November & December 2023

THE INSOLVENCY PROFESSIONAL

YOUR INSIGHT JOURNAL

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

OVERVIEW

Insolvency Professional Agency of Institute of Cost Accountants of India (IPA 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

November 3, 2023	Workshop on Mastering the Information Memorandum (Active interactive with free exchange of views on the subject, during the seminar, was the highlight of the program.)
November 4, 2023,	Seminar on Insolvency & Bankruptcy Code, 2016. Milestones Achieved & Way Forward" (The Mediation Conclave conducted by our expert faculty who shared their knowledge enriching experiences with practical aspects)
November 9, 2023	Workshop on Not Readily Realisable Assets. (The program was well appreciated by the participants who gained immensely with it. There were several take-away for the benefit of participants.)
November 17, 2023	Master Class on Personal Guarantors to Corporate Debtors under IBC, 2016
November 23, 2023	Interactive Meet: Challenges/ issues under liquidation including voluntary liquidation and its way forward was organized by IBBI with all the three IPA's
November 25 to 29 ,2023	"Certificate Course on Insolvency &Bankruptcy Code, 2016: A Refresher Guide"
November 29, 2023	Interactive Meet: Challenges/Issues and Way Forward under IP/IPE regulations including CPE, AFA, enrolmentwas organized by IBBI with all the three IPA's
December 1 to 2, 2023	Learning Session on Avoidance Transactions: Unravelling the Complexities
December 8, 2023,	Workshop on Resolution Professional & Coc: A Collaboration for Success
December 15 to 19, 2023	Executive Development Program Mastering the Art of Liquidation,
December 22, 2023	Workshop on Mediation & IBC Framework: Trajectory & Prospects

From MD Desk

Dear Reader,

I am happy to reach out to you through the monthly journal of the IPA of ICMAI. The full team joins me in wishing all the readers a very happy new year and wish that your professional aspirations are met and, indeed, leap to new heights in the leap year of 2024.
The profession of IPs, being still in infancy, is continuously evolving with numerous court rulings apart from regulatory changes and hence demands a high level of attention of IPs during assignments and related preoccupations.

Professional development happens through continuous professional education including updates on changes in the IB Code and relevant laws and regulations as also new case laws. And that is not complete without being aware of the ongoing developments in the larger ecosystem – the policy environment, financial system, and business environment. It is worth noting that the Insolvency and Bankruptcy Board of India (IBBI) has engaged with IPAs, IPs, and other stakeholders in a series of intensive discussions to update and improve on the IBC and the related regulations. Hence, we can look forward to significant changes that can improve some of the existing procedures and requirements of compliances soon. More important, hence it is, that we keep our ears to the ground and be fully prepared to make full use of the developments to our professional competence.

The equally important side of professional development is expression of a professional's knowledge and experience through sharing with fellow IPs, many of who are new to the IBC ecosystem. It should not and cannot be just the credit from mandatory Continuous Professional Education (CPE) that should drive us to attend knowledge and skill upgrade programs and contributing to our journal, but the professional strength we gain and the satisfaction we earn by participating in and conducting these programs, that shall drive us to be active participants in professional development activities.

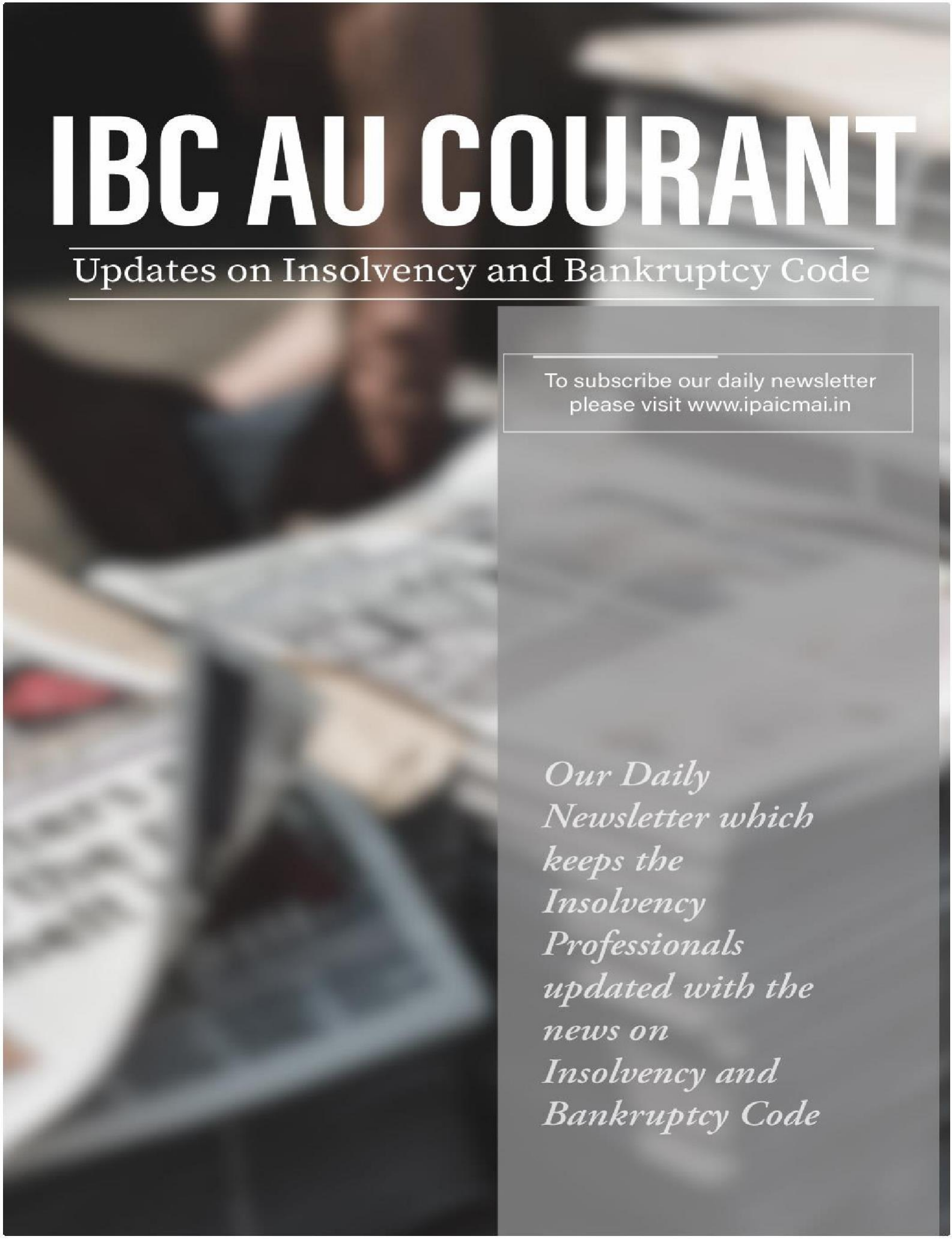
At IPA-ICAI, we strive to make our publications relevant, informative, interesting, and lucid. This issue of the 'Insolvency Professional – Your Insight Journal' has two informative articles – one on the concept of commercial wisdom of the Committee of Creditors and another, a concise round up on all aspects of the IBC. I welcome you to respond to these and add to collective knowledge and understanding. Also, I welcome you to contribute with your updates that would help our fellow IPs and opinions from your experiences that all of us can benefit from.

