FEBRUARY 2024

THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

RESIDENTIAL PROGRAM; A NATURE'S RETREAT

INSOLVENCY PROFESSIONAL AGENCY OF
INSTITUTE OF COST ACCOUNTANTS OF INDIA
(A SECTION 8 COMPANY REGISTERED UNDER THE COMPANIES ACT 2013)

RESIDENTIAL PROGRAM; A NATURE'S RETREAT

DELVING INTO INSOLVENCY AND BANKRUPTCY

PUDUCHERRY

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3.OPEN AND FREE DISCUSSIONS
4.EXPANDING HORIZONS
5.REJUVENATION AND STRESS REDUCTION
6.PHYSICAL FITNESS
7.FAMILY TIME

INCLUSIONS

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MUSICAL NIGHT

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*CPE will be granted to all Insolvency Professional & Registered Valuers who are members of IPA ICMAI, ICSIIP & IIIPI

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OVERVIEW

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

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Events

February 2nd to 3rd, 2024	Learning Session on Role of Related Parties under IBC, 2016. Active interactive with free exchange of views on the subject, during the session, was the highlight of the program.
February 9th, 2024	Interactive Meet of Insolvency Professionals and Bankers. was conducted in a Physical Mode in Delhi, and the program was well appreciated by the participants who gained immensely with it.
February 11th, 2024	Workshop on Transaction Audit & Forensic Audit" was conducted on with content like, conducting the transaction audit, Legal framework, post audit process and dispute resolution etc.
February 18th, 2024	Webinar on Recent Amendments under IBC, 2016 which received an overwhelming response from participants who benefitted from the knowledge sharing workshop
February 19th to 25th, 2024	63rd Batch Pre -Registration Educational Course conducted by our expert faculties who shared their knowledge enriching experiences practical aspects and guidance to function as an effective and efficient IP.
February 23rd to 27th, 2024	Certificate Course on Insolvency & Bankruptcy Code, 2016: A Refresher Guide

From MD Desk

Dear Reader,

This issue of 'Your Insight Journal' comes to you in the new leap year. All of my colleagues at IPA of ICMAI join me in wishing, all the members, IPs and other professionals active in the IBC ecosystem, a very happy new year. I wish all the readers continued professional satisfaction as also excellent health, professional and personal growth.

Professional development happens through continuous professional education including updates on changes in code and relevant laws and regulations as also new case laws. The equally important side of professional development is expression of a professional's knowledge and experience and competent sharing with fellow IPs. As our ancestors said, teaching and articulation is the highest level of learning. I invite more and more members to contribute articles and opinions to the E-Journal on all aspects that IBC ecosystem and related domains that will enrich the knowledge base of the readers.

At IPA-ICAI, we strive to make our publications relevant, informative, interesting and lucid. This issue of the 'Insolvency Professional – Your Insight Journal' has three interesting articles-

- *The vexed question of sovereign dues in the light of the 'Rainbow Papers' ruling of the Hon. Supreme Court is discussed in the first article,*
- *the second deals with the complications involved in dealing with PF claims,*
- *Implications of climate change is the subject of the next article, a very important topic that everyone, including IPs, should be abreast, though a slight deviation from the normal opinions in this journal that have always considered matters pertaining to IBC ecosystem,*
- *And the last article is contextual and discussed the implications of the five regulatory amendments issued by the regulator on 31st January.*

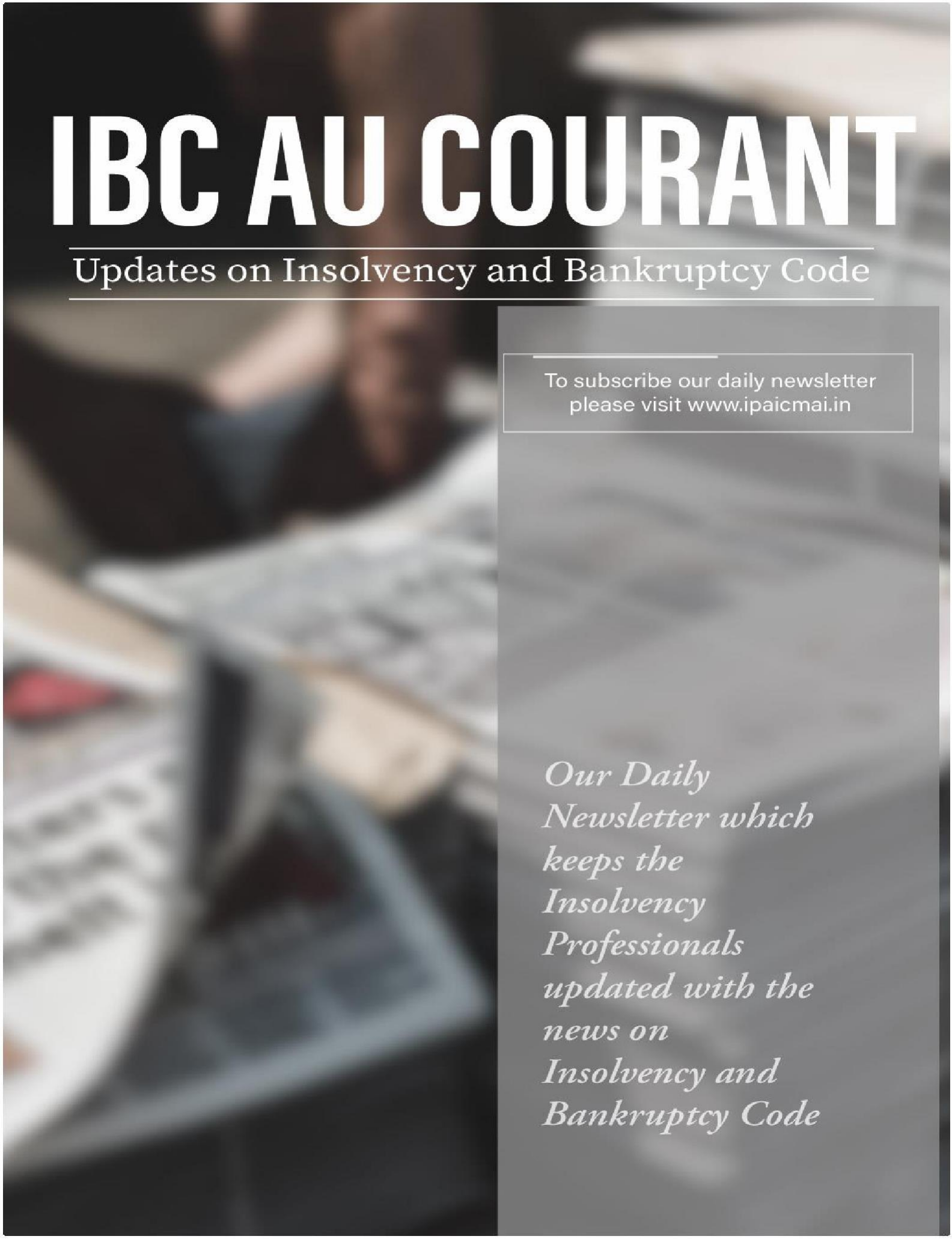
I am sure you will find both the articles interesting and useful. We welcome your responses to the published articles in this journal. You are welcome to write to publication@ipaicmai.in.

Wish you all happy reading.

Managing Director
G.S. Narasimha Prasad

PROFESSIONAL DEVELOPMENT INTIATIVES

Insolvency Professional Agency Of Institute Of Cost Accountants Of India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ARTICLES
Insolvency Professional Agency of Institute of Cost Accountants of India

A STUDY OF INTRICATE RELATIONSHIP BETWEEN CLIMATE CHANGE AND INSOLVENCY

Dr. S K Gupta
Managing Director
ICMAI Registered Valuers Organization

The perspective

Climate Change is the defining issue of our time, and we are at a defining moment. From shifting weather patterns that threaten food production, to rising sea levels that increase the risk of catastrophic flooding, the impacts of climate change are global in scope and unprecedented in scale. Climate change is currently a global challenge that threatens the future viability of our planet. Climate change can bring catastrophes for humans and ecosystems: extreme weather, melting glaciers, rising sea levels, altered ecosystems, etc. The rate of climate change and extreme weather has accelerated in recent years. Despite the growing concern and awareness, it is difficult to predict climate change accurately with the available technological tools. However, scientific evidence suggests that the risks of climate change will continue to increase.

Climate change

Climate change is a broad term used to refer to changes in the Earth's climates, at local, regional, or global scales, and can also refer to the effects of these changes. Climate change refers to periodic modification of Earth's climate brought about as a result of changes in the atmosphere as well as interactions between the atmosphere and various other geologic, chemical, biological, and geographic factors within the Earth system. Climate change refers to long-term shifts in temperatures and weather patterns. Such shifts can be natural, due to changes in the sun's activity or large volcanic eruptions. In recent decades, the term 'climate change' is most often used to describe changes in the Earth's climate driven primarily by human activity since the pre-Industrial period, particularly the burning of fossil fuels and removal of forests, resulting in a relatively rapid increase in carbon dioxide concentration in the Earth's atmosphere.

Climate refers to the long-term regional or global average of temperature, humidity and rainfall patterns over seasons, years, or decades. While the weather can change in just a few hours, climate changes over.

longer timeframes. Climate change is the significant variation of average weather conditions becoming, for example, warmer, wetter, or drier—over several decades or longer. It is the longer-term trend that differentiates climate change from natural weather variability.

There are some basic well-established scientific links:

- The concentration of GHGs in the earth's atmosphere is directly linked to the average global temperature on Earth.
- The concentration has been rising steadily, and mean global temperatures along with it, since the time of the Industrial Revolution.
- The most abundant GHG, accounting for about two-thirds of GHGs, carbon dioxide (CO_2), is largely the product of burning fossil fuels.
  Widespread improvements in the quality of life of many of the world's populations have gone hand-in-hand with increased demands on natural resources. The planet is struggling to keep up. Increases in the average global temperature, and the frequency of extreme weather events are transforming ecosystems around the world and threatening entire species of plants and animals. Forests are drying up because there is less rainfall and thus more fires, and the glaciers of both the North and South Poles are shrinking. The consequences of climate change affect all of us, but to react and adapt to these challenges, we must first understand them.

Climate Change Risks

Climate change is already a reality. The natural environment has been significantly degraded over the past few decades, which has become an important concern for modern society. Specifically, changes in the natural environment have significantly impacted national economic policies as well as corporate strategies. As scientists continue to reinforce the severity of climate change, the potential disruption and financial implications have come to the forefront. Economic and financial risks arising from climate change are typically divided into two types:

Physical risks refer to the potential damage and losses from the increasing severity and frequency of climate-related events. These can be acute (as in the case of a destructive tropical cyclone) or chronic (such as rising sea levels and temperatures).

Transition risks result from the actions taken to reduce greenhouse gas emissions, mitigate climate change and adjust to a lower emissions economy. This encompasses changes in government policies, technology, and investor and consumer preferences, which have the potential to result in substantial and, in some cases, unexpected changes to the functioning of the economy and financial system. Transition risks can arise domestically or internationally, transmitted through trade flows or financial markets.

