APRIL TO JUNE 2023

THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA ICMAI) is a Section 8 Company incorporated under the Companies Act-2013 promoted by the Institute of Cost Accountants of India. We are the frontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI). With the responsibility to enroll and regulate Insolvency Professionals (IPs) as its members in accordance with provisions of the Insolvency and Bankruptcy Code 2016, Rules, Regulations and Guidelines issued thereunder and grant membership to persons who fulfil all requirements set out in its bye laws on payment of membership fee. We are established with a vision of providing quality services and adhere to fair, just and ethical practices, in performing its functions of enrolling, monitoring, training and professional development of the professionals registered with us. We constantly endeavor to disseminate information in aspect of Insolvency and Bankruptcy Code to Insolvency Professionals by conducting round tables, webinars and sending daily newsletter namely "IBC Au courant" which keeps the insolvency professionals updated with the news relating to Insolvency and Bankruptcy.

INDEX

CHAIRMAN'S MESSAGE

Dear Readers and Contributors,

It is my great pleasure to welcome you to our e-journal, where we aim to share the latest insights, articles, and case laws on IBC, 2016. As the Chairman of this esteemed publication, I am proud to say that we are committed to providing a platform for researchers, scholars, and experts to publish their work and contribute to the development of knowledge in their respective fields. 6 years down the line, how is the Insolvency and Bankruptcy Code (IBC), 2016, working. Its performance ought to be seen in totality--in terms of what happens under the IBC, on account of it, and within its shadow.

The first-order objective of the Code is resolution in a time-bound manner. The second-order objective is the maximization of the value of assets of the firm and the third-order objectives are promoting entrepreneurship, availability of credit, and balancing the interests of stakeholders. This order of objectives is sacrosanct.

The prime objective of the IBC is to rescue corporate debtors in distress. The Code specifies a time-bound insolvency resolution process, including any litigation, which must be completed within 330 days. The fulfillment of IBC's objectives is evident from the cases that have seen successful resolutions.

Undoubtedly, the IBC has been effective to a great extent so far, however, compliance with timelines remains an issue. The earlier envisaged timeframe of 180 days (+90 days extension) was increased to 330 days for resolving issues. Despite the extension, resolution plans continue to cross the deadline. On average, it takes 380 days for resolution plans to reach a conclusion.

Another challenge is that the sole authority lies with the committee of creditors to control the RPs, without any guidelines. The need of the hour is to enhance the institutional capacity of the NCLT benches and bring in more transparency in the selection of RPs. The IBC is a crucial structural reform, which if implemented effectively and in a time-bound manner can produce major gains for the corporate sector and the economy.

According to a quarterly newsletter from the IBBI, the average time it takes for the judiciary to approve a resolution plan after proceedings have begun is significantly longer than the 180 or 270 days mandated by law. It was reported that the average time for approval was 408 days. However, there is no doubt that the IBC has significantly improved the speed of the resolution process for insolvency cases in India. According to the Ministry of Corporate Affairs, the average time taken to resolve insolvency cases has decreased. This is a significant improvement and is a testament to the effectiveness of the IBC in streamlining the resolution process.

Data released by the Insolvency and Bankruptcy Board of India (IBBI) reveals that 47% of companies, admitted to the insolvency process between December 2016 and March 2022, went into liquidation and only 14% were resolved under the Act. In terms of numbers, of the 5,258 corporate bankruptcy proceedings initiated in this period, 3,406 were closed; but, of these, only 480 were resolved and as many as 1,609 were liquidated. We are now at a stage where even large conglomerates, with some valuable assets, are attracting bids far below the liquidation value, and, in a growing number of cases, creditors are happy to accept a haircut of 80%-99% leaving nothing for other stakeholders.

To conclude, I want to express my gratitude to our esteemed contributors who have dedicated their time and effort to create high-quality articles. Their contributions have made our e-journal a reputable and reliable source of information, and I am grateful for their continued support.

We look forward to receiving your submissions and engaging with our readers through our e-journal. We are confident that our efforts will contribute to the advancement of knowledge and the betterment of society, and all the people associated with IBC.

Thank you for your interest and support.

Dr. Jai Deo Sharma,
Chairman, IPA ICAI

PROFESSIONAL DEVELOPMENT INITIATIVES

EVENT'S
APRIL TO JUNE 2023

S.NO	EVENT	DATE
1.	Two Days Learning Session on CIRP & Liquidation.	April 8th-9th, 2023
2.	Workshop on Judicial Pronouncement under IBC, 2016.	April 15th, 2023
3.	Two Days Online Learning Session on Group Insolvency & Cross Insolvency"	April 22nd-23rd, 2023
4.	Workshop on Compliances to be made by IPs under IBC, 2016.	April 29th, 2023
5.	"IP Conclave" IBC from Stakeholders Perspective.	May 6th, 2023
6.	Workshop on Treatment of Contingent Liabilities under IBC, 2016.	May 12th, 2023
7.	Learning Session on Interface of different Laws with IBC, 2016.	May 19th, 2023
8.	Workshop on Committee of Creditors: An Institution of Public Faith.	May 26th, 2023

9.	Learning Session on Interim Finance – A Source of Operational Funding under IBC	June 03rd – 04th 2023
10.	Pre-Registration Educational Course	June 07th to 13th 2023
11.	Workshop On Ethics and Management Skills For Insolvency Professionals	June 11th 2023
12.	Learning Session on Analysis of Financial Statements under PUFE Transactions	June 17th –18th 2023
13.	Learning Session on Evaluation matrix, Fair value & Liquidation value	June 24th – 25th 2023

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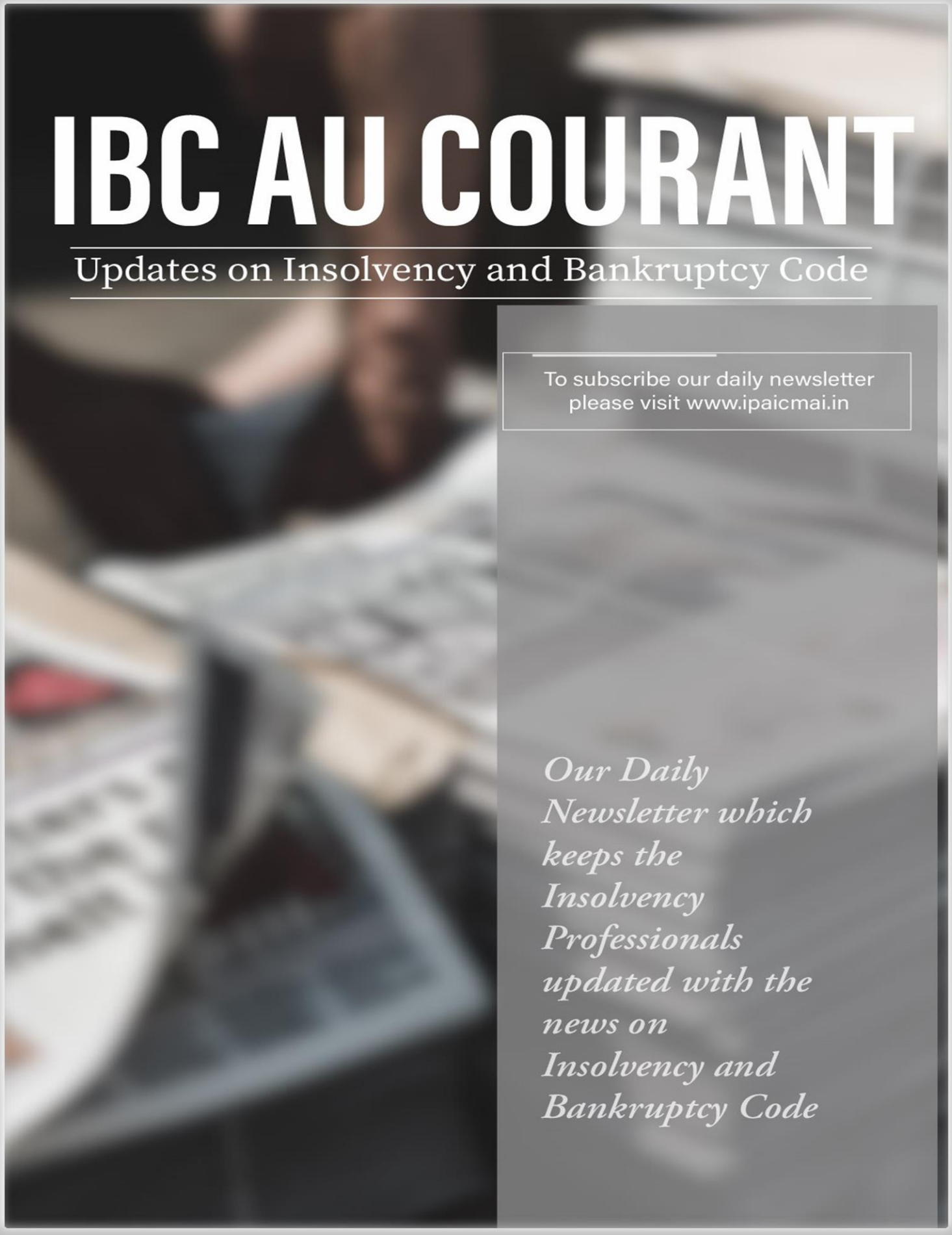

IBC AU COURANT

Updates on Insolvency and Bankruptcy Code

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Our Daily Newsletter which keeps the Insolvency Professionals updated with the news on Insolvency and Bankruptcy Code

ARTICLES

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

LEASE RENT - AN OPERATIONAL DEBT?

