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YOUR INSIGHT JOURNAL

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

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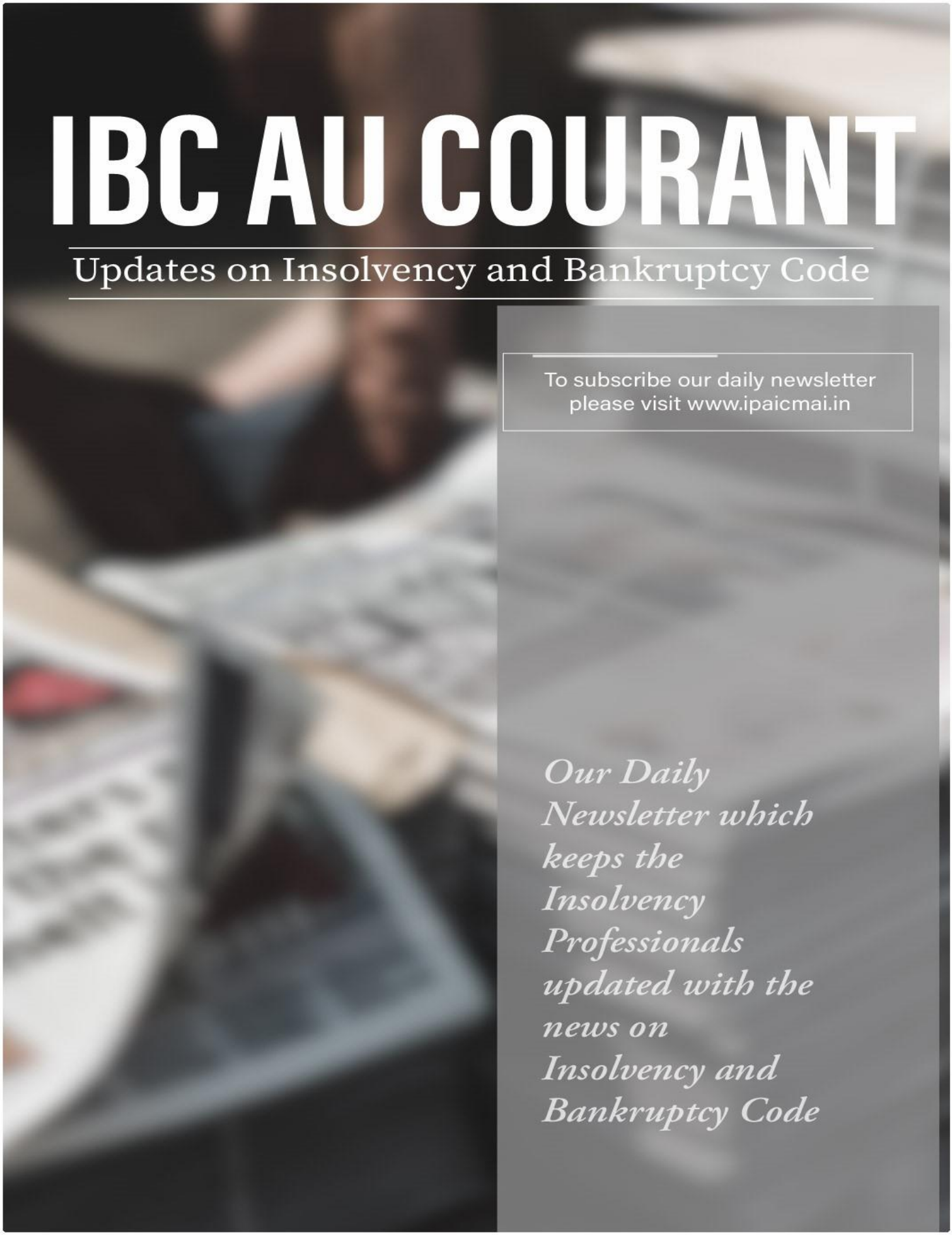
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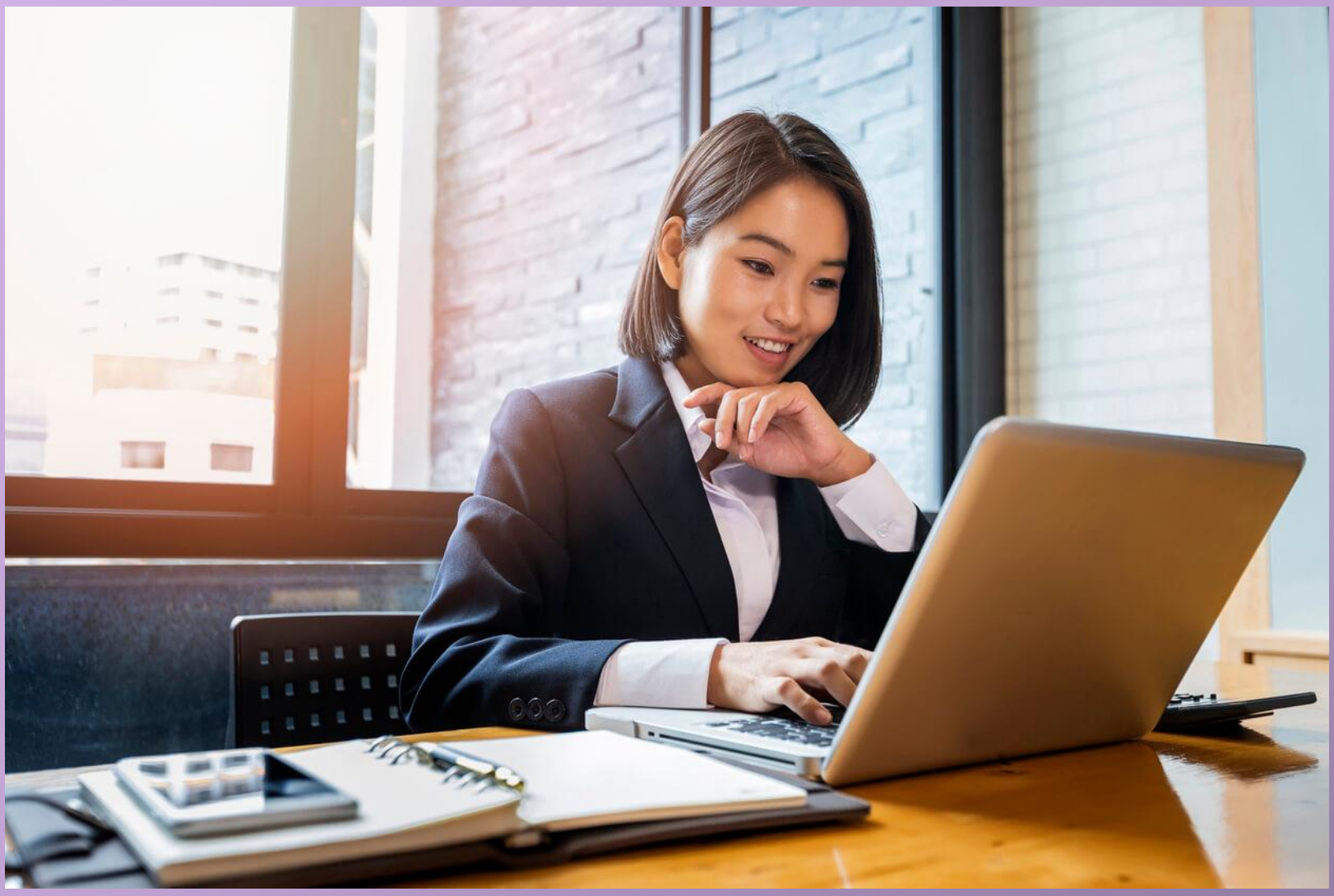

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LIMITS OF THE LIMITATION LAW AND IBC

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INTRODUCTION

JURISPRUDENCE OF LAW OF LIMITATION

The law of limitation revolves around the basic concept of fixing or prescribing the time period for barring legal actions beyond that period. A concept widely acknowledged, in India, the law of limitation is governed by the Limitation Act, 1963. As stated in its preamble, the Limitation Act, 1963 ("Act") is an act to consolidate the laws for the limitation of suits and other proceedings and for purposes connected therewith.

As observed in the 89th Report of the Law Commission of India, the laws of limitation are ultimately based on justice and convenience. An individual should not live under the threat of possible action for an indefinite period, and at the same time, should be saved from the task of defending a stale cause of action, as it would be unjust. The Report states, "all that has been said on the subject can be summarized by stating that the laws of limitation rest upon three main foundations - justice, convenience and the need to encourage diligence."

The very crux of having a limitation law in force is that a person cannot sleep over his rights for an indefinite period and seek such remedy at a later stage. That being the tenet on which the law is based, there are several basic principles which the law states. These principles substantively affect the rights of parties. Recently, there has been a lot of commotion around the manner and the circumstances, in which the limitation law can be invoked in the context of the Insolvency and Bankruptcy Code, 2016 ('Code'), though it is established now that the limitation law is applicable to the proceedings under the Code by virtue of section 238A.

BASIC PRINCIPLES OF LIMITATION

The basic principle of the Code requires that for an application to be filed under the Code, there must exists (a) a debt; and (b) default in payment of such debt. However, a question here is how old can

the event of default be? Did the Code give a window of redemption to such creditors who had been sleeping over their rights all along?

At the outset, it may be noted that the law of limitation would apply equally to an applicant's claim as well as claims of other creditor who submit proof of claim before the RP/liquidator.

As per the Act, being a general law, the right to sue accrues when the default has occurred, and the default should have occurred not beyond 3 years from filing of the application. However, when introduced, the Code did not explicitly provide for applicability of limitation law for matters under the Code- hence the anomaly.

APPLICABILITY TO IBC

The question first came up in the matter of ***Neelkanth Township & Construction (P.) Ltd. v. Urban Infrastructure Trustees Ltd.***[1] wherein the Hon'ble NCLAT, vide its order observed that since the Code is not for recovery of claims, so long as the debt is due, application under the Code can be filed regardless of limitation, and as such held that the Limitation Act shall not be applicable for matters under the Code. The above view was again affirmed by the Hon'ble Appellate Tribunal in ***Black Pearl Hotels (P.) Ltd. v. Planet M Retail Ltd.***[2]

However, the above view of the Hon'ble NCLAT was a departure from the traditional view that "a time barred debt is not a debt at all". Having said that must also note that the Hon'ble Supreme Court in its landmark judgment in the matter of ***"Innoventive Industries Ltd. v. ICICI Bank Ltd.***[3]***"*** held that "a debt may not be due if it is not payable in law or in fact", from which, one can imply indication towards applicability of limitation law for ascertaining the validity of an application filed under the Code.

Meanwhile, in spirit of the principles of purport of the law of limitation and in light of the confusion of an explicit provision, a counterpart to section 433 of the Companies Act, 2013 was introduced in the Code by way of section 238A w.e.f. 06.06.2018, which stated that:

[1] [2017] 85 taxmann.com 120/143 SCL 538 (NCLAT), dated 11.08.2017
[2] [2018] 91 taxmann.com 387 (NCLAT), dated 17.10.2017
[3] [2017] 84 taxmann.com 320/143 SCL 625, dated 31.08.22017

"238A. Limitation:

The provisions of the Limitation Act, 1963 shall, as far as may be, apply to the proceedings or Appeals before the Adjudicating Authority, the National Company aw Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be."

Hence, it was substantiated in clear words that the Limitation Act, 1963 is applicable to the Insolvency and Bankruptcy Code, 2016.

This gave rise to the landmark judgment of the Hon'ble Supreme Court in the matter of ***B.K. Educational Services (P.) Ltd. v. Parag Gupta & Associates***[4], wherein the Apex Court held that the Limitation Act will apply to the Code on and from its very commencement i.e. 01.12.2016.

In the said matter, the Hon'ble SC appreciated that the very insertion of section 238A would be rendered fruitless unless it was construed as being retrospective. It further referred to the Insolvency Committee Report of March, 2018, and stated that

"21. ....as is reflected in the Insolvency Law Committee Report of March, 2018, the legislature did not contemplate enabling a creditor who has allowed the period of limitation to set in to allow such delayed claims through the mechanism of the Code. The Code cannot be triggered in the year 2017 for a debt which was time barred, say, in 1990, as that would lead to the absurd and extreme consequence of the Code being triggered by a stale or dead claim, leading to the drastic consequence of instant removal of the present Board of Directors of the corporate debtor permanently, and which may ultimately lead to liquidation and, therefore, corporate death. This being the case, the expression "debt due" in the definition sections of the Code would obviously only refer to debts that are "due and payable" in law, i.e., the debts that are not time-barred. That this is the case has already been held by us in the Innoventive Industries Ltd....."