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

ARTICLE ON IBC 2016-A BEACON OF HOPE FOR DISTRESSED BUSINESSES IN INDIA

R. Shyamsunder

Registered Valuer

Synopsis

The Insolvency and Bankruptcy Code (IBC) of 2016 revolutionized India's approach to financial distress, replacing outdated laws with a unified framework. This article delves into the intricacies of the IBC, exploring its key features (fast-tracked resolution, creditor control, distinct processes for corporate and individual insolvency), real-world examples of its impact (Essar Steel and Jaypee Infratech), the challenges that lie ahead (implementation issues, fraudulent transactions, nascent personal insolvency framework), and the immense potential it holds for fostering a robust and resilient Indian economy.

Introduction

For decades, India's economic landscape struggled under the weight of stressed assets and cumbersome insolvency procedures. These archaic laws, riddled with inefficiencies and delays, acted as shackles on business growth and hindered a healthy financial ecosystem. Recognizing this impediment to progress, the Insolvency and Bankruptcy Code (IBC) of 2016 emerged as a transformative legislation, injecting much-needed dynamism into the realm of financial distress resolution. Replacing a web of outdated laws with a unified framework, the IBC established a comprehensive and time-bound process for addressing the vulnerabilities of companies, partnership firms, and even individuals grappling with financial challenges. This article delves into the various facets of the IBC, exploring its key features, its real-world impact, the challenges it faces, and its undeniable potential to shape a more robust and resilient Indian economy.

Fast-tracking Resolution and Empowered Creditors

One of the defining characteristics of the IBC is its emphasis on expedited resolution. Gone are the days of years-long legal battles and mounting uncertainties; the IBC mandates a swift 180-day timeline for resolving corporate insolvency cases, with a possible 90-day extension under exceptional circumstances. This time-bound approach injects an unprecedented level of certainty and stability into the financial ecosystem. Investors and creditors can now operate with greater confidence, knowing that even in the event of financial distress, solutions can be reached swiftly and efficiently. This increased agility not only reduces economic stress but also fosters a more conducive environment for business activity, paving the way for faster growth and increased competitiveness.

Another significant shift championed by the IBC is the creditor-in-control principle. Unlike the previous debtor-centric approach, which often led to protracted negotiations and suboptimal outcomes, the IBC empowers creditors, particularly financial institutions, to drive the insolvency resolution process through a dedicated Committee of Creditors (CoC). This shift of power ensures that the focus remains squarely on maximizing value for creditors and, wherever possible, reviving viable businesses.

Creditors, with their vested interest in the debtor's financial health, are incentivized to actively participate in the resolution process, leading to more informed decisions and more effective restructuring plans. This creditor-driven approach not only protects the interests of financial institutions but also contributes to a healthier financial system by ensuring the efficient allocation of capital and minimizing resource wastage.

The Corporate Insolvency Resolution Process (CIRP)

The CIRP stands as the cornerstone of the IBC for corporate insolvency resolution. Upon initiation by a creditor or even the debtor itself, a qualified and experienced insolvency resolution professional (IRP) is appointed to assess the debtor's financial situation and formulate a viable resolution plan. This plan, crafted after extensive due diligence and consultations with stakeholders, typically involves debt restructuring, asset sale, mergers and acquisitions, or a combination of these approaches. The objective is to identify the most effective strategy for reviving the distressed company, ensuring maximum recovery for creditors, and preserving jobs and economic value.

If a viable resolution plan is found within the stipulated timeframe, the company exits insolvency and embarks on a fresh chapter. However, if a turnaround proves impossible, the company enters liquidation, where its assets are sold to repay creditors in a predetermined order of priority. This ensures that secured creditors like banks receive their dues first, followed by unsecured creditors and then government dues. While liquidation represents the final resort, it provides a mechanism for orderly asset distribution and minimizes losses for all stakeholders.

Real-world Success Stories

The IBC's efficacy is not merely a theoretical construct; it has demonstrably yielded positive results in numerous real-world scenarios. Consider the case of Essar Steel, once a prominent steelmaker struggling under the weight of massive debt. In 2017, Essar Steel became the first major company to undergo CIRP under the IBC. A carefully crafted resolution plan led by ArcelorMittal, a global steel giant, was approved, successfully restructuring the company's debt, injecting fresh capital, and safeguarding thousands of jobs. This turnaround not only revived a once-faltering giant but also kept businesses' hopes high in resolving such cases.

Another story is that of Jaypee Infratech, a real estate developer facing insolvency due to stalled projects. IBC, in this case, played a crucial role by enabling a resolution plan through NBCC, a state-owned enterprise. The plan had ensured completion of stalled projects, thereby bringing relief to homebuyers who had invested their life savings.

Challenges and the Road Ahead

Despite its transformative potential, the IBC's journey is not without challenges. Implementation issues, including delays in judicial appointments and a shortage of experienced insolvency professionals, can hinder the smooth functioning of the code. Additionally, concerns exist regarding fraudulent transactions aimed at evading insolvency proceedings, necessitating robust detection and prevention mechanisms.

Furthermore, the personal insolvency framework, introduced in 2019 to address individual financial distress, is yet to gain traction and requires further refinement. Challenges such as social stigma associated with bankruptcy, lack of awareness, and inadequate infrastructure for debt counseling and financial

rehabilitation need to be addressed to ensure the effectiveness of this framework.

Addressing these challenges through continuous improvement and stakeholder engagement will be crucial to ensuring the IBC's long-term success. Key areas for focus include:

- Expediting the appointment of insolvency professionals and judges, enhancing court infrastructure, and leveraging technology to accelerate resolution timelines.
- Promoting the development of specialized insolvency professionals, credit rating agencies, and information repositories to support informed decision-making.
- Implementing robust mechanisms to detect and prevent fraudulent transactions, including strengthening the role of forensic auditors and regulators.
- Conducting widespread campaigns to educate stakeholders about the IBC's provisions and benefits, fostering a culture of responsible debt management.
- Addressing implementation challenges, raising awareness, and strengthening support systems for individuals facing financial distress.

RESOLUTION PLAN AND COMMERCIAL WISDOM OF CoC

CMA Satyanarayana Veera Venkata Chebrolu
Insolvency Professional

Committee of Creditors is considered as an expert body in determining the feasibility and viability of the Resolution Plan. The commercial wisdom of CoC cannot be questioned except on limited grounds. The power of commercial wisdom of CoC however is not unlimited. This article is intended to review some of the judicial pronouncements on commercial wisdom of CoC and its limitations.

The Committee of Creditors (CoC) has very crucial role under the IBC. Even the Supreme Court has reiterated repeatedly that the commercial wisdom of the CoC is of utmost importance under the Code and should not be interfered with

The decision as to whether to accept the resolution plan to put back Corporate Debtor on its feet or to proceed for liquidation will be taken by Committee of Creditors (CoC) using commercial wisdom. When Committee of Creditors approves a resolution plan it is presumed to be viable and feasible

Almost all the orders on approval of Resolution plans refer the judgement relating to K. Sashidhar vs. Indian Overseas Bank, Civil appeal No.10673/2018 dated 05.02.2019 of the Hon'ble Apex court where in it is stated in para No. 62 that "the legislature has not envisaged challenge to the "commercial/ business decision of the financial creditors taken collectively or for that matter their individual opinion, as the case may be, on this count" Thus the role of the NCLT is 'no more and no less'.

Similarly in the matter of Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors., Civil Appeal No. 8766-67 of 2019, judgement dated 15.11.2019 the Hon'ble Apex Court clearly laid down that the Adjudicating Authority would not have power to modify the Resolution Plan which the CoC in their commercial wisdom have approved. In para 42 Hon'ble Court observed as under:

"It is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and section 32 read with section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in K. Sashidhar(supra)

In the case of Committee of Creditors of Educomp Solutions Ltd. v. Ebix Singapore pte. Ltd, NCLAT held that once the resolution plan is approved by the CoC, the applicant cannot take a "topsy turvy" stance, and hence, is not allowed to withdraw the approved resolution plan.