M. GOVINDARAJAN

PCS & IP

Creditor Corporate Insolvency Resolution Process by Operational

Section 9 of the Insolvency and Bankruptcy Code, 2016 ('Code' for short) provides for the initiation of corporate insolvency resolution process by an operational creditor against the corporate debtor for non settlement of debts the operational creditor after fulfilling the procedure contained in Section 8 of the Code.

Operational debt

Section 3(11) of the Code defines the term 'debt' as 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 'operational debt' is defined under section 5(21) of the Code as a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government, or any local authority.

Issue

In many cases the dues could not be proved as an operational debt and in such cases the Adjudicating Authorities rejected the application filed by the operational creditor for initiation of corporate insolvency resolution process under section 9 of the Code. In this article the issue to be taken up is as to whether the licence fee amounts to operational debt with reference to decided case law.

Case laws

In 'Ravindranath Reddy v. V.G. Krishnan and others' - 2020 SCC Online NCLAT 84, the NCLAT, Principal Bench, New Delhi held that the debt on account of purported enhanced rate of leasehold properties does not fall within the definition of operational debt In **'Smartworks Coworking Spaces Private Limited v. Turbot HQ India Private Limited'** - Company Appeal

(AT) (Insolvency) No. 772 of 2022 - NCLAT, Principal Bench, New Delhi - decided on 23.05.2023, the appellant is engaged in the business of coworking and/or providing flexi office space, a working arrangement where different corporate bodies come together to work for a single business center run and maintained by the appellant. The appellant entered into an agreement with Turbot HQ India Private Limited ('respondent') called as 'Service Providers Agreement'. The features of the said agreement are as below-

- The period of agreement was from 01.10.2018 to 30.09.2021.
- The agreement does not create any right or title or interest in the property immovable or movable.
- The monthly office fees is Rs.3,52,000/-.
- There is a lock-in-period for 36 months.

The respondent in terms of agreement began to use the said premises. The respondent wanted to end the agreement with the appellant and therefore gave an email to the appellant on 04.06.2019 indicating his intention to end the contract by 01.09.2019. The appellant informed the respondent that there is a lock-in-period of 36 months ending on 30.09.2021. Therefore the respondent has to pay unpaid balance amount to the appellant. The respondent stopped using the premises with effect from 01.10.2019.

The appellant sent notice to the respondent for the payment of remaining unpaid amount to the tune of Rs. 1,05,32,126/-. Since no payment has been made the appellant issued a notice under Section 8 of the Code to the respondent, as a Corporate Debtor (now the respondent changed to 'Corporate Debtor) on 18.08.2020 claiming an operational debt of Rs.1,28,95,402/-. The Corporate Debtor denied the claim and replied accordingly to the appellant. The appellant, as an operational creditor, filed an application under Section 9 of the Code before the Adjudicating Authority for initiation of corporate insolvency resolution process against the Corporate Debtor.

The Corporate Debtor filed a reply to the Adjudicating Authority contending that the office service agreement is a lease agreement, containing all essential elements of lease prescribed under section 105 of the Transfer of Property Act, 1882. Rent is not an operational debt for the purposes of admitting the application under section 9 of the Code. The Adjudicating Authority framed the following issues for its consideration-

- Whether, the amount claimed by the petitioner for the locking period amounts to operational debt?
- Whether, the agreement dated 17th August, 2018 is compulsorily registerable Instrument under the Registration Act 1908?
- Whether, the agreement dated 17.08.2018 was originally engrossed on an unstamped paper?

The Adjudicating Authority held that the amount claimed by the operational creditor for the lock in period is not an operational debt. The agreement dated 17.08.2018 was originally engrossed on an unstamped paper. The same is required to be registered. Therefore the Adjudicating Authority rejected the application filed by the operational creditor.

The operational creditor filed an appeal before the National Company Law Appellate Tribunal ('NCLAT' for short), Principal Bench, New Delhi, against the order of Adjudicating Authority. The appellant submitted the following before the NCLAT-

- The agreement entered with the Corporate Debtor had a lock-in-period of 36 months, during which period the agreement cannot be terminated by the Corporate Debtor.
- The termination is in breach of the agreement for which the appellant is entitled for the claim within the meaning of Section 3(6) of the Code.
- The Adjudicating Authority committed error in holding that the licence fee is not an operational debt.
- The claim of the appellant arises out of the breach of contract which is a 'debt' within the meaning of the Code.
- The agreement does not require for registration since no right was created in any immovable property in favor of the Corporate Debtor.
- West Bengal Stamp Duty on document does not provide for license as chargeable with duty.
- Since there is a debt and default the Adjudicating Authority ought to have admitted the application filed by the applicant.

The Corporate Debtor submitted the following before the NCLAT-

- The rent as per the agreement cannot be treated as an operational debt.
- For the breach of contract the appellant was required to claim

compensation in the competent Civil Court.

- The agreement is not engrossed on stamp paper and therefore it is not admissible before the Court of law.
- Clause 1.12 of the agreement provides for arbitration to settle the dispute.
- The appellant could not provide services as per agreement and failed to the terms of the agreement, necessary uses and customs.
- The Adjudicating Authority rightly rejected the application since it is not an operational debt.

The NCLAT heard the submissions put forth by the parties to the present appeal and also perused the records. The NCLAT analyzed the provisions of the agreement dated 17.08.2018. The NCLAT observed that there was a lock in period for 36 months from 01.10.2018 to 30.09.2021. The amount payable for the first 6 months is Rs.2,72,000/- plus taxes and thereafter @ Rs.3,52,000/- plus taxes. The agreement creates no right, title or interest in the immovable and movable properties. The agreement is in person to the client and is non inheritable and cannot be transferred or assigned to anyone else. The agreement also provides for the cancellation of agreement by giving 30 days notice in advance without assigning any reason after the lock-in-period. However, the provider has no right to terminate the agreement during the validity of the agreement except in the circumstances of material breach of any of the terms of this agreement or the client is in default as more specifically mentioned.

The NCLAT further observed that the Corporate Debtor, on 04.06.2019 sent an email to the operational creditor intimating that their management decided to quit to their own premises and requested to accept their appeal to quit from the premises of the operational creditor. The operational creditor replied that the agreement cannot be cancelled during the lock-in-period and insisted the Corporate Debtor to honor the agreement and requested to pay the balance amount remaining unpaid.

The NCLAT observed that as per clause 1.4 of the agreement the Corporate Debtor can terminate the contract after giving 30 days notice only after the lock-in-period of 36 months. Since the Corporate Debtor terminated the contract during the lock-in-period against the clause 1.4 of the agreement the case will be in favor of the appellant. In section 9 Application, the Operational Creditor has in part-IV of the Application mentioned all details of transaction and details of operational debt giving details of

correspondence between the parties and the details of the operational debt which accrued on account of pre-mature termination of the agreement by the Corporate Debtor.

The High Court held that the Adjudicating Authority has committed an error in holding that the debt claimed by the operational creditor was not operational debt. The debt claimed by the Appellant is clearly a claim within the meaning of the Code and on default being committed by the Corporate Debtor the debt became due and Appellant was fully entitled to initiate proceedings under Section 9 of the Code.

The NCLAT then considered the second point determined by the Adjudicating Authority as to whether the agreement is liable to be registered. In this regard the NCLAT found that according to the nature of the agreement there is no claim on the moveable and immovable properties except the services run by the appellant. The NCLAT referred to Section 17(b) of Registration Act,

The NCLAT held that it is clear that agreement does not purport or operate to create, declare, assign, limit or extinguish any right, title or interest in immovable or movable property. The Agreement was clearly not required to be compulsorily registered under Section 17(b)

The NCLAT then considered the third issue decided by the Adjudicating Authority that the agreement was originally engrossed on unstamped paper. The NCLAT observed that according to the Corporate Debtor the agreement was written on the paper. Both the parties have signed but on the paper where stamp paper was mentioned there was no signature of the Corporate Debtor. The Corporate Debtor did not deny execution of the agreement between the parties. The Agreement was termed by the Corporate Debtor as a lease agreement. The Corporate Debtor in pursuance of the Agreement took the possession of the premises and also paid monthly office fee up to July 2019 which clearly indicate that the agreement dated 17th August, 2018 was given effect to.