APPLICABILITY OF SECTION 18 OF LIMITATION ACT, 1963 TO IBC

The applicability of Section 18 of the Limitation Act, 1963 ("Limitation Act") on proceedings under Insolvency and Bankruptcy Code, 2016 ("IBC") has been unclear and contentious till date. However, the Supreme Court ("Court") in a recent judgment dated 15.4.2021 delivered in the case of ***Asset Reconstruction Company (India) Limited Versus Bishal Jaiswal & Anr***[5]. Has cleared the air on the applicability of Section 18 and held that Section 18 of the Limitation Act, which extends the period of limitation depending upon an acknowledgement of debt made in writing and signed by the Corporate

[4] [2018] 98 taxmann.com 213/150 SCL 293, dated 11.10.2018
[5] 2021 SCC Online SC 321, dated 15.04.2021

Debtor, applies to proceedings under the IBC. The Supreme Court has further held that entries in the Balance Sheet would amount to acknowledgment of debt for the purpose of extension of limitation under Section 18 of the Limitation Act.

Matter travelled to the Court from an Application under Section 7 of the IBC which was filed by the Lender against Corporate Debtor before the National Company Law Tribunal, Kolkata. The Lender relied upon the Balance Sheet of the Corporate Debtor and alleged that in view of Section 18 of the Limitation Act same shall amount to acknowledgment of debt and thus fresh period of limitation shall be computed from the time of such acknowledgment.

The Court while dealing with the issue initially relied upon reasons for insertion of Section 238A in the IBC. Section 238A of the IBC specifically provides that provisions of Limitation Act shall apply to proceedings before Adjudicating Authority as well as National Company Law Appellate Tribunal. The Court observed that the reason for insertion of Section 238A was to eliminate resurrection of time-barred debts. The Court further observed that as a necessary consequence of the said insertion Section 9 of the Limitation Act which provides that when time begins to run cannot be halted except by a process known to law, shall also apply. On the issue whether Section 18 which has an effect of extending the period of limitation would apply or not the Court, relied upon its recent judgments delivered on 22.3.2021 in the case of ***Sesh Nath Singh Versus Baidyabati Sheoraphuli Co-operative Bank***[6] wherein it has been held that IBC does not exclude the application of Section 6 or 14 or 18 or any of the provisions of Limitation Act. The Court, also relied upon its another recent judgment delivered on 26.03.2021 in the case *of* ***Laxmi Pat Surana Versus Union Bank of India***[7] wherein, it was held that this Court in the case of ***Babulal Vardharji Gurjar Versus Veer Gurjar Aluminium Industries (P) Ltd.***[8]***,*** had not ruled out applicability of Section 18 of the Limitation Act and that there is no reason to exclude the effect of Section 18 of the Limitation Act to the proceedings initiated under the IBC.

The Court, thus concluded that Section 18 will apply to proceedings under the IBC and period of limitation shall be extended from the date of acknowledgment of the debt. The Court, further examined various provisions of the Companies Act, 2013 & numerous judgments and concluded that the Balance Sheet would amount to acknowledgment of debt for the purpose of extension of limitation under Section 18 of the Limitation Act, while highlighting the importance of the acknowledgement establishing a jural relationship between debtor and creditor.

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[6] 2021 SCC Online SC 244, dated 22.03.2021
[7] 2021 SCC Online SC 267, dated 26.03.2021
[8] (2020) 15 SCC 1, dated 14.08.2020

CAN MORATORIUM PERIOD BE EXCLUDED IN COMPUTING LIMITATION PERIOD?

Upon admission of an application for Corporate Insolvency Resolution process under IBC, 2016 by NCLT, a moratorium under section 14 of the IBC is declared by NCLT prohibiting all kinds of legal proceedings against the CD effective from the insolvency commencement date until approval of the resolution plan or initiation of the liquidation proceedings. The Hon'ble SC vide its judgement dated April 27, 2022in ***New Delhi Municipal Council Vs. Minosha India Limited***[9] has held that the entire period during which the moratorium stays in force with respect to CD can be excluded while computing the period of limitation for a suit or proceeding against the CD.

The Supreme Court has held that the entire period during which the moratorium was in force in respect of corporate debtor can be excluded while computing the period of limitation for a suit or proceeding by the corporate debtor. Further it is held that a Corporate Debtor can take advantage of the moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 ('**IBC**'), even though such a moratorium is put in place due to the Corporate Debtor's own application for initiation of the corporate insolvency resolution process under Section 10 of the IBC. The moratorium period applies to all proceedings, including application for appointment of an arbitrator, in relation to a Corporate Debtor, including proceedings contemplated by the Corporate Debtor itself.

UNDERSTANDING OF LIMITATION LAW UNDER IBC & LIMITATION ACT

The inception of the Insolvency and Bankruptcy Code, 2016 (Code) had brought along with-it various ambiguities, most of which are gradually being resolved through the judicial pronouncements from time to time. However, in the case of the Limitation Act, 1963 (Limitation Act) and the code, ambiguity remains in the case of applicability of certain provisions. Law of limitation requires any action to be taken within a stipulated period of time and imposes a bar on spurious litigation which consumes the time of courts and affects the genuine cases. The code was enacted to revive the companies and return the debts of creditors in a timely manner. The interplay between the Limitation Act and the Code has been attempted to be clarified by the Supreme Court of India in various instances.

Section 238A was inserted by the IBC (second Amendment) Act, 2018 which stated that the provisions of the Limitation Act will be applicable to the proceedings under NCLT, NCLAT, DRT, and DRAT.

Article 137 of the Limitation Act states that if the period of limitation has not been specified for any application, then the period of limitation shall be 3 years from the date when the right to initiate a

[9] Civil Appeal no. 3470 of 2022(Arising out of SLP (c) no. 8302 of 2021 dated 27.04.2022

cause of action accrues. In the context of the code, the period of limitation will begin from the date when the right to sue for recovery of debt will accrue to three years.

Section 18 of the Limitation Act provides that if there is written acknowledgement of the liability before the expiration of the limitation period then the new limitation period will be started from the date of the acknowledgement. If any debt has been acknowledged by the debtor in three years from the date of accrual of debt, then the limitation period for recovery of the debt will be restarted from the date of acknowledgement.

Section 29(2) of the Limitation Act states that for any suit, appeals, and an application under any law prescribes a different limitation period than Section 3 of the Limitation Act will be applicable. Further, Sections 4 to 24 will apply unless that enactment expressly excludes itself from the provisions.

CONCLUSION

The incorporation of S 238A in the IBC is a welcome step from the government towards reducing the burden of cases on the NCLT and the National Company Law Appellate Tribunal and also encouraging the aggrieved to be more vigilant with respect to their dues. The essence of IBC, as has already been discussed above, is to focus on keeping the company under proceedings as a going concern rather than liquidating it and aim for resolution. The amendment would help in keeping companies as a going concern as, although companies were being treated in this manner prior to it but, now this process would be faster as applications for insolvency would reach the concerned authorities quicker in light of the 3-year limitation period. It would also help in resolution as the company would be in a better condition due to the faster process. It is now for the tribunals and courts to put the section into practice and work towards a faster resolution process that would focus only on the genuine applications and not ones that emerge after the expiry of the stipulated 3 years.

Section 29 (2) of the Limitation Act, 1963 states that for the purpose of determining the period of limitation prescribed in any special or local law, the provisions of Limitation Act shall apply to the extent they are not expressly excluded by such special or local law. However, in the Code, even prior to insertion of Section 238A, there was no express exclusion of the provisions of Limitation Act. In fact, **Section 60 (6) of the Code states that while computing the period of limitation specified**

for any suit or application by or against the corporate debtor, the period during which moratorium was imposed under the Code shall be excluded.

Undoubtedly, the Code is a special enactment enacted with the purpose of consolidating and amending the laws relating to insolvency resolution of corporate persons in a time bound manner. The Code is intended to provide an independent mechanism free from the procedural compliances under the other legislations. However, this cannot be taken to mean that the Code intends to revive the rights of the creditors who were not aware of their rights or those who did not avail their remedy timely.

It is a settled position of law that a new law on the subject cannot revive a dead remedy and can neither extinguish a vested right. Assuming that the Code had not come into existence, would the right of the creditors who were claiming to have a remedy under the Code, be having any other remedy under the existing laws. The answer to this has to be in negative as the claim to a debt is not a vested right. Thus, the introduction of the Code cannot be taken as revival of the rights of the creditors who did not avail the remedies prior to the introduction of the Code.

With the recent amendment and the judgment of the Supreme Court clarifying that the said amendment shall be retrospective, it is hoped that the claims before the insolvency resolution professional will be lessened, as creditors whose claims are clearly time barred will no more be a party to the resolution process.

❖ References

- ✓ Indian Contract Act, 1872.
- ✓ Insolvency and Bankruptcy Code, 2016.
- ✓ Live Law, Taxmann, SCC Online.
- ✓ Insolvency and Bankruptcy Board of India Website.
- ✓ Law books and bare acts to the subject point.

PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS – CRITICAL ASPECTS

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Synopsis

This Research Paper after discussing the definition of Micro, Small and Medium Enterprises under MSME Development Act, 2006. Analyzes eligibility conditions, possible scenario for Committee of Creditors and clarification, if any, required from IBBI, informal and formal negotiation process prescribed under the Pre-packaged insolvency process. The Base Resolution Plan and Advantages of the process is also discussed in detail.

Introduction

Chapter III-A relating to Pre-packaged Insolvency Resolution Process (PPIRP) in Insolvency and Bankruptcy Code, 2016 has been inserted w.e.f. 04.04.2021. Consequently, Insolvency and Bankruptcy Board of India has come up with INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS) REGULATIONS, 2021 vide notification no. IBBI/2021-22/GN/REG071 dt. 9th April, 2021.
In this research paper, we will go deep into this process and analyses the following:

- Classification of Micro, Small and Medium Enterprises as per Micro, Small and Medium Enterprises Development Act, 2006. We will study whether the definition is mutually exclusive or dependent on investment in P&M or equipment and turnover by way of example.
- Whether Committee of Creditors as envisaged under S. 54A (2)(e) & 54A(3) of Insolvency & Bankruptcy Code, 2016 (IBC 2016) read with Regulations 24 & 25 of INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS) REGULATIONS, 2021 covers all possible scenarios or more clarification is required from the Board.
- The advantages of Pre-packaged Insolvency Resolution Process (PPIRP) over Corporate Insolvency Resolution Process (CIRP)
- Any reference of section and regulation in this Article shall mean sections of the Insolvency and Bankruptcy code, 2016 and regulations of IBBI (Pre-packaged Insolvency Resolution Process) Regulations, 2021 unless specified otherwise.

CORPORATE DEBTORS: ELIGIBILITY FOR PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS (PPIRP)

Application can only be made by such Corporate Debtor classified as a Micro, Small or Medium enterprises under sub-section (1) of Section 7 of the Micro, Small and Medium Enterprises Development Act, 2006 **(Sec 54A (1)).** Section 7(1) of the Micro, Small and Medium Enterprises Development Act, 2006 read with Notification S.O. 1702(E) dated 1st June 2020 effective from 1st July 2020 classifies the Micro, Small and Medium Enterprises as follows:

1. A Micro enterprise, where the investment in Plant and Machinery or Equipment does not exceed one crore rupees and turnover does not exceed five crore rupees.
2. A Small enterprise, where the investment in Plant and Machinery or Equipment does not exceed ten crore rupees and turnover does not exceed fifty crore rupees.
3. A Medium enterprise, where the investment in Plant and Machinery or Equipment does not exceed fifty crore rupees and turnover does not exceed two hundred and fifty crore rupees.

Analysis of above definition becomes easy with the following example. Coverage to Micro, Small and Medium enterprises is very wide depending upon investment in P&M or equipment and turnover.

Sr. No.	Company	Investment in P&M or equipment (Rs. in Crore)	Turnover (Rs. in Crore)	Category
1	A	1	5	Micro
2	B	1	5.1	Small
3	C	1	51	Medium
4	D	1.1	5	Small
5	E	10.1	5	Medium
6	F	10	50	Small
7	G	50	250	Medium
8	H	50	251	Normal
9	I	51	250	Normal

PRE-CONDITIONS FOR FILING APPLICATION

1. Corporate Debtor should have committed the default referred in section 4 of the Insolvency and Bankruptcy Code, 2016 **(Sec 54A (2)).** Ministry of Corporate Affairs vide notification S.O. 1543(E) dt. 9th April, 2021 has specified Rupees Ten Lakhs as minimum amount of default for filing application for Pre-packaged Insolvency Resolution Process.