The Adjudicating Authority, as per section 31 of IBC, 2016, before approving the Resolution Plan is required to examine whether the Resolution Plan approved by the CoC under Section 30 (4) of the Code meets the requirements as referred to under Section 30 (2) of the Code which are as under:

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor.

(b) provides for the payment of debts of operational creditors and provides for the payment of debts of financial creditors, who do not vote in favour of the Resolution Plan which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

(c) provides for the management of the affairs of the corporate debtor after approval of the Resolution Plan.

(d) The implementation and supervision of the Resolution Plan.

(e) does not contravene any of the provisions of the law for the time being in force

(f) conforms to such other requirements as may be specified by the Board.

Adjudicating authority can reject the resolution plan when the resolution plan does not conform to the above requirements under section 31(2)

Recently in the matter of Gajanand Corporation Private Limited, NCLT Ahmedabad vide order dated 02.11.2023 held that the Resolution Plan does not address the cash flows and value of the Assets enumerated and the Operational Debt claims received from Statutory Authorities. The valuation report (only a summary is submitted) of the assets is not satisfactory. The Resolution Plan presupposes approval and ignores the claim that has been received from the Income Tax Department of dues to be paid. It also proposes to pay only Rs 1000 to employees in 90 days after the approval of the Plan. Hence the Resolution Plan is rejected as it does not satisfy the provisions of Section 31(2) of IBC 2016 and Regulations 36 of the Act of the Code.

Further section 30(4) of IBC, 2016 states that the committee of creditors may approve a resolution plan after considering the aspect of feasibility and viability which is completely within the domain of the CoC.

Of late many failures due to impossibility and unviability are being observed in implementation of resolution plans. Hence CoC should undertake this exercise in all the seriousness. Further without studying the feasibility and viability of the resolution plan it should not be stated in the minutes that CoC has considered feasibility and viability of the resolution plan while approving.

Success of the plan can be determined from verification of the assumptions with which projected financials are arrived taking into account the current trend. Further the plan should be workable and there should be reasonable prospect of implementation. Other factors that can be studied includes whether working capital requirement is taken care in the resolution plan, financial background, marketing strategy, operational synergies, experience of the resolution applicant etc.

In fact, the proviso to Section 31 sub-section (1) mandates the NCLT to ensure that the resolution plan has provisions for effective implementation before authorizing it.

With regard to the viability and feasibility of a resolution plan in K. Sashidhar vs. Indian Overseas Bank, Civil appeal No.10673/2018 dated 05.02.2019 it is held as follows:

“There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is a collective business decision.”

The importance of ‘viability’ of the plan weighed by NCLAT in Committee of Creditors of Metalyst Forging Ltd. v. Deccan Value Investors LP & Ors. In this case on the realistic and actual basis of technical production of the capacity of the corporate Debtor the Resolution Applicant brought to the notice of the Adjudicating Authority that the plan was unviable or unfeasible or unimplementable.
Resolution Applicant stated that report furnished by the Resolution Professional in the ‘Virtual Data Room’ (VDR) showed the realistic capacity to be 2.10 lac MTPA. Consequently, the plan assumed 1.10 lac MTPA production in the first year and increases thereafter. Admittedly the production capacity of Metalyst is only approximately 45,000 MTPA.

NCLAT held that the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench rightly observed in this case that the 'Insolvency and Bankruptcy Code' do not confer any power and jurisdiction on the Adjudicating Authority to compel specific performance of a plan by an unwilling resolution applicant.
Further it is observed that in the absence of fact that there was any procedural infirmity and having not proceeded in the manner as was required the plan approved was violative of Section 30(2)(e) of the 'I&B Code', having contravened the provisions of the 'I&B Code'.

For the said reasons NCLAT stated that the plan approved by the 'Committee of Creditors' under sub-section (4) of Section 30 of the 'I&B Code' was rejected by the Adjudicating Authority i.e NCLT, Mumbai in terms of Section 31(2) and hence no interference is called for.

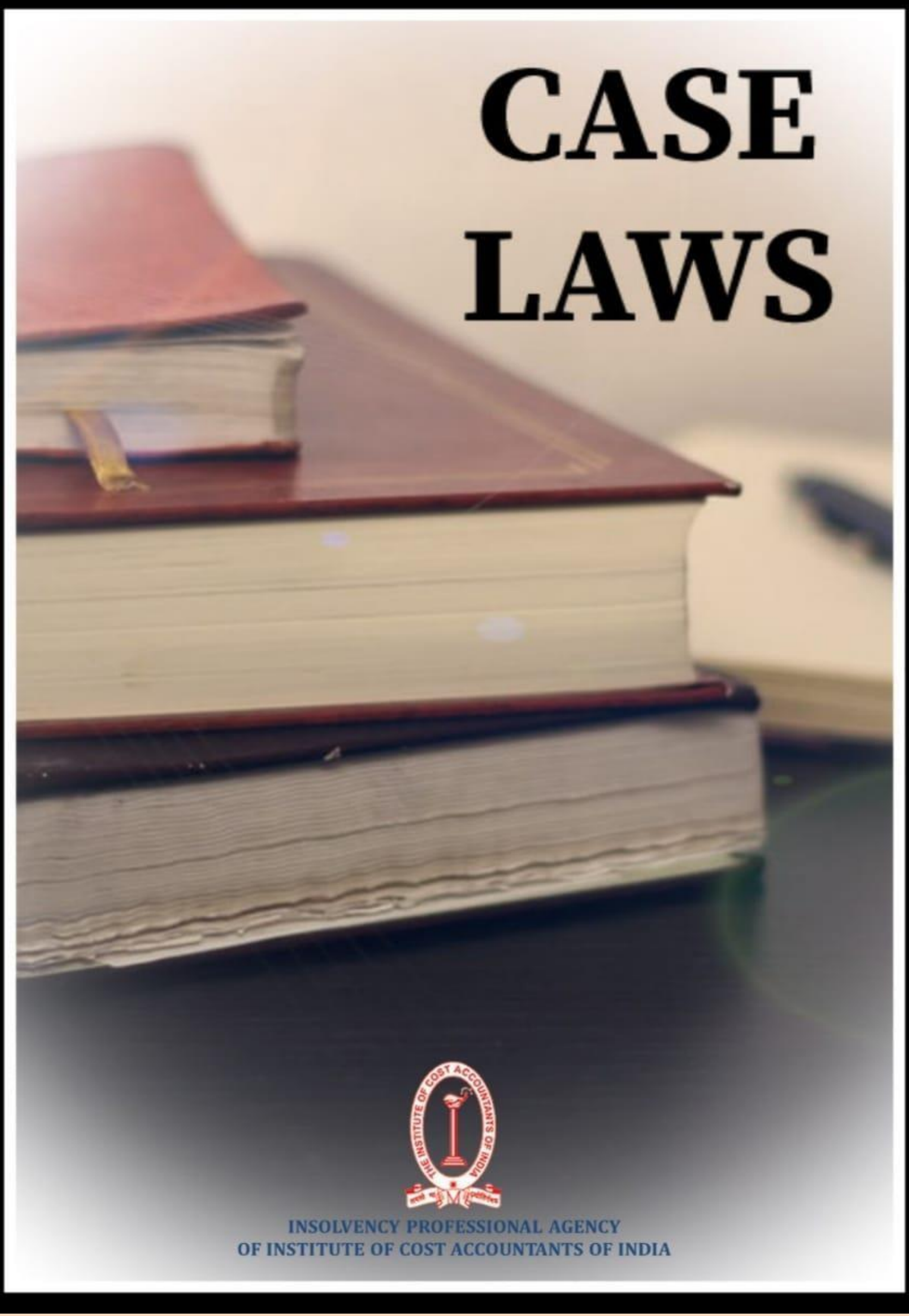
Likewise, the NCLAT permitted withdrawal after the CoC approval in Tarini Steel Company Pvt. Ltd. v. Trinity Auto Components Ltd and in Digjam Ltd.where NCLT, Ahmedabad has permitted modifications to the resolution plan post CoC's approval, at the resolution applicant's request on account of the COVID-19 virus.

