May'2021

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 enrol 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 byelaws 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 endeavour 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 domain.

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CHAIRMAN MESSAGE

Dear Readers,

It was in November 2019 that Reserve Bank of India referred the case of Dewan Housing Finance Corporation Ltd (DHFL) for resolution under Insolvency & Bankruptcy Code with total dues of Rs.93,628 crores, including Secured, unsecured and other related party fraudulent transactions reported by the auditors appointed by the Administrator of DHFL. The said proceedings have been pending before the Mumbai Bench of NCLT. Piramal Capital and Housing Finance Ltd had won the bid for acquiring DHFL in January 2021 and their Resolution Plan with an offer of Rs. 34,250 crore was approved by the Original Applicant (RBI) in February, 2021 and from Competition Commission of India in April, 2021. The original promoters of DHFL had made an offer for resolution but the same was rejected by the Committee of Creditors in the year 2020 as it lacked the credibility and also the unrealistic valuation for the proposed sale of assets attached to the proposal. The original promoter Mr. Anil Wadhawan made the offer to settle the issue at book outstanding aggregating Rs. 91,158 crore, which would help the Depositors to recover 100% of the Principal deposit amount. In the month of May 2021, NCLT asked the Administrator of the Company appointed by RBI to place the offer of Wadhawan, the original promoters before the CoC for its consideration. The Order of NCLT was challenged by the creditors before NCLAT and the said appeal praying for the stay of NCLT order was heard by the Vacation Bench of NCLAT with Justice A I S Cheema, Chairman and Shri V P Singh, Member (Technical). It was argued that the proposal of Wadhawan was merely a letter and not a Resolution Plan and its consideration may lead to derailing the Resolution Plan and also eventual liquidation of the Company. NCLAT therefore stayed orally the order of NCLT which directed the Administrator to place the proposal of the original promoters to the CoC for its consideration. NCLAT also allowed freedom to NCLT to announce its decision on the Resolution Plan of the successful Resolution Applicant viz., Piramal Capital & Housing Finance Ltd which is in advanced stage of consideration before NCLT.

It is also pertinent to note that Wadhawan is in judicial custody on the allegations of cheating, fraud, siphoning off the funds and other serious offences. Under such circumstances allowing the proposal of Wadhawan would lead to enable him to benefit from the serious wrongs committed by him. It was therefore not found fit for granting any interim relief on the offer of original promoters. Judicial merits and demerits of the order of NCLT

and NCLAT apart, it would be worth peeping into the guidelines issued by Reserve Bank of India in this regard.

DHFL has been reported a case of Fraud by the Auditors and Lenders. RBI has laid down a Broad Framework to deal with loan frauds in the year 2016 which was updated in July, 2017. It directs a focus on the part of Banks on the aspects relating to Prevention, Early Detection, Prompt Reporting to RBI & Investigating Agencies while initiating Staff Accountability in a given time frame keeping in view that the normal conduct of business of the bank and its risk taking ability is not adversely impacted and no new or onerous responsibilities are placed on the Bank. The wilful defaulters, fraudulent borrowers and fraudster, promoter directors, whole time directors should be barred from raising funds from Capital Markets or the Banking System for a period of five years. Even the nominee or part time director if found having complicity, could be penalised in the rarest of the rare case.

RBI guidelines further provide that no compromise settlement involving fraudulent borrowers is allowed unless the conditions stipulate that the criminal action against the fraudulent borrowers, promoters will be continued. The guidelines also put a bar on restructuring of the debt or granting any additional facility in the Fraud Account. However if the existing promoters are replaced by new promoters delinking the borrower company from erstwhile promoters completely, the banks are allowed to take a view on restructuring such accounts based on their viability without any prejudice to the continuance of the criminal action against the erstwhile promoters/management.

Thus the order of the NCLAT appears to be in consonance with the RBI Guidelines too.

Dr. Jai Deo Sharma
Chairman

MD MESSAGE

Dear Readers,

As nation continues to fight the terror of the pandemic, the law makers made their attempts at not letting the pandemic hit the economy in the ways it did in the first wave. Weekend curfews and regional curfews were preferred over complete lockdown while the essential service providers were allowed to operate in ways that it did not hamper their business as much as it could have made in case of complete lockdown. The judicial infrastructure was also back to operating online while hearing urgent matters only. One of the major jurisprudential developments that is worthy of discussion this month in the field of bankruptcy, despite such distractions, was the judgment of ***Lalit Kumar Jain vs Union of India*** where the Hon'ble Supreme Court adjudicated upon the validity of the notification of Part III of the Insolvency and Bankruptcy Code, 2016 which provides for the resolution and bankruptcy mechanism for personal guarantors and came in effect from December 1, 2019.

The impugned notification was a result of various conflicting views by Tribunals with regards to the position of guarantor in the resolution process. The Hon'ble Supreme Court in the present case settled the long due clarification required in this regard and held that the notification was valid and not *ultra vires*. In the views of the Court, the notification sought to bring together all the stakeholders under the same forum so that the creditors are aware of the complete picture and aid in facilitating the Committee of Creditors in framing realistic resolution plans, keeping in mind the prospect of realizing some part of the creditor's dues from personal guarantors. Further, the Hon'ble Supreme Court explained that the release or discharge of the corporate debtor from the debt owed by it to its creditor, by an involuntary process, i.e., by the operation of law or due to liquidation or insolvency does not absolve the surety/guarantor of his or her liability which arises out of an independent contract. However, it was noted that the nature and extent of the liability of the personal guarantor would depend on the terms of the guarantee itself.

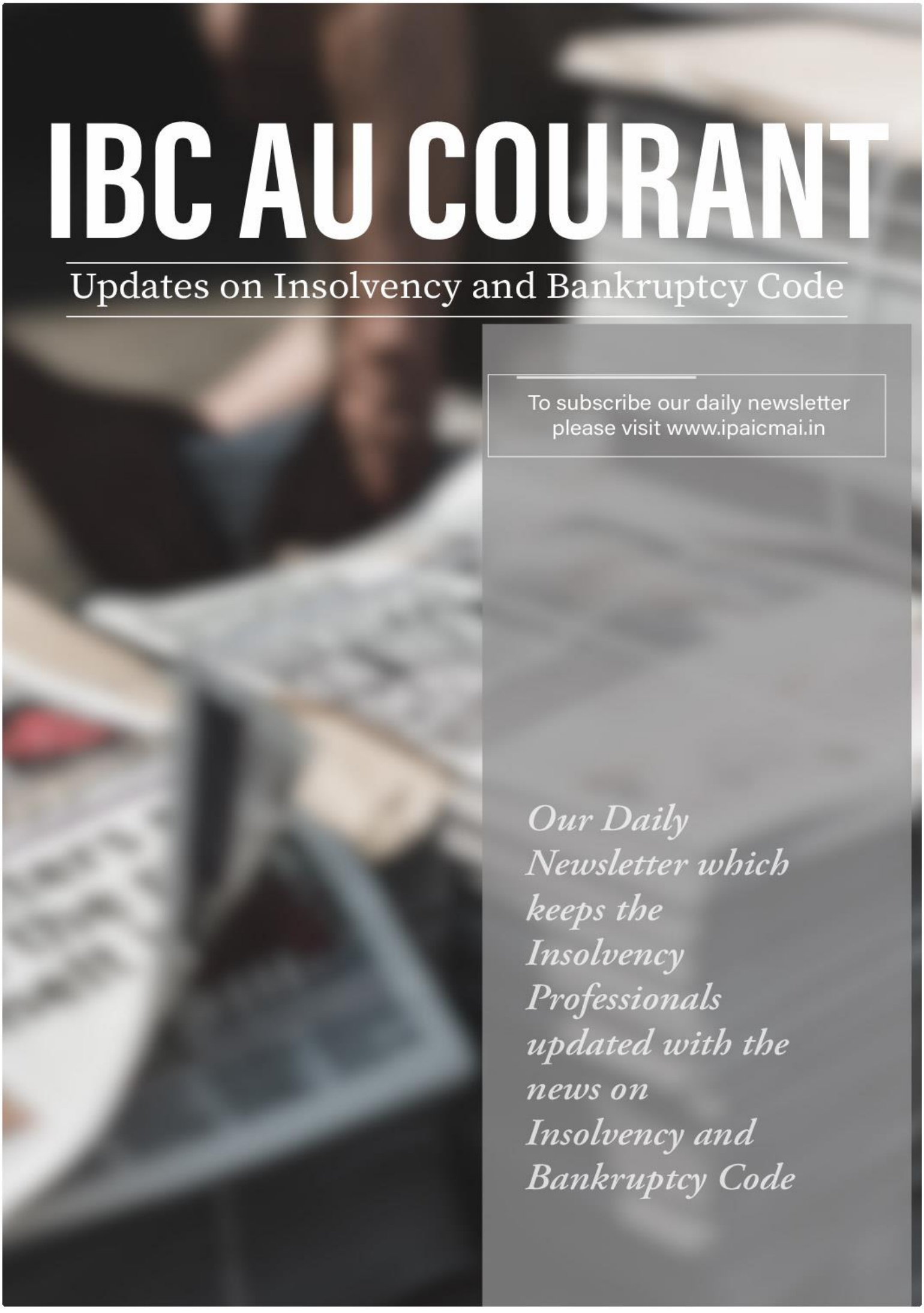
In the times of perpetual uncertainties owing to the pandemic, this judgment by Hon'ble Supreme Court serves a breath of fresh air amongst the practitioners and the creditors.

Susanta Kumar Sahu
Managing Director

PROFESSIONAL DEVELOPMENT INTIATIVES

EVENTS

May'21	
Date	Events
9th May'21	Master class on liquidation
15th May'21	Master class on leadership and management
15th - 17th May'21	3 days preparatory education course
21st May'21	Webinar -practical aspects of not readily realisable assets-NRRA
25th May'21	Master class on pre-packaged insolvency resolution process for MSME (ordinance & regulations)



IBC AU COURANT

Updates on Insolvency and Bankruptcy Code

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ARTICLES

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

PANDEMIC AND ITS AFFECT ON THE RESOLUTION PLAN APPROVED BY ADJUDICATING AUTHORITY

Mr. Sumit Shukla
Advocate and Insolvency Professional

A Resolution plan is an instrument for taking over the reign, by a qualified, eligible and competent person, of stressed company undergoing through the corporate insolvency process under the provisions of the Insolvency and Bankruptcy Code, 2016 upon the occurrence of default by a Company. The IBC Code lays down a detailed framework for the selection of the most viable and feasible resolution plan which is decided the committee of creditors and thus has the final say as far as the commercial wisdom is concerned however, the finally the Resolution Professional must secure, and rightly so to have checks and balances, the green light from the adjudicating authority if the resolution plan confirms to the provisions of the IBC, 2016. This articles discusses the scenario of the possible amendments / modifications / alterations in the resolution plan or even its withdrawal by the successful resolution applicant, after its approval by the adjudicating authority under different possible circumstances in the light of the provisions of the IBC, 2016.