2. The Corporate Debtor has not undergone pre-packaged insolvency resolution process or completed corporate insolvency resolution process, as the case may be, during the period of three years preceding the initiation date. **(Sec 54A(2)(a))**.
3. The Corporate Debtor is not undergoing a corporate insolvency resolution process. No order has been passed against Corporate Debtor requiring it to be liquidated under section 33**. (Sec 54A(2)(b&c)).**
4. The Corporate Debtor is eligible to submit a resolution plan under section 29A. **(Sec. 54A(2)(d))**

Approval required from Financial Creditors for approving the name of proposed Resolution Professional before the meeting of Directors or Partners of Corporate Debtor (Sec 54A (2) (e))

5. Financial Creditors, not being related parties of the Corporate Debtor, should have proposed the name of the insolvency professional to be appointed as resolution professional. The Financial Creditors having not less than 10% of the value of financial debt may propose names of Insolvency Professionals for this purpose.
6. Financial Creditors not less than 66% in value of financial debt due to such creditors, not being related parties of the Corporate Debtor, should have approved name proposal in **Form P3.**

Meeting of the Directors or Partners of the Corporate Debtor (Sec 54A (2) (f))

7. The majority of the Directors or Partners of the Corporate Debtor shall make declaration as follows:
    a) The corporate debtor shall file an application for initiating pre-packaged insolvency resolution process within a definite time period not exceeding ninety days;
    b) The pre-packaged insolvency resolution process is not being initiated to defraud any person;
    c) The name of the insolvency professional proposed and approved by the Financial Creditors to be appointed as resolution professional.

    The above declaration shall be made in **Form P6**. The notice of the above meeting shall indicate the date, time and venue of the meeting and shall enclose list of creditors with amount due in **Form P2**.

Approval from Members/Partners after the meeting of Directors/Partners of the Corporate Debtor

8. The members of the corporate debtor shall pass a special resolution, or at least three-fourth of the total number of partners, as the case may be, of the corporate debtor shall pass a resolution, approving the filing of an application for initiating prepackaged insolvency resolution process. (Sec **54A(2)(g))**

Approval from Financial Creditors for filing the Application (Sec 54A (3&4))

9. The corporate debtor shall obtain an approval from its financial creditors, not being its related parties, representing not less than sixty-six per cent in value of the financial debt due to such creditors, for the filing of an application. Before seeking approval, the Corporate Debtor shall provide the following to Financial Creditors:

    I. the declaration of the majority Directors or Partners in **Form P6**;

II. the special resolution of the members or resolution of at least three-fourth of the total partners.
III. A base resolution plan which conforms to the specified requirements. The below paras of Research Paper discuss in detail about Base Resolution Plan or Resolution Plan(s)

List of creditors in **Form P2**.

The Financial Creditors shall provide approval in **Form P4**.

COMMITTEE OF CREDITORS & DIFFERENT SCENARIOS

S. 54A (2)(e) & 54A(3) of Insolvency & Bankruptcy Code, 2016 (IBC 2016) read with Regulations 24 & 25 of INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS) REGULATIONS, 2021 provide following about Committee of Creditors:

a. The Committee of Creditors shall consist of all Financial Creditors, not being related parties, having voting rights in proportion to value of financial debts due to such creditor to the total debt. Sec 5(24) & 5(24A) of IBC 2016 define related party in relation to a corporate debtor and related party in relation to an individual.
b. Where Corporate Debtor has only creditors in a class viz. a class with at least ten financial creditors under clause (b) of sub-section (6A) of section 21, the Committee shall consist of only the authorized representative(s).
c. In case there are no financial debt or all financial creditors are related parties, the Committee shall consist of operational creditors, being not related to the corporate debtor as under:
d. ten largest operational creditors by value, and if the number of operational creditors is less than ten, the committee shall include all such operational creditors;
e. one representative elected by all workmen other than those workmen included under clause (a); and
f. one representative elected by all employees other than those employees included under clause(a)

Scenarios for Committee of Creditors

- From above, one can infer as follows:
- The Committee of Creditors shall consist of;
- either Financial Creditors or authorized representatives / financial creditors and authorized representatives
- Or operational creditors and a representative of all workmen and a representative of all employees.

In any case, related parties are not allowed in the Committee. Here related parties exclusion means their financial debt will also get reduced from the total debt. From this, one can interpret that if all the financial creditors & operational creditors are related parties, then Committee of creditors consists of only one representative of workmen and one representative of employees. With the following example, we can understand this type of scenario more easily:

Example: Corporate Debtor B, a seat manufacturing Company, is the subsidiary Company of holding Company A. The Corporate Debtor has around 500 workmen and 100 employees. Company C, D, E & F are also the subsidiary companies of holding Company A. Company C, D, E & F are also the operational creditors of Corporate Debtor B. Now all Companies A, B, C, D, E & F are related parties as per section 5(24) (i) of IBC, 2016. In such case, one representative of workmen and one representative of employees shall be the members of COC

Now the question is whether this type of situation is envisaged by the Insolvency and Bankruptcy Board of India (IBBI or Board). In PPIRP, this type of scenario may become too common. Since representatives of Workmen and Employees are not considered having expertise in running business, assessing viability & feasibility thereof, so running of business during pre-packaged resolution process in such situation may raise a lot of questions. **The Board may come up with more clarifications keeping such scenario in view.**

BASE RESOLUTION PLAN

In PPIRP, presence of Base Resolution Plan is must. Base Resolution Plan is resolution plan provided by the Corporate Debtor under Section 54A (4) (c). To understand more about Base Resolution Plan, we need to discuss Section 29A of IBC, 2016. The Section has been inserted vide Insolvency and Bankruptcy Code (Amendment) Act, 2017 dated 18th Jan., 2018 effective from 23rd Nov., 2017. Before Section 29A, original/existing promoter, director or persons in concert or connected to them could participate in bidding process relating to resolution plan. But with insertion of the section 29A, which is a restrictive section, such persons who are responsible to bring the corporate debtor down or are not suitable to run the Company become disqualified for bidding process

Section 240 A (1) of the Insolvency and Bankruptcy Act, 2016 provides that the provisions of clauses (c) and (h) of Section 29A shall not apply to the resolution applicant in respect of corporate insolvency resolution process or pre-packaged insolvency resolution process of any micro, small and medium enterprises. For the purpose of brevity, Section 29A is not reproduced herein this Article. But on reading Section 29A with Section 240A(1), it is clear that Original/Existing Promoters or Directors of MSME can participate in the bidding process subject to other restrictions of Section 29A.

FORMAL AND INFORMAL NEGOTIATION

Right of Financial Creditors to make Negotiation prior to making application.

From above, it is clear that Corporate Debtor has the right to initiate the PPIRP subject to approval from Financial Creditors. Even name of the Insolvency Professional shall be proposed and approved by Financial Creditors. It is obvious, Financial Creditors will not give approval in case they think that Base Resolution Plan is not up to their expectation. This encourages negotiation between Corporate Debtor and Financial Creditors at the level prior to making application. As interest of Corporate Debtor and Financial Creditors are opposite to each other as far as value of the plan is concerned, so at first level, there are chances that Financial Creditors may get good Base Resolution Plan.

Financial Creditors' right for improvement and Value Maximization during PPIRP

In addition to above, Section **54K (2)** of Insolvency and Bankruptcy Code, 2016 provides authority to Committee of Creditors (COC) to get improvement in Base Resolution Plan or invite Prospective Resolution Applicant. Section **54K(5)** provides that where COC does not approve Base Resolution Plan or the Base Resolution Plan impairs any claim owed by the Corporate Debtor to Operational Creditors, the Resolution Professional shall invite Prospective Resolution Applicant to submit a Resolution Plan (s) to compete with Base Resolution Plan. COC shall evaluate resolution plans presented by the resolution professional and select a resolution plan amongst them **(Sec 54K (9)).** If the selected resolution plan is significantly better than the Base Resolution Plan, such resolution plan may be selected for approval **(Sec 54K (10)).** Where selected resolution plan is not considered for approval or is not significantly better than the Base Resolution Plan, the selected resolution plan shall compete with the Base Resolution Plan and one of them shall be selected for approval. **(Sec 54K (11))**

Inbuilt mechanism to safeguard the interest of financial creditors

In One Time Settlement (OTS) process, it is observed that higher authorities of Financial Creditors always have reservations that OTS has not been negotiated optimally.

The beauty of PPIRP regulations is that it encourages negotiation and out of court settlement without such reservations. If higher authorities think that Base Resolution Plan is deficient one, then COC always has the authority to get improvement in Base Resolution Plan or invite Prospective Resolution Applicant. The result will make good any deficiency. In case, the plan still remains deficient, the financial creditors have the following options:

- COC may not approve the plan and thus the process inches towards termination of the PPIRP. In such cases, the corporate debtor shall bear PPIRP costs (Sec 54N(1) & (3)); or

- COC may resolve to initiate Corporate Insolvency Resolution Process (CIRP) during PPIRP. (Sec 54O (1)).

- Although PPIRP is not being widely used but once financial creditors are made aware of its benefits, the financial creditors will not think twice before using this process. We, as professionals, have the responsibility to guide the officers of financial creditors the benefits and their safety in the process. In this way, resources of the Country will not get wasted.

ADVANTAGES OF PPIRP OVER CIRP

Speedy Process: Corporate Insolvency Resolution Process (CIRP) takes around 180+90=270 days and in special cases, CIRP may take 330 days while PPIRP completes within 120 days. Due to time saving, deterioration of assets is prevented to certain extent and PPIRP becomes more efficient, viable and corporate friendly.

Management Control: Corporate Debtor retains the control over the management during entire PPIRP process. Thus, management works towards the success of PPIRP and unwanted things which occur with change in management get avoided. The provisions of IBC provide certain situations in which control can be taken from the existing management.

Negotiated Model: This process allows negotiation between Financial Creditors and Corporate Debtor as explained in above paras.

Cost Efficiency & Value Maximization: As the existing management continues control over management, the cost of resolution professional to be paid for the purpose gets saved. Moreover, disruption cost i.e., cost of shifting the management from existing promoters to resolution professional and then to resolution applicant also gets saved. In addition, the process involves very less involvement of NCLT/Court, so such costs also do not become applicable.
The process involves more of negotiation as explained above. Due to this reason, Financial Creditors get Value Maximization.

Conclusion

Improves NCLT efficiency: As the process is more like out of Court settlement, it requires less interference from NCLT. It will save the time of NCLT which is already overburdened due to piling up of insolvency petitions.

Resolvability Index: What it is and why it is useful.

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The Perspective

Death is inevitable to life. Nevertheless, it is possible to mitigate death to a great extent, provided one consciously avoids all the causal risks such as tobacco or drugs. Likewise, a company can face several risks to its life. In order to mitigate such risks, the promoters and managers have to actively anticipate such risks and work against it. Business stress is prevalent, subject to the market conditions. The company has to accordingly develop a rescue plan at the earliest indication of stress.

The Insolvency & Bankruptcy Code, 2016 envisages the corporate insolvency resolution process (CIRP) for rescuing companies from the stress. Since, CIRP rescues a company through a resolution plan, the term 'resolvable' is used in place of 'rescuable'. India had a tryst with recovery laws which changed with the advent of the IBC. With the inception of IBC, the creditors shifted their focus from recovery to resolution in case of default. The probability of resolution, which usually exceeds the probability of recovery, coupled with higher realisations and revival of the company, makes CIRP an attractive option for creditors. However, this is subject to the condition that the company is capably 'resolvable'. In case of low resolvability, the company may yield in natural death of liquidation and the creditors might recover only peanuts. Ideally, conscious efforts to be resolvable will make the company resilient against stress. Even if the company goes into stress, its resolvability will make it an attractive feature for the takers. Hence, the resolvability health of a company is a win-win for both the company and creditors.

The authors of this paper attempt to develop an index to measure the degree of resolvability of a company. The resolvability index may carry a negligible cost associated with the development and periodical calculation, but it is comparatively insignificant as opposed to rescuing the life of a company. A legal framework must also be developed which mandates maintaining a minimum threshold of resolvability by the company. The index will aid in prevention of death of viable companies which in turn improves the Indian credit culture.

Concept of Resolvability

Resolvability of a business is the ability of a business to remain viable and financially solvent in the face of economic and market forces. This includes the ability of a business to absorb the impacts of market volatility, cultural shifts, and other changes that occur in the business environment. It also includes having enough funds available to cover operational costs and debt obligations while still being profitable.

