14(2) of the IBC. Further, other ipso facto clauses are understood to be valid, based on the UKSC's decision in *Belmont Park* (supra). However, as noted previously, the UKSC decision was given in the context of the application of the anti deprivation rule, which protects against the dilution of the value of the company in debt and does not necessarily affect the status of the company as a 'going concern';

(iv) Greece is one of the few countries which legislatively upholds *ipso facto* clauses;

(v) The position of law in the Republic of Korea is unclear due to contradictory judicial decisions, which has prompted demands for legislative clarity. This highlights the growing commercial importance of legislative clarity in this area;

(vi) Generally, even where *ipso facto* clauses are invalidated, it does not have effect on the termination rights of the terminating party based on other events of default in the contract;

(vii) Some nations which invalidate ipso facto clauses, such as Austria, Canada, Singapore and UK (limited to supplier contracts), provide for an exception based on "hardship" being caused to the terminating party. This "hardship" is to be determined by the courts; and

1. 'Singapore's Restrictions on Ipso Facto Clauses: What Comes next? | Lexology' <https://www.lexology.com/library/detail.aspx?g'4d40d932-2ac4-45dd-abf4-76853aa7331a> accessed 18 February 2021.

(viii) Even in nations which legislatively invalidate ipso facto clauses, there are often contrasting judicial decisions in relation to the scope of their invalidation. There are certain judicial decisions which go beyond the legislative text to invalidate ipso facto clause on broad considerations of the object and purpose of the relevant insolvency regimes. On the other hand, there are judicial precedents, which follow a more conservative approach and strictly construe the legislative mandate.

J.3 Position in India

129. Before we consider the extent to which the lessons of other jurisdictions should be applied to India, it is important to advert to the discussion on the invalidation of *ipso facto* clauses in India.

130. In 2005, the Report of the Expert Committee on Company Law headed by J.J. Irani[1] noted the requirement of reforms in the Indian insolvency regime, specifically citing the lessons from the recently published UNCITRAL Guide. In relation to the moratorium period, it made the following observations:

"Moratorium and suspension of proceedings.—13.1 A limited standstill period is essential to provide an opportunity to genuine business to explore re-structuring.

...

13.4 The law should provide for treatment of unperformed contracts. Where the contracts provide for automatic termination on filing of insolvency, its enforcement should be stayed on commencement of insolvency.

13.5 There should be enabling provisions to interfere with the contractual obligations which are not fulfilled completely. Such interference or overriding powers would assist in achieving the objectives of the insolvency process. The power is necessary to facilitate taking appropriate business and other decisions including those directed at containing rise in liabilities and enhancing value of assets.

13.6 Exceptions of such powers are also essential to be insured in the law where there is a compelling, commercial, public or social interest in upholding the contractual rights of the counter party to the contract." (emphasis supplied)

131. The Committee noted the need to invalidate *ipso facto* clauses so as to prevent the value of a Corporate Debtor's assets from becoming diluted during the insolvency process. However, this invalidation was to be subject to

1. Available at <https://ibbi.gov.in/uploads/resources/May%202005,%20J.%20J.%20Irani%20Report%20of%20the%20Expert% 20Committee%20on%20Company%20Law.pdf> accessed 24 February 2021.

exceptions, keeping in mind the "compelling, commercial, public or social interest in upholding the contractual rights of the counter party to the contract".

132. However, as is evident, this recommendation was never directly embodied legislatively since the current IBC contains no clear-cut provision which invalidates ipso facto clauses. In fact, the issue of the invalidation of ipso facto clauses was noted in a December 2018 report titled 'Insolvency and Bankruptcy Code: The journey so far and the road ahead' issued by Vidhi Centre for Legal Policy[1]. The report notes that the IBC —does not per se prohibit the operation of ipso facto clauses during insolvency proceedings. However, Section 14 provides for a limited exception prohibiting the termination, suspension or interruption of specified "essential goods or services‖ (i.e. water, electricity, telecommunication services and information technology services to the extent they are not direct inputs to the output produced or supplied by the corporate debtor), and also provides relief to the corporate debtor from the recovery of any property by an owner or lessor during the moratorium‖. As a solution, the report recommends a conditional stay on the operation of ipso facto clauses, beginning from the insolvency commencement date, since —a complete stay on the operation of ipso facto clauses would constitute a serious restraint on the freedom of contract and would effectively compel suppliers to perform contracts even when such an action is against their commercial interests‖. In relation to the implementation of this solution, the report suggests the insertion of a new provision to the IBC.

133. More recently, however, the IBC was amended by the Insolvency and Bankruptcy Code (Amendment) Act, 2020 which, *inter alia*, introduced an Explanation to Section 14(1). The Explanation to Section 14(1) reads thus:

"14. *Moratorium.*—

...

Explanation.—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period."

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1. Pages 34-35, available at <https://vidhilegalpolicy.in/wpcontent/uploads/2019/05/IBC_Thejourneysofarandtheroadahead_Dec18.pdf> accessed on 18 February 2021.

134. The legislative intent behind this amendment was discussed in the Report of the Insolvency Law Committee dated 20 February 2020. The Report noted the importance of keeping the Corporate Debtor as a 'going concern' during the moratorium period imposed under Section 14, and how it was being affected by the termination of certain Government licenses, permits, et al, based on *ipso facto* clauses which allowed termination upon commencement of insolvency. Noting that the legislative intent underlying Section 14 would be to invalidate such terminations, the Report recommended the addition of the Explanation to Section 14(1) of the IBC. The relevant portion, in relation to the Explanation to Section 14(1), reads thus[1]:

"Prohibition on Termination on Grounds of Insolvency

...

8.3. It was brought to the Committee that in some cases government authorities that have granted licenses, permits and quotas, concessions, registrations, or other rights (collectively referred to as "grants") to the corporate debtor attempt to terminate or suspend them even during the CIRP period. This could be attempted in two ways: one, by relying on ipso facto clauses, by virtue of which these grants may be terminated on the advent of insolvency proceedings themselves, and second, by initiating termination on account of non-payment of dues.

8.4. The Committee discussed that by and large, the grants that the corporate debtor enjoys form the substratum of its business. Without these, the business of the corporate debtor would lose its value and it would not be possible to keep the corporate debtor running as a going concern during the CIRP period, or to resolve the corporate debtor as a going concern. Consequently, their termination during the CIRP by relying on ipso facto clauses or on non-payment of dues would be contrary to the purpose of introducing the provision for moratorium itself. Thus, the Committee concluded that the legislative intent behind introducing the provision for moratorium was to bar such termination.

8.5. In this regard, the Committee noted that depending on the nature of rights conferred by them, these grants may constitute the "property‖ of the corporate debtor. Section 3(27) of the Code provides an inclusive definition of property which includes "money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property." This definition is substantially the same as the definition of "property" under Section 436 of the Insolvency Act, 1986 (UK), which has

1. Available at <https://ibbi.gov.in/uploads/resources/c6cb71c9f69f66858830630da08e45b4.pdf> accessed on 18 February 2021.

been considered the widest possible definition of property. In India too, it is accepted that certain licenses and concessions can convey permission to use property, or may embody a lease, permit, etc. granting rights in the property. Thus, their termination in certain circumstances, could have been considered contrary to an order of moratorium barring actions under Section 14(1)(d) or preventing alienation of property by any person.

8.6. Similarly, in many circumstances, termination or suspension of grants, particularly registrations, would be through proceedings that follow due process of law. Such proceedings may be a form of enforcement that would deprive the corporate debtor of its assets. In this regard, The Committee noted that the Section 14(1)(a) prevents "the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority." (Emphasis supplied). This provision has been given an expansive reading by the Appellate Authority and the Adjudicating Authority, that had passed orders preventing recovery by stock exchanges and regulators, as well as the de-registration of aircrafts.

8.7. Relying on this, the Committee was of the view that termination or suspension of such grants during the moratorium period would be prevented by Section 14. However, to avoid any scope for ambiguity and in exercise of abundant caution, the Committee recommended that the legislative intent may be made explicit by introducing an Explanation by way of an amendment to Section 14(1)."

135. The position of law in India today invalidates *ipso facto* clauses in:

(i) Government licenses, permits, registrations, quotas, concessions, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, in accordance with the Explanation to Section 14(1); and

(ii) Contracts where the counter-party supplies essential/critical goods and services to the Corporate Debtor, within the meaning of Sections 14(2) and 14(2A).

However, no clear position emerges in relation to the validity of *ipso facto* clauses in other contracts, from the bare text of the IBC. Hence, this task is now left to this Court in the present case.

136. In order to fully appreciate the weight of this task upon us, it is important to understand that one of the key principles enshrined within our Constitution is separation of powers between our three main organs: the legislature, the

executive and the judiciary. In *Rai Sahib Ram Jawaya Kapur* v. *State of Punjab,* (1955) 2 SCR 225, speaking for a Constitution Bench, Chief Justice Bijan Kumar Mukherjea, spoke about the 'separation of powers' doctrine in the following terms:

"12…The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another…"

137. In *Kesavananda Bharati* v. *State of Kerala,* (1973) 4 SCC 225, Chief Justice S.M. Sikri noted that the 'separation of powers' doctrine is part of the basic structure of the Constitution:

"292. The learned Attorney-General said that every provision of the Constitution is essential; otherwise, it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same. The basic structure may be said to consist of the following features:

(1) Supremacy of the Constitution;

(2) Republican and Democratic form of Government;

(3) Secular character of the Constitution;

(4) Separation of powers between the legislature, the executive and the judiciary;

(5) Federal character of the Constitution." (emphasis supplied)

138. In performing our duties as members of the judicial branch in this case, we must tread a fine line between providing a just decision while not entering into the domain of the legislature.

139. We have already noted above in our analysis of the laws of various other national jurisdictions that the invalidation of ipso facto clauses seems to have occurred through legislative intervention. Although, in certain jurisdictions, there have been a few judicial decisions which have given an expansive interpretation to the legislative text, in order to invalidate ipso facto clauses (and their variations) which have not been explicitly barred by the legislature, these decisions have often been issued in order to give effect to legislative policy, intent and purpose of the insolvency regime. In countries like the Republic of Korea, where it is yet to happen legislatively, it is recommended. In others like

the UK, Lord Mance in his concurring opinion in *Belmont Park* (supra) has noted that it should happen only legislatively, and not through the intervention of the court.

140. Further, we also acknowledge the myriad complex questions which will arise while deciding on the issue of the validity/invalidity of *ipso facto* clauses, such as:

(i) The extent of invalidation of *ipso facto* clauses, *i.e.*, termination solely based on an 'insolvency event' (filing of an application for commencement of CIRP, commencement of CIRP, appointment of RP, et al) within the IBC will be invalid;

(ii) Whether the invalidation is absolute or conditional during the insolvency process;

(iii) What kinds of contracts should be exempt from this invalidation;

(iv) What should be the nature of the exceptions to the invalidation of ipso facto clauses to preserve the interests of the terminating party;

(v) Whether the invalidation should happen prospectively or retrospectively; and

(vi) What safeguard will be required to ensure that parties do not circumvent the invalidation.

141. The issues which we have delineated above are not exhaustive. The enumeration only seeks to highlight the complexity of the task at hand, which will require consideration of a variety of principles, which have to be balanced. The tension between the rights of a corporate debtor during the insolvency process as against the contractual rights of a terminating party, which is central to the task at hand, is one which has been acknowledged even by the UNCITRAL in its UNCITRAL Guide. There is a public interest underlying each of these balancing considerations. The law confronts the judge with the greatest challenges of adjudication when a balance has to made between what is right and what is right.

142. There are limitations of the judicial process in providing absolute answers to these questions. Judgments are rendered in cases involving specific fact situations. While they immediately bind the parties before the court, the impact of the pronouncement of principle will have a bearing on others whose contracts may contain similar provisions. In *Northern Securities Company* v. *United States,* 1904 SCC OnLine US SC 63 : 24 S.Ct. 436, Justice Oliver Wendell Holmes Jr. acknowledged a similar judicial conundrum in the following terms in his dissenting opinion:

"356. Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future,

but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment…"

143. Consequently, we hold that question of the validity/invalidity of *ipso facto* clauses is one which the court ought not to resolve exhaustively in the present case. Rather, what we can do is appeal in earnest to the legislature to provide concrete guidance on this issue, since the lack of a legislative voice on the issue will lead to confusion and reduced commercial clarity.

PART K - Appellant's right to terminate the PPA in the present case

K.1. Analysis of the PPA

144. We now turn to a consideration of the text, structure and salient features of the PPA. As the PPA records in its recitals:

"[T]he Government of Gujarat through letter dated 1st August 2009 has allocated 25 MW capacity to power producer for developing and setting up Solar Photovoltaic based power project in the State of Gujarat. The power Producer desires to set up a Solar Photovoltaic Grid Interactive Power Plant of 10 MW capacity at village Loria, Taluka-Bhuj, District Kutchh using new Solar Photovoltaic Grid Interactive power plants to produce the Electric Energy."

145. The preambular portion of the PPA also clarifies that the Power Producer (the Corporate Debtor) includes its respective successors and permitted assignees. Article 1, containing the definitions, clarifies that the term 'Commission' refers to the GERC.

146. The PPA defines the term 'law' in the following terms:

"Law" means any valid legislation, statute, rule, regulation, notification, directive or order, issued or promulgated by any Governmental Instrumentality."

147. Article 4.1(iii) provides that the Corporate Debtor shall sell the power produced by it to the appellant on first priority basis and is not allowed to sell to any third party. Article 4.1(x) states that the Corporate Debtor shall continue to hold at least 51% equity stake for the first two years after the Commercial Operation Date and at least 26% for 3 years thereafter. Article 5.2 of the PPA, as we have noted previously, clarifies that, in case the commissioning of the Plant is delayed beyond 31 December 2011, the appellant shall pay the tariff as determined by the GERC for Solar Projects effective on the date of commissioning of the plant or the tariff provided under the clause, whichever is lower.

148. Article 9.1 of the PPA clarifies that the PPA shall become effective upon the execution and delivery thereof by the parties and shall remain in operation for a period of 25 years. Article 9.2.1 enumerates the Events of Default by the Corporate Debtor, within which Article 9.2.1(e) states that the Corporate Debtor

becoming voluntarily or involuntarily, the subject of a proceeding in any bankruptcy or insolvency laws, constitutes an Event of Default. The exception to this clause is triggered where dissolution of the Corporate Debtor is for the purpose of a merger, consolidation or reorganization and where the resulting entity has the financial standing to perform its obligations under PPA and creditworthiness. Article 9.2.1(e) of the PPA is quoted below:

"9.2. 1 Power Producer's Default: The occurrence of any of the following events at any time during the Tariff [sic term] of this Agreement shall constitute an Event of Default by Power Producer:

xxx

(e) If the Power Producer becomes voluntarily or involuntarily the subject of proceeding under any bankruptcy or insolvency laws or goes into liquidation of [sic or] dissolution or has a receiver appointed over it or liquidator is appointed, pursuant to law, except where such dissolution of the Power producer is for the purpose of a merger, consolidated [sic consolidation] or reorganization and where the resulting entity has the financial standing to perform its obligations under this Agreement and creditworthiness similar to the Power Producer and expressly assumes all obligations under this agreement and is in a position to perform them."

149. In accordance with Article 9.3.1, the appellant, on the occurrence of an Event of Default under Article 9.2.1, can issue a Default Notice which shall specify in reasonable detail the Event of Default giving rise to the default notice, and call upon the Corporate Debtor to remedy it. At the expiry of 30 days from such notice, unless otherwise agreed, if the default has not been remedied, the appellant can terminate the PPA. Further, the Corporate Debtor shall have the liability to make payments towards compensation to the appellant which is equivalent to three years' billing based on the first-year tariff considered on normative PLF while determining the tariff by GERC, within 30 days from the termination notice. In accordance with Article 10.4, when differences or disputes between the parties are not settled through mutual negotiation within 60 days of the dispute arising, it shall be adjudicated by the State Commission, in accordance with Law.

150. In accordance with Article 12.9, assignment of the Corporate Debtor's rights under the PPA is permissible, with the prior written consent of the other party. The proviso to this Article makes it clear that any assignee shall expressly assume the Corporate Debtor's obligations thereafter arising under the PPA, on the furnishing of satisfactory documentation.

151. At this juncture, it is important, at the risk of repetition, to note the concurrent findings of fact returned by the NCLT and the NCLAT as to the PPA being the sole basis for the Corporate Debtor's existence. In its judgment dated 29 August 2019, the NCLT held as follows:

"6. That the Corporate Debtor is reportedly a Special Purpose Vehicle (SPV) set up only for generation of solar power in the State of Gujarat. The Respondent is the only purchaser of power generated by the Corporate Debtor's Plant, therefore, the PPA is very critical to the "going concern" status of the Corporate Debtor.

...

30... That termination of PPA at this stage may have adverse consequences on the status of the Corporate Debtor as "going concern" and eventually, may jeopardise the entire CIR Process."

In the impugned judgment, the NCLAT held as follows:

"'Gujarat Urja Vikas Nigam Ltd.' is the only purchaser of electricity generated by 'Astonfield Solar (Gujrat) Pvt. Ltd.' (Corporate Debtor). [T]he electricity line have been given only to the 'Gujarat Urja Vikas Nigam Ltd.' and in terms of an agreement, they are supposed to supply electricity to 'Gujarat Urja Vikas Nigam Ltd.'"

152. As the above excerpts indicate, but for the subsistence of the PPA, the Corporate Debtor would no longer remain as a 'going concern'. Differently stated, by virtue of the PPA with the appellant being the sheet-anchor of the Corporate Debtor's business and consequently of the CIRP, its continuation assumes enormous significance for the successful completion of the CIRP. The termination of the PPA will have the consequence of cutting the legs out from under the CIRP.

K. 2. Validity of the termination of PPA

153. As discussed in Section "J.3" of this judgement, the broader question of the validity of ipso facto clauses has been the subject matter of sustained legislative intervention in many jurisdictions. This is an intricate policy determination, for it raises a series of questions about striking the appropriate balance between contractual freedom on the one hand and corporate rescue on the other. We are cognizant that any rule that we might craft, howsoever narrow, could have a series of unintended second order effects, in terms of opening the floodgates for intervention from the NCLT that might impinge upon contractual freedom of the terminating party. Further, the comparative experience also teaches us that, given that the invalidation of ipso facto clauses can unsettle the interests that contractual relationships are founded upon, some jurisdictions that have invalidated such clauses have done so in a cautious, prospective fashion. This ensures that while the policy of the insolvency law is brought into tandem with the global regimes, it does not affect the contractual rights of those parties who could not have reasonably accounted for this change in position while negotiating their contractual terms. Such an approach is an evidence and recognition of the harmful effects on commercial stability that such

encroachment into contractual freedom can generate, even when done legislatively after careful deliberation.

154. The question of the validity/invalidity of ipso facto clauses has been discussed in a variety of documents over the years, such as: (a) UNCITRAL Guide of 2004; (b) J.J. Irani Committee Report of 2005; (c) Vidhi's Report of 2018 critiquing the IBC; and (d) IBBI's Report of 2020, which acknowledges the issue of ipso facto clauses in relation to government grants. All these materials were available to the members of the various committees which discussed the IBC. Further, suspension of contracts during insolvency was specifically allowed under Section 22(3) of SICA, which was the erstwhile statutory regime. Section 22 of the SICA provided for the suspension of legal proceedings and contracts, of which sub-Section (3) was in the following terms:

"(3) Where an inquiry under section 16 is pending or any scheme referred to in section 17 is under preparation or during the period] of consideration of any scheme under section 18 or where any such scheme is sanctioned there under, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising there under before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified by the Board:

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate."

Parliament would have been conscious of the provision which was adopted in the SICA. Yet, no concrete position has been adopted in relation to the termination of *ipso* facto clauses by the legislature under the IBC. In the absence of an express prohibition by the legislature, it can be argued that there is no general embargo on the operation of such clauses if they are part of a valid contract under the Contract Act.

155. At the same time, we cannot lose sight of the fact that this Court is apprised with a novel situation where the 'going concern' status of a corporate debtor will be negated by a termination of its sole contract, on the basis of an *ipso facto* clause. It is pertinent to note that the IBC has been in effect from 5 August 2016, and has also been amended multiple times. Hence, if the 'going concern' status of corporate debtors was being affected on a regular basis due to *ipso facto* clauses (which are in vogue even in the present contracts similar to the current PPA), then the legislature may, if it considered necessary, have

proceeded to legislate on an explicit position with regard to the operation of ipso facto clauses. However, this Court in the present case is not required to resolve the broad question of whether the invalidation/stay of *ipso facto* clauses in India, generally, is legally permissible. This is a matter which raises complex issues of legal policy and a balancing between distinct and conflicting values. Reform will have to take place through the legislative process. The stages through which legislative reform must take place -absolute or incremental – is a matter for legislative change. Our task is limited to the issue of deciding whether the NCLT correctly exercised the jurisdiction vested in it, in the facts of this case, to stay the termination of the PPA. In the absence of an explicit stand taken by the legislature, this Court's intervention in this matter would be guided by ascertaining the legislative intention from the provisions of the IBC.

156. Section 14 of the IBC reads as follows:

"*Moratorium.*—(1) Subject to provisions of Sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or less or where such property is occupied by or in the possession of the corporate debtor.

Explanation.—For the purposes of this Sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2-A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of Sub-section (1) shall not apply to—

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

(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, as the case may be."

157. Section 14 of the IBC lists the conditions under which a moratorium can be imposed by the NCLT in terms of sub-sections (a) to (d). It further clarifies that a license, permit, quota, concession, grant or right given by a government cannot be suspended or terminated on the grounds of insolvency, subject to certain exceptions. This clarification was added by way of an Explanation to Section 14(1) with effect from 28 December 2019. The Report of the Insolvency Law Committee dated 20 February 2020, as discussed above, noted that without such government grants "the business of the corporate debtor would lose its value and it would not be possible to keep the corporate debtor running as a going concern during the CIRP period, or to resolve the corporate debtor as a going concern[1]. The Report further stated that the termination of such grants during CIRP on account of *ipso facto* clauses or non-payment of dues is in contravention of the purpose behind imposition of moratorium itself.

1. Para 8.4

158. While recommending the inclusion of an explanation, the Report of the Insolvency Law Committee stated that while it was of the view that termination or suspension of such grants is prevented by Section 14, it recommended adding the Explanation —to avoid any scope for ambiguity and in exercise of abundant caution‖[1], and to ensure that the legislative intent should be made explicit by introduction of the explanation by way of an amendment to Section 14(1). The Insolvency Law Committee (in its discussion in the February 2020 Report) took the position that Section 14 even in its unamended form, contained an interdict on the invalidation of government grants, though the language of Section 14 did not make this position explicit.

159. In contrast, this Court's judgment in *Embassy Property*, **REED 2019 SC 12501**, concluded that the non-renewal of a mining lease was not within the ambit of Section 14. The Explanation to Section 14(1) was added by Parliament to make the position clear, on whether the moratorium under Section 14 included government licenses, grants, permits, quotas and concessions.

160. Section 14(2) provides that supply of essential goods or services, as may be specified, cannot be terminated, suspended or interrupted during the moratorium. Section 14(2A) was added with effect from 28 December 2019. It provides that, where the IRP or RP considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage its operations as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified. The order of moratorium has effect till the culmination of insolvency resolution process.

161. The inclusion of the Explanation to Section 14(1) and Section 14(2A) indicates that Parliament has been amending the IBC to ensure that the status of a corporate debtor as a 'going concern' is not hampered on account of varied situations, which may not have been in contemplation at the time of enacting the IBC. It will be relevant to note that in a recent three judge Bench decision of this Court in *P. Mohanraj* v. *Shah Brothers Ispat Pvt. Ltd.,* **REED 2021 SC 03526,** Civil Appeal No. 10355 of 2018 decided on 1 March 2021, Justice Rohinton Fali Nariman, speaking for the Court, expounded upon the object of Section 14 in the following terms:

"...the object of a moratorium provision such as Section 14 is to see that there is no depletion of a corporate debtor's assets during the insolvency resolution process so that it can be kept running as a going concern during this time, thus maximising value for all stakeholders. The idea is that it facilitates the continued

1. Para 8.7

operation of the business of the corporate debtor to allow it breathing space to organise its affairs so that a new management may ultimately take over and bring the corporate debtor out of financial sickness, thus benefitting all stakeholders, which would include workmen of the corporate debtor." (emphasis supplied)

162. Further, the scheme of the IBC, inter alia, in terms of Sections 20(2)(e), 25(1) and definition of resolution plan shows that it aims to preserve the corporate debtor as a 'going concern'. The relevant portion of Section 20 is extracted below:

"20. *Management of operations of corporate debtor as a going concern.*-(1) The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

(2) For the purposes of sub-section (1), the interim resolution professional shall have the authority—

…….

to take all such actions as are necessary to keep the corporate debtor as a going concern."

It is also relevant to note that Section 25(1) provides:

"Section 25. *Duties of resolution professional.*-(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor."

Resolution plan is defined under Section 5(26) of the IBC as follows:

"(26) "resolution plan" means a plan proposed by 3[resolution applicant] for insolvency resolution of the corporate debtor as a going concern in accordance with Part II;

Explanation.—For the removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger;"

163. Although various provisions of the IBC indicate that the objective of the statute is to ensure that the corporate debtor remains a 'going concern', there must be a specific textual hook for the NCLT to exercise its jurisdiction. The NCLT cannot derive its powers from the 'spirit' or 'object' of the IBC. Section 60(5)(c) of the IBC vests the NCLT with wide powers since it can entertain and dispose of any question of fact or law arising out or in relation to the insolvency resolution process. We hasten to add, however, that the NCLT's residuary jurisdiction,

though wide, is nonetheless defined by the text of the IBC. Specifically, the NCLT cannot do what the IBC consciously did not provide it the power to do.

164. In this case, the PPA has been terminated solely on the ground of insolvency, which gives the NCLT jurisdiction under Section 60(5)(c) to adjudicate this matter and invalidate the termination of the PPA as it is the forum vested with the responsibility of ensuring the continuation of the insolvency resolution process, which requires preservation of the Corporate Debtor as a going concern. In view of the centrality of the PPA to the CIRP in the unique factual matrix of this case, this Court must adopt an interpretation of the NCLT's residuary jurisdiction which comports with the broader goals of the IBC. Sir P.B. Maxwell in his commentary, On Interpretation of Statutes[1], has emphasized that a provision should be given an harmonious interpretation which comports with the intention of the Legislature. The commentary provides:

"The rule of strict construction, however, whenever invoked, comes attended with qualifications and other rules no less important, and it is by the light which each contributes that the meaning must be determined. Among them is the rule that that sense of the words is to be adopted which best harmonises with the context and promotes in the fullest manner the policy and object of the legislature. The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. They are indeed frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent, or, to use Sir Edward Cole's words, to suppress the mischief and advance the remedy." (emphasis supplied)

165. Given that the terms used in Section 60(5)(c) are of wide import, as recognized in a consistent line of authority, we hold that the NCLT was empowered to restrain the appellant from terminating the PPA. However, our decision is premised upon a recognition of the centrality of the PPA in the present case to the success of the CIRP, in the factual matrix of this case, since it is the sole contract for the sale of electricity which was entered into by the Corporate Debtor. In doing so, we reiterate that the NCLT would have been empowered to set aside the termination of the PPA in this case because the termination took place solely on the ground of insolvency. The jurisdiction of the NCLT under Section 60(5)(c) of the IBC cannot be invoked in matters where a termination may take place on grounds unrelated to the insolvency of the corporate debtor. Even more crucially, it cannot even be invoked in the event of a legitimate termination of a contract based on an *ipso facto* clause like Article 9.2.1(e) herein,

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1. Roy Wilson, Brian Galpin and Peter Benson Maxwell, On Interpretation of Statutes, (11th edn., Sweet and Maxwell 1962).

if such termination will not have the effect of making certain the death of the corporate debtor. As such, in all future cases, NCLT would have to be wary of setting aside valid contractual terminations which would merely dilute the value of the corporate debtor, and not push it to its corporate death by virtue of it being the corporate debtor's sole contract (as was the case in this matter's unique factual matrix).

166. The terms of our intervention in the present case are limited. Judicial intervention should not create a fertile ground for the revival of the regime under section 22 of SICA which provided for suspension of wide-ranging contracts. Section 22 of the SICA cannot be brought in through the back door. The basis of our intervention in this case arises from the fact that if we allow the termination of the PPA which is the sole contract of the Corporate Debtor, governing the supply of electricity which it generates, it will pull the rug out from under the CIRP, making the corporate death of the Corporate Debtor a foregone conclusion.

K.3. Dialogical Remedies

167. As indicated above in section "J.3" of this judgment, we would like to take this opportunity to note the desirability of Parliament providing its legislative vision on the broader validity of ipso facto clauses. We have outlined some of the complex considerations in paragraph 138.

168. In the past, this Court has adopted such dialogical remedies – where the Court engages in a dialogue in its judgments with the other two organs of government so that each organ can best perform its constitutionally assigned role. To illustrate, in its judgement in *S. Sukumar* v. *The Secretary, Institute of Chartered Accountants of India,* (2018) 14 SCC 360 a two judge Bench of this Court, speaking through Justice Adarsh Kumar Goel, held as follows:

53.1. The Union of India may constitute a three-member Committee of experts to look into the question whether and to what extent the statutory framework to enforce the letter and spirit of Sections 25 and 29 of the CA Act and the statutory Code of Conduct for the CAs requires revisit so as to appropriately discipline and regulate MAFs. The Committee may also consider the need for an appropriate legislation on the pattern of Sarbanes Oxley Act, 2002 and Dodd Frank Wall Street Reform and Consumer Protection Act, 2010 in US or any other appropriate mechanism for oversight of profession of the auditors. Question whether on account of conflict of interest of auditors with consultants, the auditors' profession may need an exclusive oversight body may be examined. The Committee may examine the Study Group and the Expert Group Reports referred to above, apart from any other material. It may also consider steps for effective enforcement of the provisions of the FDI policy and the FEMA Regulations referred to above. It may identify the remedial measures which may then be considered by appropriate authorities. The Committee may call for

suggestions from all concerned. Such Committee may be constituted within two months. Report of the Committee may be submitted within three months thereafter. The UOI may take further action after due consideration of such report."

169. Conscious as we are of the fact that this case is about statutory and not constitutional interpretation, we think it would be apposite to quote the following observations by Anne Meuwese and Marnix Snel.[1]:

"The core of constitutional dialogue between the judiciary and the legislature is that they engage in a conversation about constitutional meaning, in which both actors (should) listen in order to learn from each other's perspectives, which can then lead to modifying their own views accordingly... In this way, 'dialogue' represents the "middle way between judicial supremacy on the one hand, and legislative supremacy on the other".

170. The Court is at its heart, an institution which responds to concrete cases brought before it. It is not within its province to engraft into law its views as to what constitutes good policy. This is a matter falling within the legislature's remit. Equally, when presented with a novel question on which the legislature has not yet made up its mind, we do not think this Court can sit with folded hands and simply pass the buck onto the Legislature. In such an event, the Court can adopt an interpretation – a workable formula – that furthers the broad goals of the concerned legislation, while leaving it up to the legislature to formulate a comprehensive and well-considered solution to the underlying problem. To aid the legislature in this exercise, this Court can put forth its best thinking as to the relevant considerations at play, the position of law obtaining in other relevant jurisdictions and the possible pitfalls that may have to be avoided. It is through the instrumentality of an inter-institutional dialogue that the doctrine of separation of powers can be operationalized in a nuanced fashion. It is in this way that the Court can tread the middle path between abdication and usurpation.[2]

PART L

L. NCLAT's decision on the issue of liquidation

171. NCLT in paragraph 35 of its order dated 29 August 2019 upheld the right of the appellant to terminate the PPA, in case a liquidation process is initiated against the Corporate Debtor. The appellant had neither challenged this issue in

1. Anne Meuwese and Marnix Snel, 'Constitutional Dialogue': An Overview, Utrecht Law Review, vol. 9, issue 2, p. 128 [March, 2013].
2. This phrase is taken from - O Ferraz, 'Between Usurpation and Abdication? The Right to Health in the Courts of Brazil and South Africa' in Oscar Vilhena Vieira, Upendra Baxi, Frans Viljoen (eds), Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa (PULP, Pretoria 2013) 375, 393.

its appeal before NCLAT nor was it raised by any other party. However, the NCLAT deleted the observations made by the NCLT in paragraph 35, thereby holding that the appellant cannot terminate the PPA even if the Corporate Debtor goes into liquidation. Since no pleadings or prayers were made in relation to paragraph 35 of NCLT's order, NCLAT could not have considered this issue as a subject matter of the appeal. We hold that the NCLAT exceeded its jurisdiction by considering the issue of liquidation. In the absence of any liquidation proceedings initiated against the Corporate Debtor, we are not required to consider the issue of whether the appellant would be entitled to terminate the contract in such a context. Such a discussion would be academic in nature, and beyond the scope of this appeal.

PART M

M. Appellant's liability to pay for the electricity injected by the Corporate Debtor

172. The appellant had served a notice of termination to the Corporate Debtor with effect from 7 June 2019, though the termination could not be carried out due to the operation of interim protection which had been granted to the respondents by the NCLT. It was contended on behalf of the appellant that it cannot be made to suffer on the ground of erroneous injunctions granted by the NCLT and NCLAT, due to which it had to pay a higher tariff because it could not terminate the PPA with the Corporate Debtor and procure electricity at a cheaper tariff from another power producer. Since we have set aside the termination of the PPA based on the reasons discussed above, the appellant is liable to pay for the electricity procured after 7 June 2019. Consequently, the appellant's claim in respect of compensation for the termination of the PPA in terms of Article 9.3.1 of the PPA does not arise because it is restrained from terminating the PPA. Hence, this contention of the appellant has been rendered otiose.

PART N

N. Conclusion

173. In conclusion, we hold that:

(i) The NCLT/NCLAT could have exercised jurisdiction under section 60(5)(c) of the IBC to stay the termination of the PPA by the appellant, since the appellant sought to terminate the PPA under Article 9.2.1(e) only on account of the CIRP being initiated against the Corporate Debtor;

(ii) The NCLT/NCLAT correctly stayed the termination of the PPA by the appellant, since allowing it to terminate the PPA would certainly result in the corporate death of the Corporate Debtor due to the PPA being its sole contract; and

(iii) We leave open the broader question of the validity/invalidity of *ipso facto* clauses in contracts for legislative intervention.

Consequently, for the above reasons we find no merit in this appeal and it is accordingly dismissed.

174. Pending application(s), if any, stand disposed of. |||

REED 2021 SC 03531

A. Navinchandra Steels Private Limited v. SREI Equipment Finance Limited and Others

SUPREME COURT OF INDIA

1 March 2021

It was observed that a petition either under Section 7 or Section 9 of the IBC is an independent proceeding which is unaffected by winding-up proceedings that may be filed by the same company. It was further observed, a discretionary jurisdiction under the fifth proviso to Section 434(1)(c) of the Companies Act, 2013 cannot prevail over the undoubted jurisdiction of the NCLT under the IBC once the parameters of Section 7 and other provisions of the IBC have been met. Only when a company in winding up is near corporate death that no transfer of the winding up proceeding would then take place to the NCLT to be tried as a proceeding under the IBC. Short of an irresistible conclusion that corporate death is inevitable, every effort should be made to resuscitate the corporate debtor in the larger public interest. In the present case, nothing can be said to have become irretrievable.

Case Analysis

Bench/ Coram	Rohinton Fali Nariman, J. B.R. Gavai, J.
Citation	REED 2021 SC 03531
Case Number	Civil Appeal Nos. 4230-4234 of 2020
Subject	Corporate Insolvency
Keywords	going concern, guarantee, insolvency, interest, investment, legal position, legal proceeding, liquidation, liquidator, main object, bank guarantee, winding up petition, settlement, corporate death, non-obstante clause, conflict, res integra, revival, special law, general law, mortgage, notice, notices, official liquidator, overriding effect, pending proceeding, position, provisional liquidator, receiver, reorganisation, reserve, resolution, secured creditor, securities, share capital, shares, sick industrial companies, stay order, suit, winding up.
Legislation Cited	Companies Act, 1956 Section 391, Section 392, Section 393, Section 446, Section 529, Section 529A, Section 529(1)

Companies Act, 2013
Section 230(1), Section 279, Section 290, Section 434, Section 434(1)

Insolvency And Bankruptcy Code, 2016
Section 7, Section 9, Section 10, Section 11, Section 238

SARFAESI Act, 2002
Section 13(2), Section 13(4), Section 35, Section 37, Section 41

Sick Industrial Companies (Special Provisions) Act, 1985
Section 32

State Financial Corporations Act, 1951
Section 29, Section 31, Section 46B;

Tea Act, 1953
Section 16G(1)

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REED 2020 SC 12531

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(2000) 4 SCC 406

Bakemans Industries (P) Ltd. v. New Cawnpore Flour Mills
(2008) 15 SCC 1

Board of Trustees, Port of Mumbai v. Indian Oil Corpn.
(1998) 4 SCC 302

Central Bank of India v. Elmot Engineering Co.
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Damji Valji Shah v. LIC of India
AIR 1966 SC 135 : (1965) 3 SCR 665

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REED 2019 SC 01501

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REED 2020 SC 11533

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(1955) 2 SCR 374

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Maharashtra Tubes Ltd. v. State Industrial and Investment Corpn. of Maharashtra Ltd.
(1993) 2 SCC 144

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Swiss Ribbons Private Limited and Another v. Union of India and Others
REED 2019 SC 01504

Union of India v. India Fisheries (P) Ltd.
AIR 1966 SC 35 : (1965) 3 SCR 679 : (1965) 57 ITR 331

REED 2021 SC 03531

SUPREME COURT OF INDIA

Bench / Coram:

Rohinton Fali Nariman, J.
B. R. Gavai, J.

A. Navinchandra Steels Private Limited—*Appellant*

Versus

SREI Equipment Finance Limited and Others—*Respondent*

Civil Appeal Nos. 4230-4234 of 2020

1 March 2021

JUDGMENT

R.F. Nariman, J.-This appeal arises out of the judgment dated 07.02.2020, as corrected by order dated 21.09.2020, by the National Company Law Appellate Tribunal ["NCLAT"]. The Appellant is an operational creditor of Respondent No. 2 herein – M/s. Shree Ram Urban Infrastructure Limited ["SRUIL"], the company under winding up – and has a decree dated 07.10.2015 in its favour passed by the Bombay High Court in Summary Suit No. 626 of 2014. Vide order dated 06.10.2016, the Division Bench stayed the order dated 07.10.2015 and directed SRUIL to deposit INR14 crore with the Prothonotary and Senior Master of the High Court or furnish a bank guarantee for the same, failing which the stay order would get vacated. The said appeal is pending as on date. We are also informed that an execution application, being Execution Application (L) No.934 of 2016 was filed by the Appellant before the Bombay High Court and the same is also pending as on date.

2. Sometime in 2015, the Appellant had filed a winding up petition, being Company Petition No.1039 of 2015 against SRUIL before the Bombay High Court, the same being pending as on date.

3. A winding up petition, being Company Petition No. 1066/2015 filed by Respondent No. 3 herein, M/s Action Barter Pvt. Ltd. ["Action Barter"] against SRUIL, by a conditional order dated 05.10.2016, stood admitted on the failure of SRUIL to deposit INR 5.90 crore. The appeal instituted by SRUIL against this order was dismissed by the Division Bench of the High Court on 17.01.2017, whereas the appeal instituted by Action Barter was allowed vide the same order and the amount to be deposited by SRUIL was enhanced from INR 5.90 crore to

INR 18 crore. Vide order dated 27.02.2017, this Court disposed of SLP(C) No.5849/2017 filed by SRUIL, after recording a statement by the counsel for SRUIL that SRUIL would deposit INR three crore the same day, and the balance of INR 15 crore within six months from the date of the order. The parties then filed consent terms before the Single Judge of the Bombay High Court on 22.03.2017, wherein Action Barter agreed to accept a sum of INR 15 crore, payable in instalments. Apart from the payment of the first instalment of INR 25 lakh, no further instalment was paid, as a result of which the winding up petition stood revived on 24.08.2017.On 17.04.2018, the provisional liquidator took over the physical possession of the assets of SRUIL.

4. While this winding up petition was pending, Indiabulls Housing Finance Ltd. ["Indiabulls"], a secured creditor of SRUIL, filed a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 ["IBC"] before the National Company Law Tribunal ["NCLT"], which was dismissed by the NCLT vide order dated 18.05.2018 as being not maintainable as a winding up petition had already been admitted by the Bombay High Court. An appeal to the NCLAT suffered a similar fate as the appeal was dismissed on 30.05.2018. However, on 06.08.2018, the Supreme Court admitted a Civil Appeal from the NCLAT order, which is pending as on date.

5. An application filed by Indiabulls for the following relief:

"The Hon'ble Court be pleased to direct the Provisional Liquidator to handover physical possession of the said Mortgaged Property i.e. all the pieces and parcels of land bearing C.S. Nos. 288, 289 (part), 1/1540 (part), 2/1540 (part) and 3/1540 (part), collectively forming Plot Nos.5B and 6 admeasuring approximately 28,409.57 square meters situated at Worli Estate, Lower Parel Division, Mumbai to the Secured Creditor herein, in accordance with and pursuant to the provisions of the Companies Act, 1956 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 …"

resulted in an order dated 07.02.2019 by which the learned Company Judge allowed the aforesaid application in favour of Indiabulls. Indiabulls is a secured creditor who stood outside the winding up, and who sought to realise its security outside such winding up proceeding, notices having already been issued under Sections 13(2) and 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ["SARFAESI Act"]. The Court referred to an order of 12.04.2018, by which the provisional liquidator was to take physical possession of the assets of SRUIL within one week of the date of that order. Importantly, paragraph 2 of the said order stated:

"2. Ms. Maitra states that the secured creditors have already commenced proceedings under SARFAESI against the company. As and when the banks may

take out an application for banks submissions to hand over that part of the assets secured to the bank, appropriate orders will be passed."

6. This being the case, the learned Company Judge allowed the application in the following terms:

"13. For the reasons aforesaid, the present Application is allowed. The Provisional Liquidator is directed to forthwith handover possession of the Mortgaged Property to the Applicant. However, the Applicant shall conduct the sale of the property in consultation with the Official Liquidator. The Applicant shall also deposit the sale proceeds or part thereof with this Court as and when the Court directs the Applicant to do so, for the purpose of making payments to workers as prescribed in section 529A of the Companies Act, 1956."

7. As per the aforesaid order dated 07.02.2019, the provisional liquidator handed over possession of the property mortgaged with Indiabulls to Indiabulls, who then conducted a sale of the said property to M/s. Honest Shelters Pvt. Ltd. ["*HonestShelters*"], Respondent No.4 herein, for a sum of INR 705 crore, in which not only was the mortgaged property sold, but also the superstructure standing thereon, together with two other flats. We have since been informed that three sale certificates were issued to Honest Shelters on 26.06.2019 by Indiabulls on receiving the said payment of INR 705 crore. We have also been informed that the ex-Directors of SRUIL had challenged the aforesaid sale in the Debt Recovery Tribunal and the Debt Recovery Appellate Tribunal unsuccessfully. The provisional liquidator has also challenged the said sale in the Bombay High Court, alleging that the conditions of the order dated 07.02.2019 were flouted, and that what was sold was much more than what was mortgaged to the secured creditor, and that too at a gross undervalue. We are informed that the next date in these pending proceedings is 23.03.2021.

8. Meanwhile, Respondent No.1 before us, i.e., SREI Equipment Finance Limited ["*SREI*"] filed a petition under Section 7 of the IBC before the NCLT, which petition was admitted by the NCLT on 06.11.2019. An appeal was then filed by Action Barter against the aforesaid NCLT order in which, after setting out this Court's judgment in *Forech (India) Ltd.* v. *Edelweiss Assets Reconstruction Co. Ltd.,* **REED 2019 SC 01501** : (2019) 18 SCC 549 ["*Forech*"], the NCLAT dismissed the appeal with the following observations:

"5. The case of the Appellant is covered by the decision of the Hon'ble Supreme Court in *Forech India Ltd.*, **REED 2019 SC 01501**, therefore, we hold that the Application under Section 7 of the I&B Code filed by the Respondent – SREI Equipment Finance Limited is not maintainable. In so far as pending winding up petition before the Hon'ble Bombay High Court is concerned, the Appellant in terms of the decision of the Hon'ble Supreme Court in *Forech India Ltd.*, **REED 2019 SC 01501** may move before the Hon'ble High Court of Bombay.

The Appeal is dismissed with the aforesaid observations. No costs."

9. By an order dated 21.09.2020, the NCLAT corrected the order by deleting the word "not" that occurred in paragraph 5 of the order dated 07.02.2020.

10. An appeal was then filed to this Court by Action Barter on 08.10.2020, in which this Court, by order dated 27.10.2020, issued notice and directed the parties to maintain status quo qua the mortgaged property and also stayed further proceedings before the NCLAT. An appeal was also filed by the Appellant on 09.12.2020, in which this Court, by order dated 18.12.2020, issued notice and stayed further proceedings before the NCLT and tagged the appeal with the appeal filed by Action Barter.

11. We have been informed that pursuant to a settlement between Action Barter and the purchaser of the mortgaged property, i.e., Honest Shelters, Action Barter has now withdrawn its appeal that was filed before this Court. Thus, the only surviving appeal before us is Civil Appeal Nos. 4230-4234 of 2020, filed by A. Navinchandra Steels Pvt. Ltd.

12. Dr. Abhishek Manu Singhvi and Shri Ranjit Kumar, learned Senior Advocates appearing on behalf of the Appellant, argued that in view of the judgment in *Action Ispat and Power Pvt. Ltd.* v. *Shyam Metalics and Energy Ltd.,* **REED 2020 SC 12531** : 2020 SCC OnLine SC 1025 ["*Action Ispat*"], this matter is concluded in their favour inasmuch as irreversible steps have been taken in a winding up petition that has already been admitted by the Bombay High Court in that the plot on which a 72-storey building stands, has now been sold, as a result of which it is now clear that the Section 7 petition that was filed by SREI on 30.05.2019 under the IBC, would have to be held to be non-maintainable. They also argued that the effect of Section 446 of the Companies Act, 1956 (which is equivalent to Section 279 of the Companies Act, 2013) is that no suit or other legal proceeding can be initiated once there is admission of a winding up petition. This being the case, post admission of a winding up petition, no petition under Section 7 of the IBC can be filed. They also argued that it is a misnomer to think that winding up proceedings must result in corporate death. On the contrary, according to them, Sections 391 to 393 of the Companies Act, 1956 would apply if the company were to be restructured, as a result of which the winding up court could then stay the winding up and order restructuring. The learned counsel have also argued that there are gross malafides in the present case as SREI was not only aware of the winding up petition before the Bombay High Court, but has also participated in the winding up proceeding and filed its claim before the provisional liquidator. All this has been suppressed in the petition filed under Section 7 of the IBC. Further, the only route available to SREI was really to ask for transfer of the company petition in winding up from the Bombay High Court to the NCLT, which route has been circumvented by filing a Section 7 petition and suppressing the winding up proceeding.

13. Shri Abhijeet Sinha, learned counsel appearing on behalf of SREI, took us through various judgments of this Court, including the latest judgment in *Action Ispat*, **REED 2020 SC 12531**. According to him, a Section 7 proceeding under the IBC is an independent proceeding, which can be initiated at any time, even after a winding up order is made. He argued that this was a result of our decisions and that Section 238 of the IBC, which contains a non-obstante clause, clearly comes to his rescue as, if there is any conflict between Section 446 of the Companies Act, 1956 / Section 279 of the Companies Act, 2013 and the IBC, the IBC will prevail. According to him, this point is no longer *res integra*. He also argued, in the alternative, that there are no irretrievable steps that have been taken in the winding up proceeding in the present case, as the provisional liquidator continues to be seized of other assets of SRUIL. He further argued that a private sale by a secured creditor outside the winding up is not the irretrievable step that is spoken of in *Action Ispat*, **REED 2020 SC 12531**, such step having to be taken by the provisional liquidator himself in selling the assets of the company in the process of winding up the company. He also added that, on facts, two orders dated 28.11.2019 and 20.01.2020 of the Bombay High Court would indicate that the Company Court itself had directed the provisional liquidator to hand over the records and assets of SRUIL to the interim resolution professional ["*IRP*"] that had been appointed in the Section 7 proceeding. Doubtless, such assets had not been handed over because they were only to the handed over two weeks after certain payments had been made by the IRP to the provisional liquidator, which payments have not yet been made.

14. Having heard learned counsel for all the parties, it is important to restate a few fundamentals. Given the object of the IBC as delineated in paragraphs 25 to 28 of *Swiss Ribbons (P) Ltd.* v. *Union of India,* **REED 2019 SC 01504** : (2019) 4 SCC 17 ["*Swiss Ribbons*"], it is clear that the IBC is a special statute dealing with revival of companies that are in the red, winding up only being resorted to in case all attempts of revival fail. Vis-à-vis the Companies Act, which is a general statute dealing with companies, including companies that are in the red, the IBC is not only a special statute which must prevail in the event of conflict, but has a non-obstante clause contained in Section 238, which makes it even clearer that in case of conflict, the provisions of the IBC will prevail.

15. In *Allahabad Bank* v. *Canara Bank,* (2000) 4 SCC 406, this Court had to deal with whether the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ["*RDB Act*"] was a special statute qua the Companies Act, 1956. This Court held that the Companies Act is a general Act and does not prevail against the RDB Act, which was a later Act and which has a non-obstante clause that clearly excludes the provisions of the Companies Act in case of conflict. This was stated by the Court as follows:

"Special law v. general law

38. At the same time, some High Courts have rightly held that the Companies Act is a general Act and does not prevail under the RDB Act. They have relied

upon *Union of India* v. *India Fisheries (P) Ltd.* [AIR 1966 SC 35 : (1965) 3 SCR 679 : (1965) 57 ITR 331].

39. There can be a situation in law where the same statute is treated as a special statute vis-à-vis one legislation and again as a general statute vis-à-vis yet another legislation. Such situations do arise as held in *LIC of India* v. *D.J. Bahadur* [(1981) 1 SCC 315 : 1981 SCC (L&S) 111 : AIR 1980 SC 2181].

It was there observed:

"… for certain cases, an Act may be general and for certain other purposes, it may be special and the court cannot blur a distinction when dealing with the finer points of law".

For example, a Rent Control Act may be a special statute as compared to the Code of Civil Procedure. But vis-à-vis an Act permitting eviction from public premises or some special class of buildings, the Rent Control Act may be a general statute. In fact in *Damji Valji Shah* v. *LIC of India* [AIR 1966 SC 135 : (1965) 3 SCR 665] (already referred to), this Court has observed that vis-à-vis the LIC Act, 1956, the *Companies* Act, 1956 can be treated as a *general* statute. This is clear from para 19 of that judgment. It was observed:

"Further, the provisions of the special Act, i.e., the LIC Act, will override the provisions of the general Act, viz., the Companies Act which is an Act relating to companies in *general.*" (emphasis in original)

Thus, some High Courts rightly treated the Companies Act as a general statute, and the RDB Act as a special statute overriding the general statute.

Special law v. *special law*

40. Alternatively, the Companies Act, 1956 and the RDB Act can both be treated as special laws, and the principle that when there are two special laws, the latter will normally prevail over the former if there is a provision in the latter special Act giving it overriding effect, can also be applied. Such a provision is there in the RDB Act, namely, Section 34. A similar situation arose in *Maharashtra Tubes Ltd.* v. *State Industrial and Investment Corpn. of Maharashtra Ltd.* [(1993) 2 SCC 144] where there was inconsistency between two special laws, the Finance Corporation Act, 1951 and the Sick Industries Companies (Special Provisions) Act, 1985. The latter contained Section 32 which gave overriding effect to its provisions and was held to prevail over the former. It was pointed out by Ahmadi, J. that both special statutes contained non obstante clauses but that the "1985 Act being a subsequent enactment, the non obstante clause therein would ordinarily prevail over the non obstante clause in Section 46-B of the 1951 Act unless it is found that the 1985 Act is a general statute and the 1951 Act is a special one". (SCC p. 157, para 9)

Therefore, in view of Section 34 of the RDB Act, the said Act overrides the Companies Act, to the extent there is anything inconsistent between the Acts."