The Insolvency and Bankruptcy Code (hereinafter "Code") aims to bring back to the track the stressed company by putting it through a Corporate Insolvency Resolution Process (CIRP) and smoothly transferring the stressed company as going concern to the hands of the persons/entities (Resolution Applicant) who by submission of the Resolution Plan have submitted their proposal in the form of resolution plan to take over their management and assets, and service their debts. The interested resolution applicants can participate in the CIRP and put forth their 'resolution plans', which are basically a comprehensive plan for taking over the reign of the company which is in default and unable to repay its outstanding debt. The resolution applicant by way of the resolution plan undertakes to revive the corporate debtor, pay the dues of its creditors and make a turn around so that the corporate debtor which is presently stressed can run smoothly as going concern and become a profit making venture. The Resolution Plan is placed before the Committee of Creditors (COC) which examines, negotiate and approve the most viable plan by a vote of 66% or higher. The approved plan by the COC is ultimately examined and approved by the Adjudicating Authority (National Company

Law Tribunal) upon an application filed by the Resolution Professional which puts the CIRP to the conclusion and the approved plan becomes a concluded contract which is regulated to some extent by the Code.

The main topic of the present article is the amendment of the resolution plan and there can be three possible stages where the amendment of the resolution plan may be needed by the resolution applicant:

(a) After the plan is submitted to the resolution professional

(b) After the plan is approved by the CoC;

I. The application for approval of plan is not submitted before the Adjudicating Authority

II. The application for approval of plan is submitted before the Adjudicating Authority and pending approval.

(c) After the plan is approved by the Adjudicating Authority

In the first case, there is no difficulty and the resolution applicant is allowed to withdraw or he can renegotiate the plan as the resolution plan has only been submitted to the resolution professional and not to the CoC.

The second stage where the plan is approved by the COC further involve two situations first where though the plan has been approved by the COC but the application for its approval has not been filed before the Adjudicating Authority and second where the application has been filed before the Adjudicating Authority for approval of the approved plan by the COC which primarily involves a legal question as to whether a Resolution Applicant who has submitted a Resolution Plan which was approved with majority vote by CoC can be allowed to withdraw the said Resolution Plan which is under consideration for approval before the NCLT?

The first situation primarily involves a situation where for some reason after the approval of the plan by the COC, the resolution applicant backtracks from his plan which for obvious reasons affects the prospects of the corporate debtor of its effective turnaround. The selection of one particular resolution plan over other submitted plans before the COC involves representation made by the successful resolution applicant to the CoC about their capacity and their intent, to convince the CoC of their ability to perform the Resolution Plan and thus in the selection

process, the successful resolution applicant eliminate other potential bidders. If the resolution applicant is allowed to resile from its resolution plan at this belated stage, it may adversely affect the Corporate Debtor so much so that it may be forced into liquidation, causing huge loss to the CoC. Thus, the resolution plan of the successful resolution applicant is selected over other prospective resolution applicants and if he resiles from the approved plan, then the entire process of the selection of fresh resolution plan has to be initiated from scratch whereby a Resolution Professional may invite fresh resolution plans. However it is advisable for the COC and the concerned resolution professional to file an application u/s 60(5) IBC, r/w Rule 11 NCLT Rules to seek direction of the Adjudicating Authority as a matter of abundant precaution and transparency. However in case there was only one resolution applicant, even then the application under Section 60(5) IBC read with Rule 11 of the NCLT Rules has to be filed before the Adjudicating Authority seeking its direction for any kind of modification or change as it would affect the corporate debtor as a going concern.

The second situation arises when after the approval of the COC, the plan is submitted before the NCLT by way of application for its approval and is pending. Can such plan be withdrawn or modified. As far as IBC, 2016 is concerned, there is no provision which allows a Resolution Applicant to amend or withdraw its resolution plan which is pending for approval of the Adjudicating Authority. In this regard, it is submitted that Hon'ble NCLAT in Tata Steel Limited v. Liberty House Group Pte. Ltd. &Ors. Company Appeal (AT) (Insolvency) No. 198 of 2018 has held that the Resolution Applicant has no right to interfere in any decision of the Committee of Creditors at any stage, until and unless the Adjudicating Authority approves the Resolution plan in terms of Section 31 of the Code. However, the Hon'ble NCLT Ahmedabad in the case titled as Sunil Kumar Agarwal RP of DIGJAM Ltd. Vs. Suspended Board of Directors of DIGJAM Ltd. & Ors. Vide order delivered on 27.05.2020 allowed the resolution applicant to modify a plan already approved by the COC due to COVID 19 and lockdown. In this case, the resolution applicant by way of affidavit filed before the adjudicating authority sought for certain revision/modification/relaxation in Resolution Plan in respect of time frame for payment to Financial Creditors/Operational Creditors and/or other stakeholders, due to the financial

difficulties arising out of current pandemic situation of COVID 19 Virus and subsequent lockdown. While allowing the prayer of the resolution applicant it would be pertinent to mention here that the Hon'ble Adjudicating Authority observed in para 18 as under:-

"18. On perusal of the affidavit dated 29.04.2020, so filed by the Resolution Applicant, seeking modification / concession / relaxation in the time line for the payment to the Financial Creditors/Operational Creditors and/or other stakeholders, if any, due to pandemic of Covid-19 Virus, it is found that there is no material change in the Resolution Plan save and except modification/concession/relaxation in respect of time line of payment to the creditors and/or stakeholders. Those concession/modification/relaxation, so sought for by the Resolution Applicant appears to be genuine and bonafide in view of pandemic COVID-19 virus and consequent lockdown which has global effect on the economy."

The third stage essentially involves a question whether a resolution plan can be modified post approval by the adjudicating authority? In this regard it can be safely answered that a resolution applicant cannot be permitted to withdraw from the approved resolution plan or make any modification resulting into any material changes in the approved resolution plan. Once the resolution plan is approved by the adjudicating authority, it becomes binding on all the stakeholders. Further, non implementation of the resolution plan can push the corporate debtor into liquidation and it can also attract the criminal liability for contravention of the plan under Section 74 of the Code. However, owing to the COVID-19 situation and the resultant pandemic which may create a situation which makes it impossible for the resolution applicant to comply with the payment timelines as per the approved plan to the financial creditors/operational creditors or other stakeholders, the resolution applicant may approach the Adjudicating authority by invoking Section 60(5) IBC, 2016 read with Rule 11 of the NCLT Rules to seek amend and modification only to the extent of the modification in timeline but the resolution applicant cannot seek any material change in the Resolution Plan or can change the basic premise or structure of the resolution plan.

Conclusion:

The provisions under the corporate insolvency resolution process laws comes to an end once a resolution plan is approved by the adjudicating authority. While the IBC laws itself are still at a very nascent stage in India and shall continue to evolve in the upcoming years by way amendments in the Law itself as well by the of orders of Adjudicating Authorities, Appellate Authorities and Hon'ble Supreme Court. However at the Hon'ble Supreme Court in its several orders has made one thing very clear that the Committee is fully capable of deciding on the Resolution Plan in its own commercial wisdom and therefore the adjudicating authorities are not interfering in the decisions so take by the Committee of the Creditors. There are not many instances before wherein the successful resolution applicant has committed defaulted in the resolution plans after the approval by the adjudicating authority. However considering the ongoing pandemic situations the delays are inevitable and we can see introduction of new / additional provisions dealing with the implementation of the approved resolution plan. However it would interesting to see how this entire IBC eco system sails through this entire situation as one of the key objective of the Code is to keep an ailing organization as a going concern (while avoiding liquidation) which is no doubt a noble cause and is in the interest of our nation which is desperately looking forward to see more and more industrial and commercial activities in order to play major role in global environment.

DISSOLUTION OF CORPORATE DEBTOR UNDER IBC 2016

Mr. Satyanarayana Veera Venkata Chebrolu
Insolvency Professional

Before submitting application to Adjudicating Authority for dissolution of corporate debtor, liquidator has to ensure that the due process of liquidation in the manner indicated in the Insolvency and Bankruptcy code 2016 has been followed. This article is intended to understand the various type of reports that are to be submitted by the liquidator under IBC 2016 to the Adjudicating Authority besides permissions/directions to be obtained by liquidator while carrying out the process of liquidation

As per the insolvency and Bankruptcy Code, 2016 every company before getting dissolved has to mandatorily undergo the corporate insolvency resolution process (CIRP) followed by liquidation. Liquidation will be ordered by Adjudicating Authority (AA) under the following four circumstances:

1. Committee of Creditors decides to liquidate the Corporate Debtor during CIRP
2. AA did not receive any resolution plan for approval
3. AA rejects the resolution plan for non-compliance with the requirements.
4. Corporate Debtor contravened the provisions of resolution plan.

As per the statistics given by IBBI in their quarterly newsletter for the quarter ended March,2021, a total of 1277 CIRPs had yielded orders for liquidation till March, 2021 and out of which only 138 closed by dissolution while 6 cases closed by going concern sale and four cases due to compromise/ arrangement. A total of 1139 cases are ongoing and out of which for more than one year are 69% while remaining are less than one year.

Thus it can be observed from the above statistics that there is a delay in applying for dissolution orders in respect of most of the liquidation cases which may be due to various types of obstacles the liquidators are facing.

As per section 54(1) of IBC code, 2016 the liquidator shall make an application for dissolution of the corporate debtor to the Adjudicating Authority upon the assets of the corporate debtor have been completely liquidated.

The Adjudicating Authority will order dissolution of the corporate debtor after ensuring that the affairs of the corporate debtor have been wound up, assets have been completely liquidated and liquidation is not with intent to defraud any person.