In order to assess a business's resolvability, it is important to consider its financial health. This includes analysing its balance sheet, income statement, and cash flow statement to assess its current financial position and performance. It is also important to consider the business's debt-to-equity ratio, liquidity ratio, and other ratios to see how efficiently the business is operating. The other important factor to consider is the business's market position.

Apart from the financial angle, it is also essential to understand the legal framework within which the business operates. This will involve an analysis of the business's structure, as well as any applicable regulations and laws. Furthermore, it is important to study the management of the business. This includes the ability of the management to make sound decisions and the management style of the business. It is also important to understand the relationships between the stakeholders in the business and how they interact with each other.

Finally, it is important to consider the market conditions and the competitive landscape within which the business operates. This includes understanding the business's competitors, the potential markets and customers, and the potential risks associated with the business. All of these factors need to be taken into account in order to properly assess the resolvability of a business. By understanding these factors, one can assess the likelihood of the business's success and determine the best course of action to ensure the business's solvency.

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.

Objectives of Resolvability Index

The Resolvability Index is a tool used to measure the success of insolvency and bankruptcy proceedings under the Insolvency and Bankruptcy Code of India (IBC). The index was conceptualised as part of the government's concerted efforts to improve the efficiency and effectiveness of the IBC's insolvency resolution process. The Resolvability Index takes into account various parameters that measure the success of insolvency proceedings, such as the number of cases resolved, the return to creditors, and the amount of losses the creditors have to bear. The index is calculated by multiplying the value of the average return to creditors by the number of cases resolved and then dividing the total by the total value of the losses incurred.

The Resolvability Index should be designed to be an objective measure of the efficiency of the insolvency resolution process. By tracking the progress of insolvency proceedings over time, the index can provide valuable insights into the effectiveness of the IBC in delivering timely resolution of insolvency cases. The index can also be used by the Insolvency and Bankruptcy Board of India (IBBI) to assess the performance of insolvency professionals. By providing an objective measure of the success of insolvency proceedings, the Resolvability Index can help to improve the overall efficiency of the IBC and the insolvency resolution process. It can also help to ensure that creditors receive the best possible return on their investments, while minimising the losses they suffer.

Developing Resolvability Index

In order to arrive at the "Resolvability Index", it is pertinent to analyse the company from the financial, legal, and other relevant perspectives. Therefore, one must look at both internal and external factors.

Internal Factors

1. **Industry risk**: The analysis of industry risk enhances the comparability and transparency of ratings among sectors by comparing and scoring inter-industry risk. This risk also depends on Competitive risk and growth environment (barriers to entry; level and trend of industry profit margins; risk of secular change and substitution; and growth trends.)

2. **Cash Flow/ Leverage**: This leg analyses the funds from operations to debt and debt to EBITDA. These two payback ratios are used as the initial ratios to determine the relative ranking of the financial risk of companies. This preliminary assessment may then be adjusted through additional ratio analysis.

3. **Capital structure**: The assessment of a company's capital structure captures risks that may not arise in the standard analysis of cash flow adequacy and leverage.

4. **Financial Policy**: The cash flow/leverage score, in particular, will typically factor in operating and cash flows metrics observed during the past two years and their anticipated trends for the current year and the following two years based on operating assumptions and predictable financial policy elements, such as ordinary dividend payments or recurring acquisition spending.

5. **Liquidity**: Liquidity is an important component of credit risk across the entire rating spectrum. Unlike most other rating factors within an issuer's risk profile, a lack of liquidity could precipitate the default of an otherwise healthy entity. Liquidity is an independent characteristic of a company, measured on an absolute basis. The quantitative analysis of liquidity focuses on the monetary flows--the sources and uses of cash--that are the key indicators of a company's liquidity cushion.

6. **Management and governance**: The evaluation of management and governance encompasses the broad range of oversight and direction conducted by an enterprise's owners, board representatives, executives, and functional managers. Their strategic competence, operational effectiveness, and ability to manage risks shape an enterprise's competitiveness in the marketplace and credit profile.

7. **Valuation**: Firms should have valuation capabilities that would enable an independent valuer to carry out sufficiently timely and robust valuations to support effective resolution. Firms have made substantial progress with respect to their valuation capabilities for resolution. Valuations in a resolution require a large amount of analysis to be undertaken in a relatively short timeframe. Firms therefore need to ensure that relevant data and information supporting such valuations are robust and could be made readily available.

Restructuring a firm following resolution is an inherently complex task and will result in uncomfortable decisions, potentially including significant changes to its business model and structure in order to address the causes of failure. Companies need to understand the different set of challenges and potential context-specific implications of a resolution, including for the identification of restructuring options to support the restoration of a viable business model that is sustainable in the long-term. Companies should ensure that these capabilities are able to handle

the unique demands of resolution, considering how different stakeholders across the world can be best served, and how communications plans across other barriers should be linked.

External Factors:

Pestle Analysis is a concept developed by Francis Aguilar a Harvard professor in the year 1967. At the nascent stage of developing, it was called PEST analysis, and in very recent times Legal and Environment factors was included and is called as PESTLE analysis. It is a strategic tool which is used to assess markets for a particular product or a business at a given timeframe. Most companies employ this tool to track environments they are operating on or planning to operate. It is also one the most essential framework that helps businesses and organizations to understand the various external factors that can impact their operations and performance.

To formulate a "Resolvability Index" of a company it is important to consider and evaluate both the internal and external factors associated with the company. This tool serves in evaluation of the external factors associated with the product or company as a whole. The factors employed in the tool are explained hereby:

1.Political Factors: Political factors address various laws including political stability, tariffs, taxation, trade disputes, fiscal policy, trade barriers and potential corruption which are directly proportional to the changes which can be anticipated to be brought in the near future by the government. This indicates significant impact on company's operations and profitability.

2.Economic Factors: Economic factors include the overall stage of the business cycle, potential for economic growth or contraction, exchange rates, interest rates, inflation, labour costs and labour supply, unemployment rate, impact of new technology on the economy, impact of globalization on the economy, levels of disposable income and income distribution. It helps in the indication of consumer spending and purchasing power in the overall business environment.

3.Social Factors: Social factors include the demographic characteristics and attitudes of the population towards age and growth of population, health consciousness, cultural barriers, happiness index and trending lifestyles. This determines the consumer behaviour and preferences.

4.Technological Factors: Technological factors include level of innovation, emerging technologies, cyber security, internet availability and speed, the rate of technological change, and the impact of technology on how people live and work such as an increase in remote working, reduced

communication costs, rising demand for new technology product. This determination helps in how the company operates and the product and services it offers.

5.Legal Factors: Legal factors includes the laws and legal framework that affect the organization's environment such as health & safety laws, employment law, consumer law, discrimination laws and copyright protection.

6.Environmental Factors: Environmental factors are any of the trends or impacts of the weather, environmental policies, natural disaster to climate change, pollution and sustainability from environmental regulations to rising demand for eco-friendly "green" products. By determining this we can understand the reputation and brand image of the company.

Altman Z-Score

In the late 1960s a financial metric was developed by Professor Edward Altman, which is now known as Altman Z-score. It is very nuisance and advanced formula that combines five financial ratios to provide an overall assessment of company's financial health and the likelihood of it experiencing financial distress or bankruptcy.

Z-score = 1.2A + 1.4B + 3.3C + 0.6D + 1.0E

Where:

A= working capital / total assets

B= retained earnings / total assets

C= earnings before interest and taxes (EBIT) / total assets

D= market value of equity / total liabilities

E= sales / total assets

The relevance of Z-score can be witnessed at situations of in Insolvency and Bankruptcy as it helps in anticipating the financial position and likelihood of a company experiencing financial distress or bankruptcy. The Z-score represents a numerical representation of a company's financial health, and

a low Z-score which is below 1.88 indicates a high risk of bankruptcy. Therefore, the Altman Z-score helps to identify companies that may be at risk of insolvency and bankruptcy.

In the Corporate Insolvency Resolution process (CIRP) before sending the expression of interest (EOI), the Alman Z-score can be used by creditors and investors to evaluate the creditworthiness of a company and make informed decisions about lending, investing, or purchasing the company or submitting a resolution plan. Using this score can be a precautionary step for the creditors to reconsider lending money to a company or for investors in submitting the resolution plan if there is an indication of low Z-score.

In terms of the promotor, the Altman Z-score can be used by the management of the company's management to assess their company's financial health and identify areas that need improvement. By monitoring the Z-score of a company periodically the company can have a check on their financial health and take proactive steps to avoid bankruptcy. Ultimately, this score helps promoters and investors to evaluate a company's financial health and make informed decisions.

International Experience - United Kingdom

The UK's resolution framework is a core part of the response to the global financial crisis of 2007–08 and the approach to overcome the problem of firms being 'too big to fail'. The resolution regime ensures major firms can remain open and operating with shareholders and investors bearing losses and the costs of recapitalisation. This helps to preserve financial stability as the critical functions of the firm can continue while an orderly restructuring takes place. Resolution therefore reduces risks to depositors, the financial system, and the need for public funds that could arise due to the failure of a firm.

Resolution imposes losses on failed banks' shareholders and investors, not taxpayers. It ensures larger firms' services can continue to operate for a sufficient period, allowing authorities or new management to restructure them or wind them down. The Resolvability Assessment Framework (RAF) builds on the work done since the financial crisis and sets out the next step in implementing the resolution regime: ensuring that firms are, and can demonstrate that they are, resolvable. This will require firms to have the capabilities necessary to support their resolution. To this end, it

clarifies firms' responsibilities concerning resolution and sets out how the Bank and Prudential Regulation Authority (PRA) will increase transparency and accountability.

The RAF draws together Bank and PRA policies into three outcomes which firms need to be able to achieve so they are prepared for a resolution. The three outcomes' firms must achieve are:

A. having adequate financial resources in the context of resolution;
B. being able to continue to do business through resolution and restructuring; and
C. co-ordinating and communicating effectively internally and with the authorities and markets so that resolution and subsequent restructuring are orderly.

1. **Adequate Financial Resources**: To meet the Adequate Financial Resources outcome, firms need to ensure that they have resolution-ready financial resources available to absorb losses and recapitalise them without exposing public funds to loss. Firms must also have access to sufficient liquid resources to meet their financial obligations in resolution. Both are necessary to keep the firm operating. Firms need to:
   1. meet the 'minimum requirement for own funds and eligible liabilities' (MREL) and to ensure that these resources are appropriately distributed across their business;
   2. be able to support a timely assessment of their capital positions and recapitalisation needs (Valuations); and
   3. be able to analyse and mobilise liquidity in resolution (Funding in Resolution).

2. **Resolution and Restructuring**: To meet the Continuity and Restructuring outcome, firms need to ensure that they can continue activities while the authorities execute a resolution. This includes ensuring that the resolution does not result in the firm's financial and operational contracts being materially disrupted or terminated and that direct or indirect access to services delivered using Financial Market Infrastructure is maintained.

   Firms should be able to plan and execute restructuring effectively and on a timely basis in the event of resolution. Relatively more work is required across the sector on Restructuring Planning than other barriers, and this will need to be a key area of focus for firms. Firms have built upon their existing recovery planning arrangements to put in place the capabilities needed to deliver a business reorganisation plan which, once implemented, would aim to address the causes of failure and return the firm to a viable business model.

Firms also need to be able to plan so that they can execute post-resolution restructuring effectively (Restructuring Planning). Firms should be capable of continuing to operate, serve their clients and customers, and return to long-term viability as a restructured business.

Restructuring a firm following resolution is an inherently complex task and will result in uncomfortable decisions, potentially including significant changes to its business model and structure in order to address the causes of failure. Firms need to understand the different set of challenges and potential context-specific implications of a resolution, including for the identification of restructuring options to support the restoration of a viable business model that is sustainable in the long-term.

3. **Co-ordination and Communication :** To meet the co-ordination and communication outcome, firms need to have capabilities, resources, and arrangements in place to meet the objectives. Firms should be able – during the execution of a resolution – to ensure that their key roles are suitably staffed and incentivised, that their governance arrangements provide effective oversight and timely decision-making, and that they deliver timely and effective communications to staff, authorities, customers and other external stakeholders.

   Firms should ensure that these capabilities are able to handle the unique demands of resolution, considering how different stakeholders across the world can be best served, and how communications plans across other barriers should be linked.
   Some firms have further enhancements to make in order to identify more clearly their internal triggers to start pre-resolution contingency planning. Some firms also need to ensure that they have a flexible governance framework for how they would interact with a Bail-in- Administrator (BIA) appointed by the Bank. In particular, we expect firms to consider and plan for various roles that the BIA could potentially perform in a resolution, as well as to ensure suitable on-boarding and support is provided to the BIA to ensure an orderly resolution.