16. Likewise, in *Bakemans Industries (P) Ltd.* v. *New Cawnpore Flour Mills,* (2008) 15 SCC 1, this Court, in the context of the State Financial Corporations Act, 1951 ["SFC Act"] and the Companies Act, 1956, held that though the SFC Act was an earlier Act of 1951, yet, it would prevail over the winding up proceedings before a Company Judge, given that the SFC Act is a special statute qua the general powers of the Company Judge under the Companies Act. This was stated as follows:

"37. The 1951 Act indisputably is a special statute. If a financial corporation intends to exercise a statutory power under Section 29 of the 1951 Act, the same will prevail over the general powers of the Company Judge under the Companies Act.

38. There cannot be any doubt whatsoever that the proceedings under Section 29 of the 1951 Act would prevail over a winding-up proceeding before a Company Judge in view of the decision of this Court in *International Coach Builders Ltd.* v. *Karnataka State Financial Corpn.* [(2003) 10 SCC 482] wherein it has been held: (SCC p. 496, para 26)

"*26*. We do not really see a conflict between Section 29 of the SFC Act and the Companies Act at all, since the rights under Section 29 were not intended to operate in the situation of winding up of a company. Even assuming to the contrary, if a conflict arises, then we respectfully reiterate the view taken by the Division Bench of this Court in *A.P. State Financial Corpn. Case* [*A.P. State Financial Corpn.* v. *Official Liquidator*, (2000) 7 SCC 291]. This Court pointed out therein that Section 29 of the SFC Act cannot override the provisions of Sections 529(1) and 529-A of the Companies Act, 1956, inasmuch as SFCs cannot exercise the right under Section 29 ignoring a *pari passu* charge of the workmen."

The view taken therein was reiterated by a three-Judge Bench of this Court in *Rajasthan State Financial Corpn.* v. *Official Liquidator* [(2005) 8 SCC 190] wherein it was stated: (SCC pp. 201-02, para 18)

"*18*. In the light of the discussion as above, we think it proper to sum up the legal position thus:

(i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(ii) A District Court entertaining an application under Section 31 of the SFC Act will have the power to order sale of the assets of a borrower company-in-liquidation, but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(iii) If a financial corporation acting under Section 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-in-liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the Company Court and acting in terms of the directions issued by that court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of Section 529-A and Section 529 of the Companies Act.

(iv) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the SFC Act are not set in motion, the creditor concerned is to approach the Company Court for appropriate directions regarding the realisation of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the company-in-liquidation."

(See also *ICICI Bank Ltd.* v. *SIDCO Leathers Ltd.* [(2006) 10 SCC 452 : (2006) 5 Scale 27])"

17. In *Madras Petrochem Ltd.* v. *BIFR,* (2016) 4 SCC 1, this Court had to deal with whether a predecessor statute to the IBC, which has been repealed by the IBC, namely, the Sick Industrial Companies (Special Provisions) Act, 1985, prevails over the SARFAESI Act to the extent of inconsistency therewith. This Court noted that in the case of two statutes which contain non-obstante clauses, the later Act will normally prevail, holding:

"36. A conspectus of the aforesaid decisions shows that the Sick Industrial Companies (Special Provisions) Act, 1985 prevails in all situations where there are earlier enactments with non obstante clauses similar to the Sick Industrial Companies (Special Provisions) Act, 1985. Where there are later enactments with similar non obstante clauses, the Sick Industrial Companies (Special Provisions) Act, 1985 has been held to prevail only in a situation where the reach of the non obstante clause in the later Act is limited—such as in the case of the Arbitration and Conciliation Act, 1996—or in the case of the later Act expressly yielding to the Sick Industrial Companies (Special Provisions) Act, 1985, as in the case of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Where such is not the case, as in the case of Special Courts Act, 1992, it is the Special Courts Act, 1992 which was held to prevail over the Sick Industrial Companies (Special Provisions) Act, 1985.

37. We have now to undertake an analysis of the Acts in question. The first thing to be noticed is the difference between Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and Section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Section 37 of the Securitisation and Reconstruction of

Financial Assets and Enforcement of Security Interest Act, 2002 does not include the Sick Industrial Companies (Special Provisions) Act, 1985 unlike Section 34(2) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Section 37 of the Securities and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 states that the said Act shall be in addition to and not in derogation of four Acts, namely, the Companies Act, the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992 and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. It is clear that the first three Acts deal with securities generally and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 deals with recovery of debts due to banks and financial institutions. Interestingly, Section 41 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 makes amendments in three Acts—the Companies Act, the Securities Contracts (Regulation) Act, 1956, and the Sick Industrial Companies (Special Provisions) Act, 1985. It is of great significance that only the first two Acts are included in Section 37 and not the third i.e. the Sick Industrial Companies (Special Provisions) Act, 1985. This is for the obvious reason that the framers of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 intended that the Sick Industrial Companies (Special Provisions) Act, 1985 be covered by the non obstante clause contained in Section 35, and not by the exception thereto carved out by Section 37. Further, whereas the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is expressly mentioned in Section 37, the Sick Industrial Companies (Special Provisions) Act, 1985 is not, making the above position further clear. And this is in stark contrast, as has been stated above, to Section 34(2) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, which expressly included the Sick Industrial Companies (Special Provisions) Act, 1985. The new legislative scheme qua recovery of debts contained in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 has, therefore, to be given precedence over the Sick Industrial Companies (Special Provisions) Act, 1985, unlike the old scheme for recovery of debts contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993."

18. Indeed, this position has been echoed in several judgments of this Court. In *Jaipur Metals & Electricals Employees Organization* v. *Jaipur Metals & Electricals Ltd.,* **REED 2018 SC 12541** : (2019) 4 SCC 227 *["Jaipur Metals"],* this Court, in dealing with whether proceedings under the Sick Industrial Companies (Special Provisions) Act, 1985 were to be transferred to the NCLT under the IBC, held:

"19. However, this does not end the matter. It is clear that Respondent 3 has filed a Section 7 application under the Code on 11-1-2018, on which an order has been passed admitting such application by NCLT on 13-4-2018. This proceeding is an independent proceeding which has nothing to do with the

transfer of pending winding-up proceedings before the High Court. It was open for Respondent 3 at any time before a winding-up order is passed to apply under Section 7 of the Code. This is clear from a reading of Section 7 together with Section 238 of the Code which reads as follows:

"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."

20. Shri Dave's ingenious argument that since Section 434 of the Companies Act, 2013 is amended by the Eleventh Schedule to the Code, the amended Section 434 must be read as being part of the Code and not the Companies Act, 2013, must be rejected for the reason that though Section 434 of the Companies Act, 2013 is substituted by the Eleventh Schedule to the Code, yet Section 434, as substituted, appears only in the Companies Act, 2013 and is part and parcel of that Act. This being so, if there is any inconsistency between Section 434 as substituted and the provisions of the Code, the latter must prevail. We are of the view that NCLT was absolutely correct in applying Section 238 of the Code to an independent proceeding instituted by a secured financial creditor, namely, the Alchemist Asset Reconstruction Company Ltd. This being the case, it is difficult to comprehend how the High Court could have held that the proceedings before NCLT were without jurisdiction. On this score, therefore, the High Court judgment has to be set aside. NCLT proceedings will now continue from the stage at which they have been left off. Obviously, the company petition pending before the High Court cannot be proceeded with further in view of Section 238 of the Code. The writ petitions that are pending before the High Court have also to be disposed of in light of the fact that proceedings under the Code must run their entire course. We, therefore, allow the appeal and set aside the High Court's judgment [*Jaipur Metals and Electricals Ltd., In re*, **REED 2018 SC 12541** : 2018 SCC OnLine Raj 1472]."

19. Likewise, in *Forech***, REED 2019 SC 01501**,in a situation in which notice had been issued in a winding up petition and the said petition was ordered to be transferred to the NCLT, to be treated as a proceeding under the IBC, this Court clearly held:

"22. This section is of limited application and only bars a corporate debtor from initiating a petition under Section 10 of the Code in respect of whom a liquidation order has been made. From a reading of this section, it does not follow that until a liquidation order has been made against the corporate debtor, an insolvency petition may be filed under Section 7 or Section 9 as the case may be, as has been held by the Appellate Tribunal. Hence, any reference to Section 11 in the context of the problem before us is wholly irrelevant. However, we decline to interfere with the ultimate order passed by the Appellate Tribunal because it is

clear that the financial creditor's application which has been admitted by the Tribunal is clearly an independent proceeding which must be decided in accordance with the provisions of the Code."

20. In *Duncans Industries Ltd.* v. *AJ Agrochem,* **REED 2019 SC 10501** : (2019) 9 SCC 725, this Court was faced with a situation of conflict between Section 16-G(1)(c) of the Tea Act, 1953, under which winding up/liquidation proceedings were to take place (and which could not take place without prior consent of the Central Government), and a proceeding initiated under Section 9 of the IBC. After relying upon the judgment of this Court in Innoventive Industries Ltd. v. ICICI Bank, **REED 2017 SC 08563** : (2018) 1 SCC 407 and Swiss Ribbons, **REED 2019 SC 01504**, this Court held:

"7.4. Section 16-G(1)(*c*) refers to the proceeding for winding up of such company or for the appointment of receiver in respect thereof. Therefore, as such, the proceedings under Section 9 IBC shall not be limited and/or restricted to winding up and/or appointment of receiver only. The winding up/liquidation of the company shall be the last resort and only on an eventuality when the corporate insolvency resolution process fails. As observed by this Court in *Swiss Ribbons (P) Ltd.* [*Swiss Ribbons (P) Ltd.* v. *Union of India*, **REED 2019 SC 01504** : (2019) 4 SCC 17 : AIR 2019 SC 739], referred to hereinabove, the primary focus of the legislation while enacting IBC is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate debt by liquidation and such corporate insolvency resolution process is to be completed in a time-bound manner. Therefore, the entire "corporate insolvency resolution process" as such cannot be equated with "winding up proceedings". Therefore, considering Section 238 IBC, which is a subsequent Act to the Tea Act, 1953, shall be applicable and the provisions of IBC shall have an overriding effect over the Tea Act, 1953. Any other view would frustrate the object and purpose of IBC. If the submission on behalf of the appellant that before initiation of proceedings under Section 9 IBC, the consent of the Central Government as provided under Section 16-G(1)(*c*) of the Tea Act is to be obtained, in that case, the main object and purpose of IBC, namely, to complete the "corporate insolvency resolution process" in a time-bound manner, shall be frustrated. The sum and substance of the above discussion would be that the provisions of IBC would have an overriding effect over the Tea Act, 1953 and that no prior consent of the Central Government before initiation of the proceedings under Section 7 or Section 9 IBC would be required and even without such consent of the Central Government, the insolvency proceedings under Section 7 or Section 9 IBC initiated by the operational creditor shall be maintainable."

21. In *Kaledonia Jute and Fibres Pvt. Ltd.* v. *Axis Nirman and Industries Ltd.,* **REED 2020 SC 11533** : 2020 SCC OnLine SC 943 [*"Kaledonia*"], this Court decided as to whether a winding up proceeding in the Company Court could be

transferred despite the fact that the winding up order had been passed and then been kept in abeyance. This Court, in paragraph 27, held:

"27. Apart from providing for the transfer of certain types of winding up proceedings by operation of law, Section 434(1)(c) also gives a choice to the parties to those proceedings to seek a transfer of such proceedings to the NCLT. This is under the fifth proviso to Clause (c)."

The Court then went on to hold that in a winding up proceeding that has been admitted, since all creditors would be parties to such proceeding *in rem*, a secured creditor being such a party could, therefore, move the Company Court under the fifth proviso to Section 434(1)(c) of the Companies Act, 2013 to transfer the aforesaid proceeding to the NCLT to be tried as a proceeding under Section 7 or Section 9, as the case may be.

22. In *Action Ispat*, **REED 2020 SC 12531**, this Court was faced with a proceeding in which a winding up petition had been admitted by the High Court and then transferred to the NCLT to be tried as a proceeding under the IBC. After referring to the judgments in *Jaipur Metals*, **REED 2018 SC 12541**, *Forech*, **REED 2019 SC 01501**, and *Kaledonia*, **REED 2020 SC 11533**, and after setting out various Sections dealing with winding up of companies under the Companies Act, 2013, this Court then held:

"20. What becomes clear upon a reading of the three judgments of this Court is the following:

(i) So far as transfer of winding up proceedings is concerned, the Code began tentatively by leaving proceedings relating to winding up of companies to be transferred to NCLT at a stage as may be prescribed by the Central Government.

(ii) This was done by the Transfer Rules, 2016 [Companies (Transfer of Pending Proceedings) Rules, 2016] which came into force with effect from 15.12.2016. Rules 5 and 6 referred to three types of proceedings. Only those proceedings which are at the stage of pre-service of notice of the winding up petition stand compulsorily transferred to the NCLT.

(iii) The result therefore was that post notice and pre admission of winding up petitions, parallel proceedings would continue under both statutes, leading to a most unsatisfactory state of affairs. This led to the introduction of the 5th proviso to section 434(1)(c) which, as has been correctly pointed out in *Kaledonia* [*Kaledonia Jute & Fibres Pvt. Ltd.* v. *Axis Nirman & Industries Ltd.*, **REED 2020 SC 11533** : 2020 SCC OnLine SC 943], is not restricted to any particular stage of a winding up proceeding.

(iv) Therefore, what follows as a matter of law is that even post admission of a winding up petition, and after the appointment of a Company Liquidator to take over the assets of a company sought to be wound up, discretion is vested in the

Company Court to transfer such petition to the NCLT. The question that arises before us in this case is how is such discretion to be exercised?"

xxx xxx xxx

"31. Given the aforesaid scheme of winding up under Chapter XX of the Companies Act, 2013, it is clear that several stages are contemplated, with the Tribunal retaining the power to control the proceedings in a winding up petition even after it is admitted. Thus, in a winding up proceeding where the petition has not been served in terms of Rule 26 of the Companies (Court) Rules, 1959 at a pre-admission stage, given the beneficial result of the application of the Code, such winding up proceeding is compulsorily transferable to the NCLT to be resolved under the Code. Even post issue of notice and pre admission, the same result would ensue. However, post admission of a winding up petition and after the assets of the company sought to be wound up become in *custodia legis* and are taken over by the Company Liquidator, section 290 of the Companies Act, 2013 would indicate that the Company Liquidator may carry on the business of the company, so far as may be necessary, for the beneficial winding up of the company, and may even sell the company as a going concern. So long as no actual sales of the immovable or movable properties have taken place, nothing irreversible is done which would warrant a Company Court staying its hands on a transfer application made to it by a creditor or any party to the proceedings. It is only where the winding up proceedings have reached a stage where it would be irreversible, making it impossible to set the clock back that the Company Court must proceed with the winding up, instead of transferring the proceedings to the NCLT to now be decided in accordance with the provisions of the Code. Whether this stage is reached would depend upon the facts and circumstances of each case."

23. A conspectus of the aforesaid authorities would show that a petition either under Section 7 or Section 9 of the IBC is an independent proceeding which is unaffected by winding up proceedings that may be filed qua the same company. Given the object sought to be achieved by the IBC, it is clear that only where a company in winding up is near corporate death that no transfer of the winding up proceeding would then take place to the NCLT to be tried as a proceeding under the IBC. Short of an irresistible conclusion that corporate death is inevitable, every effort should be made to resuscitate the corporate debtor in the larger public interest, which includes not only the workmen of the corporate debtor, but also its creditors and the goods it produces in the larger interest of the economy of the country. It is, thus, not possible to accede to the argument on behalf of the Appellant that given Section 446 of the Companies Act, 1956 / Section 279 of the Companies Act, 2013, once a winding up petition is admitted, the winding up petition should trump any subsequent attempt at revival of the company through a Section 7 or Section 9 petition filed under the IBC. While it is true that Sections 391 to 393 of the Companies Act, 1956 may, in a given

factual circumstance, be availed of to pull the company out of the red, Section 230(1) of the Companies Act, 2013 is instructive and provides as follows:

"230. *Power to compromise or make arrangements with creditors and members*.—(1) Where a compromise or arrangement is proposed—

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them, the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

Explanation.—For the purposes of this sub-section, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.

xxx xxx xxx"

What is clear by this Section is that a compromise or arrangement can also be entered into in an IBC proceeding if liquidation is ordered. However, what is of importance is that under the Companies Act, it is only winding up that can be ordered, whereas under the IBC, the primary emphasis is on revival of the corporate debtor through infusion of a new management.

24. On facts also, in the present case, nothing can be said to have become irretrievable in the sense mentioned in paragraph 31 of *Action Ispat,* **REED 2020 SC 12531**.

25. It is settled law that a secured creditor stands outside the winding up and can realise its security dehors winding up proceedings. In *M.K. Ranganathan* v. *Govt. of Madras,* (1955) 2 SCR 374, this Court held:

"The position of a secured creditor in the winding up of a company has been thus stated by Lord Wrenbury in *Food Controller* v. *Cork* [1923 Appeal Cases 647]:

"The phrase 'outside the winding up' is an intelligible phrase if used, as it often is, with reference to a secured creditor, say a mortgagee. The mortgagee of a company in liquidation is in a position to say "the mortgaged property is to the extent of the mortgage my property. It is immaterial to me whether my mortgage is in winding up or not.

I remain outside the winding up" and shall enforce my rights as mortgagee. This is to be contrasted with the case in which such a creditor prefers to assert his

right, not as a mortgagee, but as a creditor. He may say 'I will prove in respect of my debt'. If so, he comes into the winding up".

It is also summarised in *Palmer's Company Precedents* Vol. II, page 415:

"Sometimes the mortgagee sells, with or without the concurrence of the liquidator, in exercise of a power of sale vested in him by the mortgage. It is not necessary to obtain liberty to exercise the power of sale, although orders giving such liberty have sometimes been made".

The secured creditor is thus outside the winding up and can realise his security without the leave of the winding up Court, though if he files a suit or takes other legal proceedings for the realisation of his security, he is bound under Section 231 (corresponding with Section 171 of the Indian Companies Act) to obtain the leave of, the winding up Court before he can do so although such leave would almost automatically be granted. Section 231 has been read together with Section 228(1) and the attachment, sequestration, distress or execution referred to in the latter have reference to proceedings taken through the Court and if the creditor has resort to those proceedings, he cannot put them in force against the estate or effects of the Company after the commencement of the winding up without the leave of the winding up Court. The provisions in Section 317 are also supplementary to the provisions of Section 231 and emphasise the position of the secured creditor as one outside the winding up, the secured creditor being, in regard to the exercise of those rights and privileges, in the same position as he would be under the Bankruptcy Act.

The corresponding provisions of the Indian Companies Act have been almost bodily incorporated from those of the English Companies Act and if there was nothing more, the position of the secured creditor here also would be the same as that obtaining in England and he would also be outside the winding up and a sale by him without the intervention of the Court would be valid and could not be challenged as void under Section 232(1), Indian Companies Act."(at pages 383, 384)

This principle has been followed in *Central Bank of India* v. *Elmot Engineering Co.,* (1994) 4 SCC 159 (at paragraph 14), *Industrial Credit and Investment Corpn. of India Ltd.* v. *Srinivas Agencies,* (1996) 4 SCC 165 (at paragraph 2), and *Board of Trustees, Port of Mumbai* v. *Indian Oil Corpn.,* (1998) 4 SCC 302 (at paragraph 12).

26. Indiabulls, a secured creditor of the corporate debtor, *viz*. SRUIL, has, in enforcement of its debt by a mortgage, sold the mortgaged property outside the winding up. The aforesaid sale is the subject matter of proceedings in the Bombay High Court filed by the provisional liquidator. If the aforesaid sale is set aside, the asset of SRUIL that has been sold will come back to the provisional liquidator for the purposes of winding up. If the sale is upheld, equally, there are

other assets of SRUIL which continue to be in the hands of the provisional liquidator for the purposes of winding up. We may also add that on the facts of this case, though no application for transfer of the winding up proceeding pending in the Bombay High Court has been filed, the Bombay High Court has itself, by the orders dated 28.11.2019 and 23.01.2020, directed the provisional liquidator to hand over the records and assets of SRUIL to the IRP in the Section 7 proceeding that is pending before the NCLT. No doubt, this has not yet been done as the IRP has not yet been able to pay the requisite amount to the provisional liquidator for his expenses.

27. Dr. Singhvi and Shri Ranjit Kumar have vehemently argued that SREI has suppressed the winding up proceeding in its application under Section 7 of the IBC before the NCLT and has resorted to Section 7 only as a subterfuge to avoid moving a transfer application before the High Court in the pending winding up proceeding. These arguments do not avail the Appellant for the simple reason that Section 7 is an independent proceeding, as has been held in catena of judgments of this Court, which has to be tried on its own merits. Any "suppression" of the winding up proceeding would, therefore, not be of any effect in deciding a Section 7 petition on the basis of the provisions contained in the IBC. Equally, it cannot be said that any subterfuge has been availed of for the same reason that Section 7 is an independent proceeding that stands by itself. As has been correctly pointed out by Shri Sinha, a discretionary jurisdiction under the fifth proviso to Section 434(1)(c) of the Companies Act, 2013 cannot prevail over the undoubted jurisdiction of the NCLT under the IBC once the parameters of Section 7 and other provisions of the IBC have been met. For all these reasons, therefore, the appeal is dismissed and the interim order that has been passed by this Court on 18.12.2020 shall stand immediately vacated. **|||**

REED 2021 SC 03530

Kridhan Infrastructure Private Limited v. Venkatesan Sankaranarayan and Others

SUPREME COURT OF INDIA

1 March 2021

Supreme Court observed that despite the grant of sufficient time, the appellant has not been able to comply with the terms of the Resolution Plan. Time is a crucial facet of the scheme under the IBC. To allow such proceedings to lapse into an indefinite delay will plainly defeat the object of the statute. As a consequence of this order, the management shall revert to the liquidator for taking steps in accordance with law.

Case Analysis

Bench/ Coram	Dr. Dhananjaya Y. Chandrachud, J. M. R. Shah, J.
Citation	REED 2021 SC 03530
Case Number	Civil Appeal No. 3299 of 2020
Subject	Corporate Insolvency
Keywords	nclat, ibc, coc, liquidation, nclt, date of the reversal of the liquidation order, commercial decision, ibbi, resolution plan, corporate debtor, liquidation
Legislation Cited	Insolvency and Bankruptcy Code, 2016 Section 33 NCLAT Rules, 2016 Rule 11
Cases Cited	Innoventive Industries Limited v. ICICI Bank and another **REED 2017 SC 08563**
Counsels	*For the Applicant/ Plaintiff/ Petitioner/ Appellant:* K.V. Vishwanathan, Sr. Adv., Gaurav Varma, AOR *For the Respondent/ Defendant:* Meenakshi Arora, Sr. Adv., Misha, Charu Bansal, Adv., Prabh Simran

Kaur, Adv., S. S. Shroff, AOR, Ashish Makhija, Adv., Shagun Matta, AOR, Abhijit Sengupta, AOR, Dibyadyuti Banerjee, Ad., Srideep Chatterjee, Adv., Anand Dey, Adv., Sumedha Banerjee, Advocate

REED 2021 SC 03530

SUPREME COURT OF INDIA

Bench / Coram:

Dr. Dhananjaya Y. Chandrachud, J.
M. R. Shah, J.

Kridhan Infrastructure Private Limited—*Appellant*

Versus

Venkatesan Sankaranarayan and Others—*Respondent*

Civil Appeal No. 3299 of 2020

1 March 2021

Counsels:

For the Applicant/ Plaintiff/ Petitioner/ Appellant: K.V. Vishwanathan, Sr. Adv., Gaurav Varma, AOR

For the Respondent/ Defendant: Meenakshi Arora, Sr. Adv., Misha, Charu Bansal, Adv., Prabh Simran Kaur, Adv., S. S. Shroff, AOR, Ashish Makhija, Adv., Shagun Matta, AOR, Abhijit Sengupta, AOR, Dibyadyuti Banerjee, Ad., Srideep Chatterjee, Adv., Anand Dey, Adv., Sumedha Banerjee, Advocate

JUDGMENT

Dr. Dhananjaya Y. Chandrachud, J.—This appeal arises from an order of the National Company Law Appellate Tribunal[1] dated 8 September 2020.

2. The appellant submitted a Resolution Plan for a company by the name of Tecpro Systems Limited[2] which was undergoing the Corporate insolvency Resolution Process under the Insolvency and Bankruptcy Code 2016.[3] The Resolution Plan was approved by the Committee of Creditors[4] on 8 March 2019 with a majority of 89.92%. The Resolution Plan was approved by the National Company Law Tribunal[5] on 15 May 2019. The appellant accordingly deposited

1. "NCLAT"
2. "Corporate Debtor"
3. "IBC"
4. "CoC"
5. "NCLT"

an amount of Rs 5 Crores in an Escrow Account of the Corporate Debtor. However, the appellant did not fulfil its further obligations, including equity infusion, under the Resolution Plan despite numerous opportunities over a period of six months. On 11 November 2019, the CoC voted, by a majority of 99.28%, for the liquidation of the Corporate Debtor as a result of the failure of the appellant to implement the Resolution Plan. On 16 January 2020, the NCLT allowed the liquidation of the Corporate Debtor to proceed. The order of the NCLT was upheld by the NCLAT. Among other things, the NCLAT noted that the appellant had failed to implement the Resolution Plan for a period of over eight months and, hence, declined to exercise its jurisdiction pursuant to its inherent power under Rule 11 of the NCLAT Rules, 2016.

3. When the appeal came before this Court on 9 October 2020, a statement was made on behalf of the appellant that an amount of Rs 50 crores would be deposited on or before 10 January 2021. Liquidation under the IBC is a matter of last resort. Bearing this in mind, and in view of the solemn statement made by Senior Counsel for the appellant, an opportunity was granted to the appellant. Accordingly, the following order was passed:

"1. Admit.

2. We have heard Dr Abhishek Manu Singhvi, Senior counsel in support of the appeal. Ms Meenakshi Arora, Senior counsel appears on behalf of Edelweiss Asset Reconstruction Company Limited (EARC), a financial creditor, who had appeared before the National Company Law Appellant Tribunal. EARC has supported the appellant. Mr. Ashish Makhija, learned counsel appears on behalf of the liquidator to oppose the appeal and support the order of the National Company Law Appellate Tribunal.

3. The corporate insolvency resolution process (CIR process) was initiated against the Corporate Debtor on 7 August 2017. The Resolution Plan submitted by the appellant was approved on 30 April 2018 by the Committee of Creditors (CoC). The Resolution Plan was approved by the NCLT on 15 May 2019. The NCLT was thereafter moved on the ground that the Resolution Plan had not been implemented by the appellant. Hence an application was filed under Section 33 of the Insolvency and Bankruptcy Code 2016 seeking liquidation of the Corporate Debtor. This was allowed by the NCLT by its order dated 16 January 2020.

4. After the appellant filed an appeal before the NCLAT on 3 February 2020, an opportunity was granted to them to file an affidavit indicating the time frame for compliance of the Resolution Plan. On 25 February 2020, a meeting took place between the member of the erstwhile CoC, the appellant and the liquidator. A revised time line was agreed upon, under which the appellant was to make a payment upfront of Rs 15 crores within seven days of the order of the NCLAT,

which was liable to be forfeited if the appellant failed to make the balance upfront payment of Rs 50 crores within three months thereafter.

5. The appellant filed an affidavit before the NCLAT on 2 March 2020 apprising it of the understanding which had been arrived at on the above terms. On 29 July 2020, the NCLAT permitted the appellant to deposit Rs 15 crores in an escrow account to be specified by the lenders of the erstwhile CoC, within ten days. It is not in dispute that the appellant has in compliance with the order of the NCLAT, deposited Rs 15 crores. The appellant filed an undertaking on affidavit on 18 August 2020, accepting its obligation to make an upfront payment of Rs 50 crores within three months from the date of the reversal of the liquidation order. The appellant agreed to the stipulation that the amount of Rs 15 crores deposited by it in escrow would stand forfeited if it failed to deposit the payment of Rs 50 crores. NCLAT by its order dated 8 September 2020, dismissed the appeal and upheld the order of liquidation.

6. Dr Abhishek Manu Singhvi, Senior counsel appearing on behalf of the appellant submits that liquidation of the undertaking should be a matter of last resort and, consistent with the understanding which was arrived at on 25 February 2020, the appellant is willing to abide by the terms as agreed. He has submitted that within a period of three months, the appellant would bring in the upfront payment of Rs 50 crores, failing which the amount of Rs 15 crores which has already been deposited in escrow would stand forfeited together with the amount of Rs 5 crores that was deposited following the approval of the Resolution Plan.

7. Ms. Meenakshi Arora, Senior counsel appearing on behalf of EARC supports the proposal which has been submitted by the appellant on the ground that the erstwhile members of the CoC have in their commercial decision found it in their best interest to allow the Resolution Plan to be implemented.

8. Mr. Ashish Makhija, learned counsel appearing on behalf of the liquidator has while opposing the appeal submitted that while the liquidator does not in principle oppose the request, as an officer of the Court, he would wish to apprise the Court of the fact that the appellant did not take steps following the approval of the Resolution Plan in May 2019 for complying with its obligations.

9. Liquidation of the Corporate Debtor should be a matter of last resort. The IBC recognizes a wider public interest in resolving corporate insolvencies and its object is not the mere recovery of monies due and outstanding. The appellant has indicated its bona fides, at least prima facie at the present stage, by unconditionally agreeing to subject itself to the forfeiture of an amount of Rs 20 crores, which has been deposited by it, in the event that it fails to comply with the requirement of depositing an additional amount of Rs 50 crores within a period of three months in terms of the understanding that was arrived at on 25 February 2020. In order to enable the appellant to have one final opportunity to

do so, we direct that the appellant shall, in order to demonstrate its bona fides deposit an amount of Rs 50 crores upfront in terms of the understanding which was arrived at on 25 February 2020. The appellant is specifically placed on notice of the fact that should it fail to do so in whole or in part, the entire amount of Rs 20 crores which has been deposited thus far, shall stand forfeited without any further recourse to the appellant. Accordingly, the following interim directions are issued:

(i) The operation of the impugned order of the NCLAT dated 8 September 2020, is stayed;

(ii) The appellant shall, in order to demonstrate its ability to implement the Resolution Plan and in compliance with the understanding arrived at on 25 February 2020 deposit an amount of Rs 50 crores, on or before 10 January 2021; and

(iii) The auction of the properties of the Corporate Debtor shall remain stayed in the meantime. 10 The appeal shall be listed on 12 January 2021." (emphasis supplied)

4. Subsequently, on 25 November 2020, the above order was clarified by this Court and time for making the deposit was extended until 25 February 2021.

5. Though nearly five months have elapsed since the first order, no payment has been made. Even after second order granting the extension of time, three months have elapsed. The appellant took over the Corporate Debtor after the order of stay. Though given charge, the appellant has not fulfilled its reciprocal obligations. IA 22633 of 2021 has been filed in the Civil Appeal, seeking a direction to the Ministry of Corporate Affairs, the Registrar of Companies and the Insolvency and Bankruptcy Board of India[1] to take on record the newly appointed directors and signatories of the Corporate Debtor; to accept the Corporate Debtor as an active company and change its status from "under liquidation" to "active" and generally to take all actions in compliance of the previous orders of this Court.

6. Mr. K. V. Vishwanathan, learned Senior Counsel appearing on behalf of the appellant, submits that pursuant to the earlier orders dated 9 October 2020 and 25 November 2020, the appellant had moved the Term Lenders for finance. However, the appellant submits that before finance can be made available to the appellant, the Term Lenders have insisted that the status of the Company must be altered from that of a company under liquidation, to an active company. A copy of the email addressed by the Insolvency and Bankruptcy Board of India on 15 January 2021 has been annexed to the aforesaid IA. Mr. Vishwanathan submits that the previous orders of this Court recognize that the appellant was

1. "IBBI"

required to deposit an amount of Rs 50 crores in terms of the understanding which was arrived at with the CoC on 25 February 2020. It has been submitted that the appellant would hence raise the funds after securing a mortgage on the assets of the Corporate Debtor. However, the Term Lenders are not ready and willing to make funds available unless the status of the Company is altered.

7. Ms. Meenakshi Arora, learned Senior Counsel appearing on behalf of Edelweiss Asset Reconstruction Company Limited,[1] submits that EARC has the largest stake in respect of the Corporate Debtor. Ms. Arora has submitted that EARC, as recorded in the earlier orders, supported the appellant in its efforts to comply with the Resolution Plan and, accordingly, suitable orders may be passed by this Court so as to facilitate the appellant in raising the necessary funds.

8. On the other hand, Mr. Ashish Makhija, learned counsel, who had appeared on behalf of the Liquidator, submits that though the management was handed over to the appellant, the appellant has proceeded to take action towards settling various disputes, including arbitration matters and despite various opportunities having been granted to it, the appellant has been unable to raise funds, as stated before this Court. Hence, Mr. Makhija submits that an appropriate view may be taken by this Court on the default by the appellant.

9. The above submission of Mr. Makhija has been controverted by Mr. Vishwanathan who denies that arbitration claims have been settled.

10. By the order of the court dated 9 October 2020, which was passed on the statement which was made by Senior Counsel, an amount of Rs 50 crores was required to be deposited before 10 January 2021. On 25 November 2020, while clarifying the earlier order by which the order of NCLAT was stayed, time for the deposit of Rs 50 crores was extended until 25 February 2021. The appellant was clearly put on notice that the amount of Rs. 20 crores already deposited would stand forfeited in the event the appellant fails to comply with the terms of the order.

11. The appellant has been unable to raise the funds. The fact of the matter, as it emerges from Mr. Vishwanathan's submissions, is that the appellant will be unable to raise funds from the Term Lenders who are insisting that the status of the Company should change from a company under liquidation to an active status. The order of liquidation has not been set aside. Ultimately, what the request of the appellant reduces itself to, is that it would raise funds on a mortgage of the assets of the Company and unless the Company is brought out of liquidation, it would not be in a position to raise the funds. This is unacceptable. At this stage, the order of liquidation has only been stayed, but a final view was, thus, to be taken by this Court. Sufficient opportunities were granted to the appellant earlier during the pendency of the proceedings both

1. "EARC"

before the NCLT and NCLAT. The orders of the NCLT and NCLAT make it abundantly clear that despite the grant of sufficient time, the appellant has not been able to comply with the terms of the Resolution Plan. Since 9 October 2020, despite the passage of almost five months, the appellant has not been able to deposit an amount of Rs 50 crores. Time is a crucial facet of the scheme under the IBC.[1] To allow such proceedings to lapse into an indefinite delay will plainly defeat the object of the statute. A good faith effort to resolve a corporate insolvency is a preferred course. However, a resolution applicant must be fair in its dealings as well. The appellant has failed to abide by its obligations. In that view of the matter, we see no reason or justification to entertain the Civil Appeal any further. The consequence envisaged under the order of this Court shall accordingly ensue in terms of the forfeiture of the amount of Rs 20 crores. As a consequence of this order, the management shall revert to the liquidator for taking steps in accordance with law. The Civil Appeal is accordingly dismissed.

12. Pending applications, including the application for impleadment, stand disposed of.

UPON hearing the counsel, the Court made the following

ORDER

1. The appeal is dismissed in terms of the signed reportable judgment.

2. Pending applications, including the application for impleadment, stand disposed of. **|||**

1. Innoventive Industries Ltd. v. ICICI Bank, **REED 2017 SC 08563** : (2018) 1 SCC 407, paras 12-16.

REED 2021 SC 03527

Jaypee Kensington Boulevard Apartments Welfare Association and Others v. NBCC (India) Limited and Others

SUPREME COURT OF INDIA

2 March 2021

Supreme Court ordered for Immediate release of the applicant (interim resolution professional) and the Investigating Officer (IO) was directed to not take any coercive action against the applicant in connection with the F.I.R until further orders. Further, IO was ordered to file a personal affidavit explaining the position for taking such drastic actions.

Case Analysis

Bench/ Coram	A.M. Khanwilkar, J. Dinesh Maheshwari, J.
Citation	REED 2021 SC 03527
Case Number	Civil Appeal No. 3395/2020
Subject	Corporate Insolvency – Arrest of Interim Resolution Professional
Keywords	interim resolution professional, arrest, to avoid prosecution, securing, presence, provision of privilege of IRP, immediate release, police custody, coercive action, investigating officer, drastic action.
Legislation Cited	Insolvency and Bankruptcy Code, 2016 Section 233 Constitution of India, 1950 Article 32
Cases Cited	-
Counsels	*For the parties:* Jaideep Gupta, Sr. Adv., Amit Kumar Mishra, Adv., Shashank Manish, AOR, Nidhi Sahay, Adv., Manasi Chatpalliwar, Adv., Parag P Tripathi, Sr. Adv., Sidharth Luthra, Sr. Adv., Sumant Batra, Sanjay Bhatt, Niharika Sharma, Rahul Mendiratta, Mishika Bajpai, Shubhangijain, Akansha Srivastava,

Advocates, Rabin Majumder, AOR, Maninder Singh, Sr. Adv., Gopal Sankaranarayanan, Sr. Adv., Kunal Chatterji, AOR, Maitrayee Banerjee, Pravar Veer Misra, R.K. Raizada, Rajeev Dubey, Advocates, Kamlendra Mishra, AOR, Sahil Narang, AOR, S. S. Shroff, AOR, Divyam Agarwal, AOR, Vishal Gupta, AOR, Dua Associates, AOR, Rabin Majumder, AOR, Cyril Amarchand Mangaldas, AOR, Hasan Murtaza, AOR, Shariq Ahmed, Tariq Ahmed, Saju Jakob, Advocates, Sunil Kumar Verma, AOR, Amit Pawan, AOR, Sachin Sharma, AOR, Himanshu Shekhar, AOR, Ram Lal Roy, AOR

REED 2021 SC 03527

SUPREME COURT OF INDIA

Bench / Coram:

A.M. Khanwilkar, J.
Dinesh Maheshwari, J.

Jaypee Kensington Boulevard Apartments Welfare Association and Others—*Appellant*

Versus

NBCC (India) Limited and Others—*Respondent*

Civil Appeal No(s). 3395/2020

2 March 2021

Counsels:

For the parties: Jaideep Gupta, Sr. Adv., Amit Kumar Mishra, Adv., Shashank Manish, AOR, Nidhi Sahay, Adv., Manasi Chatpalliwar, Adv., Parag P Tripathi, Sr. Adv., Sidharth Luthra, Sr. Adv., Sumant Batra, Sanjay Bhatt, Niharika Sharma, Rahul Mendiratta, Mishika Bajpai, Shubhangijain, Akansha Srivastava, Advocates, Rabin Majumder, AOR, Maninder Singh, Sr. Adv., Gopal Sankaranarayanan, Sr. Adv., Kunal Chatterji, AOR, Maitrayee Banerjee, Pravar Veer Misra, R.K. Raizada, Rajeev Dubey, Advocates, Kamlendra Mishra, AOR, Sahil Narang, AOR, S. S. Shroff, AOR, Divyam Agarwal, AOR, Vishal Gupta, AOR, Dua Associates, AOR, Rabin Majumder, AOR, Cyril Amarchand Mangaldas, AOR, Hasan Murtaza, AOR, Shariq Ahmed, Tariq Ahmed, Saju Jakob, Advocates, Sunil Kumar Verma, AOR, Amit Pawan, AOR, Sachin Sharma, AOR, Himanshu Shekhar, AOR, Ram Lal Roy, AOR

UPON hearing the counsel, the Court made the following

ORDER

I.A. No.……in T.C. No. 234/2020

We have heard Mr. Parag Tripathi, and Mr. Sidharth Luthra, learned senior counsel for the applicant, Mr. Anuj Jain.

We are appalled to see that the manner in which the Uttar Pradesh Police has handled this case emanating from F.I.R. No. 0098/2021, registered at Police Station Beta-II in District Greater Noida, including to take the extreme step to

arrest the Interim Resolution Professional, Mr. Anuj Jain, who was working in that capacity pursuant to the order passed by the Court and entrusted with the functioning of the Company in question.

It is seen that the police official dealing with the case is not familiar with the provision of privilege of interim resolution appointed by the Court, in terms of Section 233 of the Insolvency and Bankruptcy Code.

Mr. R.K. Raizada, learned senior counsel appearing for the State of Uttar Pradesh, on instructions, submits that the Investigating Officer, Mr. Bijendra Singh, was of the view that the applicant may leave India at any time to avoid the prosecution and for securing his presence thought it necessary to arrest him from Mumbai.

We will examine this aspect of the matter elaborately at appropriate time by treating this application as substantive writ petition filed by the applicant under Section 32 of the Constitution of India and to be numbered accordingly.

In the meantime, we direct immediate release of the applicant, Anuj Jain, who is presently in custody of Police Station, Beta-II, District Greater Noida, Uttar Pradesh and had been produced today i.e. 02.03.2021 before the Court of Chief Judicial Magistrate, Gautam Buddh Nagar, Uttar Pradesh.

We further direct the Investigating Officer not to take any coercive action against the applicant in connection with the subject F.I.R. until further orders.

We also issue notice to the Investigating Officer, Bijender Singh, Sub-Inspector, as to why appropriate action is not taken against him for taking such drastic action against the applicant. He shall file his personal affidavit explaining the position within two weeks from today.

List the writ petition after two weeks.

Copy of this order be forwarded to the office of the concerned Judge and Police Station Beta-II, District Greater Noida, Uttar Pradesh through e-mail and the Registrar (Judl.) of this Court shall personally intimate the office of the concerned Judge on telephone to ensure immediate release of the applicant, Mr. Anuj Jain, without imposing any conditions. |||

REED 2021 NCLAT Del 03511

Committee of Creditors of EMCO Limited v. Mrs. Mary Mody and Another

NATIONAL COMPANY LAW APPELLATE TRIBUNAL NEW DELHI

2 March 2021

Keeping in view the ratio of the Supreme Court in **K. Sashidhar v. Indian Overseas Bank and Others, REED 2019 SC 02502** *that the commercial or business decision of the CoC is non-justiciable, and at best, the Adjudicating Authority may cause an enquiry on limited grounds, but does not have Jurisdiction to undertake scrutiny of the justness of the opinion expressed by the CoC when it has voted by a majority share.*

Case Analysis

Bench/ Coram	Anant Bijay Singh, J. (Judicial Member) Ms. Shreesha Merla (Technical Member)
Citation	REED 2021 NCLAT Del 03511
Case Number	Company Appeal (AT) (Insolvency) No. 307 of 2020
Subject	Corporate Insolvency
Keywords	committee of creditors, interim funds, compliance report, interim finance, non-justiciable, insolvency resolution process cost, liquidation, salaries, going concern, security interests, encumbered property, lack of funding, non-operational.
Legislation Cited	Insolvency and Bankruptcy Code, 2016 Section 5(13), Section 5(15), Section 7, Section 9, Section 13(e), Section 20(2)(c), Section 25, Section 25(2)(c), Section 28, Section 28(1), Section 28(1)(a), Section 28(3), Section 28(4), Section 30(2)(a), Section 30(4), Section 31(1), Section 33, Section 53, Section 61, Section 188 IBBI (Insolvency Resolution Process for Corporate Person) Regulation, 2016

	Regulation 31, Regulation 32, Regulation 33, Regulation 34
Cases Cited	Savan Godiawala, Liquidator of Lanco Infratech Limited v. Apalla Siva Kumar **REED 2020 NCLAT Del 02554**
	K. Sashidhar v. Indian Overseas Bank and Others **REED 2019 SC 02502**
Counsels	*For the Applicant/ Plaintiff/ Petitioner/ Appellant:* Sanjeev Kumar, Anshul Sehgal and Abhishek Kisku, Advocates
	For the Respondent/ Defendant: Zain Khan and *Saloni Kothari (RP)* *Ayush J Rajani, PCA (RP), Advocates for R-2* *Sundaresh Bhat, Advocates*

REED 2021 NCLAT Del 03511

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Bench / Coram:

Anant Bijay Singh, J. (Judicial Member)
Ms. Shreesha Merla (Technical Member)

Committee of Creditors of EMCO Limited—*Appellant*

Versus

Mrs. Mary Mody and Another—*Respondent*

Company Appeal (AT) (Insolvency) No. 307 of 2020
(Arising out of Order dated 15th January, 2020 passed by National Company Law Tribunal, Mumbai Bench, (31) MA 4002/2019 MA 4034/2019 in Company Petition (IB) No.- 2849/MB/2018)

2 March 2021

Counsels:

For the Applicant/ Plaintiff/ Petitioner/ Appellant: Sanjeev Kumar, Anshul Sehgal and Abhishek Kisku, Advocates

For the Respondent/ Defendant: Zain Khan and Saloni Kothari (RP), Ayush J Rajani, PCA (RP), Advocate for R-2, Sundaresh Bhat, Advocate

JUDGMENT

Shreesha Merla, Member (T).—The present Appeal, by the Committee of Creditors is filed under Section 61 of the Insolvency and Bankruptcy Code 2016 (in short the 'IBC') against the Impugned Order dated 15.01.2020, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, in MA 4002/2019 in CP (IB) No. 2849/MB/2018, whereby the Learned Adjudicating Authority, vide the Impugned Order has directed the Committee of Creditors of the Corporate Debtor Company, namely EMCO Limited, to provide interim funds to the Resolution Professional to run during the CIRP period; to provide funds to meet the expenditure already incurred to the tune of Rs. 2.21/- Crores till December 2019 and further directed the CoC to submit the compliance report at the time of next hearing.

2. The Learned Adjudicating Authority while issuing the aforenoted directions has observed as follows;

"4. MA 4002/2019 – This application has been preferred by the employees/ex-employees of the Corporate Debtor. The application inter-alia seeks payment due to the employees during the CIRP period. The learned Counsel appearing for the RP in an affidavit has mentioned that the total amount available in the Debtor company is about Rs. 1.27 Crore whereas the total out go on account of payment towards CIRP cost is about Rs. 1.74 Crore per month. It was also brought through an affidavit before this Bench that total unpaid CIRP costs is now about Rs. 2.21 Crore till December, 2019. Out of which the payment towards wages and salaries to the employees during the CIRP period is about Rs. 80 lacs per month. Besides, it was brought to the notice of the Bench that certain employees who are on the rolls of the company are coming to the plant but are not being paid any wages."

3. Learned Counsel appearing for the Appellant/CoC contended that the directions issued by the Learned Adjudicating Authority were contrary to the provisions of the IBC; for Section 5(13) of the Code defines 'Insolvency Resolution Professional Costs' and any 'Interim Finance' raised should confirm to the same and also placed reliance on Section 5(15) which defines 'Interim Finance', Section 25 which deals with dues of 'Resolution Professional' and Section 25(2)(c) which provides that the Resolution Professional shall undertake to raise 'Interim Finance' subject to approval of the Committee of Creditors under Section 28.

4. The Learned Counsel argued that as per Section 28(3) of the Code approval of the CoC by a vote of 66 % of the voting share is required to raise any Interim Funds and as the Appellant has not granted any such approval and the decision of the CoC is non-justiciable as laid down by the Hon'ble Supreme Court in several Judgements, no direction to provide Interim Finance ought to have been passed by the Learned Adjudicating Authority.

5. Learned Counsel appearing for the CoC, further submitted that the said direction was passed without hearing the Appellant and in a proceeding whether the Appellant was not even made a party.

6. The Learned Counsel drew our attention to the Minutes of the 6thCoC Meeting dated 08.01.2020 wherein it was recorded by the CoC Members that EMCO Ltd. was not a going concern and therefore 'it was viable at the stage to confirm the unpaid salary and wages to all the employees and the workmen as the CIRP cost which would be required to be borne by successful Resolution Applicant and paid within 30 days of the approval of the Resolution Plan as per the provisions of the IB Code'. It is further submitted that as per Section 30(2)(a) of the Code, if the Resolution Plan is approved such a Plan would provide for the payment of the 'Insolvency Resolution Process Cost' in a manner specified by the Board in priority to the payment of other debts and in case no Resolution Plan is approved and an Order of liquidation is passed, the 'Costs' are paid as per Section 53 of the Code. In the present case no Resolution Plan is approved and the CoC has

voted for liquidation and an Application seeking liquidation has already been filed before the Adjudicating Authority which is pending. It is submitted that as the Corporate Debtor is non-operational only salaries of those employees which the Resolution Professional has retained to keep the CIRP going, at reduced salaries, was paid and hence the directions of the Learned Adjudicating Authority to the Appellant to raise Interim Finance and pay the amounts is erroneous.

7. Per contra, the Learned Counsel appearing for the 1st Respondent/ the Applicant in MA 4002/2019 contended that as on the date of CIRP i.e. 16.08.2019, the Corporate Debtor had work orders amounting to Rs. 307/- Crores; that the said work orders could not be completed owing to the failure of the CoC to raise Interim Finance despite requests made by the Resolution Professional; that the services of the Respondent employees were not terminated; that even though approval of CoC is required for raising any Interim Finance, however, the approval of CoC is *not* required for payment of salaries to the workmen of the Corporate Debtor for the period of CIRP.

8. It is further submitted that the Appellant has misappropriated the amounts from the Corporate Debtor after commencement of CIRP and the genuine dues of the workmen have not been paid. It is argued by the Learned Counsel that the Corporate Debtor was a going concern and placed reliance on the Minutes of the 2nd Meeting of the CoC in which under point 4 it is noted as follows;

"4. *Updates on the Operational Matters.*-The RP informed the CoC members that with the permission of the CoC members & IRP RP's Team had visited the Thane Plant on 3rd Oct 2019, 11th Oct 2019 and the RP had visited the Thane Plant on 15th Oct 2019.

The RP informed the CoC members that he had met the key officials from EMCO Limited and had also addressed concerns of the workers during his visit Dt. 15th Oct 2019.

Tax auditor M/s Suresh Bhardwaj & Co., Mumbai is appointed for completing tax audit and filling with Income tax, some of the PBG were also extended. The RP updated the CoC members on the following Operational Matters."

9. Learned Respondent Counsel argued that as per Section 20(2)(c) of the Code, 'Management of Operations of Corporate Debtor as a going concern', to raise Interim Finance provided that no security interests shall be created over any encumbered property of the Corporate Debtor without the prior consent of the Creditor whose debt is secured over such encumbered property, provided that no prior consent of the Creditor shall be required with a value of such property is not less than the amount equivalent to twice the amount of debt.

10. It is contended by the Learned Counsel that this Tribunal has decided in a plethora of cases that the employees of the Corporate Debtor be paid their timely dues and to ensure that the Corporate Debtor remains a going concern and the said funding made by the CoC shall be termed as the CIRP cost and shall be recoverable in priority over the claims and prayed for dismissal of the Appeal.

11. Learned Counsel appearing for Respondent No. 2, the Resolution Professional (RP) contended that the Corporate Debtor was 'not a going concern' and was non-operational; that the RP approached the CoC several times with detailed Plans during the 3rd, 4th, 5th and 6thCoC Meetings to seek Interim Finance funding from the CoC since the Corporate Debtor was in dire need of funds in order to restart the production at Thane Plant which could not be achieved due to the lack of funding; when these business Plans were presented to CoC, the first Respondent, Mrs. Mary Mody, head of the Engineering Department and Mr. Yogesh Sonje, were invited for the meetings and were personally present and hence were given sufficient opportunity to present their case before the CoC. It is also submitted by the Counsel appearing for the RP that all efforts were made to allocate some funds to the employees and workman towards their monthly salaries but the draft of the Settlement Agreement was rejected by them and the dues of only those employees whose dues during the CIRP period were approved by the CoC as CIRP cost have been cleared. The CoC has not approved the dues of the first Respondent as CIRP cost and therefore the RP could not get these dues cleared. Hence it is prayed that the Impugned Order be set aside as it is in violation of the provisions of the I&B Code.