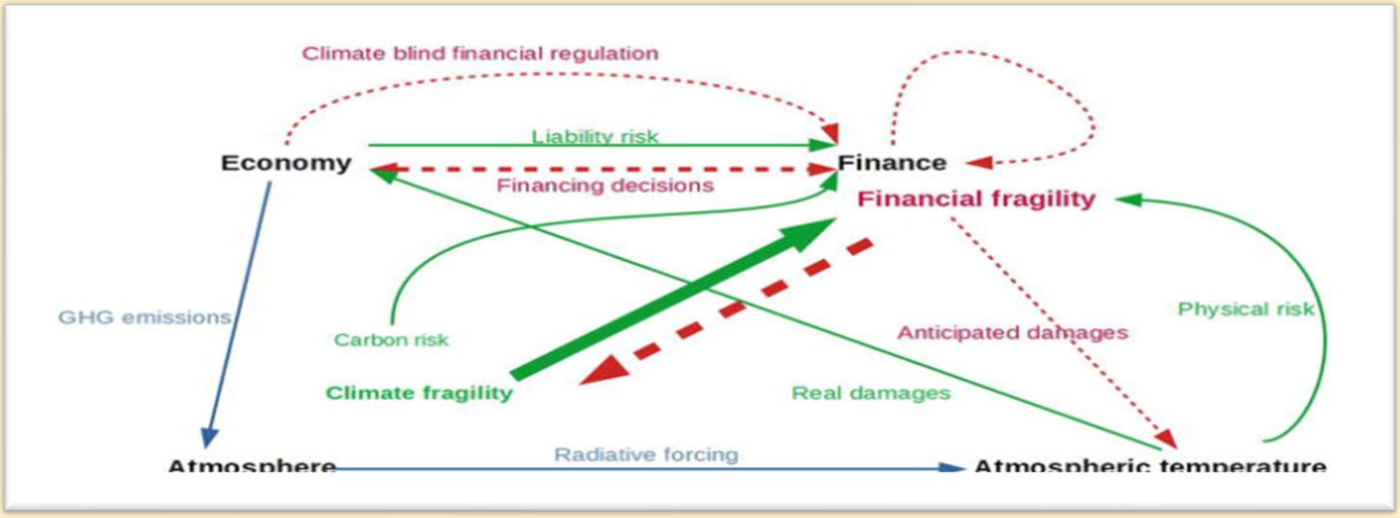
Potential effects of climate risk drivers — Table 1

Risk	Potential effects of climate risk drivers (physical and transition risks)
Credit risk	Credit risk increases if climate risk drivers reduce borrowers' ability to repay and service debt (income effect) or banks' ability to fully recover the value of a loan in the event of default (wealth effect).
Market risk	Reduction in financial asset values, including the potential to trigger large, sudden and negative price adjustments where climate risk is not yet incorporated into prices. Climate risk could also lead to a breakdown in correlations between assets or a change in market liquidity for particular assets, undermining risk management assumptions.
Liquidity risk	Banks' access to stable sources of funding could be reduced as market conditions change. Climate risk drivers may cause banks' counterparties to draw down deposits and credit lines.
Operational risk	Increasing legal and regulatory compliance risk associated with climate-sensitive investments and businesses.
Reputational risk	Increasing reputational risk to banks based on changing market or consumer sentiment.

Physical risks from increased variability and extremity of climatic conditions will reduce the value of certain assets and income streams. Policy and technological changes that address climate change will moderate these physical risks; however, they may increase the transition risks associated with the move to a lower emissions global economy. Sudden or unexpected changes in regulations, technology or consumer preferences, or uncertainty about prospective policy settings, could quickly lower the value of assets or businesses in emissions-intensive industries, some of which may become economically unviable or 'stranded.'

Relationship between physical and transition risks

Physical risk and transition risks are correlated because the more transition policies enter into force, the fewer physical risks are likely to materialize. On the other hand, the harder the economy is hit by physical risks, the stronger the demand will be for effective transition measures.



Risks can also materialize through the economy at large, especially if the shift to a low-carbon economy proves abrupt (as a consequence of prior inaction), poorly designed, or difficult to coordinate globally (with consequent disruptions to international trade). Financial stability concerns arise when asset prices adjust rapidly to reflect unexpected realizations of transition or physical risks.

Supply Chain Disruption

All businesses, to varying degrees, depend upon wider supply chains. If it's not directly, as with a company relying on particular raw materials, it may be indirectly via the fact that every business is connected to others via people, entities, information, and resources. For many businesses, climate change disruption upon supply chains is a high-risk area.

Credit risks implications of climate change

Credit risk is the risk of a financial loss resulting from a borrower's failure to repay part of or all the interests and the principal of a loan. Climate-related risks affect all three dimensions of credit risk—a borrower's capacity to generate enough income to service and repay its debt as well as the capital and collateral that back the loan.

Climate and financial fragilities reinforce each other. They are intertwined into positive feedback loops so that climate systemic risks also incur financial systemic risks. Financial fragility to external risks may increase climate fragility through negative externality effects. Conversely, climate fragility incurs new risks that may reinforce financial fragility.

Climate change and Insolvency

The realization of a climate systemic risk translates into potential financial turmoil and this in turn can increase probability of insolvency. The deterioration of the natural environment has engendered numerous challenges because firms in diverse array of industries rely on the natural environment for business-critical resources. The impact of environmental degradation and climate change poses significant financial risks and a threat to corporate survival. Consequently, it is no longer regarded as a secondary issue: firms have begun to see it as a core socio-economic concern.

Many businesses may be able to withstand the challenges ahead, but it may very well be that their trading counterparties (whether suppliers, customers, or other stakeholders) will not. Whilst these times can represent an opportunity for some, such as potential acquirers (whether of businesses, assets, or distressed debt), in most cases, the climate represents a threat to businesses.

Climate change can also affect businesses in a number of other ways. Changing weather conditions may lead to resource scarcity and cause dramatic price increases for essentials like water, food, and energy. Efforts to avert climate change could also have a damaging effect on companies. More stringent environmental levies like a carbon tax would make it very difficult for some of the most polluting businesses to operate profitably. Other policies, meanwhile, could wreak havoc on certain industries. The government's decision to ban the sale of new petrol and diesel cars from 2030 could have disastrous consequences for petrol stations and other companies in the fuel supply chain. A single large-scale natural disaster can cause the sudden failure of an otherwise solvent company. Climate change, which has fuelled increases in the severity and frequency of natural disasters, has become a "new and significant" source of

potential business failures. Many of these perils appear to be accelerating in line with scientists' warnings regarding the consequences of climate change.

Hotter years have been routinely linked with reduced economic output in developing countries. New research shows that one reason is that people are less productive at work and more likely to be absent on hot days. The aggregate effects are large enough to significantly reduce the output of the manufacturing sector. Rising temperatures can hurt economic output in various sectors by reducing the productivity of human labor. Climate change will have an impact on both industrial raw material supplies and processes. Climate change can have notable impacts to those industrial sectors whose raw materials are heavily dependent on weather and other changes in the natural environment. Climate change can produce new challenges to the construction industry when changing weather conditions demand the implementation of new types of construction materials and plans. Sea-level rise and more acidic oceans will threaten coastal tourism infrastructure and natural attractions. Rising temperatures will shorten winter sport seasons and threaten the viability of some ski resorts. Climate change will lead to changes in biodiversity, affecting eco-tourism. Industrial plants handling flammable substances, in the chemical industry for example, can be faced with a higher risk of fire as the climate becomes warmer.

Effects of Climate Change on Agriculture

- Less predictable growing seasons
- In a warming world, farming crops are more unpredictable—and livestock, which are sensitive to extreme weather, become harder to raise. Climate change shifts precipitation patterns, causing unpredictable floods and longer-lasting droughts.
- More frequent and severe hurricanes can devastate an entire season's worth of crops.
- Meanwhile, the dynamics of pests, pathogens, and invasive species—all of which are costly for farmers to manage—are also expected to become harder to predict.
- Climate change is expected to increase the frequency of heavy precipitation which can harm crops by eroding soil and depleting soil nutrients.

Climate risk and Firm's earnings

Climate effects on firm earnings and performance are getting an increasing attention from researchers. Ginglinger and Moreau (2019) find that greater climate risk leads to lower leverage in the post-2015 period, i.e., after the Paris Agreement and show that the reduction in leverage related to climate risk is shared between a demand effect (the firm's optimal leverage decreases) and a supply effect (lenders increase the spreads when lending to firms with the greatest risk). Addoum et al. (2019) find that extreme temperatures significantly impact earnings in over 40 percent of industries in the U.S. and demonstrate bi-directional effects that harm some industries and bring benefits to others. On the global scale, Pankratz et al. (2019) find that an increasing exposure to extremely high temperatures has negative impact on firms' revenues and operating income. Focusing on a panel of 55 countries, Huang, Kerstein, and Wang (2018) find that climate risk at the country level is associated with lower corporate earnings and higher earnings volatility.

It's a two-way street

Climate impacts finance. Climate change affects companies' fundamentals and thus markets overall. It brings new risks and opportunities for companies, with obvious financial implications. Globally, different sectors face different degrees of risk in the green transition. Those that contribute most to CO2 emissions

(such as transportation and food) will be harder hit than others. Changing policies, such as new regulations and restrictions on the use of certain resources, will impose transitional costs on these sectors.

International case studies

When PG&E filed for Chapter 11 protection in January, The Wall Street Journal dubbed it the "first climate change bankruptcy." The Californian power utility was facing $30 billion in potential liabilities following a series of devastating wildfires linked to its equipment—wildfires made more likely by a prolonged period of hot, dry weather that had reduced the surrounding forests to tinder and which scientists have since attributed to climate change. PG&E may well be the largest corporate casualty of climate change, but it is not the first. Climate change is increasing the frequency and severity of extreme weather around the world, and other businesses have fallen victim to these trends.
If the first climate change bankruptcy is indicative of a new reality, it is not that utilities are going to go bankrupt overnight. Rather, climate disasters will increasingly add financial stress to utility-sector stakeholders, as costs accumulate from both acute events and damaging extreme weather impacts. Adapting the regulatory bargain for a climate-exposed future will require lawmakers, regulators, and shareholders to develop new approaches and new incentive structures to ensure an accountable, robust utility sector. Moreover, while climate change is already presenting real financial challenges to utilities, it will not be the only sector to face large climate-driven costs. Other corporate actors can look to the utility experience to better understand how policy makers, investors, and companies will respond to the growing financial threat from climate change.

The announcement that Peabody, the world's largest private sector coal miner, has filed for bankruptcy has sent shockwaves through the fossil fuel industry and it acts as a warning to oil and gas companies – and their investors – about how quickly things can change. What's happened in coal is an example of the dangers. Peabody is the 50th coal company to file for bankruptcy since 2012 and a startling example of the industry's failure to anticipate how future markets might be limited by tighter environmental regulations.

This astonishing and rapid fall has been triggered by a number of events, including the continuing fall in the cost of renewable energy technologies and the rise of the shale gas industry in the US. Not only did this hit the demand for coal in the US, but it also contributed to a fall in oil and gas prices globally that reduced coal demand in other markets such as Europe. The Chapter 11 filing highlighted the risks of fossil fuel assets becoming stranded because of tightening environmental regulations and the availability of cost-competitive renewable energy alternatives.

Conclusion

Climate change is rapidly proceeding, and climate-related risks are being exacerbated. While the mechanisms of physical climate change and the possible impacts are scientifically well understood, the specific estimates of these impacts are associated with uncertainty. Climate change will affect all sectors of the economy, and it is relevant to investors and financial institutions, posing an unprecedented challenge to the governance of global socioeconomic and financial systems. Climate-related risks touch on the interests of a broad range of stakeholders across the private and public sectors, impact all the key dimensions of credit risk, and are the main channels through which climate change can affect financial stability and thus lead to higher probability of Insolvency. The adverse effects of climate change are pervasive and systemic, affecting all asset classes, industries, and economies, and in turn, the financial

system. Given the overall landscape many businesses will continue to trade in circumstances in which it is highly questionable as to what the future holds for them and whether they remain viable.