Conclusion

By considering all these factors, a company can develop a "Resolvability Index" which is a measurement of its ability to respond and adapt to changes in the external environment. This can help the company to anticipate and mitigate risks, as well as identify new opportunities for growth

and expansion. Overall, PESTLE analysis is a valuable tool for business and organizations of all sizes and industries to better understand the external factors that can impact their operations and performance.

The resolvability Assessment framework has evolved in the banks of the UK for the resolution and restructuring of the firms. Under this framework, each firm's structure and business model is taken into account as well as the preferred resolution strategy set for each firm, by assessing the firms' arrangements and capabilities against the Bank's resolution policy expectations to identify any gaps or weaknesses in firms' ability to achieve the three outcomes in the event of their resolution. Under the current Indian Regime of the IBC, there is no such resolvability Index framework to assess the resolvability of the distressed company. The lawmakers must build a index by considering both the Internal and External Factors to resolve the distressed companies in the 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 5(21) - CORPORATE INSOLVENCY RESOLUTION PROCESS - OPERATIONAL DEBT

Ashwani Atrish v. Paras Art Studio [2022]

142 taxmann.com 153 / [2022] 232 COMP CASE 111 (NCLAT- New Delhi)

Where corporate debtor engaged respondent No. 1-Operational creditor for executing an event and owed an obligation to pay for same, it was an operational debt and respondent No. 1 held status of operational creditor.

Respondent No. 5 (CK) was given a contract to organize a mega event. 'CK' engaged the corporate debtor which engaged respondent No. 1-operational creditor to provide designing and fabrication services and other assistance. In the meantime, CIRP was initiated against CK pursuant to which, the 'corporate debtor' filed a claim as an 'operational creditor' with liquidator of CK. Respondent No. 1 filed an application under section 9 against the corporate debtor. The Adjudicating Authority admitted said petition. Appellant-suspended director of the corporate debtor stated that they were engaged by CK as their authorized agent only to release payments to various vendors which included the operational creditor who was providing services directly to CK and, therefore, the corporate debtor never incurred any debt. Tax invoice raised by respondent No. 1 in favor of the corporate debtor showed that payment was made to account of the 'operational creditor' by the 'Corporate Debtor'. It was not disputed that respondent No. 1 deposited GST on entire invoice in favor of the corporate debtor and benefit of said amount as input amount had been taken by the corporate debtor.

Held that since invoices evidenced that tax invoice was raised in favor of the corporate debtor and not on CK and payment was also made by the corporate debtor and not by CK, privity of contract was between respondent No. 1 and corporate debtor and, therefore, amount, which was in default was due and payable by the corporate debtor. Since appellant hired services of respondent No. 1 for executing event and owed an obligation to pay for same, thereby it was an operational debt and respondent No. 1 held status of operational creditor, therefore impugned order passed by the Adjudicating Authority did not suffer from any factual frailty.

Case Review: Order passed by (NCLT-New Delhi) in CP (IB) No. 953/ND/2020, dated 15-

SECTION 238 - OVERRIDING EFFECT OF CODE

State Tax Officer v. Rainbow Papers Ltd. [2022]

142 taxmann.com 157 / [2022] 174 SCL 250 (SC)

Section 3(30) defines secured creditor as a creditor in favor of whom security interest is credited by operation of law and it does not exclude any Government or Governmental Authority and, thus, if resolution plan ignores statutory demands payable to a secured creditor, which includes State under GVAT or any legal authority, NCLT is bound to reject said plan.

The respondent company was engaged in the business of manufacture and sale of Crafts and Oars within and outside the State of Gujarat. Recovery proceedings were initiated by appellant against the respondent in respect of its dues for the year 2011-12, and the appellant attached the property of the respondent. Meanwhile, one operational creditor of the respondent filed petition under section 9 before NCLT, for initiation of the Corporate Insolvency Resolution Process (CIRP) against the respondent. Said Company Petition was admitted, and Resolution Professional (RP) was appointed. After appointment of the RP, claims were invited from Creditors by issuance of newspaper publications. The last date for submission of claims was 5-10-2017. After receipt of claims, a Committee of Creditors (CoC) was constituted. After admission of CIRP and appointment of RP, one 'R' submitted a resolution plan which was approved by CoC. The appellant filed a claim before the RP in the requisite Form B, claiming that Rs. 47.36 crores (approximately) was due and payable by the respondent to the appellant, towards its dues under the GVAT Act. The claim was filed beyond time. The Resolution Professional informed the appellant that in said plan the entire claim of the appellant had been waived off. The order of the RP was conveyed to the appellant by an e-mail. The appellant challenged the resolution plan contending that Government dues could not be waived off. The appellant prayed for payment of total dues of Rs. 47, 35, 72,314 towards VAT/CST on the ground that the Sales Tax Officer was a secured creditor. On behalf of the appellant, it had been argued that there were proceedings initiated by the State against the respondent-corporate debtor to realize its statutory dues. The books of account of the corporate debtor would have reflected the liability of the corporate debtor to the State in respect of its statutory dues. In abdication of its mandatory duty, the RP failed to examine the books of account of the corporate debtor, verify and include the same in the information memorandum and make provision for the same in the resolution plan. The Resolution Plan did not conform to the statutory requirements of the IBC and was, therefore, not binding on the State. NCLT rejected the application made by the appellant as not maintainable. The appellant filed an appeal before the NCLAT against the aforesaid order of the NCLT under section 61. The appeal had been dismissed by the NCLAT holding that 'Department' filed its claim at belated stage after plan had been approved by 'CoC', the 'RP' had no jurisdiction to entertain the same and rightly not entertained.

On appeal to Supreme Court:

Held that section 48 of GVAT Act is not contrary to or inconsistent with section 53 or any other provisions of IBC. Under section 53(1)(b)(ii), debts owed to a secured creditor, which would include State under GVAT Act, are to rank equally with other specified debts including debts on account of workman's dues for a period of 24 months preceding liquidation commencement date. State is a secured creditor under GVAT Act. Section 3(30) defines 'secured creditor' as a creditor in favor of whom security interest is created and such security interest can be created by operation of law. Definition of 'secured creditor' in IBC does not exclude any Government or Governmental Authority. Thus, if a resolution plan approved by CoC ignores statutory demands payable to a secured creditor, which includes State under GVAT Act or any legal authority, the NCLT is bound to reject said resolution plan and the corporate debtor would necessarily have to be liquidated and its assets are to be sold and distributed in manner stipulated in section 53. Committee of Creditors, which includes financial institutions and other financial creditors, cannot secure their own dues at cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues.

Case Review: Tourism Finance Corp. v. Rainbow Papers [2020] 120 taxmann.com 265 (NCLAT - New Delhi), reversed.

SEC 62 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - SUPREME COURT, APPEAL TO

K. Paramasivam v. Karur Vysya Bank Ltd. [2022]

142 taxmann.com 158 / [2022] 174 SCL 272 (SC)

An action under section 7 can be initiated against a corporate entity who has given a guarantee to secure dues of a non-corporate entity; liability of guarantor is co-extensive with that of principal borrower, and it is open to financial creditor to proceed against guarantor without first suing principal borrower.

The appellant was the promoter, shareholder, and suspended/discharged director of company 'MTPR'. The R1-financial creditor had advanced credit facilities to the three entities. Company 'MTPR' stood guarantor for the loans availed by all the three borrowers. The borrowers failed to repay the debts payable by them to the financial creditor. The financial creditor filed an application under section 7 for initiation of CIRP against 'MTRP'. In the said application the financial creditor stated that 'MTPR' had extended corporate guarantee(s) for loans availed by each of the borrowers. On failure of the borrowers to repay the loans, MTPR, as guarantor, became liable to repay the loan. 'MTPR' filed its counter statement before the NCLT, objecting to the jurisdiction of the NCLT to entertain the petition under section 7, on the contention that, the company, MTPR, was not a corporate debtor, which is defined in section 3(8) to mean, a corporate person who owes a debt to any person. It was contended that MTPR did not owe any financial debt to the financial creditor. The appellant contended that, MTPR did not also fall within the definition of 'corporate guarantor' in section 5(5A). The NCLT admitted the petition under section 7 and initiated the CIRP against MTPR. Being aggrieved by the order of the NCLT admitting the application for CIRP, the appellant filed an appeal. The appeal filed by the appellant, had been dismissed by the NCLAT.

Held that an action under section 7 can be initiated against a corporate entity who has given a guarantee to secure dues of a non-corporate entity; guarantor is then, corporate debtor. Liability of guarantor is co-extensive with that of principal borrower, and it is open to the financial creditor to proceed against said guarantor without first suing the principal borrower.

Case Review: *Order of NCLAT in Company Appeal (AT) Insolvency No. 538 of 2019, dated 18-11-2019, affirmed.*

SEC 61 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - APPEALS AND APPELLATE AUTHORITY

Wadhwa Rubber v. Bandex Packaging (P.) Ltd. [2022]

142 taxmann.com 169 (NCLAT- New Delhi)/ [2022] 174 SCL 627 (NCLAT- New Delhi)

Where application filed under section 9 by appellant was dismissed on 8-1-2020 and certified copy was prepared on 17-2-2021, limitation period of 30 days for filing appeal as provided under section 61 if counted from 17-2-2021 had expired much earlier than date of filing of appeal on 4-8-2021 and, hence, appeal filed by appellant was to be dismissed as being barred by limitation.

Application filed under section 9 by the appellant was dismissed on 8-1-2020 and appellant applied for certified copy on 10-2-2021, which was prepared on 17-2-2021. Appeal was filed on 4-8-2021.

Held that limitation period of 30 days as provided under section 61 for filing appeal if counted from 17-2-2021 had expired much earlier than date of filing of instant appeal and, hence, appeal filed by the appellant was without limitation as provided under section 61 and same was to be dismissed as being barred by limitation.

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

Godrej & Boyce Mfg. Co. Ltd. v. Satec Envir Engineering (India) (P.) Ltd. - [2022]

142 taxmann.com 180 / [2022] 234 COMP CASE 251 (NCLAT- New Delhi)

Where operational creditor supplied multitier racks for heavy duty shelving to IOCL-end user, however, letter issued by end user to operational creditor specified that test certificates of all plates/materials were absent and for fabrication/profiling of racking materials plates of different sizes had been used, dispute truly existed between parties and, therefore, there was no illegality or infirmity in order of NCLT rejecting application filed under section 9 by operational creditor.

The corporate debtor approached the appellant-operational creditor for supply and installation of multitier racks for heavy duty shelving for two separate work sites for end user, i.e., IOCL and same were supplied by the appellant. The appellant addressed an e-mail to the corporate debtor that a sum was overdue since more than two years. The appellant issued a statutory demand notice on the corporate debtor demanding outstanding dues. The appellant thereafter, filed an application under section 9 against the corporate debtor to initiate CIRP but the same was dismissed by NCLT on ground that that there was a pre-existing dispute with regard to work performed by the appellant. The appellant contended that supply of all materials was completed as per purchase order and there was no pre-existing dispute between parties. It was noted that communication by end user to the appellant evidenced that there were some shortcomings listed namely test certificate of materials were not found with documents and for fabrication/profiling of racking materials, plates of different sizes had been used.

Held that dispute between parties was on account of shortcomings observed in quality of racking materials supplied to IOCL and, therefore dispute truly existed between parties, which was not patently feeble legal argument, therefore, there was no illegality or infirmity in order of NCLT and instant appeal was to be dismissed

Case Review: Order of NCLT (Mumbai) passed in C.P. (IB) No. 982/ (MB)/2020, dated 25-2-2022. Affirmed

SEC 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

Tech Sharp Engineers (P.) Ltd. v. Sanghvi Movers Ltd. [2022]

142 taxmann.com 372 / [2022] 174 SCL 546 (SC)

Where last date of acknowledgement of liability by corporate debtor in terms of section 18 of Limitation Act, 1963 was 7-11-2013, application to initiate CIRP filed on 30-3-2018 was barred by limitation.

