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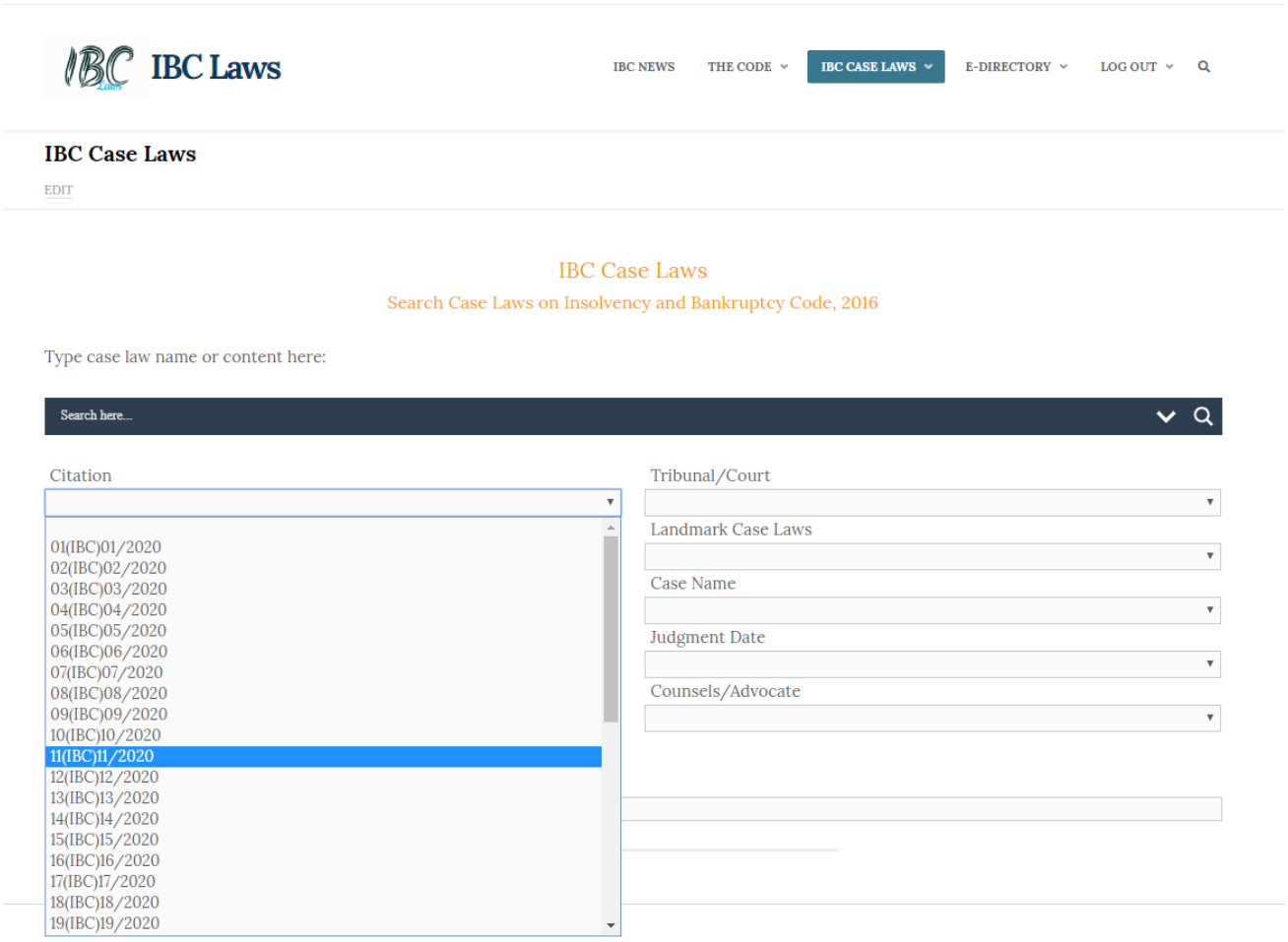

Supreme Court Judgments

Whether the High Court ought to interfere, under Article 226/227 of the Constitution, with an Order passed by the NCLT in a proceeding under the Code- M/s Embassy Property Developments Pvt. Ltd vs. State of Karnataka & Ors – SC

Case Citation: 19(IBC)19/2020

Brief facts:

A company by name M/s. Udhyaman Investments Pvt. Ltd. which is claiming to be a Financial Creditor, moved an application before the NCLT Chennai, u/s 7 of the Code against M/s. Tiffins Barytes Asbestos & Paints Ltd., the Corporate Debtor. By an Order dated 12.03.2018, NCLT Chennai admitted the application, ordered the commencement of the CIRP and appointed an IRP. Consequently, a Moratorium was also declared in terms of Section 14.