However, in case of sale as going concern, application for dissolution not required as the corporate debtor along with assets and liabilities will be transferred to the acquirer. Hence in case of going concern sale, the liquidator shall make an application to the adjudicating authority only for closure of liquidation process.

Till March, 2021 six CDs, namely, M/s. Emmanuel Engineering Private Limited, M/s. K.T.C. Foods Private Limited, M/s. Southern Online Bio Technologies, M/s. Smaat India Private Limited, M/s. Winwind Power Energy Private Limited and M/s. Topworth Pipes & Tubes Private Limited were closed by sale as a going concern under liquidation process. The liquidators in these cases realised Rs. 336.76 crores and companies were rescued.

While the last stage under corporate insolvency resolution process is resolution and in case of liquidation it is dissolution. However, in some cases Adjudicating Authority allowed direct dissolution without undergoing the process of liquidation wherever no tangible or intangible assets are there and no operations or activity since long time.

In the case of Mr. Mandar Wagh, IRP of M/s. Synew Steel Private Limited [CP (IB) No. 96/BB/2020] the Adjudicating Authority has on 16.11.2020 allowed the CD for dissolution without undergoing the process of liquidation, in view of the reason that all the financial creditors are related parties and hence RP could not able to constitute CoC. There are no assets except cash balance of Rs. 729/- and hence RP is unable to carry out CIRP. There is no business in the past three years and hence there is no revenue. The entire capital is eroded. Considering the facts and legal provisions in sections 33(2), 54 and regulation 14 of the Liquidation Regulations and Rule 11 of the NCLT Rules, the AA observed that no purpose would be served to keep the CD under CIRP or place it under a liquidation process and hence allowed dissolution of the corporate debtor.

Some of the steps to be initiated and compliance of which is to be furnished in the application for dissolution besides reports to be submitted to Adjudicating Authority before applying for dissolution by the liquidator are discussed here under.

1) Upon receipt of order, the MCA to be informed about liquidation of the corporate debtor by uploading INC-28 along with a copy of order of liquidation as per Section 33(1)(b)(iii) of the Code. The status of the company will then change to one 'under liquidation' in master data of the CD in MCA Portal.

2) Liquidator then to open a bank account in the name of corporate debtor followed by the words "in liquidation" and close the old bank accounts by transferring the credit balance to the newly opened account.

3) In case if there is any charge appearing in MCA portal against the Corporate Debtor even after repayment of dues, liquidator to request the concerned financial creditor to issue 'No Objection Certificate' for release of charge in respect of the Credit Facility for filing charge satisfaction with the MCA. The MCA will issue memorandum of satisfaction of charge in form No. CHG-5.

4) Intimation to be given to statutory authorities such as PF, ESI, Income tax, Inspector of factory and in case of listed companies to SEBI etc. Application to be made for cancellation of GSTIN.

5) Before applying for dissolution it is to be ensured that there are no litigations pending by or against Corporate Debtor. Further there should not be any applications pending filed under section 43, 45, 50 and section 66 of the IBC 2016.

6) Transfer unclaimed dividends and undistributed proceeds if any as per regulation 46 along with income earned thereon till the date of deposit before making application for dissolution to corporate liquidation account. In case of delay interest is levied @12%.

Reports to Adjudicating Authority:

The liquidator shall prepare and submit to Adjudicating Authority the following reports:

7) List of stake holders: After issue of public announcement as provided under regulation 12, liquidator to prepare a list of stakeholders along with details of each stake holder, whether secured or unsecured and file before AA as per regulation 31 (2) within forty five days from the last date for receipt of the claims. Subsequently if there is any modification required to be made, the liquidator to apply to AA and shall modify in the manner as directed by AA.

8) Preliminary Report: This is to be submitted to AA within 75 days from the liquidation commencement date as per regulation 13. Preliminary report to contain capital structure of the CD, estimate of its assets and liabilities on the date of commencement of liquidation, proposed plan of action for carrying out the liquidation, including the timelines within which liquidator proposes to carry it out and the estimated liquidation costs etc.

Any time after preparation of preliminary report, liquidator can apply to AA for **early dissolution** if the realizable properties of the corporate debtor are insufficient to cover the cost of the liquidation process and the affairs of the corporate debtor do not require any further investigation.

9) Progress reports: The liquidator shall submit progress reports to AA. The first progress report to be submitted within 15 days after the end of quarter in which liquidator is appointed and further reports within 15 days after the end of every quarter as per regulation 15.

Progress report to contain details of appointment of various professionals, statement of progress in liquidation, remuneration and other expenses, developments in any material litigation, information on avoidance transactions, changes if any in estimated liquidation cost, material change in expected realisation of any property proposed to be sold etc.

Report of 4th quarter of the financial year shall include audited accounts of liquidator's receipts and payments for the financial year.

10) Asset Memorandum: Liquidator to prepare an Asset memorandum within 75 days from the date of commencement of liquidation as per regulation 34 after forming liquidation estate under section 36. The asset memorandum has to be submitted to AA along with preliminary report.

Asset memorandum shall not be accessible to any person without prior AA approval. The asset memorandum to contain the details of value of assets, intended manner and mode of sale, expected amount of realisation from sale and other information that may be relevant for the sale of the asset.

11) Asset sale report: In terms of regulation 36, upon sale of an asset, the liquidator shall prepare an asset sale report in respect of said asset and it should be submitted to AA along with progress report. The asset sale report should contain information with regard to (a) the realized value; (b) cost of realization, if any; (c) the manner and mode of sale; (d) if the value realized is less than the value in the asset memorandum, the reasons for the same; (e) the person to whom the sale is made; and (f) any other details of the sale.

12) Minutes of consultation with stake holders: This is to be submitted after each meeting. Number of days within which to be submitted not prescribed. However in practice it is being submitted along with progress report.

The liquidator shall constitute a consultation committee within sixty days from the liquidation commencement date, based on the list of stakeholders prepared under regulation 31, to advise him on the matters relating to sale under regulation 32. However other matters also being discussed in stake holders consultation committee meetings in practice.

13) Final report prior to dissolution: The liquidator in compliance to the provisions of the Regulation 45 has to submit a final report prior to dissolution comprising all the relevant information in respect to details of liquidation of corporate debtor's assets, along with compliance certificate in form H. The final report shall form part of the application for the dissolution of the corporate debtor to be made to Adjudicating Authority.

Other permissions/directions to be obtained from AA

14) Private sale to related parties: The liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to (a) a related party of the corporate debtor; (b) his related party; or (c) any professional appointed by him.

15) Disclaimer of onerous property: Regulation 10: Liquidator to make an application to Adjudicating Authority within six months from the liquidation commencement date to disclaim the onerous property or contract. The liquidator shall serve a notice to persons interested in the onerous property or contract at least seven days before making an application for disclaimer to the Adjudicating Authority:

However, the liquidator shall not make an application if a person interested in the property or contract inquired in writing whether he will make an application to have such property disclaimed, and he did not communicate his intention to do so within one month from receipt of such inquiry.

16) Distribution of unsold assets: Regulation 38 stipulates that the liquidator with the permission of the Adjudicating Authority can distribute amongst the stakeholders, an asset that could not be sold, assigned or transferred due to its peculiar nature or other special circumstances.

17) Distribution of realisation proceeds: Subject to the provisions of section 53, the liquidator shall not commence distribution without filing the list of stakeholders and the asset memorandum with the Adjudicating Authority.

18) Extension of time for completion of liquidation if not completed within one year: If the liquidator fails to liquidate the corporate debtor within one year, he shall make an application to the Adjudicating Authority to continue such liquidation, along with a report explaining why the liquidation has not been completed and specifying the additional time that shall be required for liquidation as per regulation 44(2).

19) Waiver of public announcement of an auction: The liquidator shall make a public announcement of an auction in the manner specified in Regulation 12(3) Provided that the liquidator may apply to Adjudicating Authority to dispense with the requirement of Regulation 12(3)(a) keeping in view the value of the asset intended to be sold by auction.

20) Physical auction: If the liquidator is of the opinion that a physical auction is likely to maximize the realization from the sale of assets and is in the best interests of the creditors, he may sell assets through a physical auction after obtaining the permission of the Adjudicating Authority

21) In respect of not readily realisable assets: To facilitate quick closure of the liquidation process, IBBI amended the IBBI (Liquidation Process) Regulations, 2016, vide notification dated November 13, 2020, to enable the liquidator to assign or transfer a 'not readily realisable asset'

to any person in consultation with the stakeholders' consultation committee. For this purpose, 'not readily realisable asset' means any asset included in the liquidation estate which could not be sold through available options and includes contingent or disputed assets, and assets underlying proceedings for preferential, undervalued, extortionate credit and fraudulent transactions.

Thus liquidator shall attempt to sell the assets at the first instance, failing which liquidator ihe may assign or transfer an asset to any person, in consultation with the stakeholders' consultation committee as per regulation 37A and failing which he may distribute the undisposed assets amongst stakeholders with the permission of the Adjudicating Authority (AA) as per Regulation 38.

22) Application for dissolution: Before applying for dissolution, the liquidator to complete distribution of realized amounts among the claimants and to ensure that the due process of liquidation as per the extant provisions and in the manner indicated in the code and regulations have been followed. It should also be ensured that no party is going to be adversely affected upon dissolution.

When the corporate debtor is liquidated, the liquidator shall make an account of the liquidation, showing how it has been conducted and how the corporate debtor's assets have been liquidated. If the liquidation cost exceeds the estimated liquidation cost provided in the Preliminary Report, the liquidator shall explain the reasons for the same.

Conclusion:

The Adjudicating Authority shall on application filed by the liquidator under section 54(1) will order that the corporate debtor shall be dissolved from the date of that order and shall be dissolved accordingly. A copy of the order to be forwarded to the ROC within seven days with which the Corporate Debtor is registered. The liquidator to file e-form INC-28 with copy of the

order as attachment with the Registrar of Companies (ROC) to get reflected the name of the corporate person in the master data as 'dissolved'.

Liquidator will get discharge from AA upon dissolution of the corporate debtor. Personal liability/ guarantee of any director/promoter of the corporate debtor would not absolve by virtue of dissolution order. Aggrieved parties are at liberty to continue or to take appropriate legal action against them.