In the case of Tarini steel, the resolution plan was approved by AA (NCLT, Mumbai bench) on 22.01.2018 with modifications. In view of the same, Resolution applicant has preferred appeal before NCLAT. RA submitted that the Adjudicating Authority has no jurisdiction to modify the 'resolution plan' once approved by the Committee of Creditors. NCLAT while not expressed any opinion given liberty to the appellant to withdraw the resolution plan, if it is not satisfied with the amendment made therein and stated that in such case the Adjudicating Authority will allow the same.

In the case of Digjam Ltd NCLT, Ahmedabad has permitted on 27.05.2020 modifications in the resolution plan post CoC's approval, at the resolution applicant's request on account of the COVID-19 crisis in the payment to financial creditors/ operational creditors and/or other stakeholders due to pandemic of Covid-19 virus.

Conclusion:
Thus, the power of commercial wisdom of committee of creditors is not unlimited. The success of the implementation of resolution plan depends on the feasibility and viability which CoC has to ensure before approving the plan. Further Resolution Professional should provide in the information memorandum the most updated information about the entity as accurately as is reasonably possible.

CASE LAWS



INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

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

Union Bank of India v. Financial Creditors [2023] 154 taxmann.com 203 (SC)

Supreme Court upheld NCLATs order wherein it was held that power to review is not inherent upon NCLAT but power to recall its judgment is inherent as has been declared by rule 11 of NCLAT Rules, 2016, which can be exercised on sufficient grounds.

CIRP was initiated by the financial creditor under section 7 against the corporate debtor. Resolution plan submitted by successful resolution applicant was approved by the CoC and NCLT. NCLAT partly allowed the financial creditor's appeal against which the financial creditor filed an appeal, which was dismissed by the Supreme Court as withdrawn, with liberty to file a review application. The NCLAT dismissed review application as not maintainable under the IBC. The NCLAT had observed that order passed by NCLT or NCLAT could not be either reviewed or recalled. The NCLAT by impugned order had held that power to review is not inherent upon NCLAT but power to recall its judgment is inherent as has been declared by rule 11 of the NCLAT Rules, 2016, which can be exercised on sufficient grounds.

Held that considering views taken by five judges' bench of NCLAT, there was no reason for interfering with impugned order of NCLAT and, therefore, appeal against order of NCLAT was to be dismissed.

Case Review: Union Bank of India v. Dinkar [2023] 152 taxmann.com 106 (NCLAT), affirmed.

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

Sintex Plastics Technology Ltd. v. Mahatva Plastic Products and Building Materials (P.) Ltd. [2023] 154 taxmann.com 229 (NCLAT- New Delhi)

Where application filed under section 9 was withdrawn under section 12A due to settlement between parties and further another application under section 7 was admitted against corporate debtor, since withdrawal of section 9 application could have been detrimental to interest of other creditors, CIRP initiated under section 9 was to be allowed to run its due course and orders passed under section 12A and section 7 was to be set aside.

'Z' an operational creditor filed a section 9 application against the corporate debtor before NCLT and same was admitted. Since the corporate debtor and 'Z' entered into a settlement, application filed for withdrawal of section 9 application was allowed by NCLT and CIRP was closed. An appeal was filed by 'K', a financial creditor challenging said withdrawal application and a stay was granted with direction to IRP to continue managing affairs of the corporate debtor. SBI, being the lead bank of lenders consortium withdrew an amount from trust and retention account of the corporate debtor without approval and knowledge of IRP. 'K' filed a section 7 application against the corporate debtor and same was admitted by NCLT. Instant appeals were filed against orders allowing withdrawal of section 9 application as well as order allowing application filed by 'K' under section 7. It was noted that if section 9 application was allowed to be closed, some creditors might have withdrawn amounts or received payments from the corporate debtor as SBI had, which would have been detrimental to interest of other creditors having large claim pending against the corporate debtor.

Held that CIRP initiated under section 9 was to be allowed to continue and run its due course, which would have allowed adequate and proper insolvency resolution of the corporate debtor and impugned orders were to be set aside.

Case Review: Sintex Plastics Technology Ltd. v. Zielem Industries (P.) Ltd. [2021] 128 taxmann.com 79 (NCLT - Ahd.), Order passed by NCLT in CP(IB) No. 276/7/NCLT/AHM/2020, dated 19-7-2021, reversed.

SECTION 60 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - ADJUDICATING AUTHORITY

Monica Jajoo v. PHL Fininvest (P.) Ltd. [2023] 154 taxmann.com 257 (NCLAT- New Delhi)

Where bench IV of NCLT initiated insolvency resolution process against personal gurantor of corporate debtor vide impugned order, despite knowing that a different bench of NCLT was considering liquidation proceedings against corporate debtor, since requirement of law had not been kept in mind by bench IV while considering said insolvency application, such order was to be set aside.

A facility agreement was entered into by company 'F' with the corporate debtor. A loan on account of said facility agreement was assigned in favour of R1 which issued a demand notice to the appellant i.e. personal guarantor of the corporate debtor, seeking repayment of outstanding loan. Subsequently, R1 filed an application under section 95(1) against the appellant before bench IV of NCLT and insolvency resolution process was initiated against the appellant vide impugned order. The appellant being aggrieved by said orders, filed instant appeal contending that bench IV had no jurisdiction to pass said order as an application of insolvency resolution of personal guarantor of the corporate debtor should have been heard by bench III of NCLT where liquidation proceedings of the corporate debtor were pending. It was noted that CIRP application against the corporate debtor was considered by a different bench of NCLT and same fact was brought to notice of bench IV of NCLT.

Held that requirement of law had not been kept in mind by bench IV while considering section 95 application, therefore, impugned order was to be set aside.

Case Review: PHL Fininvest (P.) Ltd. v. Mrs. Monica Jajoo [2023] 154 taxmann.com 256 (NCLT- New Delhi), reversed.

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

SMS Foundation & Investment LLP v. Harsha Exito Engineering (P.) Ltd. [2023] 154 taxmann.com 304 (NCLAT - Chennai)

Where documentary evidence on record established that money was infused by appellant into corporate debtor as an investment to be converted into 'Equity' and, shares were transferred in name of partners of appellant, claim of appellant as an unsecured creditor was rightly rejected by RP and NCLT.

The appellant was engaged in the business of financing and investment, promoter of the corporate debtor had purchase order for Airports project and required investment. The appellant agreed to invest an amount with the corporate debtor in capacity as shareholder and in pursuance of same, a MoU was signed between parties for transfer of shares in accordance with investment made by the appellant. Meanwhile CIRP was initiated against the corporate debtor and the appellant filed its claim as an unsecured creditor before RP. However, the said claim was rejected by RP on ground that the appellant was a shareholder of the corporate debtor. Aggrieved by said rejection, the appellant filed an application before NCLT. NCLT by impugned order held that the appellant ought to have taken steps under section 59 of the Companies Act, 2013 for rectification of its name in registrar of companies however, no steps were taken by the appellant and, therefore, the appellant was shareholder of the corporate debtor. The appellant challenging NCLT's order filed instant apeal on ground that MoU was revoked and, amount which was transferred was converted into loan as per loan agreement. It was noted that there was no evidence brought on record to establish that MoU was revoked.