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ANALYSIS OF 5 REGULATIONS AMENDMENTS BY IBBI AS ON 31ST JAN 2024

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IBC 2016 was a landmark legislation passed by parliament in recent times. Due to this India's ranking in the World Bank Ease of Doing Business Index improved by another 14 places to 63 in 2019. In resolving insolvency, India's ranking jumped 56 places to 52 in 2019 from 108 last year, the highest even jump of any country in the history of the World Bank. The government also put lot of effort to make IBC 2016 as the most successful legislation of recent times. In its journey of 7 years, it brought six amendments in the Code. IBBI is the regulator of IBC 2016 and has been doing tremendous work to further ease this complicated IBC 2016. It has been regularly issuing Discussion Papers on Public domain & based on feed back it is bringing changes in the various Regulations as per powers granted to them u/s 240 read with section 196 (I) (t) of IBC 2016. In that process, it has brought amendments in the following 5 (five) Regulations as on 31st Jan 2024 followed by 2 Circulars as on 1st Feb 2024: -

1) *IBBI (Insolvency Professionals) (Amendment) Regulations, 2024* ***(`IP Regulation`)***
2) *IBBI (Model Byelaws and Governing Board of Insolvency Professional Agencies) (Amendment) Regulations, 2024* ***(`Agency Regulation`)***
3) *IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) (Amendment) Regulations, 2024* ***(`PG to CD Regulation`)***
4) *IBBI (Bankruptcy Process for Personal Guarantors to Corporate Debtors) (Amendment) Regulations, 2024* ***(`Bankruptcy Regulation`)***
5) *IBBI (Voluntary Liquidation Process) (Amendment) Regulations, 2024* ***(`VL Regulation`)***
6) *Circular No IBBI/IPE/64/2024 dated Ist Feb 2024* ***(Circular 64)***
7) *Circular No IBBI/IPE/65/2024 dated Ist Feb 2024* ***(Circular 65)***

Above regulations have further eased the implementation of IBC 2016 by allowing IPs to resign, Increasing IPE's role, Streamlining AFA tenure, Making Voluntarily Liquidation Process more transparent and allowing IRP/RP/Liquidator to act as RP for PG and Bankruptcy cases. Similarly, circulars have also clarified various IP & IPE's issues in their favours. These are discussed in detail as follows: -

1) Earlier Insolvency Professionals appointed as IRP/RP/A.R./Liquidator/Bankruptcy were having no power to resign. They have to continue sometimes for years without any remuneration to run the corporate debtor with all the responsibilities. COC/SCC/Debtor/Creditor were enjoying it as all their responsibilities get shifted to IRP/RP/A.R./Liquidator/Bankruptcy. Due to this there was great resentment among IP's & now IBBI has allowed them to resign on the recommendation of COC/SCC/Debtor/ Creditor subject to approval by AA by inserting a new clause 22A of First Schedule in ***IP Regulation***. Incidentally, it will also benefit whereas IRP/RP/A.R./Liquidator/Bankruptcy are not having good terms with COC/SCC/Debtor/Creditor. Here it is pertinent to note that IRP/RP/A.R./Liquidator/Bankruptcy now can ask AA wherever COC/SCC/Debtor/ Creditor doesn't give approval of their resignation provided there are genuine reasons to resign.

2) Earlier IPE's who were acting as IP's were restrained from engaging or appointing its partners or directors in their assignments and similarly, they were also not allowed to be engaged or appointed by partners or directors in their assignments being related to them. Now new Clause 23 B & 23 C in First Schedule to ***IP Regulation*** has been inserted to provide that IPE's acting as IP can engage or appoint its partners or directors not only in their assignments but also get appointed or engaged themselves in their assignments also except for Audit and Valuation assignments.

3) IBBI was preparing its PANEL which was forwarded to AA for appointment of IPs by AA where name of IP's was not given by applicant in their petition u/s 9,94,95,122,123 or otherwise. The tenure of this Panel was 6 months and pre-requisite for eligibility in the Panel was that IP must be holding valid AFA for the whole 6 months period. Since AFA was issued for 12 months period only, it resulted in an anomality whereas ½ of IP community get empanel only in 6 months out of 1 year. It deprives them of opportunity of getting work from AA. Now this anomality has been removed by substituting sub-clause (6) in clause 12A in para VI of Schedule of ***Agency Regulation*** whereas the validity of AFA has been extended till 30th June or 31st Dec subject to age restriction of 70 years.

4) Earlier IRP/RP/Liquidator were not allowed to appointed as RP for PG & Bankruptcy cases. The reason of the same was unknown & in fact IRP/RP/Liquidator was knowing the best of PG due to his experience in CIRP/Liquation process of CD. Now this anomality has been removed by omitting explanations (c) to Regulation 4 in the case of ***PG to CD Regulation*** and explanations (c) to Regulation 3 in the case of ***Bankruptcy Regulation***. Further, in case of non-receipt of Repayment Plan by RP, it was RP's discretion to hold or not hold MOC (Meeting of Creditor). Now he is compulsory required to inform MOC of non receipt of repayment plan as per newly inserted regulation 17A of ***PG to CD Regulation***. Earlier Bankruptcy Trustee was not allowed to appoint IRP/RP/Liquidator as professional in his assignments and now he is allowed to appoint IRP/RP/Liquidator as professional by omitting Proviso (c) to Regulation 5 of ***Bankruptcy Regulation.***

5) Earlier in case of expected adverse orders during assessment proceedings before Statutory Authorities (I-Tax, GST etc), CD's were going for Voluntarily Liquidation Process before issuing of demands by statutory authorities due to the fact that at the time of filing Voluntarily Liquidation application, they were required to declare of NO DEBT at that time only. Technically it was correct also as demand is raised only after completion of assessment proceedings which generally happens only at the end of time barring date. CD take advantage of this intervening period & files declaration of NO DEBT despite knowing huge, expected demands in due course from Statutory Authorities. Now this loophole has been plugged by adding new sub clause (iii) to Regulation 3(1) (a) in the ***VL Regulation*** whereas now CD has to compulsory provide that he has made sufficient provision to meet the obligations arising on account of pending proceedings or assessments before statutory authorities and pending litigations. The liquidation processes many a times gets extended from stipulated period of 90/270 days & in that case Liquidator was required to hold annual meetings of contributories after expiry of 12 months u/r 37(2). Now the period of 12 months has been reduced to 90/270 days alongwith compulsory giving reasons for not completing the process within stipulated time period and explanation of additional time required for completing the process by inserting a new clause vii) therein. Similarly, regulation 8 (1) (b) has been amended to omit Annual word in Status Report & duty has been casted on Liquidator of filing of status report within 7 days with IBBI as per newly inserted sub regulation (4) to regulation 37. Another relaxation is also given to stakeholder's u/r 39 to claim their money from Liquidator even after transfer of funds by him in Corporate Voluntary Liquidation Account maintained by IBBI till dissolution order is passed by the AA by filling Form I.

6) There was a great apprehension among IPE's pertaining to issue of Show Cause Notice under regulation 11 of the IBBI (Inspection and Investigation) Regulations, 2017 to the assigned partner or director or to all partners/directors of IPE. Now it has been clarified that it shall be issued to assigned partner/director only until unless there are either repeated instances of contravention against one or more partners or directors of the IPE or instance of systemic failure on the part of such IPE. Further IPE's acting as IP shall have no restriction on no of assignments to be handled by them as per Clause 22 of Code of Conduct specified in First Schedule to IP Regulations alongwith stipulation of minimum fees as per CIRP Regulations 34B. In other words, IPE acting as IP can now also quote below minimum fees and give tough competition to IPs for same assignment. This provision is definitely against IP's acting as an individual and goes against 'Sabka Sath Sabka Vikas.' IBBI must restrict IPE's entry as an IP by prescribing certain size of the CD.

7) There was some confusion whether IP can be part of monitoring committee or not. Now it has been clarified that IP can be part of monitoring committee subject to mentioning of it in the approved resolution plan. Another relaxation in the billing is given, whereas now bill or invoice may be raised in the name of the IPE or the professional or the firm in which such professional is a partner for the purposes of clause 25C of Code of Conduct specified in First Schedule to IP Regulations.

Conclusion: - All the above changes shall further ease the process involved in IBC 2016 and bring more transparency in it. IP & IPEs shall feel happy as their many demands have been accepted by IBBI. It will also bring more confidence among all stakeholders especially Investors whereas they will realise that Government is not only acting but also acting very fast. It will facilitate fast & transparent Resolution Process in the days to come and give big boost to Indian Economy which is thriving to reach $ 5 Trillion economy by FY 2025.

INTRICACY OF PF CLAIM AND ITS EFFECT ON RESOLUTION PLAN

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Introduction

Refusal of Hon'ble Supreme Court to interfere in NCLAT order dated 21.10.2022 pronounced in the matter of **Jet Aircraft Maintenance Engineers Welfare Association vs. Ashish Chhawchharia, Resolution Professional of Jet Airways**, will have far-reaching implications on approval of resolution plan(s) and recovery of financial creditors through resolution plan or liquidation proceedings. Partial reversal of its own order by NCLAT, earlier pronounced in the above referred matter, in the case of **Regional Provident Fund Commissioner Vs Manish Kumar Bhagat, RP of Perfect Boring Pvt Ltd**, confirms that issues relating to treatment of provident fund dues during corporate insolvency resolution process / liquidation process are far from fully settled and may have more further examination in future.

In Jet Airways case, NCLAT held that EPF dues do not fall under the scope of the term 'assets' even during the CIRP and, therefore, the IRP / RP cannot alienate or transfer such assets. The NCLAT observed *"...the said funds i.e.,* provident fund, pension fund and gratuity fund maintained by the corporate debtor, have to be utilized fully for payment of provident fund, pension fund and gratuity of the workmen and employees and thus, these assets cannot be included in the information memorandum as the assets of the corporate debtor, while inviting the resolution plan and claims have to be settled against the assets of the corporate debtor. It was further held that EPF dues have to be paid in full calculated till the Insolvency Commencement Date ("ICD"), along with any damages and interest as levied, as per the provisions of the EPF Act, since they do not form part of the assets of the Corporate Debtor by virtue of Section 18 and Section 36 of the Code. It was further clarified that EPF dues have to paid irrespective of whether or not the Corporate Debtor has maintained a separate fund for provident fund contributions.
In the aforesaid case, NCLAT examined and upheld following two issues relating to employee provident fund:

a) Whether the workers and employees are entitled to receive the payment of provident fund, gratuity, and other retirement benefits in full since they are not part of the liquidation estate under Section 36(4)(b)(iii) of the Code?

NCLAT held that workers and employees are entitled to receive the amount of provident fund and gratuity in full since they are not part of the liquidation estate under Section 36(4)(b)(iii).

b)Whether verified & admitted claim of Regional Provident Fund Commissioner for the amount related to Section 14B of Employees' Provident Funds & Miscellaneous Provisions Act 1952 (PF Act 1952), can be treated as secured debt and the Appellant was entitled to receive the amount as secured creditors?
Relying on its earlier judgement in the case of "Tourism Finance Corporation of India Ltd. vs. Rainbow Papers Ltd. & Ors., NCLAT held that Section 11 of Provident Funds & Miscellaneous Provisions Act 1952 provides for priority of payment of full claim over other debts and therefore. any partial payment of Provident fund dues would lead to breach of provision of Section 30(2)(e) of the Code.