12. Heard both the Parties at length. The main point which falls for consideration here is whether the Corporate Debtor was a going concern and whether the Learned Adjudicating Authority was justified in directing the CoC to raise interim funds and provide to the RP to run the CIRP period and to meet the expenditure incurred till December 2019 to the tune of Rs. 2.21/- Crores.

13. It is observed from the record that the Impugned Order was passed without hearing the CoC.

14. It is an admitted fact that the CIRP proceedings began on 16.08.2019 and the Resolution Professional was confirmed on 14.10.2019. In the Reply filed by the RP to the MA all facts with respect to the salaries of 51 employees were placed on record till 31.08.2019. It is stated in the Reply that any salary dues *prior* to the commencement of CIRP process will be considered by the Resolution Applicant, whose Resolution Plan, if any, shall be approved by the CoC Members. It is also an admitted fact that the said employees have also filed a Claim with the RP.

15. It is pertinent to mention that the Resolution Professional in para 18 of the Additional Affidavit in Reply has clearly deposed that the 'Corporate Debtor was non-operational and not a going concern'. It is significant to reproduce the para as hereunder;

"18. I say that with regard to content of para 3(k) of the Reply of Respondent No. 1, I submit that dues of only those staffers whose dues during CIRP period were approved by CoC as CIRP Cost per meaning under the I&B Code have been cleared, further to the provisions of the I&B Code which stipulate that only those dues approved by CoC are CIRP Cost. The CoC has not approved the dues of the

Respondent No. 1 as CIRP cost, hence as per the I&B Code, I am not permitted to clear any such dues and they will be settled as per the I&B Code. Furthermore, the CD was non-operational and not a going concern. Further, the CD was under severe financial distress and to ensure smooth progress of the CIRP, RP was compelled to retain only few of the employees at a reduced salary who were required to be retained in-order to continue with Corporate Insolvency and Resolution Process and under express direction and approval of the CoC. (Emphasis Supplied)

16. It is stated by the Resolution Professional that the Claims related to Pre-Corporate Insolvency Resolution Process cannot be raised now as they have to be considered only up to 16.07.2020; that RP released the payment to the tune of 4,500 per workmen to 277 workmen aggregating to Rs. 12.46/- Lakhs; that CoC decided to contribute only Rs. 1.50/- Crores as internal corporate funds in the favor of funding to meet the critical CIRP expenses and the proposal given by the RP to sell the various unencumbered assets was not approved by the CoC Members and the RP has no funds available for running the CD as a going concern. The salaries of only certain critical employees were approved by the CoC to form part of the CIRP cost during various CoC meetings and this decision was taken by the CoC to ensure smooth CIRP process towards the employees who were required to support the RP in discharging his duties.

17. As regarding the contribution to be made by the Suspended Board of Directors towards the gratuity funds, it is stated by the RP in his Affidavit that the CD has not been contributing the sufficient amounts to meet the gratuity, liabilities for its employees and workmen which cannot be attributed to the RP. At this juncture, Learned Counsel for the Appellant placed reliance on the recent Judgement of this Tribunal in *'Savan Godiawala, Liquidator of Lanco Infratech Ltd.'* v. *'Apalla Siva Kumar',* **REED 2020 NCLAT Del 02554** in Company Appeal (AT) (Insolvency) No. 1229 of 2019 in which this Tribunal has held that 'the Provident Fund, the Pension Fund and the Gratuity Fund, do not come within the purview of 'liquidation Estate' for the purpose of distribution of assets under Section 53 of the Code'. We are conscious of the fact that at this stage when admittedly an Application under Section 33 seeking a direction for liquidation is still pending before the Adjudicating Authority, we refrain from making any observations.

18. It is pertinent to mention that the Resolution Professional filed his Affidavit in Reply to the MA 4002 of 2019 before the Learned Adjudicating Authority stating as follows;

"7. With respect to the contents of the para 6 of the Application, it is submitted that I as an RP is aware about the hardships faced by the employees and is making best possible efforts to meet the ends. It is submitted that I am appointed as an RP by the Order of the Court as an officer to look after the Corporate Debtor and its affairs and manage and continue the company as a

going concern. In the present scenario I have therefore tried and retained some of the employees to keep the CIRP going as well as ensure that the salaries are paid to the employees, which is a CIRP cost as per the provisions of the Insolvency and Bankruptcy Code, 2016. It is in the view of the Corporate Debtor being under severe financial distress and the fact that the Corporate Debtor is nonoperational, that the RP had decided to retain the employees at a reduced salary…..." (Emphasis Supplied)

"25. With respect to para 26 of the I state that there has never been a dispute or an iota of doubt with respect to the salaries of the employees who are working during the CIRP being a part of the CIRP cost. In fact, RP is paying the salaries of the employees who are helping the RP in the CIRP process after the approval of the CoC. It is pertinent to note that the CIRP cost has to be approved by the members of the CoC in terms of Regulation 34 of the CIRP Regulations and to the extend claims being verified, and then ratified by CoC, I as an RP is including the same as part of the CIRP costs. It cannot be interpreted to say that salaries of all employees/workmen of corporate debtors who are not working are to be considered as CIRP cost on the basis on Section 5(13) of the Code. (Emphasis Supplied)

19. Keeping in view that the Application under Section 7 or Section 9 is not a 'Suit' or a 'Money Claim' and having regard to the fact that the Resolution Professional has filed a detailed Affidavit that the Corporate Debtor is not a 'going concern and is non-operational', this Tribunal is of the considered opinion that the Learned Adjudicating Authority ought to have taken this aspect into consideration and heard the CoC before issuing the directions.

20. Section 5(13) of the Code defines Insolvency Resolution Professional process cost as follows;

"5(13). *Insolvency Resolution Process cost means.*-(a) the amount of any Interim Finance and the costs incurred in raising such finance;

(b) the fees payable to any person acting as a resolution professional;

(c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;

(d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and

(e) any other costs as may be specified by the Board."

21. Section 5 (15) of the Code defines Interim Finance;

"5(15). Interim Finance means any financial debt raised by the resolution professional during the insolvency resolution process period."

22. Section 28 (1) refers to approval of Committee of Creditors for certain actions. Section 28(1)(a), Section 28(3) and Section 28(4) read as follows;

"28. *Approval of committee of creditors for certain actions.*-(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely;-

(a) raise any Interim Finance in excess of the amount as may be decided by the committee of

creditors in their meaning…."

"28(3) No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of 1[sixty-six] percent of the voting shares."

"28(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void."

It is clear from the aforenoted Sections that the Resolution Professional can raise Interim Finance only subject to approval of the Committee of Creditors by a vote of 66 % under Section 28. In the instant case it is an admitted fact that the CoC have not approved the raising of any interim funds.

23. At this juncture, we find it relevant to rely on the principle laid down by the Hon'ble Supreme Court in *'K. Sashidhar'* v. *'Indian Overseas Bank',* **REED 2019 SC 02502** : (2019) 12 SCC 150;

"44. Suffice it to observe that in the I&B Code and the Regulations framed there under as applicable in October 2017, there was no need for the dissenting financial creditors to record reasons for disapproving or rejecting a resolution plan. Further, as aforementioned, there is no provision in the I&B Code which empowers the adjudicating authority (NCLT) to oversee the justness of the approach of the dissenting financial creditors in rejecting the proposed resolution plan or to engage in judicial review thereof. Concededly, the inquiry by the resolution professional precedes the consideration of the resolution plan by the CoC. The resolution professional is not required to express his opinion on matters within the domain of the financial creditor(s), to approve or reject the resolution plan, Under Section 30(4) of the I&B Code. At best, the Adjudicating Authority (NCLT) may cause an enquiry into the "approved" resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors-be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the Appellate Authority (NCLAT) is limited to the grounds Under Section 61(3) of the I&B Code. It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting. To take any other view would enable even the minority dissenting financial creditors

to question the logic or justness of the commercial opinion expressed by the majority of the financial creditors albeit by requisite percent of voting share to approve the resolution plan; and in the process authorize the adjudicating authority to reject the approved resolution plan upon accepting such a challenge. That is not the scope of jurisdiction vested in the adjudicating authority Under Section 31 of the I&B Code dealing with approval of the resolution plan…"

"48. Suffice it to observe that the amended provision merely restates as to what the financial creditors are expected to bear in mind whilst expressing their choice during consideration of the proposal for approval of a resolution plan. No more and no less. Indubitably, the legislature has consciously not provided for a ground to challenge the justness of the "commercial decision" expressed by the financial creditors – be it to approve or reject the resolution plan. The opinion so expressed by voting is nonjusticiable. Further, in the present cases, there is nothing to indicate as to which other requirements specified by the Board at the relevant time have not been fulfilled by the dissenting financial creditors. As noted earlier, the Board established Under Section 188 of the I&B Code can perform powers and functions specified in Section 196 of the I&B Code. That does not empower the Board to specify requirements for exercising commercial decisions by the financial creditors in the matters of approval of the resolution plan or liquidation process. Viewed thus, the amendment under consideration does not take the matter any further.

24. The contention of the Learned Counsel appearing for the first Respondent that Section 20(2)(c) is to be relied upon which refers to 'Management of Operation of Corporate Debtor as a going concern' is untenable as the said Section refers to duties of Interim Resolution Professional. Section 25(2)(c) is relevant to the instant case as it deals with 'Duties of Resolution Professional' with respect to raising Interim Finance subject to the approval of Committee of Creditors under Section 28. Section 28 refers to whether the approval of Committee of Creditors is required for raising 'Interim Finance'. It is reiterated by the Resolution Professional that the Corporate Debtor is not a going concern. The Application MA 4002/2019 in CP (IB) No. 2849/MB/2018 was preferred by the employees seeking direction to also pay the salaries for the period prior to the commencement of CIRP cost. It is a well settled proposition of law that for the cost incurred prior to the CIRP process, in case any Resolution Plan is approved, the 'Resolution Applicant' shall bear the expenses. In the instant case, it is not in dispute that the Resolution Plan has not been approved and the CoC has recommended for liquidation.

25. Additionally, the contention of the Learned Counsel appearing for the Respondent that point 4 of the second Meeting of the CoC proves that the Company was a going concern is unsustainable as it only refers to the RP's visit to the Plant and cannot be construed to be of any documentary evidence to

substantiate the plea of the Respondent that the Corporate Debtor was a going concern.

26. CIRP Costs have to be approved by the CoC in terms of Regulation 31 of the CIRP Regulations which reads as hereunder;

"31. Insolvency Resolution Process Cost:-"Insolvency resolution process costs" under Section5(13)(e) shall mean- amounts due to suppliers of essential goods and services under regulation 32;

[1][(aa) fee payable to authorized representative under [2][sub-regulation (8)] of regulation 16-A;

(ab) out of pocket expenses of authorized representative for discharged of his functions under [2][Section 25-A];]

(b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under Section 14(1)(d);

(c) expenses incurred on or by the interim resolution professional to the extent ratified under regulation 33;

(d) expenses incurred on or by the resolution professional fixed under regulation 34; and

(e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.

27. Further Section 30(2)(a) of the Code specifies that if a Resolution Plan is approved then the same would provide for the payment of Insolvency Resolution Professional Process cost in a manner specified by the Board in priority by the repayment of other debts of the Corporate Debtor and if such a Plan is not approved and if companies go into liquidation under Section 33(1) of the Code, then the distribution of assets under Section 53(1) would arise.

28. Keeping in view all the a fore noted reasons and the ratio of the Hon'ble Supreme Court in *'K. Sashidhar'*, **REED 2019 SC 02502** that the commercial or business decision of the CoC is non-justiciable, and at best, the Adjudicating Authority may cause an enquiry on limited grounds, and does not have Jurisdiction to undertake scrutiny of the justness of the opinion expressed by the CoC when it has voted by a majority share, we are of the opinion that this ratio is applicable to the facts of this case as the CoC has by a majority vote rejected to raise any 'Interim Funds' and the Adjudicating Authority cannot direct the CoC to do the same. Hence, we hold that the direction given by the Adjudicating Authority in MA 4002/2019 are contrary to the provisions of IBC and are hereby set aside.

29. In the result, this Appeal is accordingly allowed and the Impugned Order is set aside. No order as to costs. |||

REED 2021 NCLAT Del 03509

Vidharbha Industries Power Limited v. Axis Bank Limited

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

2 March 2021

No proceedings pending before any other Forum can be used to stall a petition under Section 7 of the IBC as the admissibility of Application under Section 7 is solely governed by the provisions of the Code. It is relevant to notice that besides the Respondent (Financial Creditor) there are five Public Sector Banks who are lenders to the Appellant and with delay in admission of the Application, their fate is hanging in balance. The Adjudicating Authority, upon determination of default, is bound to admit the Application and commence CIRP initiated by the Financial Creditor by filing Application under Section 7 of IBC.

Case Analysis

Bench/ Coram	Bansi Lal Bhat, J. (Acting Chairperson) Dr. Ashok Kumar Mishra (Technical Member)
Citation	REED 2021 NCLAT Del 03509
Case Number	Company Appeal (AT) (Insolvency) No. 117 of 2021
Subject	Corporate Insolvency
Keywords	stay, financial creditor, declined to stay its hands, power purchase agreement, financial stress, substitution, existence of debt, liquidity issues, pending litigation, change in supply chain management disputes, revision of tariff, substitution under PPA, occurrence an event of default, stall the CIRP, admission or rejection of such application within fourteen days of the receipt of the application, information utility, existence of financial debt, impede the course of insolvency resolution proceedings contemplated under the IBC, Appellant has no justification installing the process and seeking stay of CIRP.
Legislation Cited	Insolvency and Bankruptcy Code, 2016 Section 7, Section 7(4), Section 7(5), Section 7(6)

Cases Cited

Innoventive Industries Limited v. ICICI Bank and Another
REED 2017 SC 08563

Counsels

For the Applicant/ Plaintiff/ Petitioner/ Appellant:
Himanshu Satija, Divyang Chandiramani and Aashna Agarwal, Advocates

For the Respondent/ Defendant: Chetan Kapadia, Nitesh Jain and Manini Bharati, Advocates

REED 2021 NCLAT Del 03509

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Bench/ Coram:

Bansi Lal Bhat, J. (Acting Chairperson)
Dr. Ashok Kumar Mishra (Technical Member)

Vidharbha Industries Power Limited—*Appellant*

Versus

Axis Bank Limited—*Respondent*

Company Appeal (AT) (Insolvency) No. 117 of 2021
(Arising out of Order dated 29.01.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, in I.A. No. 570/2020 in CP (IB) No. 264/MB/2020)

2 March 2021

Counsels:

For the Applicant/ Plaintiff/ Petitioner/ Appellant: Himanshu Satija, Divyang Chandiramani and Aashna Agarwal, Advocates

For the Respondent/ Defendant: Chetan Kapadia, Nitesh Jain and Manini Bharati, Advocates

JUDGMENT

Bansi Lal Bhat, J.—Respondent Axis Bank Limited (Financial Creditor) initiated Corporate Insolvency Resolution Process (for short 'CIRP') against Vidharbha Industries Power Limited (Corporate Debtor) by filing Application under Section 7 of Insolvency and Bankruptcy Code, 2016 (for short 'I&B Code'). It happened sometime in January 2020. The Corporate Debtor filed IA No.570 of 2020 in the aforesaid Company Petition being CP(IB) No. 264/MB/2020 seeking stay of further proceedings in the Company Petition by projecting its inability in servicing the debts in respect whereof default was alleged by the Financial Creditor by projecting disputes between the Corporate Debtor and the recipient of energy as well as change in supply chain management of the recipient of energy hindering it from carrying on its business, in respect whereof disputes were pending determination before the Hon'ble Apex Court and other Authorities. On consideration of the Application of Corporate Debtor the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench, Court No. II (Special Bench) passed order dated 29th of January, 2021 rejecting the Application of Corporate Debtor with observation that the dispute of the Corporate Debtor with the Regulator or the recipient of energy would be

extraneous to the matters involved in the Company Petition and the decision in matters pending before Hon'ble Apex Court and other Authorities would hardly have any impact on the issues involved in Company Petition under Section 7 of the I&B Code. Thus, the Adjudicating Authority declined to stay its hands from considering the Company Petition. It is this order of the Adjudicating Authority which has been impugned in the instant Appeal preferred by the Corporate Debtor.

2. The Corporate Debtor is a power generating Company claiming to be operating a 600 MW Coal-fired Thermal Power Plant in Maharashtra with two units having capacity of 300 MW each. It claims to be supplying power to Reliance Infrastructure Limited (RIL) with effect from 1st April, 2014 as per Power Purchase Agreements (PPA) duly approved by Maharashtra Electricity Regulatory Commission (MERC). According to the Appellant/Corporate Debtor it has been reeling under massive financial stress due to problems confronting the power sector and its claims relating to the recovery of dues before Hon'ble Apex Court and MERC are substantial in nature and sufficient to repay the dues of the Respondent/Financial Creditor. According to Appellant/ Corporate Debtor there has been delay in adjudication of the legal matters for which it could not be penalized by way of admission of CIRP initiated at the instance of Respondent. According to Appellant the dues of Respondent/ Financial Creditor payable by the Appellant/ Corporate Debtor are approximately Rs. 553 crores.

3. It is submitted on behalf of Appellant that Appellant's petition before MERC for revision of tariff was disallowed by MERC vide order dated 20th June, 2016 and the Appellant had filed Appeal No. 192 of 2016 before APTEL against MERC's order dated 20th June, 2016. APTEL vide order dated 3rd November, 2016 directed MERC to allow the Appellant's actual cost of coal purchased from unit 1, capped to the coal cost of unit 2 till the Fuel Supply Agreement (FSA) of unit 1 was executed by Coal India Limited with the Appellant. However, MERC filed Civil Appeal No. 372 of 2017 before the Hon'ble Apex Court challenging the aforesaid APTEL order dated 3rd November, 2016 which is pending adjudication at the final hearing stage. Appellant's recovery of fuel costs including carrying costs aggregating to Rs. 2100 crores stand impacted. It is submitted that implementation of the APTEL judgment would aid in settling the claims of Respondent and obviate any need for the initiation of CIRP against the Appellant. It is submitted that the admission of Application of Respondent under Section 7 of the I&B Code would adversely impact the outcome of the litigation as regards revision tariff in order to recover its actual costs. It is further submitted that the Coal India Limited, did not execute an FSA for unit 1 with the Appellant as this unit did not figure in its list of Power Plants having capacity of 78000 MW. Coal India Limited even did not execute FSA for unit 1 of Appellant for allocating coal linkages under the notified SHAKTI Policy. This is said to have compelled the Appellant to file Writ Petition No.10614 of 2017 before the Hon'ble High Court of Delhi which is still pending adjudication. It is further submitted on behalf of the

Appellant that MERC delayed its verdict for over two years causing unprecedented financial stress to Appellant. It is further submitted that the Respondent is pursuing substitution under PPA before Hon'ble Apex Court while simultaneously pursuing the CIRP in I&B proceedings initiated against the Appellant. The Appellant intends to settle the dues of Respondent by way of its recovery from the pending Hon'ble Supreme Court Appeal and this Appeal is not intended to stall or delay the CIRP proceedings initiated under Section 7 of I&B Code. It is submitted that the admission and continuation of Section 7 proceedings would be prejudicial to all stake holders of Corporate Debtor including the Respondent-Financial Creditor and five other Public Sector Banks who are lenders to the Appellant.

4. Per contra Respondent-Axis Bank Limited (Financial Creditor) would submit that while the Respondent sought initiation of CIRP against Corporate Debtor by filing Application under Section 7 of I&B Code on 15th January, 2020, proceedings remained pending till 29th January, 2021 i.e. the date of impugned order. The Respondent would further submit that the Appellant has not disputed the existence of debt owed to the Respondent nor did it dispute the occurrence an event of default. Respondent would further submit that the Adjudicating Authority only needs to ascertain the existence of debt and default in the payment of such debt. The Appellant has challenged neither legal nor the factual basis of the conclusion in regard to debt and default and the issues raised have no relevance to the Company Petition. Corporate Debtors alleged liquidity issues or its pending litigation proceedings are immaterial for adjudication of Application filed under Section 7 of I&B Code. No proceedings pending before any other Forum can be used to stall a petition under Section 7 of the I&B Code as the admissibility of Application under Section 7 of I&B Code is solely governed by the provisions of the Code.

5. Heard learned Counsel for the parties and perused the record.

6. Admittedly, Petition under Section 7 of I&B Code filed by the Respondent Bank is still at the pre-admission stage and the Appellant Corporate Debtor has, by raising the issue of problems confronted by the Power Sector resulting in inflicting of heavy financial loss to the power generating Companies like the Appellant, been able to stall the CIRP proceedings initiated by the Respondent (Financial Creditor) against it by filing Application under Section 7 of I&B Code. It is flabbergasting to find that by raising the liquidity issue and pending litigation proceedings the Corporate Debtor put a spoke in the wheel of Corporate Insolvency Resolution Process stalling its commencement at the hands of Adjudicating Authority who was required, in terms of mandate of Section 7(4) & (5) of I&B Code to pass an order of admission or rejection of such Application within fourteen days of the receipt of the Application. The relevant provisions are reproduced herein below:—

Section 7(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under subsection (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

(5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority,"

7. The commencement of CIRP takes effect from the date of admission of Application as specifically laid down under sub-section (6) of Section 7 of the I&B Code. All that the Adjudicating Authority is required to do is to ascertain the existence of default and on being satisfied that a default has occurred and the Application is complete, the Adjudicating Authority is required to admit the Application. The existence of default in respect of financial debt would be ascertainable from the records of an Information Utility or on the basis of other evidence furnished by the Financial Creditor. Where the Adjudicating Authority is satisfied that there is no financial debt payable in law or in fact or that default has not occurred, it may reject such Application but if the Application is incomplete, the Financial Creditor has to be provided an opportunity of rectifying the defect in the Application within seven days of notice received from the Adjudicating Authority. All that should be present to the mind of Adjudicating Authority is that there is an obligation on the part of Corporate Debtor to pay the financial debt and that the Corporate Debtor has failed in such obligation. The Adjudicating Authority, upon determination of default, is bound to admit the Application and commence CIRP initiated by the Financial Creditor by filing Application under Section 7 of I&B Code. The issues raised by the Appellant are anterior to the considerations governing admission of Application under Section 7 of I&B Code and commencement of CIRP upon its admission. The liquidity issues raised by the Appellant (Corporate Debtor), who may or may not succeed in the litigations pending before Hon'ble Apex Court and other for a in regard to revision of tariff have no bearing and should not impact the admission of Application under Section 7 of I&B Code when the existence of financial debt which the Corporate Debtor is obliged to pay and default in discharging of such obligation is admitted. The fortunes of Corporate Debtor may wax or wane

depending upon the outcome of litigation but same cannot be permitted to impede the course of insolvency resolution proceedings contemplated under the I&B Code, object whereof, inter alia, is maximisation of value of assets of corporate person by reorganization and insolvency resolution in a time bound manner. The dictum of law laid down by the Hon'ble Apex Court in *"Innoventive Industries Ltd.* v. *ICICI Bank and Another,* **REED 2017 SC 08563** : *(2018) 1 SCC 407"* on this proposition of law is loud and clear and same has been reiterated in host of judgments thereafter, which is now the settled and established position of law.

8. It is significant to notice that the Application filed by the Corporate Debtor seeking stay of proceedings before the Adjudicating Authority did neither dispute the existence of debt owed to the Respondent Bank nor did it raise any issue in regard to the event of default as alleged by the Respondent Bank. Its therefore, clear that debt and default are not disputed. The financial woes of the Appellant and the liquidity problems faced by it, whether forced upon it or of its own making, have no bearing on commencement of insolvency resolution and cannot be permitted to be a stumbling block in triggering of CIRP at the instance of Financial Creditor. The commencement of CIRP proceedings has already been delayed by one year much to the chagrin of Respondent (Financial Creditor) who has been virtually compelled to be a spectator helplessly watching the assets of Corporate Debtor getting depleted in value. It is relevant to notice that besides the Respondent (Financial Creditor) there are five Public Sector Banks who are lenders to the Appellant and with delay in admission of the Application, their fate is hanging in balance.

9. On consideration of the issues raised in this Appeal we are of the considered opinion that the Appellant has no justification installing the process and seeking stay of CIRP, which in essence has manifested in blocking the passing of order of admission of Application of Respondent under Section 7 of I&B Code. There is no merit in Appeal as we find no legal infirmity in the impugned order. The Adjudicating Authority is conscious of the mandate of law and the course it has to take as per I&B provisions, which practically stands stalled. This is impermissible. The flow of legal process cannot be permitted to be thwarted on considerations which are anterior to the mandate of Section 7(4) & (5) of I&B Code. The Appeal being devoid of merit is dismissed. However, we do not propose to impose any costs. |||

REED 2021 NCLAT Del 03512

Vijay Sitaram Dandnaik v. Punjab National Bank and Another

NATIONAL COMPANY LAW APPELLATE TRIBUNAL NEW DELHI

2 March 2021

In the present case, all the 'Balance and Security Confirmation Letter' relied upon by the Respondents were beyond three years of the date of NPA and does not fall within the provisions of Section 18 of the Limitation Act, 1963. Accordingly, Appellate Authority observed that the Application under Section 7 was barred by limitation. Further, it was observed that there is nothing on record to suggest that the Appellant has acknowledged the debt 'within three years' and has agreed to pay the debt. As the scope and objective of the Code was not to give a fresh lease of life to time barred debts, the appeal was allowed.

Case Analysis

Bench/ Coram	Anant Bijay Singh, J. (Judicial Member) Ms. Shreesha Merla (Technical Member)
Citation	REED 2021 NCLAT Del 03512
Case Number	Company Appeal (At) (Insolvency) No. 90 of 2020
Subject	Corporate Insolvency
Keywords	limitation, application, npa, winding up, acknowledgement of debt, extended, fresh limitation, balance and security confirmation letter, sufficient opportunity to present case, status report,
Legislation Cited	Insolvency and Bankruptcy Code, 2016 Section 7, Section 9, Section 30(4), Section 61, Section 238, Section 238A Limitation Act, 1963 Section 18, Article 62, Article 137 Companies Act, 1956 Section 433 Bankers' Book Evidence Act, 1891 Section 2A

Cases Cited

B.K. Educational Services Private Limited v. Parag Gupta and Associates
REED 2018 SC 10542

Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Private Limited and Another
REED 2019 SC 02501

Bimal Kumar Manubhai Savalia v. Bank of India and Another
Company Appeal (AT) (Insolvency) No. 1166 of 2019 dated 05.03.2020

Forec India Limited v. Edelwiss Assets Reconstruction Company Limited
REED 2019 SC 01501

Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. and Another
REED 2019 SC 09502

Jagdish Prasad Sarda v. Allahabad Bank
Company Appeal (AT) (Insolvency) No. 183 of 2020, dated 28.08.2020

Jignesh Shah v. Union of India
(2019) 10 SCC 750

Rajendra Kumar Tekriwal v. 'Bank of Baroda
Company Appeal (AT) (Insolvency) No. 183 of 2020, dated 13.08.2020

S. Natrajan v. Sama Dharman
2012 SCC OnLine Mad 2776

Vashdeo R. Bhojwani v. Abhyydaya Coop. Bank Ltd.
(2019) 9 SCC 158

Counsels

For the Applicant/ Plaintiff/ Petitioner/ Appellant: Madhumita Chakraborty, Advocate

For the Respondent/ Defendant: PBA Srinivasan and Avinash Mohapatra (R-1) and Vicky Dang (R-2) (RP), Advocates

REED 2021 NCLAT Del 03512

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Bench / Coram:

Anant Bijay Singh, J. (Judicial Member)
Ms. Shreesha Merla (Technical Member)

Vijay Sitaram Dandnaik—*Appellant*

Versus

Punjab National Bank and Another—*Respondent*

Company Appeal (AT) (Insolvency) No. 90 of 2020
(Arising out of Order dated 06th November, 2019 passed by National Company Law Tribunal, Mumbai Bench, in Company Petition (IB) No.-3568/NCLT/MB/2019)

2 March 2021

Counsels:

For the Applicant/ Plaintiff/ Petitioner/ Appellant: Madhumita Chakraborty, Advocate

For the Respondent/ Defendant: PBA Srinivasan and Avinash Mohapatra and Vicky Dang, Advocates

JUDGMENT

Shreesha Merla, Member (T).—Aggrieved by the Impugned Order dated 06.11.2020, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, in CP (IB) No. 3568/NCLT/MB/2019, admitting the Section 7 Application filed by Punjab National Bank; the Financial Creditor, Jailxami Sugar Products (Nitali) Private Limited, the Corporate Debtor preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short the 'IBC'). While admitting the Application, the Learned Adjudicating Authority in the Impugned Order observed as follows:-

"15. On perusal of the Sanction letters dated 07.05.2010, 28.09.2010 and 17.09.2011, Term Loan Facility Agreement dated 29.09.2010 and Bank statement of the Corporate Debtor's account annexed to the Application and it is established that the Corporate Debtor has received the debt amount.

16. On perusal of letter dated 11.06.2017 issued by Corporate Debtor to Applicant seeking restructuring of the loan and Balance & Security Confirmation

Letter dated 17.06.2017, it is clear that the Corporate Debtor has admitted to its liability to repay the debt amount received from the Applicant.

17. On perusal of the bank statement of the Corporate Debtor along with certificate under section 2A of the Bankers Books Evidence Act, 1891 it is seen that the Corporate Debtor has not made any payments to the Applicant. The date of default being the date of classification of the Corporate Debtor's account as NPA i.e. 31.03.2013.

18. The Corporate Debtor initiated proceedings before Debt Recovery Tribunal, Pune in OA No. 185/2014 and vide order dated 01.11.2016 it was held that the Corporate Debtor is liable to repay the debt amounts to the Applicant. The Applicant has issued letter for restructuring the loan on 11.06.2017 acknowledged its liability to repay debt amounts on 17.06.2017.

19. The present application is filed by the Applicant The debt amount of more than Rupees One Lakh and default by the Corporate Debtor has been established. The application is filed on proper Form 1 and is complete. The Application has been filed within the period of limitation."

2. Learned Counsel appearing for the Appellant contended that the Application filed by the Financial Creditor was barred by limitation; that the Petition was filed six years after the account by the Corporate Debtor was declared as NPA and was therefore barred by limitation; that a winding up Order has been passed and an Official Liquidator was appointed by the Hon'ble High Court of Bombay which was not considered by the Adjudicating Authority; that the Directors were not served with a copy of the Petition; that the Company was classified as NPA on 31.03.2013 and the Petition was filed in the year 2019 after a lapse of six years and was clearly barred by limitation; that the Official Liquidator cannot handover the documents to the IRP without seeking permission of the Hon'ble High Court of Bombay and sought for setting aside the Impugned Order.

3. Leaned Counsel appearing for the Appellant relied on the following Judgements to establish that the Application was barred by limitation;

- *'Babulal Vardharji Gurjar'* v. *'Veer Gurjar Aluminium Industries Pvt. Ltd. and Another',* **REED 2019 SC 02501** : 2020 SCC Online SC 647.
- *'Rajendra Kumar Tekriwal'* v. *'Bank of Baroda',* Company Appeal (AT) (Insolvency) No. 183 of 2020, dated 13.08.2020.
- *'Jagdish Prasad Sarda'* v. *Allahabad Bank',* Company Appeal (AT) (Insolvency) No. 183 of 2020, dated 28.08.2020.
- *'Bimalkumar Manubhai Savalia'* v. *'Bank of India and Another',* Company Appeal (AT) (Insolvency) No. 1166 of 2019 dated 05.03.2020.

4. Learned Counsel appearing for the Respondent contended that though a winding up Order has been passed by the Hon'ble High Court of Bombay and an Official Liquidator was also appointed, the Hon'ble Supreme Court in the case of *'Jaipur Metals and Electricals Employees Organization'* v. *'Jaipur Metals and Electricals Ltd. and Others'* has observed that 'Section 7 Application filed under the Code is an independent proceeding which has nothing to do with the transfer of pending and winding up proceedings before the High Court' and submitted that in view of the precedent laid down by the Hon'ble Supreme Court, pendency of winding up Petition before the High Court will not be a bar for initiation of proceedings under Section 7 of the Code.

5. The Learned Counsel further submitted that the Account was classified as NPA on 31.03.2013, but the Application filed under Section 7 is well within the period of limitation as it is a well settled proposition of law that wherever there is an acknowledgement of debt in writing, the period of limitation gets extended and fresh limitation starts from the date of acknowledgement by virtue of the provision of Section 18 of the Limitation Act, 1963. The Learned Counsel placed reliance on the letter dated 11.06.2017 (exhibit W) addressed by the Corporate Debtor to the Respondent Bank requesting for restructuring of the existing loan and sanction of fresh loan. The Counsel also drew our attention to the 'Balance and Security Confirmation Letter' dated 17.06.2017 wherein the Corporate Debtor had confirmed the correctness of the balance of Rs. 32,52,07,800.75/- as the amount due in terms of the Agreement dated 29.09.2010. The Learned Counsel vehemently contended that this 'Balance and Security Confirmation Letter' squarely falls within 'acknowledgement of debt' as provided under Section 18 of the Limitation Act, 1963 and therefore the Judgement of the Hon'ble Supreme Court in *'S. Natrajan'* v. *'Sama Dharman',* 2012 SCC OnLine Mad 2776 is squarely applicable to the facts of this case.

6. Heard both sides at length. The Contention of the Learned Counsel that the Directors were not served a copy and therefore sufficient opportunity was not given to them to present their case is untenable, in the light of the admitted position of fact that the Notice was admittedly hand delivered to the Official Liquidator who was appointed by the Hon'ble High Court of Bombay on 25.01.2018; but the Corporate Debtor did not enter any appearance nor has chosen to file any Reply despite the Adjudicating Authority having given sufficient opportunities to do so.

7. It is not in dispute that the Hon'ble High Court of Bombay had ordered for winding up of the Company in Company Petition No. 614 of 2015 dated 04.01.2018. The Hon'ble Supreme Court in *'Jaipur Metals and Electricals Employees Organization'* (Supra) held as follows;

"17. However, this does not end the matter. It is clear that Respondent No. 3 has filed a Section 7 application under the Code on 11.01.2018, on which an

order has been passed admitting such application by the NCLT on 13.04.2018. This proceeding is an independent proceeding which has nothing to do with the transfer of pending winding up proceedings before the High Court. It was open for Respondent No. 3 at any time before a winding up order is passed to apply Under Section 7 of the Code. This is clear from a reading of Section 7 together with Section 238 of the Code which reads as follows;

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."

8. Learned Counsel appearing for both parties accepted the applicability of the decision of the Hon'ble Supreme Court in *'Jaipur Metals and Electricals Employees Organization'* (Supra) and in *'Forec India Limited'* v. *'Edelwiss Assets Reconstruction Company Limited'*, **REED 2019 SC 01501** in Civil Appeal No. 818 of 2018 that the Application under Section 7 was maintainable irrespective of the pendency of the Petition before the Hon'ble High Court of Bombay in CP No. 614 of 2015 in which the Hon'ble High Court has passed Order of winding up the Company on 04.01.2018.

9. The Resolution Professional has also filed a status report that seven CoC Meetings were conducted and in the Meeting held on 07.10.2020 one Expression of Interest (EOI) was received from a prospective Resolution Applicant after the cutoff date, however, a decision was taken by the CoC to republish the Form-G to accommodate the prospective Resolution Applicant.

10. Now we address ourselves to the main point for consideration as to whether the Section 7 Application is barred by limitation. The Hon'ble Supreme Court in *'Babulal Vardharji Gurjar'* v. *'Veer Gurjar Aluminium Industries Pvt. Ltd. and Another'*, **REED 2019 SC 02501** : 2020 SCC Online SC 647, has elaborately discussed the issue of Limitation and placing reliance on *'BK Educational Services (P) Ltd.'*, **REED 2018 SC 10542** : (2019) 11 SCC 633, *'Gaurav Hargovindbhai Dave'* v. *'Asset Reconstruction Company (India) Ltd. and Another,'* **REED 2019 SC 09502** : (2019) SCC OnLine SC 1239, *'Jignesh Shah'* v. *'Union of India',* (2019) 10 SCC 750, *'Vashdeo R. Bhojwani'* v. *'Abhyydaya Coop. Bank Ltd.',* (2019) 9 SCC 158 has observed as follows;

"25.2. This Court accepted the contentions urged on behalf of the appellants and while reproducing the relevant passages from B.K. Educational Services, **REED 2018 SC 10542** held that the bar of limitation was operating over the application filed by IL&FS in the following words:-

12. This judgment clinches the issue in favour of the Petitioner/Appellant. With the introduction of Section 238A into the Code, the provisions of the Limitation Act apply to applications made under the Code. Winding up petitions filed before

the Code came into force are now converted into petitions filed under the Code. What has, therefore, to be decided is whether the Winding up Petition, on the date that it was filed, is barred by lapse of time. If such petition is found to be time-barred, then Section 238A of the Code will not give a new lease of life to such a time-barred petition. On the facts of this case, it is clear that as the Winding up Petition was filed beyond three years from August, 2012 which is when, even according to IL & FS, default in repayment had occurred, it is barred by time." (Emphasis in bold supplied)

"25.3. Though with the aforesaid finding, the matter stood concluded that the petition filed by IL&FS was barred by limitation but thereafter, the Court also proceeded to examine another line of submissions of the parties as regards effect of the suit for recovery over the proceedings under Section 433 of the Companies Act, 1956, where it was argued on behalf of the appellants that existence of such a suit cannot be construed as having either revived the period of limitation or having extended it, insofar as concerning the proceeding for winding up. This Court accepted the said contention of the appellants and in that context, made the observations that are relied upon by the parties and read as under:-

21. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding-up proceeding. In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an acknowledgment of liability under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding-up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding-up proceeding."

11. The Hon'ble Apex Court in *'Babulal Vardharji Gurjar'* **REED 2019 SC 02501** has also reproduced the relevant passages of the said decision in *'Gaurav Hargovindbhai Dave'* **REED 2019 SC 09502** detailed as hereunder

"4. Mr Aditya Parolia, learned counsel appearing on behalf of the appellant has argued that Article 137 being a residuary article would apply on the facts of this case, and as right to sue accrued only on and from 21.07.2011, three years having elapsed since then in 2014, the Section 7 application filed in 2017 is clearly out of time. He has also referred to our judgment in *B.K. Educational Services Private Limited* v. *Parag Gupta and Associates,* **REED 2018 SC 10542** : 2018 SCC OnLine SC 1921 in order to buttress his argument that it is Article 137 of the Limitation Act which will apply to the facts of this case.

5. Mr Debal Banerjee, learned Senior Counsel, appearing on behalf of the respondents, countered this by stressing, in particular, para 7 of B.K. Educational Services Private Limited, **REED 2018 SC 10542** and reiterated the

finding of the NCLT that it would be Article 62 of the Limitation Act that would be attracted to the facts of this case. He further argued that, being a commercial Code, a commercial interpretation has to be given so as to make the Code workable.

6. Having heard the learned counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that it would only apply to suits. The present case being “an application” which is filed under Section 7, would fall only within the residuary Article 137. As rightly pointed out by learned counsel appearing on behalf of the appellant, time, therefore, begins to run on 21.07.2011, as a result of which the application filed under Section 7 would clearly be time-barred. So far as Mr Banerjee’s reliance on para 7 of B.K. Educational Services Private Limited, **REED 2018 SC 10542** suffice it to say that the Report of the Insolvency Law Committee itself stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred.

7. This being the case, we fail to see how this para could possibly help the case of the respondents. Further, it is not for us to interpret, commercially or otherwise, articles of the Limitation Act when it is clear that a particular article gets attracted. It is well settled that there is no equity about limitation - judgments have stated that often time periods provided by the Limitation Act can be arbitrary in nature. 8. This being the case, the appeal is allowed and the judgments of the NCLT and NCLAT are set aside.” (Emphasis in bold supplied)

12. In the case of *‘Jignesh Shah’* (Supra) the Hon’ble Supreme Court noticed the provisions of Section 238A of the I&B Code and relevant provisions including Sections 7 and 9 of the I&B Code to decide the question of limitation. The Hon’ble Supreme Court observed and held as follows;

"8. In paragraph 7 of the said judgment, the Report of the Insolvency Law Committee of March, 2018 was referred to as follows:

"7. Having heard the learned counsel for both sides, it is important to first set out the reason for the introduction of Section 238A into the Code. This is to be found in the Report of the Insolvency Law Committee of March, 2018, as follows:

"28. Application of Limitation Act, 1963

28.1 The question of applicability of the Limitation Act, 1963 ("Limitation Act") to the Code has been deliberated upon in several judgments of the NCLT and the NCLAT. The existing jurisprudence on this subject indicates that if a law is a complete code, then an express or necessary exclusion of the Limitation Act should be respected. In light of the confusion in this regard, the Committee deliberated on the issue and unanimously agreed that the intent of the Code could not have been to give a new lease of life to debts which are time barred. It is settled law that when a debt is barred by time, the right to a remedy is

time-barred. This requires being read with the definition of 'debt' and 'claim' in the Code. Further, debts in winding up proceedings cannot be time-barred, and there appears to be no rationale to exclude the extension of this principle of law to the Code.

28.2 Further, non-application of the law on limitation creates the following problems: first, it reopens the right of financial and operational creditors holding time barred debts under the Limitation Act to file for CIRP, the trigger for which is default on a debt above INR one lakh. The purpose of the law of limitation is "to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or latches". Though the Code is not a debt recovery law, the trigger being 'default in payment of debt' renders the exclusion of the law of limitation counterintuitive. Second, it re-opens the right of claimants (pursuant to issuance of a public notice) to file time-barred claims with the IRP/RP, which may potentially be a part of the resolution plan. Such a resolution plan restructuring time-barred debts and claims may not be in compliance with the existing laws for the time being in force as per section 30(4) of the Code.

28.3 Given that the intent was not to package the Code as a fresh opportunity for creditors and claimants who did not exercise their remedy under existing laws within the prescribed limitation period, the Committee thought it fit to insert a specific section applying the Limitation Act to the Code. The relevant entry under the Limitation Act may be on a case to case basis. It was further noted that the Limitation Act may not apply to applications of corporate applicants, as these are initiated by the applicant for its own debts for the purpose of CIRP and are not in the form of a creditor's remedy." (Emphasis Supplied)

In the aforenoted Judgement the scope and intent of the Code that it cannot be treated as a Debt Recovery Law and cannot reopen the right of claimants to file time barred claims has been made clear.

13. In *'Babulal Vardharji Gurjar'*, **REED 2019 SC 02501** the Hon'ble Apex Court while dealing with 'whether Section 18 Limitation Act could be applied to that case' observed as follows;

"32.1. Even in the later decisions, this Court has consistently applied the declaration of law in *B.K. Educational Services*, **REED 2018 SC 10542**. As noticed, in the case of *Vashdeo R. Bhojwani* (supra), this Court rejected the contention suggesting continuing cause of action for the purpose of application under Section 7 of the Code while holding that the limitation started ticking from the date of issuance of recovery certificate dated 24.12.2001. Again, in the case of *Gaurav Hargovindbhai Dave*, **REED 2019 SC 09502** where the date of default was stated in the application under Section 7 of the Code to be the date of NPA i.e., 21.07.2011, this Court held that the limitation began to run from the date

of NPA and hence, the application filed under Section 7 of the Code on 03.10.2017 was barred by limitation.

32.2. In view of the above, we are not inclined to accept the arguments built up by the respondents with reference to one part of observations occurring in paragraph 21 of the decision in *Jignesh Shah* (supra).

33. Apart from the above and even if it be assumed that the principles relating to acknowledgement as per Section 18 of the Limitation Act are applicable for extension of time for the purpose of the application under Section 7 of the Code, in our view, neither the said provision and principles come in operation in the present case nor they ensure to the benefit of respondent No. 2 for the fundamental reason that in the application made before NCLT, the respondent No.2 specifically stated the date of default as '8.7.2011being the date of NPA'. It remains indisputable that neither any other date of default has been stated in the application nor any suggestion about any acknowledgement has been made. As noticed, even in Part-V of the application, the respondent No. 2 was required to state the particulars of financial debt with documents and evidence on record. In the variety of descriptions which could have been given by the applicant in the said Part V of the application and even in residuary Point No. 8 therein, nothing was at all stated at any place about the so called acknowledgment or any other date of default. (Emphasis Supplied)

14. In the instant case the date of default (NPA) is 31.03.2013 and the Application under Section 7 was filed on 10.10.2019.The contention of the Learned Counsel appearing for the Bank that there was another 'Balance and Security Confirmation Letter' dated 03.07.2014, page 84 of the Reply, which is vehemently opposed by the Appellant Counsel on the ground that it has not been filed before the Adjudicating Authority, which would give a fresh lease of life to the debt, is unsustainable as three years has lapsed for computing the limitation as the date of filing of the Application is 10.10.2019. The other 'Balance and Security Confirmation Letter' relied upon by the Respondent Counsel is dated 17.06.2017 which is also beyond three years of the date of NPA. The letter dated 11.06.2017 written by the Corporate Debtor seeking for request for restructuring of the existing loan has not been accepted by the Bank. Be that as it may, this communication relied upon by the Respondent Bank is beyond the period of three years from the date of NPA and also does not fall within the provisions of Section 18 of the Limitation Act, 1963. Keeping in view the ratio laid down by the Hon'ble Supreme Court in the aforenoted catena of Judgements, we are of the considered view that this Application under Section 7 is barred by limitation as it is filed beyond three years of the date of NPA. Further, as we observe that there is nothing on record to suggest that the Appellant has acknowledged the debt *'within three years'* and has agreed to pay the debt. As the scope and objective of the Code was not to give a fresh lease of life to time barred debts,

we are of the considered opinion that the ratio of *'Babulal Vardharji Gurjar'*, **REED 2019 SC 02501**, is squarely applicable to the facts of the instant case.

15. The material on record shows that the Company Petition No. 614 of 2015 for winding up was taken up for admission by the Hon'ble High Court of Bombay on 02.07.2016 and an Order of winding up was passed on 04.01.2018 and then official liquidator was appointed on 25.01.2018. The Suspended Board of Directors has not challenged the winding up Orders.

16. Although we are dismissing the present stand-alone Petition filed under Section 7 of IBC, without seeking transfer of winding up proceedings, as time barred, we record that dismissal of the present Application will not come in the way of the parties to proceed with the winding up proceedings before the Hon'ble High Court of Bombay, or seek transfer in accordance with law, if permissible.

17. For all the aforenoted reasons this Appeal is allowed and the Impugned Order is set aside. It is open to the parties to take recourse before an appropriate forum.

18. The matter is remitted to the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) to be listed on 5th April, 2021 for quantifying the fees of the RP to be borne by Applicant/Financial Creditor. The Registry is directed to upload the Order in website and also to remit one copy of Order to the Adjudicating Authority. |||

REED 2021 NCLAT Del 03515

India Resurgence ARC Private Limited v. Amit Metaliks Limited and Another

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

2 March 2021

Considerations including priority in scheme of distribution and the value of security are matters falling within the realm of the Committee of Creditors. Such considerations, being relevant only for purposes for arriving at a business decision in exercise of commercial wisdom of the CoC cannot be the subject of judicial review in appeal within the parameters of Section 61(3) of IBC. While it is true that prior to amendment of Section 30(4) the CoC was not required to consider the value of security interest obtaining in favour of a Secured Creditor while arriving at a decision in regard to feasibility and viability of a Resolution Plan, legislature brought in the amendment to amplify the scope of considerations which may be taken into consideration by the CoC while exercising their commercial wisdom in taking the business decision to approve or reject the Resolution Plan

Case Analysis

Bench/ Coram	Bansi Lal Bhat, J. (Acting Chairperson) Dr. Ashok Kumar Mishra (Technical Member)
Citation	REED 2021 NCLAT Del 03515
Case Number	Company Appeal (AT) (Insolvency) No. 1061 of 2020
Subject	Corporate Insolvency
Keywords	resolution professional, liquidation, financial creditor, debts, resolution plan, commercial wisdom, Successful Resolution Applicant, manner of distribution and priority of share, value of security interest, underlying security value, quality of security, principle of equality, Creditor, vote for liquidation.
Legislation Cited	Insolvency and Bankruptcy Code 2016 Section 3(10), Section 6(b), Section 30(4), Section 36(2), Section 53, Section 61(3)

IBBI (Insolvency Resolution process for Corporate Persons) Regulations, 2016

Regulation 39(4)

Cases Cited

Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Others
REED 2019 SC 11505

Swiss Ribbons (P) Ltd. v. Union of India
REED 2019 SC 01504

Counsels

For the Applicant/ Plaintiff/ Petitioner/ Appellant: Sanjeev Singh, Kajal Bhatia and Prashant Tripathi, Advocates

For the Respondent/ Defendant: Kumarjit Banerjee, Gaurav Gupta, Aakash Khattar Advocates (R-1), Raj Singhania (IRP in Person)

REED 2021 NCLAT Del 03515

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Bench / Coram:

Bansi Lal Bhat, J. (Acting Chairperson)
Dr. Ashok Kumar Mishra (Technical Member)

India Resurgence ARC Private Limited—*Appellant*

Versus

M/s. Amit Metaliks Limited and Another—*Respondent*

Company Appeal (AT) (Insolvency) No. 1061 of 2020
[Arising out of Order dated 20th October, 2020 amended on 21st October, 2020 passed by the National Company Law Tribunal, Kolkata Bench, Kolkata in IA (IB) No.
805/KB/2020 in CP (IB) No. 1221/KB/2018]

2 March 2021

Counsels:

For the Applicant/ Plaintiff/ Petitioner/ Appellant: Sanjeev Singh, Kajal Bhatia and Prashant Tripathi, Advocates

For the Respondent/ Defendant: Kumarjit Banerjee, Gaurav Gupta, Aakash Khattar and Raj Singhania, Advocates

JUDGMENT

Bansi Lal Bhat, J.—Corporate Insolvency Resolution Process qua 'M/s VAP Udyog Pvt. Ltd.' (Corporate Debtor) was set in motion by Adjudicating Authority (National Company Law Tribunal) Kolkata Bench Kolkata by admitting CP(IB) No. 1221/KB/2018. Committee of Creditors approved Resolution Plan of 'M/s Amit Metaliks Ltd.' (Respondent No. 1) with 95.35% voting shares. Upon consideration of application being I.A. (IB) No.805/KB/2020 filed by the Resolution Professional, the Adjudicating Authority approved the Resolution Plan of Respondent No. 1 (Successful Resolution Applicant) in terms of order dated 20th October, 2020 which has been assailed by 'India Resurgence ARC Pvt. Ltd.' - the dissenting Secured Financial Creditor having a vote share of 3.94% and a COC Member, through the medium of instant appeal primarily on the ground that the approved Resolution Plan failed to deal with the interests of the all the stakeholders including the Appellant who was offered a meagre amount of slightly over Rs. 2 Crores as against its admitted claim of an amount exceeding Rs.13 Crores without even considering the valuation of the security held by the

Appellant in its Resolution Plan which had a valuation of approximately Rs.12 Crores.