Pursuant to an agreement executed by and between the corporate debtor and operational creditor, the operational creditor let out on hire to the corporate debtor, 150 MT crane for erection of equipment at site of Indian Oil Corporation Ltd... Operational creditor raised invoices on the corporate debtor. The Corporate debtor committed default and, thus, the operational creditor filed a petition for winding up of the corporate debtor. Meanwhile, IBC came into force. Thereafter the operational creditor filed an application to initiate CIRP against the corporate debtor. The NCLT rejected said application on ground that default occurred in year 2013 and, thus, application filed on 30-3-2018 was barred by limitation. The NCLAT by impugned order set aside NCLT's order on ground that right to apply accrued on 1-12-2016, when IBC came into force and, thus, said application was filed well within limitation period. It was noted that right to sue accrues when a default occurs and date of enforcement of IBC is not relevant in computation of limitation.

Held that since in instant case default occurred in year June 2013 and there was no acknowledgement of liability after 7-11-2013, the NCLAT's impugned order was unsustainable in law and, thus, same was to be set aside.

Case Review: NCLAT's order in Company Appeal (AT) Insolvency No. 118 of 2019, dated 23-7-2019, affirmed.

SEC 62 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - SUPREME COURT, APPEAL TO

Excel Tubes and Cones v. Saurabh Bharat Bhushan Jain [2022]

142 taxmann.com 461 / [2022] 174 SCL 92 (SC)

Where NCLAT by impugned order had set aside NCLT's earlier order admitting CIRP against corporate debtor, in view of fact that CIRP had already commenced pursuant to subsequent order of NCLT, nothing further would survive in instant proceedings and any observations contained in order of NCLAT would not affect merits of claim of operational creditor, which was to be pursued in accordance with law.

The NCLT by order dated 8-9-2021 commenced CIRP against the corporate debtor. Committee of creditors was constituted and resolution plan for the corporate debtor had been approved by CoC and was awaiting approval of the NCLT. Claim of the appellant-operational creditor had been admitted by CoC. However, earlier the NCLAT by impugned order had set aside NCLT's order dated 19-2-2020 admitting CIRP against the corporate debtor by observing that there existed dispute regarding quality of goods supplied by the operational creditor.

Held that CIRP had already commenced pursuant to subsequent order of NCLT, therefore, nothing further survived in instant proceedings. However, any observations contained in impugned order of NCLAT would not affect merits of claim of appellant, which was to be pursued in accordance with law.

Case Review: Saurabh Bharat Bhushan Jain Shareholder & Director of Sysco Industries Ltd. v. Excel Tubes & Cones [2022] 142 taxmann.com 460 (NCLAT - New Delhi), affirmed.

SEC 62 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - SUPREME COURT, APPEAL TO

Ashok G. Rajani v. Beacon Trusteeship Ltd. [2022]

142 taxmann.com 465 / [2022] 174 SCL 350 (SC)

Where application filed by financial creditor under section 7 had been admitted by NCLT and NCLAT granted opportunity to parties to settle their dispute before NCLT but permitted IRP to handover all assets and proceed with CIRP, in view of fact that order impugned was only an interim order which did not call for interference and there was no question of law which required determination by Supreme Court, appeal against order of NCLAT was to be dismissed.

Application filed by the financial creditor under section 7 had been admitted by the NCLT. The NCLAT granted opportunity to parties to settle their dispute before the NCLT and granted stay on constitution of CoC. Application for settlement under section 12A was pending before the NCLT. It was a case of the corporate debtor that though NCLAT by impugned order stayed formation of CoC, it however, declined to exercise its power under rule 11 of NCLAT Rules to take on record settlement and dispose matter and further permitted IRP to issue publication and also handover all assets and proceed with CIRP. It was noted that order impugned was only an interim order, which did not call for interference. Further, there was no question of law which required determination by the instant Court.

Held that appeal against order of NCLAT was to be dismissed. However, considering investments made by the corporate debtor and considering number of people dependent on the corporate debtor for their survival and livelihood, the NCLT was directed to take up settlement application and decide same.

Case Review: Ashok G. Rajani v. Beacon Trusteeship Ltd. [Company Appeal (AT) (Insolvency) No. 598 of 2021, dated 18-8-2021], affirmed.

SEC 53 - CORPORATE LIQUIDATION PROCESS - ASSETS, DISTRIBUTION OF

Kashvi Power & Steel (P.) Ltd. v. West Bengal State Electricity Distribution Company Ltd. [2022]

142 taxmann.com 1 / [2022] 174 SCL 502 (Calcutta)

I. *Claim of electricity distribution company against petitioners-auction purchasers for electricity dues left by erstwhile owners/management of corporate-debtor company prior to commencement of CIRP was to be turned down as claim of distribution licensee was admitted both in CIRP and in liquidation and it was supposed to be paid in ratio and order of priority as stipulated in sec 53.*
II. *Section 53 provides for distribution of assets in liquidation and sets out order of priority of distribution of proceeds from sale of liquidation assets; order of priority given therein cannot be overridden by any of operational creditors of corporate debtor by jumping queue in contravention of priorities enumerated in section 53.*

I. The petitioner, auction purchaser acquired the corporate debtor company as a going concern in a liquidation sale under IBC. The respondent No.1, electricity Distribution Company, being an operational creditor, filed its claim with the Resolution Professional as well as the Liquidator and a portion of claim was admitted. When the petitioner applied for new electricity connection, same was refused by the respondent No. 1 demanding past outstanding dues against the corporate debtor. The petitioner submitted that if electricity dues were permitted to be realized from auction purchaser, then Electricity Company which was an operational creditor would be given status of special creditor who would rank higher than all creditors mentioned in sec 53 and moreover, a genuine auction purchaser could not be saddled with responsibilities of previous dues.
Held that both sale of the corporate debtor and business (es) of the corporate debtor as a going concern as envisaged in regulation 32, clauses (e) and (f) respectively, do not contemplate automatic transfer of all pre-CIRP liabilities of the corporate debtor to auction purchaser. The respondent No. 1 having made its claim during resolution process as well as before the liquidator, whatever claim was allowed by the Adjudicating Authority would be payable to respondent No. 1 from sale proceeds in ratio and order of priority as stipulated in sec 53. Therefore, claim of respondent No. 1 against petitioners for electricity dues left by erstwhile owners/management of the corporate debtor company prior to commencement of CIRP was to be turned down and respondent No. 1 was to be directed to give new electricity connection to petitioners, without insisting upon payment of such dues.

Held that sec 53 provides for distribution of assets in liquidation and sets out order of priority of distribution of proceeds from sale of liquidation assets. Sixth category in such pecking order is sec 53(1) (f), 'any remaining debts and dues' and clause (f) is only provision in sec 53 which confers

rights on operational creditors to recover their dues. As such, sec 53 is culmination of entire endeavor of liquidator and order of priority given therein cannot be overridden by any of operational creditors of the corporate debtor by jumping queue in contravention of priorities enumerated in sec 53. Operational creditors, who fall within category (f), cannot claim any priority over preceding categories in having their debts paid off. No interpretation contrary to sec 53 which, again, is preceded by a non-obstante clause, could be attributed to expression 'going concern sale', as contemplated in regulation 32 of Liquidation Process Regulations.

SECTION 31 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PLAN - APPROVAL OF

Cimco Projects Ltd. v. Anup Kumar (Resolution Professional) Shivkala Developers (P.) Ltd. [2022]

143 taxmann.com 17 (NCLAT- New Delhi)

Where Resolution Professional filed an application before NCLT for approval of resolution plan and NCLT directed appellant-resolution applicant to submit performance guarantee and more than three years had passed from approval of resolution plan by CoC, but resolution applicant had neither furnished performance guarantee nor shown any willingness to proceed with resolution plan, NCLT had rightly rejected application for approval of resolution plan.

CIRP was initiated against the corporate debtor. Resolution plan submitted by the appellant was approved by CoC. Thereafter, Resolution Professional filed an application before NCLT for approval of the resolution plan. The appellant, successful resolution applicant, was impleaded as a party to said application and NCLT directed him to submit performance guarantee. More than three years had passed from approval of the resolution plan by CoC, resolution applicant had neither furnished performance guarantee nor shown any willingness to proceed with resolution plan. NCLT issued bailable and non-bailable warrants against the resolution applicant but had failed to secure presence of the resolution applicant and, therefore, rejected application for approval of the resolution plan and ordered liquidation.

Held that due to non-serious, casual and non-diligent conduct of the resolution applicant, NCLT had rightly dismissed application for approval of the resolution plan. However, since application filed by the appellant for cancellation of non-bailable warrant had been dismissed by NCLT without adverting to any of reasons given by the appellant, application for cancellation of warrants was to be allowed.

Case Review: Order of NCLT-Special Bench in CA 734 of 2018 dated 24-11-2021, partly reversed.

SECTION 25- CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PROFESSIONAL - DUTIES OF

Sumat Kumar Gupta, Resolution Professional, Vallabh Textiles Company Ltd. v. Vardhman Industries Ltd. [2022]

143 taxmann.com 18 (NCLAT- New Delhi)

Where Resolution Professional (RP) summarily rejected claims filed by respondent-financial creditor without presenting complete set of facts to CoC, RP had misconstrued his role, duties and responsibilities and, therefore, NCLT rightly directed RP to reconsider and evaluate claims of financial creditor afresh

CIRP was initiated against the corporate debtor and the appellant was appointed as Resolution Professional (RP) of the corporate debtor. The respondent filed its claim as financial creditor. The RP sent an e-mail seeking additional details and documentation by way of account statement of the corporate debtor in books of the financial creditor. Thereafter, RP rejected claim of the financial creditor on ground that he had to decide claims within seven days from last date of receipt of claims as per regulation 13 and details sought for were not received from the financial creditor within stipulated period. The financial creditor resubmitted claim but same was not entertained by RP on ground that earlier claim had already been rejected and no belated claim could be filed. The financial creditor filed an application before NCLT seeking for directions to be issued to RP to admit/verify claim. NCLT by impugned order directed RP to reconsider and evaluate claims of the financial creditor afresh. It was noted that RP did not take adequate and credible effort on his part and rejected claims of the financial creditor after sending a bare four-line mail requisitioning additional information pertaining to 12-year period having allowed only one day time to furnish information.

Held that there was no negligence, or inaction or lack of bona fide on part of the financial creditor to submit claim with proof to RP and, therefore, NCLT could not be faulted for coming to conclusion that there was no evidence of non-compliance on part of the financial creditor when he submitted his claims. The RP by summarily rejecting belated claims at his own level without presenting complete facts to CoC had misconstrued his role, duties and responsibilities.

Case Review : Order of NCLT, Chandigarh in Vardhman Industries Ltd. v. Sumat Kumar Gupta [IA 568 of 2019, dated 24-5-2022], affirmed

SECTION 238A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIMITATION PERIOD

Punjab National Bank v. Vijay Sitaram Dandnaik [2022]

143 taxmann.com 19 /[2022] 174 SCL 573 (SC)

Where financial creditor granted loan to corporate debtor and account of corporate debtor was declared NPA on 31-3-2013 but recovery certificate was issued by DRT against corporate debtor on 1-11-2016 and thereafter corporate debtor issued balance and security confirmation letter on 17-6-2017, application filed by financial creditor under section 7 on 10-10-2019 was well within period of three years from date on which right to apply in terms of article 137 accrued.

The appellant-financial creditor granted a loan to the corporate debtor and account of the corporate debtor was declared NPA on 31-3-2013. The appellant filed an application under section 7 for initiation of CIRP against the corporate debtor. NCLT admitted said application. The NCLAT set aside order of NCLT on ground that date of default was 31-3-2013 and thus, application to initiate CIRP filed on 10-10-2019 was barred by limitation. It was noted that the financial creditor had filed an application before DRT also and received recovery certificate dated 1-11-2016 against the corporate debtor. It was only thereafter the corporate debtor issued balance and security confirmation letter dated 17-6-2017, apart from making a request for restructuring loan.

Held that the application filed by the financial creditor was clearly within three years from date on which right to apply in terms of article 137 accrued. Therefore, impugned order of the NCLAT was to be set aside.

Case Review : Vijay Sitaram Dandnaik v. PNB [2021] 129 taxmann.com 272 (NCLT-AT), reversed.

SECTION 61 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - APPEALS AND APPELLATE AUTHORITY

Vikas Dahiya v. Arrow Engineering Ltd. [2022]

143 taxmann.com 92 / [2022] 174 SCL 212 (NCLAT- New Delhi)

Where NCLAT adverted to all contentions of parties and set aside order of NCLT dismissing CIRP application filed by financial creditor and directed NCLT to admit same and said order of NCLAT was affirmed by Supreme Court, appeal against consequential CIRP order passed by NCLT, re-agitating findings recorded by NCLAT, was without merit and same as to be dismissed.