Held that documentary evidence on record established that money was infused by the appellant in terms of MoU as an investment to be converted into equity and further auditor's report and endorsement of the appellant on share transfer certificate clearly established that shares were transferred in name of partners of the appellant and, thus, there was no substantial grounds to interfere with impugned order.

Case Review: SMS Foundation & Investment LLP v. Harsha Exito Engineering (P.) Ltd. [2023] 154 taxmann.com 303 (NCLT - Chennai), affirmed.

SECTION 10A - CORPORATE INSOLVENCY RESOLUTION PROCESS - SUSPENSION OF INITIATION OF

Nitin Chandrakant Desai v. Edelweiss Asset Reconstruction Ltd. [2023] 154 taxmann.com 321 (NCLAT-New Delhi)

Default committed during section 10A period cannot be held bar to CIRP application which is filed on basis of default Committed prior to section 10A and subsequent to section 10A period.

The Adjudicating Authority had admitted section 7 application filed by the financial creditor-respondent. The appellant submitted that said application was barred by section 10A. The Adjudicating Authority noticed that default recorded in NESL certificate as well as application filed under section 7 indicated date of default as 31-1-2020 i.e., prior to section 10A period.

Held that when default had been committed by the corporate debtor prior to section 10A period, any subsequent default committed during section 10A period could not be held bar to application which is filed on basis of default prior to section 10A and subsequent to section 10A period, thus, no error had been committed by Adjudicating Authority in admitting section 7 application.

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

Anil Kumar, Suspended Director, SK Elite Industries India Ltd. v. Jayesh Sanghrajaka [2023] 154 taxmann.com 354 (NCLAT- New Delhi)

Where CoC after considering viability and feasibility of a resolution plan had approved same with 100 per cent vote share, such decision of CoC was a commercial decision which could not be interfered with and, therefore, resolution plan was rightly approved by NCLT.

CIRP was initiated against the corporate debtor and RP was appointed. Resolution plans were received by the RP and the appellant/suspended director of the corporate debtor submitted a settlement proposal. CoC of the corporate debtor gave resolution applicants and the appellant an opportunity to revise their offers as some were unsatisfactory. Since neither revised resolution plans nor a concrete proposal was received by CoC, RP filed an application before NCLT seeking initiation of liquidation of the corporate debtor. Meanwhile, 'M' resolution applicant submitted a resolution plan to RP. RP filed another application seeking withdrawal of liquidation application, and NCLT kept liquidation application in abeyance and allowed consideration of resolution plan of 'M'. Resolution plan of 'M' was approved by CoC and NCLT also approved same vide impugned order. Aggrieved by said order, the appellant preferred instant appeal.

Held that when CoC had approved a resolution plan by 100 per cent voting share after considering its feasibility and viability, such decision of CoC was a commercial decision which could not be interfered with and since NCLT had not erred in approving resolution plan, impugned order did not warrant interference and instant appeal was to be dismissed.

Case Review: Jayesh Sanghrajka v. S.K. Elite Industries (India) Ltd. [2023] 154 taxmann.com 353 (NCLT - Mum.), affirmed.

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

Bankey Bihari Infrahomes (P.) Ltd. v. Alok Kumar Kuchchal [2023] 154 taxmann.com 516 / 239 COMP CASE 625 (SC)

Where NCLAT upheld NCLT's order rejecting appellant's application for stay of auction as appellants failed to submit scheme of compromise and arrangement within stipulated time, in view of fact that reasonable and sufficient opportunity was provided to appellants and bottom line to submit payment under scheme had not been brought as assured on last date, appeal filed by appellants was to be dismissed.

NCLT directed liquidation of the corporate debtor and liquidator was appointed. The appellants filed an application under section 60(5) seeking direction to liquidator to place scheme of compromise and arrangement submitted by appellants under section 230 of the Companies Act, 2013. However, the said application was disposed of by NCLT directing Liquidator to consider scheme of compromise and arrangement submitted by appellants within three weeks i.e., till 4-5-2022. Thereafter, Liquidator published a public announcement to initiate the auction process of the corporate debtor's assets. Since liquidator continued with auction process, appellants filed an application before NCLT seeking stay of auction process. NCLT rejected said application on ground that appellants neither submitted scheme of compromise and arrangement within stipulated time i.e., 4-5-2022 nor did they inform Liquidator about delay in submitting scheme or requested any extension of time limit from NCLT. Aggrieved by NCLT's order, appellants filed an appeal before NCLAT. NCLAT by impugned order stated that NCLT provided reasonable and sufficient opportunity to appellants to submit a credible scheme of compromise and arrangement and, therefore, appeal filed by appellants was to be dismissed. Appellants filed an instant appeal before Supreme Court. It was noted that the bottom line to submit payment under scheme had not been brought as assured on last date.

Held that instant appeal filed against order of NCLAT was to be dismissed.

Case Review: Bankey Bihari Infrahomes (P.) Ltd. v. Alok Kumar Kuchchal [2023] 154 taxmann.com 515 (NCLAT - New Delhi), affirmed.

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

Biswa Janani Services v. Shree Nokoda Ispat Ltd. [2023] 154 taxmann.com 551 / 239 COMP CASE 336 (SC)

Where application for initiating CIRP under section 9 was rejected by NCLT on ground that there was a pre-existing dispute between parties and NCLAT concurring with findings of NCLT passed impugned order dismissing appeal filed against order of NCLT, concurrent findings in impugned order indicated a pre-existing dispute and, thus, there was no error in impugned order.

The corporate debtor issued purchase orders and the appellant-operational creditor in pursuance of said orders supplied goods. The appellant claiming outstanding dues, issued a demand notice under section 8 to the corporate debtor and same was replied by the corporate debtor by issuing a notice of dispute. A petition under section 9 against the corporate debtor was filed by the appellant, however, the same was rejected by NCLT on ground of pre-existing dispute between parties. The appellant filed an appeal challenging order passed by NCLT and said appeal was dismissed by NCLAT vide impugned order.

Held that concurrent findings in impugned order indicated that there was a pre-existing dispute, proceedings for initiating CIRP under section 9 not entertained and, thus, there was no error in concurrent findings of fact by NCLAT while dismissing appeal against order of NCLT.

Case Review: Biswa Janani Services v. Shree Nokoda Ispat Ltd. [2023] 154 taxmann.com 550 (NCLAT - New Delhi), affirmed.

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

Assistant Commissioner of Central Tax v. Sreenivasa Rao Ravinuthala [2023] 154 taxmann.com 628 (NCLAT - Chennai)

Where resolution plan was fully implemented as successful resolution applicant had made payments to all creditors of corporate debtor and there was no irregularity in provisions of said resolution plan, appeal challenging approval of such plan was to be dismissed.

CIRP was initiated against the corporate debtor and resolution plans were received. A resolution plan of the resolution applicant was approved by CoC of the corporate debtor with majority votes and same was also approved by NCLT vide impugned order. The appellant, Excise Department, filed instant appeal challenging approval of said plan on ground that the corporate debtor owed towards default in payment of Central Excise Duty, interest and penalty as per Central Excise Returns filed with the appellant department and provisions of said plan only earmarked 0.13% towards Government dues, which was unfair. It was noted that resolution plan was fully implemented, successful resolution applicant had made payments to all creditors of the corporate debtor and two years had passed since approval of said plan.