Earlier, NCLAT in the case of ***Tourism Finance Corporation of India Ltd. vs Rainbow Papers Ltd.*** held that since no provisions of the Code and the EPF Act are in conflict, the application of Section 238 of the Code does not arise in respect PF claim filed pursuant to section 7Q and 14B of PF Act. Section 17B of the EPF Act creates an obligation on the transferee to pay the contribution and other sums due from the employer whenever an establishment is transferred. Therefore, by operation of Section 17B of the EPF Act, the successful resolution applicant was made liable to pay the provident fund dues arising pursuant to section 7Q and 14B of PF Act which the corporate debtor owes to its employees.

NCLAT followed its judgement given *in* Jet Airways case, subsequently in the *case of* **Assam Tea Employees Provident Fund Organization Vs, Mr. Madhur Agarwal, Resolution Professional of Hail Tea Limited.** In this case**,** NCLAT also relied on Hon'ble Supreme judgement given in the case of **"Maharashtra State Cooperative Bank Limited vs. Assistant Provident Fund Commissioner & Others**, wherein Apex observed that. *The expression "any amount due from an employer" appearing in sub-section (2) of Section 11 has to be interpreted keeping in view the object of the Act and other provisions contained therein including sub-section (1) of Section 11 and Sections 7A, 7Q, 14B and 15(2) which provide for determination of the dues payable by the employer, liability of the employer to pay interest in case the payment of the amount due is delayed and also pay damages, if there is default in making contribution to the Fund. If any amount payable by the employer becomes due and the same is not paid within the stipulated time, then the employer is required to pay interest in terms of the mandate of Section 7Q. Likewise, default on the employer's part to pay any contribution to the Fund can visit him with the consequence of levy of damages."*

NCLAT observed that the above judgment lays down that any amount due from employer appearing in sub-section (2) of Section 11 also covers the amount determined under Section 14B and there cannot be any quarrel to the preposition as laid down by the Hon'ble Supreme Court in the above case. The priority for payment of debt under Section 11 of the PF Act has to be looked into in view of the mechanism which is specifically provided under Section 53(1) of the Code. It further stated that they had already dealt the provision of Section 36(4)(a)(iii) of the Code and held that provident fund dues are not subject to distribution under Section 53(1) of the Code.

In the case of **State Bank of India v. Moser Baer Karamchari Union** the question of whether provident fund, pension fund, and gratuity fund dues could be included in section 53 of the IBC was considered. The Adjudicating Authority allowed the application on the grounds that these dues could not be part of Section 53 of the IBC. NCLAT upheld the decision of the Adjudicating Authority, which held that provident fund, pension fund, and gratuity fund do not come within the meaning of liquidation estate. This means that these funds are not part of the assets available for distribution to the creditors of the company in liquidation.

However, NCALT in the case of **Regional Provident Fund Commissioner, Vatwa Vs Shri Manish Kumar Bhagat, Resolution Professional of M/s. Perfect Boring Pvt. Ltd. (**Judgement pronounced on 11.10.2023) partially reversed its earlier orders by examining afresh nature of section 17 B and discretionary power vested with the concerned authority for waiver of penalty under section 32 B of Provident Fund Scheme. NCLAT observed that *Central Board is empowered to waive the damages under Section 14B of the Act. The Para 32B of the Scheme provides that Board for Industrial and Financial Reconstruction for reasons to be recorded in its schemes, in this behalf recommends, waiver of damages up to 100 per cent may be allowed. After enforcement of IBC, the provisions of Board for Industrial and Financial Reconstruction and Sick Industrial Companies (Special Provisions) Act, 1985 were repealed and earlier*

statutory regime for rehabilitation is now substituted by Insolvency Regime as contained in IBC. Thus, when Insolvency Resolution Process has been initiated against a Corporate Debtor and Resolution plan has been approved under IBC, power of Central Board to reduce or waive the damages can be exercised with regard to the damages imposed under Section 14B. The power of recommendation as contemplated in paragraph 32B of the scheme can very well be exercised by the NCLT.

Accordingly, NCLAT asked Successful Resolution Applicant to pray to the Central Board to waive 100 percent damages imposed under Section 14B of the PF Act 1952 and no direction was issued for payment of damages of imposed under Section 14B. Successful resolution applicant was directed to pay remaining amount as determined to be payable under section 7A & 7Q of EPF Act 1952.

From above judicial pronouncements, it is amply clear that a Resolution Plan will have to provide for payment of entire outstanding EPF dues, calculated as on ICD. Claim for such outstanding EPF amount can be filed either by workers/ employees or by Provident fund organisation. Such provisioning in the Resolution Plan is essential to make it compliant with Section 30(2)(e) of the IBC which stipulates that the Resolution Plan must not contravene any of the provisions of the law for the time being in force. Further, in liquidation, *a*ll sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund be excluded from liquidation estate as well as from the purview of the waterfall mechanism, as enshrined under Section 53 of the IBC, which enumerates the order of priority in which the payment during liquidation is to be made.

While it is laudable to accord priority to the payment of workers / employees dues, a cause espoused by the Apex Court, but in none of the above referred judgements, the Apex Court / NCLAT examined rationale and purpose of section 7Q and 14 B of PF 1952 and how amount collected pursuant to said sections are utilised by PF organisation.

Section 7Q and 14 B of PF Act 1952

7 Q: *Interest payable by the employer. —The employer shall be liable to pay simple interest at the rate of twelve per cent. per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment: Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank.]*

14B. Power to recover damages.—Where an employer makes default in the payment of any contribution to the Fund , Pension Fund or the Insurance Fund or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 or sub-section (5) of section 17 or in the payment of any charges payable under any other provision of this Act or of 5 any Scheme or Insurance Scheme or under any of the conditions specified under section 17, the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf may recover from the employer by way of penalty such damages, not exceeding the amount of arrears, as may be specified in the Scheme Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985,subject to such terms and conditions as may be specified in the Scheme.

Section 14 B is a deterrent provision to prevent default in payment of EPF dues and any recovery pursuant to said provision is never paid to employees of concerned organisation. Further, since the section prescribes stiff penalty, the section itself empowers Central Board to reduce / waive penalty levied in the case of sick unit. Corporate debtor undergoing CIRP, or liquidation process is certainly a distressed unit and therefore, deserves waiver of penalty levied u/s 14 B. Similarly, pursuant to section 7 Q, PF department normally charges interest @ 12% while it pays interest between 7-8 percent to employees on outstanding PF balances. In view of this, payment of full amount of claim including for interest and damages charged pursuant to section 7Q and 14 B may be considered as enrichment of PF organisation at the cost of other creditors.

Further, section 36(4)(a)(iii) of the Code excludes all sums due to any worker or employee from the provident fund, pension fund and the gratuity fund from liquidation estate. Sub section (3) of section 36, prescribe list of assets which shall form part of liquidation estate. Generally, organisation deposit contribution (both employer and employees) with Employees' Provident Fund Organisation ("EPFO") and only handful of organisations are having their Provident Fund Trust. In financial statements, there are generally no assets named as provident fund, even if contribution amount is deposited with its own trusts. On retirement / retrenchment / otherwise, EPFO or PF trust, as the case may be, directly settles PF claims, without routing funds through the concerned organisation. Similarly, in liabilities side of the financial statement, only contribution amount, which are yet to deposited, are shown. In view of the above, in Author's view, no adjustment is needed in the liquidation estate, created pursuant to section 36(3) of the Code, even if there are outstanding PF dues unless Regulatory authorities allows deduction of outstanding PF amount reflected as liability in the books of corporate debtor / Admitted amount of PF department or employees claim towards PF from assets value representing immovable properties, plant & machinery, investment and monetary assets.

In author's views, even considering NCLAT and Apex Court judgements that there is no conflict between section 11 of EPF Act 1952 and provisions of the Code, priority can be given and amount can be excluded from liquidation estate *under Section 36(4)(b)(iii) of the Code,* only to the extent of contribution (both employer and employee) and accrued interest to the extent payable to workmen / employee only and not for any additional interest, penalty and damages as claimed EPFO.

Further, Invariably, EPFO files claim during CIRP / liquidation based on ex-parte order issued by its own officers on the basis of salary & wages amount disclosed in audited financial statements. Seldom only, claims are substantiated with employee wise claim detail or based on PF returns filed by the concerned organisation. As per Regulation 12 of CIRP Regulation, it is responsibility of creditor to submit claim with proof. IRP / RP may call for such other evidence or clarification as he deems fit from creditor to substantiate the whole or part of its claim. In Author's view, filing of any claim by EPFO on estimate / best judgement basis, cannot be termed as substantiated.

In all cases, referred in earlier paragraphs, workers and EPFO had filed their claims with the RP before approval of resolution plan and the dispute was only over the amount allocated towards their claims under the Resolution Plan. The law is still unclear on what were to unfold if EPF claims are lodged based on assessments/ inspections carried out at belated stages where the Resolution Plan is already approved. Despite multiple legal pronouncements, there are still many unresolved issues, and therefore, Payment of EPF dues during CIRP or liquidation is far from fully settled. Further, payment of full amount of EPF dues including interest under section 7Q of PF 1952, and gratuity dues during CIRP / Liquidation may affect recovery of financial creditors who drives CIRP / liquidation process. Financial creditors enjoy priority

under section 53 of Code also. Therefore, according to priority in payment of entire EPF and gratuity dues, irrespective of category or number of dues may disincentivise financial creditors to support resolution. Appellate courts normally examine legal issues which are espoused in appeal and does not look into nitty gritty of entire issue. Hence, there is a need for examination of entire PF claim issue afresh to resolve unsettled issues and to balance out interest of all stakeholders.

GOVERNMENT DUES CONONDRUM –
"RAINBOW PAPERS" EFFECT – A CASE STUDY

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SYNOPSIS

The State Tax Officer(1) Vs Rainbow Papers Ltd ***(Civil Appeal No. 1661 of 2020) (SC)*** *("**Rainbow Papers**") case created a huge whirlpool in the near about steady waters of I&B Code and its ripples continue to remain in the ecosystem and grossly impact the decision making process of the insolvency professionals during CIRP and Liquidation proceedings, at adjudication forums like NCLT, NCLAT and Supreme Court in the form of protracted litigations and among the uncertain and undecided lenders and corporate debtors at large.*

The lenders are the most effected fraternity in this respect as they are unsure and uncertain about the settlement of amounts due to central government and state governments as per provisions of section 53(1) of the IB Code. This measure, alone, effects their realizations from corporate debtors to a great extent.

In this process, the legal forums like NCLT, NCALT and Supreme court and the regulator IBBI, have done an exemplary work of providing valuable guidance and direction to the IBC fraternity at large for creating a holistic understanding of the issues involved by providing indications of the way forward. However, the whirlpool created by the ***Rainbow Papers*** *case still refuses to abate.*

Therefore, in this Article, the author has made a humble attempt to analyze and bring out the issues, ***which were not brought to the attention of the Hon'ble Supreme Court bench****, which delivered the* ***Rainbow Papers*** *judgement in September 2022.*

In this Article, the author has endeavored to provide a persuasive methodology about dealing with such issues by the stakeholders. The intensive search for appropriate answers to various questions, which were generated in the ecosystem after the ***Rainbow Papers*** *case,* ***is still continuing****. The author may be reached by email on –* ***rajeevip2020@gmail.com***

This judgment ***is exceptional*** *because, although the SC concluded that the resolution applicant was not allowed to submit a resolution plan****, yet, on peculiar facts of the case, the implementation of resolution plan was allowed to continue in the overall interests of the corporate debtor.***

Since its inception, the provisions contained in the I&B Code have generated extraordinary interest in the insolvency professionals (IP) and legal fraternity for determination of the most appropriate interpretation of such provisions framed by IBBI. On several occasions, the matters related to such legal interpretations travelled right up to the Supreme Court, where the final word was delivered. However, some issues continued to retain interests of all stakeholders, due to the far-reaching effect on determination of amount payable to creditors under resolution and liquidation process. Yes, we are talking about the Rainbow Papers case, wherein the status and payment of amount due to central government and state governments under the corporate insolvency resolution process (CIRP), was deliberated upon at length.