2. It is contended on behalf of Appellant that while approving the Resolution Plan value and quality of security interest of the Appellant was not considered by the Successful Resolution Applicant and the Committee of Creditors. It is contended that the manner of distribution and priority of share based on the value of security interest of a Secured Financial Creditor pursuant to Amendment in Section 30(4) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') has been overlooked. Reliance is placed on the judgement of Hon'ble Apex Court in *'Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta and Others',* **REED 2019 SC 11505** (Civil Appeal No. 8766-67 of 2019)', (2019) SCC OnLine SC 1478, to buttress the point that in considering the fairness of distribution, underlying security value and the quality of security has to be taken into consideration. Learned counsel for Appellant has also relied upon Regulation 39(4) of the IBBI (Insolvency Resolution process for Corporate Persons) Regulations, 2016 as amended w.e.f. 28th November, 2019 wherein secured, unsecured and dissenting secured financial creditors are differentiated in terms of the amounts to be paid under a Resolution Plan. It is submitted that the principle of equality cannot be stretched to treating unequal's equally as that will destroy the very objective of the I&B Code. It is further submitted that while unamended Section 30(4) of the I&B Code failed to consider the value of the security interest within the ambit of feasibility and viability, the amendment was affected to ensure that the manner of distribution must take into account the order of priority among creditors, including the priority and value of security interest of a secured creditor. It is submitted that Respondent No.1 having failed to consider the underlying security interest in favour of Appellant, the impugned order approving the Resolution Plan cannot be sustained.

3. Per contra it is submitted on behalf of Respondent No.1 that the interpretation sought to be given by Appellant to Section 30(4) of the I&B Code as amended has already been dealt with by the Hon'ble Apex Court in *'Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta and Others'*, **REED 2019 SC 11505** wherein it was held that the I&B Code gives the Committee of Creditors flexibility to approve or not to approve a Resolution Plan which may take into account different classes of creditors specified in Section 53 and different priorities and values of security interests of a secured creditor. It is pointed out that the Hon'ble Apex Court has categorically stated that the Committee of Creditors, while exercising its discretion may look into these considerations including different priorities and values of security interests of secured creditors only as a guideline in arriving at a business decision for acceptance or rejection of a Resolution Plan. It is accordingly submitted that only a discretion is vested in the Committee of Creditors to take into account value of security interest of a Creditor in approving a Resolution Plan, it being only a guideline and the

discretionary consideration being a business decision. Such discretion itself is a commercial consideration reserved for the Committee of Creditors and as such beyond the purview of review in appeal under I&B Code. It is lastly submitted that an appeal on account of purported non-compliance under Section 30(4) of I&B Code is not maintainable.

4. Heard learned counsel for the parties and perused the record. Section 3(10) of the I&B Code provides that the "Creditor'' means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder. Holding that the equitable treatment of creditors is equitable treatment only within the same class, the Hon'ble Apex Court in *'Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta and Others',* **REED 2019 SC 11505** : (2019) SCC OnLine SC 1478, observed that reorganization is a collective remedy designed to find an optimum solution for all parties connected with a business in the manner provided by the Code. Protecting creditors in general is, no doubt, an important objective but protecting creditors from each other is also important which means that the I&B Code should not be read so as to imbue creditors with greater rights in a bankruptcy proceeding than they would enjoy under the general law, unless it is to serve some bankruptcy purpose. Dealing with the importance of valuing security interest separately from interests of creditors who do not have security, the Hon'ble Apex Court taking note of the World Bank Report of 2015 which stated that a cramdown on dissentient creditors would pass muster under an insolvency law if such creditors will receive, under a resolution plan, an amount at least equal to what such creditors would receive in a Liquidation Proceeding being "Liquidation Value" dealt with the issue of all creditors being treated identically as under:-

"85. 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.

86. Financial creditors are in the business of lending money. The RBI Report on Trend and Progress of Banking in India, 2017-2018 reflects that the net interest margin of Indian banks for Financial Year 2017-2018 is averaged at 2.5%. Likewise, the global trend for net interest margin was at 3.3% for banks in the USA and 1.6% for banks in the UK in the year 2016, as per the data published on the website of the bank. Thus, it is clear that financial creditors earn profit by earning interest on money lent with low margins, generally being between 1 to 4%. Also, financial creditors are capital providers for companies, who in turn

are able to purchase assets and provide a working capital to enable such companies to run their business operation, whereas operational creditors are beneficiaries of amounts lent by financial creditors which are then used as working capital, and often get paid for goods and services provided by them to the corporate debtor, out of such working capital. On the other hand, market research carried out by India Brand Equity Foundation, a trust established by the Ministry of Commerce and Industry, as regards the oil and gas sector, has stated that the business risk of operational creditors who operate with higher profit margins and shorter cyclical repayments must needs be higher. Also, operational creditors have an immediate exit option, by stopping supply to the corporate debtor, once corporate debtors start defaulting in payment. Financial creditors may exit on their long-term loans, either upon repayment of the full amount or upon default, by recalling the entire loan facility and/or enforcing the security interest which is a time consuming and lengthy process which usually involves litigation. Financial creditors are also part of a regulated banking system which involves not merely declaring defaulters as non-performing assets but also involves restructuring such loans which often results in foregoing unpaid amounts of interest either wholly or partially.

87. All these differences between financial and operational creditors have been reflected, albeit differently, in the judgment of Swiss Ribbons [*Swiss Ribbons (P) Ltd.* v. *Union of India,* **REED 2019 SC 01504** : (2019) 4 SCC 17]. Thus, this Court in dealing with some of the differences has held:

"50. According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country. Apart from the above, the nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set-up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately.

Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand,

financial debts made to banks and financial institutions are well documented and defaults made are easily verifiable.

51. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.

* * *

75. Since the financial creditors are in the business of money lending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report, already quoted above, makes this abundantly clear.

76. Quite apart from this, the United Nations Commission on International Trade Law, in its Legislative Guide on Insolvency Law (the UNCITRAL Guidelines) recognises the importance of ensuring equitable treatment to similarly placed creditors and states as follows:

'*Ensuring equitable treatment of similarly situated creditors.*-7. The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests. This key objective recognises that all creditors do not need to be treated identically, but

in a manner that reflects the different bargains they have struck with the debtor. This is less relevant as a defining factor where there is no specific debt contract with the debtor, such as in the case of damage claimants (e.g. for environmental damage) and tax authorities. Even though the principle of equitable treatment may be modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, for example, by operation of law, it retains its significance by UNCITRAL Legislative Guide on Insolvency Law ensuring that the priority accorded to the claims of a similar class affects all members of the class in the same manner. The policy of equitable treatment permeates many aspects of an insolvency law, including the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganisation and distribution mechanisms. An insolvency law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided.""

5. Again, dealing with equitable treatment to similarly situated creditors the Hon'ble Apex Court observed:-

"88. By reading para 77 (of *Swiss Ribbons* [*Swiss Ribbons (P) Ltd.* v. *Union of India,* **REED 2019 SC 01504** : (2019) 4 SCC 17]) de hors the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Para 76 clearly refers to the UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of similarly situated creditors. This being so, the observation in para 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, para 77 itself makes it clear that there is a difference in payment of the debts of financial and operational creditors, operational creditors having to receive a minimum payment, being not less than liquidation value, which does not apply to financial creditors. The amended Regulation 38 set out in para 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of operational creditors' rights under the said regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution

applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.

89. Indeed, by vesting the Committee of Creditors with the discretion of accepting resolution plans only with financial creditors, operational creditors having no vote, the Code itself differentiates between the two types of creditors for the reasons given above. Further, as has been reflected in Swiss Ribbons [*Swiss Ribbons (P) Ltd.* v. *Union of India,* **REED 2019 SC 01504** : (2019) 4 SCC 17], most financial creditors are secured creditors, whose security interests must be protected in order that they do not go ahead and realise their security in legal proceedings, but instead are incentivised to act within the framework of the Code as persons who will resolve stressed assets and bring a corporate debtor back to its feet. Shri Sibal's argument that the expression "secured creditor" does not find mention in Chapter II of the Code, which deals with the resolution process, and is only found in Chapter III, which deals with liquidation, is for the reason that secured creditors as a class are subsumed in the class of financial creditors, as has been held in Swiss Ribbons [*Swiss Ribbons (P) Ltd.* v. *Union of India,* **REED 2019 SC 01504** : (2019) 4 SCC 17]. Indeed, Regulation 13(1) of the 2016 Regulations mandates that when the resolution professional verifies claims, the security interest of secured creditors is also looked at and gets taken care of. Similarly, Regulation 36(2)(d) when it provides for a list of creditors and the amounts claimed by them in the information memorandum (which is to be submitted to prospective resolution applicants), also provides for the amount of claims admitted and security interest in respect of such claims."

6. Section 30(4) of the I&B Code provides that the Committee of Creditors may approve a Resolution Plan by a vote which shall not be less than 66% of voting share of Financial Creditors. Such approval is to be done after considering the feasibility and viability of the Resolution Plan, the manner of distribution proposed therein having regard to the order of priority amongst the creditors in terms of the waterfall mechanism laid down in Section 53 of the I&B Code including the priority and value of security interest of Secured Creditor besides other requirements specified by IBBI. On a plain reading of this provision, it is manifestly clear that the considerations regarding feasibility and viability of the Resolution Plan, distribution proposed with reference to the order of priority amongst creditors as per statutory distribution mechanism including priority and value of security interest of Secured Creditor are matters which fall within the exclusive domain of Committee of Creditors for consideration. These considerations must be present to the mind of the Committee of Creditors while taking a decision in regard to approval of a Resolution Plan with vote share of requisite majority. As regards amendment introduced in Section 30(4), be it seen that the amendment that it, introduced vide Section 6 (b) of Amending Act of 2019 vests discretion in the Committee of Creditors to take into account the value of security interest of a Secured Creditor in approving of a Resolution Plan. It's a guideline and not imperative in terms, which may be taken into account

by the Committee of Creditors in arriving at a decision as regards approval or rejection of a Resolution Plan, such decision being essentially a business decision based on commercial wisdom of the Committee of Creditors. In this regard the observations of Hon'ble Apex Court in '*Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta and Others*', **REED 2019 SC 11505** are significant. The Hon'ble Apex Court observed as under:-

"131. The challenge to sub-clause (b) of Section 6 of the Amending Act of 2019, again goes to the flexibility that the Code gives to the Committee of Creditors to approve or not to approve a resolution plan and which may take into account different classes of creditors as is mentioned in Section 53, and different priorities and values of security interests of a secured creditor. This flexibility is referred to in the BLRC Report, 2015 (see para 56 of this judgment). Also, the discretion given to the Committee of Creditors by the word "may" again makes it clear that this is only a guideline which is set out by this sub-section which may be applied by the Committee of Creditors in arriving at a business decision as to acceptance or rejection of a resolution plan. For all these reasons, therefore, it is difficult to hold that any of these provisions is constitutionally infirm."

7. It abundantly clear that the considerations including priority in scheme of distribution and the value of security are matters falling within the realm of Committee of Creditors. Such considerations, being relevant only for purposes for arriving at a business decision in exercise of commercial wisdom of the Committee of Creditors, cannot be the subject of judicial review in appeal within the parameters of Section 61(3) of I&B Code. While it is true that prior to amendment of Section 30(4) the Committee of Creditors was not required to consider the value of security interest obtaining in favour of a Secured Creditor while arriving at a decision in regard to feasibility and viability of a Resolution Plan, legislature brought in the amendment to amplify the scope of considerations which may be taken into consideration by the Committee of Creditors while exercising their commercial wisdom in taking the business decision to approve or reject the Resolution Plan. Such consideration is only aimed at arming the Committee of Creditors with more teeth so as to take an informed decision in regard to viability and feasibility of a Resolution Plan, fairness of distribution amongst similarly situated creditors being the bottom-line. However, such business decision taken in exercise of commercial wisdom of Committee of creditors would not warrant judicial intervention unless creditors belonging to a class being similarly situated are not given a fair and equitable treatment.

8. We find no merit in this appeal, it is accordingly dismissed. **|||**

REED 2021 SC 03547

N. Subramanian v. Aruna Hotels Limited and Another

SUPREME COURT OF INDIA

3 March 2021

Supreme Court observed that it is a clear fact that from the date of the last acknowledgement till the date on which the petition before the NCLT was filed, three years have not been elapsed. Therefore, at least to the extent of an acknowledgement made by the then Managing Director of the Corporate Debtor, the arrears of salary due for a period of at least 3 years prior to 30.09.2014 would certainly be within limitation, and therefore payable to the Appellant. This being the case, that the NCLT judgment is correct in admitting the Section 9 application by the Appellant. Since it is clear that there is an acknowledgement of liability, which shows that there is no "dispute" as to amounts owed to the Appellant. The impugned NCLAT judgment is accordingly set aside. Consequently, the NCLT judgment is restored to the file.

Case Analysis

Bench/ Coram	Rohinton Fali Nariman, J. B.R. Gavai, J. Hrishikesh Roy, J.
Citation	REED 2021 SC 03547
Case Number	Civil Appeal No. 187 of 2019 With Civil Appeal Diary No. 34841 of 2018 Civil Appeal Diary No. 34836 of 2018 Civil Appeal Diary No. 34839 of 2018
Subject	Corporate Insolvency
Keywords	Corporate debtor, arrears of payment, retirement from service, Time-barred, payment voucher, red-herring, arrears of salary, Acknowledgement of liability.
Legislation cited	Insolvency and Bankruptcy Code, 2016 Section 8, Section 9, Section 14
Counsels	*For the Applicant/ Plaintiff/ Petitioner/ Appellant:* Ritin Rai Advocate *For the Respondent/ Defendant: Mohan Parasaran,* Advocate

REED 2021 SC 03547

SUPREME COURT OF INDIA

Bench / Coram:

Rohinton Fali Nariman, J.
B.R. Gavai, J.
Hrishikesh Roy, J.

N. Subramanian—*Appellant*

Versus

Aruna Hotels Limited and Another—*Respondent*

Civil Appeal No. 187 of 2019
With
Civil Appeal Diary No. 34841 of 2018
Civil Appeal Diary No. 34836 of 2018
Civil Appeal Diary No. 34839 of 2018

3 March 2021

Counsels:

For the Applicant/ Plaintiff/ Petitioner/ Appellant: Ritin Rai Advocate

For the Respondent/ Defendant: Mohan Parasaran, Advocate

JUDGMENT

R.F. Nariman, J.-

Civil Appeal No. 187 of 2019

1. I.A. No. 163654 of 2019 for intervention is dismissed.

2. The present appeal is filed by an erstwhile employee of the Corporate Debtor, i.e. the Respondent No. 1 Company. The Appellant joined the Corporate Debtor as a Personal Assistant on 01.01.1983, and over the years received several promotions, including to Manager-Administration. His final designation before he left from service in 2013 was Public Relations Manager.

3. This appeal arises from an application that was made by the Appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 ["IBC"] dated 21.07.2017. In this application, the Appellant averred that a sum of Rs.1.87 Crores was owed to him, being the arrears of salary from the year 1998 till 2013

when he retired from service, and that several acknowledgments of liability have been given of the arrears payable, the last of which was by a letter dated 30.09.2014 by the erstwhile Managing Director of the Company. The Corporate Debtor replied to the aforesaid Section 9 application denying any liability and, in any case, stated that claims that are made by the Appellant are time-barred. The National Company Law Tribunal ["NCLT"] in its judgment dated 17.11.2017, after setting out the facts and, in particular, setting out the acknowledgement of liability letter dated 30.09.2014, went on to state that the principal amount of Rs. 1.06 Crores being admitted, a case has been made out for admission. It also referred to a certain "payment voucher" (which was relied upon by the learned counsel for the Company), stating that this voucher was merely a red-herring, and in any case could not be relied upon. According to the NCLT, even a cursory look at the said voucher by the naked eye would show that the name of the Appellant has been filled by somebody different from the person who has filled – in a different handwriting – that the amount paid is in "full and final" settlement of the arrears of salary. It was also held that this payment voucher was only proof of payment of arrears of salary of 6 months' payment @ Rs.35,000/- p.m. which was not paid on the due dates, but which was paid in one go. In any event, the NCLT held that this voucher was not part of the claim of the Appellant.

4. The NCLT then referred to a Civil Suit that was filed on 06.07.2017 by the Corporate Debtor one week after the notice under Section 8 of the IBC was issued by the Appellant (i.e. on 29.06.2017). The suit contained the following prayers:

"(a) declaring the notice/letters dated 30.09.2006, 22.01.2013, 30.06.2013, 31.03.2014 and 30.09.2014 alleged to have been issued by 1st defendant as null and void and will not bind the plaintiff,

(b) grant permanent injunction restraining the 2nd defendant from relying on or claiming against the plaintiff based on the alleged letters/notices dated 30.09.2006, 22.01.2013, 30.06.2013, 31.03.2014 and 30.09.2014."

The NCLT went on to state that the suit was a desperate attempt of the Company to get out of acknowledgements of liability that were due, and appears to be "*mala fide*, fraudulent and mischievous".

5. Mr. Ritin Rai, learned Senior Advocate appearing for the Appellant, informs us that this suit has been dismissed for non-prosecution. We are informed that an application to restore the suit to the file is pending.

6. Referring to the point of limitation, the NCLT held in favour of the Appellant, relying upon the acknowledgement dated 30.09.2014, as a result of which, it admitted the petition and appointed an Interim Resolution Professional and

imposed a moratorium under Section 14 of the IBC. In the appeal filed by a shareholder of the Corporate Debtor (i.e. Respondent No. 2 before us), the National Company Law Appellate Tribunal ["NCLAT"] referred to a letter by the Employees Provident Fund Organisation dated 13.04.2016 and stated that the Appellant's claim has been settled as a result of that letter. It then, in a cryptic fashion, went into the point of limitation and recorded:

"7. The Respondent - ('Operational Creditor') himself has pleaded that the salary is due since 1998 which was not paid but delay of raising claim of arrears of salary for the period 1998 to 2016 has not been explained.

* * *

9. In the present case as we find that there is an 'existence of dispute' about arrears of salary and the Respondent has also failed to explain the delay in making claim of arrears alleged to be done since 1998 to 2016 (delay of about 18 years), we hold that the application under Section 9 preferred by the Respondent was not maintainable."

7. For these reasons, including the fact that according to the NCLAT, a dispute has been raised, the NCLAT held that the NCLT was incorrect in admitting the matter, and thus allowed the appeal and set aside the NCLT order.

8. Mr. Rai, learned Senior Advocate appearing for the Appellant, has referred to three acknowledgements that are on record. The first is *vide* a letter dated 30.09.2006 acknowledging arrears of payment of salary from 01.01.2000 till the actual date the Appellant was relieved from service. The second is a letter dated 30.06.2013 stating that the "accounts will be settled" as the Appellant had now been retired from service. He emphasised the third letter, dated 30.09.2014, which had appended to it the list of the exact amount due from 1998 till the date of retirement which amounted to roughly Rs.1.06 Crores. According to him, all these acknowledgements would show that amounts due and payable to the

Appellant cannot be said to be barred by limitation. Equally, the Employees Fund Organisation letter is only a red-herring, and has nothing to do with the facts of this case, and it is clear that given the acknowledgements of liability, there is no question of any "dispute". On the contrary, this admitted principal amount of Rs.1.06 Crores is due to the Appellant.

9. Mr. Mohan Parasaran, learned Senior Advocate for the Respondent Company, has argued that a new management took over the Company in 2015, and the amounts due to the Appellant were neither reflected in the annual reports of the Corporate Debtor nor in a Due Diligence Report dated 27.07.2015. What is clear from a reading of the Report, together with the annexures there to, is that 77 employees were owed various amounts which was promised to be paid by the new management. What is conspicuous by its absence is the name of the Appellant in the aforesaid annexures, and therefore, according to Mr. Parasaran,

no amount was owed to the Appellant. In any case, he argued that the NCLAT appreciated the facts correctly, and the claim of the Appellant is clearly time-barred. As an alternative argument, if the Court were to set aside the NCLAT judgment, it ought to remit the same for hearing on whether the NCLT was correct on merits in admitting the Section 9 petition.

10. Having heard learned counsel for both parties, what becomes clear is the fact that from the date of the last acknowledgement i.e. 30.09.2014 till the date on which the petition before the NCLT was filed i.e. 27.07.2017, three years have not elapsed. Therefore, at least to the extent of an acknowledgement made by the then Managing Director of the Corporate Debtor, the arrears of salary due for a period of at least 3 years prior to 30.09.2014 would certainly be within limitation, and therefore payable to the Appellant. This being the case, it is clear that the NCLT judgment is correct in admitting the Section 9 application by the Appellant. Mr. Rai correctly points out that the Employees Provident Fund letter dated 13.04.2016 was only a red-herring, and has nothing to do with the arrears of salary which had to be paid. It is clear that there is an acknowledgement of liability, which therefore shows that there is no "dispute" as to amounts owed to the Appellant. The impugned NCLAT judgment is accordingly set aside. Consequently, the NCLT judgment is restored to the file. The alternative argument of Mr. Parasaran also stands dismissed in view of what has been held by this judgment.

11. The Appeal is thus allowed.

Civil Appeal Diary No. 34841 of 2018, Civil Appeal Diary No. 34836 of 2018 & Civil Appeal Diary No. 34839 of 2018

12. Permission to file the Civil Appeals are rejected. **|||**

REED 2021 Cal 03549

Ayan Mallick and Another v. State Bank of India and Others

CALCUTTA HIGH COURT

4 March 2021

The High Court observed that the section 14 of IBC has to be read in scope of operation of the resolution professional. Continuance of proceedings of the borrowing company falls within the purview of moratorium under section 14 of IBC. As such the petitioners cannot interfere in the functioning of the company. Immunity cannot be extended to directors in matter with the affairs of the company. Thus, the petitioners cannot claim immunity under section 14 of the IBC the doctrine of piercing of corporate veil has to be lifted as per the guidelines of the RBI. Hence the writ petition to be dismissed.

Case Analysis

Bench / coram	Sabyasachi Bhattacharyya, J.
Citation	REED 2021 Cal 03549
Case number	WPO No. 23 of 2021
Subject	Corporate Insolvency – Wilful defauler
Keywords	loan, CIRP, wilful defaulters, moratorium, show-cause, RBI guidelines, corporate debtor, interim resolution Professional, board of directors, immunity, corporate veil.
Legislation cited	Insolvency and Bankruptcy Code, 2016 Section 14, Section 14(1), Section 14(1)(a), Section 14(1)(c), Section 14(3), Section 14(3)(b), Section 17, Section 17(1), Section 18, Section 20, Section 23, Section 25 RBI Guidelines dated 1 July 2015 Clause 2.4, Clause 2.5, Clause 3(a), Clause 3(b), Clause 3(c), Clause 4.1, Clause 4(1)(a), Clause 4(1)(c), Clause 4.2(i)
Counsels	*For the Applicant/ Plaintiff/ Petitioner/ Appellant:* Sabyasachi Choudhury, Sanwal Tibrewal, Sutapa Saha, Advocates *For the Respondent/ Defendant:* Smtuti Mishra, Ashim Rout, Advocates

REED 2021 Cal 03549

CALCUTTA HIGH COURT

Bench / Coram:

Sabyasachi Bhattacharyya, J.

Ayan Mallick and Another—*Petitioner*

Versus

State Bank of India and Others—*Respondent*

WPO No. 23 of 2021

4 March 2021

Counsels:

For the Applicant/ Plaintiff/ Petitioner/ Appellant: Sabyasachi Choudhury, Sanwal Tibrewal, Sutapa Saha, Advocate

For the Respondent/ Defendant: Smtuti Mishra, Ashim Rout, Advocates

JUDGMENT

Sabyasachi Bhattacharyya, J.—The petitioners are the erstwhile Directors of a company, M/s. A K Power Industries Private Limited. The company took loan from the respondent no.1-bank and subsequently failed to repay the same. The loans were secured by primary and collateral securities and equitable mortgage of immovable properties standing in the name of the petitioners, as well as by the guarantee of the petitioners. At the behest of the respondent no.1- bank, forensic audit was carried out into the affairs of the company in April, 2019. Pursuant to the forensic report placed before the members of the joint lenders' meeting held on May 10, 2019, the respondent no. 1 declared the account of the company as a 'No Fraud Account'.

2. Subsequently, the company forwarded an One-Time Settlement proposal, which was accepted by the respondent no.1-bank.

3. In the interregnum, Corporate Insolvency Resolution Process (CIRP) was commenced in respect of the company by an order dated October 1, 2019 passed by the National Company Law Tribunal, Kolkata Bench.

4. During pendency of the CIRP, respondent no.1 issued a notice on November 4, 2019 calling upon the company and the petitioners to show cause and make

submissions in writing within 30 days from the date of receipt of the letter as to why their names should not be included in the list of Wilful Defaulters as per the relevant Reserve Bank of India (RBI) guidelines.

5. The petitioners replied to such notice. Subsequently, several letters were issued to the petitioners as well as the company, asking the petitioners and the company to appear before the Wilful Defaulter Identification Committee for personal hearing. Such notices dated March 17, 2020, March 23, 2020, July 18, 2020, July 27, 2020, August 6, 2020, October 28, 2020 and December 7, 2020 have been annexed to the writ petition.

6. In the present writ petition, the petitioners challenge the notice dated August 6, 2020 (wrongfully described in portions of the writ petition and the prayer portion as "August 8, 2020").

7. Learned counsel appearing for the petitioners argues that in view of the prior commencement of CIRP under the Insolvency and Bankruptcy Code, 2016 (IBC), the Identification Committee had no authority to issue the show-cause notice dated November 4, 2019 and the subsequent notices for personal hearing pursuant thereto.

8. Learned counsel for the petitioners argues that, in view of the moratorium envisaged in Section 14 of the IBC, the proceeding for declaration of Wilful Defaulter did not lie against the company. Since the notices to the petitioners were all issued in their capacity as Directors of the company, such notices were also not tenable in the eye of law. It is argued that, as per the scheme of the IBC, the 'unit' (here, the company), if the subject-matter of a CIRP, its directors, acting in that capacity, would also not be prosecuted in any legal proceeding before any authority, including the Identification Committee. It is illogical, learned counsel submits, that if all proceedings against the company itself are arrested by virtue of Section 14 of the IBC, the Committee could continue to proceed against the petitioners in the capacity of Directors of the company.

9. By relying on the show-cause notice dated November 4, 2019, learned counsel appearing for the petitioners contends that the notice was addressed not only to the company but the present petitioners and the other Directors of the company. All allegations in the show-cause notice were against the company and, as such, the impugned notices are bad in law.

10. Learned counsel appearing for the respondent-bank, on the other hand, contends that the writ petition is premature, since the petitioners have not yet given a representation before the Wilful Defaulter Identification Committee, despite having received the show-cause. The petitioners are evading personal appearance before the Committee, which is evident from the several letters issued to the petitioners. It is argued that all points taken in the writ petition can very well be contended by the petitioners before the Identification Committee itself and the writ petition is, thus, not maintainable.

11. That apart, learned counsel for the respondent no.1 argues, the RBI guidelines dated July 1, 2015, read with Section 14 of the IBC, do not envisage any moratorium against the Directors of a company.

12. Learned counsel further argues that the IBC was enacted after the RBI guidelines were issued in 2015 and the provisions of the IBC are in addition to, and not in derogation of, the RBI guidelines. It is submitted that the two complement each other and do not operate in mutual contradiction.

13. Upon hearing learned counsel for both sides, it is relevant to look into the scope of the relevant provisions of the IBC vis-à-vis the RBI guidelines dated July 1, 2015.

14. Section 14 of the IBC lays down provisions regarding moratorium and cover, inter alia, the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority, as well as any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Sub-section (3) of Section 14 excludes the application of the provisions of Section 14(1) to transactions as may be notified by the Central Government in consultation with any financial regulator and a surety in a contract of guarantee to a corporate debtor.

15. Sections 17 and 18 of the IBC respectively set out the management of affairs of corporate debtor by interim resolution professional and duties of interim resolution professional. The said two sections indicate the scope of measures to be taken by the interim resolution professional with regard to the corporate debtor. Section 20 provides for the management of operations of corporate debtor as a going concern by the interim resolution professional.

16. The RBI guidelines dated July 1, 2015 indicate the consequences of declaration of a corporate debtor as Wilful Defaulter, on the said debtor.

17. Clause 3(a) of the RBI guidelines indicates that the evidence of wilful default on the part of not only the borrowing company but its promoter/whole-time Directors at the relevant time should be examined by a committee. Sub-clause (b) of Clause 3 stipulates that if the Committee concludes that an event of wilful default has occurred, it shall issue a show-cause notice to the borrower and the promoter/whole-time Director and call for their submissions. Upon considering such submissions, the Committee may issue an order recording the fact of wilful default. An opportunity has to be given to the borrower and the promoter/whole-time Director for a personal hearing if the Committee feels it necessary. Sub-clause (c) provides for a reconsideration of the decision by a Review Committee.

18. Clause 2.4 of the RBI guidelines provides for a monitoring of the end-use of funds in respect of the borrower. Clause 2.5 provides for the penal measures

which can be initiated by the banks and the financial institutions against the Wilful Defaulters. Such measures include debarment of the borrower (including their entrepreneurs/promoters) under certain circumstances, from institutional finance from scheduled commercial banks, financial institutions etc. for floating new ventures for a period of five years from the date of removal of their names from the list of Wilful Defaulters. Legal process against the borrowers/ guarantors and foreclosure for recovery of dues should be initiated expeditiously under the said clause. Other financial measures are also contemplated therein.

19. Clause 4.1 of the 2015 guidelines mention the JPC recommendations regarding criminal action against the Wilful Defaulters, which also includes close monitoring of the end-use of funds. In Clause 4.2(i), such monitoring of the end-use of funds has been elaborated further.

20. The purpose of the Master Circular containing the RBI guidelines of 2015, as mentioned therein, is to put in place a system to disseminate credit information pertaining to Wilful Defaulters for cautioning banks and financial institutions so as to ensure that further bank finance is not made available to them.

21. Thus, it is evident from the aforesaid provisions of the 2015 Circular that the measures contemplated therein will have a direct detrimental effect on the scope of functioning of the resolution professional as envisaged under the IBC.

22. The moratorium stipulated in Section 14 of the IBC has to be read in the context of the scope of operation of the resolution professional. Read in conjunction, the provisions of the IBC indicate that Section 14(1), Clauses (a) and (c) contemplate an arrest of all proceedings not only before courts of law and tribunals but before other authorities as well. Although, strictly speaking, the declaration of Wilful Defaulter dealt with in the RBI guidelines is not an action to foreclose, recover or enforce any security interest created by the corporate debtor, the effect of such a declaration is to interdict and conflict with the functioning of the resolution professional within the scope of the IBC. Thus, the continuance of proceedings for declaration of Wilful Defaulter in respect of the borrowing company must be construed to fall within the purview of the moratorium provided in Section 14 of the IBC.

23. The Directors of the company, however, stand on a different footing.

24. Section 17(1) clearly provides that the management of the affairs of the corporate debtor shall vest in the interim resolution professional and the powers of the Board of Directors of the said debtor shall stand suspended and be exercised by the interim resolution professional. The scope of functioning of the interim resolution professionals are clearly laid down in Sections 17, 18 and 20 of the IBC. Section 23 provides the mode of conduct of Corporate Insolvency Resolution Process by the resolution professional. The duties of the resolution professionals are delineated in Section 25 of the IBC.

25. It is clear from the said provisions that the Directors are shut out from having any role in the functioning of the corporate debtor-company from the inception of the CIRP. As such, the present petitioners, in the capacity of Directors of the borrower company, cannot interfere in the functioning of the company at all. On the other hand, the steps taken against the Directors, even in their capacity as Directors, such as publication of their names in the list of Wilful Defaulters and the like, do not affect the CIRP at all, since the Directors have no truck with the company from the moment of inception of the CIRP.

26. However attractive the petitioners' argument regarding the Directors being also immune from proceedings under the moratorium envisaged in Section 14 of the IBC, since such proceedings against the unit itself are arrested, may seem at the first blush, the same has an inherent fallacy.

27. Section 14 of the IBC contemplates a moratorium in respect of all proceedings against the corporate debtor, for the obvious reason that the continuance of other proceedings may lead to conflicting decisions vis-àvis the management of the corporate debtor by the resolution professional. However, such immunity cannot be extended to Directors in view of their interference with the affairs of the company being negated by the provisions of the IBC itself during CIRP.

28. Hence, whatever may be the consequence of declaration of the Directors, even in the capacity of Directors of the company, as Wilful Defaulters, the same does not interfere with the CIRP in any manner in view of the prior dissociation of the Directors from the affairs of the company at the commencement of the CIRP.

29. Thus, the petitioners cannot claim immunity under Section 14 of the IBC, being not covered by the moratorium contemplated therein, although the company itself is covered by such moratorium for the reasons discussed above.

30. That apart, although neither the show-cause notice nor the notices for personal hearing indicated specifically that the petitioners were also being invited to show-cause on their liability as guarantors of the company, it is an admitted position, appearing from the pleadings of the writ petition itself, that the petitioners are also guarantors. Section 14(3)(b) of the IBC excludes a surety in a contract of guarantee to a corporate debtor from the moratorium stipulated in Section 14(1). As such, even in the capacity of guarantors, the petitioners are liable to be prosecuted, bereft of the benefit of such moratorium.

31. In proceedings for declaration of Wilful Defaulter, the corporate veil has to be lifted in order to examine the role of the Directors in the alleged actions of the corporate debtor-company which lead to the proposed declaration of Wilful Defaulter.

32. In the circumstances considered above, the petitioners cannot take advantage of Section 14 of the IBC merely on the ground of being at par with

the corporate debtor, which itself is covered by the said section. Adopting the doctrine of piercing the corporate veil, particularly in view of the contemplation of the RBI guidelines being to promote public policy and advance public interest, the Directors cannot claim to be at par with their company as far as the moratorium under Section 14 of the IBC is concerned.

33. Thus, the writ petition fails.

34. WPO No. 23 of 2021 is dismissed on contest, without any order as to costs.

35. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities. |||

REED 2021 SC 03546

Arun Kumar Jagatramka v. Jindal Steel and Power Limited and Another

SUPREME COURT OF INDIA

15 March 2021

The Supreme court observed that a promoter, who is barred under section 29A of IBC from bidding for his company undergoing insolvency proceeding, cannot also take control of the company back by using the provision of scheme of arrangement under Section 230 of the Companies Act, 2013.

Case Analysis

Bench/ Coram	Dr. Dhananjaya Y. Chandrachud M R Shah, J.
Citation	REED 2021 SC 03546
Case Number	Civil Appeal No. 9664 of 2019 With Writ Petition (C) No. 269 of 2020 and With Civil Appeal No. 2719 of 2020
Subject	Corporate Insolvency
Keywords	liquidation, promoter, compromise, arrangement, barred, CIRP, revival, disqualified, corporate debtor, revival, clean slate, constitutional validity, resolution plan
Legislation Cited	Companies Act, 1956 Section 391
	Companies Act, 2013 Section 230, Section 231, Section 232
	Constitution of India 1949 Article 14, Article 19, Article 21, Article 32
	Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 Regulation 30A, Regulation 36A

Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016
Rule 8

Insolvency Bankruptcy Code, 2016
Section 7, Section 9, Section 10, Section 12A, Section 29A, Section 35, Section 36, Section 196, Section 238, Section 240

IBBI (Liquidation Process) Regulations, 2016
Regulation 32, Regulation 44

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Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited
REED 2020 SC 02502

Arcelormittal India Private Limited v. Satish Kumar Gupta and Others
REED 2018 SC 10541

Brilliant Alloys (P) Ltd. v. S Rajagopal
REED 2018 SC 12540

Chitra Sharma v. Union of India
REED 2018 SC 08562

Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta
REED 2019 SC 11505

Iridium India Telecom Ltd. v. Motorola Inc
(2005) 2 SCC 145

Jasbir Singh v. Vipin Kumar Jaggi
(2001) 8 SCC 289

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Meghal Homes Pvt. Ltd. v. Shree Niwas Girni K. K. Samiti,
(2007) 7 SCC 753

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(2002) 5 SCC 548

Phoenix ARC Private Limited v. Spade Financial Service
REED 2021 SC 02501

Ramesh Kymal v. M/s Siemens Gamesa Renewable Power Pvt Ltd.
REED 2021 SC 02503

SBI v. V. Ramakrishnan
REED 2018 SC 08560

Standard Chartered Bank v. Satish Kumar Gupta
2019 SCC OnLine NCLAT 388

Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.
REED 2019 SC 01504

Talchar Municipality v. Talcher Regulated Market Committee
(2004) 6 SCC 178

Y Shivram Prasad v. S Dhanapal
2019 SCC OnLine NCLAT 172

REED 2021 SC 03546

SUPREME COURT OF INDIA

Bench / Coram:

Dr. Dhananjaya Y. Chandrachud, J.
M R Shah, J.

Arun Kumar Jagatramka—*Appellant*

Versus

Jindal Steel and Power Limited and Another—*Respondent*

Civil Appeal No. 9664 of 2019
With
Writ Petition (C) No. 269 of 2020

And With
Civil Appeal No. 2719 of 2020

15 March 2021

JUDGMENT

Dr. Dhananjaya Y Chandrachud, J.-This judgment has been divided into the following sections to facilitate analysis:

A. Factual Background

A.1. Civil Appeal 9664 of 2019

A.2. Civil Appeal 2719 of 2020

A.3. Liquidation Process Regulations, 2016

A.4. Article 32 Petition

B. Issues

C. Submissions

D. Analysis of the Legal Framework

D.1. Ineligibility during the resolution process and liquidation

D.2. Interplay : IBC liquidation and Section 230 of the Act of 2013

D.3. The ‘Clean Slate’

A. Factual Background

A.1. Civil Appeal 9664 of 2019[1]

1. By its judgment dated 24 October 2019, the National Company Law Appellate Tribunal[2] held that a person who is ineligible under Section 29A of the Insolvency Bankruptcy Code, 2016[3] to submit a resolution plan, is also barred from proposing a scheme of compromise and arrangement under Section 230 of the Companies Act, 2013[4]. The judgment was rendered in an appeal[5] filed by Jindal Steel and Power Limited[6], an unsecured creditor of the corporate debtor, Gujarat NRE Coke Limited[7]. The appeal was preferred against an order passed by the National Company Law Tribunal[8] in an application[9] under Sections 230 to 232 of the Act of 2013, preferred by Mr Arun Kumar Jagatramka, who is a promoter of GNCL. The NCLT had allowed the application and issued directions for convening a meeting of the shareholders and creditors. In its decision dated 24 October 2019, the NCLAT reversed this decision and allowed the appeal by JSPL. The decision of the NCLAT dated 24 October 2019 is challenged in the appeal before this Court.

2. Mr Arun Kumar Jagatramka, assails the order dated 24 October 2019 of the NCLAT, inter alia, on the ground that Section 230 of the Act of 2013 does not place any embargo on any person for the purpose of submitting a scheme. According to the appellant, in the absence of a disqualification, the NCLAT could not have read the ineligibility under Section 29A of the IBC into Section 230 of the Act of 2013. This would, in the submission, amount to a judicial reframing of legislation by the NCLAT, which is impermissible.

3. Before we advert to the submissions of the counsels on questions of law, it will be useful to outline the salient facts of this dispute to understand the contours of the controversy. GNCL, the corporate debtor, moved an application

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1. "First Appeal"
2. "NCLAT"
3. "IBC"
4. the "Act of 2013"
5. Company Appeal (AT) No. 221 of 2018
6. "JSPL"
7. "GNCL"
8. "NCLT"
9. C.A. (CAA) No. 198/KB/2018

under Section 10 of the IBC before the NCLT for initiating the Corporate Insolvency Resolution Process[1]. The application was admitted on 7 April 2017.

4. Mr Arun Kumar Jagatramka submitted a resolution plan for GNCL on 1 November 2017, which was presented by the Resolution Professional[2] before the Committee of Creditors[3]. The plan was to be put to a vote in a meeting of the CoC scheduled on 23-24 November 2017.

5. The IBC was amended by the Insolvency and Bankruptcy Code (Amendment) Act, 2018. 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. A second amendment was made to various provisions of IBC, including Section 29A, under the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, effective from 6 June 2018. A proviso was added to sub-Section (g) of Section 29A. Section 29A of the IBC in its present form reads as follows:

"29A. *Persons not eligible to be resolution applicant:*-A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—

(a) is an un-discharged insolvent;

(b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);

(c) at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and

1. "CIRP" or "resolution process"
2. "RP"
3. "CoC"

charges relating to nonperforming asset accounts before submission of resolution plan;

Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I.-For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed, prior to the insolvency commencement date.

Explanation II.-For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;

(d) has been convicted for any offence punishable with imprisonment-

(i) for two years or more under any Act specified under the Twelfth Schedule; or

(ii) for seven years or more under any other law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

(e) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013);

Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) has 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 Adjudicating Authority under this Code;

Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;

(h) has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part;

(i) is subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or

(j) has a connected person not eligible under clauses (a) to (i).

Explanation I.-For the purposes of this clause, the expression "connected person" means—

(i) any person who is the promoter or in the management or control of the resolution applicant; or

(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares 9[or completion of such transactions as may be prescribed], prior to the insolvency commencement date;

Explanation II.-For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:-

(a) a scheduled bank;

(b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;

(c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999 (42 of 1999);

(d) an asset reconstruction company registered with the Reserve Bank of India under Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(e) an Alternate Investment Fund registered with the Securities and Exchange Board of India;

(f) such categories of persons as may be notified by the Central Government."

(emphasis supplied)

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

6. No further resolution plan was approved by the CoC due to the paucity of time. In the absence of a resolution plan, the NCLT passed an order of liquidation on 11 January 2018, after the expiry of 270 days. The order of the NCLT ordering liquidation was challenged in appeal[1] by Mr Arun Kumar Jagatramka before the NCLAT. The appeal was dismissed by the NCLAT by its order dated 10 July 2018. The dismissal of the appeal by the NCLAT was assailed before this Court, which issued notice to GNCL on 19 July 2019.

7. During the pendency of the appeal before NCLAT, where the order of liquidation passed by the NCLT was assailed, Mr Arun Kumar Jagatramka 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 erstwhile promoters and creditors. This application was allowed by the NCLT through its order dated 15 May 2018, and a direction was issued for convening of a meeting of shareholders, secured creditors, unsecured creditors and FCCB holders for approval of the scheme of compromise and arrangement.

1. Company Appeal (IB) No. 55-56 of 2018

8. JSPL, an operational creditor of GNCL, preferred an appeal against the order of the NCLT dated 15 May 2018 before the NCLAT. The NCLAT allowed the appeal by its judgement dated 24 October 2019, holding that promoters who are ineligible to propose a resolution plan under Section 29A of the IBC are not entitled to file an application for compromise and arrangement under Sections 230 to 232 of the Act of 2013. The basis of this finding is contained in paragraphs 10 to 12 of the impugned judgement which is extracted below:

"10. As noticed above, the Hon'ble Supreme Court in *Swiss Ribbons Pvt. Ltd. & Anr.* v. *Union of India & Ors.,* **REED 2019 SC 01504** Writ Petition (Civil) No. 99 of 2019 held that the 'primary focus of the legislation is to ensure revival and continuation of the corporate debtor by *protecting the corporate debtor from its own management* and from a corporate death by liquidation'.

11. The aforesaid judgment makes it clear that even during the period of Liquidation, for the purpose of Section 230 to 232 of the Companies Act, the 'Corporate Debtor' is to be saved from its own management, meaning thereby the Promoters, who are ineligible under Section 29A, are not entitled to file application for Compromise and Arrangement in their favour under Section 230 to 232 of the Companies Act. Proviso to Section 35(f) prohibits the Liquidator to sell the immovable and movable property or actionable claims of the 'Corporate Debtor' in Liquidation to any person who is not eligible to be a Resolution Applicant, quoted below:-

"35. *Powers and duties of Liquidator.*-(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:-

xxx xxx xxx

(f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified.

Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant."

12. From the aforesaid provision, it is clear that the Promoter, if ineligible under Section 29A cannot make an application for Compromise and Arrangement for taking back the immovable and movable property or actionable claims of the 'Corporate Debtor'." (emphasis in original)

9. The judgment and order of the NCLAT is the subject of the appeal.

A.2. Civil Appeal 2719 of 2020[1]

10. This appeal has been filed for assailing an order dated 19 December 2019 of the NCLAT in which it relied on the judgment dated 24 October 2019 impugned in the earlier appeal, to hold that an individual ineligible for proposing a resolution plan under Section 29A of the IBC, is also ineligible to propose a scheme of compromise and arrangement under Section 230 of the Act of 2013.

11. The appellant - Mr Kunwer Sachdev - was the promoter and director (since suspended) of Su-Kam Power Systems Limited[2]. An application[3] under Section 7 of the IBC was filed by one of the financial creditors of Su-Kam, which was admitted by the NCLT through its order dated 5 April 2018. The CIRP was initiated against Su-Kam.

12. When the RP invited applications for resolution plans for Su-Kam, Mr Kunwar Sachdev submitted a plan along with Phoenix ARC Private Limited on 15 November 2018. However, Mr Kunwar Sachdev was informed by an email dated 27 December 2018 issued by the RP, that the CoC had found him to be ineligible under Section 29A(h) of the IBC and consequently annulled his resolution plan.

13. This decision was challenged by filing an application[4] before the NCLT. However, this was dismissed by the NCLT through its order dated 2 April 2019. This order was not challenged.

14. In the interim, due to the absence of any other resolution plan, the NCLT passed an order dated 3 April 2019, under Section 34(1) of the IBC, directing the liquidation of Su-Kam and appointing a Liquidator. The appointment of the Liquidator was challenged before the NCLAT in an appeal[5], which was disposed of by an order dated 29 April 2019 upholding the appointment of the Liquidator. The Liquidator was also directed to accept applications for schemes of compromise and arrangement under Sections 230 to 232 of the Act of 2013.

15. When the Liquidator invited expressions of interest for submitting schemes of compromise and arrangement, Mr Kunwar Sachdev again expressed his interest. Emails were exchanged between the Liquidator and Mr Kunwar Sachdev, during the course of which Mr Kunwar Sachdev was invited to present his plan to the lenders of Su-Kam. However, before this could materialise, Mr Kunwar Sachdev was informed by the Liquidator through an email dated 19 September 2019, that he was ineligible to propose a scheme under Section 230 of the Act of 2013 in view of his ineligibility under Section 29A(h) of the IBC.

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1. "Second Appeal"
2. "Su-Kam"
3. CP (IB)/540 (PB)/2017)
4. CA. 58(PB)/2019
5. Company Appeal (AT) (Ins) No.451 of 2019

16. Mr Kunwar Sachdev challenged this decision in an application[1] filed before the NCLT, which was dismissed by an order dated 31 October 2019 relying on the judgment dated 24 October 2019 impugned in the earlier appeal, and on the basis of Section 29A and Section 35(1)(f) of the IBC.

17. Mr Kunwar Sachdev then filed an appeal[2] against this order dated 31 October 2019 before the NCLAT, which dismissed it by an order dated 19 December 2019. Mr Kunwar Sachdev now comes before this Court in appeal.

A.3. Liquidation Process Regulations, 2016

18. Before averting to Writ Petition (Civil) No 269 of 2020, it is important to first understand the controversy surrounding the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016[3].

19. The Liquidation Process Regulations have been issued by the Insolvency and Bankruptcy Board of India[22], constituted under Part IV of the IBC, in exercise of the powers conferred by Sections 5, 33, 34, 35, 37, 38, 39, 40, 41, 43, 45, 49, [4]50, 51, 52, 54, 196 and 208 read with Section 240 of the IBC.

20. The Liquidation Process Regulations were amended by the IBBI by a notification[5] dated 25 July 2019, which inserted Regulation 2B. Sub-section (1) of Regulation 2B provides that a compromise or arrangement proposed under Section 230 of the Act of 2013 shall have to be completed within 90 days of the order of liquidation issued under sub-sections (1) and (4) of Section 33 of the IBC. Further, Sub-section (2) provides that the time taken in a compromise or arrangement, not exceeding 90 days, shall not be included within the liquidation period. Finally, Sub-section (3) provides that any cost which is incurred by the Liquidator in relation to the compromise or arrangement shall be borne by the corporate debtor, if such compromise or arrangement is sanctioned by the NCLT under Section 230(6). However, a proviso to Sub-section (3) notes that if such compromise or arrangement is not sanctioned by the NCLT under Section 230(6), the cost shall be borne by the parties who proposed the compromise or arrangement.

21. Regulation 2B was amended by a notification[6] dated 6 January 2020, by which a proviso was added to Sub-section (1) of Regulation 2B, which provides that a party ineligible to propose a resolution plan under the IBC cannot be a

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1. CA-2335(PB)/2019
2. Company Appeal (AT) (Insolvency) No. 1498 of 2019
3. "Liquidation Process Regulations"
4. "IBBI"
5. Noti. No. IBBI/2019-20/GN/REG047
6. Noti. No. IBBI/2019-20/GN/REG053

party to a compromise or arrangement. Regulation 2B, in its present form, reads as follows:

"2-B. *Compromise or arrangement*.—(1) Where a compromise or arrangement is proposed under Section 230 of the Companies Act, 2013 (18 of 2013), it shall be completed within ninety days of the order of liquidation under sub-sections (1) and (4) of Section 33:

Provided that a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise or arrangement.

(2) The time taken on compromise or arrangement, not exceeding ninety days, shall not be included in the liquidation period.

(3) Any cost incurred by the liquidator in relation to compromise or arrangement shall be borne by the corporate debtor, where such compromise or arrangement is sanctioned by the Tribunal under sub-section (6) of Section 230:

Provided that such cost shall be borne by the parties who proposed compromise or arrangement, where such compromise or arrangement is not sanctioned by the Tribunal under sub-section (6) of Section 230." (emphasis supplied)

A.4. Article 32 Petition

22. Writ Petition (Civil) No. 269 of 2020 has been filed by Mr Arun Kumar Jagatramka, also the appellant in the First Appeal, assailing the notifications dated 25 July 2019 and 6 January 2020 issued by the IBBI, through which it inserted Regulation 2B into the Liquidation Process Regulations, and subsequently amended it. As the petitioner, he contends that Regulation 2B is *ultra vires* the IBC and the Act of 2013, and also violates Articles 14, 19 and 21 of the Constitution. The prayer in the writ petition has been extracted below:

"In the premises set forth above, the Petitioner prays that this Hon'ble Court may be pleased to issue:

a. Writ, Order or Direction more particularly in the nature of WRIT OF DECLARATION declaring that the provisions of Notifications dated 25.07.2019 and 06.01.2020 issued by the Insolvency and Bankruptcy Board of India are ultra vires the Insolvency and Bankruptcy Code, 2016 as well as the Companies Act, 2013 and violative of Article 14, 19, 21 of the Constitution of India."

B. Issues

23. Having detailed the factual background of these petitions, we shall now turn to the issues before this Court and the submissions of counsels.

24. The NCLAT formulated two principal issues in the first of its judgments in appeal:

"(i) Whether in a liquidation proceeding under Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I&B Code')the Scheme for Compromise and Arrangement can be made in terms of Sections 230 to 232 of the Companies Act;

(ii) If so permissible, whether the Promoter is eligible to file application for Compromise and Arrangement, while he is ineligible under Section 29A of the I&B to submit a 'Resolution Plan'."

25. The first of the above issues has been answered in the affirmative by the NCLAT, to which, as Mr Sandeep Bajaj, learned Counsel for the appellant noted, there is no challenge. The real bone of dispute relates to the second issue. In the submission of Mr Sandeep Bajaj, what the NCLAT determined while addressing itself to the issue in dispute is whether the ineligibility under Section 29A of the IBC can be read into the provisions of Section 230 of the Act of 2013. In essence, Mr Bajaj's approach to the issue is that a disqualification which is not provided by the legislature cannot be introduced by a judicial determination. In the present case, he submitted, Section 29A does not expressly provide that it extends to Section 230 of the Act of 2013. Section 230, in his submission, is a 'different section in different enactment' to which the ineligibility under Section 29A of the IBC cannot be attracted.

26. Mr Amit Sibal, learned Senior Counsel appearing for the respondent in the Second Appeal, on the other hand, submitted that the correct question to pose is whether a person who is ineligible under Section 29A of the IBC is permitted to propose a scheme for revival under Section 230 of the Act of 2013 at the stage of liquidation either themselves or in concert with others.