The NCLAT held that when Agreement was admittedly executed between the parties, signed by both the parties and acted upon, mere fact that it not being engrossed on stamped papers shall have no adverse consequence on the claim of the Operational Creditor. The Adjudicating Authority erred in determining the third point against the operational creditor. The appellant has proved that debt claimed by the Appellant in Section 9 Application was operational debt. Further the agreement dated 17th August, 2018 was not compulsorily registrable and

agreement having not been executed on Rs. 100 Stamp Paper was inconsequential, the agreement having been acted upon and the Corporate Debtor having entered into possession of the premises in pursuance of the Agreement.

The NCLAT allowed the appeal and set aside the order of the Adjudicating Authority. The NCLAT further directed the Adjudicating Authority to pass order of admission under section 9 of the Code within one month from the date of receipt of the order. The parties to the appeals are at liberty to arrive at a settlement, if any.

PRE-PACK: ITS RELEVANCE AND WHY IT HAS NOT TAKEN OFF YET IN INDIA

Padmanabhan Nair
Insolvency Professional

SYNOPSIS

Pre-pack has succeeded in all the developed countries where it has been initiated saving much time and cost to the system and economy at large. It is in the nature of things that businesses would rise and fall due to market conditions, political and regulatory environments and international arrangements and tensions. There could also be simple managerial incompetence and sometimes malafide, although the latter is not as widespread as it seems This article briefly explores all the issues and stresses the urgent need to have simple mutually acceptable solutions which revive the companies and do not put undue and unnecessary pressure on the judicial system In this case NCLT/NCLAT) through frivolous applications due to hostile confrontations between management and creditors. At the same time, the IBC is there to provide due process and legally binding solutions.

1. *INTRODUCTION*

The Indian Insolvency Law committee brought Pre-pack (PPIRP) into fruition in Oct 2020.They believed that it should be introduced as an alternative to CIRP to speed up the process of insolvency. Here the promoters have maximum option to retain control (debtor in possession) rather than CIRP(creditor in control)pre-pack administration is an arrangement pursuant to which a plan relating to the business of a distressed company is negotiated and agreed by the requisite stakeholders prior to the appointment of an administrator, and implemented upon the commencement of the administration

A pre-pack administration combines features of an informal restructuring and a formal administration procedure, allowing for private negotiations to be made in relation to how the financial distress of the company is to be resolved on an informal basis, before subsequently effecting the deal under a formal administration procedure.

2. *ADVANTAGES & DISADVANTAGES*

I.ADVANTAGES

Some of the key advantages of the pre-pack (PPIRP) are

- CD can initiate with approval of shareholders and creditors.
- CD shall prepare the base resolution plan as per business viability and underlying security to FC's who have already consented to the same.
- RP doesn't have to run the unit which requires considerable technical expertise. Moreover, there is likely to be considerable cooperation from the CD who would retain his unit at a haircut and with decent relations with the FC (most likely)
- Benefit of moratorium is still there with all the attendant provisions of basic amenities.
- Whole process can be completed within 90 days max 120 days.CD is likely to cooperate in this process.
- CD is bearing the cost so no need for FC to take endless approvals for this which is often difficult for desk officer in nationalized banks.
- Audit query less likely if the unit is an MSME as the government is known to be very lenient towards them, as they provide huge employment in the common society.

II. DISADVANTAGES

1. The biggest problem is that this process is confined to MSME's only. No doubt there is a fear of misuse but this can be offset by putting some sort of limits to the haircuts envisaged. Moreover, the type of CD likely to misuse is likely to fall afoul of Sec 29 A

2. Bankers tend to block the process and they have full powers to do so.There has to be some leeway to the banker to freely approve MSME pre-packs. The failure of this scheme is mainly due to the bankers hesitancy to approve PPIRP for fear of audit queries.

The practical experience of this IP is that privately they may agree it makes sense but they are hesitant to approve even a reasonable package for fear of audits, enquiries etc. probing the reason for such decisions. If limits are given, at least for MSME's no doubt there may be some misuse, but it would be comparatively less in quantum. On the other hand, huge number of genuine MSME's may get relief, leading to much revival in the middle and lower strata of the economy.

Likewise, the larger segment should be permitted pre-packs but with stricter guidelines. As they have better and more

knowledgeable staff and advisors, they should be able to comply to these guidelines generally speaking.

All it needs is a declaration by the directors that

I. The PPIRP would be filed in 90 days
II. There is no intent to defraud anyone
III. IP is identified and the duties are very clear cut and specified such as filing form P8 and other documents which the Board may require. If PPIRP not filed by CD then RP has no further responsibility. Likewise, if the AA does not approve the same.

Much simpler procedure without long legal complications, troubles of non-cooperation and settling these accounts would either.

- Revive the corporation which would seem to be the intent of majority of promoters dealing with PPIRP.
- All the assets to be released into the market(including land and building) and allow it to be utilized in a more profitable or productive way by some other enterprise. As it is, getting land in India is tedious and difficult and if there is readymade commercial land available, which can be taken over it's a huge gift to productivity of Industry as a whole.
- At the same time larger corporations, especially those who are professionally managed and with a good track record generally, get some relief .If these companies are publically funded by IPO, private placement etc. then the revival of the company would bring much needed relief to the financial community.

Relatively easy conditions

1. CD should not have done CIRP/PIRP past 3 years.
2. Should be eligible under 29A.
3. 66% by unrelated FC's and 75 ¾ by Directors/promoters of Board
4. No liquidation process started.
5. One RP identified to carry out processing work who has to process relevant forms.

The process involves more of negotiation as explained above. Due to this reason, Financial Creditors get Value Maximization.