- At that time, the Corporate Debtor held a mining lease granted by the Government of Karnataka, which was to expire by 25.05.2018.
- The IRP filed a writ petition in WP No. 23075 of 2018 on the file of the High Court of Karnataka, seeking a declaration that the mining lease should be deemed to be valid upto 31.03.2020 in terms of Section 8A(6) of the MMDR Act, 1957.
- During the pendency of the writ petition, the Government of Karnataka passed an Order dated 26.09.2018, rejecting the proposal for deemed extension.
- In view of the Order of rejection passed by the Government of Karnataka, the Corporate Debtor, represented by the IRP, withdrew the Writ Petition No.23075 of 2018, on 28.09.2018, with liberty to file a fresh writ petition.
- The Resolution Professional moved a Miscellaneous Application No.632 of 2018, before the NCLT, Chennai praying for setting aside the Order of the Government of Karnataka, and seeking a declaration that the lease should be deemed to be valid upto 31.03.2020. By an Order dated 11.12.2018, NCLT, Chennai allowed the Miscellaneous Application setting aside the Order of the Government of Karnataka on the ground that the same was in violation of the moratorium declared on 12.03.2018 in terms of Section 14(1).
- Aggrieved by the order of the NCLT, Chennai, the Government of Karnataka moved a writ petition in WP No.5002 of 2019, before the High Court of Karnataka.

- By an Order dated 22.03.2019, the High Court of Karnataka set aside the Order of the NCLT and remanded the matter back to NCLT for a fresh consideration of the Miscellaneous Application No.632 of 2018.
- Thereafter, the State of Karnataka filed a Statement of Objections before the NCLT, primarily raising two objections, one relating to the jurisdiction of the NCLT to adjudicate upon disputes arising out of the grant of mining leases under the MMDR Act, 1957, between the State-Lessor and the Lessee and another relating to the fraudulent and collusive manner in which the entire resolution process was initiated by the related parties of the Corporate Debtor themselves, solely with a view to corner the benefits of the mining lease.
- Overruling the objections of the State, the NCLT Chennai passed an Order dated 03.05.2019 allowing the Miscellaneous Application, setting aside the order of rejection and directing the Government of Karnataka to execute Supplemental Lease Deeds.
- Challenging the Order of the NCLT, Chennai, the Government of Karnataka moved a writ petition in WP No.41029 of 2019 before the High Court of Karnataka.

Question of law:

i) Whether the High Court ought to interfere, under Article 226/227 of the Constitution, with an Order passed by the NCLT in a proceeding under the Code, 2016, ignoring the availability of a statutory remedy of appeal to the NCLAT and if so, under what circumstances; and

ii) Whether questions of fraud can be inquired into by the NCLT/NCLAT in the proceedings initiated under the Code, 2016.

Hon'ble Supreme Court decision:

i) Jurisdiction and the powers of the High Court under Article 226:

- The decision of the Government of Karnataka to refuse the benefit of deemed extension of lease, is in the public law domain and hence the correctness of the said decision can be called into question only in a superior court which is vested with the power of judicial review over administrative action.
- The NCLT, being a creature of a special statute to discharge certain specific functions, cannot be elevated to the status of a superior court having the power of judicial review over administrative action. Judicial review, as

observed by this court in Sub-Committee on Judicial Accountability vs. Union of India, flows from the concept of a higher law, namely the Constitution.

- The NCLT is not even a Civil Court, which has jurisdiction by virtue of Section 9 of the Code of Civil Procedure to try all suits of a civil nature excepting suits, of which their cognizance is either expressly or impliedly barred.
- Therefore NCLT can exercise only such powers within the contours of jurisdiction as prescribed by the statute, the law in respect of which, it is called upon to administer. Hence, let us now see the jurisdiction and powers conferred upon NCLT.