27. The nuanced manner in which the contesting sides have prefaced their submissions is indicative of the broad nature of the contest. On one hand, Mr Bajaj submits that the ineligibility under Section 29A of the IBC attaches to the proceedings under the IBC alone, involving the submission of a resolution plan. On the other hand, what Mr Sibal urges is that when an order of liquidation has been passed under and in pursuance of proceedings which were initiated under the IBC, Section 230 of the Act of 2013 expressly contemplates that the liquidator appointed under the IBC may move the NCLT where a compromise or arrangement is proposed. Hence, the proposal for a compromise or arrangement under Section 230, where a company is in liquidation under the IBC, is in continuation of that liquidation process. Hence, according to Mr Sibal, a person who is ineligible under Section 29A cannot propose a scheme for revival under Section 230.

C. Submissions

28. Having thus elucidated the battle lines of legal conflict, we proceed to enumerate the submissions.

29. Mr Sandeep Bajaj, learned Counsel appearing on behalf of the appellant in the First Appeal and the Petition under Article 32 submitted that:

(i) Chapter II of the IBC indicates that the CIRP can be invoked in three modes:

(a) By a financial creditor under Section 7;

(b) By an operational creditor under Section 9; and

(c) By a corporate debtor under Section 10.

(ii) The IBC and its regulations indicate that there is a clear distinction between:

(a) the settlement mechanism which allows for a settlement upon which the corporate debtor would stand restored to the promoter together with all its assets and liabilities; and

(b) the resolution mechanism under which, upon the acceptance of a resolution plan, the company moves over to the control of the acquirer on a clean slate for a fixed consideration, consequent to the provisions of Section 31;

(iii) Section 29A is a part of the resolution mechanism, the object and purpose of which is to prevent a back-door entry to the promoter who should not be allowed to have advantage of their own wrong;

(iv) Though the appellant falls in the prohibited category under Section 29A, the purpose of the prohibition is to prevent the promoter from submitting a resolution plan with reference to the provisions of Sections 30 and 31 of the IBC;

(v) Chapter III of the IBC, commencing with Section 33, deals with the liquidation process and Regulation 32 of the Liquidation Process Regulations deals with “sale of assets etc. by the liquidator”. In the course of the liquidation under Chapter III, the liquidation estate is to be formed under Section 36 and the sale under Regulation 32 is an intrinsic part of the liquidation estate. The consequence is that acquirer begins on a clean slate. The ineligibility under Section 29A which attaches for the purpose of Chapter II, in the context of a resolution plan, has been extended under Section 35(1)(f) to Chapter III on the basis of the above rationale, i.e., that the liquidator shall not sell the moveable or immoveable property of the corporate debtor or its actionable claims in liquidation to any person who is not eligible to be a resolution applicant;

(vi) Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 contemplates that the NCLT, in its role as the Adjudicating Authority, may permit withdrawal of an application by the financial creditor, operational creditor or corporate applicant on a request made by the applicant before its admission. This is indicative of the position that the NCLAT does not have an inherent power to allow for withdrawal of the application after admission;

(vii) Section 12-A was inserted in the IBC by Amending Act 26 of 2018 with retrospective effect from 6 June 2018 so as to permit the NCLT to allow the withdrawal of an application which has been admitted under Sections 7, 9 or 10

on an application made by the applicant, with the approval of ninety per cent of a voting share of the CoC in such a manner as may be specified;

(viii) Regulation 30-A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (which was inserted on 3 July 2018) allowed for the withdrawal under Section 12-A before the issuance of an invitation for expression of interest under Regulation 36-A. In the decision of this Court in *Swiss Ribbons Private Limited* v. *Union of India,* **REED 2019 SC 01504** : (2019) 4 SCC 17; herein, referred to as "Swiss Ribbons" which was rendered on 25 January 2019, the Court held that a withdrawal of an application can be permitted between admission of the application and the constitution of the CoC. Following up on this, Regulation 30-A was substituted on 25 July 2019 to allow an application for withdrawal under Section 12-A both before and after the constitution of the CoC. However, where the application is made after the constitution of the CoC (under Regulation 30-A(1)(b)), and after the issuance of the invitation for expression of interest, the reasons justifying the withdrawal are required to be stated;

(ix) The decision in *Brilliant Alloys (P) Ltd.* v. *S Rajagopal,* **REED 2018 SC 12540** : 2018 SCC OnLine SC 3154; hereinafter, referred to as "Brilliant Alloys" would indicate that a withdrawal can be permitted even after the expression of interest, as a consequence of which Regulation 30-A is directory in nature;

(x) The consequence of a withdrawal of the application under Sections 7, 9 or 10 is that the corporate debtor stands restored to the promoter. As such, Section 29A does not operate as an ineligibility on the settlement mechanism. On the withdrawal of the application the corporate debtor goes back to the same promoter, even if they are ineligible under Section 29A for the submission of the resolution plan;

(xi) The ineligibility under Section 29A, which forms a part of Chapter II of the IBC, is only during the resolution process;

(xii) The rationale for imposing an ineligibility under Section 29A in the resolution process is that the successful resolution applicant under Section 31 of the IBC obtains the company on a clean slate, as indicated in the decision of this Court in *Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta,* **REED 2019 SC 11505** : (2020) 8 SCC 531. This benefit is not available where an application is *simpliciter* withdrawn under Section 12-A;

(xiii) Section 230 of the Act of 2013 is a part of the settlement mechanism and is at par with the provisions of Section 12-A. The impact of a compromise or arrangement is also that company is restored to the promoters with all its liabilities. While Section 12-A of the IBC permits withdrawal of an application, Sections 230 and 230-A of the Act of 2013 envisage a compromise or arrangement. As such, they both form a part of the settlement mechanism and

are not part of the resolution mechanism, to which alone the ineligibility under Section 29A applies. Hence, this ineligibility cannot now be engrafted into Section 230;

(xiv) Section 230 was amended on 15 November 2016 and under Sub-Section (6), the compromise or arrangement becomes binding if 3/4th in value of the creditors or class of creditors or members agree to it, and if it is sanctioned by the NCLT. The compromise or arrangement then becomes binding on the liquidator appointed under the IBC as a whole. The provisions of Section 230 are, however, not restricted to liquidation. They are not regulated by the IBC. Section 230 operates in an area independent of the IBC. Following the amendment of Section 230(1) on 15 November 2016, the application for a compromise can also be proposed by the liquidator appointed under the IBC. However, the right of the liquidator to make an application under Section 230(1) is in addition to the others enumerated therein and not exclusive, in view of the principle which was laid down by this Court while construing the corresponding provisions of Section 391 of the Companies Act, 1956[1];

(xv) The discussion papers circulated by the IBBI in April and November 2019 clearly demonstrate that IBBI was aware of the fact that the ineligibility which attaches to the resolution process under Section 29A will not attach to Section 230 of the Act of 2013. The proviso to Regulation 2B was notified by the IBBI on 6 January 2020 to stipulate that a person who is not eligible under the IBC to submit a resolution plan for insolvency resolution of the corporate debtor shall not be a party to such compromise or arrangement. Regulation 2B is *ultra vires* the provisions of Section 230 of the Act of 2013. IBBI had no statutory authority to make the Regulation 2B, through which it has effectively provided a disqualification under the Act of 2013, even though the mandate of IBBI is confined only to the IBC; and

(xvi) Regulation 2B is violative of Articles 14, 19 and 21 of the Constitution as it seeks to import an ineligibility under the provisions of the IBC to a dissimilar provision in the Act of 2013. Moreover, when ineligibility is not attracted under Section 12-A of the IBC, imposing this ineligibility under Section 230 of the Act of 2013 is arbitrary.

30. Adopting the submissions which were urged by Mr Sandeep Bajaj, Mr Shiv Shankar Banerjee, learned Counsel appearing on behalf of the appellant in the Second Appeal, submitted that:

(i) A complete procedure has been stipulated under the provisions of the IBC for liquidation;

(ii) Where a sale of the assets of the corporate debtor or sale of the business of the corporate debtor takes place in the course of the liquidation, Section 35(1)(f)

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of the IBC stipulates that the assets cannot be sold to a person who is ineligible under Section 29A. The object is to ensure that liquidation should not be used to allow the promoter to get the assets free from encumbrances;

(iii) In contrast to a successful resolution applicant under Chapter II or the person who benefits from the sale of assets in liquidation under Chapter III of the IBC, the person who proposes a compromise or arrangement under Section 230 under the Act of 2013 does not have the benefit of acquiring the company free of encumbrances. There is thus no reason or justification to exclude the promoter from invoking the provisions of Section 230;

(iv) Section 230(1) makes a reference to a liquidator appointed under the IBC because when the provision of Sections 7, 9 or 10 have been invoked, and an order of admission has been passed, liquidation, if required, will take place under the provisions of Section 35 of the IBC;

(v) The mischief which was sought to be remedied by the adoption of Section 29A is restricted to the resolution process, its object being that persons should not take advantage of their own wrong. It is justifiable if a defaulter is excluded from the resolution process which may result in the creditors taking a haircut of their outstanding claims. Moreover, a successful resolution applicant begins on a clean slate. In contrast, under Section 230, the scheme has to be sanctioned by the NCLT only upon which it will pass muster; and

(vi) The insertion of the proviso in Regulation 2B of the Liquidation Process Regulations is a clear indicator of the fact that a disqualification or ineligibility under Section 29A is not a part of Section 230 of the Act of 2013.

31. The above submissions have been contested by Mr Amit Sibal, learned Senior Counsel appearing on behalf of the respondents in the Second Appeal. Learned Senior Counsel submitted that:

(i) A proposal under Section 230 of the Act of 2013 need not result in the revival of the company. The proposal may apply only to a class of creditors or shareholders. Even prior to its amendment, this Court had held that additional conditions apply when a plan under the erstwhile provisions of Section 391 of the Act of 1956 is propounded at the time of liquidation of the company;

(ii) Section 29A has several ineligibilities apart from those that attach to promoters. To allow a person who is ineligible under Section 29A from submitting a compromise or arrangement under Section 230 at the liquidation stage is contrary to the letter and spirit of the IBC;

(iii) The NCLT while dealing with an application for a compromise or arrangement under Section 230 of the Act of 2013, in respect of a company which is being liquidated under the IBC, performs a dual role: firstly, as an Adjudicating Authority under the IBC and as a Tribunal under the Act of 2013. Therefore, it can insist on adherence to additional conditions namely that:

(a) The proposed compromise or arrangement must result in a revival of the company; and

(b) The compromise or arrangement cannot be proposed by a person who is barred under Section 29A;

(iv) When the IBC was originally enacted there was no bar of the nature found in Section 29A on who can propose a resolution plan either pre or post liquidation;

(v) The ineligibility under Section 29A and Section 35(1)(f) was introduced by a legislative amendment on 23 November 2017[1], both at the pre and post liquidation stages;

(vi) The purpose of the disqualification is to ensure a sustainable revival, which means that those responsible for the state of affairs of a company and other persons regarded by the legislature as undesirable should be excluded from the process;

(vii) Persons who are ineligible under Section 29A or Section 35(1)(f) cannot seek an entry:

(a) at the CIRP stage; or

(b) under Section 230 of the Act of 2013; or

(c) by purchasing the assets during liquidation.

(viii) Section 29A does not apply only to conduct in relation to the corporate debtor, but in relation to other companies as well;

(ix) The ineligibility engrafted in Section 29A extends to Chapter III by virtue of the provision of Section 35(1)(f). This must be read together with Regulation 32 of the Liquidation Process Regulations. Regulation 32 provides six modes of realization of assets, out of which four involve the sale of assets and two involve the transfer of the corporate debtor or its business as a 'going concern';

(x) Regulation 44(1), through its proviso, allows for an additional period of ninety days for the liquidation process where the sale is through Regulation 32-A(1) so as to encourage a revival of the company;

(xi) There is no reference in the body of the IBC to a scheme of compromise under Section 230. Section 230 (especially sub-Sections (1) and (6)) indicate that:

(a) a compromise can be with a sub-set of creditors;

(b) liquidation is one scenario in which Section 230 can be invoked; and

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(c) a compromise with only a class of creditors will bind only that class under Section 230(c);

(xii) While construing the corresponding provisions of erstwhile Section 391 of the Act of 1956, this Court held in *Meghal Homes Pvt. Ltd.* v. *Shree Niwas Girni K. K. Samiti,* (2007) 7 SCC 753; herein, referred to as "Meghal Homes" that where a scheme of compromise and arrangement is proposed in respect of the company in liquidation, additional requirements need to be established, namely that the scheme must be for the revival of company. The impact of a scheme under Section 391, where the company is in liquidation, is that the proposers of the scheme enter into the management with the debt having been resolved.

This makes the scheme of compromise or arrangement under Section 230 qualitatively different from a simpliciter withdrawal of an application under Section 12-A of the IBC. Section 12-A does not incorporate any requirement for the revival of the company;

(xiii) The IBC provides for three modes of revival:

(a) the CIRP under Chapter II;

(b) sale of a company in liquidation as a going concern (read with Regulation 32(e) and (f)); and

(c) a scheme of compromise or arrangement under Section 230 of the Act of 2013, following upon an order for liquidation being passed under Chapter III of the IBC;

The prohibition or ineligibility which applies in (a) and (b) must necessarily attach to (c) as well. When a plan for compromise or arrangement is proposed at the liquidation stage of IBC under Section 230 of the Act of 2013, it must satisfy the rigors of the IBC. Hence, a person who is ineligible under Section 29A cannot submit a plan under Section 230 of the Act of 2013;

(xiv) In construing the provisions of Sections 29A and 35(1)(f) of the IBC, notice must be taken of the fact that the ineligibility was made applicable both to the resolution stage as well as the stage of liquidation. In interpreting these provisions, the purpose and object of the amendment must be borne in mind, which is that a scheme of revival cannot be proposed by a person who stands disqualified under Section 29A;

(xv) The proposal of a compromise or arrangement under Section 230 in a situation where the company is in liquidation under the IBC is a facet of the liquidation process under the IBC. Section 230 was amended to include a liquidator appointed under the IBC. The statutory scheme indicates that:

(a) A liquidation under the IBC follows upon the entire gamut of proceedings under the IBC;

(b) Section 230 of the Act of 2013 provides one of the modes of revival in the liquidation process; and

(c) Other activities of the liquidator do not cease while inviting schemes under Section 230. The steps required to be taken by the liquidator in liquidation include a compromise or arrangement under Section 230. It is in this context that the NCLT performs a dual role - that of an Adjudicating Authority in the matter of liquidation under the IBC as well as of a Tribunal for a scheme of compromise and arrangement under the Act of 2013;

(xvi) The fundamental postulate of the IBC is that a corporate debtor has to be protected from its management and corporate debt. Hence, it would be anomalous if a compromise or arrangement can be entertained from a person who is responsible for the state of affairs of the corporate debtor;

(xvii) Where a company is in liquidation under the provisions of the IBC, the submission of a compromise or arrangement under Section 230 has distinct features of commonality with a resolution plan namely:

(a) The object is to revive the company; and

(b) Once officially approved, it assumes a binding character;

These intrinsic elements of revival and of the binding nature permeate both a resolution plan on the one hand and a compromise or arrangement on the other, which is arrived at in the course of liquidation;

(viii) The introduction of the proviso to Regulation 2(B) of the Liquidation Process Regulations with effect from 6 January 2020 is only by way of a clarification;

(xix) *Dehors* the provisions of the IBC, the rigors of the IBC will not apply to a proceeding under Section 230 of the Act of 2013. In other words, the ineligibility under Sections 29A and 35(1)(f) applies only to a situation where a corporate debtor has come within the purview of the IBC and has been taken into liquidation under Chapter III. It is only where a compromise or arrangement under Section 230 of the Act of 2013 is proposed in respect of a company which is undergoing liquidation under the IBC that the rigors of Section 29A and 35(1)(f) would stand attracted;

(xx) An absurdity will result if persons found to be derelict or guilty of malfeasance, who are barred from:

(a) submitting a resolution plan;

(b) obtaining a sale of assets in liquidation; and

(c) obtaining a sale of the company as a going concern can still propose a compromise under Section 230 of the Act of 2013. It is a settled principle of law that an interpretation which leads to absurdity must be avoided;

(xxi) There is a fallacy in equating the provisions of Section 230 of the Act of 2013 with an application for withdrawal under Section 12-A of the IBC. Section

12-A is not intended to be the culmination of the resolution process but is at the inception. The withdrawal by an applicant leads to a *status quo ante* in respect of liabilities of the corporate debtor and does not require that the defaults in respect of all creditors are brought to an end. In contrast:

(a) a resolution plan under Section 31 of the IBC (as well as the scheme under Section 230 of the Act of 2013) binds all the stakeholders;

(b) results in a clean slate unlike Section 12-A; and

(c) constitutes a culmination of the resolution plan.

As distinct from the provisions of Section 31 of the IBC and Section 230 of the Act of 2013, a withdrawal under Section 12-A restores the *status quo ante* and is hence not concerned with ineligibilities under Section 29A; and

(xxii) Section 240 of the IBC enunciates the power to make regulations to carry out the provisions of the Code. The insertion of the proviso to Regulation 2(B) is valid because:

(a) the amendment is consistent with the IBC and carries out its provisions; and

(b) it is clarificatory in nature since even in its absence, the ineligibility under Section 29A would govern.

32. In summing up, Mr Sibal urged that:

(i) Where a company is in liquidation under Chapter III of the IBC, a proposed scheme of compromise or arrangement under Section 230 of the Act of 2013 must comply with the requirements of the IBC;

(ii) The specific requirements which must be fulfilled under (i) above are that:

(a) the scheme must be for the revival of the company; and

(b) it must not be proposed by a person who is ineligible under Section 29A of the IBC;

(iii) The above requirements are IBC specific and not inconsistent with the provisions of Section 230 of the Act of 2013;

(iv) Sections 29A and 35(1)(f) of the IBC prohibit a certain category of persons from proposing a revival of the company in the course of the CIRP, liquidation process and in purchasing the assets in the course of liquidation. To make an exception in a plan for revival under Section 230 of the Act of 2013 in the context of a scheme of compromise or arrangement will defeat the object and intent of the amendment to the IBC and lead to an absurdity. This would perpetrate the mischief which was sought to be obviated;

(v) When a company is in liquidation under the IBC, a scheme proposed under Section 230 is a facet of the liquidation process and the same rationale which permeates the liquidation process must also govern it; and

(vi) Section 12-A stands on a completely different footing. It provides for a withdrawal at the inception of the CIRP and is not a culmination of a resolution process. Nor does a Section 12-A withdrawal bind all stakeholders.

33. Mr Gopal Jain, learned Senior Counsel appearing for the respondents in the First Appeal, has urged submissions along the same lines as Mr Amit Sibal. His submissions are summarized below:

(i) The commencement or the initiation process attracting the IBC is an application under Sections 7, 9 or 10;

(ii) In the present case, an application was filed under Section 10 as a consequence of which the case has to be analyzed through the prism of the IBC;

(iii) The IBC is an economic legislation and its key objectives are to ensure:

(a) good corporate governance;

(b) control deviant behavior;

(c) protect the integrity of the resolution process;

(d) enhance commercial morality; and

(e) foster respect for the rule of law.

The IBC is premised on the principle that there is a significant element of public interest in facilitating a creditor-centric regime for achieving economic growth. Ensuring that resolution plans are submitted by credible persons is intrinsic to the scheme of the IBC. Speed is of the essence. The IBC has sought to convert a legal regime which was a debtor's paradise into a regime governed by corporate justness. The regime under the IBC is dynamic, which is reflected by eight amendments which took place between November 2017 and September 2020;

(iv) The basic principle is that an entity which is barred under Section 29A and Section 35(1)(f) should not be in control of the assets of the corporate debtor. The objective is that defaulting promoters:

(a) should not be in the driver's seat; and

(b) should be kept at arm's length;

(v) In order to achieve the above objectives, the Parliament enacted a simultaneous amendment of both Section 29A and Section 35(1)(f) to maintain a level playing field by comprehensively catering to all situations relating to defaulting or barred promoters;

(vi) In interpreting the IBC, legal sanctity and clarity are of utmost importance. But for Section 29A, promoters would have got back into management after securing a haircut to lenders in the course of the resolution plans. Section 29A which applies to the resolution process and Section 35(1)(f) which applies to the liquidation process were intended to plug a loophole. To accept the submissions

of the appellants would be creating a new loophole. Section 29A is in the nature of a see-through provision. The submissions of the appellants will in fact scare away genuine creditors and derail the process; and

(vii) According to Section 238 of the IBC, in case of any inconsistency between the provisions of the IBC and any other law in force, the provisions of the IBC are to have an overriding effect.

34. Mr Tushar Mehta, learned Solicitor of General of India, defended the validity of Regulation 2B, more specifically the proviso. The learned Solicitor General submitted that:

(i) The trigger is the liquidation resulting from the operation of the provisions of Section 33 of the IBC;

(ii) Regulation 2B facilitates an additional period of ninety days for a compromise under Section 230 of the Act of 2013 because the entire process is time specific;

(iii) Even if the legal position is assessed independent of Regulation 2B, the same embargo as contained in Section 29A and Section 35(1)(f) would apply to a compromise or arrangement proposed under Section 230 of the Act of 2013 in respect of a company which is undergoing liquidation under Chapter III of the IBC;

(iv) Regulation 2B is essentially clarificatory;

(v) The basis of Regulation 2B is the same as Sections 29A and 35(1)(f), which is that a person who is the cause of the problem either by a design or default cannot be a part of the process solution;

(vi) The IBC is a beneficial legislation. Prior to the enactment of the IBC:

(a) individual creditors had individual remedies; and

(b) the debtor would remain in possession of the company and its assets.

With the introduction of the IBC, there has been a paradigm shift in that:

(a) under the new legal regime there is a collective effort of all creditors even if at the behest of one of them;

(b) the creditor is in control instead of the debtor in possession; and

(c) revival is the soul of the IBC;

(vii) Sections 196 and 240 of the IBC reflect a specific conferment of power on the IBBI to frame regulations subject to the stipulation that:

(i) they are not inconsistent with the provisions of the IBC; and

(ii) they carry out the purposes of the IBC. Both these conditions are fulfilled by Regulation 2(B);

(viii) A regulation which is framed under a statute in exercise of the authority which is conferred on the delegate can be challenged on the ground of being:

(a) ultra vires the parent statute; or

(b) being contrary to the provisions of Part III of the Constitution;

To suffer from unreasonableness, a regulation must be held to be manifestly arbitrary. Regulation 2(B) is consistent with the object and purpose of the IBC; and does not suffer from manifest arbitrariness; and

(ix) Sections 29A and 35(1)(f) apply to liquidation pursuant to the IBC. The principle of Section 29A stands absorbed in the hybrid process of compromise during liquidation under the IBC, by way of a device of incorporation by reference.

35. Mr Balbir Singh, learned Additional Solicitor General, has addressed submissions also along the above lines.

D. Analysis of the Legal Framework

36. Having narrated the submissions advanced by both sides, we now turn to the legal position and the interplay between the proposal of a scheme of compromise and arrangement under Section 230 of the Act of 2013 and liquidation proceedings initiated under Chapter III of the IBC.

D.1. Ineligibility during the resolution process and liquidation

37. Section 29A of the IBC was introduced with effect from 23 November 2017 by Act 8 of 2018. The birth of the provision is an event attributable to the experience which was gained from the actual working of the provisions of the statute since it was published in the Gazette of India on 28 May 2016. The provisions of the IBC were progressively brought into force thereafter.

The foundation

38. The IBC is a law which consolidated and amended existing legislation relating to re-organisation and insolvency resolution of corporate persons, partnerships and individuals. The long title to the legislation indicates the specific objects, which it is intended to facilitate. These objects include:

(i) A time bound process of re-organization and insolvency resolution;

(ii) Maximization of the value of assets;

(iii) Promoting entrepreneurship;

(iv) Facilitating the availability of credit; and

(v) Balancing the interests of all stakeholders.

39. Some of the key drawbacks of the legal regime, as it existed prior to the enactment of the IBC, were:

(i) The absence of a single legislation governing insolvency and bankruptcy;

(ii) A multiplicity of laws governing insolvency and bankruptcy of corporate entities;

(iii) The existence of multiple for a established to deal with the enforcement of diverse legislative provisions; and

(iv) The complexity caused by a maze of statutes resulting in inadequate, ineffective and delayed resolutions, occasioned by the (then) existing framework.

These inadequacies were noticed in the Statement of Objects and Reasons accompanying the introduction of the Bill. The IBC reflects a fundamental change in the erstwhile legal regime. A timely resolution of corporate insolvency was conceived as an instrument to support the development of credit markets, encourage entrepreneurship, enhance the ease of doing business and provide an environment conducive to investment, setting the economy on the path to growth and development. In resolving some of the complex issues which arise under the new legal regime envisaged under the IBC, it then becomes necessary to vacuum the cobwebs of the past. Interpreting the IBC in a manner which would facilitate the salutary objects which it is intended to achieve requires all stakeholders to shed concepts and notions associated with the earlier legal regime, which was largely a debtor's paradise. The earlier regime was one in which the debtor would largely remain in possession of the company and its assets and individual creditors were left to paddle their own canoe in headwinds controlled by those in debt and default.

40. The enactment of the IBC has marked a quantum change in corporate governance and the rule of law. First and foremost, the IBC perceives good corporate governance, respect for and adherence to the rule of law as central to the resolution of corporate insolvencies. Second, the IBC perceives corporate insolvency not as an isolated problem faced by an individual business entities but places it in the context of a framework which is founded on public interest in facilitating economic growth by balancing diverse stakeholder interests. Third, the IBC attributes a primacy to the business decisions taken by creditors acting as a collective body, on the premise that the timely resolution of corporate insolvency is necessary to ensure the growth of credit markets and encourage investment. Fourth, in its diverse provisions, the IBC ensures that the interests of corporate enterprises are not conflated with the interests of their promoters; the economic value of corporate structures is broader in content than the partisan interests of their managements. These salutary objectives of the IBC can be achieved if the integrity of the resolution process is placed at the forefront. Primarily, the IBC is a legislation aimed at re-organization and resolution of insolvencies. Liquidation is a matter of last resort. These objectives can be achieved only through a purposive interpretation which requires courts, while infusing meaning and content to its provisions, to ensure that the problems which beset the earlier regime do not enter through the backdoor through disingenuous stratagems.

The amendments

41. On 23 November 2017, Parliament intervened through its amending power to introduce Section 29A into the provisions of Chapter II and Section 35(1)(f) into the provisions of Chapter III. Chapter II of the IBC ,which enunciates provisions for the CIRP, has evolved over the previous four years. Chapter III enunciates provisions in regard to the liquidation process. Section 29A stipulates diverse categories of persons who will not be eligible to submit a resolution plan.

42. By the same amending Act through which Section 29A was introduced, Section 35(1)(f) was also amended with the introduction of a proviso. Section 35 specifies the powers of the liquidator as well as their duties, which are subject to the directions of the Adjudicating Authority. Section 35(1)(f) provides as follows:

"35. *Powers and duties of liquidator*.—(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:—

...

(f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:

Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant."

43. The Statement of Objects and Reasons accompanying the introduction of the Bill proposing the amendment dated 23 November 2017, elucidates the purpose of introducing the new provisions:

"2. The provisions for insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a resolution plan or participating in the acquisition process of the assets of a company at the time of liquidation. Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible."

44. During the course of the debate in the Lok Sabha on 29 December 2017, the Finance Minister noted that the IBC had been in operation for about a year. The new legislation had been a "learning experience". The Ordinance was promulgated since a large number of cases were "already pending resolution mechanism itself" and there was a danger that if the amendment was not immediately brought in, persons who were "ineligible" would have started applying as resolution applicants. The finance minister in the course of his speech highlighted the reason for the amendments when he observed as follows:

"…What do you do with promoters who are themselves responsible for these NPAs, that is clause C. Every creditor takes his haircut and there is an equitable distribution in the case of dissolution. In the case of resolution also, all type of creditors may take some haircut and the man who created the insolvency pays a fraction of the amount and comes back into management. Should we allow that to continue? The overwhelming view, as expressed by the Members, is that it should not be allowed. This was a gap which was there in the original Bill and by bringing in 29(a) we have tried to fill in that gap. That is the objective. In order that this provision must apply to all existing cases of resolution which are pending, that is the case for urgency. If we had not done this, then all such defaulters would have rejoiced because they would have merely walked back into these companies by paying only a fraction of these amounts. That is something which besides being commercially imprudent would also be morally unacceptable. That is the real rationale behind this particular Bill:."

(emphasis supplied)

45. The Report of the Insolvency Law Committee dated 3 March 2018 states that the intent behind introducing Section 29A was to prevent unscrupulous persons from gaining control over the affairs of the company. These persons included those who by their misconduct have contributed to the defaults of the company or are otherwise undesirable. The Committee observed:

"14.1. Section 29A was added to the Code by the Amendment Act. Owing to this provision, persons, who by their misconduct contributed to the defaults of the corporate debtor or are otherwise undesirable, are prevented from gaining or regaining control of the corporate debtor. This provision protects creditors of the company by preventing unscrupulous persons from rewarding themselves at the expense of creditors and undermining the processes laid down in the Code."

46. Significantly, the ineligibility which was engrafted by the amending legislation was incorporated in both the provisions of Chapter II dealing with the CIRP as well as in Chapter III dealing with the liquidation process. Section 29A stipulates the category of persons who "shall not be eligible to submit a resolution plan". The proviso to Section 35(1)(f) incorporates the same norm in the liquidation process, when it stipulates that the liquidator shall not sell the immovable and movable or actionable claims of the corporate debtor in

liquidation "to any person who is not eligible to be a resolution applicant". These words in Section 35(1)(f) are clearly referable to the ineligibility which is set up in Section 29A.

Judicial understanding

Chitra Sharma

47. The underlying purpose of introducing Section 29A was adverted to in a judgment of this court in *Chitra Sharma* v. *Union of India,* **REED 2018 SC 08562** : (2018) 18 SCC 575; hereinafter, referred to as "Chitra Sharma". One of us (Justice DY Chandrachud) speaking for a Bench of three learned judges took note of the Statement of Objects and Reasons accompanying the Bill and emphasised the purpose of Section 29A thus:

"[…]

38. Parliament has introduced Section 29A into IBC with a specific purpose. The provisions of Section 29A are intended to ensure that among others, persons responsible for insolvency of the corporate debtor do not participate in the resolution process. The Statement of Objects and Reasons appended to the Insolvency and Bankruptcy Code (Amendment) Bill, 2017, which was ultimately enacted as Act 8 of 2018, states thus:

"2. The provisions for insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a resolution plan or participating in the acquisition process of the assets of a company at the time of liquidation. Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible." (emphasis supplied)

Parliament was evidently concerned over the fact that persons whose misconduct has contributed to defaults on the part of debtor companies misuse the absence of a bar on their participation in the resolution process to gain an entry. Parliament was of the view that to allow such persons to participate in the resolution process would undermine the salutary object and purpose of the Act. It was in this background that Section 29A has now specified a list of persons who are not eligible to be resolution applicants." (emphasis supplied)

48. The Court held that "Section 29A has been enacted in the larger public interest and to facilitate effective corporate governance". The Court further

observed that "Parliament rectified a loophole in the Act which allowed backdoor entry to erstwhile managements in the CIRP".

Arcelormittal

49. In *Arcelormittal India Private Limited* v. *Satish Kumar Gupta and Others,* **REED 2018 SC 10541** : (2019) 2 SCC 1; hereinafter, referred to as "Arcelormittal", Justice Rohinton F Nariman, speaking for himself and Justice Indu Malhotra, reiterated the same principle when he underscored the need to impart a purposive interpretation to Section 29A "depending both on the text and context in which the provision was enacted":

"30. A purposive interpretation of Section 29A, depending both on the text and the context in which the provision was enacted, must, therefore, inform our interpretation of the same. We are concerned in the present matter with clauses (*c*), (*f*), (*i*) and (*j*) thereof."

The decision adverts to Section 29A as "a typical 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[1].

Swiss Ribbons

50. In *Swiss Ribbons*, **REED 2019 SC 01504**, the constitutionality of certain provisions of the IBC was challenged. Justice Rohinton F Nariman emphasised the object of the IBC in the following observations:

"27. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of

1. "32. The opening lines of Section 29A of the Amendment Act refer to a de facto as opposed to a de jure position of the persons mentioned therein. This is a typical 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. A wooden, literal, interpretation would obviously not permit a tearing of the corporate veil when it comes to the "person" whose eligibility is to be gone into. However, a purposeful and contextual interpretation, such as is the felt necessity of interpretation of such a provision as Section 29A, alone governs. For example, it is well settled that a shareholder is a separate legal entity from the company in which he holds shares. This may be true generally speaking, but when it comes to a corporate vehicle that is set up for the purpose of submission of a resolution plan, it is not only permissible but imperative for the competent authority to find out as to who are the constituent elements that make up such a company. In such cases, the principle laid down in *Salomon* v. *A. Salomon & Co. Ltd.* [*Salomon* v. *A. Salomon & Co. Ltd.*, 1897 AC 22 (HL)] will not apply. For it is important to discover in such cases as to who are the real individuals or entities who are acting jointly or in concert, and who have set up such a corporate vehicle for the purpose of submission of a resolution plan."

the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme—workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern.

(See *ArcelorMittal* [*ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta,* **REED 2018 SC 10541** : (2019) 2 SCC 1] at para 83, fn 3).

28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

51. While adverting to the earlier decision in *Chitra Sharma* and *Arcelormittal***, REED 2018 SC 10541**, which had elucidated the object underlying Section 29A, this Court in *Swiss Ribbons*, **REED 2019 SC 01504** held that the norm underlying Section 29A "continues to permeate" Section 35(1)(f) "when it applies not merely to resolution applicants, but to liquidation also". Rejecting the plea that Section 35(1)(f) is *ultra vires,* this Court held:

"102. According to the learned counsel for the petitioners, when immovable and movable property is sold in liquidation, it ought to be sold to any person, including persons who are not eligible to be resolution applicants as, often, it is the erstwhile promoter who alone may purchase such properties piecemeal by public auction or by private contract. The same rationale that has been provided earlier in this judgment will apply to this proviso as well — there is no vested right in an erstwhile promoter of a corporate debtor to bid for the immovable and movable property of the corporate debtor in liquidation. Further, given the categories of persons who are ineligible under Section 29A, which includes persons who are malfeasant, or persons who have fallen foul of the law in some way, and persons who are unable to pay their debts in the grace period allowed, are further, by this proviso, interdicted from purchasing assets of the corporate debtor whose debts they have either willfully not paid or have been unable to pay. The legislative purpose which permeates Section 29A continues to permeate the section when it applies not merely to resolution applicants, but to liquidation also. Consequently, this plea is also rejected."

A. Purposive Interpretation

52. This line of decisions, beginning with *Chitra Sharma***, REED 2018 SC 08562** and continuing to *Arcelormittal***, REED 2018 SC 10541** and *Swiss Ribbons*, **REED 2019 SC 01504** is significant in adopting a purposive interpretation of Section 29A. Section 29A has been construed to be a crucial link in ensuring that the objects of the IBC are not defeated by allowing "ineligible persons", including but not confined to those in the management who have run the company aground, to return in the new *avatar* of resolution applicants. Section 35(1)(f) is placed in the same continuum when the Court observes that the erstwhile promoters of a corporate debtor have no vested right to bid for the property of the corporate debtor in liquidation. The values which animate Section 29A continue to provide sustenance to the rationale underlying the exclusion of the same category of persons from the process of liquidation involving the sale of assets, by virtue of the provisions of Section 35(1)(f). More recent precedents of this Court continue to adopt a purposive interpretation of the provisions of the IBC. (See in this context the judgments in *Phoenix ARC Private Limited* v. *Spade Financial Service,* **REED 2021 SC 02501** : 2021 SCC OnLine SC 51 at paragraphs 103-104 *Ramesh Kymal* v. *M/s Siemens Gamesa Renewable Power Pvt Ltd.,* **REED 2021 SC 02503** C.A. No. 4050 of 2020, decided on 9 February 2021, at paragraphs 23 and 25 and *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited* v. *Axis Bank Limited,* **REED 2020 SC 02502** : (2020) 8 SCC 401, at paras 28.4 and 28.5.

Sustainable revival

53. The purpose of the ineligibility under Section 29A is to achieve a sustainable revival and to ensure that a person who is the cause of the problem either by a design or a default cannot be a part of the process of solution. Section 29A, it

must be noted, encompasses not only conduct in relation to the corporate debtor but in relation to other companies as well. This is evident from clause (c) ("an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as a non-performing asset"), and clauses (e), (f), (g), (h) and (i) which have widened the net beyond the conduct in relation to the corporate debtor.

54. The prohibition which has been enacted under Section 29A has extended, as noted above, to Chapter III while being incorporated in the proviso to Section 35(1)(f). Under the Liquidation Process Regulations, Chapter VI deals with the realization of assets. Regulation 32 is in the following terms:

"32. Sale of Assets, etc.

The liquidator may sell-

(a) an asset on a standalone basis;

(b) the assets in a slump sale;

(c) a set of assets collectively;

(d) the assets in parcels;

(e) the corporate debtor as a going concern; or

(f) the business(s) of the corporate debtor as a going concern: Provided that where an asset is subject to security interest, it shall not be sold under any of the clauses (a) to (f) unless the security interest therein has been relinquished to the liquidation estate."

Clauses (a) to (d) of Regulation 32 deal with the sale of assets on a stand-alone basis in a slump sale collectively or in parcels. Clauses (e) and (f) deal with the sale of the corporate debtor or its business as a going concern.

55. Regulation 32-A(1) then stipulates:

"32A. *Sale as a going concern.*-(1) Where the committee of creditors has recommended sale under clause (e) or (f) of regulation 32 or where the liquidator is of the opinion that sale under clause (e) or (f) of regulation 32 shall maximize the value of the corporate debtor, he shall endeavor to first sell under the said clauses."

Regulation 32-A(1) emphasizes the importance placed on the transfer of the corporate debtor or its business on a going concern basis.

56. Regulation 44 allows for a period of one year for the liquidation of the corporate debtor from the liquidation commencement date. Its proviso, however, allows for an additional period up to ninety days where the sale is attempted under sub-Regulation (1) of Regulation 32A. Regulation 44 is as follows:

"44. *Completion of liquidation.*-(1) The liquidator shall liquidate the corporate debtor within a period of one year from the liquidation commencement date, notwithstanding pendency of any application for avoidance of transactions under Chapter III of Part II of the Code, before the Adjudicating Authority or any action thereof:

Provided that where the sale is attempted under sub-regulation (1) of regulation 32A, the liquidation process may take an additional period up to ninety days.]

(2) If the liquidator fails to liquidate the corporate debtor within 29[one year], he shall make an application to the Adjudicating Authority to continue such liquidation, along with a report explaining why the liquidation has not been completed and specifying the additional time that shall be required for liquidation."

D.2. Interplay : IBC liquidation and Section 230 of the Act of 2013

57. Section 230 of the Act of 2013 is incorporated in Chapter XV which is titled "compromise, arrangement and amalgamations". Sub-section (1) of Section 230 provides as follows:

"230. *Power to compromise or make arrangements with creditors and members*.—(1) Where a compromise or arrangement is proposed—

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them, the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

Explanation.—For the purposes of this sub-section, arrangement includes a reorganization of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods."

58. A compromise or arrangement under Sub-section (1) of Section 230 may take place:

(i) between a company and its creditors or any subset of creditors; or

(ii) between a company and its members or subset of members.

59. Liquidation is one of the factual situations in which the provisions of Section 230 can be invoked. Section 230(1) can also be invoked in the case of a company which is wound up, as is evident from the statutory provision itself, which contemplates that an application may be submitted to the NCLT, acting as the Tribunal, by the liquidator.

60. Sub-section (1) of Section 230 was amended by Act 31 of 2016 with effect from 15 November 2016. Prior to the amendment, an application for compromise or arrangement could be moved before the Tribunal by:

(i) the company;

(ii) a creditor;

(iii) a member of the company; and

(iv) in the case of a company which is being wound up, by the liquidator.

Following the amendment, Section 230(1) envisages that an application in the case of a company which is being wound up may be presented by a liquidator who has been appointed under the Act of 2013 or under the IBC. Interestingly, Section 230 (except Sub-sections (11) and (12)) came into force on 7 December 2016. Where a compromise has been entered into with only a class of creditors, it will bind that class under the provisions of Section 230(6), which reads thus:

"(6) Where, at a meeting held in pursuance of sub-section (1), majority of persons representing three fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator and the contributories of the company."

61. Under Sub-section (6) of Section 230, the comprise or arrangement has to be agreed to by a "majority of persons representing 3/4th in value" of the creditors, members or a class of them. Upon the sanctioning of the compromise or arrangement by the NCLT, it binds the company, all the creditors or members or a class of them, as may be, or in the case of a company being wound up, the liquidator appointed under the Act of 2013 or the IBC and the contributories.

The Companies' Act 1956 : Section 391 and *Meghal Homes*

62. Prior to the enforcement of the Act of 2013, the erstwhile legislation - the Act of 1956 - contained an analogous provision in Section 391.

63. The provisions of Section 391 came up for interpretation in a decision of this Court in *Meghal Homes* (supra). Justice PK Balasubramanyan, speaking for the two judge Bench of this Court, adverted to the earlier decision in *Miheer H Mafatlal* v. *Mafatlal Industries Ltd.,* (1997) 1 SCC 579 which had dealt with the jurisdiction of the Company Court (or the Company Law Board as it then was) while sanctioning a scheme of merger or amalgamation of two companies. The earlier decision, as this Court noted, did not involve either a transferor or transferee in liquidation. Hence, this Court did not have occasion to consider whether "any additional tests have to be satisfied when the company concerned is in liquidation and a compromise or arrangement in respect of it is proposed".

Dealing specifically with a company which has been ordered to be wound up, this Court observed that the Company Court (before whom the jurisdiction under the erstwhile Section 391 was vested at the material time) had “necessarily to see whether the scheme contemplates revival of the business of the company". In that context, this Court observed:

“47. When a company is ordered to be wound up, the assets of it are put in possession of the Official Liquidator. The assets become custodia legis. The follow-up, in the absence of a revival of the company, is the realisation of the assets of the company by the Official Liquidator and distribution of the proceeds to the creditors, workers and contributories of the company ultimately resulting in the death of the company by an order under Section 481 of the Act, being passed. But, nothing stands in the way of the Company Court, before the ultimate step is taken or before the assets are disposed of, to accept a scheme or proposal for revival of the Company. In that context, the court has necessarily to see whether the scheme contemplates revival of the business of the company, makes provisions for paying off creditors or for satisfying their claims as agreed to by them and for meeting the liability of the workers in terms of Section 529 and Section 529A of the Act. Of course, the court has to see to the bona fides of the scheme and to ensure that what is put forward is not a ruse to dispose of the assets of the company in liquidation.”

Moreover, the Court held that in the case of a company which has been wound up it would have to perceive aspects of public interest, commercial morality and the existence of a *bona fide* intent to revive the company, while considering whether a compromise or arrangement put forward under Section 391 should be accepted. While the Court would not sit in appeal over the commercial wisdom of the shareholders, "it will certainly consider whether there is a genuine attempt to revive the company that has gone into liquidation and whether such revival is in public interest and conforms to commercial morality”. On the facts of the case, the Court found that it was difficult to hold that "it is a scheme for revival of the Company, the clear statutory intention behind entertaining a proposal under Section 391". These observations of the two judge Bench in *Meghal Homes* (supra) have a significant bearing on the nature of a compromise or arrangement which fell within the purview of Section 391 of the Act of 1956. This Court emphasized that where a company is in liquidation, its assets are *custodia legis*, the liquidator being the custodian for the distribution of the liquidation estate. A compromise or arrangement in respect of a company in liquidation must foster a revival of the company, this being (as the Court termed it) "the clear statutory intention behind entertaining a proposal under Section 391” in respect of a company in liquidation.

IBC liquidation and Section 230 scheme: a statutory continuum

64. Now, there is no reference in the body of the IBC to a scheme of compromise or arrangement under Section 230 of the Act of 2013. Sub-section (1) of Section

230 was however amended with effect from 15 November 2016 so as to allow for a scheme of compromise or arrangement being proposed on the application of a liquidator who has been appointed under the provisions of the IBC. The substratum of the submission of Mr Sandeep Bajaj, learned Counsel for the appellants, is that Section 230 is not regulated by the IBC but is a provision independent of it, though after the amendment of Sub-section (1), a compromise or arrangement can be proposed by the liquidator appointed under the IBC. Aligned to this submission, he urged that the decision in *Meghal Homes* (supra) recognises that the liquidator is an additional person who may submit an application under Section 391 of the Act of 1956 (corresponding to Section 230 of the Act of 2013). The submission of Mr Bajaj however misses the crucial interface between the provisions of Section 230 of the Act of 2013 in their engagement with a company in respect of which the provisions of the IBC have been invoked, resulting in an order of liquidation under Section 33 of the IBC. Liquidation of the company under the IBC, as emphasized by this Court in its previous decisions, is a matter of last resort. Section 33 requires the NCLT, acting as the Adjudicating Authority, to pass an order for the liquidation of the corporate debtor where:

(i) before the expiry of the insolvency resolution process period or the maximum period contemplated for its completion a resolution plan has not been received under Sub-section (6) of Section 30; or

(ii) the resolution plan has been rejected under Section 31 for non-compliance with the requirements of the provision.

65. Under Sub-Section (2) of Section 33, the Adjudicating Authority has to pass a liquidation order where the resolution professional, during the CIRP but before the confirmation of the resolution plan, intimates the Adjudicating Authority of the decision of the CoC approved by not less than 66 per cent of the voting shares to liquidate the corporate debtor. Under Section 34, upon the Adjudication Authority passing an order for liquidation of the corporate debtor under Section 33, the resolution professional appointed for the CIRP under Chapter II is to act as a liquidator for the purpose of liquidation. Section 35 proceeds to stipulate that subject to the directions of the Adjudicating Authority, the liquidator shall have the powers and duties enumerated in the provision.

66. What emerges from the above discussion is that the provisions of the IBC contain a comprehensive scheme, first, for the initiation of the CIRP at the behest of financial creditor under Section 7 or at the behest of the operational creditor under Section 9 or the corporate debtor under Section 10. Chapter II provides for the appointment of an interim resolution professional[1] in Section 17 and the constitution of a CoC under Section 21. Chapter II contemplates the submission of a resolution plan in Section 30 and the approval of the plan in

1. "IRP"

Section 31. Liquidation forms a part of a distinct Chapter - Chapter III. Liquidation under Section 33 is contemplated in specific eventualities which are adverted to in Sub-Section (1) and Sub-section (2) as noted above.

67. Now, it is in this backdrop that it becomes necessary to revisit, in the context of the above discussion the three modes in which a revival is contemplated under the provisions of the IBC. The first of those modes of revival is in the form of the CIRP elucidated in the provisions of Chapter II of the IBC. The second mode is where the corporate debtor or its business is sold as a going concern within the purview of clauses (e) and (f) of Regulation 32. The third is when a revival is contemplated through the modalities provided in Section 230 of the Act of 2013. A scheme of compromise or arrangement under Section 230, in the context of a company which is in liquidation under the IBC, follows upon an order under Section 33 and the appointment of a liquidator under Section 34. While there is no direct recognition of the provisions of Section 230 of the Act of 2013 in the IBC, a decision was rendered by the NCLAT on 27 February 2019 in *Y Shivram Prasad* v. *S Dhanapal,* 2019 SCC OnLine NCLAT 172[1]. NCLAT in the course of its decision observed that during the liquidation process the steps which are required to be taken by the liquidator include a compromise or arrangement in terms of Section 230 of the Act of 2013, so as to ensure the revival and continuance of the corporate debtor by protecting it from its management and from "a death by liquidation". The decision by NCLAT took note of the fact that while passing the order under Section 230, the Adjudicating Authority would perform a dual role: one as the Adjudicating Authority in the matter of liquidation under the IBC and the other as a Tribunal for passing an order under Section 230 of the Act of 2013. Following the decision of NCLAT, an amendment was made on 25 July 2019 to the Liquidation Process Regulations by the IBBI so as to refer to the process envisaged under Section 230 of the Act of 2013.

68. The statutory scheme underlying the IBC and the legislative history of its linkage with Section 230 of the Act of 2013, in the context of a company which is in liquidation, has important consequences for the outcome of the controversy in the present case. The first point is that a liquidation under Chapter III of the IBC follows upon the entire gamut of proceedings contemplated under that statute. The second point to be noted is that one of the modes of revival in the course of the liquidation process is envisaged in the enabling provisions of Section 230 of the Act of 2013, to which recourse can be taken by the liquidator appointed under Section 34 of the IBC. The third point is that the statutorily contemplated activities of the liquidator do not cease while inviting a scheme of compromise or arrangement under Section 230. The appointment of the liquidator in an IBC liquidation is provided in Section 34 and their duties are specified in Section 35. In taking recourse to the provisions of Section 230 of

1. 2019 SCC OnLine NCLAT 172; herein, referred to as “Y Shivram Prasad”

the Act of 2013, the liquidator appointed under the IBC is , above all, to attempt a revival of the corporate debtor so as to save it from the prospect of a corporate death. The consequence of the approval of the scheme of revival or compromise, and its sanction thereafter by the Tribunal under Sub-section (6), is that the scheme attains a binding character upon stakeholders including the liquidator who has been appointed under the IBC. In this backdrop, it is difficult to accept the submission of Mr Bajaj that Section 230 of the Act of 2013 is a standalone provision which has no connect with the provisions of the IBC. Undoubtedly, Section 230 of the Act of 2013 is wider in its ambit in the sense that it is not confined only to a company in liquidation or to corporate debtor which is being wound up under Chapter III of the IBC. Obviously, therefore, the rigors of the IBC will not apply to proceedings under Section 230 of the Act of 2013 where the scheme of compromise or arrangement proposed is in relation to an entity which is not the subject of a proceeding under the IBC. But, when, as in the present case, the process of invoking the provisions of Section 230 of the Act of 2013 traces its origin or, as it may be described, the trigger to the liquidation proceedings which have been initiated under the IBC, it becomes necessary to read both sets of provisions in harmony. A harmonious construction between the two statutes[1] would ensure that while on the one hand a scheme of compromise or arrangement under Section 230 is being pursued, this takes place in a manner which is consistent with the underlying principles of the IBC because the scheme is proposed in respect of an entity which is undergoing liquidation under Chapter III of the IBC. As such, the company has to be protected from its management and a corporate death. It would lead to a manifest absurdity if the very persons who are ineligible for submitting a resolution plan, participating in the sale of assets of the company in liquidation or participating in the sale of the corporate debtor as a 'going concern', are somehow permitted to propose a compromise or arrangement under Section 230 of the Act of 2013.

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1. G.P. Singh, *Principles of Statutory Interpretation* (1st edn., Lexis Nexis 2015) which notes that "Further, these principles [referring to the principle of harmonious construction] have also been applied in resolving a conflict between two different Acts" and providing the following examples-"*Jogendra Lal Saha* v. *State of Bihar,* 1991 Supp (2) SCC 654 (Sections 82 and 83 of the Forest Act, 1927 are special provisions which prevail over the provisions in the Sale of Goods Act); *Jasbir Singh* v. *Vipin Kumar Jaggi,* (2001) 8 SCC 289 (Section 64 of NDPS Act will prevail over section 307 CrPC 1974 as it is a special provision in a Special Act which is also later); *P.V. Hemlatha* v. *Kattam Kandi Puthiya Maliackal Saheeda*, (2002) 5 SCC 548 (conflict between section 23 of the Travancore Cochin High Court Act and section 98(3) Civil Procedure Code resolved by holding the latter to be special law); *Talchar Municipality* v. *Talcher Regulated Market Committee,* (2004) 6 SCC 178 (Section 4(4) of the Orissa Agricultural Produce Markets Act, 1956 was held to prevail over section 295 of the Orissa Municipalities Act, 1950 as the former was a special provision and also started with a non-obstante clause); and *Iridium India Telecom Ltd.* v. *Motorola Inc,* (2005) 2 SCC 145 (Letters Patent and rules made under it constitute special law for the High Court concerned and are not displaced by the general provisions of the Civil Procedure Code)"

69. The IBC has made a provision for ineligibility under Section 29A which operates during the course of the CIRP. A similar provision is engrafted in Section 35(1)(f) which forms a part of the liquidation provisions contained in Chapter III as well. In the context of the statutory linkage provided by the provisions of Section 230 of the Act of 2013 with Chapter III of the IBC, where a scheme is proposed of a company which is in liquidation under the IBC, it would be far-fetched to hold that the ineligibilities which attach under Section 35(1)(f) read with Section 29A would not apply when Section 230 is sought to be invoked.