Application filed by the financial creditor for initiating CIRP against the corporate debtor was dismissed by NCLT. NCLAT however set aside said order and directed NCLT to admit CIRP application and pass consequential orders. Aggrieved by the NCLAT's order, the appellant-ex-director of the corporate debtor filed an appeal before the Supreme Court and same was dismissed while confirming order of the NCLAT. After confirmation of order passed by the NCLAT, NCLT passed impugned order commencing CIRP as directed by the NCLAT. The appellant vide instant appeal contended that impugned order of NCLT was silent on issues raised by him regarding relationship between the financial creditor and the corporate debtor, limitation and acknowledgement of any debt etc. and, therefore, same was erroneous.

Held that the instant Tribunal adverted to all contentions of both parties and recorded specific findings, which became final, therefore, the appellant was disentitled to re-agitate findings recorded by the instant Tribunal. Since NCLT had complied with directions issued by the instant Tribunal and passed consequential order, same did not warrant any interference and the instant appeal was devoid of merits and same was to be dismissed.

Case Review: Order of NCLT (New Delhi) in IA No. 830/NCLT/AHM in CP (IB) No. 268/NCLT/AHM/09/2020, dated 7-6-2022, affirmed.

SECTION 30 - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION PLAN - SUBMISSION OF

KL Rathi Steels Ltd. v. Ajit Kumar Jha [2022]

143 taxmann.com 93 /[2022] 174 SCL 317 (NCLAT- New Delhi)

Where resolution plan had already been approved by CoC and application for approval of resolution plan was pending before NCLT, application filed by appellant for submitting its EOI after expiry of last date by submission was rightly rejected by NCLT.

The appellant filed an application before NCLT seeking direction to the respondent-RP to permit the appellant to submit a resolution plan. NCLT by impugned order rejected said application. On appeal, the appellant submitted that Expression of Interest (EoI) was delayed only for 10 days and CIRP being current, it could have been permitted to submit its EOI.

Held that since resolution plan had already been approved by CoC and application for approval of resolution plan was pending before NCLT, application filed by the appellant for submitting its EOI after expiry of last date of submission was rightly rejected by NCLT.

Case Review: Order of NCLT (New Delhi) in CA-2855/2019, dated 8-4-2022, affirmed.

SECTION 29A - CORPORATE INSOLVENCY RESOLUTION PROCESS - RESOLUTION APPLICANT - PERSONS NOT ELIGIBLE TO BE

Vikram Puri v. Universal Buildwell (P.) Ltd. [2022]

143 taxmann.com 98 (NCLAT- New Delhi)

Where a resolution plan had already been approved by CoC and same had been remitted back to CoC by NCLT for limited issues, any financial proposal of appellant-suspended director, placed before CoC at such belated stage could not be considered; appellant being a suspended director was not eligible to submit a resolution plan in terms of section 29A.

The appellant-suspended director of the corporate debtor filed an application before NCLT to submit its financial proposal and placed it before CoC for consideration.

Held that since resolution plan had already been approved by CoC and same had been remitted back by NCLT to the CoC for limited issues, any proposal of the appellant to be placed before the CoC at such belated stage could not be considered. Further, in view of section 29A, the appellant being a suspended director was not eligible to submit a resolution plan.

Case Review: Order of NCLT (New Delhi) in I.A. No. 5312 of 2021, dated 4-3-2022, affirmed.

SECTION 62 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - SUPREME COURT, APPEAL TO

Neeraj Singal v. Tata Steel Ltd. [2022]

143 taxmann.com 104 /[2022] 174 SCL 522 (SC)

SC upholds orders of NCLT and the NCLAT compelling promoters of Bhushan Steels Ltd. to exit company by selling their shares to Tata Group.

The corporate debtor underwent a CIRP in which a resolution plan submitted by the respondent had been approved by NCLT. As per said resolution plan, resolution applicant was required to subscribe 72.65 per cent equity shares of the corporate debtor and to acquire 2.35 per cent equity shares of erstwhile promoters to reach 75 per cent shareholding. NCLT allowed application filed by the resolution applicant seeking a direction to promoters to sell their shares. Said order of NCLT was upheld by the NCLAT.

Held that there was no reason to interfere with order passed by NCLT as well as the NCLAT and, thus, appeal against both orders was to be dismissed.

Case Review: Neeraj Singal v. Tata Steel Ltd. [2022] 137 taxmann.com 244 (NCLAT- New Delhi), affirmed.

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

Rajratan Babulal Agarwal v. Solartex India (P.) Ltd. [2022]

143 taxmann.com 190 / [2023] 175 SCL 325 (SC)

NCLAT erred in concluding that there was no pre-existing dispute between corporate debtor and operational creditor over quality of coal supplied merely on ground of non-raising of debit note by corporate debtor as quality of coal could be established only after use/consumption and not on mere physical examination.

The operational creditor supplied 500 metric tonnes of coal to the corporate debtor and raised invoices. The corporate debtor committed default and thus, the operational creditor filed application under section 9 to initiate CIRP against the corporate debtor. Said application was admitted by NCLT. Order of NCLT was upheld by the NCLAT. The corporate debtor had preferred instant appeal praying for termination of CIRP process initiated against it on ground that there was pre-existing dispute with respect to quality of coal supplied by the operational creditor due to which it had suffered heavy production losses. It was a case of the operational creditor that the corporate debtor had neither issued any debit note nor had returned supplied coal but consumed same even after alleged deficiency and, thus, act of consumption would constitute acceptance of goods within meaning of section 42. Further, perusal of accounts of the corporate debtor did not establish case that a loss ensued to the corporate debtor. It was noted that quality of coal as set out in purchase order was something which could not be established on mere physical examination. It was only upon use of goods, defects in goods was discovered.

Held that absence of debit note raised in respect of supplied goods would not clinchingly rule out existence of a 'pre-existing dispute', thus, the NCLAT had erred in its finding about existence of a pre-existing dispute. Therefore, order of the NCLAT was to be set aside.

Case Review: Rajratan Babulal Agarwal v. Solartex India (P.) Ltd. [2022] 142 taxmann.com 573 (NCLT - New Delhi), reversed.

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

Ritu Saluja v. Union of India [2022]

143 taxmann.com 255 / [2023] 175 SCL 37 (Punjab & Haryana)

Where petitioner was a mere guarantor to loans granted by various banks to two companies and debts owed by said companies was resolved in CIRP proceedings, petitioner having not committed any cognizable offence Look Out Circulars (LOCs) issued against petitioner at instance of lender bank were to be set aside.

The petitioner was a guarantor to loans granted by various banks to two companies i.e., SMCL and STL whose promoters were the petitioner's husband and brother. CIRP was initiated against SMCL since it could not repay loans taken by it from its lenders. The Resolution Professional accepted claims submitted by various lenders and a resolution plan was approved by the COC. NCLT approved and granted necessary sanctions in regard to said resolution plan. It was noted that debt owed by SMCL was resolved by CIRP and debts of lender banks had been admitted in process.

Held that petitioner was a mere guarantor to loans and had neither it committed any cognizable offence, nor any FIR was registered against petitioner, therefore respondent banks could not make a request for issuance of Look Out Circular (LOC) to Bureau of Immigration in respect of dues owed by the petitioner to it as per office memorandums issued by Ministry of Home Affairs (MHA) from time to time. Therefore, LOCs issued and extended by Bureau of Immigration against petitioner at instance of lender bank were to be set aside.

SECTION 5(21) - CORPORATE INSOLVENCY RESOLUTION PROCESS - OPERATIONAL DEBT

Athena Demwe Power Ltd. v. Abir Infrastructure (P.) Ltd. [2022]

143 taxmann.com 274 (NCLAT- New Delhi)

Where amount of mobilization advance given by appellant to corporate debtor was in pursuance of an EPC contract agreement between parties, amount of mobilization advance given by appellant was an operational debt and resolution applicant was under obligation to include claim of appellant as an operational debt and make payment to appellant as an operational creditor.

The appellant awarded a contract to the corporate debtor and advanced an amount as a mobilization advance. Meanwhile, an order was passed by NCLT initiating CIRP against the corporate debtor and the appellant filed its claim to the RP as a financial creditor. The RP informed the appellant that its claim could not be considered as operational creditor or financial creditor but would be considered in capacity of other creditor. Thereafter, the appellant filed its claim as other creditor reserving its right to approach NCLT. However, the RP informed the appellant that its claim would be considered in capacity of other creditor only when it accepted that it was neither financial creditor nor operational creditor. The appellant filed an application before NCLT challenging rejection of its claim. NCLT by impugned order approved resolution plan and dismissed application filed by the appellant.

Held that mobilization advance given by the appellant to the corporate debtor did not fall in any of clauses (a) to (h) of section 5(8) and hence, the appellant could not avail any benefit of provisions of section 5(8)(i). Since mobilization advance given by the appellant to the corporate debtor was in pursuance of an EPC contract agreement between parties, amount of mobilization advance given by the appellant to the corporate debtor was an operational debt and resolution applicant was under obligation to include claim of the appellant as an operational debt and make payment to the appellant as an operational creditor.

Case Review: Order of NCLT (New Delhi) in I.A. No. 3197/ND/2020, dated 12-1-2022, reversed.

SECTION 5(22) - CORPORATE INSOLVENCY RESOLUTION PROCESS - PERSONAL GUARANTOR

Sudip Dutta @ Sudip Bijoy Dutta v. State Bank of India [2022]

143 taxmann.com 366 (NCLAT- New Delhi)

A personal guarantor who has given guarantee to a corporate debtor cannot escape from his liability under guarantee deed only for reason that he has after execution of guarantee deed has obtained citizenship of a foreign country.

Respondent-bank had granted loans and various credit facilities to EDAL (corporate debtor) and numerous documents pertaining to the same had been executed since the date of sanction. The personal guarantor, viz., appellant had executed personal guarantee in favour of the bank to secure the repayment of the principal amount together with all interest, additional interest, liquidated damages, premium on pre-payments, reimbursement of all costs, charges and expenses and all other obligations payable by corporate debtor in respect of the term loan. Corporate debtor had failed to make payment of its dues and finally the account was declared as Non-Performing Asset. The bank issued a demand notice section 8 was send to the guarantor. Due to default in payment of dues by the corporate debtor, an application had been filed under section 7. Said application was admitted by NCLT. It was a case of appellant that NCLT committed error in admitting section 95(1) application filed by the Bank against the appellant who was no more within the jurisdiction of the NCLT he having obtained the citizenship of Singapore with effect from 18-6-2018. It was submitted that the appellant being a citizen of Singapore, a foreign national, the I&B Code was not applicable. It was further submitted the that I&B Code was applicable only on those personal guarantors who were Indian citizens and the foreign citizens did not come within the ambit of personal guarantors. The intent of legislature had been clarified by sections 234 and 235 which states that Code to be enforced outside India only when Central Government enters into an agreement with the Government of any country outside India. There was no agreement of Central Government with Government of Singapore so as to initiate insolvency resolution process against the appellant who was citizen of Singapore. The NCLT had acted beyond the scope of the Code and its action of admitting the section 95(1) application was ultra vires. It was submitted that for the execution of the Deed of Guarantee, the bank was at liberty to initiate necessary proceedings for specific performance of the contract or initiate arbitration and raise their claims accordingly. However, resort to the I&B Code could not be taken since the NCLT had no jurisdiction to entertain petition against a foreign citizen. While the liability arising from the Deed of Guarantee did not extinguish but the said liability could not be enforced by way of proceedings under I&B Code.

Provision under section 60(1) makes it clear that residence of personal guarantor is not taken into consideration when proceedings against personal guarantor are initiated. Personal guarantor, who is whether residing in India or residing outside India, when an application is filed against personal

guarantor, jurisdiction shall be before NCLT in whose territorial jurisdiction registered office of the corporate person is located. 'Personal guarantors' as used under section 60(1) are personal guarantors irrespective of fact as to whether they are Indian citizen or foreign nationals. Where a personal guarantee has been given by a person who is residing outside India or is a foreign national, in event personal guarantee is accepted, he shall be bound by personal guarantee. There is no indication in statutory scheme that a personal guarantor can escape from his liability under guarantee deed only for reason that he has, after execution of guarantee deed obtained citizenship of a foreign country. For Central Government to enter into an agreement as required under sections 234-235 to enable NCLT to proceed against the guarantor, a foreign citizen, arises only in a case where assets or property of personal guarantor are situated at any place in a country outside India.

Case Review: Order of NCLT - Kolkata in CP (IB) No. 54/KB/2021, dated 3-8-2021, affirmed.