Jurisdiction and powers of NCLT

- NCLT and NCLAT are constituted, not under the IBC, 2016 but under Sections 408 and 410 of the Companies Act, 2013. The matters that fall within the jurisdiction of the NCLT, under the Companies Act, 2013, lie scattered all over the Companies Act. Therefore, Sections 420 and 424 of the Companies Act, 2013 indicate in broad terms, merely the procedure to be followed by the NCLT and NCLAT before passing orders. However, there are no separate provisions in the Companies Act, exclusively dealing with the jurisdiction and powers of NCLT.
- In contrast, Sub-sections (4) and (5) of Section 60 of IBC, 2016 give an indication respectively about the powers and jurisdiction of the NCLT.
- Clause (c) of Sub-section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase “arising out of or in relation to the insolvency resolution” appearing in Clause (c) of Sub-section (5). The jurisdiction of the NCLT delineated in Section 60(5) cannot be stretched so far as to bring absurd results.
- Section 25 of the Code shows that wherever the corporate debtor has to exercise rights in judicial, quasi-judicial proceedings, the resolution professional cannot short-circuit the same and bring a claim before NCLT taking advantage of Section 60(5). Therefore in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot,

through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right.

The moratorium provided for in Section 14 could have any impact upon the right of the Government to refuse the extension of lease. The purpose of moratorium is only to preserve the status quo and not to create a new right. Therefore nothing turns on Section 14 of IBC, 2016. Even Section 14 (1) (d), of IBC, 2016, which prohibits, during the period of moratorium, the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor, will not go to the rescue of the corporate debtor, since what is prohibited therein, is only the right not to be dispossessed, but not the right to have renewal of the lease of such property. In fact the right not to be dispossessed, found in Section 14 (1) (d), will have nothing to do with the rights conferred by a mining lease especially on a government land.

NCLT do not have jurisdiction to entertain an application against the Government of Karnataka for a direction to execute Supplemental Lease Deeds for the extension of the mining lease. Since NCLT chose to exercise a jurisdiction not vested in it in law, the High Court of Karnataka was justified in entertaining the writ petition, on the basis that NCLT was coram non judice.

Question ii): The Government of Karnataka thought fit to invoke the jurisdiction of the High Court under Article 226 without taking recourse to the statutory alternative remedy of appeal before the NCLAT. But the contention of the appellants herein is that allegations of fraud and collusion can also be inquired into by NCLT and NCLAT and that therefore the Government could not have bypassed the statutory remedy.

Even fraudulent tradings carried on by the Corporate Debtor during the insolvency resolution, can be inquired into by the Adjudicating Authority under Section 66. Section 69 makes an officer of the corporate debtor and the corporate debtor liable for punishment, for carrying on transactions with a view to defraud creditors. Therefore, NCLT is vested with the power to inquire into (i) fraudulent initiation of proceedings as well as (ii) fraudulent transactions. It is significant to note that Section 65(1) deals with a situation where CIRP is initiated fraudulently "for any purpose other than for the resolution of insolvency or liquidation".

It is clear that NCLT has jurisdiction to enquire into allegations of fraud. As a corollary, NCLAT will also have jurisdiction. Hence, fraudulent initiation of CIRP cannot be a ground to bypass the alternative remedy of appeal provided in Section 61.

Conclusion:

The upshot of the above discussion is that though NCLT and NCLAT would have jurisdiction to enquire into questions of fraud, they would not have jurisdiction to adjudicate upon disputes such as those arising under MMDR Act, 1957 and the rules issued thereunder, especially when the disputes revolve around decisions of statutory or quasi-judicial authorities, which can be corrected only by way of judicial review of administrative action. Hence, the High Court was justified in entertaining the writ petition.