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Source: *IBC Code 2016, regulations and case laws/AA orders on the subject.*

AN ANALYSIS OF APPLICABILITY OF LIMITATION ACT 1963 IN CIRP

Mr. Sunil Kumar Gupta

Insolvency Professional

The insertion of Section 238A in the Code has settled the dust that the Limitation Act is applicable for the purpose of CIRP proceedings under sections 7 and 9 of IBC. Further, Apex Court settled its applicability retrospectively since the inception of IBC. However, there is no clarity whether Section 18 of the Limitation Act (fresh period of limitation starts if a written acknowledgment of any property, rights, or liability is claimed) will be applicable or not. The latest judgment of Apex Court in the case of Laxmi Pat provided much-needed clarity on this issue and save this for continuous guarantee guarantees, subject to the guaranteed agreement.

The applicability of the Limitation Act, 1963 (Limitation Act) to the applications under the Insolvency and Bankruptcy Code, 2016 has been settled long back after insertion of section 238A in the Code. This section was inserted vide the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 which came into effect from June 06, 2018. By virtue of this amendment, IBC clearly stated that the provisions of the Limitation Act would apply to the proceedings or appeals before the NCLT, NCLAT, DRT and DRAT. However, prior to this, in a series of judgments, the NCLT and NCLAT, both considered claims which were time barred by limitation for the purpose of CIRP under sections 7 and 9 of IBC. Further, the Hon'ble Supreme Court upheld the applicability of section 238 A retrospectively in the case of B.K. Educational Services Private Limited v. Parag Gupta & Associates (AIR 2018 SC 5601).

In the said judgement, SC held that-

a)Limitation Act, 1963 is applicable to applications filed under section 7 and 9 of the IBC from the inception of the Code.

b) Article 137 of the Limitation Act gets attracted.

c) The right to sue will occur from the date of "default".

d) Section 5 of the Limitation Act may be applied to condone the delay in filing such application.

However, there is no clarity on the application of section 18 of Limitation Act with reference to section 7 and 9 of IBC.

Section 18 of Limitation Act states that fresh period of limitation starts if a written acknowledgement of any property, rights or liability is claimed. It is based on the doctrine of Admission.

In case of Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr. 2020 SCC Online SC 647, SC ("Babulal") laid down the following "basics" pertaining to the application of principles of limitation to IBC (Para 30)

"(a) that the Code is a beneficial legislation intended to put the corporate debtor back on its feet and is not a mere money recovery legislation;

(b) that CIRP is not intended to be adversarial to the corporate debtor but is aimed at protecting the interests of the corporate debtor;

(c) that intention of the Code is not to give a new lease of life to debts which are time-barred;

(d) that the period of limitation for an application seeking initiation of CIRP under Section 7 of the Code is governed by Article 137 of the Limitation Act and is, therefore, three years from the date when right to apply accrues;

(e) that the trigger for initiation of CIRP by a financial creditor is default on the part of the corporate debtor, that is to say, that the right to apply under the Code accrues on the date when default occurs;

(f) that default referred to in the Code is that of actual non-payment by the corporate debtor when a debt has become due and payable; and

(g) that if default had occurred over three years prior to the date of filing of the application, the application would be time-barred save and except in those cases where, on facts, the delay in filing may be condoned; and

(h) an application under Section 7 of the Code is not for enforcement of mortgage liability and Article 62 of the Limitation Act does not apply to this application."

However, it was also held that Section 18 of the Limitation Act, 1963 ('Limitation Act'), which provides for a fresh period of limitation to be computed from the time when an acknowledgment of liability has been made in writing and signed, is not applicable to proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2016 ('Code'). In the said case there was acknowledgment of liability in the financial records of the debtor.

It further observed that limitation period is extendable only by application of section 5 of the Limitation Act. The SC relied on the fact that the question of limitation is essentially a mixed question of law and facts and when a party seeks application of any particular provision for extension or enlargement of the period of limitation, the relevant facts are required to be pleaded and requisite evidence is required to be adduced. As the same was lacking in the current case, the benefit of section 18 of the Limitation Act ought not to be given.

In both judgements, the issue of applicability of the Limitation Act on proceedings under IBC has been settled in detail by Supreme Court, the issue of application of section 18 has always remained a contentious issue before the courts.

In Babulal case, the respondents extensively argued the grounds of application of section 18 on the basis of the decision of Jagnesh Shah and Anr. v. Union of India and Anr. (2019) 10 SCC 750, passed by the Supreme Court, where it was clarified that Article 18 of the Limitation Act is applicable only to Suit proceedings, making its applicability out of the preview of Insolvency Proceedings.

In the case of M Ramachandran vs. South Indian Bank Ltd. & Ors, the account of the corporate debtor was marked as a non-performing Asset (NPA) on December 31, 2015 and the bank filed an application under Section 7 of the Code on April 10, 2019. The National Company Law Tribunal (NCLT) admitted the application. The promoter of the Group, then preferred an appeal against the order of the NCLT, by way of which he had challenged the initiation of the Corporate

Insolvency Resolution Process (CIRP) and contested that the same was barred under law as the limitation period of the default was beyond the period of limitation of three years. Bank argued that besides other acknowledgements, the corporate debtor through its promoter and director had issued an email dated May 2, 2016 and a letter dated May 30, 2016 within the limitation period of the subsisting three years and that the same clearly acknowledged the debt due to the bank.

The NCLAT accepted the argument and dismissed the appeal of the corporate debtor. The said order was challenged in Supreme Court (Full Bench). The counsel for the appellant heavily relied on the judgment of Babulal. Full Bench of the Supreme Court observed that the issue of application of Section 18 of the Limitation Act has been not dealt by the Court in Babulal case and dismissed the said appeal.

Recently, the Supreme Court in the case of *Laxmi Pat Surana vs Union Bank of India & Anr.* [Civil Appeal No. 2734 of 2020] ("Laxmi Pat") has settled the issue of the applicability of Section 18 of the Limitation Act for initiation of insolvency proceedings under IBC.

The brief facts in the case are that, in 2007 and 2008, Union Bank of India ("UBI") extended credit facilities to Mahaveer Construction, a proprietary firm which was guaranteed by one Surana Metals Limited. The date of default was January 30, 2010. During pendency of recovery case before Debt Recovery Tribunal, Kolkata against principal borrower, bank wrote to the corporate guarantor/debtor on 3rd December, 2018 in the form of a notice of payment under the IBC. The corporate guarantor/debtor replied to the notice of demand vide a letter dated 8th December, 2018, inter alia, clarifying that it was not the principal borrower nor owed any financial debt to the bank and had not committed any default in repayment of the outstanding amount. The bank then filed an application under Section 7 of the IBC against Surana Metals Limited (as the corporate debtor in respect of the corporate guarantee given by it) before the NCLT on February 13, 2019. The application was admitted by the NCLT and the appeal against the order of admission was dismissed by the NCLAT. The order of the NCLAT was thereafter challenged in appeal before the Supreme Court.

The Court observes that the principal borrower as well as the corporate guarantor/debtor had acknowledged the debt time and again after 30th January, 2010 and lastly on 8th December, 2018, which was the basis of filing of the application under Section 7 of the IBC on 13th February, 2019.

As per Para 37 of the Judgement-

"Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 of the Code. However, Section 7 comes into play when the corporate debtor commits "default". Section 7 consciously uses the expression "default" — not the date of notifying the loan account of the corporate person as NPA. Further, the expression "default" has been defined in Section 3(12) to mean non-payment of "debt" when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the moment the principal borrower commits default due to non-payment of debt. Thus, when the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process under Section 7 of the Code enures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to time, for institution of the proceedings under Section 7 of the Code. Further, the

acknowledgment must be of a liability in respect of which the financial creditor can initiate action under Section 7 of the Code."

Other relevant judgements

Bengal Silk Mills Co. v. Ismail Golam Hossain Arif, the Calcutta High Court held, "In each balance sheet there is thus an admission of a subsisting liability to continue the relation of debtor and creditor, and a definite representation of *a present intention to keep the liability alive until it is lawfully determined by payment or otherwise*." In order to be regarded as acknowledgment of debt, it need not he made to the creditor nor need it amount to a promise to pay the debt.

Bhajan Singh Samra v. M/S. Wimpy International Ltd, the Delhi High Court held that admission of a debt either in a balance sheet or in the form of a letter duly signed by the respondent, would amount to an acknowledgement under section 18(1) of the Limitation Act, extending the period of limitation. Thus, acknowledgement of the petitioner's loan by way of letters and also in the respondent-company's balance sheets not only extends the period of limitation but also constitutes fresh cause of action for filing a winding up petition.

In the case of Manesh Agarwal v. Bank of India & Ors., NCLAT relied on *Jignesh Shah* ruling of SC, to hold that a one-time settlement offer amounts to acknowledgment of liability and would lead to fresh limitation period.

In *Punjab National Bank v. J-Marks Exim (India) Private Limited,* the NCLT held that the acknowledgment of liability in financial statements filed with MCA and the offer of one Time Settlement (OTS) made by the corporate debtor to the financial creditor constitutes an acknowledgement of liability within the meaning of section 18 of the Limitation Act.

Conclusion

Limitation Act is applicable to the CIRP proceedings under Section 7 and 9. In both the judgment i.e. MM Ramachandran and Laxmi Pat Supreme Court found no reason to exclude the applicability of Section 18. Article 137 of the Limitation Act (which provides that the period of limitation runs for a period of three years from "*when the right to apply accrues*") is applicable

for computation of the limitation period for initiating proceedings under the Code). Hence, an acknowledgment of debt within the period of limitation, would extend the period of limitation for initiating proceedings under the IBC. Further, in case of continuing guarantees, subject to the guarantee agreement, an acknowledgement of debt by the borrower could also save the limitation period *qua* the guarantor. On the basis of various judgements, in our humble view, "Acknowledgement" under Section 18 of the Limitation Act may constitute- Balance Sheets entry, Cheque (dated within the limitation period) given by a debtor to pay his dues, one time settlement (OTS) with Bank and E mails acknowledging the debt. Such Acknowledgement has to be prior to the expiration if limitation period.

CONSOLIDATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS

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Despite the new benefits arising from this new concept, substantial consolidation brings about a few challenges as well. The consolidation does not always bring benefit to all the creditors. It goes against those creditors who extended monies to the company as an individual entity, rather than the group. Financial Creditors will also have their voting shares reduced in the CoC due to the proportionate reduction in the debt owed to them. Operational creditors are at severe disadvantage with some might even losing their right to be present in the CoC meetings. It is, therefore, expected that while making provisions in this aspect the above ought to be considered.

Doctrine of consolidation

The doctrine of substantial consolidation, which is widely, used in US and UK bankruptcy laws. There is no explicit provision available in the Insolvency and Bankruptcy Code, 2016 ('Code' for short) to initiate consolidation of corporate insolvency processes. This doctrine enables the adjudicating authority to merge the assets and liabilities of all such individual entities in a common pool, resulting into a common corporate insolvency resolution process ('CIRP' for short). This not only maximizes the asset value of the group company, but also attempts to eliminate cross-debts.

The Insolvency Law Committee in their report on 26.03.2018 paved a way for this doctrine of consolidation to enter the Indian judiciary. The report stated that the treatment of group companies within insolvency laws is a complicated subject. The current system of insolvency laws is new, and it may be too soon to introduce a complex subject, like the present issue.

Case laws

In **'State Bank of India v. Videocon Industries Limited'** the Mumbai Bench decided in favor of consolidation of CIRPs vide its order dated 08.08.2019. In this case, a consortium of banks

led by State Bank of India, being the common creditor, moved a petition before Adjudicating Authority, Mumbai Bench, asking for the substantial consolidation of the group of 15 companies under the 'Videocon Group', to form the common debtor. The functions of the companies were so interlinked that it was difficult to ascertain their value as independent entities due to inability to segregate their assets and liabilities. Videocon Group's consolidated financial statements, or existence of inter-corporate guarantees on loans further established their interdependence on each other. The said petition was filed by State Bank of India because a separate CIRP petition against each of the companies failed to attract bids due to their complex interdependence, and inability to pay off since they held no separate value or identity.

The question before the Bench was to analyze whether the consolidation so asked for, would be more beneficial than harmful.

The Adjudicating Authority analyzed the case, with reference to previous US and UK case laws, and decided in favor of the consortium, grouping 13 out of the 15 companies into a single entity as the common debtor. The Bench left out two of their companies, KAIL Ltd. and Trend Electronics Ltd., out of the grouping because they did not have any operational dependency on the other companies and were strong financial entities.

Mumbai Bench stated that the problem of consolidation had cropped up sooner than expected, and a matter as pressing as this could not be avoided or deferred till legal provisions are established for the same. The Bench came up with two-pronged tests to determine the test for consolidation in this case-

- A *prima facie* existence of elementary governing factors; and
- Categorisation based on the governing factors.

The Bench used the approach forwarded by the US bankruptcy courts and laid down a list of 14 factors, whose existence needed to be verified into, such as-

- common control;
- common directors;
- common assets;
- common liabilities;
- interdependence;
- interlacing of finance;
- pooling of resources;
- coexistence for survival;
- intricate link of subsidiaries;
- intertwined accounts;
- interloping of debts;
- singleness of economic units;
- common financial creditors; and
- common group of corporate debtors.

The first category consisted of companies whose assets and liabilities were so interlinked that their segregation would result in little or no maximization of asset value, whereas the second category would comprise of companies whose asset liability intermingling, when segregated, would still provide for viable profitable restructuring proposals.

In **'Radiko Khaitan Ltd v. BT & FC Pvt Ltd. and 6 others' - COMPANY APPEAL (AT)(Insolvency) No.919/2020, NCLAT, New Delhi, dated 26.03.2021**, the appellant, an Operational Creditor filed this Appeal against Impugned Order dated 02.09.2020 passed by Adjudicating Authority, Bangaluru Bench. The Adjudicating Authority rejected the application filed by the appellant for consolidation of two corporate insolvency resolution processes.

The appellant, an operational creditor, initiated corporate insolvency resolution process against the first respondent BT & FC Private Limited for the default of Rs.5.72 crores. The said application was admitted by the Adjudicating Authority and appointed interim resolution professional (respondent No. 6). The Committee of Creditors ('CoC' for short) of Corporate Debtor (Respondent No. 1) consists of State Bank of India, Financial Creditor (Respondent No. 3) and Ugro Capital Limited, Financial Creditor (Respondent No. 4).

The Ugro Capital Limited, a financial creditor initiated CIRP under Section 7 of the Code against Bengaluru Dehydration and Drying Equipment Company Pvt. Ltd. (Respondent No. 2) for the default of Rs.25.81 crores as guarantor. The Adjudicating Authority appointed R. Bhuvaneshwari as IRP. The CoC consist of State Bank of India (Respondent No. 3) and Ugro Capital Ltd. (Respondent No. 4).

The appellant filed an application under Section 60(5) (a) of the Code read with Rule 11 of NCLT Rules, 2016 by *inter alia* seeking an order for the consolidation of CIRP of Respondent Nos. 1 and 2. The appellant submitted the following before the Adjudicating Authority-

- The Respondent No. 2 only operates as the land holding Company of Respondent No. 1 without carrying on any business activity.
- The Respondent No. 2 owns immovable property bearing 15, first phase, Peenya Bengaluru and Respondent No. 1 set up its bottling unit thereon to undertake the activity of the blending and bottling for the Company.
- The business of Corporate Debtors is inextricably interlinked and intertwined.
- The shareholding pattern of the Corporate Debtor shows that the Corporate Debtors are promoted, owned and controlled by one Mr. M.V. Murlidher along with his family holding 65% and 71% of the shareholding in Respondent Nos. 1 and 2 respectively.

- The Board of the Corporate Debtors consist of common Directors *i.e.*, Mr. M.V Murlidher and Mrs. Padma Murlidher.
- The claims of Respondent Nos. 3 and 4 show that the Respondent No. 2 stood as a guarantor for the financial debt of Respondent No. 1.
- Therefore, the assets and liabilities of the Corporate Debtors are also interlinked. Therefore, CIRP of the Corporate Debtors ought to be consolidated.

The first and sixth respondent supported the arguments put forth by the appellant before the Adjudicating Authority. The second and seventh respondent opposed the arguments of the appellant. They contended that-

- Merely having few common shareholders in Respondent Nos. 1 and 2 cannot be ground for consolidation of CIRP of both the Companies into a single entity.
- There is no provision under the Code to justify such consolidation.

The third and fourth respondents contended that-

- The CoC have already resolved to liquidate the Respondent No. 1 Company and same has been endorsed and submitted by the Resolution Professional on 03.03.2020 before the Adjudicating Authority.
- Thus, the present application has become infructuous.
- There is no ground made out for consolidating the CIRP of the Respondent Nos. 1 and 2.

The Adjudicating Authority held that the applicant being an Operational Creditor has no *locus standi* to file the application. The CoC of Respondent No. 1 in sixth meeting unanimously decided to go for liquidation. The Adjudicating Authority rejected the application filed by the appellant on the ground that the application is filed on mis-conception of facts and law and the appellant too has no *locus* to interfere in the CIRP of Respondent No. 2 by filing the application.

Aggrieved against the order of Adjudicating Authority the appellant filed the present appeal. The appellant submitted the following before the Appellate Tribunal-

- The Adjudicating Authority, Mumbai Bench, in the case of 'State Bank of India Vs. Videocon Industries Ltd.' decided on 08.08.2019 laid down certain parameters while ordering for consolidation of CIRP. The Present case fulfilled the parameters, however, the Adjudicating Authority without considering the parameters rejected the application of the appellant.
- The object of the Code is resolution and rehabilitation of the Corporate Debtors as a going concern as opposed to liquidation.
- Both the Corporate Debtors have not got a resolution plan and the CoCs have resolved to liquidate.
- The only option available to revive the Companies is to consolidate them and offer them as a single unit for CIRP.

The respondent Nos. 3 and 4 contended that-

- The Appellant being an Operational Creditor has no *locus standi* to seek consolidation of CIPR of the Respondent Nos. 1 and 2 because the Appellant cannot form part of CoC.
- The Respondent No. 1 has had no business relationship whatsoever with Respondent No. 2 and has no direct nexus with the Respondent No. 2
- The Respondent No. 2 possesses an immovable property (Mortgaged with Respondent Nos. 3 and 4 having a *pari passu* charge). Therefore, appellant *mala fide*ly seeking consolidation of CIRP of the Respondent Nos. 1 and 2.
- The respondent Nos. 1 and 2 are two separate and distinct legal entities and apart from the common directors there is no commonality in terms of shareholding, nature of business, Operational Creditors, investments and borrowing/landing.
- There is no cross shareholding or *inter-se* landing/borrowing between the Respondent Nos. 1 and 2 companies, which is one of the essential ingredients for the said Respondent Companies to be deemed as group companies.

The Appellate Tribunal considered the submissions put forth by the parties to the appeal. It further analyzed the order in 'State Bank of India v. Videocon Industries' (supra) in detail. The Appellate Tribunal observed that the Adjudicating Authority, Bengaluru Bench, while passing the impugned order there is no finding whether these parameters are fulfilled or not in this case. The Appellate Tribunal considered whether the Respondent Nos. 1 and 2 have fulfilled the criteria of consolidation of CIRP.

- **Common Control** - The Respondent Nos. 1 and 2, both the companies are promoted by Mr. M.V Murlidher and his wife Padma Murlidher. Murlidhers family holds approximately 77% of total shareholding and 78% of total shareholding in Respondent Nos. 1 and 2 Company respectively; the shareholder of the Respondent No. 2 Company together holds approximately 85% of the shareholding in the Respondent No. 1 Company. Thus, both Companies are promoted by the same family and there is unity of ownership and interest.
- **Common Directors:** Mr. M.V. Murlidher and Padma Murlidher both are Directors in Respondent Nos. 1 and 2 Company. Thus, the Directors of the both Companies are Common and there is common control of companies.
- **Common Assets**: The Respondent No. 2 Company owns a partial of land admeasuring 2 acres 36 gundas situated at No. 15, First Phase, Peenya, Bengaluru and has constructed warehouse on the land. The Respondent No. 1 Company runs a bottling plant unit in the warehouse and owns the plant and machinery therein, therefore, there is inter-dependency between two Companies and the assets are common to such an extent that the Respondent No. 2 Company has provided its land and warehouse to the Respondent No. 1 Company to carry on its business activity.
- **Common Liabilities**: In so far as the loan obtained by the Respondent No. 1 Company from the Respondent No. 4 is concerned, the Respondent No. 2 as security had created *pari pasu* charge over the Peenya land, placed 67% of its shares and provided a corporate guarantee. Therefore, the liabilities of the Companies are also common and Companies had

made themselves jointly and severally liable for the loans. Respondent No. 1 and 2 have common creditors i.e. Respondent Nos. 3 and 4. Directors of both the Companies have given personal guarantees for the loans.