IN THE NATIONAL COMPANY LAW TRIBUNAL, SPECIAL BENCH — I, CHENNAI

IA (IB C)/1430(CHE)/2022 in IBA/446/2019

(Filed under Sec. 30(6) & 31 of the Insolvency & Bankruptcy Code, 2016

IN THE MATTER OF:

Mr. Ramakrishnan Sadasivan

Liquidator of

Terra Energy Limited Old No. 22, New No. 28,

Menod Street, Purasawalkam,

Chennai — 600 007

Present: Applicant

for Applicant: Ramakrishnan Sadasivan Liquidator

CORAM

Chief Justice (Retd.) RAMALINGAM SUDHAKAR, PRESIDENT Sh. L. N. GUPTA, MEMBER (TECHNICAL)

Order Pronounced on 18th January 2023

Order

Per: Chief Justice (Retd.) RAMALINGAM SUDHAKAR, PRESIDENT

The present Application has been fi1eJ by the Liquidator of the Corporate Debtor viz. M/s. Terra Energy limited under Regulation 45(3) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 seeking relief as follows.

•Take note of the sale of the Corporate Debtor os a Going - concern Io M/s. KDU Distilleries private Limited pursuant to the E-Auction dated 05.08.2022 and on the terms end. conditions mentioned in the E-Auction Process Memorandum dated 78.07.2022, COC pOY0I0 Profile dated, Letter of Intent dated 0ñ.08.2022 and the Certificate of Sale dated 04.11.2022 issued to the Success I Auction bidder.

• Direct closure of the Liquidation process of the Corporate Debtor and consequently discharge the Applicant herein as Liquidation of the corporate Debtor.

• Pass such further or of other orders as may be deemed fit and Proper in the facts and circumstances of the case and thus render justice."

2. The Ld. Liquidator submitted that the Corporate Insolvency Resolution Process in respect of the Corpora te Debtor viz. M/s. Terra Energy Limited was initiated by this Tribunal vide its order dated 20.11.2019 and one Mr. C. Sanjeevi was appointed as the 'Interim. Resolution Professional 'and subsequently replaced by Mr.R. Raghavendran by the CoC in its 1st meeting held on 03.01.2020.

3. It was submitted that during the CIRI° of the Corporate Debtor, no resolution plan was received and hence, the Resolution Professional had filed an application bearing no. IA/1186/113/2.020 under Section 33 of IBC, 2016 seeking Liquidation of the Corporate Debtor. In pursuance of the same, this Tribunal vide its order dated 17.02.2022 ord d for liquidation of the Corporate Debtor and appointed the Applicant hereinas the Liquidator.

4. It was submitted that pursuant to the receipt of the Liquidation Order, the Applicant caused Public Announcement, informing commencement of Liquidation of the Corporate Debtor and calling for claims, which was published in Form-B on 21.02.2022 in English Daily" Business Standard"-all India Edition and Tamil Daily "The Hindu Tamil" in Tamil Nadu edition. The last date for submission of claims fixed on 19.03.2022. Accordingly, the Preliminary Report dated 02.05.2022 and Asset Memorandum dated 02.05.2022 were filed before this Tribunal.

5. It was submitted that the Applicant had constituted the Stakeholders Consultation Committee ("SCC") on 18.04.2022. It was submitted that in accordance with Regulation 35(2) of the IBBI (Liquidation Process) Regulations, 2016 the Liquidator had appointed 2 registered valuers to determine the realizable value of the assets being Land & Building, Plant & Machinery and Securities / Financial Assets.

6.The summary of valuation of the assets of the Corporate Debtor are as follows:

S.NO	ASSET DESCRIPTION	RESERVE PRICE (RS. IN CRORE) LIQUIDATION VALUE
1.	**Land and Building**	
	Thirumankudi	3.04
	A Chittur	2.96
2.	**Plant and Machinery**	
	A Chittur	6.14
	Thirumankudi	5.18
	Thirumankudi& Others	6.84
3.	**Securities and Financial Assets**	
	Investments	0.03
	Loans and Advances	0.15
	Trade Receivables	0.60
	Cash and Cash Equivalents	0.02
	Other Current Assets	2.69
	Total	**27.65**

The Liquidator has also filed Form H on record, wherein the Fair Market Value or the Corporate Debtor is disclosed as Rs 52.28 Crore and Liquidation value as 27.65 Crore

7. It was submitted that in pursuance to the valuation of the assets of the Corporate Debtor at Rs.27.65 Crore, the Applicant / Liquidator had conducted 2 auctions on 10.06.2022 and 08.07.2022 with Reserve Price being Rs.28 Crore and Rs.25 Crore respectively. However, both the auction did not materialize. subsequent to failure of the above 2 auctions, the 3rd auction for the sale of the Corporate Debtor as a "Going concern basis" was held on 03.08.2022 at a Reserve Price of Rs.23 Crore. It was submitted that the Earnest Money Deposit (EMD) was received only from one party, M/s. KALS Distilleries Private Limited, which was declared as the successful Auction bidder with the Highest Bid of Rs.23.05 Crore. Pursuant to the same, the Letter of Intent (LOI) was issued to the successful Auction Bidder on 03.08.2022.

8. It was further submitted by the Ld. Liquidator that as per Regulation 31A read with 32A of the IBBI (Liquidation Process) Regulations 2016, the sale parameters regarding the Manner of sale, Mode of sale, Pre-bid qualifications, Reserve Price and Earnest Money Deposit, were placed before the Stakeholders Consultation Committee (SCC) for their consideration and all the auctions were held only with the concurrence of the Stakeholders Consultation Committee.

9. It was further submitted that in pursuance of the e-auction sale, the Successful Auction Bidder had 90 days' time till 02.11.2022 for remitting the balance sale consideration and accordingly, the Successful Auction Bidder had remitted the entire sale consideration on 28.10.2022.

10. Further, it was submitted by the Ld. Liquidator that on receipt of the entire sale consideration, it has distributed the sale proceeds to the stakeholders in accordance with the Scheme stipulated in Section 53 of the Insolvency and Bankruptcy Code, 2016. The schedule of Distribution to the stakeholders as filed by Ld. Liquidator on record is reproduced As

S No.	DISTRIBUTION MADE TO	AMOUNT (IN Rs)
1	CIRP Cost	34,65,172
2	Liquidation Costs	1,14,80,086
3	PF Dues — Paid fully in priority over other dues	1,04,993
4.	Creditors - to be paid at par	
4.1	Secured Financial Creditors	20,88,39,649
4.2	Government Dues (In consonance with Supreme Court Judgment in the matter of State Tax Officer -Vs- Rainbow Papers Limited	50,955
4.3	Workmen — Proportionate 24 Months Salary prior to the date of commencementof Liquidation	99,91,603
	TOTAL	**23,39,32,48**

11. It was submitted by the Ld. Liquidator that on receipt of the entire sale consideration From the successful Auction Bidder, the Applicant /Liquidator had issued the certificate of sale to the successful Auction Bidder M/S. KALS Distilleries Private Limited.

12. It was further submitted by the Ld. Liquidator that there is no application filed before the NCI.T pertaining to the Avoidance Transactions. However, the following cases pertaining to the Corporate Debtor are pending before various Judicial forums:

SNO.	CASE NO.	CASE DESCRIPTION.
1	WP Nos. 33115 and 33116 of 2013	Writ Petitions filed by Terra Energy Limited before the Hon'ble High Court challenging the levy and manner of collection of start-up power charges power. This case has now been transferred to TNERC & numbered as TA 43 44 of 2022
2	WP Nos. 17255 of 2015	Writ petition filed by Terra Energy pertains to Writ of Certiorari calling for the records of the 4th Respondent in demand notice (Impugned notice) Lr. SE/TEDC/TJR/DFC/AO/R/RCS/AS/AI/F.AG Audit/ D 202/2015 dated 25.05.2015 calling for shortfall in collect'. On of CC (Current Consumption) Charges contrary to the Applicable tariff orders, agreement between parties and order of interim stay granted by the Hon'b1e Madras High Court in W.P. No. 33118 of 2013
3	WP No. 15119 of 2015 & WP No. 14953 & 14956 of 2014	Writ petition filed by Terra Energy pertains to a Writ of certiorarified Mandamus challenging the unjust excessive demand in the form of security deposit made 20l4by TANGEDCO for thedrawal of power by the Sugar factory and bagasse based co-generating plant located Tirumandankud, Papanasam Taluk, for meeting their season and off-season requirements.
4	WP No. 24295 of 2015	Writ petition filed by Terra Energy Limited before the Hon'b1e High Court challenging the demand in the form of charges towards Terminal Equipments provided by TNEB
4.1	WP No.13170 13174 of 2019	Writ Petition filed by Terra Energy Limited before the Hon'ble High Court Challenging the order passed by TNERC disposing the Dispute Resolution Petition (DRP No 25 of 2011), in the absence of Judicial Member.
6	Appeal against DRP 15 & DRP 16 of 2011	Appeal filed by PTC India Limited contesting to make payment of a sum of Rs.59,54,077/- illegally levied as penalty upon the Corporate Debtor

13.The Ld. Liquidator has submitted that in the 5 h SCC Meeting held on 03.11.2022, the Stakeholders were also duly intimated about the filing of an application for closure of the Liquidation Proceedings of the Corporate Debtor. No objections were raised by the stakeholders present for the meeting.

14. The Ld. Liquidator submitted that the total Liquidation expenses incurred from 17.02.2022 to the instant date of filing of this application is to the tune of Rs 1.15 Crore. Thus, as on date of payment of all the liquidation expenses and the distribution to stakeholders stand completed. The liquidation Bank statement is appended as 'Annexure 14'. The liquidator's Receipts and payment Account for the period from 17-02-2022 – 15-11-2022 is appended as 'Annexure 15'.

15. In terms of Regulation 45 or the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016," The liquidator shall submit an application along with the final report and the compliance certification form H to the Adjudicating Authority for a) closure of the liquidati0n process of the corporate debtor where the corporate debtor is sold os e going concern". Accordingly, the Applicant/Liquidator has filed the present Application seeking directions before this Tribunal for closure of the liquidation process of the Corporate Debtor which has been sold as a Going concern.

16. We have heard the submissions of the Ld. Liquidator and gone through the documents placed on record. The Liquidator has submitted its Final Report as per Regulation 45 of the IBBI (Liquidation Process) Regulations, 2016 on 23.11.2022, whicn is appended as 'Annexure 18'.and form H i.e., Compliance Certificate under Regulation 45(3) of the IBBI (Liquidation Process) Regulations, 2016 dated 23.11.2022, which is appended as 'Annexure — 17'.

17. The Liquidator by way of a memo has also filed the Affidavit of the Successful Auction Bidder M/s. KALS Distilleries Private Limited under Section 29A of IBC, 2016 along with the Due Diligence Report of the Liquidator. A perusal of the aforesaid Report filed by the Liquidator manifests that the Successful Auction Bidder M/s. KALS Distilleries Private Limited satisfies the eligibility requirements in accordance with Section 29A of IBC, 2016. The Liquidator has distributed the sale consideration received as per the scheme stipulated in Section 53 of the Code.

18. In view of the aforesaid facts and circumstances, we allow the closure of the Liquidation Process of the Corporate Debtor.

19. The Liquidator shall stand discharged from its responsibilities, subject to procedural compliances. The Liquidator shall handover all the books and files of the Corporate Debtor, after retaining copies of the same for future requirement, if any, to the successful bidder viz. M/s. KALS Distilleries Private Limited.

20. The Successful Bidder is also directed to pursue the litigations filed by or against the Corporate Debtor which are reflected in Para 12of this order.

21. IA(IBC)1430(CHE)/2022 stands disposed of accordingly.

22. The Registry is directed to email copies of the order forthwith to the Applicant, the Registrar of Companies, Chennai, and also to IBBI for information.

23. Certified Copy of this order may be issued, if applied for, uponcompliance of all requisite formalities

GUIDELINES FOR ARTICLES

The articles sent for publication in the journal "The Insolvency Professional" should conform to the following parameters, which are crucial in selection of the article for publication:

✓ The article should be original, i.e., not published/broadcasted/hosted elsewhere including any website. A declaration in this regard should be submitted to IPA ICAI in writing at the time of submission of article.

✓ The article should be topical and should discuss a matter of current interest to the professionals/readers.

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

✓ The length of the article should be 2500-3000 words.

✓ The article should also have an executive summary of around 100 words.

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

✓ The authors must provide the list of references, if any at the end of article.

✓ A brief profile of the author, e-mail ID, postal address and contact numbers and declaration regarding the originality of the article as mentioned above should be enclosed along with the article.

✓ In case the article is found not suitable for publication, the same shall not be published.

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