II. The exit route prescribed in Sec. 12A is not applicable to a Resolution Applicant- Maharasthra Seamless Limited Vs. Padmanabhan Venkatesh & Ors.- SC

Case Citation:27(IBC)27/2020

Facts of the case:

Resolution Applicant & Appellant	Maharashtra Seamless Ltd. (MSL)
Promoter of CD & Respondent	Padmanabhan Venkatesh
Corporate Debtor	United Seamless Tubulaar Private Limited
Foreign Financial Creditor	DB International (Asia) Limited and Deutsche Bank AG, Singapore Branch(Branches of Deutsche Bank)
Indian Financial Creditor	One Indian Bank
Corporate Guarantor	UMW (to Deutsche Bank, Singapore)

This appeal is filed by MSL sought directions upon the corporate debtor as also the police and administrative authorities for effective implementation of the resolution plan. Grievance of MSL in that proceeding was that they were not being given access to the assets of the corporate debtor. In this application, they have, in substance, sought refund of the sum deposited in terms of the resolution plan alongwith interest. In this application, MSL has also applied for withdrawal of the resolution plan. Their grievance is that in order to take over the corporate debtor, they had availed of substantial term loan facility and deposited the sum of Rs.477 crores for resolution of the corporate debtor in a designated escrow account on 19.02.2019 but because of delay in implementation of the resolution plan, they were compelled to bear the interest burden.

The appeal of MSL argued by learned senior counsel is mainly on the ground that the NCLAT had exceeded its jurisdiction in directing matching of liquidation value in the resolution plan. MSL in the appeal have sought to sustain the resolution plan but their prayer in the interlocutory application is refund of the amount remitted coupled with the plea of withdrawal of resolution plan. However, their main case in the appeal is that final decision on resolution plan should be left to the commercial

wisdom of the Committee of Creditors and there is no requirement that resolution plan should match the maximized asset value of the corporate debtors.

Question before Hon'ble Supreme Court:

i) Whether the scheme of the Code contemplates that the sum forming part of the resolution plan should match the liquidation value or not.

Hon'ble Supreme Court has held that no provision in the Code or Regulations has been brought to notice under which the bid of any Resolution Applicant has to match liquidation value arrived at in the manner provided in Clause 35 of the IBBI(Insolvency Resolution Process for Corporate Persons) Regulations, 2016. This point has been dealt with in the case of ***Essar Steel.*** It appears to us that the object behind prescribing such valuation process is to assist the CoC to take decision on a resolution plan properly. Once, a resolution plan is approved by the CoC, the statutory mandate on the Adjudicating Authority under Section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of sub-sections (2) and (4) of Section 30 thereof. The Appellate Authority has proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the Adjudicating Authority has to be satisfied that the requirement of sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an Adjudicating Authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the Adjudicating Authority in limited judicial review has been laid down in the case of Essar Steel, the relevant passage (para 54). The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the Appellate Authority ought to have interfered with the order of the Adjudicating Authority in directing the successful Resolution Applicant to enhance their fund inflow upfront.

ii)The second question we shall deal with is as to whether Section 12A is the applicable route through which a successful Resolution Applicant can retreat.

Hon'ble Supreme Court has held that MSL cannot withdraw from the proceeding in the manner they have approached this Court. The exit route prescribed in Section 12A is not applicable to a Resolution Applicant. The procedure envisaged in the said provision only applies to applicants invoking Sections 7, 9 and 10 of the code. In this case, having appealed against the NCLAT order with the object of implementing the

resolution plan, MSL cannot be permitted to take a contrary stand in an application filed in connection with the very same appeal. Moreover, MSL has raised the funds upon mortgaging the assets of the corporate debtor only. In such circumstances, we are not engaging in the judicial exercise of determining the question as to whether after having been successful in a CIRP, an applicant altogether forfeits their right to withdraw from such process or not.

IBC Laws Newsletter

January-2020

National Company Law Appellate Tribunal (NCLAT) Judgments/Orders

National Company Law Appellate Tribunal(NCLAT) Judgments/Orders

1. To challenge approved Resolution Plan, appeal should be under grounds provided in Sec. 61(3)-Mr. Kaushal Ramesh Mehta vs. Metallica Industries Ltd. & Ors. –NCLAT