Certain issues are usually peculiar to laws which relate to financial matters. One such issue, which is particularly peculiar and contentious in the I&B Code, is the settlement of dues of the Crown, i.e., amounts due to the central government and state governments, for which claims are submitted by concerned government departments with the RP or the liquidator, as the case may be. The founding fathers of I&B Code were conscious of the challenge faced by them with respect to the claims of government dues and they had a difficult task of finding appropriate answers for addressing this issue under the I&B Code. At that point in time, it was also widely known that all laws framed earlier than I&B Code (like SICA, etc.), with the solemn objective of settlement of claims of creditors, had hit a major roadblock, including but not limited to, settlement of dues of the Crown.

In order to address this issue, the first Banking Law Reforms Committee (BLRC), which was assigned the onerous task of making recommendations for setting up a framework for resolution of stressed assets, was faced with a serious challenge of finding a solution to this issue within the I&B Code framework. The BLRC studied the framework of resolution process, which was followed with respect to dues of the Crown, under the resolution laws framed by other countries and also considered the past experience of the ecosystem while dealing with this issue.

The question before the BLRC was – Can the dues of the Crown be considered higher in priority to the dues of other creditors, especially Financial Creditors, who had provided funds for setting up the business and/or for supporting the business operations of an entity?

On page 14 of the First BLRC recommendations made in November 2015, under the heading 'Liquidation' the Committee observed as follows –

"The Committee has recommended to keep the right of the Central and State Government in the distribution waterfall in liquidation at a priority below the unsecured financial creditors in addition to all kinds of secured creditors for promoting the availability of credit and developing a market for unsecured financing (including the development of bond markets). In the long run, this would increase the availability of finance, reduce the cost of capital, promote entrepreneurship and lead to faster economic growth. The government also will be the beneficiary of this process as economic growth will increase revenues. Further, efficiency enhancement and consequent greater value capture through the proposed insolvency regime will bring in additional gains to both the economy and the exchequer."

It was perhaps a result of such recommendations made by BLRC, that the amounts due to central government and state governments were placed at a priority, which was lower to the debts of unsecured financial creditors and of all kinds of secured creditors, in the waterfall mechanism provided in section 53(1) of the I&B Code.

Therefore, when the I&B Code was introduced in the Parliament, the Preamble of the Code stated as follows: —

"An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a timebound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."

The issue relating to the payment of debts of government dues came up for consideration before the Hon'ble Supreme court on various occasions and on due consideration of facts and the law involved, the Hon'ble Supreme Court held that dues of government fell under the category of Operational Creditors and they were to be considered to be lower in priority than the secured creditors under the waterfall mechanism provided under section 53(1) of the I&B Code.

However, when the matter of Rainbow Papers, relating to dues of State Government under Gujarat Value Added Tax (GVAT), came up for hearing before the Hon'ble Supreme Court, on due consideration of facts of the case and on detailed consideration of the provisions of the Gujarat VAT Act and the I&B Code, the Hon'ble Supreme Court was pleased to hold that the dues of the state government under GVAT were to be treated at par with the dues of other secured creditors and such dues should be given the same treatment under the provisions of I&B Code as was available to other secured creditors. The conclusions of Hon'ble Supreme Court in the Rainbow Papers case are mentioned below (extract of relevant paras reproduced here)–

A) "48. A resolution plan which does not meet the requirements of Sub- Section (2) of Section 30 of the IBC, would be invalid and not binding on the Central Government, any State Government, any statutory or other authority, any financial creditor, or other creditor to whom a debt in respect of dues arising under any law for the time being in force is owed. Such a resolution plan would not bind the State when there are outstanding statutory dues of a Corporate Debtor."

B) "54. In our considered view, the Committee of Creditors, which might include financial institutions and other financial creditors, cannot secure their own dues at the cost of statutory dues owed to any Government or Governmental Authority or for that matter, any other dues."

C) "56. Section 48 of the GVAT Act is not contrary to or inconsistent with Section 53 or any other provisions of the IBC. Under Section 53(1)(b)(ii), the debts owed to a secured creditor, which would include the State under the 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 the liquidation commencement date."

D) "57. As observed above, the State is a secured creditor under the GVAT Act. Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority."

Subsequently, a review petition was filed against the Rainbow Papers judgement, before the Hon'ble Supreme Court with a plea that various provisions of I&B Code had not been brought to the notice of the Court and certain judgements pronounced by other benches of the Court itself had not been considered. This review petition was rejected by the Hon'ble Supreme Court. It was held that there was no error or infirmity in the judgement pronounced in the case of Rainbow Papers and the reasons, for which the review of Rainbow Papers judgement was being sought, were either insufficient or were not relevant.

It will be useful to list out the following facts relating to Rainbow Papers case-

1. Certain amounts were due to the GVAT department (GVAT) by the corporate debtor (CD) and a recovery notice was issued by GVAT in July 2016; The property of the CD was attached by GVAT in October 2018.

2. The CIRP of CD commenced in September 2017 with the appointment of IRP and the Committee of Creditors (CoC) was constituted in October 2017. Till such time, although the recovery notice had been served by GVAT on the CD, the attachment of property of CD had not been made till such time.

3. The GVAT did not submit its claim with the RP within the time allowed under I&B Code. Such claim was submitted with RP belatedly i.e., while the process of consideration of the resolution plan by the Committee of Creditors (CoC) was underway.

4. A resolution plan was approved by NCLT for resolution of the CD. The GVAT wrote a letter to the RP for confirming the status of the amount claimed. The RP informed GVAT that their entire claim had been waived off under the resolution plan.

5. The GVAT filed an application before NCLT against the successful resolution applicant and RP for not considering their claim, which was rejected by NCLT. On appeal before NCLAT, the prayer of the GVAT was, once again, rejected.

6. Thereafter, GVAT filed a special leave petition before the Hon'ble Supreme Court with a prayer that the claims of the state government could not be waived under a resolution plan and such claims should be treated at par with the claims of other secured creditors under section 53 of the I&B Code.

7. On due consideration of facts and law, the Hon'ble Supreme Court allowed the appeal of GVAT and held that claim of state government could not be waived off under a resolution plan and such claims should be treated at par with other secured creditors for settlement of dues under the resolution plan.

Certain legal provisions referred to in the Rainbow Papers case are as follows –
Section 48 of the GVAT Act is reproduced below: -

"48. Tax to be first charge on property. —

Notwithstanding anything to the contrary contained in any law for the time being in force, any amount payable by a dealer or any other person on account of tax, interest or penalty for which he is liable to pay to the Government shall be a first charge on the property of such dealer, or as the case maybe, such person."

Section 3(30) and 3(31) of the I&B Code are reproduced below-
"3(30) "secured creditor" means a creditor in favour of whom security interest is created.

3(31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation

and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a performance guarantee;"

Section 53 of the I&B Code, which provides for the mode and manner for distribution of the proceeds of sale of the assets of a Corporate Debtor in liquidation, is reproduced below: -

"53. Distribution of assets.—(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely—

(a) the insolvency resolution process costs and the liquidation costs paid in full.

(b) the following debts which shall rank equally between and among the following—

- workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
- debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in Section 52.

(c) wages and any unpaid dues owed to employees other than workers for the period of twelve months preceding the liquidation commencement date.

(d) financial debts owed to unsecured creditors.

(e) the following dues shall rank equally between and among the following:

- any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date.
- debts owed to a secured creditor for any amount unpaid following the enforcement of security interest.

(f) any remaining debts and dues.

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation. —For the purpose of this section—

- it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and

- the term "workmen's dues" shall have the same meaning as assigned to it in Section 326 of the Companies Act, 2013 (18 of 2013)."

Certain facts and point of law, which were not brought to the attention of the Hon'ble Supreme Court, in Rainbow Papers Case –

A. SEPARATE PROVISION INCLUDED IN SECTION 53(1) FOR GOVERNMENT DUES:

(1) Section 53(1) of the I&B Code includes a separate provision with regard to the treatment to be given to the amounts due to central government and state governments during a corporate resolution or liquidation process. Section 53(1) of I&B code reads as follows (relevant extract reproduced below)-

"53. Distribution of assets. — 1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds

(e) the following dues shall rank equally between and among the following: —

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date.

2)The important question to consider here is that when a specific and separate provision was made by the legislature in section 53(1)(e)(i) of the I&B Code, then whether the amount due to central government and state government could be included with or considered to be covered by the provisions of some other clause of section 53(1) of the IB Code ?

3)Sub-clause (i) of clause (e) of section 53(1) of I&B Code, clearly provides for settlement of the amount due to central government and state governments in a decreasing order of priority. The I&B Code does not create any exceptions or special conditions under which payment of such dues may be considered in a different manner or in some other order of priority.

4)Therefore, the question that, whether the provisions of section 53(1)(b)(ii) of I&B Code (applicable to secured creditors), were applicable to dues of central and state government, when such an implication was, neither expressly nor impliedly, contemplated by provisions contained in section 53(1) of the IB Code, was not raised before the Court.

RATIONALE FOR A SEPARATE PROVISION UNDER I&B CODE FOR GOVERNMENT DUES:

5)The reason for including a separate and a special provision for treatment of all government dues under I&B Code can be found in the observations of the First BLRC Report, which was issued in November 2015. The relevant extract has already been reproduced hereinabove.

6)The most important words to mark in the BLRC recommendations are –
"The Committee has recommended to keep the right of the Central and State Government in the distribution waterfall in liquidation at a priority below the unsecured financial creditors in addition to all kinds of secured creditors for promoting the availability of credit and developing a market for unsecured financing (including the development of bond markets)"

7) Three important points emerge from such consideration:

- First, that the rights of central and state government were recognized as separate rights.
- Second, that the rights of central and state government were to be provided priority lower than unsecured financial creditors; and
- Third, and most significant one, that the rights of central government and state government were to be provided priority lower to all kinds of secured creditors also.

8) It is important to appreciate this interesting dimension of section 53(1) of I&B Code. The reference to "priority lower to all kinds of secured creditors" in this recommendation clearly brings out two important principles related to rights of central government and state governments:

- Firstly, it was the understanding of BLRC that the rights of the central government and state governments were never to be treated at par or equal or equivalent to secured creditors under the waterfall mechanism provided in section 53(1) of I&B Code; AND/OR

- Secondly, even if the rights of the central government and state governments were to be treated as secured creditors under I&B Code, it was the understanding of BLRC that they were still to be ranked lower in priority below the amounts payable to unsecured financial creditors and to all kinds of secured creditors also.

9) It is interesting to note that if one considers either of these two principles, then the amounts due to central government and state governments would always be placed at a priority, which was lower to all unsecured financial creditors and all kinds of secured creditors, as per provisions of section 53(1) of the I&B Code. The determination of such government dues, as secured or unsecured, would not make any difference in the treatment to be given to such dues under the waterfall mechanism.

10) This rationale for introducing a separate provision relating to dues of government under section 53(1)(e)(i) of I&B Code was not brought to the attention of the Court.