Such an interpretation would result in defeating the provisions of the IBC and must be eschewed.

70. An argument has also been advanced by the appellants and the petitioners that attaching the ineligibilities under Section 29A and Section 35(1)(f) of the IBC to a scheme of compromise and arrangement under Section 230 of the Act of 2013 would be violative of Article 14 of the Constitution as the appellant would be "deemed ineligible" to submit a proposal under Section 230 of the Act of 2013. We find no merit in this contention. As explained above, the stages of submitting a resolution plan, selling assets of a company in liquidation and selling the company as a going concern during liquidation, all indicate that the promoter or those in the management of the company must not be allowed a back-door entry in the company and are hence, ineligible to participate during these stages. Proposing a scheme of compromise or arrangement under Section 230 of the Act of 2013, while the company is undergoing liquidation under the provisions of the IBC lies in a similar continuum. Thus, the prohibitions that apply in the former situations must naturally also attach to the latter to ensure that like situations are treated equally.

D.3. The 'Clean Slate'

71. A crucial limb of the submissions which have been urged by Mr Sandeep Bajaj and Mr Shiv Shankar Banerjee, learned Counsel appearing for the appellants and the petitioner is that both Section 12-A of the IBC and Section 230 of the Act of 2013 belong to what is described as the "settlement mechanism" which is distinct from the "resolution mechanism". The corporate debtor, it has been urged, will proceed to liquidation if no resolution is possible. Section 29A was designed to prevent a back-door entry to a class of persons considered to be ineligible to participate in the resolution process. Section 35(1)(f) extends the ineligibility where the liquidator is conducting a sale of the assets of the corporate debtor in liquidation. It has been submitted in this context that where an application for withdrawal under Section 12-A is allowed, the company reverts to the promoter. Placing a scheme under Section 230 of the Act of 2013 on the same pedestal, it has been urged that there is no reason to prevent a person who falls in the class of those ineligible under Section 29A from submitting a scheme of compromise or arrangement under Section 230 of

the Act of 2013. In order to amplify the line of submissions as recorded above, the following points have been urged:

(i) Though eight amendments have been brought about to the IBC between November 2017 and September 2020, the ineligibility contemplated by Section 29A and Section 35(1)(f) has not been expressly incorporated in Section 230 of the Act of 2013 even after the amendment to the IBC;

(ii) Under Section 230, the persons competent to submit a scheme are

(a) the company or its liquidator;

(b) the creditors; or (c) a member.

Section 230 does not prohibit a promoter or a person belonging to the ex-management, from proposing a scheme of compromise or arrangement. This creates a "front door opportunity" to the erstwhile management to come forth and save the company;

(iii) Under Section 30(1) of the IBC, a resolution plan can be submitted by a person who is not ineligible with reference to Section 29A. Under Subsection (4) of Section 30, for the approval of the resolution plan, a 66 per cent voting share only of the financial creditors is required. Sub-section 2(b) of Section 30 requires the resolution professional to examine whether the resolution plan provides for the payment of the debt of operational creditors which shall not be less than the amount which is payable to them in the event of liquidation. On the other hand, the provisions of Section 230 of the Act of 2013 are far more stringent in that they require a voting share of 75 per cent and, where the company is in liquidation, a settlement with all creditors including the operational creditors;

(iv) Section 35(1)(f) applies to the liquidator but does not apply to the NCLT, acting as either the Adjudicating Authority or as the Tribunal;

(v) A resolution plan upon being approved becomes binding on all stakeholders and is attended with all benefits unlike Section 230 of the Act of 2013;

(vi) Under Regulation 32 of the Liquidation Process Regulations, two modes are contemplated for the sale of the corporate debtor as a 'going concern', while four modes are contemplated for the sale of the assets of the corporate debtor. The prohibition under Section 35(1)(f) will apply only to a sale which is governed by Regulation 32, and will have no application to a scheme of compromise or arrangement which is proposed under Section 230; and

(vii) There is no mechanism in the IBC for effecting a compromise or arrangement, and since the only provision is contained in Section 230, there is no inconsistency with the IBC.

Withdrawal of application

72. Section 12A[1] of the IBC was inserted with effect from 6 June 2018 by Amending Act 26 of 2018. Under Section 12A, the Adjudicating Authority may allow the withdrawal of an application which is admitted under Sections 7, 9 and 10, on an application made by the applicant with the approval of a 90 per cent voting share of the CoC in such manner as may be specified. Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016[2], on the other hand, contemplates that the NCLT, functioning as the Adjudicating Authority, may permit a withdrawal of an application made under Rule 4 (by the financial creditor), Rule 6 (by the operational creditor) or Rule 7 (by the corporate applicant) on the request made by the applicant before its admission. Regulation 30-A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 contains provisions for the withdrawal of an application. Under Regulation 30-A[3], as it originally stood, an application for withdrawal under Section 12-A was required to be submitted before the issuance of an invitation for the expression of interest under Regulation 36-A. In the decision of this Court in *Swiss Ribbons***, REED 2019 SC 01504**, which was rendered on 25 January 2019, it was contemplated that an application for withdrawal may be presented between the period commencing from the admission of the application and the date of the constitution of the CoC. This led to the substitution of the Regulation 30-A[4] on

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1. "**12A. Withdrawal of application admitted under section 7, 9 or 10 -** The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified."
2. "**Adjudicating Authority Rules**"
3. "**30A. Withdrawal of Application**.-(1) An application for withdrawal under section 12A shall be submitted to the interim resolution professional or the resolution professional, as the case may be, in Form FA of the Schedule before issue of invitation for expression of interest under regulation 36A.
4. "**30A. Withdrawal of Application.**-(1) An application for withdrawal under section 12A may be made to the Adjudicating Authority.-

   (a) before the constitution of the committee, by the applicant through the interim resolution professional;

   (b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:

   Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

   (2) The application under sub-regulation (1) shall be made in Form FA of the Schedule accompanied by a bank guarantee-

   (a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application under clause (a) of sub-regulation (1); or

   (b) towards estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of regulation 31, till the date of filing of the application under clause (b) of sub-regulation (1).

25 July 2019. As substituted, Regulation 30-A stipulates that an application for withdrawal under Section 12-A may be made to the adjudicating authority:

(2) The application in sub-regulation (1) shall be accompanied by a bank guarantee towards estimated cost incurred for purposes of clauses (c) and (d) of regulation 31 till the date of application.

(3) The committee shall consider the application made under sub-regulation (1) within seven days of its constitution or seven days of receipt of the application, whichever is later.

(4) Where the application is approved by the committee with ninety percent voting share, the resolution professional shall submit the application under sub-regulation (1) to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

(5) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (4)."

(a) before the constitution of the CoC, by the applicant through the IRP; and

(b) after the constitution of the CoC, by the applicant through the IRP or the RP as the case may be.

However, where the application under clause (b) is made after the issuance of the invitation for expression of interest, the applicant has to state the reasons justifying withdrawal after the issuance of the invitation. In the decision of this Court in *Brilliant Alloys*, **REED 2018 SC 12540**, it has been held that a withdrawal may be contemplated even after the issuance of invitation of expression of interest. In *Swiss Ribbons*, **REED 2019 SC 01504**, the provisions of Section 12-A were upheld against the challenge that they violated Article 14

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(3) Where an application for withdrawal is under clause (a) of sub-regulation (1), the interim resolution professional shall submit the application to the Adjudicating Authority on behalf of the applicant, within three days of its receipt.

(4) Where an application for withdrawal is under clause (b) of sub-regulation (1), the committee shall consider the application, within seven days of its receipt.

(5) Where the application referred to in sub-regulation (4) is approved by the committee with ninety percent voting share, the resolution professional shall submit such application along with the approval of the committee, to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

(6) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (3) or (5).

(7) Where the application is approved under sub-regulation (6), the applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-regulation (2) till the date of approval by the Adjudicating Authority, as determined by the interim resolution professional or resolution professional, as the case may be, within three days of such approval, in the bank account of the corporate debtor, failing which the bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to any other action permissible against the applicant under the Code."

of the Constitution. Justice Rohinton F Nariman, while adverting to the decision in *Brilliant Alloys*, **REED 2018 SC 12540**, noted that Regulation 30-A(1) has been held not to be mandatory but directory because in a given case an application for withdrawal may be allowed for exceptional reasons even after issuance of an invitation for expression of interest under Section 36-A. Dealing with the provisions of Section 12-A, this Court observed:

"82. It is clear that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the adjudicating authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim.· A question arises as to what is to happen before a Committee of Creditors is constituted (as per the timelines that are specified, a Committee of Creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional). We make it clear that at any stage where the Committee of Creditors is not yet constituted, a party can approach NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the parties concerned and considering all relevant factors on the facts of each case.

83. The main thrust against the provision of Section 12-A is the fact that ninety per cent of the Committee of Creditors has to allow withdrawal. This high threshold has been explained in the ILC Report as all financial creditors have to put their heads together to allow such withdrawal as, ordinarily, an omnibus settlement involving all creditors ought, ideally, to be entered into . This explains why ninety per cent, which is substantially all the financial creditors, have to grant their approval to an individual withdrawal or settlement. In any case, the figure of ninety per cent, in the absence of anything further to show that it is arbitrary, must pertain to the domain of legislative policy, which has been explained by the Report (supra). Also, it is clear, that under Section 60 of the Code, the Committee of Creditors do not have the last word on the subject. If the Committee of Creditors arbitrarily rejects a just settlement and/or withdrawal claim, NCLT, and thereafter, NCLAT can always set aside such decision under Section 60 of the Code. For all these reasons, we are of the view that Section 12-A also passes constitutional muster."

Distinction between a withdrawal simpliciter and scheme of arrangement

73. The submission is that on the withdrawal of the application under Sections 7, 9 and 10, as the case may be, the company goes back to the same promoter in spite of such a promoter being ineligible under Section 29A for submitting a resolution plan. As such, it was urged that there is no reason or justification then

to preclude a promoter from presenting a scheme of compromise or arrangement under Section 230.

74. There is a fundamental fallacy in the submission. An application for withdrawal under Section 12-A is not intended to be a culmination of the resolution process. This, as the statutory scheme would indicate, is at the inception of the process. Rule 8 of the Adjudicating Authority Rules, as we have seen earlier, contemplates a withdrawal before admission. Section 12-A subjects a withdrawal of an application, which has been admitted under Sections 7, 9 and 10, to the requirement of an approval of ninety per cent voting shares of the CoC. The decision of this Court in *Swiss Ribbons* (para 82 extracted above) stipulates that where the CoC has not yet been constituted, the NCLT, functioning as the Adjudicating Authority, may be moved directly for withdrawal which, in the exercise of its inherent powers under Rule 11 of the Adjudicating Authority Rules, may allow or disallow the application for withdrawal or settlement after hearing the parties and considering the relevant factors on the facts of each case. A withdrawal in other words is by the applicant. The withdrawal leads to a status quo ante in respect of the liabilities of the corporate debtor. A withdrawal under Section 12-A is in the nature of settlement, which has to be distinguished both from a resolution plan which is approved under Section 31 and a scheme which is sanctioned under Section 230 of the Act of 2013. A resolution plan upon approval under Section 31(1) of the IBC is binding on the corporate debtor, its employees, members, creditors (including the central and state governments), local authorities, guarantors and other stakeholders. The approval of a resolution plan under Section 31 results in a "clean slate," as held in the judgment of this Court in *Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta,* **REED 2019 SC 11505** : (2020) 8 SCC 531. Justice Rohinton F Nariman, speaking for the three judge Bench of this Court, observed:

"105. Section 31(1) of the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders, including guarantors. This is for the reason that this provision ensures that the successful resolution applicant starts running the business of the corporate debtor on a fresh slate as it were. In *SBI* v. *V. Ramakrishnan* [*SBI* v. *V. Ramakrishnan*, **REED 2018 SC 08560** : (2018) 17 SCC 394 : (2019) 2 SCC (Civ) 458], this Court relying upon Section 31 of the Code has held: (SCC p. 411, para 25)

"25. Section 31 of the Act was also strongly relied upon by the respondents. This section only states that once a resolution plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section

31(1), in fact, makes it clear that the guarantor cannot escape payment as the resolution plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him.""

In the same vein, the Court observed:

"107. For the same reason, the impugned NCLAT judgment [*Standard Chartered Bank* v. *Satish Kumar Gupta,* 2019 SCC OnLine NCLAT 388] in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count."

75. The benefit under Section 31, following upon the approval of the resolution plan, is that the successful resolution applicant starts running the business of the corporate debtor on "a fresh slate". The scheme of compromise or arrangement under Section 230 of the Act of 2013 cannot certainly be equated with a withdrawal simpliciter of an application, as is contemplated under Section 12-A of the IBC. A scheme of compromise or arrangement, upon receiving sanction under Sub-section (6) of Section 230, binds the company, its creditors and members or a class of persons or creditors as the case may be as well as the liquidator (appointed under the Act of 2013 or the IBC). Both, the resolution plan upon being approved under Section 31 of the IBC and a scheme of compromise or arrangement upon being sanctioned under Sub-section (6) of Section 230, represent the culmination of the process. This must be distinguished from a mere withdrawal of an application under Section 12-A. There is a clear distinction between these processes, in terms of statutory context and its consequences and the latter cannot be equated with the former.

76. Additionally, there is no merit in the submission that Section 35(1)(f) applies only to a liquidator who conducts a sale of the property of the corporate debtor in liquidation but not to the NLCT, acting as the Tribunal, when it exercises its powers under Section 230 of the Act of 2013. The liquidator appointed under the provisions of Chapter III of the IBC is entrusted with several powers and duties. Sections 37 to 42 of the IBC are illustrative of the powers of the liquidator in the course of the liquidation. The liquidator exercises several functions which are of a quasi-judicial in nature and character. Section 35(1) itself enunciates that the powers and duties which are entrusted to the liquidator are "subject to the directions of the adjudicating authority". The liquidator, in other words, exercises functions which have been made amenable to the jurisdiction of the NCLT, acting as the Adjudicating Authority. To hold therefore that the ineligibility prescribed under the provisions of Section 35(1)(f) can be disregarded by the Tribunal for the purpose of considering an application for a scheme of compromise or arrangement under Section 230 of the Act of 2013, in respect of a company which is under liquidation under the IBC, would not be a correct construction of the provisions of law.

D.4 Constitutional validity of Regulation 2B - Liquidation Process Regulations

77. Regulation 2B(1) introduced on 25 July 2019 provides that where a compromise or arrangement is proposed under Section 230 of the Act of 2013, it shall be completed within ninety days of the order of liquidation under sub-Sections (1) and (4) of Section 33. The proviso to Regulation 2B has been inserted with effect from 6 January 2020 to stipulate that a person who is not eligible under the IBC to submit a resolution plan for insolvency resolution of the corporate debtor shall not be a party in any manner to such compromise or arrangement.

IBBI discussion papers

78. IBBI initially brought out a discussion paper on 27 April 2019. Para 3.1 of the discussion paper noted thus:

"3.1. Compromise or arrangement under Section 230 of the Companies Act 2013. If there is a proposal for a compromise or arrangement, a member, a creditor or the Liquidator may make an application to the NCLT under the Compromise Act 2013 (Act) (not the Adjudicating Authority under the Code) and then proceed in the manner directed by the NCTL in accordance with the Act. While compromise or arrangement under Section 230 of the Act is proposed, it must be utilize first and only on its closure/ failure, liquidation under the Code may commence. The Code read with regulations may provide that where a credible proposal is made to the Liquidator under Section 230 of the Act for compromise or arrangement of the CD within seven days of the order under Section 33 of the Code for liquidation, the Liquidator shall file an application under the said section within ten days of the order of liquidation under Section

33 of the Code. A member or a creditor may file an application under Section 230 of the Act within 10 days of the order of liquidation. If approved by the NCLT, the Liquidator shall complete the process under Section 230 within 90 days of the order of liquidation. The Regulations may provide that liquidation process under the Coe shall commence at the earlier of the four events:

(a) there is no proposal for compromise or arrangement within ten days;

(b) the NCLT does not approve the application under Section 230 of the Act,

(c) the process under Section 230 is not completed within 90 days or such extended period as may be allowed by the NCLT, or

(d) the process under Section 230 is not sanctioned under Section 230(6) of the Act.

A tight time schedule is necessary for conclusion of the process for compromise or arrangement to ensure that the liquidation process is concluded without undue delay."

79. IBBI noted in its discussion paper that the introduction of ineligibilities stipulated under Section 29-A of the IBC to Section 230 of the Act of 2013 would pose practical difficulties in its implementation. IBBI observed:

"3.3.3. Ineligibility: Proviso to section 35(1)(f) of the Code mandates that the Liquidator shall not sell the immovable and movable property or actionable claims of the CD in liquidation to any person who is not eligible to be a resolution applicant. This prohibits GCS to persons ineligible under section 29A. However, the law does not prohibit such ineligible persons to participate in compromise or arrangement under section 230 of the Act. It may be necessary to harmonise the provisions in the Code and the Act to provide level playing field. Some stakeholders feel that the ineligibility norms under section 29A of the Code may also apply to compromise or arrangement under section 230 of the Act. Other stakeholders feel that unlike liquidation under the Code, which is mostly Liquidator driven, the compromise or arrangement under the Act is mostly driven by the Tribunal. Further, section 29A of the Code has several exceptions, while section 230 of the Act deals with all kinds of companies in all situations. There will be practical difficulties in implementation of ineligibility for the purposes of section 230 of the Act. Therefore, it is proposed that the ineligibility norms under section 29A of the Code may not apply to compromise or arrangement under section 230 of the Act."

Be that as it may, the IBBI solicited public comments on its proposals. The IBBI evolved its view on the issue of whether Section 29-A should be made applicable to Section 230 of the Act of 2013 in its subsequent discussion paper.

80. The discussion paper brought out on 3 November 2019 by IBBI discussed the applicability of Section 29A of the IBC to a compromise and arrangement under Section 230 of the Act of 2013. The discussion paper notes that there

were many instances where the NCLAT had allowed the application under Section 230 of the Act of 2013. In that context, the discussion paper notes thus:

"21. Section 29 A of the Code prohibits certain persons from becoming a resolution applicant/ submitting a resolution plan in a CIRP. Proviso to section 35(1)(f) of the Code mandates that a Liquidator shall not sell the immoveable and moveable property or actionable claims of the CD in liquidation to any person who is not eligible to be a resolution applicant. These provisions were inserted in the Code with effect from 23rd November, 2017, while section 230 of the Act was amended along with the enactment of the Code. 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, which may result in person ineligible under section 29A acquiring control of the CD. Thus, while section 29A of the Code is applicable to a CD when it is under CIRP and when it is under Liquidation Process, it is not applicable to the same CD when it is undergoing compromise or arrangement, in between CIR process and liquidation process. This has created an anomaly that section 29A is applicable during the stage before and the stage after compromise and arrangement and not during compromise and arrangement.

22. Section 29A of the Code keeps out a person, who is a wilfull defaulter, who has an account with non-performing assets for a long period, etc. and therefore, is likely to be a risk to a successful resolution of insolvency of a company. This rationale equally applies to the stage of compromise or arrangement. 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, it may be necessary to harmonise the provisions in the Code and the Act to provide level playing field."

81. The discussion paper also notes that it was necessary to have a discussion on the following amongst other issues:

"(f) Should the persons ineligible under section 29A of the Code to be a resolution applicant be barred from becoming a party in compromise or arrangements under section 230 of the Companies Act, 2013?

(g) Or, should applicability of section 230 of the companies act, 2013 during liquidation process under the Coe be reviewed?"

82. Thereafter, public comments were invited. The discussion paper is what it professes to be – a matter for discussion in the public realm. This cannot be held to constitute an admission of IBBI that an applicant who is ineligible under Section 29A may submit a scheme of compromise or arrangement under Section 230 of the Act of 2013. The validity of the provisions of Regulation 2B, more specifically the proviso, has to be considered on their own footing.

Section 196 of the IBC

83. The powers and functions entrusted to IBBI are specified in Section 196 of the IBC. Section 196(1)(t) provides IBBI with the power to frame regulations, as follows:

"(t) 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 the corporate debtor or debtor; and"

Clause (t) empowers IBBI to make regulations and guidelines on matters relating to insolvency and bankruptcy, as may be required under the IBC.

Section 240

Section 240(1) empowers IBBI with the power to make regulations in the following terms:

"(1) The Board may, by notification, make regulations consistent with this Code and the rules made there under, to carry out the provisions of this Code."

Under Sub-Section (1) of Section 240, the power to frame regulations is conditioned by two requirements: first, the regulations have to be consistent with the provisions of the IBC and the rules framed by the Central Government; and second, the regulations must be to carry out the provisions of the IBC. Regulation 2B meets both the requirements, of being consistent with the provisions of IBC and of being made in order to carry out the provisions of the IBC, for the reasons discussed earlier in this judgment.

A. clarificatory exercise

84. The principal ground of challenge to Regulation 2B is that the regulation transgressed the authority of IBBI by introducing a disqualification or ineligibility in regard to the presentation of an application for a scheme of compromise or arrangement under Section 230 of the Act of 2013. It has been urged that IBBI, as an entity constituted by the IBC, had no statutory jurisdiction to amend the provisions of Section 230 of the Act of 2013 or to impose a restriction which operates under the purview of Section 230. The position in our view can be considered from two perspectives, independent of the provisions of Regulation 2B. We have indicated in the discussion earlier that even in the absence of the Regulation 2B, a person ineligible under Section 29A read with Section 35(1)(f) is not permitted to propose a scheme for revival under Section 230, in the case of a company which is undergoing a liquidation under the IBC. We have come to the conclusion, as noted for the reasons indicated earlier, that in the case of a company which is undergoing liquidation pursuant to the provisions of Chapter III of the IBC, a scheme of compromise or arrangement proposed under Section 230 is a facet of the liquidation process. The object of the scheme of compromise or arrangement is to revive the company. The principle was enunciated in the

decision in *Meghal Homes* (supra) while construing the provisions of erstwhile Section 391. The same rationale which permeates the resolution process under Chapter II (by virtue of the provisions of Section 29A) permeates the liquidation process under Chapter III (by virtue of the provisions of Section 35(1)(f)). That being the position, there can be no manner of doubt that the proviso to Regulation 2B is clarificatory in nature. Even absent the proviso, a person who is ineligible under Section 29A would not be permitted to propose a compromise or arrangement under Section 230 of the Act of 2013. We therefore do not find any merit in the challenge to the validity of Regulation 2B.

E. Epilogue

85. In paragraph 24 of our judgment, we noted the two issues which had been framed by the NCLAT in the impugned judgment in the first of the appeals. The first issue was "Whether in a liquidation proceeding under [IBC] the Scheme for Compromise and Arrangement can be made in terms of Sections 230 to 232 of the [Act of 2013]". While we noted in paragraph 25, that no challenge has been made by the appellant in regard to the finding of the NCLAT on this issue, it is imperative for us to make some remarks in relation to this issue and the larger issue of judicial intervention by the NCLT and NCLAT while adjudicating disputes under the IBC.

86. To begin with, we would like to take note of the observations made by the Insolvency Law Committee in its Report of February 2020[1]. The Committee began by acknowledging that the floating of schemes of compromise or arrangement under Sections 230 to 232 of the Act, even for companies undergoing liquidation, was not part of the framework under the IBC. This, the Committee noted, had led to a multiplicity of issues including, but not limited to, the duality of the role of the NCLT (as a supervisory Adjudicatory Authority under the IBC versus the driving Tribunal under the Act of 2013) and indeed the very question before us in this case, whether the disqualification under Section 29A and proviso to Section 35(1)(f) of the IBC also attaches to Section 230 of the Act of 2013. However, the Committee notes that judicial intervention by the NCLAT along with the IBBI's introduction of new regulations have led to some alignment in the two frameworks.

87. The Committee thereafter notes that the introduction of such schemes into the framework of the IBC may be worrisome since it will alter the incentives during the CIRP and lead to destructive delays, which often plagued the process under the Sick Industrial Companies (Special Provisions) Act, 1985.[2] However,

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1.Available at <https://ibbi.gov.in/uploads/resources/c6cb71c9f69f66858830630da08e45b4.pdf> accessed on 10 March 2021

2. Ibid, at para 4.5.

it nonetheless also acknowledges the benefits such schemes may have to offer[1]. Even so, the Committee concludes by noting that such schemes, if at all they are to be brought in, should not be under the Act of 2013 but the IBC itself. The Report notes thus:

"4.6…However, the Committee was of the view that such a process for compromise or settlement need not be effected only through the schemes mechanism under the Companies Act, 2013, and felt that the liquidator could be given the power to effect a compromise or settlement with specific creditors with respect to their claims against the corporate debtor under the Code.

4.7. Given the incompatibility of schemes of arrangement and the liquidation process, the Committee recommended that recourse to Section 230 of the Companies Act, 2013 for effecting schemes of arrangement or compromise should not be available during liquidation of the corporate debtor under the Code. However, the Committee felt that an appropriate process to allow the liquidator to effect a compromise or settlement with specific creditors should be devised under the Code." (emphasis in original)

88. Due to the ambiguity in the application of the two frameworks, it became imperative that a clarification be issued in this regard. The introduction of the proviso to Regulation 2B was a step in this direction which sought to clarify the position with respect to the applicability of the disqualifications set out in Section 29A of the IBC to Section 230 of the Act of 2013 in tandem with the legislative intendment.

89. At this juncture, it is important to remember that the explicit recognition of the schemes under Section 230 into the liquidation process under the IBC was through the judicial intervention of the NCLAT in *Y Shivram Prasad* (supra). Since the efficacy of this arrangement is not challenged before us in this case, we cannot comment on its merits. However, we do take this opportunity to offer a note of caution for the NCLT and NCLAT, functioning as the Adjudicatory Authority and Appellate Authority under the IBC respectively, from judicially interfering in the framework envisaged under the IBC. As we have noted earlier in the judgment, the IBC was introduced in order to overhaul the insolvency and bankruptcy regime in India. As such, it is a carefully considered and well thought out piece of legislation which sought to shed away the practices of the past. The legislature has also been working hard to ensure that the efficacy of this legislation remains robust by constantly amending it based on its experience.

Consequently, the need for judicial intervention or innovation from the NCLT and NCLAT should be kept at its bare minimum and should not disturb the

1. Ibid, para 4.6; In the Indian context, see Umakanth Varottil, 'The Scheme of Arrangement as a Debt Restructuring Tool in India: Problems and Prospects' (March 2017) NUS Working Paper 2017/005 available at <http://law.nus.edu.sg/wp>

foundational principles of the IBC. This conscious shift in their role has been noted in the report of the Bankruptcy Law Reforms Committee (2015) in the following terms:

"An adjudicating authority ensures adherence to the process.-At all points, the adherence to the process and compliance with all applicable laws is controlled by the adjudicating authority. The adjudicating authority gives powers to the insolvency professional to take appropriate action against the directors and management of the entity, with recommendations from the creditors committee. All material actions and events during the process are recorded at the adjudicating authority. The adjudicating authority can assess and penalise frivolous applications. The adjudicator hears allegations of violations and fraud while the process is on. The adjudicating authority will adjudicate on fraud, particularly during the process resolving bankruptcy. Appeals/actions against the behaviour of the insolvency professional are directed to the Regulator/Adjudicator."

90. Once again, we must clarify that our observations here are not on the merits of the issue, which has not been challenged before us, but only limited to serve as guiding principles to the benches of NCLT and NCLAT adjudicating disputes under the IBC, going forward.

F. Conclusion

91. Based on the above analysis, we find that the prohibition placed by the Parliament in Section 29A and Section 35(1)(f) of the IBC must also attach itself to a scheme of compromise or arrangement under Section 230 of the Act of 2013, when the company is undergoing liquidation under the auspices of the IBC. As such, Regulation 2B of the Liquidation Process Regulations, specifically the proviso to Regulation 2B(1), is also constitutionally valid. For the above reasons, we have come to the conclusion that there is no merit in the appeals and the writ petition. The civil appeals and writ petition are accordingly dismissed.

92. Pending application(s), if any, stand disposed of. **|||**

REED 2021 SC 03551

Alok Kaushik v. Mrs. Bhuvaneshwari Ramanathan and Others

SUPREME COURT OF INDIA

15 March 2021

The Supreme Court observed that the Adjudicating Authority is sufficiently empowered under Section 60(5)(c) of the IBC to make a determination of the amount which is payable to an expert valuer as an intrinsic part of the CIRP costs. Regulation 34 of the IRP Regulations 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.

Case Analysis

Bench/ Coram	Dr. Dhananjaya Y. Chandrachud, J. M. R. Shah, J.
Citation	REED 2021 SC 03551
Case Number	Civil Appeal No. 4065 of 2020
Subject	Corporate Insolvency
Keywords	corporate debtor, adjudicating authority, resolution professional, valuation exercise, functus officio, initiation of CIRP, IBBI.
Legislation cited	IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 Regulation 16A(7), Regulation 27, Regulation 30A(2), Regulation 30A(2)(a), Regulation 30A(2)(b), Regulation 30A(7), Regulation 31, Regulation 32, Regulation 33, Regulation 34 Insolvency and Bankruptcy Code, 2016 Section 5(13), Section 12A, Section 14(1)(d), Section 25A, Section 60, Section 60(5)(c), Section 62, Section 12 (A), Section 217, Section 218, Section 220

	Constitution of India, 1950 Article 142
Cases Cited	Gujarat Urja Vikas Nigam Limited v. Amit Gupta and Others **REED 2021 SC 03533**
Counsels	*For the Applicant/ Plaintiff/ Petitioner/ Appellant:* Manish Paliwal, Advocate *For the Respondent/ Defendant:* None

REED 2021 SC 03551

SUPREME COURT OF INDIA

Bench / Coram:

Dr. Dhananjaya Y. Chandrachud, J.
M. R. Shah, J.

Alok Kaushik—*Appellant*

Versus

Mrs Bhuvaneshwari Ramanathan and Others—*Respondent*

Civil Appeal No. 4065 of 2020

15 March 2021

Counsels:

For the Applicant/ Plaintiff/ Petitioner/ Appellant: Manish Paliwal, Advocate

For the Respondent/ Defendant: None

JUDGMENT

Dr. Dhananjaya Y Chandrachud, J.-Admit.

2. The present appeal arises out of proceedings relating to the insolvency of a company by the name of Kavveri Telecom Infrastructure Limited ("Corporate Debtor"). The National Company Law Tribunal, Bengaluru ("NCLT" or "Adjudicating Authority") initiated the Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor by its order dated 21 March 2019. By an order dated 26 August 2019, the first respondent was appointed as the Resolution Professional ("RP").

3. By a letter dated 16 September 2019, the first respondent appointed the appellant as a registered valuer of the Plant and Machinery of the Corporate Debtor, under Regulation 27 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("IRP Regulations"). The appellant was appointed to value the plant and machinery at 115 sites of the Corporate Debtor across India. The appellant's appointment fee (Rs 7.50 lakhs plus applicable GST) and other expenses were ratified by the Committee of Creditors ("CoC"), led by the second respondent, in its meeting held on 9 December 2019.

4. The appellant claims to have conducted valuation work of over eighty-four sites and to have visited forty sites. Further, several outstation meetings were also stated to have been conducted between the appellant and the first

respondent. The appellant has stated that he paid for expenses in the sum of Rs 52,000.

5. The National Company Law Appellate Tribunal ("NCLAT" or "Appellate Authority") set aside the initiation of CIRP against the Corporate Debtor by an order dated 18 December 2019. The NCLAT remanded the matter back to the NCLT to decide on the issue of CIRP costs. By an order dated 20 December 2019, the NCLT decided on the fee of the RP and reduced it by 20% from the fee ratified by the CoC.

6. In view of the order dated 18 December 2019 of the NCLAT, the first respondent cancelled the appointment of the appellant on 19 December 2019. In relation to the fee payable to the appellant, the first respondent requested him to consider a waiver. In return, the appellant agreed to reduce his fee by 25% from the fee ratified by the CoC, along with the expenses payable. However, on 2 March 2020, the first respondent informed the appellant that the fee as ratified could not be paid, and paid a sum of Rs 50,000.

7. The appellant then filed an application[1] under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("IBC") before the NCLT challenging the non-payment of the fees. However, the NCLT dismissed the application by an order dated 29 June 2020 concluding that it had been rendered *functus officio*. In appeal, the NCLAT by an order dated 13 October 2020 rejected the contention of the appellant, noting that an amount of Rs 50,000 had already been paid over. The appellant moved this Court in an appeal under Section 62 of the IBC, for challenging the order of the NCLAT.

8. On 11 January 2021, this Court issued notice in the appeal and, while doing so, passed the following order:

"1. Mr Manish Paliwal, learned counsel appearing on behalf of the appellant submits that:

(i) The appellant was appointed as a Registered Valuer on 16 September 2019, and that his professional fees and other expenses in the amount of Rs 7.50 lakhs were ratified by the Committee of Creditors on 19 December 2019;

(ii) The NCLAT by its order dated 18 December 2019 set aside the corporate insolvency resolution process and the proceedings were remitted to the NCLT to decide on the CIRP costs;

1. CA No 192 of 2020

(iii) On 20 December 2019, the NCLT determined the fees which were payable to the Interim Resolution Professional; and

(iv) However, despite the order of the NCLAT, no determination was made by the NCLT of the amount which was due and payable to the appellant for the work which was done as a Registered Valuer, recording that an amount of Rs 50,000 has been paid.

2. Issue notice, returnable in four weeks.

3. Dasti, in addition, is permitted."

9. The Office Report indicates that all the respondents have been served. By an order dated 19 February 2021, fresh notice was directed to be served on the Corporate Debtor, returnable in three weeks. Service has since been completed.

10. The issue in the present appeal relates to the costs, charges, expenses and professional fees 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 Adjudicating Authority or, as the case may be, Appellate Authority.

11. The submission of the appellant is that neither the NCLT nor the NCLAT have applied their mind to the professional charges payable to him in his capacity as a registered valuer. According to the appellant, he had completed the valuation of eighty-four sites and undertaken expenses of Rs 52,000 in the valuation exercise. During the course of the hearing Mr Manish Paliwal, learned counsel appearing on behalf of the appellant, also submits that an amount of Rs 35,000 was paid towards GST by the appellant. But the real issue which has been sought to be canvassed in the appeal is that in a situation such as present, where the CIRP was set aside by the Appellate Authority, there has to be within the framework of the IBC, a modality for determining the claim of a professional valuer such as the appellant. The NCLT came to the conclusion that it was *functus officio*. The NCLAT declined to exercise its appellate jurisdiction.

12. The expression 'insolvency resolution costs' has been defined in Section 5(13) of the IBC in the following terms:

"(13) "*insolvency resolution process costs" means.*-(a) the amount of any interim finance and the costs incurred in raising such finance;

(b) the fees payable to any person acting as a resolution professional;

(c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;

(d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and

(e) any other costs as may be specified by the Board;"

13. Regulation 31 of the IRP Regulations is contained in Chapter 9, which is titled 'Insolvency Resolution Process Costs'. Regulation 31 is in the following terms:

"31. *Insolvency resolution process costs*.-"Insolvency resolution process costs" under Section 5(13)(e) shall mean-(a) amounts due to suppliers of essential goods and services under Regulation 32;

(aa) fee payable to authorized representative under sub-regulation (7) of regulation 16A;

(ab) out of pocket expenses of authorized representative for discharge of his functions under section 25A;

(b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);

(c) expenses incurred on or by the resolution professional to the extent ratified under regulation 33;

(d) expenses incurred on or by the resolution professional fixed under regulation 34; and

(e) other costs directly relating to the corporate insolvency resolution process and approved by the committee."

14. Of the clauses of Regulation 31, of particular importance to the present case is clause (c) which enunciates expenses incurred on or by the IRP to the extent ratified under Regulation 33. Clause (e) refers to other costs directly relating to the CIRP and approved by the CoC. Regulation 33 provides for the costs of the IRP:

"33. *Costs of the interim resolution professional.*-(1) The applicant shall fix the expenses to be incurred on or by the interim resolution professional.

2. The Adjudicating Authority shall fix expenses where the applicant has not fixed expenses under sub-regulation (1).

3. The applicant shall bear the expenses which shall be reimbursed by the committee to the extent it ratifies.

4. The amount of expenses ratified by the committee shall be treated as insolvency resolution process costs.

Explanation.-For the purposes of this regulation, "expenses" include the fee to be paid to the interim resolution professional, fee to be paid to insolvency professional entity, if any and fee to be paid to professionals, if any, and other expenses to be incurred by the interim resolution professional."

15. "Resolution professional costs" are defined in Regulation 34:

"34. *Resolution professional costs.*-The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.

Explanation.-For the purposes of this regulation, "expenses" include the fee to be paid to the resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the resolution professional."

16. Where an application for withdrawal is filed under Section 12A of the IBC, a provision has been made in Regulation 30A(7) in regard to the deposit of expenses. Regulation 30A(7) provides as follows:

"30A. Withdrawal of application.

[...]

(7) Where the application is approved under sub-regulation (6), the applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-regulation (2) till the date of approval by the Adjudicating Authority, as determined by the interim resolution professional or resolution professional, as the case may be, within three days of such approval, in the bank account of the corporate debtor, failing which the bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to any other action permissible against the applicant under the Code."

17. Clause 2 of Regulation 30A, which is referred to in clause 7, is as follows:

"(2) The application under sub-regulation (1) shall be made in form FA of the Schedule accompanied by a bank guarantee-

(a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application under clause (a) of sub-regulation (1); or

(b) towards estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of regulation 31, till the date of filing of the application under clause (b) of sub-regulation (1)."

18. Regulation 30(A) would not apply specifically to the present situation, since it deals with a case where an application is withdrawn under Section 12A of the IBC. The appellant is justified in contending that there must be a forum within the ambit and purview of the IBC which has the jurisdiction to make a determination on a claim of the present nature, which has been instituted by a valuer who was appointed in pursuance of the initiation of the CIRP by the RP. After the NCLAT set aside the CIRP and remitted the proceedings to the NCLT to decide on the CIRP costs, the NCLT held that it was rendered *functus officio* in relation to the appellant's claim. This, in our view, would be an incorrect reading

of the jurisdiction of the NCLT as an Adjudicating Authority under the IBC. In a recent judgment in *Gujarat Urja Vikas Nigam Limited* v. *Amit Gupta and Others,* **REED 2021 SC 03533** : 2021 SCC OnLine SC 194, this Court clarified the jurisdiction of the NCLT/NCLAT under Section 60(5)(c)[1] of the IBC in the following terms:

"71. The institutional framework under the IBC contemplated the establishment of a single forum to deal with matters of insolvency, which were distributed earlier across multiple for ... Therefore, considering the text of Section 60(5)(c) and the interpretation of similar provisions in other insolvency related statutes, NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the Corporate Debtor. However, in doing do, we issue a note of caution to the NCLT and NCLAT to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and for a when the dispute is one which does not arise solely from or relate to the insolvency of the Corporate Debtor. The nexus with the insolvency of the Corporate Debtor must exist." (Emphasis supplied)

19. 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. The NCLT would have been justified in exercising its jurisdiction under Section 60(5)(c) of the IBC and, in exercise of our jurisdiction under Article 142 of the Constitution, we accordingly order and direct that in a situation such as the present case, the Adjudicating Authority is sufficiently empowered under Section 60(5)(c) of the IBC to make a determination of the amount which is payable to an expert valuer as an intrinsic part of the CIRP costs. Regulation 34 of the IRP Regulations 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.

20. The NCLT in its order dated 29 June 2020, while dismissing the application of the appellant for the payment of fees, observed that the Insolvency and Bankruptcy Board of India ("IBBI") is the competent authority to deal with allegations against the RP relating to their failure to discharge statutory duties

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1. "Section 60 (5) (c) – Adjudicating Authority for Corporate Persons:-(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of-

   .....

   (c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code."

(paragraph 7). Section 217 of the IBC empowers a person aggrieved by the functioning of an RP to file a complaint to the IBBI. If the IBBI believes on the receipt of the complaint that any RP has contravened the provisions of IBC, or the rules, regulations or directions issued by the IBBI, it can, under Section 218 of the IBC, direct an inspection or investigation. Under Section 220 of the IBC, IBBI can constitute a disciplinary committee to consider the report submitted by the investigating authority. If the disciplinary committee is satisfied that sufficient cause exists, it can impose a penalty. The availability of a grievance redressal mechanism under 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. In any event, 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.

21. We accordingly allow the appeal and set aside the impugned judgment and order of the NCLAT dated 13 October 2020. The proceedings shall accordingly stand 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. In order to facilitate a fresh determination by the NCLT, the order passed by the NCLT on 18 December 2019 is also set aside and CA No 192 of 2020 shall stand restored to the file of the NCLT for determination afresh in the light of the above observations.

22. Pending applications, if any, stand disposed of. **|||**

REED 2021 SC 03571

Laxmi Pat Surana v. Union Bank of India and Another

SUPREME COURT OF INDIA

26 March 2021

The Financial Creditor had extended a credit facility to a proprietorship firm, which failed to repay the amount. The credit was guaranteed by a company. The Financial Creditor filed an application under section 7 for CIRP of the Corporate Debtor (guarantor company). The application was contested on the ground that the principal borrower was not a corporate person. The Adjudicating Authority admitted the application as the Corporate Debtor was coextensively liable to repay the debt, and the NCLAT confirmed it. While dismissing the appeal, the Apex Court observed that the principal borrower may or may not be a corporate person, but if a corporate person extends guarantee for the loan transaction concerning a principal borrower not being a corporate person, it would still be covered within the meaning of expression 'corporate debtor' under section 3(8) of the Code. In law, the status of the guarantor, who is a corporate person, metamorphoses into Corporate Debtor the moment principal borrower, regardless of not being a corporate person commits default in payment of debt which has become due and payable.

Case Analysis

Bench/ Coram	A.M. Khanwilkar, J B.R. Gavai, J. Krishna Murari
Citation	REED 2021 SC 03571
Case Number	Civil Appeal No. 2734 of 2020
Subject	Corporate Insolvency
Keywords	remedy, financial assets, civil suit, financial institutions, expedition, extraordinary jurisdiction, appropriate tribunal, high court, interim orders, alternative remedy, appeal, appellate tribunal, evidence, impugned order, demand notice, legitimate dues, fallacious, financial assets, supreme court, civil appeal, investments, criminal proceedings, investigation.

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Section 2, Section 2(f), Section 2(haa), Section 3(6), Section 3(7), Section 3(8), Section 3(10), Section 3(11), Section 3(12), Section 3(37), Section 4(1), Section 5(7), Section 5(5A), Section 5(8), Section 7, Section 30(4), Section 60, Section 238A

Companies Act, 1956
Section 125, Section 127, Section 137

Limitation Act, 1963
Section 3, Section 5, Section 18, Article 62Article 137

Recovery of Debts Due to Banks and Financial Institutions Act, 1993
Section 19

The Indian Contract Act, 1872
Section 128

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(2019) 9 SCC 158

Counsels

For the Applicant/ Plaintiff/ Petitioner/ Appellant: Abhijit Sinha Advocate

For the Respondent/ Defendant: O.P. Gaggar, Advocate

REED 2021 SC 03571

SUPREME COURT OF INDIA

Bench / Coram:

A.M. Khanwilkar, J.
B.R. Gavai, J.
Krishna Murari, J.

Laxmi Pat Surana—*Appellant*

Versus

Union Bank of India and Another—*Respondent*

Civil Appeal No. 2734 of 2020

26 March 2021

Counsels:

For the Applicant/ Plaintiff/ Petitioner/ Appellant: Abhijit Sinha Advocate

For the Respondent/ Defendant: O.P. Gaggar, Advocate

JUDGMENT

A.M. Khanwilkar, J.-Two central issues arise for our determination in this appeal, as follows:-

(i) Whether an action under Section 7 of the Insolvency and Bankruptcy Code, 2016[1] can be initiated by the financial creditor (Bank) against a corporate person (being a corporate debtor) concerning guarantee offered by it in respect of a loan account of the principal borrower, who had committed default and is not a "corporate person" within the meaning of the Code?

(ii) Whether an application under Section 7 of the Code filed after three years from the date of declaration of the loan account as Nonperforming Asset,[2] being the date of default, is not barred by limitation?

2. Briefly stated, respondent No. 1 bank[3] extended credit facility to M/s. Mahaveer Construction,[4] a proprietary firm of the appellant, through two loan agreements in years 2007 and 2008 for a term loan of Rs. 9,60,00,000/ (Rupees nine crore sixty lakhs only) and an additional amount of Rs.

1. for short, "the Code"
2. for short, "NPA"
3. for short, "the Financial Creditor"
4. for short, "the Principal Borrower"

2,45,00,000/(Rupees two crore fortyfive lakhs only), respectively. The loan amount was disbursed to the Principal Borrower. M/s. Surana Metals Limited,[1] of which the appellant is also a Promoter/Director, had offered guarantee to the two loan accounts of the Principal Borrower. The stated loan accounts were declared NPA on 30.1.2010. The Financial Creditor then issued a recall notice on 19.2.2010 to the Principal Borrower, as well as, the Corporate Debtor, demanding repayment of outstanding amount of Rs. 12,35,11,548/ (Rupees twelve crore thirty-five lakhs eleven thousand five hundred forty-eight only).

3. The Financial Creditor then filed an application under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993[2] against the Principal Borrower before the Debt Recovery Tribunal[3] at Kolkata.

4. During the pendency of the stated action initiated by the Financial Creditor, the Principal Borrower had repeatedly assured to pay the outstanding amount, but as that commitment remained unfulfilled, the Financial Creditor eventually wrote to the Corporate Debtor on 3.12.2018 in the form of a purported notice of payment under Section 4(1) of the Code. The Corporate Debtor replied to the said notice of demand vide letter dated 8.12.2018, *inter alia*, clarifying that it was not the Principal Borrower nor owed any financial debt to the financial creditor and had not committed any default in repayment of the stated outstanding amount. This communication was sent without prejudice.

5. The Financial Creditor then proceeded to file an application under Section 7 of the Code on 13.2.2019 for initiating Corporate Insolvency Resolution Proceeding[4] against the Corporate Debtor, before the National Company Law Tribunal, Kolkata.[5] This application came to be resisted on diverse counts and in particular, on the preliminary ground that it was not maintainable because the Principal Borrower was not a "corporate person"; and further, it was barred by limitation, as the date of default was 30.1.2010, whereas, the application had been filed on 13.2.2019 i.e., beyond the period of three years. These two preliminary objections came to be negatived by the Adjudicating Authority vide judgment and order dated 6.12.2019.

6. The Adjudicating Authority held that the action had been initiated against the Corporate Debtor, being coextensively liable to repay the debt of the Principal Borrower and having failed to do so despite the recall notice, became Corporate Debtor and thus liable to be proceeded with under Section 7 of the Code. As regards the second objection, the Adjudicating Authority found that the Principal Borrower, as also, the Corporate Debtor had admitted and acknowledged the

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1. for short, the "Corporate Debtor"
2. for short, "the 1993 Act"
3. for short, "DRT"
4. for short, "the CIRP"
5. for short, the "Adjudicating Authority" or "NCLT", as the case may be.

debt time and again, lastly on 8.12.2018 and thus the application filed on 13.2.2019 was within limitation.

7. The appellant carried the matter before the National Company Law Appellate Tribunal[1] New Delhi by way of Company Appeal (AT) (Ins) No. 77 of 2020. The NCLAT vide impugned judgment and order dated 19.3.2020, dismissed the appeal and affirmed the conclusion reached by the Adjudicating Authority on the two preliminary objections raised by the appellant.

8. The appellant, feeling aggrieved, has approached this Court by way of present appeal reiterating the two preliminary objections referred to above. This Court vide order dated 28.7.2020 issued notice in this appeal, recording the principal ground urged at that time. The order reads thus:-

"A question has been raised by learned counsel for the appellant that the proprietorship firm had taken the loan, the principal borrower has to be corporate entity, in order to maintain the proceedings under the Insolvency and Bankruptcy Code.

Issue notice confined to the aforesaid aspect returnable in four weeks.

Steps be taken within three days from today. If the steps are not taken within the stipulated time, the civil appeal shall stand dismissed without further reference to the Court.

There shall be interim stay on the operation of impugned judgment till the next date of hearing.

List in the last week of August, 2020."

9. According to the appellant, Section 7 plainly ordains that an application can be filed by a financial creditor only against the corporate debtor. A corporate debtor can either be a corporate person, who had borrowed money or a corporate person, who gives guarantee regarding repayment of money borrowed by another corporate person. In other words, the Code cannot apply in respect of "debts" of an entity who is not a "corporate person". This position is reinforced by the fact that initiation of insolvency of firms and/or individuals in terms of Part III of the Code has still not been notified. Further, Section 2 of the Code came to be amended to clarify that partnership firms and proprietorship firms would fall within Part III of the Code on the basis of the differentiation made in the report of the Insolvency Law Committee, February, 2020, which reads thus:-

"2. DEFINITION OF 'PROPRIETORSHIP FIRMS'

2.1 Part III of the Code is applicable to debtors who are individuals or partnership firms. Section 2 of the Code was recently amended to clarify the different

1. for short, "NCLAT"

categories of debtors falling within Part III of the Code – (i) personal guarantors to corporate debtors, (ii) partnership firms and proprietorship firms, and (iii) other individuals. Though section 2(f) of the Code now includes the words "proprietorship firms", this term has not been defined in another legislation.

2.2 Proprietorship firms are businesses that are owned, managed and controlled by one person. They are the most common form of businesses in India and are based in unlimited liability of the owner. Legally, a proprietorship is not a separate legal entity and is merely the name under which a proprietor carries on business. Due to this, proprietorships are usually not defined in statutes. Though some statutes define proprietorships, such definition is limited to the context of the statute. For example, Section 2(haa) of the Chartered Accountants Act, 1949 defined a 'sole proprietorship' as "*an individual who engages himself in practice of accountancy or engages in services …*". Notably, '*proprietorship firms*' have also not been statutorily defined in many other jurisdictions." We may also usefully advert to Chapter 7 of the same report. It deals with the issue relating to Guarantors. Paragraph 7.3 thereof reads thus:-

"7.3 The Committee noted that while, under a contract of guarantee, a creditor is not entitled to recover more than what is due to it, an action against the surety cannot be prevented solely on the ground that the creditor has an alternative relief against the principal borrower. Further, as discussed above, the creditor is at liberty to proceed against either the debtor alone, or the surety alone, or jointly against both the debtor and the surety. Therefore, restricting a creditor from initiating CIRP against both the principal borrower and the surety would prejudice the right of the creditor provided under the contract of guarantee to proceed simultaneously against both of them." (Emphasis supplied)

It is urged that any other view would inevitably result in indirectly enforcing the Code even against entities, such as partnership firms and proprietorship firms and/or individuals, who are governed by Part III of the Code, without notifying the same. According to the appellant, a corporate guarantee is one which is extended in respect of a loan given to a "corporate person", coming within the purview of Part II of the Code. That is reinforced by the amendment Act 26 of 2018 on account of insertion of definition of "corporate guarantor" with effect from 6.6.2018, as can be discerned from the portion of report of Insolvency Law Committee, dated 26.3.2018, which reads thus:-

"23.1 Section 60 of the Code requires that the Adjudicating Authority for the corporate debtor and personal guarantors should be the NCLT which has territorial jurisdiction over the place where the registered office of the corporate debtor is located. This creates a link between the insolvency resolution or bankruptcy processes of the corporate debtor and the personal guarantor such that the matters relating to the same debt are dealt in the same tribunal. However, no such link is present between the insolvency resolution or liquidation

processes of the corporate debtor and the corporate guarantor. It was decided that section 60 may be suitably amended to provide for the same NCLT to deal with the insolvency resolution or liquidation processes of the corporate debtor and its corporate guarantor. For this purpose, the term "corporate guarantor" will also be defined." (Emphasis supplied)

In substance, it is urged that since an application under Section 7 of the Code cannot be maintained against a principal borrower, who is not a "corporate person", it must follow that in respect of such transaction, no action under Section 7 of the Code can be maintained against a company or corporate person, merely because it had extended guarantee thereto.