Case Citation: 01(IBC)01/2020

In these appeals, while such submission has been made, Appellant(s) have challenged the order of NCLT whereby the Resolution Plan approved with 85.89% voting share of the CoC have been approved by the Adjudicating Authority. Sub-Section (3) of Section 61 of the Code provides the grounds on which a Resolution Plan approved can be challenged by any aggrieved person. Since, no grounds of this appeal make out with sec. 61(3), the appeal has been rejected by NCLAT. Sub-Section (3) of Section 61 of the 'I&B Code' provides the grounds on which a 'Resolution Plan' approved can be challenged by any aggrieved person, which is as follows:

> *"61. Appeals and Appellate Authority.—*
> *.....(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:—*
> *(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;*
> *(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;*
> *(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;*
> *(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or*
> *(v) the resolution plan does not comply with any other criteria specified by the Board."*

2. If the earlier application u/s 7 was dismissed for non-prosecution, it was always open to the Respondent to file fresh application u/s 7-Venus Sugar Ltd. Vs. SASF – NCLAT

Case Citation: 02(IBC)02/2020

The Respondent–'SASF' filed application u/s 7 of Code, which was taken up by the Adjudicating Authority (NCLT), Ahmedabad Bench. It appears that the matter was taken up on 18th November, 2019 and in absence of the counsel for the Respondent(Financial Creditor), the application u/s 7 was dismissed for non-prosecution. However, before signing of the order by the Adjudicating Authority (The

Hon'ble Member), the matter was mentioned later on by counsel for Financial Creditor, who apologised for not being present and on his oral prayer the impugned order was passed on the same day.

NCLAT held that to maintain rule of natural justice right action was taken by the Hon'ble Member, who before signing the order, ordered to list the matter and inform the Appellant as otherwise it would have incurred more litigation. If the earlier application under Section 7 was dismissed for non-prosecution, it was always open to the Respondent to file fresh application under Section 7.

3. Adjudicating Authority in an application u/s 9 as it cannot decide the claim or counter claim being not Court of competent jurisdiction. It is required to be seen that prior to issuance of demand notice u/s 8(1) is there any dispute-Suman Chakraborty Vs. Anhui Technology Imp. & Exp. Co. Ltd. –NCLAT

Case Citation: 03/2019(IBC)03

The demand notice u/s 8(1) was issued by the Operational Creditor on 10th June, 2017, the email dated 30th September, 2016 is much prior to demand notice, which shows that quality material was not supplied and it was substandard. Though by letter dated 14th February, 2017, the Corporate Debtor has said that they will make payment but letter dated 10th July, 2017 shows that sales proceeds could not be realized by the Corporate Debtor because they faced lot of problems in the material supplied by the Operational Creditor for bad quality and short supply. Submission made by learned counsel for Operational Creditor that the Corporate Debtor admitted the claim, cannot be adjudicated by the Adjudicating Authority in an application u/s 9 of Code as it cannot decide the claim or counter claim being not Court of competent jurisdiction. It is required to be seen that prior to issuance of demand notice under Section 8(1) is there any dispute.

NCLAT held that in the present case there being a pre-existing dispute relating to quality of product supplied by the Operational Creditor referred in the email dated 30th September, 2016, the Adjudicating Authority without deciding the issue whether it was accepted to pay the amount or not is not competent to admit application under Section 9, there being a pre-existing dispute. For the reason aforesaid NCLAT set aside the NCLT's order.

4. NCLAT decision on provisos inserted by the Insolvency & Bankruptcy Code (Amendment) Ordinance, 2019 dt. 28.12.2019-Vipul Ltd vs M/s. Vipul Greens Residents Welfare Association-NCLAT

Case Citation: 04/2019(IBC)04

NCLAT set aside the order of NCLT on the ground provisos to section 7(1) inserted by the Insolvency And Bankruptcy Code (Amendment) Ordinance, 2019. NCLAT held that in view of the insertion of provisions under explanation below Section 7, the Adjudicating Authority is only required to see whether the application u/s 7 has been filed by 100 allottees, who are members of RWA or a 10% of the allottees who are members of the allottees to maintain it. The Adjudicating Authority is required to take into consideration only the Form-1 and the enclosure therein but find out the default, if any and to proceed in accordance with law. Before the admission of the application u/s 7, the Adjudicating Authority has no jurisdiction to direct the Corporate Debtor to deposit any amount to certain corpus or with regard to maintenance which may not be a subject matter of application under Section 7.