Held that there was no irregularity in the provisions of resolution plan, therefore, there was no tangible and substantial reason to set clock back and appeal was to be dismissed.

Case Review: Sreenivasa Rao Ravinuthala, Resolution Professional for Samyu Glass (P.) Ltd., In re [2023] 154 taxmann.com 627 (NCLT - Hyd.), affirmed.

SECTION 95 - INDIVIDUAL/FIRM'S INSOLVENCY RESOLUTION PROCESS - APPLICATION BY CREDITOR

Mahendra Kumar Agarwal v. PTC India Financial Services Ltd. - [2023] 154 taxmann.com 666 (NCLAT - Chennai)

NCLT has jurisdiction to entertain/initiate insolvency proceedings of personal guarantors, even when there is no CIRP proceedings pending against corporate debtor.

The respondent No. 1-financial creditor extended term loan facility to the corporate debtor. In pursuance of said loan, the appellant stood as a personal guarantor. However, the corporate debtor defaulted in making repayment of loan amount and the respondent No. 1 filed an application under section 95 before NCLT against the appellant. NCLT by impugned order admitted said application. The appellant submitted that NCLT had failed to take into consideration that there were no pending CIRP or liquidation proceedings, against the principal borrower.

Held that guarantee is an independent obligation of guarantor, which is evident from personal guarantee and there is no requirement enabling a person to exhaust any remedy against a corporate debtor, prior to issuance of demand in terms of personal guarantee. NCLT has jurisdiction to entertain/initiate insolvency proceedings of personal guarantors, even when no CIRP proceedings is pending against corporate debtor. NCLT was entitled to initiate CIRP against the appellant and in any event since CIRP proceedings was pending and continued to be pending against the corporate debtor, impugned order passed by NCLT admitting petition under section 95 against the appellant was free from any legal flaws.

Case Review: PTC India Financial Services Ltd. v. Mahendra Kumar Agarwal [2023] 154 taxmann.com 665 (NCLT - Hyd.), affirmed.

SECTION 238A - LIMITATION PERIOD

A.L Sundershan v. Syndicate Bank [2023] 154 taxmann.com 630 (NCLAT - Chennai)

Where account of corporate debtor was declared a NPA on 11-6-2006 but last confirmation, was made on behalf of corporate debtor towards joint and several liabilities by Borrower/Sureties on 11-5-2017 and also multiple One Time Settlement reports had been made in years 2018 to 2022, application filed by financial creditor under section 7 for initiation of CIRP against corporate debtor on 19-3-2020 was well within limitation period and was rightly admitted by NCLT.

The corporate debtor had availed loan facilities from the respondent No. 1-financial creditor. On default in repayment of loan amount account of the corporate debtor was declared NPA on 11-6-2006 and the financial creditor filed an application under section 7 against the corporate debtor on 19-3-2020 and same was admitted by NCLT. Aggrieved by NCLT's order, the appellant being suspended director of the corporate debtor filed instant appeal on ground that application filed by the financial creditor on 19-3-2020 was barred by limitation. It was noted that last confirmation was made on behalf of the corporate debtor towards joint and several liabilities by Borrower/Sureties on 11-5-2017. It was further noted that the corporate debtor sent multiple OTS requests to the financial creditor in the years 2018 to 2022 but same were rejected by the financial creditor.

Held that the corporate debtor had committed default in respect of debt, to be paid by it, to and in favour of financial creditor and appellant could not deny or abdicate his responsibility, under Cloak of Limitation and therefore, application filed by the financial creditor was well within limitation period.

Case Review: Syndicate Bank v. A.L Sudershan Constructions Company Ltd. [2023] 154 taxmann.com 629 (NCLT - Hyd.) (para 71) affirmed.

SECTION 21 - CORPORATE INSOLVENCY RESOLUTION PROCESS - COMMITTEE OF CREDITORS

Ravindra Kumar Goyal, RP of Yashasvi Yarns Ltd. v. Committee of Creditors of Yashasvi Yarns Ltd. [2023] 154 taxmann.com 668 (NCLAT- New Delhi)

Where CoC's decision to not approve performance linked payment incentive fee (PRIF) claimed by RP was in accordance with their discretionary power under regulation 34B of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, PRIF being part of Insolvency Resolution Cost, commercial decisions of CoC must be given due credence and same could not be interfered with by NCLT/NCLAT.

The Adjudicating Authority admitted section 7 application against the corporate debtor and the appellant was appointed as resolution professional. On 1-12-2022, a resolution plan was approved by CoC. The appellant claimed performance linked payment incentive fee (PRIF) for value of maximization of the corporate debtor as per regulation 34B. The CoC dismissed resolution for payment of PRIF fee to RP and NCLT affirmed decision of the CoC. The appellant submitted that he was able to maximize the value of the corporate debtor and, hence, he was entitled to performance linked incentive fee. Further, he submitted that the decision of CoC refusing claim was not in accordance with regulation 34B. It was noted that PRIF in the event it is paid to RP is part of Insolvency Resolution Cost and decision of the CoC approving resolution plan also contained consideration of PRIF was a commercial decision of CoC.

Held that commercial decision of CoC must be given due credence and NCLT/NCLAT cannot interfere in commercial decision CoC, thus, decision of CoC in not approving PRIF could not be faulted with and was in accordance with discretionary power vested with CoC under regulation 34B.

Case Review: State Bank of India v. Yashasvi Yarns Ltd. [2023] 154 taxmann.com 667 (NCLT - Ahm.), affirmed.

SECTION 3(31) - CORPORATE INSOLVENCY RESOLUTION PROCESS - SECURITY INTEREST

Naresh Sundarlal Jain v. Udaipur Entertainment World (P.) Ltd. [2023] 155 taxmann.com 36 (Bombay)

Where petitioner/director of corporate debtor lent money to corporate debtor without any agreement, mere lending of money without there being any security created for repayment of loan would not create any security interest as contemplated under section 3(31) and, therefore, petitioner could only be treated as an unsecured creditor of corporate debtor.

Resolution plan of the corporate debtor was approved by NCLT while vacating an order of attachment of flats constructed by the corporate debtor which was passed by the Adjudicating Authority under provisions of Prevention of the Money Laundering Act, 2002 (PMLA). The petitioner/director of the corporate debtor preferred instant writ petition, submitting that he had lent money to the corporate debtor for construction of said flats and prejudice was caused to the petitioner by vacation of said attachment order. Further, the petitioner contended that he stood in same category as homebuyers in said project who were recognized as unsecured creditors thereby pushing him to bottom of list of creditors of the corporate debtor as per water fall mechanism. It was noted that the role of petitioner was not more than that of a lender of money to the corporate debtor as there was neither any allotment nor agreement in favour of the petitioner unlike homebuyers in whose favour agreements/allotments were made for sale of flats in their favour creading in them a security interest as defined under section 3(31).

Held that mere lending of money without there being any security created for repayment of loan would not create any security interest and, therefore, a person like the petitioner could only be treated as an unsecured creditor. Since the NCLT vacating order of attachment passed by the PMLA authority had attained finality, same could not be interfered with by the instant Court and, therefore, instant writ petition was to be summarily dismissed.

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

Vishal Chelani v. Debashis Nanda - [2023] 155 taxmann.com 273 (SC)

In view of section 5(8)(f) no distinction is per se made out between different classes of financial creditors for purposes of drawing a resolution plan and by introduction of Explanation to section 5(8)(f) home buyers and allottees of real estate projects are included in class of financial creditors.