FIGURE-1-CHARTPRE-PACK

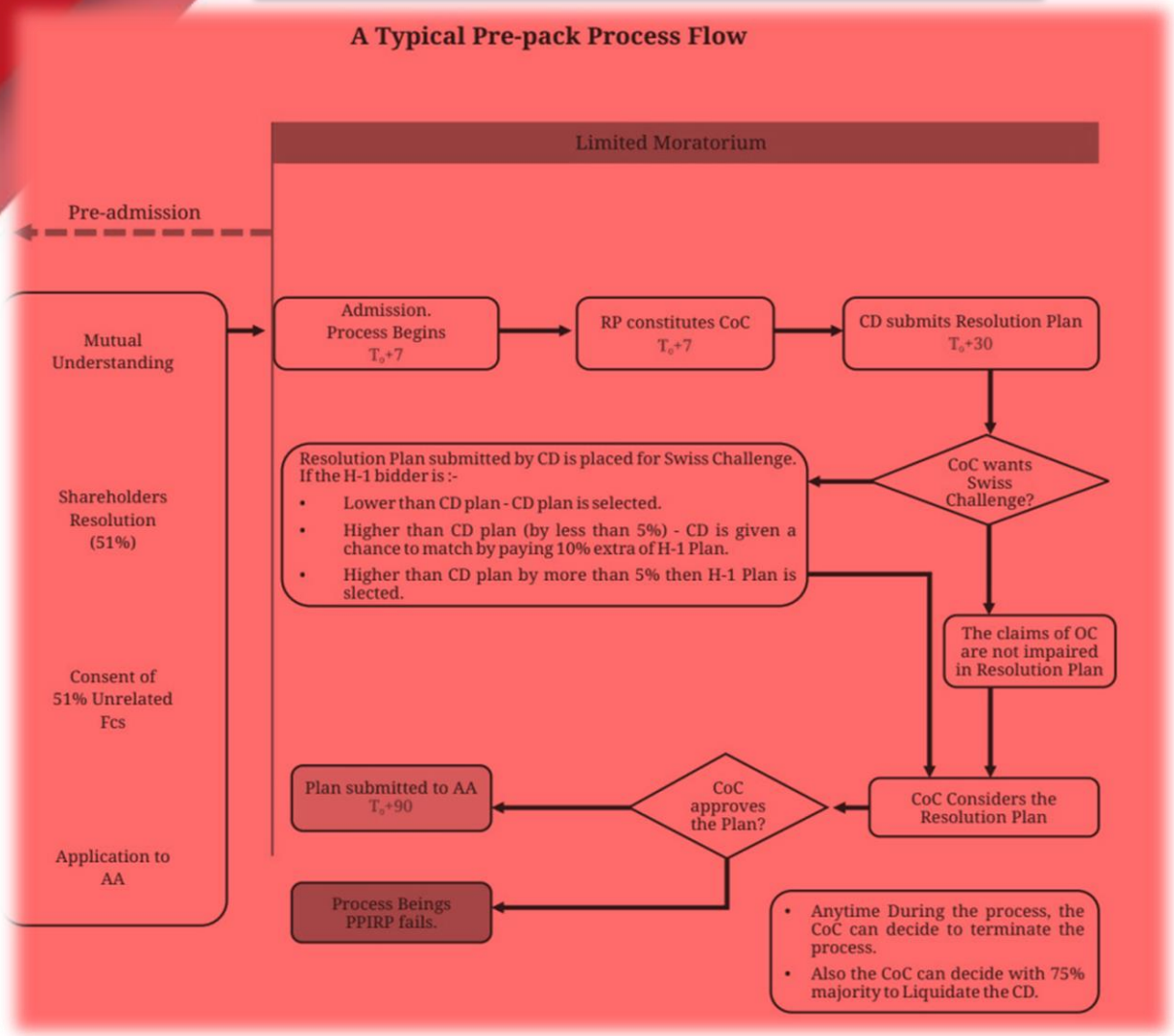


FIGURE 2: TABLE ON PREPACK /CIRP PROCESSES

Parameter	CIRP	Proposed Pre-pack
Objective	Resolution through a resolution plan	Resolution through a resolution plan
Legal framework	Relatively more in statute and less in regulations	Relatively less in the statute and in regulations
Applicability	Companies and LLPs	Companies and LLPs
Initiation of process	Default above Rs.1crore, excluding COVID-19 Default	Pre and post default stress, incl COVID-19 default. In a phased may, if required.
Initiation by	FC, OC, or CD	CD, with consent of majority unrelated Fcs
Management of the CD	IP-in-possession with creditor-in-control	Debtor-in-possession creditor-in-control
Role of IP	IRP appointed by the applicant and then RP by the CoC	RP, to be appointed with consent majority of unrelated Fcs
Claim collation	IRP to invite and collate	CD to provide. RP to verify.
Information memorandum	Prepared by RP	Draft prepared by CD and fin by RP
Moratorium	Moratorium under section 14	Limited Moratorium
Interim finance	Yes	Yes
Avoidance transactions	Yes	Yes
Valuation	By two valuers	By two valuers
IRPC	Includes cost of running operations	Does not include cost of running operations.

Invitation for resolution plans	Public process	First right of offer to prom Swiss Challenge
Ineligibility for resolution plan	Section 29A to applies	Section 29A to apply
Early closure of process	Under section 12A, on request of the applicant	With approval of 66% of voting s present and voting; Suo moto by CoC
Approval of resolution plan by CoC	66% of voting share	66% of voting share, present and voting
Consequence of termination of process	No termination allowed	Liquidation, with 75 % of share of CoC
Consequence of failure of process	Liquidation	Closure
Binding outcome	Resolution plan binding	Resolution plan binding
Regulatory benefits	Yes	Yes
Clean Slate, post resolution	Yes	Yes
Role of IP and AA	Relatively more	Relatively less
Timeline	180 days till approval of resolution plan by the AA	90 days for filing of resolution plan the AA plus 30 days for the AA to approve it
Cooling off	12 months between two CIRPs	Three years between two Pre-packs

3. OPERATIONAL CREDITORS

One important point here is that the operational creditors need to be protected in full in PPIRP.A lot of attention is paid to this by the AA, any sort of discount to the operational creditors would lead to the rejection of PPIRP. This approach has an advantage in that the operational creditors, usually suppliers of vital raw material and services would continue to support the CD once the PPIRP is in practice. As the object of the exercise is to revive the MSME quickly (often vitally dependent on prompt supply of the above at reasonable prices) this is a very vital development.

Another issue concerns the Swiss Challenge to the base resolution plan. If the CoC does not find the Base plan satisfactory, then it may invite other plans to provide a better realization.

In the first scenario ,the CoC has the choice to decide as to whether or not the existing plan would be open to Swiss Challenge.

If it feels that the original plan would suffice in terms of value, it may accept the plan. On the other hand, if it does not feel so, then it may apply its commercial wisdom and open the Swiss Challenge, There would be a single round of bidding and the promoters would be given a chance to better their offer. The OC's in any case would have to be paid minimum liquidation value come what may

4. INTERNATIONAL PRACTICES - PRACTICE IN THE WESTERN COUNTRIES

Pre-Pack is in widespread use in the western nations, especially those ruled by common law such as UK/USA/Canada etc. It is seen as fast and generally effective in switching resources in productive areas. For the Global South and India in particular, it is seen as a goal to aspire to, particularly as the common law frameworks prevalent in Britain and America are largely intact.

A pre-pack administration combines features of an informal restructuring and a formal administration procedure, allowing for private negotiations to be made in relation to how the financial distress of the company is to be resolved on an informal basis, before subsequently effecting the deal under a formal administration procedure.

In the United States, a pre-pack is in essence a pre-negotiated plan of reorganisation that is implemented with the benefit of the pre-approval of the requisite creditor groups and

generally sees the emergence from bankruptcy of the reorganised debtor.

In the United Kingdom, pre-packs are used to describe sale transactions, where the business and assets of the debtor are transferred to a purchaser and creditors are either rolled into the new structure, to the extent that the sale is a share sale.

Pre-packs are often combined with pre-agreed arrangements with secured creditors of the business being sold to fund the purchase price through the novation of 'credit-bidding'of their debt claims to the purchaser, thereby creating a powerful debt-restructuring tool. India is similar to UK to that extent.

As it does not typically involve courts and regulatory authorities, it can be done in as little time and as privately as possible, thereby preserving the goodwill of the company while seeking efficient ways to keep it alive. The private nature of the negotiations also serves the purpose of limiting negative publicity that would further destabilise the business and potentially lead to a greater loss of value for stakeholders.

The restructuring scene in England has, over the years, transitioned from informal consensus-based restructurings led by significant bank lenders with extensive control to more formal restructuring mechanisms. which allows an insolvency practitioner to be appointed to take over the management of a distressed company and rescue the company as a going concern, as long as this produces the best outcome for the creditors as a whole.

In the USA the company would have to file under Chapter 11 of the bankruptcy Act wherein a whole set of models are available, designed to reduce the amount of time spent under Chapter 11 and make the entity productive once more.

As a result, several options exist for prepackaged Chapter 11 cases, with all seeking to minimise the time that the debtor remains or operates in Chapter 11 by completing (or all but completing) the time-consuming task of negotiating and gaining acceptances to a plan of reorganisation prior to the filing of the Chapter 11 petition, but with each permutation permitting the debtor, as set forth herein, to address issues and circumstances specific to its financial situation and creditor body.

5. CONCLUSION

The above article gives the gist and flavour of what PPIRP is all about and does not attempt to be a detailed or accurate treatise. The idea

is to present a scheme that has been successful throughout the developed world, especially the English-speaking work and hope that despite its less developed situation, the Authorities in India might make an effort to make PPIRP much easier to deploy, with sufficient safeguards. Enough leeway should be given to the bankers to accept PPIRP proposals. With the MSME's, they are essentially promoter driven companies and that should be the key focus. With others, particularly the large publicly held companies, different criteria should apply.

FRADULENT / WRONGFUL TRADING & RELATED PARTY

Renuka Devi Rangaswamy
Insolvency Professional

SYNOPSIS

It is the paramount duty of the Resolution Professional (RP) during the CIRP / the Liquidator (Lr) during the Liquidation proceedings under the IBC, 2016 (Code) is to identify the perverse transactions which caused the Insolvency or aggravated Insolvency or may put the creditors in deep trouble during the IBC proceedings of the Corporate Debtor (CD). For identifying such transactions, RP / Lr after deeply tunnelling all the details before the Insolvency Commencement Date (ICD), segregates the perverse transactions into 2 broad categories viz., Avoidance Transactions and Fraudulent Transactions. The majority of these "Red" transactions are entered / executed by the CD prior to the CIRP with the Related parties, especially with the group companies. This article deals especially with the liability fixed on the CD and related parties who were involved in the Fraudulent / wrongful trading prior to the CIRP of the CD.

INTRODUCTION:

It is the paramount duty of the Resolution Professional (RP) during the CIRP / the Liquidator (Lr) during the Liquidation proceedings under the IBC, 2016 (Code) is to identify the perverse transactions which caused the Insolvency or aggravated Insolvency or may put the creditors in deep trouble during the IBC proceedings of the Corporate Debtor (CD). For identifying such transactions, RP / Lr after deeply tunnelling all the details before the Insolvency Commencement Date (ICD), segregates the perverse transactions into 2 broad categories viz., Avoidance Transactions and Fraudulent Transactions. The majority of these "Red" transactions are entered / executed by the CD prior to the CIRP with the Related parties, especially with the group companies. This article deals especially with the liability fixed on the CD and related parties who were involved in the Fraudulent / wrongful trading prior to the CIRP of the CD.

The persons covered under the related parties are well defined under Sec-5(24) & 5(24A) of

the IBC, 2016, which includes a body corporate which is a holding, subsidiary or an associate company of the CD, or a subsidiary of a holding company to which the CD is a subsidiary, Directors, Promoters, Key Managerial Persons, any person who is associated with the corporate debtor on account of participation in policy making processes of the CD / having more than two directors in common between the CD and such person / interchange of managerial personnel between the CD and such person / provision of essential technical information to, or from, the CD, any person in whom the CD controls more than 20 % of voting rights on account of ownership or a voting agreement, a public company in which a director, partner or manager of the CD is a director and holds along with relatives more than 2% of its paid- up share capital, anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the CD and relative of above mentioned class such persons.

Predominantly, all these perverse transactions are indulged by the Directors / Promoters when they are aware that there is no chance of the revival of the Company. By act of transferring assets or interests of the Company to the related parties, the Directors / Promoters in turn fetch the same back by transfer of assets / benefit accrue from such related parties.