- **Inter-dependence:** The Respondent No. 1 Company was running a Distillery Unit in the Peenya land and warehouse building belonging to the Respondent No. 2 Company as stated by Respondent No. 6 (RP) in its Status Report filed before this Appellate Tribunal. Thus, the Respondent Nos. 1 and 2 are interdependence.
- **Pooling of Resources:** Undisputedly the Directors are common using their contacts and relationship to run both the Companies. For the sanction of the loan facility for the Respondent No. 1 Company. The Respondent No. 2 Company has mortgaged Peenya land and warehouse and also stood as guarantor for the Respondent No. 1 Company.
- **Intricate links between the Companies**: The Respondent No. 2 is associated Company of the Respondent No. 1, this fact is admitted by the Respondent No. 3 while submitting its claim form before the RP.
- **Common Financial Creditors**: The Respondent Nos. 1 and 2 have Common Financial Creditors i.e. the Respondent Nos. 3 and 4.

The Appellate Tribunal was satisfied the criteria for consolidation of CIRPs were fully met and satisfied. Respondent Nos. 3 and 4 in their written submissions have not pointed out that how the consolidated CIRP shall prejudice their rights. Even if the combined CIRP is ordered the balance of convenience is squarely on Respondent Nos. 3 and 4 herein who are secured Financial Creditors and whose interest will remain protected even during the combined Insolvency as secured Financial Creditors.

The Adjudicating Authority has not appreciated the facts of this case in right perspective. The Appellate Tribunal allowed the appeal and directed the Adjudicating Authority to appoint a single common Resolution Professional/Liquidator who will carry on the duties and perform the

function of the Resolution Professional/Liquidator in accordance with the I&B Code for the consolidated CIRP.

PERSONAL GUARANTORS' VIS-A-VIS IBC

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The Notification dated November 15, 2019, issued by the Central Government extending the scope of Insolvency Bankruptcy Code, 2016 in so far as it relates to the personal guarantors of the corporate debtor was challenged by various stakeholder as ultra vires. The Apex Court uphold the impugned notification and declares the same not an instance of legislative exercise, nor amounts to impermissible and selective application of provisions of the Code. This judgment would assist in speeding the revival of the corporate debtor, as against the current trend of liquidation.

Initiation of controversy

The Notification dated November 15, 2019, issued by the Central Government extending the scope of Insolvency Bankruptcy Code, 2016 ("Code") in so far as it relates to the personal guarantors of the corporate debtor brought a wave of joy amongst the creditors with the assurance of greater accountability among personal guarantors with maximisation of value to the creditors.

To ensure that the said proceedings are filed and adjudicated upon smoothly, the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 and the Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 also come into force.

However, the said Notification and allied regulation were not perceived affirmatively and therefore lead to hue and cry among the heavyweights of the industries. Mass filing of petitions challenging the maintainability of the Notification on constitutional grounds was witnessed before various High Courts. Consequently, the Hon'ble Supreme Court transferred all such common petitions from various High Courts with a view to deliver a common order addressing the issues arising out of the Notification. After due consideration of the arguments presented by the aggrieved parties and the Union, the Hon'ble Supreme Court settled the controversy in

the matter of *Lalit Kumar Jain vs. Union of India*, on May 21, 2021. This shall be discussed in the latter part of this article.

Before commenting on the main controversy, the article discusses the environment before the issuance of the Notification along with the law governing personal guarantee in India.

Personal Guarantee under Indian Contract Act

Black Law's dictionary defines the term "guarantee" as the assurance that a legal contract will be duly enforced. Contract of Guarantee is a secondary contract that flows from the primary contract entered between the Principal Debtor and Creditor.

Chapter VIII of the Indian Contract Act, 1872 deals with indemnity and guarantee. Section 126 to 147 governs the contract of guarantee. According to the definition of "Contract of guarantee" as enshrined in Section 126, the contract of guarantee has three aspects, namely:

i. Surety: A person giving his/her guarantee;
ii. Principal Debtor: For whom the guarantee is given; and,
iii. Creditor: To whom the guarantee is given.

The surety here may be a corporate or a natural person and the liability of such person goes as far as the liability of the principal debtor. As a basic tenet of the Contract Law, for a contract to be a valid one there needs to be a consideration in lieu of the performance of such contract. Similarly, any promise made for the benefit of the Principal Debtor may be a sufficient consideration to the surety for giving the guarantee.

The pertinent question which arises in the said contract relates to scope of the liability of the surety. It is one of the most significant aspects of such contract. As per section 128 of the Indian Contract Act, 1872, the liability of the surety is co-extensive with that of the principal debtor and therefore, a creditor may go against either the principal debtor, or the surety, or

both, in no particular sequence. Though the liability of guarantors/surety *can* be limited subject to the terms of the contract of guarantee, the general principle of such contracts is that the liability of the principal debtor and the surety is co-extensive and is, therefore, joint and several. Thus, a creditor has a right to obtain a decree against the surety. However, on the flip side, the surety has no right to dictate the terms of the contract to the creditor vis-a-vie how s/he should make the recovery in case of breach of such contracts. Taking a cue from the Contract Act, the Supreme Court in *State Bank of India v. V. Ramakrishnan & Ors*, (2018) 17 SCC 394, and the National Company Law Appellate Tribunal (NCLAT) in *State Bank of India v. Athena Energy Ventures Private Limited,* 2020 SCC Online NCLAT 774, held that creditors are entitled to initiate simultaneous proceedings before the NCLT as against the corporate debtor and before the relevant forum as against the personal guarantor to discharge the contractual liability.

Under the terms of the contract, the liability of the surety can be extended to a series of transaction and shall be a continuing one, and same is covered by section 129. However, to limits its liability against future transactions the surety can revoke its guarantee by simple serving a notice to the creditor as provided under section 130 of the Contract Act**.**

Amendments before the release of the Notification

The intent of the law makers to bring guarantors within the scope of the Code can be said to be pre-meditated as, the original section 2(e) before the amendment of 2018 encompassed all individuals' namely personal guarantors to corporate debtors; partners of firms; partnership firms; other partners as well as individuals who were either partners or personal guarantors to corporate debtors. Further, the Section 60 before the amendment of 2018 contemplated that the adjudicating authority in respect of personal guarantors was to be the NCLT thereby paving a way for enabling provisions as notified by the Notification vis-a-vie the guarantors of the Corporate Debtor.

Controversy in Lait Kumar Jain vs. Union of India

A common question that arises before the Hon'ble Supreme Court concerning all the seventy-five petitions concerns that was the validity of the Notification dated 15.11.2019 (hereinafter referred to as "the impugned notification") issued by the Central Government along with the validity of allied regulations that came into force, i.e. the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 issued by the Insolvency and Bankruptcy Board of India, in furtherance of the Notification.

The petitioners challenged the impugned notification on the following grounds:

i. **That the issuance of notification surpassed the authority conferred upon the Union of India.**

The petitioners were of the view that the power conferred upon the Union under Section 1(3) of the Code does not permit it to notify parts of provisions of the Code, or to limit the application to certain categories of

persons. The impugned notification notified various provisions of the Code only in so far as they relate to personal guarantors to corporate debtors. Therefore, the same is not tenable as per the proviso to Section 1(3) of the Code.

ii. **That the impugned notification is an exercise of excessive delegation.**

The Central Government had no authority, legislative or otherwise, to impose conditions on the enforcement of the Code. It was contended as a corollary, that the enforcement of Sections 78, 79, 94-187 etc. in terms of the impugned notification of the Code only concerned personal guarantors and is *ultra vires* with regard to the powers granted to the Central Government. Further, the parent statute i.e. the Code falls short in defining the "guarantor". It was pointed out that though Section 239(1) of the Code empowers the Insolvency and Bankruptcy Board of India to make rules and regulations in

consonance with the objective and provisions of the Code, it still doesn't empower them to issues rules that define a term that is not defined in the Code.

iii. **That the impugned notification suffers from non-application of mind**

The petitioners asserted that the Central Government failed to bring into effect Section 243 of the Code, which would have repealed the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. Therefore it was implied that due to non-application of mind of the law-makers, impugned notification due to its illogical effect creates two self-contradictory legal regimes for insolvency proceedings against personal guarantors to corporate debtors.

iv. **That the impugned notification is *ultra vires***

The provision of the Code in so far as it notifies provisions of Part III of the Code only in respect of personal guarantors to corporate debtors. It was contended that the Part III of the Code does not contain any provision permitting initiation of the insolvency resolution process as against personal guarantors to corporate debtors. Also, that provisions of the Code brought into effect by the impugned notification when enforced only in respect of personal guarantors to corporate debtors, are manifestly arbitrary.

Also, the act of clubbing financial creditors and operational creditors concerning the procedure for insolvency resolution of personal guarantors to corporate debtors amounts to treating unequal, equally and amounts to collapsing the classification carefully created by Parliament in Part II of the Code. The application of Sections 96 and 101 of the Code by the impugned notification leads to the illogical consequence of staying insolvency proceedings against the corporate debtor when insolvency proceedings initiated.

v. **That it is untenable as the liability of a guarantor is co-extensive with that of the principal debtor**.

Given the settled law that upon conclusion of insolvency proceedings all claims against the principal debtor extinct, except to the ones admitted in the insolvency resolution process itself. This is further clear from Section 31 of the Code, which makes the resolution plan approved by the Adjudicating Authority binding on the corporate debtor, its creditors and guarantors.