OVERRIDING EFFECT OF NON-OBSTANTE CLAUSE CONTAINED IN SECTION 53(1) OF I&B CODE VS. NON-OBSTANTE CLAUSE CONTAINED IN SECTION 48 OF GVAT:

11) The non-obstante clause contained in the opening part of section 53(1) of IB Code that "53. Distribution of assets. — (1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force,".

12) The non-obstante clause contained in Gujarat VAT, 2003 act provides that "Notwithstanding anything to the contrary contained in any law for the time being in force" ….

13) Therefore, a decision is required to be made as to which non-obstante clause will have an overriding effect over the other. The GVAT is a state legislation, which provides for collection of taxes in the state of Gujarat on sales of goods and services, while the I&B Code is a special Central legislation, which was enacted by the Parliament for a specific purpose i.e., resolution of distressed assets. In its wisdom, the Parliament had chosen to provide a non-obstante clause in the widest possible terms in section 53(1) of I&B code and included the words "Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force".

14) Thus, from the perusal of the aforesaid non-obstante clauses, it can be seen that the non-obstante clause included in section 53(1) of IB Code is of a much wider import and it overrides all laws enacted by any State Legislature for the time being in force. As a result, the provisions contained in GVAT Act, 2003 could not be said to have an overriding effect over the provisions of section 53(1) of the I&B Code.

15) This aspect of the overriding effect of provision relating to dues of state government under I&B Code was not brought to the attention of the Court.

OVERRIDING EFFECT OF SECTION 238 OF I&B CODE VS. NON-OBSTANTE CLAUSE CONTAINED IN SECTION 48 OF GVAT:

16) Section 238 of the I&B Code provides as follows –
"The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

17) The provision of section 238 of the I&B Code operate on a global basis. This means that the provisions of I&B Code will be applicable and will override the provisions of all other laws for the time being in force, inspite of any inconsistency which may exist in such other laws.

18) Here, it is important to point out that while provisions of section 238 of the IB Code apply globally, the provisions of section 53(1) apply specifically with respect to distribution of funds or settlement of dues of creditors due to the inclusion of a more specific non-obstante clause included in that section. Therefore, there is a double protection or safeguard in I&B code, on account of overriding effect over other laws, due to the non-obstante clauses contained in section 53(1) as well as in section 238 of IB Code, which are applicable to the settlement of dues of creditors. It could be reasonably concluded that no other law, whether enacted by Central or any State Government, could be said to override or supersede the I&B Code in any manner, except for exceptions, if any, provided under the I&B Code itself.

19) Further, the argument taken by the GVAT in the Rainbow Paper case that there is nothing "contrary or inconsistent" between the provisions of section 48 of the GVAT and the provisions of section 53(1) of the I&B Code does not seem to be relevant here as there is no question of inconsistency between the non-obstante clauses mentioned in section 53(1) and section 238 of the IB Code and section 48 of the GVAT.

20) It has simply to be determined whether the provisions of section 48 of GVAT have an overriding effect over provisions of section 53(1) and section 238 of the I&B Code. If this question is answered in the negative, then there could be no question on the inconsistency between the two provisions because the provisions contained in both sections are absolutely clear and unambiguous.

21) In this connection, the ratio laid down by Hon'ble Supreme Court in the case of M/s Innoventive Industries Ltd Vs ICICI Bank (Civil Appeal No. 8337-8338 of 2017 – Judgment dated 31st August 2017) (Specific Reference – Para 50 to Para 60 of the said judgement) with regard to inconsistency or repugnancy between the laws framed by the Centre and State is squarely applicable to this matter.
It was held by the Court that the repugnancy may exist between the two Acts on account of similar provisions contained in both the Acts.

In para 50(ix) of this judgment, the Court held that "The repugnant legislation by the State is void only to the extent of the repugnancy. In other words, only that portion of the State's statute which is found to be repugnant is to be declared void." In such circumstances, the State Act is supposed to make way for the

Central Act to apply. In other words, the provisions contained in the Central Act will prevail and the provisions contained in the State Act shall not be applicable in such circumstances.

22) This overriding effect of section 238 of I&B code and the ratio of judgment pronounced by Hon'ble Supreme Court in the case of M/s Innoventive Industries Ltd Vs ICICI Bank supra was not brought to the attention of the Court.

CREATION OF SECURITY INTEREST:

23) The words "security interest" have been defined under the I&B code to mean any right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge,…….etc. The definition of security interest, therefore, includes all rights, titles and interests created as a result of some "transaction" which takes place between the debtor and the creditor.

24) In civil law, the word "transaction" is usually used to refer to an agreement or a contract, which is reduced to writing, reached between two or more parties whereby they make reciprocal concessions to prevent or end a dispute that might end up in litigation.

25) In commercial law, the word "transaction" has been defined as an occasion when someone buys or sells something or when money is exchanged or the the activity of buying and selling something is undertaken.

26) So, now the question is, can a provision made under a state law for collection of taxes by the government (for e.g., tax on provision of goods and services like VAT or GST, on any miscellaneous receipts, etc) can be said to be giving rise to a "transaction"?

27) As per powers given to the States and Union Territory (UT) in India by the Constitution of India, the States and UT can make their own laws with regard to collection of certain taxes within their States and UT like sale of goods and services, other local taxes, etc. This power of collection of taxes is granted by the Constitution of India as a measure for raising revenue for the State and UT so that the State and UT can meet their expenditure for the development of the State and UT for the welfare of people. Therefore, the collection of taxes by the State government or UT, under the powers conferred by the Constitution of India, cannot be classified as a "transaction" between the State (as a collector of taxes) and the Taxpayer (as the entities paying such taxes to the State).

28) As per definitions contained in GVAT Act also, the word "tax" is defined as -
'"tax" means a tax leviable and payable under this Act on sales or purchase of goods and includes lumpsum tax leviable or payable under section 14, 14A, 14B, 14C and 14D'. This definition also provides guidance that tax is proposed to be collected under GVAT Act on sales of goods and services.

Therefore, such collection of taxes, which is defined in the GVAT Act, and which is collected according to the powers given by the Constitution of India to the States for collection of taxes, does not fall under the definition of "transaction."

29) Once we arrive at such an inescapable conclusion, the natural corollary to the main theorem is that if the collection of taxes by state government could not be termed as a "transaction", then a "security interest" could not have been created under the I&B Code against the corporate debtor, as a result of non-

payment of any taxes to the state government, as the activity of collection of taxes does not give rise to a "transaction".

30) The fact that, the activity of collection of tax by GVAT from the CD, was not a transaction between the GVAT and CD, was not brought to the attention of the Court in this case.

CREATION OF FIRST CHARGE UNDER GVAT:

31) Another contention, which was raised in Rainbow Papers matter, which needs to be addressed, was creation of a charge in favour of GVAT. It was submitted that a charge created as per provisions of section 48 of GVAT was a "charge created under law or by operation of law" on the assets of the corporate debtor and creation of such a charge under law was to be duly recognized and given the treatment as a secured creditor under the provisions of the I&B Code.

32) So, now the relevant question is, does a "charge created under GVAT Act" stand on the same footing as a charge created as a result of a "transaction" as provided in definition of "security interest"?

33) The answer to this query again rests in the provisions contained in section 3(31) of the I&B code. The words used in section 3(31) of I&B Code are "security interest" which means any right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a "transaction" which secures payment or performance of an obligation and includes mortgage, charge,…….etc.".

34) This definition only includes right, title or interest created in favour of or provided for a secured creditor by a "transaction". Such right, title or interest is expected to be "created in favour of or provided for" by some act of a "transaction" or something that can be termed as a "transaction." We have seen in the earlier discussion hereinabove that the collection of taxes by the state government cannot be termed as a "transaction" between the state government and the taxpayer.

35) Therefore, when the basic premise i.e. "transaction" was missing from the main contention, then it would not be appropriate to agree that such a right, title or interest was created in favour of or provided for in favour of GVAT as a result of a default by CD in payment of taxes.

36) The attention of the Court was not drawn for its consideration that no charge could have been created in favour of the GVAT on the assets of the CD in such a manner.

IS A CHARGE CREATED BY LAW EXCLUDED FROM SECURITY INTEREST?

37) Now, does the conclusion, that no charge gets created, otherwise than through a transaction between the two parties, means that a "charge created by law" is excluded from the definition of "security interest" as per section 3(31) of IB Code? For this purpose, we need to understand the concept of creation of a charge by operation of law.

38) Under the Companies Act, a charge is created on the property of the company, in favour of some other entity, on the basis of contracts or agreements entered into between the company and such other entity, by registering such charge with the ROC under the provisions of the Companies Act. On being satisfactorily so registered, all such charges are said to be created under law on the assets of the company.

39) It should be understood that non-registration of charge with ROC does not mean or imply that the contract is not enforceable, or the other entity cannot take legal recourse against the company for recovery of their dues. Yet, the registration of charge with ROC provides a legal status to such a charge, which is said to be registered or created under a law, and such a legal status of charge is recognized as enforceable under such law.

40) Similarly, under the banking laws, a charge is said to be a right which is created by any person, including a company, referred to as "the borrower", on its assets and properties, present and future, in favour of a financial institution or a bank, referred to as "the lender", which has agreed to extend financial assistance. This is a case of creation of charge as a result of a transaction of borrowing and lending between the borrower and the lender.

41)A charge created by other revenue laws prevailing in States and UT also provide, in some cases, that the payments to be made for taxes, duty or other sums under such laws shall be a charge on the properties owned by the person or entity and they shall be recoverable in the manner provided in such laws. This is another example of creation of charge by operation of law.

42) However, for the reasons mentioned hereinabove, all such charges, which are created only by the force of law for recovery of amounts payable to governments as taxes, duties, or such other sums, could not be said to be arising out of any "transaction" between the government and the taxpayer.

43) Therefore, there appears to be sufficient force in the contention that the definition of the words "security interest" provided in section 3(31) of the I&B Code includes only those rights, titles and interests, which are created in favour of or provided for a secured creditor, as a result of a "transaction" between the debtor and the creditor and all other charges, which are created in any other manner, are excluded from such definition.

44) As a result, a charge created by the provisions of section 48 of GVAT Act, as a First Charge on the properties of the corporate debtor, could not be said to be a charge created as a result of a "transaction" between the State government and the corporate debtor and such a charge could not be said to be treated as creating a security interest in favour of the GVAT.

45) This aspect of the matter was not brought to the attention of the Court that in the absence of security interest being created in favour of GVAT, there was no occasion to treat the GVAT as a secured creditor under the provisions of I&B code.

CONCLUSION:

The observations given in this Article hereinabove show that in the absence of adequate presentation of these issues before the Hon'ble Supreme Court, the decision of the Court in Rainbow Papers case seldom reflects on all these issues. Therefore, a student of law and all stakeholders under I&B code, face a stiff challenge of searching for answers to all these issues elsewhere.

Author's Views:

The issues emanating from the Rainbow Papers judgment pronounced by Hon'ble Supreme court have consumed umpteen numbers of hours of IPs, legal professionals, and other stakeholders, in understanding and assessing the impact of this judgment on the insolvency and liquidation proceedings under I&B code. As the matter is related to distribution of proceeds under I&B Code, all stakeholders are continuously debating on the nuances of this judgment with a solemn objective of finding a solution. The central and state government departments have also stepped on their vigil and are eager to claim their

share of pie from the delinquent CD under the CIRP and Liquidation process.