What is a resolvability index?

Insolvency is a situation where an individual or entity is unable to pay their debts. In this situation, the resolvability index, an economic metric, can be used to assess the potential for the debtor to successfully negotiate a restructuring of their debt. The index is based on several factors, including the amount of debt owed, the size of the debtor's assets and liabilities, the debtor's ability to raise capital, and the type of debt owed. Other factors such as the debtor's credit history and the current economic climate may also be taken into account. The higher the index, the higher the likelihood that the debtor will be able to successfully resolve their situation and move forward.

Avoidance of Preferential Or Undervalue Transactions u/s 43, 45, 49 of the Code:

Avoidance Transactions involves RP / Lr to form opinion, identify, examine, determine, demonstrate the transactions which are preferential and undervalue transactions. Further, RP / Lr must identify the counter parties involved in these transactions and look

back at the period of these transactions from the Insolvency Commencement Date (ICD).

Look back period for the preference or undervalue transactions u/s 43 and 45 of the Code entered between the CD and unrelated parties is one year and if with the related parties is two years. However, undervalue transactions "deliberately or intentionally" entered by CD u/s 49 of the Code with either unrelated or related parties to defraud the Creditors of the CD, there is no look-back period.

On filing of application by the RP / Lr, the Adjudicating Authority (AA) may pass the order to reverse such transactions as if such transactions have not entered or order to compensate the loss to the CD or any other necessary directions to protect the interest of the CD and its Creditors. Further AA before passing order analyses whether these transactions are entered by the CD in the ordinary course of its business or the counter party and the transactions entered with good faith. Such bonafide transactions are protected by the AA and even if these transactions are reversed by AA, interest of the bonafide counter party is protected by its suitable order.

Importantly that the orders passed by the AA u/s 43, 45 and 49 of the Code directs the CD and the counter parties to the transactions to avoid certain transactions. Hence, the AA order is maintainable on the related parties and on the third parties even if they are not at all connected with the CD's operations. It is notable that the AA's order u/s 49 is having flavor of Sec-45 and Sec-66 of the Code and need lot of efforts on the part of the RP / Lr to prove that such transactions entered by the CD intentionally and deliberately to defraud the creditors with all substantial documentary evidences.

Fraudulent Or Wrongful Trading u/s 66 of the Code:

While Section-66 of the Code deals with Fraudulent / wrongful trading of the CD with any parties, there is no look back period for these transactions. Peculiarly, Sec-66(1) of the Code, heavily lays that any persons who were knowingly parties to the carrying on of the business of the CD in such a manner shall be liable to make such contributions to the assets of the CD as it may deem fit. Here any person u/s 66 means, Directors, Promoters, Employees, Advisors, Related parties, Contributories who were knowingly carrying on the fraudulent business is to contribute to the assets of the CD to make out loss to the CD.

It is pertinent to note that Sec 66(2) of the Code direct that a director or partner of the CD who conducts the wrongful trading

business of the CD as the case may be, shall be liable to make such contribution to the assets of the CD as it may deem fit.

The reason behind this is that only the directors are conducting the day-to-day operations of the CD and very well aware of the each and every aspect of conduct of the business. One such wrongful trading example is that without approval from the Board, taking unrelated speculative derivative contracts and making huge losses to the CD.

Another instance is selling adulterant products or illegal trading of goods / services. In such cases, all the consequential liabilities which caused the burden on the CD are to be borne by the Directors, who conducted the wrongful trading. However, no liability can be ordered on the third parties or counter parties who are not connected to the conduct of the CD's business.

The Hon'ble High Court Of Tripura, in the matter of "1Smt. Sudipa Nath Vs Union of India, MCA, IBBI", analysed about the Liability for fraudulent conduct of business, u/s- 542 of Companies Act, 1956, Liability for fraudulent conduct of business, u/s- 339(1) of Companies Act, 2013 and fraudulent trading or wrongful trading, u/s- 66(1) of the Code. Further pointed out that in all these Acts and provisions, common mandatory pre-requisite factors are that if any business of the Company / CD has been carried on an intent to defraud the Creditors of the Company or for any other fraudulent purpose with "Mens rea".

Further in the matter of Smt. Sudipa Nath (Supra), The High Court of Tripura held that it is clear from Sec-66(1) of the Code that NCLT is not having jurisdictions in declaring any transaction as void even if fraudulent but confers jurisdiction on NCLT to fix the liabilities on the persons responsible for conducting business of CD which is fraudulent or wrongful. And such application u/s 66(1) of the Code shall be filed by the RP / Lr only. Finally Sec 66 (1) also restricts the power of NCLT subject to being satisfy with pre-requisite that any business of the CD has been carried on with intent to defraud creditors or the corporate debtors or for any fraudulent purpose and if satisfied it has powers to pass an order is only against such person who are responsible for the conduct of such fraudulent business of the CD with mens rea to make them personally liable to make such contributions to the assets of the CD as it may deem fit.

While passing orders in the Smt. Sudipa Nath (Supra) matter, The High Court of Tripura has relied on the following judgements:

The Hon'ble Apex Court in the matter of " [2]**Usha Ananthasubramanian vs. Union of India"** held that u/s 337 and 339 of the CA, 2013 that any business of the company which has been carried on with the intent to defraud creditors of that company, the penalty may be imposed for such frauds on an officer of the company in which mis-management has taken place, however not on third/ another parties / another Companies.

The Hon'ble Calcutta High Court observed in the matter of "[3]**Prashant Properties Limited Vs. SPS Steels Rolling Mills Ltd"** in the context of Section 66 of IBC, the NCLT cannot avoid past transactions, even if fraudulent, but under Section 66(2) can only direct the Director/partner of the Corporate Debtor, and no other parties to the transaction, to make contribution to assets of the Corporate Debtor.

The Hon'ble High Court of Kerala held in the matter of "4**South India Paper Mills Pvt. Ltd. Vs Sree Rama Vilasam Press & Publications"** dealt in detail about the Fraudulent Preference u/s 531, Liability for Fraudulent conduct of Business u/s 542 and Powers of Court to assess damages against delinquent Directors etc., under the CA 1956. The common ingredients of these sections are that no escape for the fiduciary persons who conducted the businesses of the Company in the fraudulent manner by order passed by the Court to contribute of the losses to the Company.

The Hon'ble Apex court in the matter of "[5]**Mr.Anuj Jain, IRP of Jaypee Infratech Ltd., Vs Axis Bank Ltd.,"** held that the Transactions under avoidance and fraudulent / wrongful trading are entirely different and specific material facts are necessary to be pleaded for remedies u/s 45/46/47/66 of IBC, 2016 while making motion to the AA by the RP / Lr. Further the Apex court held that the provisions of Sec- 66 of the Code related to fraudulent trading and wrongful trading entail the liabilities of the persons responsible, therefore.

The Hon'ble NCLAT in the matter of "[6]**Deepak Parasuraman Vs. Sripriya Kumar"** upheld the order passed by NCLT allowing the prayers of the RP filed u/s 43, 46 and 60(5) of the Code.

While dealing with this matter, NCLAT observed that the Sec-339 of the CA, 2013 and Sec-542 of CA, 1956 was aimed at conferring jurisdiction in the course of winding up of the company to proceed against the persons responsible for fraudulent conduct of the business of the Company and makings such persons personally liable

for such fraudulent trading to recouping losses incurred to the Company as a relief. Further held that the Sec-66(1) of the Code which is the pari materia of Sec-542 of CA, 1956 and Sec-339 of CA, 2013 also directed towards making such persons personally liable for such fraudulent trading to recouping losses incurred and thereby that the NCLT can pass order holding such persons liable to make such contributions to the assets of the CD as it may deem fit.

The Hon'ble Apex court in the matter of "[7]**Deepak Parasuraman & Anr. Vs. Sripriya Kumar & Anr.,"** upheld the order of the NCLAT in 6Deepak Parasuraman Vs. Sripriya Kumar" (supra) to contribute to the assets of CD who are related parties conducted the fraudulent business and observed that even though the Appellant argues that the transactions have been in the ordinary course of business and no element of fraud was involved therein but, the fatal shortcomings noticed by the NCLT and NCLAT leave nothing doubt that the transactions are hit by the mischief of Sec-66 of the Code.

The Hon'ble Apex court in the matter of "8**Gluckrich Capital Pvt. Ltd., Vs The State Of West Bengal & Ors.,"** while dismissing the appeal, upheld the order of the High Court Of Tripura passed in the matter of Smt. Sudipa Nath (Supra). Further the Apex Court held that remedy against third party is not available u/s 66 of the IBC and the Civil remedies which may be available in law are independent of the said Section that can be perused by the RP or the Successful Resolution Applicant for recovery of dues payable to the CD. Accordingly, order u/s -66(1) of the IBC can be passed only on the Directors, Promoters, Advisors, Employees, Related parties, Contributories those who involved in the Fraudulent Trading to contribute to the assets of the CD. However, order u/s 66(2) may be passed on the Directors / Promoters who indulged in the Wrongful trading to make good such losses incurred by the CD.