NCLAT also held that the Adjudicating Authority is also required to notice the maintainability on the basis of insertion as made by Ordinance dated 28th December, 2019 as noticed above and then to find out whether any debt is payable in the eye of law or in fact and there is a default. Except the aforesaid facts and the observations as given by the Hon'ble Supreme Court in "Innoventive Industries Ltd. v. ICICI Bank— 2017 SCC OnLine SC 1025" as quoted above, the Adjudicating Authority will not go into the other facts which are required to be determined by Court of Competent Jurisdiction.

5. Jurisdiction to decide whether the application u/s 9 is time barred by limitation or not, it is within the domain of the Adjudicating Authority and not NCLAT-State Bank of India vs Sical Logistics Ltd.-NCLAT

Case Citation: 05/2019(IBC)05

SBI claimed to be an Operational Creditor and moved an application u/s 9 Code against M/s. Sical Logistics Ltd.- (Corporate Debtor). The Adjudicating Authority (NCLT) taking into consideration the fact that the date of default was 10.04.2008, rejected the application u/s 9 being barred by limitation.

NCLAT rejected such submission and held that such submission cannot be accepted as it is within the domain of the Adjudicating Authority (Court of Competent Jurisdiction) to decide whether the application is barred by limitation or not.

6. To levy a penalty in terms of Sec. 65 of the Code, the Adjudicating Authority is to form an ex-facie opinion & also is to provide an adequate opportunity of hearing to the concerned person, to explain his stand-Munish Kumar Bhunsali & Anr.vs Kotak Mahindra Bank Ltd. & Anr.-NCLAT

Case Citation: 06/2019(IBC)06

On the fact the default made by the Corporate Debtor took place in June, 2015 and that the application u/s 7 of the Code was filed by the 1st Respondent of the Bank before the Adjudicating Authority on 30.01.19 and that the account of the Corporate Debtor was declared as NPA on 30.09.15, NCLAT held that that the application filed by the Bank before the Adjudicating Authority is barred by Limitation.

NCLAT further held that one cannot brush aside a significant fact that if a person initiates the CIRP or liquidation proceeding fraudulently or with malicious intent for any purpose other than for Resolution of Insolvency or Liquidation, then it will attract section 65 of the Code. To levy a penalty in terms of Section 65 of the Code, the Adjudicating Authority is to form an ex-facie opinion and also is to provide an adequate opportunity of hearing to the concerned person, to explain his stand.

7. Once for same set of claim & default application u/s 7 against the Principal Borrower is admitted, the application against the Corporate Guarantor is not maintainable-M/s. SEW Infrastructure Ltd. vs M/s. Mahendra Investment Advisors Pvt. Ltd.-NCLAT

Case Citation: 07/2019(IBC)07

The Appellant- M/s. SEW Infrastructure Limited claimed to be Financial Creditor of M/s. Mahendra Investment Advisors Private Limited- ('Corporate Debtor) and moved application u/s 7 of the Code, which has been rejected by impugned order dated 24.10.2019 passed by the Adjudicating Authority on one of the grounds that the Corporate Debtor is a Guarantor in respect of the loan given to the Principal Borrower- 'M/s. Amrit Jal Ventures Private Limited' and the Appellant claimed amount as Financial Creditor, has already moved a petition u/s 7 against Principal Borrower which has already been admitted. Once for same set of claim and default application u/s 7 against the Principal Borrower- M/s. Amrit Jal Ventures Private Limited is admitted, the application against the Corporate Guarantor is not maintainable. NCLAT not inclined to interfere with the impugned order of rejection of the application under Section 7.

8. Adjudicating Authority (NCLT) of the country will never entertain the company applications in insolvency matters as Interlocutory Applications are maintainable under the Code-Raman Agarwal Vs. Mohit Chawla & Ors. Resolution Professional J.R. Agro Tech Pvt. Ltd.-NCLAT

Case Citation: 08/2019(IBC)08

The objection of the Appellant is that the application under Sections 43, 45 and 66 is not maintainable as no 'preferential transactions' or 'under value transactions' were made by the 'Corporate Debtor'.