After the Rainbow Papers case, a coordinate bench of Hon'ble Supreme court delivered another remarkable judgment in the case of Paschimanchal Vidyut Vitran Nigam Ltd Vs Raman Ispat Pvt Ltd, wherein it was held that the judgment pronounced in the case of Rainbow Papers did not take into consideration, the various provisions contained in the I&B code and the judgments pronounced by Hon'ble Supreme court in other similar cases. On due consideration of facts and the law involved, it was held that the dues of the state government could not be considered as a "secured creditor" under the provisions of I&B Code.

The judgment passed in the case of petition filed, for review of judgment pronounced in the case of Rainbow Papers, by a bench of Hon'ble Supreme Court observed that since there was a difference of opinion on the same issue between the two coordinate benches, before pronouncing any judgment in the case of Paschimanchal Vidyut Vitran Nigam Ltd Vs Raman Ispat Pvt Ltd, the coordinate bench should have referred the matter to a larger bench for final determination on this question.

Therefore, it would serve the interests of all stakeholders of insolvency and liquidation process if the Hon'ble Supreme Court could take a Suo-moto cognizance of this issue and constitute a larger bench for deciding this matter at the earliest because the difference of opinion has arisen at the highest temple of judiciary and they alone can provide final guidance on this issue.

In conclusion, there is lot of hope that, moving forward, the stakeholders involved in insolvency and liquidation proceedings will not be required to face challenges in addressing the issues relating to settlement of amounts due to central government and state governments under the provisions of the I&B Code.

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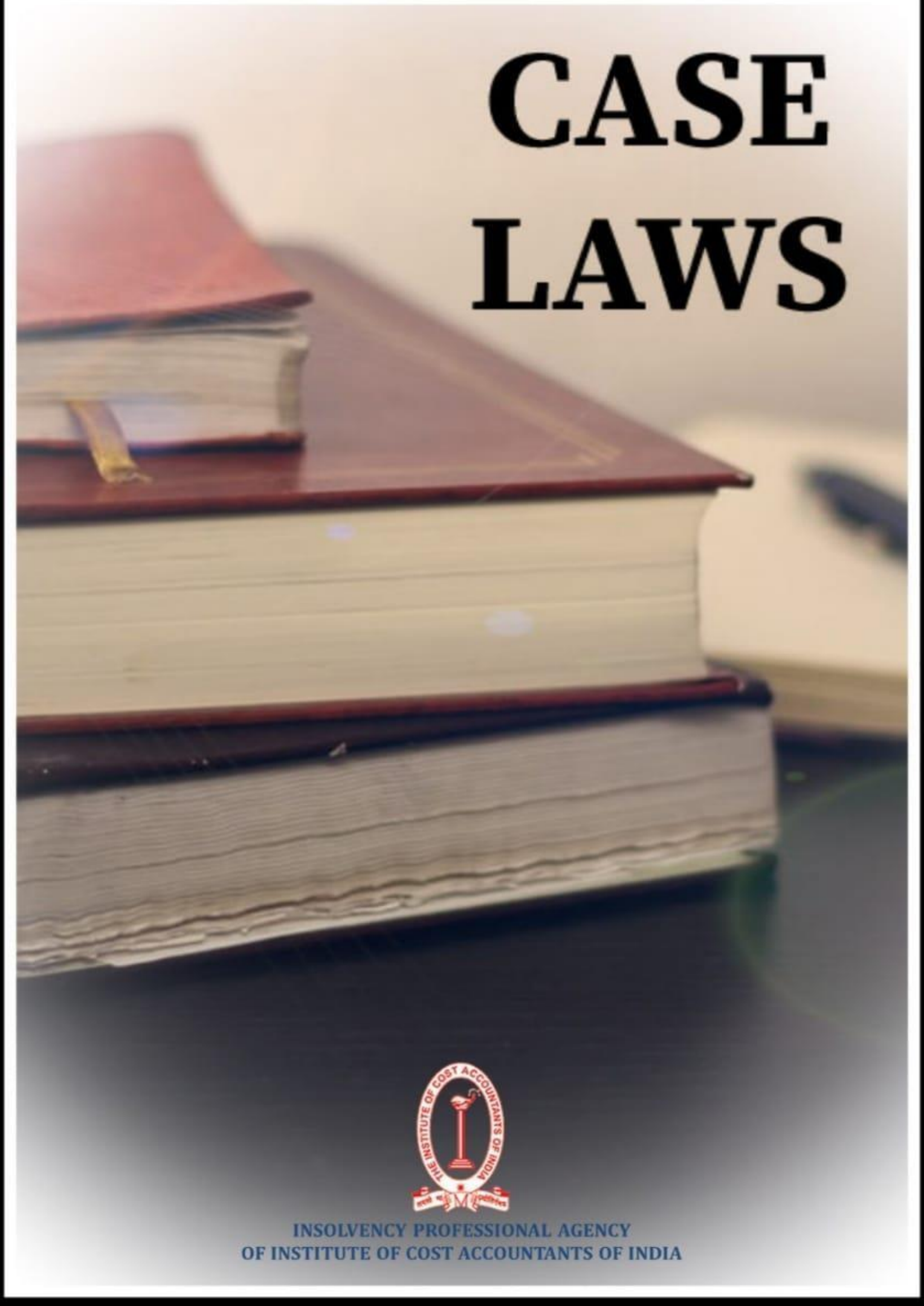
References:

1. Sales Tax Officer (1) Vs Rainbow Papers Ltd (2022) (Civil Appeal No. 1661 of 2020) (SC) Dated 06th September 2022

2. Innoventive Industries Ltd Vs ICICI Bank Ltd (2017) (Civil Appeal No. 8337-8338 of 2017) (SC) Dated 31st August 2017)

3. Paschimanchal Vidyut Vitran Nigam Ltd Vs Raman Ispat Pvt Ltd (Civil Appeal 7976 of 2019) (SC) – Dated 17th July 2023

CASE LAWS



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

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

UV Asset Reconstruction Co. Ltd. v. Aria Hotels & Consultancy Services (P.) Ltd. [2023] 157 taxmann.com 57/[2024] 181 SCL 355 (SC)

Where proceedings had been pending before NCLAT and adjourned to 24-11-2023 with interim order to continue, Supreme Court declined to interfere with, as matter was to be considered by NCLAT on 24-11-2023, and appellant would be at liberty to move NCLAT for modification/vacation of interim order.

CIRP was initiated against the corporate debtor and, in meeting of CoC, a resolution was passed to change management of respondent-subsidiary company of the corporate debtor. The respondent filed an application before NCLT seeking a stay of implementation of decision of meeting of CoC. NCLT by impugned interim order rejected said application. Aggrieved by NCLT's order, the respondent filed an appeal before NCLAT on the grounds that its debt and its creditors were different from creditors of the corporate debtor. The respondent further submitted that it was a profit-making company and its balance sheet showed profit and, thus, there was no reason as to why management of the respondent company be changed in exercise of section 28(1)(j) of Companies Act, 2013. Meanwhile Promoters and Shareholders of the corporate debtor filed an appeal before NCLAT, in which they had agreed to pay 100 per cent debt of lenders. The NCLAT by impugned order held that interim order which was passed on 2-2-2023, continued for more than 7 months and date of proposal submitted by the respondent should be considered by CoC and, thus appeal of shareholders and promoters of the corporate debtor was admitted and listed on 17-10-2023 and till 17-10-2023, no further steps be taken in pursuance of impugned order and resolution passed in CoC meeting. The appellant filed an instant appeal before the Supreme Court. It was noted that proceedings had been adjourned to 24-11-2023, with directions interim order to continue.

Held that instant Court would not interfere in view of fact that date 24-11-2023 would be date for consideration of matter before NCLAT and, the appellant was also at liberty to move the NCLAT for modification/vacation of the interim order.

Case Review: Aria Hotels and Consultancy Services (P.) Ltd. v. Sapan Mohan Garg [2023] 157 taxmann.com 56 (NCLAT - New Delhi), affirmed.

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

Vinay Yadav v. Anita Jindal [2023] 157 taxmann.com 157/ [2024] 181 SCL 352 (SC)

Supreme Court upheld NCLAT's order wherein it was held that where financial creditor had accepted due amount with 6 per cent interest per annum but was now demanding interest at rate of 18 per cent, recovery proceedings of this nature do not fall within scope and ambit of words 'for any purpose other than resolution' as defined under section 65 and, therefore, order of NCLT admitting CIRP application was to be set aside.

The financial creditor advanced a certain amount to the corporate debtor as a short-term loan, and the corporate debtor issued two post dated cheques for Rs. 57 lakhs and Rs. 30.5 lakhs with the intention of providing security for the amount lent. However, the said cheques were returned unpaid by the bank with the remark 'insufficient funds'. Consequently, the financial creditor-initiated proceedings against the corporate debtor under the Negotiable Instrument Act. During ongoing proceedings, the corporate debtor paid an amount of Rs. 67.90 lakhs with 6 per cent interest vide a demand draft as per directions

of the Trial Court. Subsequently, the financial creditor filed an application under section 7 for initiation of CIRP against the corporate debtor, claiming an amount of Rs. 87.50 including 18 percent interest. NCLT admitted said application and initiated CIRP against the corporate debtor. The NCLAT by impugned order set aside NCLT's order on ground that having accepted 6 per cent interest, the financial creditor was now claiming an interest at 18 per cent per annum, recovery proceedings of this nature do not fall within scope and ambit of words 'for any purpose other than resolution' as defined under section 65.

Held that view as taken by the NCLAT, particularly with reference to factual matrix of the instant case, was a just and proper view of matter, more particularly with reference to latest view of the Supreme Court as reflected in Vidarbha Industries Power Ltd. v. Axis Bank Ltd. [2022] 140 taxmann.com 252/173 SCL 355, thus, instant appeal against order of the NCLAT was to be dismissed.

Case Review: Anita Jindal v. Jindal Buildtech (P.) Ltd. [2023] 148 taxmann.com 398 (NCLAT - New Delhi), affirmed.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL

Platino Classic Motors India (P.) Ltd. v. Deputy Commissioner of Central Tax and Central Excise [2023] 157 taxmann.com 276 (Kerala)

Section 14 does not create a bar for finalization of assessment and adjudication proceedings in respect of taxes and, thus, subsequent to admission of resolution for liquidation, there was moratorium for recovery of tax dues but there was no bar for such finalization of assessment and adjudication proceedings.

Order of liquidation in terms of section 33 was passed by NCLT against the corporate debtor, liquidator was appointed, and moratorium was commenced. The respondent/Commissioner of tax assessed taxes applicable on assets of the corporate debtor and finalized said assessment vide impugned order. The liquidator issued a public notice and received claims from creditors of the corporate debtor including respondent. Instant writ petition was filed by the corporate debtor against impugned order, contending that impugned order was issued after commencement of moratorium under section 14, and it was not afforded with an opportunity to present its case. It was noted that show cause notice was issued by the respondent to the corporate debtor to which reply was filed and after hearing parties impugned order was finalized.

Held that section 14 does not create a bar for finalization of assessment and adjudication proceedings in respect of taxes. Since subsequent to admission of resolution for liquidation there was moratorium for recovery of tax dues but there was no bar for finalization of assessment and adjudication proceedings, instant writ petition was to be dismissed and claims of the respondents were to be considered according to law.

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

Mahmod Alam Khan v. Ahmed Alam Khan [2023] 157 taxmann.com 324 (NCLAT - Chennai)

Where financial creditor extended a loan facility to a corporate debtor during a financial crisis, to tide over situation and, loan provided to corporate debtor was duly acknowledged, in audited balance sheet of corporate debtor was a clear-cut case of a financial debt under section 5 (8) and, therefore, CIRP petition admitted by NCLT was free from all legal flaws.