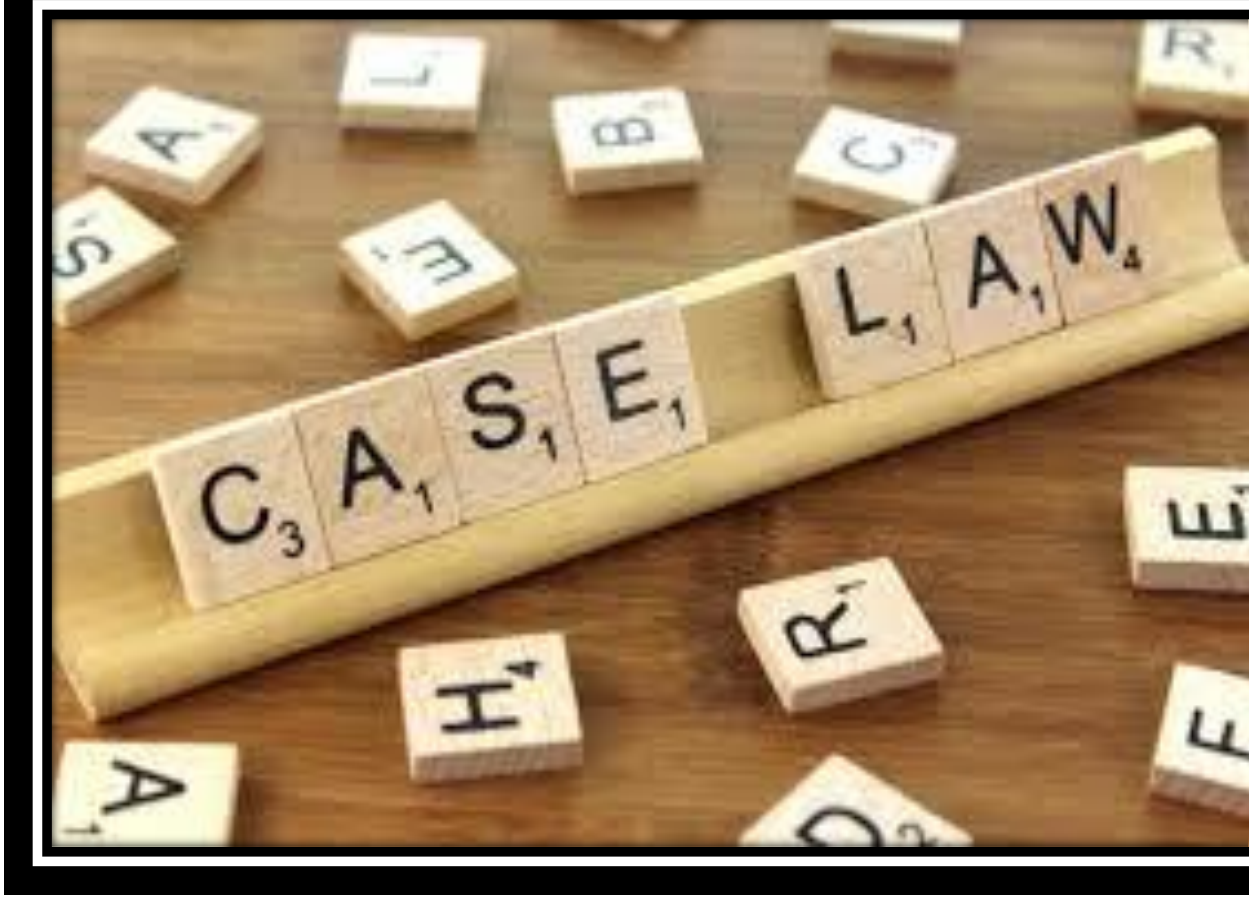
Further that the "[9]**Bankruptcy Law Reforms Committee Report"** – November 2015 dealt with the Treating of recoveries from vulnerable transactions. While detailing the avoidance transactions which may result in reversing transactions by the application of RP / Lr to AA and Fraudulent or Wrongful trading would result in contribution to the CD to make such losses Good by those are responsible for such fraudulent or wrongful conduct of the CD business before CIRP. Report also stressed that there should be stricter scrutiny for transactions of fraudulent preference or transfer to related parties, for which the "look back period" should be specified in regulations to be longer.

The Hon'ble NCLAT while upholding the order of NCLT in the matters of " [10]**Rakesh Kumar Jain, RP of HBN Homes Colonizers Pvt. Ltd., Vs Jagdish Singh Nain**, **RP of HBN Foods Ltd.,& 20 Ors.,"** and in the other appeal arising out of the same NCLT order in the matter of "[11]**True Blue Finlease Limited Vs Jagdish Singh Nain , RP of HBN Foods Ltd.,"** dealt in detail about the Sec-14, Sec-66 and Sec-60(5) of the IBC.

In this appeal, NCLAT while referring the Apex Court's judgements in **"M. Pentiah Vs. Veeramallappa Muddala", "CIT Vs. S. Teja Singh", "Corporation of Calcutta Vs. Liberty Cinema", "Raj Krushna Vs. Binod Kanungo", "Sultana Begum Vs. Premchand Jain", "Kailash Chandra Vs. Mukundi Lal", "University of Allahabad Vs. Amritchand Tripathi" "Manohar Joshi Vs. State of Maharashtra and Ors"** applied the principles laid down by the Apex court in the above judgments and held it is the duty of the Appellate Tribunal to construe Section 14 (1) (a) and Section 66 of IBC harmoniously to make the enactment effective and workable while there is absolutely no inconsistency or repugnancy between Section 14 (1) (a) and Section 66 of IBC. Further held that the Section 14 of IBC is not a bar to pass appropriate order in the pending proceedings **against the RP or suspended directors and related parties, by the AA, during the CIRP / Liquidation,** consequently upheld the order of AA directing the Respondent Nos. 2 to 21 **who are related parties viz., different companies,** RP of HBN Homes to contribute to the assets of the other CD, HBN Foods Ltd.

From the above explanation and supporting judgements, it is clear that the order under the Sec-66 of the IBC can be passed by AA only on the Directors, Promoters, Key Managerial Personnels, Group companies, advisors and related parties of these persons who were knowingly involved in such transactions and contribute to the losses of the CD for the benefit of the Creditors. For the brief reference, herewith presented the flowchart on the Sections- 43, 45, 49, 66 of the IBC in detail. Resolve the distressed companies in a time bound manner. This will help the Insolvency Professional and the Resolution Applicant to resolve the company earliest.

CASE LAWS



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 208 - INSOLVENCY PROFESSIONALS - FUNCTIONS AND OBLIGATIONS OF

Kapil Goel v. Insolvency and Bankruptcy Board of India [2023] 146 taxmann.com 554 (Delhi)/ [2023] 176 SCL 389 (Delhi)

Where Disciplinary Committee considering that RP had incorporated a partnership firm using 'IBBI' in firms's name in violation of section 208 suspended RP's registration, since name of partnership firm incorporated by RP had already been struck off from Register of Companies by Ministry of Corporate Affairs (MCA) and period of suspension of three months of RP's registration had already passed, no interference in Disciplinary Committee's order was required.

The petitioner-Resolution Professional (RP) had incorporated a partnership firm by name 'IBBI Insolvency Practitioners LLP'. Considering that RP had used name 'IBBI' in firm's name, a show cause notice was issued to RP. Disciplinary Committee observed that RP's conduct was in violation of section 208, read with regulation 7(2)(a) and 7(2)(b) and directed RP not to take up any new assignment till 'IBBI Insolvency Practitioners LLP' was removed from Register of Companies by Ministry of Corporate Affairs (MCA) and suspended RP's registration as an insolvency professional for three months from date of issue of order.

Held that the name of partnership firm incorporated by RP had already been struck off and period of suspension of three months had already passed, therefore no interference was required in Disciplinary Committee's order. Respondent No. 1 held status of operational creditor; therefore, impugned order passed by the Adjudicating Authority did not suffer from any factual frailty.

SECTION 5(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS - DISPUTE

G4S Secure Solutions (India) (P.) Ltd. v. Heavy Engineering Corporation (P.) Ltd. [2023]

146 taxmann.com 526 / [2023] 176 SCL 114 (NCLAT-New Delhi)

Where there was a pre-existing dispute with regard to payment of amount claimed by appellant-operational creditor for providing security arrangement in plants and headquarters of respondent-corporate debtor, NCLT had not committed any error in rejecting section 9 application filed by appellant on grounds of pre-existing dispute.

The respondent-corporate debtor issued a notice inviting tender, in pursuance of which work orders for hospitals, township, plants and headquarter were issued and a proforma agreement was executed between the appellant-operational creditor and the respondent. The appellant had provided round clock security arrangement of all plants,

headquarters of the corporate debtor. After contract came to an end, the appellant issued part of respondent. NCLT by impugned order dismissed said application on ground that there was a pre-existing dispute between parties.