Appellants were home buyers, who had opted for allotment in a real estate project of the respondent company. Meanwhile, due to the delay in completion of project, the appellants approached UPRERA, which by its orders upheld their entitlement to a refund of amounts they had deposited. In the meantime, insolvency proceedings were initiated against the respondent and a resolution plan was presented to NCLT, in which, a distinction was made between home buyers, who had opted or elected for other remedies such as applying before RERA and having secured orders in their favour and home buyers who did not approach authorities under the RERA Act. In said plan, home buyers who did not approach RERA were given benefit of 50 per cent better terms than those who approached RERA or were decree holders. Aggrieved by said plan, appellants filed their applications before NCLT but some were rejected and appeals too were unsuccessful.

Held that in view of section 5(8)(f) no distinction is per se made out between different classes of financial creditors for purposes of drawing a resolution plan. Section 238 contains a non obstante clause which gives overriding effect to its provisions and, therefore, its provisions acquire primacy, and cannot be read as subordinate to the RERA Act. By introduction of Explanation to section 5(8)(f) home buyers and allottees of real estate projects were included in class of financial creditors because financial debt was owed to them, it is only home buyers that can approach and seek remedies under RERA and, therefore, to treat particular segment of that class differently for purposes of another enactment, on ground that one or some of them had elected to take back deposits together with such interest as ordered by competent authority, would be highly inequitable. Therefore, appellants were to be declared as financial creditors within meaning of section 5(8)(f) (Explanation) and entitled to be treated as such along with other home buyers/financial creditors for purposes of resolution plan and impugned order passed by NCLAT was to be set aside.

Case Review: Natwar Agrawal (HUF) v. Ms. Ssakash Developers & Builders (P.) Ltd. [CP (IB) No. 21/MB-IV/2023, dated 2-8-2023], approved.

SECTION 238A - LIMITATION PERIOD

Tottempudi Salalith v. State Bank of India [2023] 155 taxmann.com 380 (SC)

Question of election between fora for enforcement of debt under RDB Act, 1993 and initiation of CIRP under IBC arises only after a recovery certificate is issued, reliefs under two statutes are different and once CIRP results in declaration of moratorium, enforcement mechanism under RDB Act or SARFAESI Act gets suspended.

The respondent-financial creditor had extended financial facilities to the corporate debtor. Because of default in repaying financial facilities, the financial creditor filed an application under section 7 on 6-9-2019 against the corporate debtor on basis of three recovery certificates dated 8-9-2015, 17-10-2017 and 4-8-2017. NCLT on basis of said recovery certificate and a letter issued by the corporate debtor on 29-1-2020, in which the corporate debtor agreed to repay amount due to the financial creditors admitted CIRP application and declared moratorium in terms of section 14. The appellant, managing director of the corporate debtor, filed an appeal before NCLAT order on ground that the respondent bank having approached DRT, was barred under doctrine of election from approaching NCLT for recovery of same set of debts. NCLAT sustained decision of NCLT.

Held that in absence of averments or pleading, after initiation of insolvency proceeding, any promise made to pay debt cannot be treated to have cured fault of limitation in a pre--existing action and a promise of this nature would constitute an independent cause of action. Question of election between fora for enforcement of debt under the 1993 Act and initiation of CIRP under IBC arises only after a recovery certificate is issued, reliefs under two statutes are different and once CIRP results in declaration of moratorium, enforcement mechanism under the 1993 Act or the SARFAESI Act gets suspended. After issue of recovery certificate, the financial creditor ought to have option for enforcing recovery through a new forum instead of sticking on to mechanism through which recovery certificate was issued and, thus, doctrine of election could not be applied to prevent financial creditors from approaching NCLT for initiation of CIRP. Since application was not barred by limitation and right of the financial creditor to invoke mechanism under IBC after issue of recovery certificate stood acknowledged as a valid legal course, application with respect to two recovery certificates issued in year 2017 was maintainable and, in respect of recovery certificate issued in year 2015 decree would be still alive and, claim based on said recovery certificate could be segregated from composite claim.

Case Review: Tottempudi Salalith v. State Bank of India [2023] 154 taxmann.com 674 (NCLAT - Chennai), affirmed.

SECTION 10A - CORPORATE INSOLVENCY RESOLUTION PROCESS - SUSPENSION OF INITIATION OF

Vikram Kumar v. Aranca (Mumbai) (P.) Ltd. - [2023] 155 taxmann.com 419 (NCLAT- New Delhi)

Where financial creditor invoked deed of guarantee of corporate guarantor on 25-8-2020 and filed an application under section 7 against corporate debtor for initiating CIRP, NCLT rightly held that section 7 application was non-maintainable as default arose in a period excluded by provisions of section 10A.

The appellant-financial creditor granted loan facilities to principal borrower, which were secured by the corporate guarantees issued by the respondent-corporate guarantor. Since the principal borrower had not repaid loan amount, the appellant had invoked guarantee and filed an application under section 7 for initiation of CIRP against the corporate guarantor. NCLT dismissed the said application as not maintainable on grounds that the appellant had invoked corporate guarantee on 25-8-2020, which was falling under period specified under section 10A and, therefore, CIRP could not be initiated.

Held that since deed of guarantee was invoked on 25-8-2020, CIRP could not have been initiated for default in repayment as default arose in a period excluded by provisions of section 10A and, thus, NCLT had rightly held that default fell within specified period under section 10A, and application filed under section 7 was non-maintainable.

Case Review: Vikram Kumar v. Aranca (Mumbai) (P.) Ltd. [2023] 155 taxmann.com 418 (NCLT - Mum.) (para 10) affirmed [See Annex].

SECTION 60 - CORPORATE PERSON'S ADJUDICATING AUTHORITIES - ADJUDICATING AUTHORITY

Standard Chartered Bank] v. Winsome Investor Welfare Association [2023] 155 taxmann.com 421 (NCLAT- New Delhi)

Where appellants filed an application before NCLT raising question of maintainability to an application filed by respondents, since NCLT had already given opportunity to all appellants in respondent's application to file their reply on issue of maintainability as well as on merit filing separate application on issue of maintainability was not required.

Appellants filed an application before NCLT raising question of maintainability of an application filed by respondents. However, said application was rejected by NCLT on ground that NCLT had already given opportunity to all appellants in respondent's application to file their reply on issue of maintainability as well as on merit also, therefore, filing separate application on issue of maintainability was not required.

Held that since NCLT permitted appellants to take all issues regarding maintainability in their reply, filing separate applications raising maintainability need not be decided and all issues could be considered and decided along with application of the respondent. Since NCLT itself granted liberty to appellants to raise the issue of maintainability, question of maintainability should be decided by NCLT before passing any order on merits.

Case Review: Ramesh T Mehta (HUF) v. Winsome Diamond & Jewellery Ltd. [2023] 155 taxmann.com 420 (NCLT - AHD.), matter remanded.

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

Spicejet Ltd. v. Affordable Infrastructure and Housing Projects (P.) Ltd. [2023] 155 taxmann.com 443 (SC)

Supreme Court upheld NCLAT's order wherein it was held that where an agreement entered between parties was for use of premises by appellant and LoI contemplated execution of lease deed was on a rent basis, amount of Rs. 1.02 crores advanced could not be held to be a financial debt and, therefore, no error had been committed by NCLT in rejecting section 7 application filed for nonpayment of advance amount.