The corporate debtor was a family company, struggling financially, and indebted to various banks/financial institutions and with no access to funds. On request of other directors, and to bail out, the corporate debtor, the financial creditor, one of director of the corporate debtor had lent a sum of Rs.9.15 crores from time to time, as financial loans. The financial creditor issued a loan amount of Rs.13.84 crores and was entitled to interest at 14 per cent per annum. Thereafter, the corporate debtor was requested by financial creditor, to return amount and, a Letter dated 17.11.2021, was issued to the corporate debtor. On default in making payment, a petition under section 7 was filed by the financial creditor against the corporate debtor. The corporate debtor alleged that nature of family run business, was evident from fact that even annual returns, filed by the financial creditor did not specifically show that the financial creditor had given unsecured loan and, that instant transaction, would not have effect of commercial effect of borrowing. NCLT admitted said petition and declared a moratorium under section 14. The appellant, director of the corporate debtor, filed instant appeal. It was noted that total unsecured loans, provided by the financial creditor to the corporate debtor were duly acknowledged, in audited balance sheet of the corporate debtor and, even certificate of auditor also mentioned unsecured loan, described in balance sheet of the corporate debtor as advanced given by the financial creditor. It was further noted that the financial creditor had advanced a sum of Rs.3.97 crores to the corporate debtor for purpose of satisfying OTS Offer, given to the corporate debtor by bank and, said amount was disbursed through Banking Transactions, clearly established that there was a financial debt of more than Rs.1 Crore, due and payable, by the corporate debtor, to and in favour of the financial creditor.

Whether sum loaned by a director of a corporate debtor on account of financial crisis/Distress, to tide over situation, was a clear-cut case of a financial debt under section 5 (8), therefore, CIRP petition admitted by NCLT was free from all legal flaws.

Case Review: Ahmed Alam Khan v. Golconda Textiles (P.) Ltd. [2023] 157 taxmann.com 323 (NCLT - Hyd.), affirmed.

SECTION 63 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - CIVIL COURT, NOT TO HAVE JURISDICTION

Tejinder Pal Setia v. Kone Elevators India (P.) Ltd. [2023] 157 taxmann.com 361 (Delhi)

Section 60 vests jurisdiction in NCLT to entertain and dispose of any question of law or fact arising out of insolvency resolution and sections 63 and 231 create a bar on jurisdiction of Civil Court in respect of any matter in which NCLT and NCLAT has jurisdiction and thus, suit filed before High Court against pending insolvency proceedings before NCLT/NCLAT was to be returned.

Company 'F' approached defendant No. 1 company (D1) for supply of elevators on its project site, which was owned by the corporate debtor. However, due to certain disputes between the corporate debtor and 'F', 'F' abandoned the project site and refused to make balance payment to D1. The corporate debtor being owner of site assured to pay balance amount to D1. Since said dues continued to remain unpaid by the corporate debtor, D1 filed a petition under section 9 against the corporate debtor before NCLT, Chandigarh. An assignment deed was executed between D1 and defendant No. 2 (D2), whereby D1 had assigned debt owed to it by the corporate debtor to D2. Section 9 petition was admitted by NCLT, Chandigarh due to non-adherence of settlement agreement by the corporate debtor. Plaintiff/erstwhile director of the corporate debtor filed instant suit invoking territorial jurisdiction of instant Court as assignment deed emanated from a settlement agreement which was subject to Delhi jurisdiction, seeking to declare assignment deed as invalid in law and, thus, it was not

binding upon plaintiff. D2 opposed instant suit on ground that instant Court lacked jurisdiction to adjudicate said suit as no part of cause of action arose within territorial jurisdiction of instant Court and, therefore, same was not maintainable before instant Court.

Held that sections 63 and 231 create a bar on jurisdiction of Civil Court in respect of any matter in which NCLT and NCLAT has jurisdiction under IBC and Adjudicating Authority under IBC is competent to pass any order. Since, section 60 vests jurisdiction in NCLT to entertain and dispose of any question of law or fact, arising out of or in relation to insolvency resolution or liquidation proceedings, instant Court had no territorial jurisdiction to entertain prayers of plaintiff with respect to assignment deed, which was fulcrum of instant suit, and since in instant case, corporate debtor was undergoing CIRP, instant suit was precluded/barred under section 231 and section 60 and, thus, same was to be returned, with liberty to plaintiff to take appropriate remedies.

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

SV. Ganesan Erst. Liquidator of Kamachi Industries Ltd. v. Prudent ARC Ltd. [2023] 157 taxmann.com 382 (NCLAT - Chennai)

Where appeal was filed after period of 53 days from date of impugned order, but Tribunal can condone a delay only up to 15 days beyond prescribed period of 30 days i.e. 30+15 and not a day thereafter, appeal filed against order of NCLT after 53 days was barred by limitation.

The respondent filed an application before NCLT to replace Liquidator. NCLT by impugned order allowed said appeal on ground that a stalemate in conduct of all concerned was causing detriment to liquidation estate. Liquidator challenged NCLT's order before the High Court on the grounds that NCLT did not possess authority to remove Liquidator Suo motu and liquidator could be removed only under regulation 31A (11). However, said writ petition was dismissed by the High Court on grounds that liquidator had an alternative efficacious remedy of appeal to which appellant was relegated and, interim protection was granted for 7 days for filing statutory appeal. The liquidator, instead of filing an appeal, filed a petition before the Supreme Court and, same was dismissed. The liquidator filed instant appeal after expiry of 53 days taking support of section 14 of Limitation Act, 1963 alleging that period spent before High Court and Supreme Court in prosecuting writ petition and SLP had to be excluded and, thus present appeal was filed within period of limitation. It was noted that the appellant, being a liquidator, knew about statutory appeal provided under section 61, which could have been filed with an exemption from filing certified copy, but the appellant chose to file a writ petition before the High Court, in which it had been mentioned that there was a statutory appeal provided and it would be appropriate for the appellant to avail statutory remedy.

Held that section 14 will not help a party who is guilty of negligence, lapse, or inaction. If such procedure was allowed to be followed then there would be no end to filing of writ petitions against order of NCLT before the High Court and, thereafter, orders of the High Court would be challenged before the Supreme Court. Tribunal can condone delay only for a period of 15 days beyond prescribed period of 30 days, i.e., 30+15 and not a day thereafter, and since the appeal had been filed after period of 53 days from date of passing of the impugned order, instant appeal was barred by limitation and same was to be dismissed.

Case Review: V. Ganesan v. Prudent ARC Ltd. [2023] 157 taxmann.com 381 (NCLT - Chennai), affirmed.

SECTION 208 - INSOLVENCY PROFESSIONAL - FUNCTIONS AND OBLIGATIONS OF

Poonam Basak v. Union of India [2023] 157 taxmann.com 384 (Bombay)

Where impugned order was passed by IBBI, who was Chairperson and not a Whole Time Member, since order passed by IBBI lacked jurisdiction, instant Court issued an injunction order, thereby restraining IBBI from in any manner acting upon or giving effect to or implementing impugned Order.

The petitioner-Insolvency professional (IP) filed instant writ petition, challenging impugned order passed by the Disciplinary Committee of Insolvency and Bankruptcy Board of India (IBBI) on ground that impugned order passed by IBBI, who was Chairperson and not a Whole Time Member and, therefore, impugned order passed by IBBI was without jurisdiction. IBBI submitted that Chairperson was a de facto Whole Time Member of IBBI.

Held that nomination of Whole Time Members is to be done by Central Government under section 189(1)(d), whereas appointment of Chairperson is under section 189 (1)(a) thus, it would effectively mean that instead of 5 Whole Time Members, Board would consist of 6 Whole Time Members, which would be contrary to provisions of section 189. The chairperson was a separate and distinct category from a Whole Time Member and, impugned order had not been passed by a Whole Time Member but by Chairperson. The impugned order was passed by an Authority which lacked jurisdiction, thus instant Court issued an injunction order, thereby restraining and IBBI from in any manner acting upon or giving effect to or implementing impugned order.

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

TUF Metallurgical (P.) Ltd. v. Union of India [2023] 157 taxmann.com 424 (Delhi)

Where pursuant to initiation of CIRP of corporate debtor, RP invited claims from creditors, however, respondent/revenue had not submitted its claim before RP to recover tax claims to be paid by corporate debtor for assessment year 2017-18 and meanwhile resolution plan for corporate debtor was approved by NCLT, right of respondent to recover amount due had extinguished.

CIRP was initiated against the corporate debtor and RP was appointed. RP made a public announcement calling upon all creditors to submit their proof of claims. Concededly, respondent/revenue did not lodge their claims with RP. Meanwhile, resolution plan of successful resolution applicant in respect of the corporate debtor was approved by CoC and subsequently by NCLT. It was thereafter respondent/revenue issued assessment order and demand notice against the corporate debtor qua assessment year 2017-18, raising income tax claims.

Held that resolution plan qua the corporate debtor having been approved by NCLT, tax claim pertaining to assessment year 2017-18 stood extinguished, thus instant writ assailing tax claim of revenue was to be allowed.

Case Review: Ghanshyam Mishra & Sons (P.) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd. [2021] 126 taxmann.com 132/166 SCL 237 (SC) (para 10) followed.

SECTION 60 - CORPORATE PERSONS ADJUICATING AUTHORITIES - ADJUDICATING AUTHORITY

Zee Entertainment Enterprises Ltd. V. IndusInd Bank Ltd. [2023] 157 Taxmann.Com 425 (Delhi)

Where Writ Court directed that no coercive action be taken against appellant-guarantor till next date of hearing, however, said order was subsequently modified granting liberty to bank to take recourse to legal remedies available towards recovery of outstanding loan amounts, accordingly, bank filed an application under section 7 of IBC against appellant for recovery of outstanding amount, there was no disobedience or violation of Courts order by bank and thus, contempt petition was to be dismissed.

The appellant-Zee was guarantor to loan availed by the respondent no 2 from bank in terms of Debt Service Reserve Account (DSRA) Guarantee Agreement. The bank issued notice to the appellant invoking the DSRA Guarantee Agreement and calling upon the appellant to pay Rs.83 crore. The appellant filed a civil suit along with an application seeking interim relief that bank be restrained from seeking recovery of any amount under DSRA agreement. The writ Court by order dated 25-2-2021 directed that no coercive action be taken against the appellant till the next date of hearing. Thereafter, the bank filed an application under section 7 of IBC. The appellant filed an application before NCLT under section 60(5) contending that section 7 application was in contempt of order passed by Division Bench of writ court. It was noted that the order dated 25-2-2021 only restrain bank from initiating coercive steps against the appellant. Further, writ court vide order dated 3.12.2021 modified its previous order and granted liberty to bank to take recourse to legal remedies available towards recovery of outstanding loan amounts. Further, the bank had a legal right to proceed against a guarantor, which in this case was the applicant, in an appropriate court of law. This legal right to proceed against a guarantor before various judicial forums, would include NCLT under IBC. Lastly, the appellant in its application seeking interim injunction never sought any relief to restrain the bank from initiating IBC proceedings and had prayed for a restraint from initiating recovery proceedings only.

Held that every individual has a right to file any legal proceed in till specifically prohibited by law or by a stay / injunction order granted by the competent court, and accordingly, there was no disobedience or violation of Courts order dated 25.2.2021 and 3.12.2021 and contempt petition was without merit and thus, was to be dismissed.

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✓ 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.

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