Observation and Ratio

The Hon'ble Apex Court observed that Insolvency proceedings' relating to individuals is regulated by Part-III of the Code. Before the amendment of 2018, all individuals namely personal guarantors to corporate debtors, partners of firms, partnership firms and other partners as well as individuals who were either partners or personal guarantors to corporate debtors fell under one descriptive description under the original Section 2(e). Concerning the fact that Section 2 brought all three categories of individuals within one umbrella class as it were, it would have been difficult for the Government to selectively bring into force the provisions of part –III only in respect of personal guarantors. The 2018 Amendment Act altered Section 2(e) and subcategorized three categories of individuals, resulting in Sections 2(e), (f) and (g).The earlier notification dated 30.11.2016 had brought the Code into force concerning entities covered under Section 2(a) to 2(d).

The scheme of the Code always contemplated that overseas asset of a corporate debtor or its guarantor could be dealt with identically during insolvency proceedings, including by issuing letters of request to courts or authorities in other countries to deal with such assets located within their jurisdiction. The impugned notification authorises the Central Government and the Board to frame rules and regulations on how to allow the pending actions against a personal guarantor to a corporate debtor before the Adjudicating Authority.

Also, Section 243, which provides for the repeal of the personal insolvency laws, not notified, yet. Section 60(2) prescribes that in the event of an ongoing resolution process or liquidation process against a corporate debtor, an application for resolution process or bankruptcy of the personal guarantor to the corporate debtor shall be filed with the concerned NCLT seized of the resolution process or liquidation. Therefore, the Adjudicating Authority for personal guarantors will be the NCLT, if a parallel resolution process or liquidation process is pending in respect of a corporate debtor for whom the guarantee is given. The same logic prevails, under Section 60(3), when any insolvency or bankruptcy proceeding pending against the personal guarantor in a court or tribunal and a resolution process or liquidation is initiated against the corporate debtor.

In conclusion, the Apex Court uphold the impugned notification and declares the same not an instance of legislative exercise, nor amounts to impermissible and selective application of provisions of the Code. It was observed against the contention of the petitioner that no compulsion cast in the Code that it should be made applicable to all individuals, (including personal guarantors), at the same time. The sufficient indication in the Code via Section 2(e), Section 5(22), Section 60 and Section 179 acknowledges the fact that personal guarantors, though forming part of the larger grouping of individuals, is to be, given their intrinsic connection with corporate debtors, through the same adjudicatory process and by the same forum as to such corporate debtors.

The Court also settled the other controversy raised by the petitioners concerning the discharge of the liability. The Court held that approval of a resolution plan does not *ipso facto* discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. The release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.

Conclusion

Law has to stand the test of time and its true spirit can be released only once it's applied. The judgment is delivered at a very crucial time when the country is fighting the catastrophe of the pandemic. The moratorium against initiating fresh insolvency proceeding also lifted months back, had marked a dent in the objective of the Code. This judgment would assist in speeding the revival of the corporate debtor, as against the current trend of liquidation.

CASE LAWS

INSOLVENCY PROFESSIONAL AGENCY
OF INSTITUTE OF COST ACCOUNTANTS OF INDIA

SECTION 35 - CORPORATE LIQUIDATION PROCESS - LIQUIDATOR - POWERS AND DUTIES OF

- **Savan Godiawala v. G. Venkatesh Babu - [2020] 117 taxmann.com 477 /[2020] 160 SCL 634 (NCL-AT)**

Where criminal complaint under section 276B of Income-tax Act was filed against corporate debtor company and its managing director and during pendency of liquidation proceedings against company, managing director approached authority for compounding of its offence, prosecution having been launched against managing director in his personal capacity and not because he was director of company, liquidator would not be liable to pay compounding fee.

R-1 was managing director and person responsible and in-charge of day-to-day affairs of the corporate debtor company. Income Tax Department filed criminal complaint against R-1 and the corporate debtor with allegation that they had committed an offence punishable under section 276B, read with section 278B, of the Income-tax Act for having deducted tax at source during financial year 2012-13 but not having deposited it to the Government account within stipulated period. CIRP under section 7 was initiated against the corporate debtor and thereafter, the appellant was appointed as official liquidator of the corporate debtor. During pendency of the liquidation proceedings, R-1 filed an application for compounding of offence and also filed an application seeking direction to the appellant to make payment of compounding fees on behalf of the corporate debtor before concerned authorities. The official liquidator opposed the application, however, the Adjudicating Authority by order directed him to reimburse compounding fees to R-1.

Held that the liquidator has to institute or defend any suit, prosecution or other legal proceedings, civil or criminal in name of or on behalf of the corporate debtor; however, compounding of offence is a process whereby person/entity committing default files an application to compounding authority accepting that it has committed an offence and same

should be condoned. Since in the instant case, prosecution was launched against R-1 in his personal capacity and not because R-1 was managing company and even after liquidation proceedings had started, R-1 would have to face trial in his personal capacity and ultimately if offence was proved, he would be punished and company being a juristic person would not be punished with imprisonment, impugned order directing the liquidator to reimburse compounding fees to R-1 would not be sustainable in law and facts.

Case Review : Vennelaganti Sri Hari v. Savan Godiawala [2020] 117 taxmann.com 476 (NCLT - Hyd.), Set aside.

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

- **Gopal Krishan Bathla v. Crown Realtech (P.) Ltd. - [2020] 117 taxmann.com 493 /[2020] 160 SCL 648 (NCL-AT)**

Appeal requesting Appellate Tribunal to exercise its inherent powers to take on record settlement deed arrived at between financial creditor and corporate debtor prior to admission of application under section 7 and constitution of committee of creditors was to be dismissed as there was no evidence on record to establish that any such settlement was arrived at.

The Adjudicating Authority by impugned order admitted application under section 7 filed against the corporate debtor as it had failed to handover physical possession of flat within agreed period to allottee-financial creditor. Against admission of said application, the appellant - Ex-director of corporate debtor, preferred an appeal on ground that the financial creditor had arrived at a settlement with the corporate debtor prior to date of admission of the application under section 7 and constitution of committee of creditors and, hence, the Appellate Tribunal should exercise

its inherent powers to take on record settlement deed executed inter se the financial creditor and the corporate debtor and set aside impugned order. However, fact of such settlement had not been brought to notice of the Adjudicating Authority even after passing of impugned order and until constitution of committee of creditors and there was no evidence on record to establish that the applicant financial creditor had arrived at any such settlement with the corporate debtor, it was to be concluded that this was nothing but a ploy designed to defeat legitimate interests of other stakeholders.

Held that, no ground having been made out for exercise of inherent powers by the Appellate Tribunal, instant appeal was to be dismissed.

Case Review : Mohan Agarwal v. Crown Realtech (P.) Ltd. [2020] 113 taxmann.com 546/158 SCL 74 (NCLT - New Delhi), Affirmed.

stayed.

SECTION 9 - CORPORATE INSOLVENCY RESOLUTION PROCESS - APPLICATION BY OPERATIONAL CREDITOR

- **Pankaj Aggarwal v. Union of India - [2020] 117 taxmann.com 494 /[2020] 160 SCL 624 (Delhi)**

In view of Notification No. S.O. 1205(E), dated 24-3-2020, order passed by NCLT admitting application under section 9 where default amount was less than Rs. 1 crore, was to be stayed.

The petitioner was falling under category of Micro, Small and Medium Enterprise (MSME). An application under section 9 was admitted in its case by the NCLT and moratorium was declared by an order dated 29-5-2020. Against said order, the petitioner filed instant petition contending that vide Notification dated 24-3-2020, minimum amount of default had been increased to Rs. 1 crore; however, in petitioner's case the NCLT proceeded on basis that defaulted amount was more than Rs. 1 lakh, and, thus NCLT wrongly exercised its jurisdiction.

Held that prima facie, there was an error committed by NCLT, thus, plea raised by the petitioner deserved consideration. In such circumstances, impugned order passed by NCLT was to be stayed.

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

- **Prashant Properties (P.) Ltd v. Vijaykumar V. Iyer - [2020] 117 taxmann.com 546 /[2020] 160 SCL 332 (NCL-AT)**

Operational creditor cannot seek intervention after approval of Resolution Plan by Adjudicating Authority.

Held that where approved resolution plan had not been assailed by the appellant-operational creditor in appeal under section 61 and limitation for filing such appeal had already expired, the appellant could not seek intervention after approval of resolution plan by the Adjudicating Authority.

Case Review : Allahabad Bank v. SPS Steels Rolling Mills Ltd . [2020] 117 taxmann.com 545 (NCLT-Kol.), Affirmed.

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

- **Anjani Gases v. B.P. Projects (P.) Ltd. - [2020] 117 taxmann.com 561 (NCL-AT)**

Where prior to issuance of Demand Notice by operational creditor, there was a record of dispute, viz, filing of FIR for cheating by creditor against debtor, existing between parties which was serious in nature and could not be adjudicated in a summary proceeding, order passed by Adjudicating Authority rejecting CIRP application, could not be interfered with.

The appellant - operational creditor alleged that the respondent-corporate debtor committed default in paying operational debt. However, prior to issuance of Demand Notice by the

appellant under section 8, the appellant itself started dispute by filing an FIR against Directors of the respondent company for cheating the appellant for impugned amount. The respondent disputed debt to be payable and categorically stated that they had paid an excess amount apart from amount payable. The appellant disputed respondent's version.

Held that even prior to issuance of Demand Notice by the appellant, there was a record of dispute existing between parties which was serious in nature. Since there was pre-existing dispute between parties which could not be adjudicated in a summary proceeding, order passed by the Adjudicating Authority rejecting CIRP application could not be interfered with.

Case Review : Anjani Gases v. B.P. Projects (P.) Ltd. [2019] 106 taxmann.com 78/154 SCL 270 (NCLT - Kol.), Affirmed.

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

- **Central Transmission Utility v. Korba West Power Co. Ltd. - [2020] 117 taxmann.com 611 (NCL-AT)**

Appellate Tribunal is not empowered to condone delay in filing appeal beyond 15 days after expiry of period of 30 days, hence, appeal filed by appellant after 150 days of passing of impugned order was to be dismissed as barred by limitation.