A contractual arrangement was entered between the appellant and respondent to provide a premises for which letter of Intent (LOI) was issued. The appellant paid Rs. 1.02 crores to the respondent. However, the lease could not be excuted in terms of LOI. On default in making due payment, the appellant filed an application under section 7 against the respondent on ground that the respondent committed a default of Rs. 1.02 crores. NCLT rejected the said application on ground that debt claimed by the appellant to be payable by respondent was not a financial debt. Aggrieved by NCLT's order, the appellant filed an appeal before NCLAT. NCLAT by impugned order upheld order of NCLT holding that agreement entered between parties was for premises for use of the appellant and LoI contemplated execution of lease deed on a rent basis and, therefore, amount of Rs. 1.02 crores were an advance and same could not be held to be a financial debt.

Held that in view of the facts, there was no error in NCLAT's order and, therefore, appeal against order of NCLAT was to be dismissed.

Case Review: SpiceJet Ltd. v. Affordable Infrastructure and Housing Projects (P.) Ltd. [2023] 155 taxmann.com 442 (NCLAT - New Delhi), affirmed.

SECTION 43 - CORPORATE LIQUIDATION PROCESS - PREFERENTIAL TRANSACTIONS AND RELEVANT TIME

Ashique Ponnamparambath v. Vibin Vincent - [2023] 155 taxmann.com 563 (NCLAT - Chennai)

Where a transaction was made by corporate debtor in favour of appellant-ex-director within a period of two years immediately preceding insolvency commencement date, such transaction was clearly preferential transactions and benefit of exception that transactions were made during ordinary course of business could not be provided to appellant.

CIRP was initiated against the corporate debtor by NCLT and, respondent was appointed as a liquidator. Thereafter, a forensic audit for period from 1-4-2016 to 6-10-2021 was carried out by a forensic auditor, wherein it was found that certain transactions made by appellant-ex-director had infringed section 43. RP on basis of forensic audit report, filed an avoidance application under section 43 before NCLT to set aside preferential transactions. NCLT by impugned order held that transactions in question were preferential transactions and, further, the appellant was directed to pay a sum of Rs. 7.81 lacs with 12 per cent interest per annum to the corporate debtor. It was noted that transactions were made during the period 18-11-2019 to 30-9-2021 and, out of this, transactions made between 22-6-2021 to 30-9-2021 amounting to Rs. 7.81 lakhs were all made within a period of two years immediately preceding insolvency commencement date, which was 6-10-2021.

Held that all these transactions were within relevant period and appellant in its reply before NCLT had not given any clarity or reason as to why such transactions were made in his favour from account of the corporate debtor and, therefore, such transaction were clearly preferential transactions and benefit of exception that transactions were made in ordinary course of business could not be provided to the appellant. Thus, said transactions amounting to Rs. 7.81 lakhs were preferential transactions and impugned order was free from any infirmity.

Case Review: Vibin Vincent v. P.P. Ashique [2023] 155 taxmann.com 562 (NCLT - Kochi), affirmed

SECTION 3(6) - CORPORATE INSOLVENCY RESOLUTION PROCESS - CLAIM

Ashok Dattatray Atre v. Kanoria Chemicals & Industries Ltd. [2023] 155 taxmann.com 566 (SC)

Where in an approved resolution plan respondent-operational creditor was given payment of zero amount against its claim and NCLAT allowed an appeal filed by respondent against said approval holding that respondent was to be paid maximum percentage of payment permissible to other operational creditors, since observation of NCLAT had not specified category of respondent, this aspect was to be considered by NCLT.

CIRP against the corporate debtor was initiated under section 9 and RP was appointed. The respondent/operational creditor of the corporate debtor submitted its claim to RP on the basis of an arbitration award passed in its favour. RP filed an application under section 30(6) seeking approval of resolution plan, same was approved by 100 per cent voting share of CoC and by NCLT. The respondent filed an appeal challenging approval of the resolution plan by NCLT on ground that its claim was not considered in accordance with section 30(2)(b). NCLAT vide impugned order, allowed said appeal and held that since arbitration award by competent Court was neither quashed nor there was any contrary order against said award, respondent's claim had to be admitted by RP and considered for payment equal to amount permissible to the operational creditor with maximum percentage of payment against admitted claim in approved resolution plan. The appellant-director of the corporate debtor filed an instant appeal against impugned order and contended that respondent could be considered in a category wherein zero amount was to be paid to it against its claim.

Held that observation of NCLAT had not specified category of operational creditor in which respondent would fall, this aspect would have to be raised and considered by NCLT, thus, instant appeal was to be disposed and all pleas and contentions including contention of the appellant that resolution plan was substantially implemented, were to be left open.

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

Naresh Kumar Aggarwal v. CFM Asset Reconstruction (P.) Ltd. [2023] 155 taxmann.com 667 (NCLAT- New Delhi)

Where NCLT while admitting section 7 application against corporate debtor, recorded that there was a financial debt and default on part of corporate debtor and issue contesting debt and default was not raised by either party, there was no error on part of NCLT, in admitting said application.

Bank 'S' sanctioned credit facilities to the principal borrower and a deed of guarantee was executed by the corporate debtor in favour of security trustee, securing credit facilities availed by the principal borrower. 'S' entered into an assignment agreement with the financial creditor/Asset Reconstruction company assigning debt owed by the principal borrower. A section 7 application was filed by the financial creditor against the corporate debtor and same was admitted by NCLT vide impugned order. Aggrieved by the impugned order, an instant appeal was filed by the appellant, shareholder of the corporate debtor, contending that service of notice was not proper since it was sent only by e-mail and not by dasti as directed by the NCLT. It was noted that notice was properly served upon the corporate debtor at its valid e-mail address and no submissions were made by the appellant raising issue of debt and default on part of the corporate debtor.

Held that since NCLT had recorded that there existed financial debt and default, which was not contested by either party, there was no error on part of NCLT in admitting section 7 application and, thus, instant appeal was to be dismissed.

Case Review: CFM Asset Reconstruction (P.) Ltd. v. Micro Stock Holdings (P.) Ltd. [2023] 155 taxmann.com 666 (NCLT - New Delhi), affirmed.

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

Operational debt cannot be interpreted widely so as to include any agreement between parties which does not specifically pertain to supply of goods or services; claims of operational creditor on basis of settlement agreement or MoU were contractual claims for which appropriate civil proceedings would lie and, therefore, petition filed under section 9 for initiation of CIRP for nonpayment of such claims was rightly rejected by NCLT.

Maulik Kirtibhai Shah v. United Telecoms Ltd. [2023] 155 taxmann.com 632 (NCLAT - Chennai)

The appellant-operational creditor rendered services of 'Business Development' for the corporate debtor and amount of Rs. 8.6 crores were due and payable along with a running interest at rate of 15 per cent per annum. Thereafter, an agreement was entered between parties, in which it was unequivocally agreed that the operational creditor was entitled to 1 per cent of commission of Total Project Value after successfully completion of project. Thereafter, the appellant issued a demand notice claiming an amount of Rs. 7.48 crores and filed a petition under section 9 to initiate CIRP against the respondent on ground that the respondent had approached the operational creditor for settlement and made part payments, however, the corporate debtor did not honour cheques or settlement agreement apart from making few part payments.

Held that a petition filed in respect of claims arising under settlement agreement (even if disputed) does not come within definition of operational debt. Claims arising under MoU lost character of operational debt and became a debt simpliciter. Operational debt cannot be interpreted widely to include any agreement between parties, which does not specifically pertain to the supply of goods or services. In view of spirit of Code, claims were contractual claims for which appropriate Civil Proceedings could lie and, therefore, instant appeal was to be dismissed.

Case Review: Maulik Kirtibhai Shah v. United Telecoms Ltd. [2023] 155 taxmann.com 631 (NCLT - Beng.) affirmed.

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

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