10. As regards maintainability of the subject application under Section 7 on the ground of being barred by limitation, it is urged by the appellant that the date of default must be reckoned as 30.1.2010, on which date, the loan accounts were declared as NPA. That fact has been duly noted in the subject application filed on 13.2.2019. Hence, the application was ex facie barred by limitation in view of Article 137 of the Limitation Act, 1963.[1] It is urged that Section 18 of the Limitation Act invoked by the Financial Creditor and which commended to the Adjudicating Authority and the NCLAT, has no application to the proceedings under the Code. It applies only to suits for recovery and in respect of property or right. The Insolvency and Bankruptcy Code is a self-contained code. Section 7 thereof merely refers to the factum of default being the cause of action for maintaining the application. The amended provision in the form of Section 238A of the Code, which has come into effect with effect from 6.6.2018, is only a clarificatory provision. It is urged that there is distinction between the proceedings for recovery and winding up under the Companies Act and the action under Section 7 of the Code. It is further urged that action under the Code cannot be invoked nor can be used as a fresh opportunity for creditors and claimants who had failed to invoke remedy in respect of claims which had become time barred under the existing laws. It is finally urged that even if Section 18 of the Limitation Act was to be applied to an action under Section 7 of the Code, the application including Form1 filed by the financial creditor before the adjudicating authority in no way makes out the case for granting benefit under Section 18 of the Limitation Act. The factual narration in the subject application is that the date of default was 30.1.2010 being the date of declaration of accounts as NPA, and no other fact which is relevant for giving benefit under Section 18 of the Limitation Act as expounded in *Shanti Conductors Private Limited* v. *Assam State Electricity Board & Ors.,* (2020) 2 SCC 677 has been stated therein. In other words, respondent No. 1 has failed to set forth a case in that behalf in the application as filed. Further, letters relied upon do not mention about the factum of acknowledgment of debt by the Principal Borrower or the Corporate Debtor, as the case may be. The said communications were

1. 11 for short, "the Limitation Act"

sent without prejudice and cannot be read as an acknowledgment of liability as such. The communication dated 8.12.2018, therefore, will be of no avail to the Financial Creditor. All other relied upon communications have been sent by the Principal Borrower and not the Corporate Debtor, who is an independent legal entity. The so-called acknowledgment by the Principal Borrower, therefore, cannot bind the Corporate Debtor. Communications sent by the Principal Borrower after the original limitation period had expired, in any case, cannot be taken into account for invoking remedy under Section 7 of the Code. Obviously, there was delay in filing of the application under Section 7 and despite that, it was not accompanied by application for condonation of delay under Section 5 of the Limitation Act. According to the appellant, the factum of application being barred by limitation is a mixed question of fact and law and would involve triable issues. Those aspects can be finally adjudicated after production of evidence in the form of affidavits before the Adjudicating Authority.

11. Reliance is placed by the appellant on the dictum of this Court in *Babulal Vardharji Gurjar* v. *Veer Gurjar Aluminium Industries Private Limited & Anr. (I),* **REED 2019 SC 02501** : (2019) 15 SCC 209 *B.K. Educational Services Private Limited* v. *Parag Gupta and Associates,* **REED 2018 SC 10542** : (2019) 11 SCC 633 *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Company (India) Limited & Anr.,* **REED 2019 SC 09502** : (2019) 10 SCC 572 *Vashdeo R. Bhojwani* v. *Abhyudaya Cooperative Bank Limited & Anr.,* (2019) 9 SCC 158 and *Sagar Sharma & Anr.* v. *Phoenix Arc Private Limited & Anr.,* (2019) 10 SCC 353.

12. The Financial Creditor has refuted the plea regarding maintainability of the application against the Corporate Debtor. According to the Financial Creditor, the liability of the Principal Borrower and of the Guarantor is coextensive or coterminous, as predicated in Section 128 of the Indian Contract Act, 1872.[1] This legal position is well-established by now (see *–Bank of Bihar Ltd.* v. *Dr. Damodar Prasad & Anr.,* (1969) 1 SCR 620) Section 7 of the Code enables the financial creditor to initiate CIRP against the principal borrower if it is a corporate person, including against the corporate person being a guarantor in respect of loans obtained by an entity not being a corporate person. The Financial Creditor besides placing reliance on Section 7, would also rely on definition of expressions “corporate debtor” in Section 3(8), “debt” in Section 3(11), “financial creditor” in Section 5(7) and “financial debt” in Section 5(8) of the Code. It is urged that upon conjoint reading of these provisions, it is crystal clear that a “financial debt” includes the amount of any liability in respect of any guarantee or indemnity for any money borrowed against interest. Resultantly, the money borrowed by sole proprietorship of the appellant against payment of interest for which the Corporate Debtor stood guarantee or indemnity, was also a “financial debt” of the Corporate Debtor and for that reason, the Financial Creditor respondent No. 1, could proceed under Section 7 of the Code. It is further urged that the

1. for short, “the Contract Act”

definition of "corporate guarantor" introduced by way of amendment of 2018 is to define a corporate guarantor in relation to a corporate debtor against whom any CIRP is to be initiated, in reference to Section 60 of the Code. The objection regarding maintainability of the application against a corporate guarantor, is, therefore, devoid of merit and needs to be rejected.

13. As regards the second issue of application being barred by limitation, it is contended that this Court had issued limited notice in the present appeal only to examine the question noted in the order dated 28.7.2020. Hence, the second objection of limitation need not be examined. It is then urged that in any case, there is no substance even in this objection. Referring to the decisions relied upon by the appellant, it is urged that it was open to the Financial Creditor to maintain the application even after three years from the declaration of accounts as NPA because of the acknowledgment of debt including by the Corporate Debtor from time to time and lastly on 8.12.2018, whereby it admitted the initial loan granted by the Financial Creditor in favour of the Principal Borrower and also of having provided collateral security to secure the liability of the Principal Borrower. The Adjudicating Authority, as well as, the NCLAT had justly taken due cognizance of the said admission to conclude that fresh period of limitation commenced because of such acknowledgment by the Corporate Debtor. Further, the default committed by the Corporate Debtor is a continuing one. It is urged that the Court must look behind the veil of corporate entity M/s. Surana Metals Limited, being the alter ego of the appellant herein. The Code is a special enactment for resolution of a financial debt and it is in larger public interest that financial debts are recovered and the debts of corporate person are restructured to revive the failing corporate entity. Thus understood, the process is not for recovery as such, but for resolution of the insolvency of the corporate person. It is further urged that there is no need to relegate the parties before the Adjudicating Authority on the question of limitation. It is not a mixed question of fact and law as contended, but on the facts discerned from the communication and as stated in the subject application, it is obvious that the Corporate Debtor had admitted the liability vide communication dated 8.12.2018, for which reason the application filed on 13.2.2019 was within limitation. The Financial Creditor-respondent No. 1 pressed for dismissal of the appeal.

14. We have heard Mr. Abhijit Sinha, learned counsel for the appellant and Mr. O.P. Gaggar, learned counsel for respondent No. 1.

15. It is no more *res integra* that the Code is a complete code — provisioning for actions and proceedings relating to, amongst others, reorganisation and insolvency resolution of corporate persons in a time bound manner for maximisation of value of assets of such persons, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.

ISSUE (i):

16. Section 7 of the Code propounds the manner in which corporate insolvency resolution process (CIRP) may be initiated by the "financial creditor" against a "corporate person being the corporate debtor". It predicates that a financial creditor either by itself or jointly with other financial creditors or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating CIRP against a corporate debtor before the Adjudicating Authority when a default is committed by it. The expression "default" is expounded in Section 3(12) to mean nonpayment of debt which had become due and payable and is not paid by the debtor or the corporate debtor, as the case may be.

17. Section 7 is an enabling provision, which permits the financial creditor to initiate CIRP against a corporate debtor. The corporate debtor can be the principal borrower. It can also be a corporate person assuming the status of corporate debtor having offered guarantee, if and when the principal borrower/debtor (be it a corporate person or otherwise) commits default in payment of its debt.

18. The term "financial creditor" has been defined in Section 5(7) read with expression "Creditor" in Section 3(10) of the Code to mean a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. This means that the applicant should be a person to whom a financial debt is owed. The expression "financial debt" has been defined in Section 5(8). Amongst other categories specified therein, it could be a debt along with interest, which is disbursed against the consideration for the time value of money and would include the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of the same clause. It is so provided in sub-clause (i) of Section 5(8) of the Code to take within its ambit a liability in relation to a guarantee offered by the corporate person as a result of the default committed by the principal borrower. The expression "debt" has been defined separately in the Code in Section 3(11) to mean a liability or obligation in respect of "a claim" which is due from any person and includes a financial debt and operational debt. The expression "claim" would certainly cover the right of the financial creditor to proceed against the corporate person being a guarantor due to the default committed by the principal borrower. The expression "claim" has been defined in Section 3(6), which means a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured. It also means a right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment in respect of specified matters.

19. Indubitably, a right or cause of action would enure to the lender (financial creditor) to proceed against the principal borrower, as well as the guarantor in equal measure in case they commit default in repayment of the amount of debt acting jointly and severally. It would still be a case of default committed by the

guarantor itself, if and when the principal borrower fails to discharge his obligation in respect of amount of debt. For, the obligation of the guarantor is coextensive and coterminous with that of the principal borrower to defray the debt, as predicated in Section 128 of the Contract Act. As a consequence of such default, the status of the guarantor metamorphoses into a debtor or a corporate debtor if it happens to be a corporate person, within the meaning of Section 3(8) of the Code. For, as aforesaid, expression "default" has also been defined in Section 3(12) of the Code to mean nonpayment of debt when whole or any part or instalment of the amount of debt has become due or payable and is not paid by the debtor or the corporate debtor, as the case may be.

20. A *priori,* in the context of the provisions of the Code, if the guarantor is a corporate person (as defined in Section 3(7) of the Code), it would come within the purview of expression "corporate debtor", within the meaning of Section 3(8) of the Code.

21. It may be useful to also advert to the generic provision contained in Section 3(37). It postulates that the words and expressions used and not defined in the Code, but defined in enactments referred to therein, shall have the meanings respectively assigned to them in those Acts. Drawing support from this provision, it must follow that the lender would be a financial creditor within the meaning of the Code. The principal borrower may or may not be a corporate person, but if a corporate person extends guarantee for the loan transaction concerning a principal borrower not being a corporate person, it would still be covered within the meaning of expression "corporate debtor" in Section 3(8) of the Code.

22. Thus understood, it is not possible to countenance the argument of the appellant that as the principal borrower is not a corporate person, the financial creditor could not have invoked remedy under Section 7 of the Code against the corporate person who had merely offered guarantee for such loan account. That action can still proceed against the guarantor being a corporate debtor, consequent to the default committed by the principal borrower. There is no reason to limit the width of Section 7 of the Code despite law permitting initiation of CIRP against the corporate debtor, if and when default is committed by the principal borrower. For, the liability and obligation of the guarantor to pay the outstanding dues would get triggered coextensively.

23. To get over this position, much reliance was placed on Section 5(5A) of the Code, which defines the expression "corporate guarantor" to mean a corporate person, who is the surety in a contract of guarantee to a Corporate debtor. This definition has been inserted by way of an amendment, which has come into force on 6.6.2018. This provision, as rightly urged by the respondents, is essentially in the context of a corporate debtor against whom CIRP is to be initiated in terms of the amended Section 60 of the Code, which amendment is introduced by the same Amendment Act of 2018. This change was to empower NCLT to deal with

the insolvency resolution or liquidation processes of the corporate debtor and its corporate guarantor in the same Tribunal pertaining to same transaction, which has territorial jurisdiction over the place where the registered office of the corporate debtor is located. That does not mean that proceedings under Section 7 of the Code cannot be initiated against a corporate person in respect of guarantee to the loan amount secured by person not being a corporate person, in case of default in payment of such a debt.

24. Accepting the aforementioned argument of the appellant would result in diluting or constricting the expression "corporate debtor" occurring in Section 7 of the Code, which means a corporate person, who owes a debt to any person. The "debt" of a corporate person would mean a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. The expression "debt" in Section 3(11) is wide enough to include liability of a corporate person on account of guarantee given by it in relation to a loan account of any person including not being a corporate person in the event of default committed by the latter. It would still be a "financial debt" of the corporate person, arising from the guarantee given by it, within the meaning of Section 5(8) of the Code.

25. Notably, the expression "corporate guarantee" is not defined in the Code. Whereas, expression "corporate guarantor" is defined in Section 5(5A) of the Code. If the legislature intended to exclude a corporate person offering guarantee in respect of a loan secured by a person not being a corporate person, from the expression "corporate debtor" occurring in Section 7, it would have so provided in the Code (at least when Section 5(5A) came to be inserted defining expression "corporate guarantor"). It was also open to the legislature to amend Section 7 of the Code and replace the expression "corporate debtor" by a suitable expression. It could have even amended Section 3(8) to exclude liability arising from a guarantee given for the loan account of an entity not being a corporate person. Similarly, it could have also amended expression "financial debt" in Section 5(8) of the Code, "claim" in Section 3(6), "debt" in Section 3(11) and "default" in Section 3(12). There is no indication to that effect in the contemporaneous legislative changes brought about.

26. The expression "corporate debtor" is defined in Section 3(8) which applies to the Code as a whole. Whereas, expression "corporate guarantor" in Section 5(5A), applies only to Part II of the Code. Upon harmonious and purposive construction of the governing provisions, it is not possible to extricate the corporate person from the liability (of being a corporate debtor) arising on account of the guarantee given by it in respect of loan given to a person other than corporate person. The liability of the guarantor is coextensive with that of the principal borrower. The remedy under Section 7 is not for recovery of the amount, but is for reorganisation and insolvency resolution of the corporate debtor who is not in a position to pay its debt and commits default in that regard.

It is open to the corporate debtor to pay off the debt, which had become due and payable and is not paid by the principal borrower, to avoid the rigours of Chapter II of the Code in general and Section 7 in particular.

27. In law, the status of the guarantor, who is a corporate person, metamorphoses into corporate debtor, the moment principal borrower (regardless of not being a corporate person) commits default in payment of debt which had become due and payable. Thus, action under Section 7 of the Code could be legitimately invoked even against a (corporate) guarantor being a corporate debtor. The definition of "corporate guarantor" in Section 5(5A) of the Code needs to be so understood.

28. A priori, we find no substance in the argument advanced before us that since the loan was offered to a proprietary firm (not a corporate person), action under Section 7 of the Code cannot be initiated against the corporate person even though it had offered guarantee in respect of that transaction. Whereas, upon default committed by the principal borrower, the liability of the company (corporate person), being the guarantor, instantly triggers the right of the financial creditor to proceed against the corporate person (being a corporate debtor). Hence, the first question stands answered against the appellant.

ISSUE (ii):

29. As noted earlier, this Court while entertaining the present appeal in its order dated 28.07.2020 had adverted to only one contention which already stands answered against the appellant. However, the appellant would contend that the other plea taken by him and having been dealt with by the NCLT as well as the NCLAT, the appellant ought to be allowed to pursue that plea — regarding the maintainability of application under Section 7 of the Code, on the ground of being barred by limitation. Inasmuch as, if this ground is answered in favour of the appellant, it would go to the root of the matter touching upon the jurisdiction of the NCLT to entertain the subject application under Section 7 of the Code. Hence, despite the objection of the respondent (financial creditor) not to permit the appellant to canvas this ground, in our opinion, it is necessary to answer this ground as well in the interest of justice; and also, because it is the duty of the court under Section 3 of the Limitation Act, to answer the stated issue at the threshold or at appropriate stage, as the case may be, even if it is not expressly raised by the opposite party.

30. The objection regarding limitation has been negatived by the NCLT vide judgment dated 06.12.2019. It observed in paragraph 7 of its judgment as follows:

"7. It is seen from the evidence on record that not only the original borrower but also the Corporate Debtor admitted and acknowledged the debt time and again on 27.05.2015 (exhibit J1) and 08.12.2018 (exhibit K). The Corporate Debtor

replied the notice issued by the Bank clearly admitting the debt. We have gone through his reply to the notice. We hold that his reply is in form of admission of debt and nothing else. The Corporate Debtor contended that recovery proceeding is pending in Debt Recovery Tribunal, Kolkata against the Corporate Debtor. It cannot be said that debt become due and payable. We hold that it is admission of debt and his only defense is that it is yet to become due and payable. In this case, by virtue of guarantee in favour of the Bank, the Corporate Debtor undertook to clear loan of the original borrower in case original borrower commit default and it is duty of the Corporate Debtor to clear the outstanding. His defence is that debt is yet to become due is not sustainable."

(Emphasis supplied)

31. After so observing, the NCLT proceeded to advert to the decision in *Gaurav Hargovindbhai Dave*, **REED 2019 SC 09502,** and distinguished the same on the ground that in that case the original borrower and the corporate debtor had not admitted or acknowledged the debt after the date of default, which had occurred three years before the filing of the application. In the present case, however, the principal borrower as well as the corporate debtor had acknowledged the debt time and again after 30.01.2010 and lastly on 08.12.2018, which was the basis of filing of subject application under Section 7 of the Code on 13.02.2019.

32. Even the NCLAT noted this ground urged by the appellant in paragraph 21 of the impugned judgment as follows:

"21. In the instant case the Corporate Debtor (M/s Surana Metals Ltd.) had duly executed the Letter of Guarantor dated 2.2.2007, 17.2.2007 and 3.8.2008 for the Loan facilities Sanctioned by the Bank to M/s Mahaveer Construction also that the Corporate Debtor had acknowledged its debt on 16.9.2010, 3.3.2012, 27.5.2015, 24.10.2016, and executed by the Appellant (Vide Page. No.196, 197, 140, 198) and on 8.12.2018 executed by the (M/s Surana Metals Ltd.) page no.141 respectively against the execution of the Letters of Guarantee. Significantly, the Corporate Debtor in its Reply dated 8.12.2018 had tacitly admitted the execution of Guarantors Agreement dated 2.2.2007, 17.2.2007, 3.8.2008 in and by which the Corporate Debtor had agreed to pay Rs.12,05,00,000/ crore and interest on such sum." (Emphasis supplied)

Finally, in paragraph 30 of the impugned judgment, the NCLAT after analysing the relevant decisions relied upon by the parties in *B.K. Educational Services Private Limited* **REED 2018 SC 10542**, *Jignesh Shah and Anr.* v. *Union of India and Anr,* **REED 2019 SC 09503** : (2019) 10 SCC 750 and *Gaurav Hargovindbhai Dave,* **REED 2019 SC 09502**, concluded as follows:

"30. In the light of detailed qualitative and quantitative discussions aforesaid and also this Tribunal keeping in mind the present facts and circumstances of the instant case in an integral fashion, which float on the surface case comes to an inescapable conclusion that there is an acknowledgment of 'Debt' on various

dates like 2.2.07, 17.2.07, 3.8.07 for the loan facilities availed by Mahaveer Construction the Letters of Guarantee Acknowledged by the Corporate Debtor (M/s Surana Metals Ltd.) on 16.9.10, 3.3.12, 27.5.15, 24.10.16 executed by the Appellant and on 8.12.18 by the Surana Metals Ltd. etc. This apart, here is an acknowledgment of Debt by the Principal Borrower but also the Corporate Debtor on 27.5.15 & 8.12.18 respectively. The object of specifying time limit for limitation is undoubtedly based on 'Public Policy'. The application projected before the Adjudicating Authority (NCLT) Kolkata Bench, on 13.2.19 is well within limitation and not barred by Limitation. Looking at from any angle, the present Appeal sans merits and the same is dismissed without costs. …"

(emphasis supplied)

33. We may straight away advert to the decision of this Court in *Babulal Vardharji Gurjar* v. *Veer Gurjar Aluminium Industries Private Limited & Anr. (II),* **REED 2019 SC 02501** : (2020) 15 SCC 1 wherein after analysing the earlier decisions of this Court, the Court summed up the position in the following words:

"32. When Section 238-A of the Code is read with the above noted consistent decisions of this Court in *Innoventive Industries,*[1] *B.K. Educational Services,*[2] *Swiss Ribbons,*[3] *K. Sashidhar,*[4] *Jignesh Shah*,[5] *Vashdeo R. Bhojwani*,[6] *Gaurav Hargovindbhai Dave*,[7] and *Sagar Sharma,*[8] respectively, the following basics undoubtedly come to the fore:

(a) that the Code is a beneficial legislation intended toput the corporate debtor back on its feet and is not a mere money recovery legislation;

(b) that CIRP is not intended to be adversarial to the corporate debtor but is aimed at protecting the interests of the corporate debtor;

(c) that intention of the Code is not to give a new lease of life to debts which are time-barred;

(d) that the period of limitation for an application seeking initiation of CIRP under Section 7 of the Code is governed by Article 137 of the Limitation Act and is, therefore, three years from the date when right to apply accrues;

(e) that the trigger for initiation of CIRP by a financial creditor is default on the part of the corporate debtor, that is to say, that the right to apply under the Code accrues on the date when default occurs;

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1. Innoventive Industries Ltd. v. ICICI Bank, **REED 2017 SC 08563** : (2018) 1 SCC 407
2. supra at footnote 14
3. Swiss Ribbons (P) Ltd. v. Union of India, **REED 2019 SC 01504** : (2019) 4 SCC 17
4. K. Sashidhar v. Indian Overseas Bank, **REED 2019 SC 02502** : (2019) 12 SCC 150
5. supra at footnote 20
6. supra at footnote 16
7. supra at footnote 15
8. supra at footnote 17

(f) that default referred to in the Code is that of actual non-payment by the corporate debtor when a debt has become due and payable; and

(g) that if default had occurred over three years prior to the date of filing of the application, the application would be time-barred save and except in those cases where, on facts, the delay in filing may be condoned; and

(h) an application under Section 7 of the Code is not for enforcement of mortgage liability and Article 62 of the Limitation Act does not apply to this application."

34. In the earlier part of this reported decision, the Court did advert to the exposition in *Jignesh Shah*, **REED 2019 SC 09503**. In that decision, the Court had analysed the provisions of the Code by first adverting to the decision in *B.K. Educational Services Private Limited,* **REED 2018 SC 10542** in which Section 238A of the Code was referred to. Paragraphs 7 and 8 of the decision in *Jignesh Shah* (supra) read thus:

"7. Having heard the learned Senior Counsel for the parties, it is important to first advert to this Court's decision in *B.K. Educational Services (P) Ltd.*[1] in which Section 238A of the Code was referred to, which states as follows:

"238-*A. Limitation*.—The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debts Recovery Tribunal or the Debts Recovery Appellate Tribunal, as the case may be."

8. In para 7 of the said judgment, the Report of the Insolvency Law Committee of March 2018 was referred to as follows: (*B.K. Educational Services case,* SCC pp. 64445, para 11)

"11. Having heard the learned counsel for both sides, it is important to first set out the reason for the introduction of Section 238A into the Code. This is to be found in the Report of the Insolvency Law Committee of March 2018, as follows:

'28. Application of Limitation Act, 1963

28.1. The question of applicability of the Limitation Act, 1963 ("the Limitation Act") to the Code has been deliberated upon in several judgments of NCLT and NCLAT. The existing jurisprudence on this subject indicates that if a law is a complete code, then an express or necessary exclusion of the Limitation Act should be respected.[2] In light of the confusion in this regard, the Committee deliberated on the issue and unanimously agreed that the intent of the Code could not have been to give a new lease of life to debts which are timebarred. It

1. supra at footnote 14
2. Ravula Subba Rao v. CIT, AIR 1956 SC 604

is settled law that when a debt is barred by time, the right to a remedy is time-barred.[1] Thisrequires being read with the definition of “debt” and “claim” in the Code. Further, debts in windingup proceedings cannot be timebarred,[2] and there appears to be no rationale to exclude the extension of this principle of law to the Code.

28.2. Further, non-application of the law on limitation creates the following problems: first, it reopens the right of financial and operational creditors holding time-barred debts under the Limitation Act to file for CIRP, the trigger for which is default on a debt above INR one lakh. The purpose of the law of limitation is ‘to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches’.[3] Though the Code is not a debt recovery law, the trigger being “default in payment of debt” renders the exclusion of the law of limitation counterintuitive. Second, it reopens the right of claimants (pursuant to issuance of a public notice) to file timebarred claims with the IRP/RP, which may potentially be a part of the resolution plan. Such a resolution plan restructuring time-barred debts and claims may not be in compliance with the existing laws for the time being in force as per Section 30(4) of the Code.

28.3. Given that the intent was not to package the Code as a fresh opportunity for creditors and claimants who did not exercise their remedy under existing laws within the prescribed limitation period, the Committee thought it fit to insert a specific section applying the Limitation Act to the Code. The relevant entry under the Limitation Act may be on a casetocase basis. It was further noted that the Limitation Act may not apply to applications of corporate applicants, as these are initiated by the applicant for its own debts for the purpose of CIRP and are not in the form of a creditor's remedy.’”

(Emphasis in original and supplied)”
(Emphasis supplied)

In paragraph 21 after analysing the decisions on the point, the Court noted as follows:

“21. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding-up proceeding. In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an acknowledgment of liability under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the

1. Punjab National Bank v. Surendra Prasad Sinha, 1993 Supp (1) SCC 499
2. Interactive Media and Communication Solution (P) Ltd. v. GO Airlines Ltd., 2013 SCC OnLine Del 445
3. Rajender Singh v. Santa Singh, (1973) 2 SCC 705

remedy of winding up would, in no manner, impact the limitation within which the winding-up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding-up proceeding." (Emphasis supplied)

35. The purport of such observation has been dealt with in the case of *Babulal Vardharji Gurjar (II),* **REED 2019 SC 02501**. Suffice it to observe that this Court had not ruled out the application of Section 18 of the Limitation Act to the proceedings under the Code, if the fact situation of the case so warrants. Considering that the purport of Section 238A of the Code, as enacted, is clarificatory in nature and being a procedural law had been given retrospective effect; which included application of the provisions of the Limitation Act on case-to-case basis. Indeed, the purport of amendment in the Code was not to reopen or revive the time barred debts under the Limitation Act. At the same time, accrual of fresh period of limitation in terms of Section 18 of the Limitation Act is on its own under that Act. It will not be a case of giving new lease to time barred debts under the existing law (Limitation Act) as such.

36. Notably, the provisions of Limitation Act have been made applicable to the proceedings under the Code, as far as may be applicable. For, Section 238A predicates that the provisions of Limitation Act shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the NCLAT, the DRT or the Debt Recovery Appellate Tribunal, as the case may be. After enactment of Section 238A of the Code on 06.06.2018, validity whereof has been upheld by this Court, it is not open to contend that the limitation for filing application under Section 7 of the Code would be limited to Article 137 of the Limitation Act and extension of prescribed period in certain cases could be only under Section 5 of the Limitation Act. There is no reason to exclude the effect of Section 18 of the Limitation Act to the proceedings initiated under the Code. Section 18 of the Limitation Act reads thus:

"18. *Effect of acknowledgment in writing.*—(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.—For the purposes of this section,—

(a) an acknowledgment may be sufficient though it omitsto specify the exact nature of the property or right, or avers that the time for payment, delivery,

performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right;

(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right."

37. Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 of the Code. However, Section 7 comes into play when the corporate debtor commits "default". Section 7, consciously uses the expression "default" — not the date of notifying the loan account of the corporate person as NPA. Further, the expression "default" has been defined in Section 3(12) to mean nonpayment of "debt" when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the moment the principal borrower commits default due to nonpayment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process under Section 7 of the Code enures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to time, for institution of the proceedings under Section 7 of the Code. Further, the acknowledgment must be of a liability in respect of which the financial creditor can initiate action under Section 7 of the Code.

38. In the present case, the NCLT as well as the NCLAT have adverted to the acknowledgments by the principal borrower as well as the corporate guarantor corporate debtor after declaration of NPA from time to time and lastly on 08.12.2018. The fact that acknowledgment within the limitation period was only by the principal borrower and not the guarantor, would not absolve the guarantor of its liability flowing from the letter of guarantee and memorandum

of mortgage. The liability of the guarantor being coextensive with the principal borrower under Section 128 of the Contract Act, it triggers the moment principal borrower commits default in paying the acknowledged debt. This is a legal fiction. Such liability of the guarantor would flow from the guarantee deed and memorandum of mortgage, unless it expressly provides to the contrary.

39. In the application under Section 7 of the Code filed by the financial creditor on 13.02.2019, in Part IV thereof, it has been clearly stated that the corporate debtor duly secured the credit facilities from time to time. The relevant portion of paragraph 1 of Part IV of the application and paragraph 2 of the same Part reinforces this position. The same reads thus:

"PART IV

PARTICULARS OF FINANCIAL DEBT

1.	TOTAL AMOUNT OF DEBT GRANTED AND DATE(S) OF DISBURSEMENT	... ***The aforesaid credit facilities duly secured from time to time by the Corporate Guarantor being the Corporate Debtor*** herein as follow: **02.2007**: i. Letter of Guarantee for Rs. 9,60, 00,000/-; **17-02-2007** i. Letter of Guarantee by the Corporate Debtor **30-08-2008** i. Letter of Guarantee for Rs. 12,05,00,000/-; ii. Memorandum of Extension of Mortgage; iii. Declaration of the Director of the Corporate Debtor; Copies of all the aforesaid Documents are annexed hereto and marked with Letter **'F', 'F1', 'F2', 'F3' and 'F4'**. ***In addition to the above the aforesaid Credit facility not only secured by execution of Guarantee by the Corporate Debtor as aforesaid but also by deposit of Title Deed***being No. for the year in respect of its immovable property being **ALL THAT** piece and parcel of Government Khas Mahal Land

		measuring about 50 Cottahs comprised in Touzi No.1298 in Dihi Panchanan Gram, Division II, together with Building and Structure standing thereon P.S. Maniktala being Municipal Premises No.17, Ultadanga Main Road, Kolkata ***with an intent to create equitable Mortgage in favour of the Financial Creditor. Creation of such Mortgage in respect of the immovable property as aforesaid duly extended by the Corporate Guarantor lastly on 25.08.2008***. Creation of such charge filed with the Registrar of Companies, West Bengal by the Corporate Debtor in Form No.8 Under Section 125/127/137 of the Companies Act, 1956 dated 19.09.2008 and a copy of the Title Deed is annexed hereto and marked with Letter **'G' and 'G1'**. Initially while sanctioning the Term Loan1 dated 19th January, 2007, the Financial Creditor also send a Letter on 19th January, 2007 to the said Pantaloons Retail (India) Limited being the SubLicensee whose monthly Rent of Rs.21,45,000/ payable to the said Principal Borrower intimating its conformation sending therewith a copy of the General Power of Attorney executed by the Principal Borrower assigned its right of collecting and receiving Monthly rents from the said Pantaloons Retail (India) Limited in favour of the Financial Creditor. A copy of the said Letter of the Financial Creditor dated 19.01.2007 is annexed hereto and marked with Letter **'H'.** Due to default in repayment in both the said account of the Principal Borrower maintained with the Financial Creditor at its said Strand Road Branch, Kolkata the said accounts maintained in the name of the said principal Borrower with the Financial Creditor duly were Classified and declared as NPA with effect from 30.01.2010 and as such the Financial Creditor on 19th February, 2010 issued Recall Notice to the Principal Borrower as well as its Corporate Guarantor being the Corporate Debtor herein demanding a total sum of Rs.12,35,11,548/ including interest as of 31.01.2010. A copy of the said Recall Notice dated 19.02.2010 is annexed hereto and marked with Letter **'I'.** However, both the Principal

		borrower and the Corporate Debtor being the Corporate Guarantor had defaulted in repayment of the dues to the Applicant Bank. ***The Principal Borrower vide its Letter dated 3rd March, 2012 requested the Financial Creditor regarding outstanding of its liability as on 29.02.2012 and on 27th May, 2015 requested to provide Statement of accounts. Copies of both the said letters dated 3.03.2012 and 27.05.2015 are annexed hereto and marked with Letter*** **'J' and 'J1'.** ***In reply of to the Notice of Demand dated 3rd December, 2018 issued by the Financial Creditor, the Corporate Debtor vide its letter dated 8th December, 2018 not only admitted the initial Loans Granted by the Financial Creditor in favour of the Principal Borrower but also providing Collateral Security by the Corporate Debtor to secure the liability of the principal borrower. A copy of the said letter of the Corporate Debtor dated 8.12.2018 is annexed hereto and marked with Letter*** **'K'**
		Amount in default: **Rs.23,90,35,759.00** as on 31st January, 2019 as per the following particulars: Statement of Account of the Principal Borrower is attached herewith. **Date of default** was 30/01/2010 and the total claim of the Financial Creditor as of the date of default is Rs.**11,76,80,270.00** However, since the Principal Borrower as well as its Corporate Guarantor being the Corporate Debtor herein had defaulted to pay any part or portion of the outstanding amount to UNION BANK OF INDIA the Financial Creditor thereafter the Financial Creditor on 14th July, 2010 filed an application Under Section 19 of the RDDB Act, 1993 before the Debts Recovery Tribunal-3, Kolkata being O.A. No.130 of 2010 which is still pending for final adjudication and in that proceeding the said Principal Borrower

		as well as Corporate Debtor are appearing and several interim orders have been passed from time to time related to collection of rents from the subLicensee."

(Emphasis supplied in italics)

Again, in Part V specifying about the particulars of financial debt in paragraphs 5 and 8, it is mentioned as follows:

"PART V

PARTICULARS OF FINANCIAL DEBT

5.	THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE (ATTACH A COPY)	Attached to this application. Sanction letters dated 19.01.2007 and 25.08.2008 and Letter dated 08.12.2018 written by the Corporate Debtor acknowledging their liability towards Financial Creditor-Union Bank of India.
8.	LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF FINANCIAL DEBT, THE AMOUNT AND DATE OF DEFAULT.	Letter dated 08.12.2018 written by the Corporate Debtor acknowledging their liability towards Financial Creditor Union Bank of India."

(Emphasis supplied)

40. Besides the clear assertion made in the application about the last acknowledgment on 08.12.2018 resulting in fresh period of limitation, the Tribunal adverted to the correspondence exchanged between the principal borrower, corporate guarantor (corporate debtor) and the financial creditor (Bank) during the relevant period after 30.01.2010 until filing of application under Section 7 of the Code on 13.02.2019. The last such acknowledgement by the (corporate) guarantor/corporate debtor taken note of by the NCLT as also the NCLAT reads thus:

"SURANA METALS LIMITED

12, BONFIELD LANE, KOLKATA700001

CIN:L27209WB1983PLC36141

SML/SB/2/1819/08

December 08, 2018

The Chief Manager, WITHOUT PREJUDICE

Union Bank of India,

Asset Recovery Branch, Kolkata,

15, India Exchange Place,

KOLKATA700 001.

Sir,

SUB: Notice regarding initiation of proceedings under the Insolvency and Bankruptcy Code, 2016.

We acknowledge the receipt of your Notice being No.ARB:KOL:198:1819 dated 03.12.2018 issued under Section 4(1) of The Insolvency and Bankruptcy Code, 2016 and are really surprised to note its contents. We deny each and every allegation contained therein including the nature of loan and quantum of claim and wish to inform you as under:

1. No Term Loan was sanctioned by you to M/s. Mahaveer Construction, 12, Bonfield Lane, Kolkata for a sum of Rs. 9,45,00,000/ and Rs. 2,45,00,000/ as alleged by you in your above stated letter. We understand that a loan for Rs.945 lacs and Rs.245 lacs was sanction by you to M/s Mahaveer Construction of No.12, Bonfield Lane, Kolkata700001 under “rent securitization” i.e. against future rent receivables from M/s Pantaloon Retail (India) Ltd. (now known as Future Retail Ltd.) for the development of a commercial complex at Kharagpur, on a government land, on the basis of securities provided by them of which you are fully aware of. We also understand that M/s Mahaveer Construction has executed a power of attorney in your favour authorizing you to collect the future rent receivables from M/s Pantaloon Retail (India) Ltd. and you have been collecting the rent from them directly and/or through a Receiver appointed by the Ld. DRTIII, Kolkata, without any intimation to M/s Mahaveer Construction. As such M/s Mahaveer Construction is a lawful borrower and the guarantee for repayment has been provided to you by M/s Pantaloon Retail (India) Ltd. which was unconditionally accepted by you. We are not the borrowers and/or the corporate debtor as claimed by you in your aforesaid notice.

2. We have, at the request of M/s Mahaveer Construction, provided you a collateral security only in the form of a premises being No.17, Ultadanga Main Road, Kolkata by way of creation of a paripassu charge with Syndicate Bank, of which we are a Lessee only. It is a Debutter Trust Estate. Our corporate guarantee was issued in accordance with the provisions of The Companies Act, 1956 only.

3. You have initiated legal proceedings for recovery ofyour loan against Mahaveer Construction in the Learned Debt Recovery Tribunal III, at Kolkata treating them as defaulters and the said proceeding is awaiting adjudication. We have not committed any default as alleged by you and therefore cannot be

termed as a defaulter, far less to speak of corporate defaulter, by any stretch of imagination. You are, therefore, not authorized legally to initiate further proceedings for the self same cause under the pretext of The Insolvency and Bankruptcy Code, 2016.

4. Until the recovery proceedings initiated by you against M/s Mahaveer Construction in the Learned Court of Debt Recovery Tribunal III at Kolkata attains finality you are, under the provisions of law, not authorized to further threaten us and/or initiate any proceedings against us for recovery of loan granted to M/s Mahaveer Construction.

5. The Insolvency and Bankruptcy Code, 2016 proceeds to secure the benefits of all creditors, dealing with the assets of the debtor in The Insolvency and Bankruptcy Code, 2016. Therefore before proceeding under The Insolvency and Bankruptcy Code, 2016 you have to surrender all the securities for the benefit of all the creditors (COC). That would also include the assets involved in SARFAESI Act and RDBA, 1973 proceedings. Thus, the Bank has to choose before proceeding under The Insolvency and Bankruptcy Code, 2016 whether to surrender the security or to exclusively deal with the same as a secured creditor. If you choose to deal with the property as secured creditor you cannot proceed under The Insolvency and Bankruptcy Code, 2016. O.A. and S.A. are the remedies. Per contra if the Bank chooses to offer and/or surrender its security then it has to waive its right over the secured asset and proceed under The Insolvency and Bankruptcy Code, 2016 but not OA and SA.

6. You have not made demand against the Principal Borrower – Mahaveer Construction. Thus, without any demand being made against/from the Principal Borrower the issuance of deemed notice upon the Corporate Guarantor is bad in law.

7. The IBC cannot be made as a tool to recover debt. Issuance of the purported notice is nothing but a threat to recover debt. We are commercially solvent and the alleged debt is disputed since O.A. No.310 of 2010 and is pending adjudication before the Learned Debt Recovery Tribunal III at Kolkata, and therefore the debt is not yet crystallized, wherein you have unequivocally stated that Pantaloon Retail (India) Ltd. is liable to repay the loan granted to Mahaveer Construction under rent securitization. Thus the Bank cannot proceed under The Insolvency and Bankruptcy Code, 2016.

8. There is no mismatch between the asset and liability. In fact asset held as security is for more valuable than liability. Thus, venturing upon the provisions of The Insolvency and Bankruptcy Code, 2016 is unfounded/untenable in law.

9. This letter is issued reserving our rights to add further points of law and/or to act further as may be advised in the matter.

Under the circumstances it is most humbly requested to refrain from taking any action against us for the reasons stated above as otherwise it will only be an

abuse of the process of law and you would be doing so at your own peril and cost.

Please acknowledge the receipt of this letter.

Thanking you,

Yours faithfully,
For Surana Metals Limited.

Sd/
SURANA METALS LIMITED
12, BONFIELD LANE,
KOLKATA700 001"

(Emphasis supplied)

Indeed, this communication has been sent without prejudice by the corporate guarantor (corporate debtor). Nevertheless, it does acknowledge the liability of M/s. Mahaveer Construction (principal borrower); and of corporate guarantee having been offered by the corporate debtor in that behalf. As aforesaid, the liability of the corporate guarantor (corporate debtor) is coextensive with that of the principal borrower and it gets triggered the moment the principal borrower commits default in paying the debt when it had become due and payable. The liability of the corporate debtor (corporate guarantor) also triggers when the principal borrower acknowledges its liability in writing within the expiration of prescribed period of limitation, to pay such outstanding dues and fails to pay the acknowledged debt. Correspondingly, right to initiate action within three years from such acknowledgment of debt accrues to the financial creditor. That however, needs to be exercised within three years when the right to sue/apply accrues, as per Article 137 of the Limitation Act. This is the effect of Section 18 of the Limitation Act. In that, a fresh period of limitation is required to be computed from the time when the acknowledgment was so signed by the principal borrower or the corporate guarantor (corporate debtor), as the case may be, provided the acknowledgment is before expiration of the prescribed period of limitation. Thus, the conclusion reached by the NCLT and affirmed by the NCLAT on the basis of the asservation in the application under Section 7 of the Code, read with the relevant undisputed correspondence, is a possible view.

41. The appellant was at pains to persuade us that the intention behind the communication dated 08.12.2018 sent to the financial creditor by the corporate guarantor (corporate debtor) is a triable matter, as it was sent without prejudice. We are not impressed by this submission. The fact that the principal borrower had availed of credit/loan and committed default and that the (corporate) guarantor/corporate debtor had offered guarantee in respect of the loan account is not disputed. What is urged by the appellant is that the acknowledgment of liability to pay the amount in question was by the principal borrower and that

acknowledgment cannot be the basis to proceed against the corporate guarantor (corporate debtor). Section 18 of the Limitation Act, however, posits that a fresh period of limitation shall be computed from the time when the party against whom the right is claimed acknowledges its liability. The financial creditor has not only the right to recover the outstanding dues by filing a suit, but also has a right to initiate resolution process against the corporate person (being a corporate debtor) whose liability is coextensive with that of the principal borrower and more so when it activates from the written acknowledgment of liability and failure of both to discharge that liability.

42. Suffice it to conclude that there is no substance even in the second ground urged by the appellant regarding the maintainability of the application filed by the respondent financial creditor under Section 7 of the Code on the ground of being barred by limitation. Instead, we affirm the view taken by the NCLT and which commended to the NCLAT — that a fresh period of limitation is required to be computed from the date of acknowledgment of debt by the principal borrower from time to time and in particular the (corporate) guarantor/corporate debtor vide last communication dated 08.12.2018. Thus, the application under Section 7 of the Code filed on 13.02.2019 is within limitation.

43. As no other issue arises for our consideration — except the two grounds urged by the appellant regarding the maintainability of the application for initiating CIRP by the financial creditor (Bank) under Section 7 of the Code, we dispose of this appeal leaving all "other grounds" and contentions available to both the sides open to be decided in the pending proceedings before the NCLT. The same be decided uninfluenced by any observation(s) made in the impugned judgment or in the present judgment.

44. Accordingly, this appeal is disposed of in the above terms with no order as to costs. Pending applications, if any, also stand disposed of. |||

REED 2021 SC 03573

Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund (earlier known as Kotak India Venture Limited) and Others

SUPREME COURT OF INDIA

26 March 2021

Once an insolvency resolution application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 is admitted, any application made thereafter under Section 8 of the Arbitration Act becomes non-maintainable. Further, even in a case where the petition under Section 7 of IBC is yet to be admitted, and an application under Section 8 of the Arbitration Act is kept alongside for consideration, the NCLT has to first consider the application under the IBC and adjudicate the same. Only if the petition under IBC is rejected, the parties will be at their discretion to secure appointment of the Arbitral Tribunal in appropriate proceedings as contemplated in law and the need for the NCLT to pass any orders on such application under Section 8 of Arbitration Act would not arise. The Adjudicating Authority would necessarily have to determine the question relating to the existence of a default, which would in turn bring out the true nature of the dispute.

Case Analysis

Bench/ Coram	S. A. Bobde, CJI A. S. Bopanna, J. V. Ramasubramanian, J.
Citation	REED 2021 SC 03573
Case Number	Arbitration Petition (Civil) No. 48/2019 with Civil Appeal No. 1070 /2021 @ SLP (C) No. 8120 of 2020
Subject	Corporate Insolvency – Arbitration Petition - Maintainability
Keywords	Remedy, Financial Assets, Supreme Court, Civil suit, Financial Institutions, expedition, extraordinary jurisdiction, Appropriate tribunal, High Court, Interim orders, Alternative remedy, Appeal, Appellate Tribunal, evidence, Impugned order, Demand Notice, Legitimate dues, fallacious,

Financial Assets, Supreme Court, civil appeal, Investments, Criminal Proceedings, Investigation.

Legislation Cited

Arbitration and Conciliation Act, 1996
Section 8, Section 11, Section 11(3), Section 11(4)(a), Section 11(12)(a)

Insolvency and Bankruptcy Code, 2016
Section 3(6), Section 3(8), Section 3(11), Section 3(12), Section 5(7), Section 7, Section 7(1), Section 7(2), Section 7(3), Section 7(4), Section 7(5), Section 7(5)(a), Section 7(5)(b), Section 7(6), Section 61, Section 238

Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements), Regulations 2018
Regulation 5(2)

Cases Cited

A. Ayyasamy v. A. Paramasivam and Others
(2016) 10 SCC 386

Booz Allen and Hamilton INC. v. SBI Home Finance Limited and Others, (2011) 5 SCC 532

Innoventive Industries Limited v. ICICI Bank and Another
REED 2017 SC 08563

Keir v. Leeman
(1846) 9 QB 371 : 115 ER 1315

Duro Felguera S.A v. M/S. Gangavaram Port Limited
(2017) 9 SCC 729

Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan
(1999) 5 SCC 651 : (SCC p. 669, para 35

Pioneer Urban Land and Infrastructure Limited v. Union of India and Others
REED 2019 SC 08502

Swiss Ribbons Private Limited and Another v. Union of India and Others
REED 2019 SC 01504

Vidya Drolia and Others v. Durga Trading Corporation
2021 (2) SCC 1

Counsels

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For the Respondent/ Defendant: ANS Nadkarni, Dr. Abhishek Manu Singhvi, Khambhatta, Neeraj Kishan Kaul, Nakul Dewan, Advocates

REED 2021 SC 03573

SUPREME COURT OF INDIA

Bench / Coram:

S. A. Bobde, CJI
A. S. Bopanna, J.
V. Ramasubramanian, J.

Indus Biotech Private Limited—*Petitioner*

Versus

Kotak India Venture (Offshore) Fund (earlier known as Kotak India Venture Limited) and Others—*Respondent*

Arbitration Petition (Civil) No. 48/2019
With
Civil Appeal No. 1070 /2021 @ SLP (C) No. 8120 of 2020.

26 March 2021

Counsels:

For the Applicant/ Plaintiff/ Petitioner/ Appellant: Shyam Divan, Aryama Sundaram, Mukul Rohatgi and Ritin Rai, Advocates

For the Respondent/ Defendant: ANS Nadkarni, Dr. Abhishek Manu Singhvi, Khambhatta, Neeraj Kishan Kaul, Nakul Dewan, Advocates

JUDGMENT

1. Leave granted in Special Leave Petition.

2. The Arbitration Petition is filed by 'Indus Biotech Private Limited' under Section 11(3) read with Sections 11(4) (a) and 11(12)(a) of the Arbitration and Conciliation Act, 1996 ('Act, 1996' for short) seeking the appointment of an Arbitrator on behalf of the respondent Nos. 1 to 4 so as to constitute an Arbitral Tribunal to adjudicate upon the disputes that have arisen between the petitioner and the respondent Nos. 1 to 4 herein. The petition filed before this Court is due to the fact that the respondent No.1 is a Mauritius based Company and the dispute qualifies as international arbitration. The respondents No. 2 to 4 though are Indian entities, they are the sister ventures of respondent No.1. Further, according to the petitioner the subject matter involved is the same, though under different agreements, the arbitration could be conducted as a single

process, by a single Arbitral Tribunal. Hence a common petition is filed before this Court, instead of bifurcating the causes of action and availing their remedy before the High Court in respect of similar disputes with respondents No.2 to 4.

3. The petition seeking constitution of the Arbitral Tribunal emanates from the Share Subscription and Shareholders' Agreements ('SS and SA' for short) dated 20.07.2007, 12.07.2007, 09.01.2008 and the Supplemental Agreements dated 22.03.2013 and 19.07.2017. Through the said agreements the respondent Nos. 1 to 4 subscribed to equity shares and Optionally Convertible Redeemable Preference Shares ('OCRPS' for short) in the company i.e. Indus Biotech Private Ltd. In the process of business, a decision was taken by the petitioner company to make a Qualified Initial Public Offering ('QIPO' for short). However, under Regulation 5(2) of Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements), Regulations 2018 ('SEBI Regulations' for short), a company which has any outstanding convertible securities or any other right which would entitle any person with an option to receive equity shares of the issuer is not entitled to make QIPO.

4. In that view, it had become necessary for the respondents No.1 to 4 to convert their respective preference shares invested in Indus Biotech Private Ltd., into equity shares. In that context the petitioner company proposed to convert the OCRPS invested by the respondents No. 1 to 4, into equity shares. In the said process of negotiation, a dispute is stated to have arisen between the petitioner company and the respondents No. 1 to 4, with regard to the calculation and conversion formula to be applied in converting the preference shares of the respondents No. 1 to 4, into equity shares. As per the formula applied by the respondent Nos. 1 to 4, it was claimed by them that they would be entitled to 30 per cent of the total paid up share capital in equity shares. The petitioner company, by relying on the reports of the auditors and valuer contended that the respondents No. 1 to 4 would be entitled to approximately 10 per cent of the total paid up share capital paid by the respondent as per their conversion formula.

5. The dispute in question, according to the petitioner company is with regard to the appropriate formula to be adopted and to arrive at the actual percentage of the paid up share capital which would be converted into equity shares and the refund if any thereafter. Until an amicable decision is taken there is no liability to repay the amount. Therefore, there is no 'debt' or 'default', nor is the petitioner company unable to pay. The petitioner company is a profitmaking company and is engaged in its day-to-day activity. Since the parties themselves had not resolved the issue, the petitioner company contends that the said dispute is to be resolved through Arbitration by the Arbitral Tribunal.

6. On the said issue, the respondents No. 1 to 4 would however contend that the fact of the respondents No. 1 to 4 herein having subscribed to the OCRPS is

not in dispute. In such event, on redemption of the same, the amount is required to be paid by the petitioner company. The respondents No. 1 to 4 contend that on redemption of OCRPS, a sum of Rs. 367,08,56,503/ (Rupees Three Hundred Sixty-Seven Crore Eight Lakh Fifty-Six Thousand Five Hundred Three) became due and payable. The respondents No. 1 to 4 having demanded the said amount and since the same had not been paid by the petitioner company, it is contended that the same had constituted default. It is contended that as the debt had not been paid by the company it had given a cause of action for the respondents No. 1 to 4 herein to invoke the jurisdiction of the Adjudicating Authority, NCLT by initiating the Corporate Insolvency Resolution Process ('CIRP' for short) provided under the Insolvency and Bankruptcy Code, 2016 ('IB Code' for short).