NCLAT allow the Adjudicating Authority (NCLT), Chandigarh Bench, Chandigarh to pass appropriate order on the application filed under Sections 43, 45 and 66 of the Code, after giving opportunity to the parties to file their respective replies, including the Appellant. It will be open to the Appellant to show that the transactions were not 'preferential transactions' or 'under value transactions', based on the record. NCLAT also mentioned that there is no provision to file any company application under the 'National Company Law Tribunal Rules, 2016'. Henceforth, the Adjudicating Authority (NCLT) of the country will never entertain the company applications in insolvency matters as Interlocutory Applications are maintainable under the Code.
Citation: 08/2019(IBC)08

9. CIRP being not a litigation or money suit or recovery proceeding-Landmark Realty Vs. Siroya Developers Pvt. Ltd.-NCLAT

Case Citation: 09(IBC)09/2020

The Appellant(Landmark Realty) filed application u/s 9 of the Code which has been rejected by the Adjudicating Authority on the ground of pre-existence of dispute i.e. the Appellant has filed Civil Suit for recovery of the money against the Corporate Debtor before Bombay City Civil Court at Dindoshi, Mumbai. NCLAT referred decision in the matter of ***Binani Industries Limited vs. Bank of Baroda & Anr.*** Company Appeal (AT) (Insolvency) No. 82 of 2018 etc. and held that as admittedly money suit has been filed by the Appellant against the Corporate Debtor prior to the Demand Notice dated 19th January, 2019 and is pending, the Adjudicating Authority rightly rejected the application u/s 9.

10. CoC is to pay the fees & cost incurred by IRP, who also acted during the resolution process beyond 30 days till the date of liquidation having not allowed to continue as Liquidator-CoC M/s. Smartec Build Systems Pvt. Ltd. Vs. B. Santosh Babu & Ors. –NCLAT

Case Citation: 10(IBC)10/2020

Order of liquidation has been passed by the Adjudicating Authority(AA) (NCLT), Hyderabad Bench for liquidation of M/s. Smartec Build Systems Private Limited(Corporate Debtor) and on application by Interim Resolution Professional(IRP), the Adjudicating Authority directed the CoC (Appellant) to pay the fees and cost incurred by the IRP. According to the Appellant (CoC), the fees and costs of the IRP is to be borne by the Applicant who filed application u/s 9.

NCLAT held that however, such submission cannot be accepted as Operational Creditor who moved application, may not receive any amount during liquidation being not Secured Creditor cannot be asked to pay the dues. Admittedly, Mr. B. Santosh Babu performed the duty of the IRP and constituted the CoC and thereafter, continued to function even beyond 30 days with designation of the IRP and as he

moved an application for liquidation (though designated "continue as IRP"), we agree with the observations made by the Adjudicating Authority that the CoC is to pay the fees and cost incurred by IRP, who also acted during the resolution process beyond 30 days till the date of liquidation having not allowed to continue as Liquidator. If IRP who continued till the order of impugned order of liquidation was passed, would have been allowed to continue as Liquidator and only in such case, the payment could have been made to him as Liquidator in terms of Section 34(8) of the Code.

11. In Law, an Acknowledgement in writing within expiration of prescribed period will mark a new commencement period for limitation to base a claim & the same will not create a new contract-Vivek Jha vs Daimler Financial Services India Private Ltd. & Anr.-NCLAT

Case Citation: 11(IBC)11/2020

The Respondent/Applicant's claim was that there was an agreement dated 28.03.2013 between the Appellant and the Respondent pertaining to the securing of the Loan in respect of 'car' for an amount of Rs. 43,51,403/-. The Appellant(Corporate Debtor) had made a payment of three Lakhs through Cheque on 18.03.2015 and that the said payment was made after the issuance of Loan Recall notice dated 06.05.2014 and later a demand notice dated 17.08.2017 was issued by the Respondent to the Appellant(Corporate Debtor) and co-borrower in respect of the loan agreement dated 28.03.2018 where the 'Corporate Debtor' had agreed to pay Rs. 1,08,755/- per month beginning from 30.03.2013 to 30.03.2016. The application u/s 7 of the Code was filed by the Respondent/Applicant before the Adjudicating Authority on 16.12.2017. The application is ultimately admitted by Adjudicating Authority (NCLT) Mumbai Bench.