Held that e-mails issued by the respondent to the appellant clearly reflected dispute regarding recovery at time of finalization of contract on ground of short supply of supervisors, security personnel and penalty, which had to be imposed and, therefore, claim of the appellant was clearly disputed. There being a pre-existing dispute with regard to payment of amount claimed by the appellant, NCLT had not committed any error in rejecting section 9 application filed by the appellant on ground of pre-existing dispute.

Case Review: G4S Secure Solutions India (P.) Ltd. v. Heavy Engg. Corpn. (P.) Ltd. [2023] 146 taxmann.com 525, affirmed.

SECTION 5(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS - DISPUTE

Hindustan Petroleum Corporation Ltd. v. S.S. Engineers [2023] 146 taxmann.com 524 / [2022] 234 COMP CASE 72 (NCLAT- New Delhi)

Where prior to issuance of demand notice, operational creditor itself invoked arbitration to settle dispute and stated that corporate debtor had raised issues relating to non-adherence of terms of contract, invocation of arbitration itself substantiated existence of dispute and, therefore, order passed by NCLT initiating CIRP against corporate debtor was to be set aside.

The corporate debtor floated a tender, which was assigned to the operational creditor for a turnkey basis project. There occurred some differences during execution of project resulting in non-payment of sum due by the corporate debtor. The operational creditor invoked arbitration clause for recovery of unpaid amount. Thereafter, CIRP application was filed by the operational creditor due tounpaid bills and same was admitted by the NCLT. The corporate debtor vide instant appeal contended that providing substandard material and delayed execution of assigned project caused violation of tender conditions by the operational creditor, thereby raising dispute between both parties.

Held that since prior to issuance of demand notice the operational creditor itself invoked arbitration to settle dispute and stated that the corporate debtor had raised issue to non-adherence of terms of contract, invocation of arbitration itself substantiated existence of dispute and, hence, there being pre-existing dispute, order of the NCLT admitting section 9 application was to be set aside.

Case Review: S.S. Engineers v. HPCL Biofuels Ltd. [2023] 146 taxmann.com 523 (NCLT - Kol.), reversed.

SECTION 70 - CORPORATE PERSON'S OFFENCES AND PENALTIES - PUNISHMENT FOR MISCONDUCT

Vivek Prakash v. Dinesh Kr. Gupta - [2023]

146taxmann.com 404 (NCLAT- New Delhi)

Any prosecution under section 70 can be initiated only in accordance with procedure as provided under section 236(2) and not by Resolution Professional.

The Resolution Professional (RP) filed an application under section 19 seeking directions that the appellant-suspended director of the corporate debtor be directed to handover complete books of account and other financial records and information to RP. By impugned order, the Adjudicating Authority had come to conclusion that documents as claimed were not provided and suspended directors failed to co-operate. It directed RP to institute a criminal case against the appellant under section 70 for not co-operating and providing documents claimed for. On appeal, the appellant submitted that all documents had been submitted by the appellant and it was respondent no. 2 who could have been asked for any other documents if required and in any event the Resolution Professional was not empowered to initiate prosecution. RP, however, had explained that no prosecution had been initiated under section 70 by the RP and he had only sent information to Board and it was for Board to take appropriate action.

Held that any prosecution under section 70 can be initiated only in accordance with procedure as provided under section 236(2) and not by Resolution Professional, therefore there was no ground to entertain the instant appeal.

SECTION 44 - CORPORATE LIQUIDATION PROCESS ORDER IN CASE OF- PREFERENTIAL TRANSACTIONS,

Sandeep Sood Director of Seitz India (P.) Ltd. v. Seitz GmbH
[2023] 146 taxmann.com 403
(NCLAT- New Delhi)

Where appellant-ex-director of corporate debtor took out monies from account of corporate debtor and failed to explain transactions, NCLT was justified in holding that said transaction was hit by section 46 and directing appellant to return money to account of corporate debtor.

Pursuant to admission of CIRP application filed by the operational creditor, Resolution Professional (RP) was appointed. Based on details provided by concerned banks of the corporate debtor, RP filed an application under sections 43, 45 and 66 praying for transfer of money taken out by the appellant, ex-director of the corporate debtor back into accounts of the corporate debtor. The NCLT by its impugned order allowed said application and directed the appellant to return said amount to the corporate debtor. On appeal, the appellant submitted that case was proceeded exparte against him even though he had valid reasons regarding his absence before the NCLT and that he could file his written reply detailing how transactions were genuine and carried out in ordinary course business. It was found that the appellant was given ample opportunity to explain transactions, but he did not file a reply providing satisfactory explanation/information about impugned transactions being related to regular business dealings.

Held that in absence of any reply/clarification/explanations by the appellant to explain transactions, the NCLT had not committed any error in inferring that said transactions were hit by section 46 and, therefore, the NCLT had correctly directed the appellant to transfer monies back to the corporate debtor's account. Case Review: Order passed by (NCLT-New Delhi) in Atul Kumar Kansal v. Sandeep Sood CA No. 574 of 2019 in CP(IB) No. 252/ND/2019, dated 12-1-2022, affirmed.

SECTION 33 - CORPORATE LIQUIDATION PROCESS

Alok Kailash Saksena, Resolution Professional for Associate Décor Ltd. v. Svamitva Landmarks [2023]

146 taxmann.com 379 (NCLAT - Chennai)

Where last date for submission of resolution plan had expired on 7-12-2019 and respondent submitted its plan on 27-5-2020 and statutory period of 330 days of CIRP had also expired, order passed by NCLT for considering resolution plan of respondents after expiry of last date for submission and that too after completion of CIRP period was unjust, illegal, and unwarranted and was to be set aside.

CIRP was initiated against the corporate debtor and the appellant was appointed as a Resolution Professional (RP). RP invited expression of interest and plan of METL-SRA was approved by CoC with 100 per cent voting. RP filed an application before the NCLT for approval of resolution plan. Subsequently, respondents as a consortium after completion of CIR process submitted their resolution plan to the RP who stated that last date for submission of resolution plan had already expired on 7-12-2020 and 330 days period of CIRP had also expired and, therefore, plan filed on 27-5-2020 i.e. after lapse of more than 5 months from last date could not be considered - Respondents filed an application before the NCLT seeking direction to be issued to RP to place their plan for consideration before CoC. The NCLT by impugned order directed RP to place plan of respondents along with resolution plan submitted by METL before CoC for its consideration.

Held that the NCLT had no power to consider resolution plan of a new applicant, who had submitted its plan after expiry of last date for submission and that too after completion of CIRP period. The NCLT exceeded its jurisdiction in directing RP to place resolution plan of respondents before CoC as same amounted to interference with commercial wisdom exercised by CoC in its commercial decision, more particularly, in absence of any 'material irregularity' and 'violation of any law' for time being in force, therefore, impugned order passed by the NCLT was to be set aside.

Case Review : State of Karnataka v. Alok Kailash Saksena, Resolution Professional for Associate Decor Ltd. [2023] 146 taxmann.com 378 (NCLT - Beng.), reversed.

SECTION 5(8) - CORPORATE INSOLVENCY RESOLUTION PROCESS - FINANCIAL DEBT

Base Realtors (P.) Ltd. v. Grand Realcon (P.) Ltd. [2023]

146 taxmann.com 377 (NCLAT- New Delhi)

Where corporate debtor allotted debentures to appellant and interest became due and payable by corporate debtor, in view of condition enumerated in debentures, even if principal amount had not yet become due and payable, application filed under section 7 could be maintained in respect of component of interest only..

The respondent-corporate debtor allotted debentures to the appellant, which were redeemable at request of debenture holder after expiry of one year. Debentures allotted to the appellant were carrying interest at coupon rate of 6 per cent per annum payable at end of every quarter. Since interest amount of three quarter was not paid, the appellant served a default notice and filed application under section 7. However, the Adjudicating Authority by impugned order dismissed said application on ground that only interest amount would not fall within definition of financial debt until and unless principal amount had also become due and payable.

Held that application filed under section 7 could be maintained in respect of component of interest, which became due and payable, without asking for principal amount, which had not yet become due and payable. Since, in instant case, amount of interest became due and payable by the corporate debtor to the appellant in view of condition enumerated in debentures, impugned order of the Adjudicating Authority was to be set aside.

Case Review: Base Realtors (P.) Ltd. v. Grand Realcon (P.) Ltd. [2023] 146 taxmann.com 376 (NCLT - New Delhi), reversed.

SECTION 33 - CORPORATE LIQUIDATION PROCESS

Sreedhar Tripathy v. Gujarat State Financial Corporation [2023] 146 taxmann.com 374 (NCLAT- New Delhi)

Where corporate debtor was not functioning for last 19 years and all machinery had become scrap and CoC in its commercial wisdom decided to liquidate corporate debtor, impugned order passed by NCLT directing liquidation of corporate debtor was not to be interfered with.