The appellant had entered into bulk power transmission agreement for long term access with the corporate debtor. The corporate debtor was liable as per agreement to pay transmission charges, however, the corporate debtor filed petition against the appellant before the Central Electricity Regulatory Commission (CERC) claiming deferment of charges. During pendency of said application, the corporate debtor filed application under section 10 which came to be admitted. The resolution plan submitted by 'A' came to be accepted by the Adjudicating Authority by order dated 24-6-2019. The appellant filed instant appeal against the impugned order dated 24-6-2019. It was found that the appeal had been filed after about 150 days of

impugned order. The appellant submitted that it did not have knowledge of impugned order and knowledge of impugned order was received by appellant only by virtue of pending proceeding before CERC. It further submitted that it was unable to file appeal because of pendency of proceedings before CERC. However, nothing was shown that under law there was any bar to appellant from filing appeal against impugned order merely because proceedings were pending before CERC. Further, appeal memo showed that the appellant was aware of limitation period of 30 days under section 61 and also legal position that the Appellate Tribunal could at most condone period of 15 days beyond period of 30 days.

Held that the Appellate Tribunal had no jurisdiction to entertain appeal as it was time barred and thus was to be dismissed.

Case Review : Abhijit Guhathakurta v. Korba West Power Co. Ltd. [2019] 108 taxmann.com 323 (NCLT - Ahd.), Affirmed.

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

- **Gouri Shankar Jain v. Punjab National Bank - [2020] 117 taxmann.com 613 (Calcutta)**

Liability of guarantor of debt does not stand reduced/extinguished upon an Insolvency Resolution Plan in respect of corporate debtor being approved.

Resolution Plan approved by the Tribunal in respect of the corporate debtor, envisaged payment of Rs. 34.25 crores to secured financial creditors against their entire outstanding claim amount of Rs. 76.21 crores in full and final settlement of all dues. The resolution applicant had paid secured financial creditors in terms of such Resolution Plan. First respondent bank, a secured creditor, issued a notice under section 13(2) of the SARFAESI Act to the petitioner personal guarantor on basis of guarantee. Thereafter, the petitioner was posted with CIBIL for alleged default of Rs. 12.62 crores towards first respondent-bank. In instant writ, the petitioner sought

for a direction upon first respondent-bank to remove name of petitioner from the list of defaulters on ground that personal guarantee given by the petitioner stood extinguished upon Resolution Plan being approved.

Held that liability of guarantor of debt of a corporate debtor did not stand reduced/extinguished upon Insolvency Resolution Plan in respect of corporate debtor being approved.

SECTION 52 - CORPORATE LIQUIDATION PROCESS - SECURED CREDITOR IN

- **Srikanth Dwarakanath v. Bharat Heavy Electricals Limited - [2020] 117 taxmann.com 622 /[2020] 160 SCL 425 (NCL-AT)**

Where secured creditors which were 73.76 per cent in value had already relinquished security interest into liquidation estate, it would be prejudicial to stall liquidation process at instance of a single creditor having only 26.24 per cent share (in value) in secured assets and, therefore, liquidator was directed to complete liquidation process though respondent-secured creditor had not relinquished its security interest in assets of corporate debtor.

The respondent, a secured creditor of the corporate debtor, succeeded in Arbitration proceeding against the corporate debtor and the respondent had been granted lien over equipment and goods lying at site of the corporate debtor. Secured assets, on which the respondent had been granted lien or a charge was one which was already hypothecated to all other secured creditors. In liquidation of the corporate debtor, the respondent informed the appellant-liquidator about unwillingness to relinquish its security interest in assets of the corporate debtor. All secured creditors had relinquished their security interest into liquidation estate of the corporate debtor except respondent. The liquidator was unable to proceed with any further sale of assets without receipts of relinquishment of security interest from all secured creditors to whom said assets were charged. The liquidator filed a application seeking permission from the Adjudicating Authority to sell assets of the corporate debtor. However, said application was rejected by the Adjudicating Authority by impugned order on ground that respondent was a secured creditor, entitled to proceed under section 52 to realise its security interest and the appellant-liquidator

could not cause sale of assets falling under section 52 in manner as specified under section 53 unless charge holder relinquished security interest.

Held that since secured creditors which were 73.76 per cent in value had already relinquished security interest into liquidation estate, it would be prejudicial to stall liquidation process at instance of a single creditor having only 26.24 per cent share (in value), in secured assets. Section 13 of the SARFAESI Act would be applicable in instant case to end deadlock, and decision of 73.76 per cent of majority secured creditors, who had relinquished security interest would also be binding on dissenting secured creditor, i.e., the respondent. The respondent's charge on secured assets was not exclusive, respondent could realise a security interest as per provision section 13(9) of the SARFAESI Act. Since the respondent did not have a requisite 60 per cent value in the secured interest, the respondent did not have right to realise its security interest, as it would be detrimental to the liquidation process and interest of remaining secured creditors and, therefore, appellant/liquidator was directed to complete liquidation process.

Case Review : Srikanth Dwarakanath v. Bharat Heavy Electricals Ltd. [2020] 113 taxmann.com 200 (NCLT - Chennai),ss Set aside.

SECTION 238 - OVERRIDING EFFECT OF CODE

- **JSW Steel Ltd. v. Mahender Kumar Khandelwal - [2020] 117 taxmann.com 624 (NCL-AT)**

Where corporate debtor was undergoing CIRP, order of attachment of property passed by Directorate of Enforcement with regard to part property of corporate debtor was to be stayed and property already attached by them was to be released in favour of Resolution Professional.

Held that Directorate of Enforcement does not have jurisdiction to attach property of the corporate debtor or part thereof which was undergoing CIRP. Therefore order of attachment passed by the Directorate of Enforcement with regard to part property of the corporate debtor

was to be stayed and property already attached by them was to be released in favour of the Resolution Professional.

SECTION 7 - CORPORATE INSOLVENCY RESOLUTION PROCESS - INITIATION BY FINANCIAL CREDITOR

- **Gradient Nirman (P.) Ltd. v. IFCI Ltd. - [2020] 117 taxmann.com 627 /[2020] 161 SCL 636 (NCL-AT)**

Where debt became NPA on 30-6-2014, CIRP Application filed on 8-11-2017 was barred by limitation; limitation period is extended neither by an acknowledgement without signature of concerned party nor by DRT/SARFAESI recovery proceedings.

Debt became NPA on 30-6-2014 and, thus, 'right to sue' accrued on 30-6-2014. The limitation period of 3 years ended on 29-6-2017. The financial creditor relied upon an acknowledgement of debt which was dated 30-9-2017, however, said acknowledgement was neither signed by the concerned party against whom right was claimed nor by any person through whom concerned party derived its title or liability. The CIRP application was filed on 8-11-2017.

Held that benefit under section 14 (2) of the Limitation Act cannot be given to the applicant where there is no materiel on record to show that subject application was being prosecuted with due diligence in a court of First Instance or of Appeal or Revision which has no jurisdiction. Acknowledgement in question would neither come to rescue of the financial creditor nor would shift forward period of limitation. Suit for recovery based upon a cause of action even if it is within limitation, cannot in any manner impact separate and independent remedy of a winding-up proceeding and, thus, a suit for recovery is a separate and independent proceeding distinct from remedy of winding-up and, therefore, contention that period spent while pursuing DRT/SARFAESI proceedings should extend period of limitation, cannot be sustained, as intent of the Court is not to give a new lease of life to debt which is already time barred. Thus, CIRP application was barred by limitation.

Case Review : IFCI Ltd. v. Indu Techzone (P.) Ltd . [2020] 114 taxmann.com 524 (NCLT - Hyd.), Reversed.

SECTION 14 - CORPORATE INSOLVENCY RESOLUTION PROCESS - MORATORIUM - GENERAL

- **India Infoline Finance Limited v. State of West Bengal - [2020] 117 taxmann.com 641 /[2020] 160 SCL 488 (Calcutta)**

Where any action of police would have to be based on investigation on subject matter of transaction, which was directly within purview of CIRP, police could not take further steps in matter unless and until CIRP culminates in a resolution or otherwise.

A notice under Section 41A of Criminal Procedure Code was served on the respondent and subsequent to registration of FIR, a police case was started. Accused persons were examined by the police who admitted that a loan of Rs.25 lakh was procured from the petitioner company and they were guarantors of said loan. It was further stated by accused persons that loan amount was not in their personal account but credited in account of their company 'P'. Though the police took sufficient steps, order of intervening commencement of CIRP and moratorium following therefrom had been passed by the NCLT.

Held that any action of police would have to be based on investigation on subject matter of transaction, which was directly within purview of CIRP, it was to be deemed that police could not take further steps in matter unless and until CIRP culminates in a resolution or otherwise.

SECTION 32A - CORPORATE INSOLVENCY RESOLUTION PROCESS - LIABILITY FOR PRIOR OFFENCES, ETC.

- ***Tata Steel BSL Ltd. v. Union of India - [2020] 117 taxmann.com 660 (Delhi)***

A corporate debtor would not be liable for any offence committed prior to commencement of CIRP and corporate debtor would not be prosecuted if a resolution plan has been approved by Adjudicating Authority

Pursuant to corporate insolvency resolution process against the corporate debtor i.e. BSL, resolution plan was submitted in respect of BSL which was approved by CoC and the NCLT. BSL filed instant petition impugning an order dated 16-8-2019 in complaint captioned 'Serious Fraud Investigation Office v. Bhushan Steel Ltd.' and summons issued to it for offences committed by BSL.

Held that a corporate debtor would not be liable for any offence committed prior to commencement of CIRP and the corporate debtor would not be prosecuted if a resolution plan has been approved by the Adjudicating Authority. Since a resolution plan had been approved by the Adjudicating Authority (NCLT), BSL could not be prosecuted and was to be discharged. The petition was to be allowed and impugned order and summons were to be set aside.

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

- ✓ *The article should be original, i.e. not published/broadcasted/hosted elsewhere including any website. A declaration in this regard should be submitted to IPA ICAI in writing at the time of submission of article.*
- ✓ *The article should be topical and should discuss a matter of current interest to the professionals/readers.*
- ✓ *It should preferably expose the readers to new knowledge area and discuss a new or innovative idea that the professionals/readers should be aware of.*
- ✓ *The length of the article should be 2500-3000 words.*
- ✓ *The article should also have an executive summary of around 100 words.*
- ✓ *The article should contain headings, which should be clear, short, catchy and interesting.*
- ✓ *The authors must provide the list of references, if any at the end of article.*
- ✓ *A brief profile of the author, e-mail ID, postal address and contact numbers and declaration regarding the originality of the article as mentioned above should be enclosed along with the article.*
- ✓ *In case the article is found not suitable for publication, the same shall not be published.*

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