7. Accordingly, the respondent No.2 herein filed the petition under Section 7 of IB Code before the NCLT in IBC No.3077/2019 dated 16.08.2019 seeking appointment of Resolution Professional. In the said petition, the petitioner company herein filed a Miscellaneous Application No.3597/2019 under Section 8 of the Act, 1996 seeking a direction to refer the parties to arbitration, for the reasons indicated therein which is as noted above and is similar to the contention in the arbitration petition. The respondent No.2 herein objected to consideration of the said application.

8. The NCLT, Mumbai Bench-IV through its order dated 09.06.2020 has taken note of the rival contentions and has allowed the application filed by the petitioner herein under Section 8 of the Act, 1996. As a consequence, the petition filed by the respondent No.2 herein under Section 7 of the IB Code is dismissed. The respondent No.2 herein claiming to be aggrieved by the said order dated 09.06.2020 passed by the NCLT is before this Court in the connected SLP.

9. Since the rank of the parties is different in the above noted, two petitions, for the ease of reference and clarity, the parties would be referred to by their name and the respondents No. 1 to 4 in the Arbitration Petition will be collectively referred to as 'Kotak India Venture'.

10. In the above backdrop, we have heard Mr. Shyam Divan, Mr. Aryama Sundaram, Mr. Mukul Rohatgi and Mr. Ritin Rai respective learned senior counsel on behalf of Indus Biotech Private Limited, Dr. Abhishek Manu Singhvi, learned senior counsel on behalf of Kotak India Venture as also Mr. Khambhatta, Mr. Neeraj Kishan Kaul, Mr. Nakul Dewan, Mr. ANS Nadkarni for the other parties and perused the petition papers.

11. As a matter of fact, the transaction entered into between the parties arising out of the SS and SA dated 20.07.2007, 12.07.2007, 09.01.2008 and the supplemental agreements dated 22.03.2013 and 19.07.2017 is not in dispute. The further fact that the SS and SA dated 20.07.2007, 12.07.2007 and 09.01.2008 vide Clause 20.4 provides for arbitration in the event of any dispute,

controversy or claim arising out of, relating to or in connection with the said agreement is also not in dispute. Further the supplemental agreements vide Clause 13 and 19 respectively provides that the provision for arbitration in Clause 20.4 of the SS and SA agreement dated 20.07.2007 shall apply to the supplemental agreement is also evident. If in that context the matter is looked at, there would be no need for this Court to advert to any other aspect in the petition filed under Section 11 of the Act, 1996 since in the normal circumstance, on constitution of the Arbitral Tribunal all other issues are to be gone into by the Arbitral Tribunal relating to the above noted dispute between the parties. However, the nature of Arbitral Tribunal will have to be considered since one is international arbitration and the other are domestic.

12. Despite the said position, before concluding on the Arbitration Petition filed by Indus Biotech Private Limited, keeping in perspective the objection raised by the Kotak India Venture relating to the petition having already been instituted before the NCLT under Section 7 of the IBC and also keeping in perspective the order dated 09.06.2020 passed by NCLT disposing of the application filed under Section 8 of the Act, 1996; the matter requires deeper consideration on that aspect since Dr. Abhishek Manu Singhvi, the learned senior counsel for the Kotak India Venture has contended with regard to a serious error said to have been committed by the NCLT in entertaining an application under Section 8 of the Act, 1996 in the backdrop of the legal duty cast on NCLT to proceed strictly in accordance with the procedure contemplated under Section 7 of IB Code. It is further contented that Indus Biotech Private Limited having defaulted, the event enabling the petition under Section 7 of IB Code has occurred and the dispute sought to be raised is not arbitrable after the insolvency proceeding is commenced.

13. Before adverting to the contentions in this regard, it is to be taken note that against the order dated 09.06.2020 assailed in the special leave petition, Kotak India Venture in the normal course if aggrieved, ought to have availed the remedy of appeal by filing an appeal in the NCLAT as provided under Section 61 of IB Code. Having not done so, in a normal circumstance we would have chosen to relegate Kotak India Venture to avail the alternate remedy of appeal. The contention on behalf of Kotak India Venture that they do not have the remedy of appeal as it is an order disposing an application filed under Act, 1996 and not an order under the part as provided in Section 61 of IB Code is noted only to be rejected. The order dated 09.06.2020 is certainly an order passed by the Adjudicating Authority under IB Code and petition under Section 7 of that Code is also disposed. However, as noted from the narration made above, the order dated 09.06.2020 passed by the NCLT is while taking note of petition under Section 7 of IB Code, in the backdrop of Indus Biotech seeking for the resolution of dispute through arbitration and the Arbitration Petition to that effect was already pending before this Court as on the date the order was passed by the

NCLT. It is only in this special circumstance we have proceeded to entertain the petition and examine the matter on merits.

14. In order to arrive at a conclusion on the correctness or otherwise of the impugned order, at the outset it is necessary for us to take note of the scope of the proceedings under Section 7 of the IB Code to which detail reference is made with reference to the definitions in Section 3(6), 3(8), 3(11), 3(12) and 5(7) of the Code. It provides for the 'financial creditor' to file an application for initiating Corporate Insolvency Resolution Process against a 'corporate debtor' before the Adjudicating Authority when 'default' has occurred. The provision, therefore, contemplates that in order to trigger an application there should be in existence four factors: (i) there should be a 'debt' (ii) 'default' should have occurred (iii) debt should be due to 'financial creditor' and (iv) such default which has occurred should be by a 'corporate debtor': On such application being filed with the compliance required under sub-Section (1) to (3) of Section 7 of IB Code, a duty is cast on the Adjudicating Authority to ascertain the existence of a default if shown from the records or on the basis of other evidence furnished by the financial creditor, as contemplated under sub-Section (4) to Section 7 of IB Code.

15. This Court had the occasion to consider exhaustively the scheme and working of the IB Code in the case of *Innoventive Industries Limited* v. *ICICI Bank and Another,* **REED 2017 SC 08563** : (2018) 1 SCC 407. The proceeding under Section 7 of the IB Code and the scope thereof is articulated in paras 27 to 30 which read hereunder.

"27. 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. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes nonpayment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under subsection (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in subsection (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is preexisting—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter

that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise." (Emphasis supplied)

16. Dr. Singhvi, learned senior counsel while seeking to repel the contention put forth on behalf of the Indus Biotech Private Limited seeks to emphasise that a proceeding under Section 7 of IB Code is to be considered in a stringent manner. Referring to the Preamble to the IB Code, it is contended that the same has evolved after all the earlier processes like civil suit, winding up petition, SARFAESI proceeding and SICA have failed to secure the desired result. The provision under the IB Code is with the intention of making a debtor to seek the creditor. In that regard, Dr. Singhvi has referred to the decisions in the case of *Swiss Ribbons Private Limited and Another* v. *Union of India and Others,* **REED 2019 SC 01504** : (2019) 4 SCC 17 and *Booz Allen and Hamilton INC.* v. *SBI Home Finance Limited and Others,* (2011) 5 SCC 532 to contend that the proceeding under Section 7 of IB Code is an action *inrem.* As such insolvency and winding up matters are nonarbitrable. In that background, the nature of transaction under the SS and SA was referred. It is in that regard contended that the agreement provides for the manner of redemption as also the redemption value. The date of redemption is fixed as 31.12.2018. The OCRPS when redeemed is payable, within 15 days from the date of redemption. In such situation, there is no other issue which require resolution by arbitration. Further, it is contended Clause 5.1 and 5.2 in Schedule J to the agreement provided that the redemption value shall constitute a debt outstanding by the Company to the holder. Hence the amount being debt on the redemption date, if not paid within 15 days of redemption constituted default. In that background, when the petition under Section 7 of IB Code was filed the Adjudicating Authority ought to have looked into that aspect alone and the consideration of an application filed under Section 8 of the Act, 1996 is without jurisdiction is the contention.

17. The procedure contemplated will indicate that before the Adjudicating Authority is satisfied as to whether the default has occurred or not, in addition to the material placed by the financial creditor, the corporate debtor is entitled to point out that the default has not occurred and that the debt is not due, consequently to satisfy the Adjudicating Authority that there is no default. In such exercise undertaken by the Adjudicating Authority if it is found that there is default, the process as contemplated under sub-Section (5) of Section 7 of IB Code is to be followed as provided under sub-Section 5(a); or if there is no default the Adjudicating Authority shall reject the application as provided under sub-Section 5(b) to Section 7 of IB Code. In that circumstance if the finding of default is recorded and the Adjudicating Authority proceeds to admit the application, the Corporate Insolvency Resolution Process commences as provided under subsection (6) and is required to be processed further. In such

event, it becomes a proceeding *in rem* on the date of admission and from that point onwards the matter would not be arbitrable. The only course to be followed thereafter is the resolution process under IB Code. Therefore, the trigger point is not the filing of the application under Section 7 of IB Code but admission of the same on determining default.

18. In that circumstance, though Dr. Singhvi has referred to the evolution of IB Code after all earlier legal process had failed to give the rightful place to the creditor; which is sought to be achieved by the IB Code, it cannot be said that by the procedure prescribed under the IB Code it means that the claim of the creditor if made before the NCLT, more particularly under Section 7 of IB Code is sacrosanct and the corporate debtor is denuded of putting forth its version or the contention to show to the Adjudicating Authority that the default has not occurred and explain the circumstance for contending so. In fact, in the very decision relied on by both the parties in the case of *Innoventive Industries Limited,* **REED 2017 SC 08563**, this court while considering the scope of the various provisions under the Act and while referring to the procedure contemplated in a petition under Section 7 of the IB Code, which is also extracted supra reads thus:

"It is at the stage of Section 7(5), where the Adjudicating Authority is to be satisfied that default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the 'debt', which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact."

19. In the instant case, Dr. Singhvi, as noted earlier has referred to clause 5.1 and 5.2 contained in Schedule J to the agreement to contend that the OCRPS would become due within 15 days from the redemption date and the parties are agreed that it shall constitute a debt outstanding by the company to the Holder. The question would be; whether that alone was sufficient to come to a conclusion that there was default as well in the fact situation of the present nature. It is no doubt true that the original period of the OCRPS was up to 31.12.2018, on which date it could be redeemed. In that background, Mr. Shyam Divan, learned senior counsel for Indus Biotech Private Limited has drawn our attention to Clause 4 and 6 of the very same document to indicate that it provides for early redemption under the circumstances stated therein. Vide clause 6 thereof it has provided that the OCRPS could be converted into equity shares of the company in the circumstances provided therein, which is also on the occurrence of QIPO or Strategic Sale, provided that the OCRPS shall be converted in the manner indicated. Regulation 5(2) of SEBI – ICDR Regulations mandated the same. In that regard, Mr. Divan has also referred to the Board meeting held on 14.03.2018 wherein QIPO related matters were taken into consideration and the conversion of the preference shares was discussed, to which the Nominee Director representing the Kotak India Venture Group was also a party. The said

issue was also discussed in the subsequent meeting dated 06.04.2018 and 10.04.2018. Therefore, the said events *prima facie* indicate that the process of converting the OCRPS into equity shares and the allotment thereof was an issue which had already commenced a while before the redemption date agreed upon i.e., 31.12.2018 had arrived.

20. Therefore, in a fact situation of the present nature when the process of conversion had commenced and certain steps were taken in that direction, even if the redemption date is kept in view and the clause in Schedule J indicating that redemption value shall constitute a debt outstanding is taken note; when certain transactions were discussed between the parties and had not concluded since the point as to whether it was 30 per cent of the equity shares in the company or 10 per cent by applying proper formula had not reached a conclusion and thereafter agreed or disagreed, it would not have been appropriate to hold that there is default and admit the petition merely because a claim was made by Kotak Venture as per the originally agreed date and a petition was filed. In the process of consideration to be made by the Adjudicating Authority the facts in the particular case is to be taken into consideration before arriving at a conclusion as to whether a default has occurred even if there is a debt in strict sense of the term, which exercise in the present case has been done by the Adjudicating Authority.

21. In such circumstance if the Adjudicating Authority finds from the material available on record that the situation is not yet ripe to call it a default, that too if it is satisfied that it is profit making company and certain other factors which need consideration, appropriate orders in that regard would be made; the consequence of which could be the dismissal of the petition under Section 7 of IB Code on taking note of the stance of the corporate debtor. As otherwise if in every case where there is debt, if default is also assumed and the process becomes automatic, a company which is ably running its administration and discharging its debts in planned manner may also be pushed to the Corporate Insolvency Resolution Process and get entangled in a proceeding with no point of return. Therefore, the Adjudicating Authority certainly would make an objective assessment of the whole situation before coming to a conclusion as to whether the petition under Section 7 of IB Code is to be admitted in the factual background. Dr. Singhvi, however contended, that when it is shown the debt is due and the same has not been paid the Adjudicating Authority should record default and admit the petition. He contends that even in such situation the interest of the corporate debtor is not jeopardised inasmuch as the admission orders made by the Adjudicating Authority is appealable to the NCLAT and thereafter to the Supreme Court where the correctness of the order in any case would be tested. We note, it cannot be in dispute that so would be the case even if the Adjudicating Authority takes a view that the petition is not ripe to be entertained or does not constitute all the ingredients, more particularly default, to admit the petition, since even such order would remain appealable to the

NCLAT and the Supreme Court where the correctness in that regard also will be examined.

22. In the above backdrop the question would be as to whether a grave error as contended on behalf of Kotak Venture is committed by the Adjudicating Authority by observing in the course of the order that the invocation of arbitration in a case like this seems to be justified. In our view, the stage of the proceedings at which the said observation was made will be relevant. If the case has reached the stage to the status of a proceeding *inrem*, then such observation would not be justified and sustainable but not otherwise. In the instant case, the petition was yet to be admitted and, therefore had not assumed the status of a proceedings *inrem*.

23. The tests to be applied to determine as to when the subject matter is not arbitrable and on applying such test, actions *in rem* is not arbitrable is laid down by this Court in the case of *Vidya Drolia and Others* v. *Durga Trading Corporation*, 2021 (2) SCC 1 which reads as hereunder:

"**76**. In view of the above discussion, we would like to propound a fourfold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable:

76.1. (1) when cause of action and subject matter of the dispute relates to actions *in rem,* that do not pertain to subordinate rights *in personam* that arise from rights *in rem.*

76.2. (2) when cause of action and subject matter of the dispute affects third party rights; have *erga omnes* effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;

76.3. (3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and

76.4. (4) when the subject-matter of the dispute is expressly or by necessary implication nonarbitrable as per mandatory statute(s).

76.5. (5) These tests are not watertight compartments; they dovetail and overlap, *albeit* when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is nonarbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable.

76.6. However, the aforesaid principles have to be applied with care and caution as observed in *Olympus Superstructures (P) Ltd.* [*Olympus Superstructures (P) Ltd.* v. *Meena Vijay Khetan*, (1999) 5 SCC 651] : (SCC p. 669, para 35)

"*35*. … Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to

status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (*Keir* v. *Leeman* [*Keir* v. *Leeman*, (1846) 9 QB 371 : 115 ER 1315]). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter.

77. Applying the above principles to determine non-arbitrability, it is apparent that insolvency or intracompany disputes have to be addressed by a centralised forum, be the court or a special forum, which would be more efficient and has complete jurisdiction to efficaciously and fully dispose of the entire matter. They are also actions in rem. Similarly, grant and issue of patents and registration of trademarks are exclusive matters falling within the sovereign or government functions and have erga omnes effect. Such grants confer monopoly rights. They are non-arbitrable. Criminal cases again are not arbitrable as they relate to sovereign functions of the State. Further, violations of criminal law are offences against the State and not just against the victim. Matrimonial disputes relating to the dissolution of marriage, restitution of conjugal rights, etc. are not arbitrable as they fall within the ambit of sovereign functions and do not have any commercial and economic value. The decisions have erga omnes effect. Matters relating to probate, testamentary matter, etc. are actions in rem and are a declaration to the world at large and hence are nonarbitrable."

In view of the exhaustive consideration made in Vidya Drolia and our clear understanding that a dispute will be non-arbitrable when a proceeding is *in rem* and a IB Code proceeding is to be considered *in rem* only after it is admitted it is seen that in the instant case the position is otherwise. The decisions relied on behalf of Kotak India Venture in the case of *Booz Allen and Hamilton* v. *SBI Home Finance Ltd. and Others*, (2011) 5 SCC 532 and *A. Ayyasamy* v. *A. Paramasivam and Others,* (2016) 10 SCC 386 need not be referred in detail and overburden this judgment since they have been referred in Vidya Drolia which also explain the same situation.

24. In the case of *Swiss Ribbons Private Limited* v. *Union of India,* **REED 2019 SC 01504** : (2019) 4 SCC 17 and *Pioneer Urban Land and Infrastructure Limited* v. *Union of India and Others,* **REED 2019 SC 08502**, W.P. (C) No. 43/2019 relied on behalf of Kotak Venture, the entire scope and ambit of the IB Code was considered and the validity of the provisions were upheld. The said decisions have also been relied on to contend that when the petition under Section 7 of IB Code is triggered it becomes a proceeding in rem and even the creditor who has triggered the process would also lose control of the proceedings as Corporate Insolvency Resolution Process is required to be considered through the mechanism provided under the IB Code. The principles as laid down in *Swiss Ribbons*, **REED 2019 SC 01504** : was also referred to in detail in the case of

Pioneer Urban Land and Infrastructure, **REED 2019 SC 08502** wherein the observations contained in para 39 though in the case of Real Estate Development was laid down. The relevant portion which has been referred to, reads as follows:-

"Thus, any allottee/home buyer who prefers an application under Section 7 of the Code takes the risks of his flat/apartment not being completed in the near future, in the event of there being a breach on the part of the developers. Under the Code, he may never get refund of the entire principal, let alone interest. This is because, the moment a petition is admitted under Section 7, the resolution professional must first advertise for and find a resolution plan by somebody, usually another developer which has then to pass muster under the Code, i.e. that it must be approved by at least 66 per cent of the Committee of Creditors and must further go through challenges before NCLT and NCLAT before the new management can take over and either complete construction or pay out for refund amounts."

The underlying principle, therefore, from all the above noted decisions is that the reference to the triggering of a petition under Section 7 of the IB Code to consider the same as a proceedings *inrem,* it is necessary that the Adjudicating Authority ought to have applied its mind, recorded a finding of default and admitted the petition. On admission, third party right is created in all the creditors of the corporate debtors and will have erga omnes effect. The mere filing of the petition and its pendency before admission, therefore, cannot be construed as the triggering of a proceeding in *rem.* Hence, the admission of the petition for consideration of the Corporate Insolvency Resolution Process is the relevant stage which would decide the status and the nature of the pendency of the proceedings and the mere filing cannot be taken as the triggering of the insolvency process.

25. As noted, the issue which is posed for our consideration is arising in a petition filed under Section 7 of IB Code, before it is admitted and therefore not yet an action *in rem*. In such application, the course to be adopted by the Adjudicating Authority if an application under Section 8 of the Act, 1996 is filed seeking reference to arbitration is what requires consideration. The position of law that the IB Code shall override all other laws as provided under Section 238 of the IB Code needs no elaboration. In that view, notwithstanding the fact that the alleged corporate debtor filed an application under Section 8 of the Act, 1996, the independent consideration of the same dehors the application filed under Section 7 of IB Code and materials produced therewith will not arise. The Adjudicating Authority is duty bound to advert to the material available before him as made available along with the application under Section 7 of IB Code by the financial creditor to indicate default along with the version of the corporate debtor. This is for the reason that, keeping in perspective the scope of the proceedings under the IB Code and there being a timeline for the consideration to be made by the Adjudicating Authority, the process cannot be defeated by a

corporate debtor by raising moonshine defence only to delay the process. In that view, even if an application under Section 8 of the Act, 1996 is filed, the Adjudicating Authority has a duty to advert to contentions put forth on the application filed under Section 7 of IB Code, examine the material placed before it by the financial creditor and record a satisfaction as to whether there is default or not. While doing so the contention put forth by the corporate debtor shall also be noted to determine as to whether there is substance in the defence and to arrive at the conclusion whether there is default. If the irresistible conclusion by the Adjudicating Authority is that there is default and the debt is payable, the bogey of arbitration to delay the process would not arise despite the position that the agreement between the parties indisputably contains an arbitration clause.

26. That apart if the conclusion is that there is default and the debt is payable, due to which the Adjudicating Authority proceeds to pass the order as contemplated under subsection 5(a) of Section 7 of IB Code to admit the application, the proceedings would then get itself transformed into a proceeding *in rem* having erga omnes effect due to which the question of arbitrability of the so-called *inter se* dispute sought to be put forth would not arise. On the other hand, on such consideration made by the Adjudicating Authority if the satisfaction recorded is that there is no default committed by the company, the petition would stand rejected as provided under subsection 5(b) to Section 7 of IB Code, which would leave the field open for the parties to secure appointment of the Arbitral Tribunal in an appropriate proceedings as contemplated in law and the need for the NCLT to pass any orders on such application under Section 8 of Act, 1996 would not arise.

27. Therefore, to sum up the procedure, it is clarified that in any proceeding which is pending before the Adjudicating Authority under Section 7 of IB Code, if such petition is admitted upon the Adjudicating Authority recording the satisfaction with regard to the default and the debt being due from the corporate debtor, any application under Section 8 of the Act, 1996 made thereafter will not be maintainable. In a situation where the petition under Section 7 of IB Code is yet to be admitted and, in such proceedings, if an application under Section 8 of the Act, 1996 is filed, the Adjudicating Authority is duty bound to first decide the application under Section 7 of the IB Code by recording a satisfaction with regard to there being default or not, even if the application under Section 8 of Act, 1996 is kept along for consideration. In such event, the natural consequence of the consideration made therein on Section 7 of IB Code application would befall on the application under Section 8 of the Act, 1996.

28. In the above background, on reverting to the fact situation in this case, a perusal of the order dated 09.06.2020 would indicate that the Adjudicating Authority, NCLT though has taken up the application filed under Section 8 of the Act, 1996 as the lead consideration, the petition filed under Section 7 of the IB

Code is also taken alongside and made a part of the consideration in the said order. A further perusal of the order would disclose that the Adjudicating Authority was conscious of the fact that consideration of the matter before it any further would arise only if there is default and the debt is payable. This is evident from the observation contained in para 5.13 of the order. The further narration made in para 5.14 would indicate that the Adjudicating Authority, from the material available on record had arrived at the conclusion that the issue involved has not led to a stage of the default having occurred and has rightly, in that context held that the claim of the company by invoking the arbitration clause is justified but the Adjudicating Authority has rightly done nothing with regard to arbitration and has left it to this Court. Accordingly, the Adjudicating Authority in para 5.15 has categorically recorded that they are not satisfied that a default has occurred.

29. It would be appropriate to extract the relevant findings recorded by the NCLT which demonstrates that NCLT was conscious that there should be judicial determination by the Adjudicating Authority as to whether there has been a default within the meaning of Section 3(12) while considering a petition under Section 7 of the IB Code. The relevant finding taken note above read as hereunder:-

"5.13 Therefore, in a section 7 petition, there has to be a judicial determination by the Adjudicating Authority as to whether there has been a 'default' within the meaning of section 3(12) of the IBC.

5.14. *In the present case, the dispute centres around three things*.-(1) The valuation of the Respondent/Financial Creditor's OCRPS; (2) The right of the Respondent/Financial Creditor to redeem such OCRPS when it had participated in the process to convert its OCRPS into equity shares of the Applicant/Corporate Debtor; and (3) Fixing of the QIPO date. All of these things are important determinants in coming to a judicial conclusion that a default has occurred. The invocation of arbitration in a case like this seems to be justified.

5.15. Looking at the contention raised, and that the facts are not in dispute, we are not satisfied that a default has occurred. We note Mr. Mustafa Doctor's statements that the Applicant/Corporate Debtor is a solvent, debt-free and profitable company. It will unnecessarily push an otherwise solvent, debt-free company into insolvency, which is not a very desirable result at this stage. The disputes that form the subject matter of the underlying Company Petition, viz., valuation of shares, calculation and conversion formula and fixing of QIPO date are all arbitrable, since they involve valuation of the shares and fixing of the QIPO date. Therefore, we feel that an attempt must be made to reconcile the difference between the parties and their respective perceptions. Also, no meaningful purpose will be served by pushing the Applicant/Corporate Debtor into CIRP at this stage."

(emphasis supplied)

The NCLT after having recorded such finding has taken note of the arbitration petition pending before this court and has accordingly concluded the proceedings.

30. The conclusion reached by the Adjudicating Authority, NCLT in the instant case cannot be faulted if reference is made to the documents produced by Indus Biotech Private Limited along with an application and referred to by Mr. Shyam Divan, learned senior counsel are noted. It indicates that the allotment of equity shares against the OCRPS in view of the QIPO was still a matter of discussion between the parties and no conclusion had been arrived at so as to term it as default. The said issue was initiated in the 121st meeting of the Board of Directors wherein the Nominee Director representing Kotak India Venture Fund was also present. The IPO related matters were discussed as item No. 6 and at 6(c). The discussion and decision that the conversion of the outstanding preference shares would take place after issuance of bonus shares as per the provisions of the Shareholders Agreement was recorded. In the 122nd meeting of the Board of Directors wherein the Non-Executive Director and Nominee Director representing Kotak India Venture were also present, the issue was considered at item No.7. It was resolved that the Board has accorded approval to the allocation of such percentage of the offer as may be determined by the Board to any category. Further, though in the Extraordinary General Body meeting dated 10.04.2018, the Representative Directors of the Kotak India Venture had obtained leave of absence, the resolution adopted in the said meeting had indicated that the equity shares of the company proposed to be issued and allotted as bonus equity shares shall be subject to the provisions of the memorandum of association and articles of association of the company. The Company Secretary was authorised to do all such acts in that regard.

31. In the letter dated 21.11.2018 addressed by Indus Biotech Private Limited to Kotak India Venture, it was mentioned with regard to the fundamental issue that needs to be addressed regarding conversion and convertible securities into equity shares since the exist process initiated cannot move forward without such conversion. The letter dated 17.12.2018 addressed to Indus Biotech Private Limited by Kotak India Venture in fact refers to the stake in conversion and the dispute being as to whether it should be 10 per cent of the share capital of the company as offered by Indus Biotech Private Limited or 30 per cent as claimed by Kotak India Venture Fund. It is that aspect of the matter, which is still contended to be in dispute between the parties regarding which the arbitration is sought by Indus Biotech Private Limited, which was also noted by Adjudicating Authority. We express no opinion on the merits of the rival contention relating to the dispute.

32. In such situation, in our opinion, it would be premature at this point to arrive at a conclusion that there was default in payment of any debt until the said issue is resolved and the amount repayable by Indus Biotech Private Limited to Kotak

India Venture with reference to equity shares being issued is determined. In the process, if such determined amount is not paid it will amount to default at that stage. Therefore, if the matter is viewed from any angle, not only the conclusion reached by the Adjudicating Authority, NCLT insofar as the order on the petition under Section 7 of the IB Code at this juncture based on the factual background is justified but also the prayer made by Indus Biotech Private Limited for constitution of the Arbitral Tribunal as made in the petition filed by them under Section 11 of the Act, 1996 before this Court is justified.

33. In that circumstance though in the operative portion of the order dated 09.06.2020 the application filed under Section 8 of the Act, 1996 is allowed and as a corollary the petition under Section 7 of the IB Code is dismissed; in the facts and circumstances of the present case it can be construed in the reverse. Hence, since the conclusion by the Adjudicating Authority is that there is no default, the dismissal of the petition under Section 7 of IB Code at this stage is justified. Though the application under Section 8 of the Act, 1996 is allowed, the same in any event will be subject to the consideration of the petition filed under Section 11 of the Act, 1996 before this Court. The contention as to whether payment of investment in preferential shares can be construed as financial debt was raised in the written submissions. However, we have not adverted to that aspect since the same was not the basis of the impugned order passed by the Adjudicating Authority.

34. Since we have arrived at the above conclusion, the next aspect relates to the appointment of the Arbitral Tribunal as sought in the petition. Essentially the main contention that has been urged is with regard to the proceedings before the NCLT and, therefore, the dispute not being arbitrable. However, in the present position the parties would be left with no remedy if the process of arbitration is not initiated and the dispute between the parties are not resolved in that manner as the proceedings before the NCLT has terminated. Mr. Shyam Divan, learned senior counsel for Indus Biotech Private Limited has contended that the transaction between the parties is a common one and as such it would be efficient if the dispute is resolved by a single Arbitral Tribunal. Further in view of the objection raised on behalf of the respondent No.4 (Kotak India Venture) that the arbitration clause has not been invoked in accordance with the requirement therein, since the promoters have to suggest one arbitrator and not the Company, Mr. ANS Nadkarni, learned senior counsel representing the promoters who are arrayed as respondent Nos.5 to 11 in the arbitration petition has pointed out that the affidavit has been filed supporting the petition seeking arbitration and, therefore, the Tribunal be constituted. Though Mr. Neeraj Kishan Kaul, learned senior counsel and Mr. Nitin Mishra, learned counsel had in their argument opposed the reference to arbitration by pointing out lacunae in the manner the clause was invoked and the name of the arbitrator was suggested, in the circumstance the only remedy for the parties being resolution of their dispute through arbitration as indicated above, we consider it appropriate to take

note of the substance of the arbitration clause and constitute an appropriate Tribunal.

35. In that regard it would be necessary to consider as to whether the matter is to be referred to a Single Tribunal or the Tribunal be appointed in respect of each of the agreements. Mr. Nitin Mishra in his written submission has contended that there cannot be composite arbitration. In that regard the decision in the case *of M/S. Duro Felguera S.A* v. *M/S. Gangavaram Port Limited,* (2017) 9 SCC 729 is relied upon with specific reference to paragraphs 38 and 55 therein, while Mr. Ritin Rai has pressed para 44 of the same decision into service seeking common Tribunal. In the said case there were five separate contracts each having independent existence with separate arbitration clauses and in that light, it was held that there cannot be a single Arbitral Tribunal for International Commercial Arbitration and domestic arbitration and bifurcated accordingly. In the instant case also four separate agreements have been entered into between the parties. The provision for arbitration contained in clause 20.04 is similar in all the agreements and the supplemental agreements have also adopted the same. Clause 20.4.1 reads as hereunder:

"20.4.1 Except as provided in Section 20.4.2, the parties hereto irrevocably agree that any dispute, controversy or claim arising out of, relating to or in connection with this Agreement (including any provision of any exhibit, annex or schedule hereto) or the existence, breach, termination or validity hereof (a "Dispute") shall be finally settled by arbitration. The arbitration shall be conducted in accordance with the international arbitration rules of the Arbitration and Conciliation Act, 1996. The arbitration shall be held at Mumbai and shall be conducted by three (3) arbitrators. For purpose of appointing such arbitrators, KIVF I, KEIT and KIVL shall jointly, on the one hand, and the Promoters, as a group, on the other hand, shall each appoint one arbitrator, and the third arbitrator, who shall be the chairperson, shall be selected by the two party appointed arbitrators. In the event that any party fails to appoint an arbitrator within fifteen (15) days after receipt of written notice of the other party's intention to refer a Dispute to arbitration, or in the event of the two party appointed arbitrators failing to identify the third arbitrator within fifteen (15) days after the two party-appointed arbitrators are selected such arbitrator shall be appointed by a Court of competent jurisdiction on an application initiated by any party. An arbitral tribunal thus constituted is herein referred to as a "Tribunal". In the event an appointed arbitrator may not continue to act as an arbitrator of a Tribunal, then the party (or the two appointed arbitrators, in the case of the third arbitrator) that appointed such arbitrator shall have the right to appoint a replacement arbitrator in accordance with the provisions of this Section 20.4.1."

36. A perusal of the arbitration agreement indicates that the arbitration shall be held at Mumbai and be conducted by three arbitrators. For the purpose of

appointment KIVF I, KEIT and KIVL are to jointly appoint one arbitrator and the promoters of Indus Biotech Private Limited, to appoint their arbitrator. In the second agreement dated 20.07.2007, 'KMIL' as the Investor is on the other side. In the third agreement dated 20.07.2007, 'KIVFI' as the Investor is on the other side and in the fourth agreement dated 09.01.2008 it has the same clause as in the first agreement. The two arbitrators who are thus appointed shall appoint the third arbitrator who shall be the Chairperson. The recital (c) in the different agreements though refers to each of the entity in the Kotak Investment Venture and amount invested in shares is referred to, it is provided therein that the equity shares and preference shares subscribed by KMIL, KIVF I, KEIT and KIVL are hereafter collectively referred to as the 'Financial Investors Shares'. If the said aspect is taken into consideration keeping in view the nature of the issues involved being mainly with regard to the conversion of preference shares into equity shares and the formula to be worked thereunder, such consideration in the present facts can be resolved by the Arbitral Tribunal consisting of same members but separately constituted in respect of each agreement. It will be open for the Arbitral Tribunal to work out the modalities to conduct the proceedings by holding separate proceedings in the agreement providing for international arbitration and by clubbing the domestic disputes. All other issues which have been raised on merits are to be considered by the Arbitral Tribunal and therefore they have not been referred to in this proceedings.

37. Since Indus Biotech Private Limited had nominated Mr. Justice V.N. Khare, former Chief Justice of India through their letter dated 15.10.2019 the said learned Arbitrator is treated as having been proposed jointly by the Company and the promoters. Mr. Justice R.M. Lodha, former Chief Justice of India is appointed as the second arbitrator since the respondents had failed to nominate. The said learned arbitrators shall mutually nominate a third arbitrator to be the Chairperson of the Arbitral Tribunal.

38. In the result, the following order;

(i) Civil Appeal arising out of SLP(C) No. 8120 of 2020 is dismissed.

(ii) Arbitration Petition No. 48 of 2019 is allowed.

(iii) Parties to bear their own costs in these proceedings. |||

REED 2021 NCLAT Del 03576

Kuldeep Verma, Resolution Professional K.S Oils Ltd. v. State Bank of India and Others

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

16 March 2021

The Appellate Authority observed that even after the lapse of 981 days and repeated compliance by the RP, the Adjudicating Authority has not yet considered initiation of liquidation as per section 33 of the IBC. The court further noted that whatever power vests in the Adjudicating Authority is always available to the Appellate Authority. It passed the order for liquidation.

Case Analysis

Bench/ Coram	Bansi Lal Bhat, J. (Acting Chairperson) Dr. Ashok Kumar Mishra (Technical Member)
Citation	REED 2021 NCLAT Del 03576
Case number	Company Appeal (AT) (Insolvency) No. 98 of 2021
Subject	Corporate Insolvency
Keywords	IBC, NCLT, NCLT, IP, IRP, CIRP, moratorium, liquidation, appeal, dismissal, committee of creditors, corporate debtor, interlocutory application, quash, maintainable, resolution plan, addendum, adjudicating authority, expression of interest, resolution applicant, intervention application, pandemic.
Legislation cited	Insolvency and Bankruptcy Code, 2016 Section 7, Section 12, Section 14, Section 21(1), Section 30(6), Section 31, Section 33, Section 33(1), Section 34(8), Section 35-50, Section 52, Section 53, Section 54, Section 56, Section 61 Companies Act, 2013 Section 230, Section 232 IBBI (Liquidation Process) Regulations, 2016 Regulation 2B, Regulation 32
Cases Cited	K. Sashidhar v. Indian Overseas Bank & Others **REED 2019 SC 02502**

Essar Steel India Limited Through Authorised Signatory v. Satish Kumar Gupta & Others
REED 2019 SC 11505

Counsels

For the Applicant/ Plaintiff/ Petitioner/ Appellant: Vivek Sibal, Rahul Sharma, Advocates and Kuldeep Verma (RP in person)

For the Respondent/ Defendant: Pooja M. Saigal, Shantanu Chaturvedi, Anshul Bajaj, Advocates for R-14 & R-15
Sumant Batra, Sanjay Bhatt, Niharika Sharma, Advocates for R 1-13
Ramji Srinivasan, Sr. advocate with Ashutosh Ghade, Shashvata Shukla, Rajshree Chaudhary, Shivkrit Rai, Advocates for Intervenor ('Om Shri Subh Labh Agritech Pvt. Ltd.)

REED 2021 NCLAT Del 03576

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Bench / Coram:

Bansi Lal Bhat, J. (Acting Chairperson)
Dr. Ashok Kumar Mishra (Technical Member)

Kuldeep Verma, Resolution Professional K.S Oils Ltd.—*Appellant*

Versus

State Bank of India and Others—*Respondent*

Company Appeal (AT) (Insolvency) No. 98 of 2021

16 March 2021

Counsels:

For the Applicant/ Plaintiff/ Petitioner/ Appellant: Vivek Sibal, Rahul Sharma, Advocates and Kuldeep Verma (RP in person)

For the Respondent/ Defendant: Pooja M. Saigal, Shantanu Chaturvedi, Anshul Bajaj, Advocates for R-14 & R-15
Sumant Batra, Sanjay Bhatt, Niharika Sharma, Advocates for R 1-13
Ramji Srinivasan, Sr. advocate with Ashutosh Ghade, Shashvata Shukla, Rajshree Chaudhary, Shivkrit Rai, Advocates for Intervenor ('Om Shri Subh Labh Agritech Pvt. Ltd.)

JUDGEMENT

Dr. Ashok Kumar Mishra, Technical Member—The present Appeal is filed by the Appellant–Mr. Kuldeep Verma, Resolution Professional ('RP') of M/s. K.S Oils Ltd, under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') against the Impugned order dated 01.01.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Indore Bench at Ahmedabad Court No.1) in IA No. 165/2018 in CP(IB) No. 32 of 2017 (TP No. 60/2019).

2. The grievance of the Appellant – RP is that as on 01.01.2021 i.e. the date of hearing by the Adjudicating Authority as above, despite lapse of 981 days from the date of filing (23.04.2018/26.04.2018)of the Application i.e. IA No. 165/2018 seeking broadly to consider passing orders for liquidation of the

Corporate Debtor i.e. M/s. K.S Oils Ltd., as no Resolution Plan has been approved by the Committee of Creditors (CoC) before the maximum period permitted for the Corporate Insolvency Resolution Process ('CIRP') under Section 12 of the Code: instead the Adjudicating Authority has dismissed the Interlocutory Application ('IA') as not maintainable and being infructuous.

3. The Appellant has accordingly sought the following reliefs:

(a) Allow the instant appeal and set aside/quash the impugned order dated 01.01.2021 passed by the Ld. Adjudicating Authority, NCLT, Indore Bench at Ahmedabad in IA No. 165/2018 in CP(IB) No. 32 of 2017 (TP No.60/2019).

(b) Pass an order initiating liquidation of the Corporate Debtor M/s. K.S. Oils Ltd., under section 33(1) of IBC,2016; and

(c) Pass such further or other orders as this Hon'ble Tribunal may deem fit and proper.

4. Learned Counsel for the Appellant has made a detailed submission which includes followings:

(a) Section 12 of the Code requires completion of CIRP within a period of 180 days from the date of submission of the Application whereas in this case even on completion of 270 days from the date of CIRP commencement the Appellant filed the said IA No.165/2018 for appropriate order to be passed by Adjudicating Authority under Chapter –III of the Code, the Adjudicating Authority has erred in not passing Liquidation order but has dismissed the IA as not maintainable & infructuous.

(b) The said IA was listed and heard on 31 hearings commencing from 11.05.2018, 21.06.2018, 19.07.2018, 04.09.2018, 03.10.2018, 30.10.2018, 11.12.2018, 04.02.2019, 18.03.2019, 03.04.2019, 12.04.2019, 26.04.2019, 28.06.2019, 19.07.2019, 08.08.2019, 06.09.2019, 25.09.2019, 25.10.2019, 22.11.2019, 13.12..2019, 19.12.2019, 03.01.2020, 23.01.2020 (Order Reserved), 03.07.2020 (List the matter for further consideration), 10.09.2020 (Order Reserved), 16.09.2020 (Further consideration on 28.09.2020), 28.09.2020, 08.10.2020, 27.11.2020, 10.12.2020 and 01.01.2021 (dismissed being infructuous).

(c) History of the case is that an Application under Section 7 of the Code was filed by SREI Infrastructure Finance Limited (SREI) and on 21.07.2017 the Adjudicating Authority has admitted the Petition filed in respect of M/s. K.S. Oils Ltd- Corporate Debtor and ordered for CIRP. SREI is also a Financial Creditor who submitted a Resolution Plan dated 09.04.2018 as Resolution Applicant and the same was put to vote in the 7th CoC Meeting held on 13.04.2018 and the Resolution Plan was rejected by a vote of 71.34%. Since the maximum statutory period of 270 days concluded on 16.04.2018 without a Resolution Plan approved

by CoC, the RP filed an application IA No. 165 of 2018 to consider passing of orders for liquidation of the Corporate Debtor under Chapter –III of the Code. However, the Adjudicating Authority asked the RP to consider addendum –III dated 04.05.2018 submitted by SREI to the Resolution Plan as stated above for placing before the CoC. The RP placed the said addendum before the CoC on 13.06.2018; the same was rejected by e-voting of 76.50%. The RP filed affidavit on 27.06.2018 apprising the Adjudicating Authority. The Adjudicating Authority again asked the RP to consider the Addendum –IV dated 09.07.2018 to the said Resolution Plan and place before the CoC. The CoC members filed individual affidavit confirming that Addendum –IV has been rejected by 69.14% voting. SREI again submitted Addendum –V dated 11.04.2019 and RP was asked by Adjudicating Authority to place before the CoC. The RP convened the meeting of the CoC on 12.07.2019 and Addendum –V was rejected by 64.16% of the voting. The Adjudicating Authority vide its order 08.08.2019 again directed CoC to consider positive workable solution for the Corporate Debtor by considering any of the 5(Five) Addendum. The RP called 10th meeting of the CoC on 29.08.2019 and CoC rejected all Addendum upto V with 77.96% of the voting shares. The RP filed additional affidavit dated 03.09.2019 that CoC has rejected all the Addendums and also resolved for liquidation of the Corporate Debtor. The Appellant also filed his consent to act his Liquidator of the Corporate Debtor.

(d) State Bank of India, one of the CoC Member, on behalf of Joint lenders forum who collectively holds 76.53% of the voting rights of the CoC filed an appeal before the Appellate Tribunal bearing No. Company Appeal (AT) (Ins) No. 1015 of 2019 on the ground that Adjudicating Authority has not adhered to the timelines of CIRP and has not passed liquidation order even after completion of maximum period allowed under CIRP requiring Adjudicating Authority under Part-III of the Code for initiation of Liquidation. The order passed by this Tribunal is extracted below:

18.11.2019- The Appellant – 'State Bank of India' is one of the member of the 'Committee of Creditors'. It has challenged the order dated 6th September, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, Ahmedabad, which reads as follows: "The parties are represented through learned counsels. On the request of the proposed Resolution Applicant, the matter is adjourned. List the matter on 25.09.2019." The main plea taken by the Appellant is that the 'resolution plan' was revised 5 times and the Adjudicating Authority adjourned the matter from time to time even after the impugned order. Till date, no final order has been passed. Learned counsel for the 'Resolution Applicant' submits that the matter relates to 'Madhya Pradesh' for which 'Indore Bench' had been notified initially but there was no Bench constituted and now the Hon'ble Members of the 'Ahmedabad Bench' have been allowed to take up 'Indore Bench matters' at Ahmedabad. Learned counsel for the Appellant submits that the 'revised plan' has already been filed, which may be considered by the 'Committee of Creditors'. In the facts and

circumstances, we allow the 'Committee of Creditors' to consider the 'revised plan', if any, filed or is to be filed within a week. The 'Committee of Creditors' is allowed to consider the same within 2 weeks from the date of this order or receipt of the 'revised plan' and in case the 'proposed resolution plan' is not filed within a week, the Adjudicating Authority will take up the application under Section 33 of the 'I&B Code' and pass appropriate order in accordance with law. The appeal stands disposed of.

(e) Even after this Appellate Tribunal order, the Petition before the Adjudicating Authority was heard on 22.11.2019, 13.12.2019, 19.12.2019, 03.01.2020, 23.01.2020, 03.07.2020, 10.09.2020, 16.09.2020, 28.09.2020, 08.10.2020, 27.11.2020, 10.12.2020 and finally 01.01.2021 dismissed being not maintainable & Infructuous.

(f) In the meantime, IA No. 357 of 2021 has been filed on 25.02.2021 vide Diary No. 25695 by Om Shri Shubh Labh Agritech Private Limited, Gwalior seeking intervention in the matter under the provisions of Rule 11 of NCLAT Rules, 2016. Learned Senior Counsel has argued that the Applicant proposes to infuse Rs. 310 Crore (Page 3 para 4 of the IA No. 357 of 2021) in the Corporate Debtor (which at the time of hearing was shown to increase to Rs. 625 Crore Page 79 of the IA No. 357 of 2021) within a period of 270 days from the date of approval of the Resolution Plan by Adjudicating Authority with a view to revive its operations. However, it is to be mentioned here that the RP published Expression of Interest ('EOI') on 14.11.2017 against which SREI submitted its EOI Addendum-IV of Rs.451 Crore to its Resolution Plan dated 09.04.2018 which was rejected by CoC.

(g) Learned Senior Counsel representing Respondent No.1 to 13 basically banks and financial institution, he was very categorical that the time was come when the Appellate Authority has to pass the liquidation order under Chapter-III of the Code. Time is the essence of the Code & its core objects is to provide Resolution in a time bound manner for maximization of value of assets of the Corporate Debtor and the Adjudicating Authority has erroneously failed to consider this aspect in spite of 31 hearings and finally dismissing the petition as infructuous and not maintainable.

5. We have carefully gone through the pleadings and the submissions made by the learned Sr. Counsels / Counsels and are observing the followings:-

(a) The Code has come into force with the basic objective of Resolution in a time bound manner. Available literature on the subject suggests that in pre-IBC period Resolution used to take more than 4(Four) years in India while it was around 1 (one) year in other European Countries and USA. If the Adjudicating Authority takes such a considerable time it will defeat a very purpose of the Code.

(b) No doubt, reorganisation and Insolvency Resolution is the prime purpose of the Act but with a rider in a time bound manner as well as maximization of the

value of assets of such Corporate Debtor. Section 12 of the Code has already laid down a period of 330 days on the outer side, although it is directory in nature. This also suggests that the need for giving multiple opportunities to the sole Resolution Applicant is not warranted to defeat the very purpose of the Act.

(c) If this Appellate Tribunal consider the intervention Application i.e. IA No. 357 of 2021, it will again move in a wrong direction and will violate the principles of natural justice as the Code and the Regulator IBBI has prescribed a process for selection of Resolution Applicant which initially starts with Invitation for Expression of Interest (EOI) followed by Information Memorandum, Evaluation Matrix and a request for Resolution Plan in accordance with Chapter –X of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Hence, such midway interruptions of allowing a party to enter the fray after 3 years of issue of EOI is neither warranted by the Regulations nor by the Code.

Learned Senior Counsel representing Respondent No.1 to 13 has already vehemently objected the intervention application. Considering the above said aspect, we are no way inclined to allow the Intervention Application and accordingly, the Intervention Application is rejected at the very threshold. However, the Intervener is free to move for a compromise or arrangement under IBBI Liquidation Process Regulations, 2016 if advised and permitted under its Regulation 2-B.

(d) It is unfortunate to observe that even after the lapse of 981 days and repeated compliance by the RP of the direction of the Adjudicating Authority; the Adjudicating Authority has not yet considered initiation of Liquidation as per Section 33 / Chapter –III of the 'Code'. Neither the Adjudicating Authority nor the Appellate Authority is supposed to look into the commercial wisdom of CoC or to reverse the Commercial wisdom of CoC as repeatedly observed by Hon'ble Supreme Court in *Committee of Creditors of Essar Steel India Limited Through Authorised Signatory* v. *Satish Kumar Gupta & Others,* **REED 2019 SC 11505,** Civil Appeal No.8766-67 of 2019 dated 15.11.2019 and *K. Sashidhar* v. *Indian Overseas Bank & Others,* **REED 2019 SC 02502**, Judgment dated 05.02.2019 in Civil Appeal No. 10673 of 2018.

(e) While we appreciate that the year 2020 has faced unprecedented global pandemic Covid-19 and it might have acted as a bottleneck to the Adjudicating Authority but Adjudicating Authority may not have allowed repeated reference of Resolution Applicant for the consideration of CoC when CoC was repeatedly rejecting their variants of proposals.

6. Chapter –III of the Code deals with Liquidation Process and Section 33 of the Code deals with initiation of liquidation. Section 33 is reproduced below for convenience:

"Section 33. *Initiation of Liquidation*.-(1) Where the Adjudicating Authority,—

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or

(b) rejects the resolution plan under section 31 for the noncompliance of the requirements specified therein, it shall—

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors 1[approved by not less than sixty-six per cent. of the voting share] to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of subsection (1).

[*Explanation.*-For the purpose of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.]

(3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

(6) The provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(7) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

7. It is abundantly clear that the Object of the Code, 2016, IBBI Regulations, this Appellate Tribunal Judgments, Hon'ble Apex Court Judgments all this suggests that time is the essence of the Code. The Adjudicating Authority naturally, is to keep this factor in mind, liquidation sale can be in the format of anyone of the followings as per Regulations 32 of IBBI (Liquidation Process) Regulations, 2016:

(a) An asset on a standalone basis;

(b) the assets in a slump sale;

(c) set of assets collectively;

(d) the assets in parcels;

(e) the Corporate Debtor as a going concern; or

(f) the business (s) of the Corporate Debtor as a going concern. Even Provisions of Section 230 & 232 of the Companies Act, 2013 can also be invoked.

8. All this suggests that the Appellate Tribunal has to perforce consider the relief sought by the Appellant-Resolution Professional approved by the CoC for setting aside the impugned order and initiation of Liquidation Process. The Adjudicating Authority has failed to implement the order of the Appellate Tribunal dated 18.11.2019. It is settled law that whatever power vests in the Adjudicating Authority is always available to Appellate Authority.

9. In view of the above elaborate observations, it is in the fitness of situation to allow the appeal and set aside the impugned order dated 01.01.2021 passed by the Adjudicating Authority (NCLT, Indore bench at Ahmedabad Court No. 1) in IA No. 165/2018 in CP(IB) No. 32 of 2017 (TP No. 60/2019) and initiate Liquidation of the Corporate Debtor M/s. K.S.Oils Ltd under Section 33(1) of the Code. Hence, the Appeal is allowed and the impugned order dated 01.01.2021 passed by the Adjudicating Authority is set aside and at the same time the order for initiation for liquidation of the Corporate Debtor M/s. K.S.Oils Ltd is also allowed.

The Corporate Debtor- M/s. K.S. Oils Ltd shall liquidate in the manner as laid down in Chapter-III of the Code;

(a) Mr Kuldeep Verma IP Registration No. IBBI/IPA-001/IPP00014/2016-2017/10038 an Insolvency Professional is appointed as the Liquidator. He shall be entitled to such fees as may be specified by the Board in terms of Section 34 (8) of the Code.

(b) He shall issue public announcement stating that Corporate Debtor is in liquidation.

(c) The Moratorium declared under Section 14 of the IBC 2016 shall cease to operate here from.

(d) Subject to section 52 of the IBC 2016 no suit or other legal proceedings shall be instituted by or against the Corporate Debtor. This shall however not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(e) All powers of the Board of Directors, Key Managerial Personnel and partners of the Corporate Debtor shall cease to have effect and shall be vested in the Liquidator.

(f) The liquidator shall exercise the powers and perform duties as envisaged under Sections 35 to 50 and 52 to 54 of the Code, read with Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016.

(g) Personnel connected with the Corporate Debtor shall extend all assistance and cooperation to the Liquidator as will be required for managing its affairs.

(h) Copy of the Order shall be furnished to the IBBI, to the Regional Director (North Western Region), Ministry of Corporate Affairs; Registrar of Companies, the Liquidator and the Adjudicating Authority (NCLT Indore Bench at Ahmedabad Court No. 1).

No order as to costs. Pending Application(s), if any, stands disposed of |||