The NCLT directed liquidation of the corporate debtor. The appellant challenged said order on ground that CoC never wanted to continue with CIRP and decision taken by CoC for liquidation of the corporate debtor was not in its commercial wisdom. It was noted that the corporate debtor was not functional and was completely shut for last 19 years.

Held that CoC in its Legislative scheme has been empowered to take decision to liquidate the corporate debtor, any time after its constitution and before confirmation of resolution plan. Since the corporate debtor had not been functioning for last 19 years and all machinery had become scrap, even buildings were in dilapidated condition and CIRP would involve huge costs, decision taken by CoC to liquidate the corporate debtor was not arbitrary and same was not open for Judicial review by the NCLT.

SECTION 5(8) - CORPORATE INSOLVENCY RESOLUTION PROCESS - FINANCIAL DEBT

Ashish Chandravandan Patel Suspended Board of Director of Cengres Tiles Ltd. v. Axis Bank Ltd. [2023]

146 taxmann.com 373 (NCLAT- New Delhi)

Where Technical Member who heard matter was not available to sign order of admission of CIRP application and with his consent said order was pronounced, there was no error in said order; since there was clear debt and default which finding was not questioned in section 7 application, CIRP application was rightly admitted.

The NCLT by impugned order admitted application filed by the financial creditor under section 7. On appeal, the appellant contended that pronouncement of said order was not in accordance with rules 151 and 152 of the NCLT Rules as said order had no signature of Technical Member. It was noted that aforesaid order indicated that one of Member of Bench, who heard matter was not available for another couple of weeks and as matter could not be kept pending for pronouncement because hearing was concluded almost a month ago, order was pronounced under rule 151 of the NCLT Rules, 2016 with consent of other Member.

Held that there is no error in pronouncement of order by one Member with consent of other Member of Bench under rule 151 of the NCLT Rules and since it was not a case where order could not be signed by reason of death, retirement or resignation or for any other reason, but it was case where Technical Member was to be available after a couple of weeks to sign order and with his consent order was pronounced, there was no occasion for application of rule 152(4). There being clear debt and default which finding was not questioned in section 7 application, appeal was to be dismissed.

Case Review: Order passed by (NCLT - Ahmedabad) in C.P(IB)/39(AHM) 2021, dated 27-4-2022, affirmed.

SECTION 5(8) - CORPORATE INSOLVENCY RESOLUTION PROCESS - FINANCIAL DEBT

Namdeo Ramchandra Patil v. Vishal Ghisulal Jain [2023] 146 taxmann.com 329 (NCLAT- New Delhi)

Precondition for application of Explanation (i) of section 5(8)(f) is raising of an amount from allottee under a real estate project; where landowners were entitled to share 45 per cent constructed area in lieu of their entitlements under a development agreement, same does not amount to financial debt under section 5(8) and, therefore, NCLT was justified in not holding landowners as financial creditors.

The corporate debtor, a real estate company, entered into development agreement with landowners, including appellants, and in consideration of development rights by landowners, the corporate debtor agreed to give 45 per cent of total construction to landowners. Further, allotment letters were issued by the corporate debtor to appellants mentioning properties allotted to them. The corporate debtor raised loan from Bank of India in pursuance of said agreement. CIRP application filed by Bank of India against the corporate debtor for default of loan repayment was admitted and RP was appointed. Appellants submitted their claim as financial creditors for an amount which included total value of allotted flats and shops along with interest on delayed possession and same was accepted by RP. Thereafter, an application was filed by Bank of India objecting admission of landowners as financial creditor on ground of reduction of voting right in CIRP and asserting fact that mere being allottee was not equal to being a financial creditor.

Held that precondition for application of Explanation (i) of section 5(8)(f) is raising of an amount from allottee and since entitlement to share a constructed area and certain allotments under development agreement does not make a transaction of allotment a financial debt under section 5(8)(f), the NCLT was justified in holding appellants as not financial creditors.

Case Review: Bank of India v. Vishal Ghisulal Jain [2023] 146 taxmann.com 328 (NCLT - Mum.), affirmed.

SECTION 12A - CORPORATE INSOLVENCY RESOLUTION PROCESS - WITHDRAWAL OF APPLICATION

Kamal K. Singh v. Dinesh Gupta [2023]

146 taxmann.com 293 /[2022] 235
COMP CASE 286 (SC)

Where NCLT dismissed withdrawal application filed by operational creditor, settlement between parties having been arrived before constitution of CoC, order passed by NCLT was to be set aside.

Application filed by the respondent-operational creditor under section 9 against the corporate debtor had been admitted by the NCLT. Thereafter, negotiations took placed between parties, and the corporate debtor through its promoter, agreed to settle dues and paid settlement amount to the respondent. The respondent filed an application under section 12A before the NCLT seeking withdrawal of admitted CIRP petition. The NCLT dismissed said application. The applicant-promoter, director of the corporate debtor being aggrieved by order of the NCLT filed instant appeal before Supreme Court on ground that settlement between parties had been arrived before Constitution of CoC.

Held that the respondent was justified in filing withdrawal application under section 12A on ground that matter had been settled between parties before constitution of CoC and, therefore, order passed by the NCLT was to be set aside.

Case Review: Dinesh Gupta v. Rolta India Ltd. [2023] 146 taxmann.com 292 (NCLT - Mum.), reversed.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL

Shekhar Resorts Ltd. v. Union of India [2023]

146 taxmann.com 121 (SC)

Where appellant had applied for settlement under 'Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 and was entitled to benefit under Scheme as Form No. 1 submitted by appellant had been accepted and also Form No. 3 determining settlement amount had been issued, however, appellant was not in a position to deposit settlement amount at relevant time in view of moratorium under IBC.

The appellant was engaged in business of hospitality services. Revenue Department conducted investigations for alleged evasion of Service Tax by the appellant. CIRP was initiated and the appellant was subjected to moratorium under section 14 from 11-9-2018. Subsequently, the appellant submitted an application for availing benefit of 'Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019, wherein, Designated Committee directed the appellant to pay settled amount under Scheme, 2019 within 30 days. could have been made. Thereafter, resolution plan was approved by the NCLT due to which moratorium period came to an end on 27-7-2020. The appellant, therefore, expressed its desire to make full payment of amount as ascertained by Designated Committee, which was rejected on grounds that last date for same had expired. On writ, the appellant sought directions for consideration of its case under Scheme, 2019. The High Court dismissed petition on grounds that no direction contrary to Scheme, 2019 could have been issued and relief sought could not be granted as Designated Committee under Scheme was not existing.

Held that the appellant was not in a position to deposit settlement amount at relevant time due to legal impediment and bar to make payment of settlement amount in view of mortarium under IBC, but was otherwise entitled to benefit under Scheme as Form No. 1 submitted by the appellant had been accepted and Form No. 3 determining settlement amount had been issued, therefore. the High Court had erred in refusing to grant any relief to the appellant as prayed. the High Court had erred in refusing to grant any relief to the appellant as prayed. **Case Review:** Shekhar Resorts Ltd. v. Union of India [2022] 145 taxmann.com 657 (All.), reversed.

SECTION 5(8) - CORPORATE INSOLVENCY RESOLUTION PROCESS - FINANCIAL DEBT

Nikhil Gandhi v. Sudip Bhattacharya Resolution Professional of Reliance Naval and [2023]

146 taxmann.com 120 (NCLAT- New Delhi)

Where corporate debtor committed default in repayment and lenders of corporate debtor, thus, invoked corporate/personal guarantees and called upon appellant-guarantors to pay outstanding amount, in view of fact that no payments had yet been made by appellants towards invocation of guarantee, which could be construed as a 'financial debt' owed by corporate debtor, it was not open for appellants to file any claim in CIRP of corporate debtor as financial creditor.

Application filed by the financial creditor for initiating CIRP against the corporate debtor was Appellants were promoters of the corporate debtor and had executed deed of personal and corporate guarantees to secure financial facilities extended to the corporate debtor by lenders. The corporate debtor committed default in repayment. Lenders of the corporate debtor, thus, invoked said corporate/personal guarantees and called upon appellants to pay outstanding amount. Proceedings were also initiated by lenders against NCLT. Public announcement was made by IRP, in pursuance of which, all appellant(s) filed their claims. Appellant's claim as financial creditor was rejected by the NCLT by impugned order. Admittedly, no payments had yet been made by appellants towards invocation of guarantee, which could be construed as a 'financial debt' owed by the corporate debtor.

Held that claim of said amount by appellants was not a financial claim within meaning of section 5(8)(h) and it was not open for appellants to file any claim as financial creditor in CIRP of the corporate debtor, thus, claim of appellants was rightly rejected by the NCLT. **Case Review:** Order passed by NCLT Ahemedabad in CP (IB) no. 418/AHM/2018 dated 28-6-2022, affirmed

Case Review: Order passed by NCLT Ahemedabad in CP (IB) no. 418/AHM/2018 dated 28-6-2022, affirmed.

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✓ It should preferably expose the readers to new knowledge area and discuss a new or innovative idea that the professionals/readers should be a-ware of.

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✓ The article should contain headings, which should be clear, short, catchy and interesting.

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