The grievance of the Appellant is that the Learned Adjudicating Authority had passed the Ex-parte impugned order dated 03.10.2019 and that the Appellant assails the impugned order on the ground of (i) Barred by Limitation; and (ii) the Application was never served on the Appellant.

The Demand Notice dated 17.08.2017 was issued by the Respondent/Applicant for which the Corporate Debtor and the co-Borrower to the loan agreement had not responded and (not made payment of the outstanding sum of Rs. 29,29,149.74/-. As per Section 3(12) of the Code the Corporate Debtor had committed default in respect of a financial debt envisaged u/s 5(8) of the Code. In Law, an 'Acknowledgement' in writing within expiration of prescribed period will mark a new commencement period for limitation to base a claim and the same will not create a new contract. In fact, it only extends the limitation period. Suffice it for this Tribunal to make a pertinent mention that if a suit is filed within three years from the last acknowledgement the same is not barred by limitation as per decision Union of India Vs. M.C. Pandey AIR 2009 NOC Page 494 (UTR). Further, an 'Acknowledgement' must

be made before the expiration of the limitation period as per Section 18 of the Limitation Act, 1963. An 'Acknowledgement' of Liability not only saves limitation period but also confers on an individual a 'cause of action' to him, to lay his claim.

NCLAT held that the claim of the Respondent/Applicant is not barred by the plea of Limitation. Consequently, the present Appeal fails and the same is dismissed but without costs.

12. Lease of immovable property cannot be considered as a supply of goods or rendering of any services and thus, cannot fall within the definition of Operational Debt-Mr. M. Ravindranath Reddy Vs. Mr G. Kishan & Ors.-NCLAT

Case Citation:12(IBC)12/2020

The Appellant is the Director of the Corporate Debtor Company, and the Respondent herein was the applicant before the NCLT, claiming to be the Operational Creditors. The Respondents are the Lessors and the Corporate Debtor – M/s. Walnut Packaging Private Limited is the Licensee of Industrial Premises consisting of land measuring about 1667 sq. Yards, situated at Kukatpally, Hyderabad.

That tenancy of the Appellant was yearly, and the rent payable for the period from July 2011 to June 2017 was Rs. 85,67,290/- and The Corporate Debtor stopped making the payment from January 2017, after the last part payment was made, which was adjusted towards rental dues. After that, the Respondent /Petitioner issued a legal notice dated 15-06-2017 to handover the property back to the Petitioners, but the Corporate Debtor failed to vacate the property. After that, an eviction suit was filed against the Corporate Debtor before the jurisdictional Civil Court. The Demand Notice U/S 8 of I&B Code 2016 dated 18-01-2018 was also issued against the Corporate Debtor demanding Rs. 49,51,605/-, which was duly served on the Corporate Debtor.

The Corporate Debtor/Appellant submitted that he had paid the rent until December 2017, and no amount is due to the Petitioner. It is further stated that due to slowdown in the Operations of the Corporate Debtor during the period from April 2012 to July 2012 Petitioner/Respondent agreed on a moratorium for no yearly enhancement of rent for six years. The Adjudicating Authority held that the Corporate Debtor had taken the property of the Petitioners on rent and they were paying rent up to June 2017. But the Corporate Debtor failed to pay the rent from July 2017 onwards.

Question arises before NCLAT:

1. Whether a landlord by providing lease, will be treated as providing services to the corporate debtor, and hence, an operational creditor within the meaning of Section 5(20)read with Section 5(21) of the Code?

2. Whether the petition filed u/s 9 of the Code is not maintainable on account of 'pre-existing dispute'?

NCLAT decision:

I. The Code recognises two types of debt to enable the creditors to make an application for initiating insolvency proceedings against the corporate debtor- financial debt and operational debt. If there is a debt, other than a financial debt or an operational debt, the creditor will not qualify to apply u/s 7 or 9, as the case may be. Hence, the determination of nature of claim/debt is an important step while considering the admission of an application under the Code.

II. There seems to be some rationale in restricting only to operational creditors for initiation of CIRP, other than financial creditors. Default committed to operational creditors about payment of their debt connotes that the corporate debtor is not even in a position to service the regular payments and operational expenses, as required in the day-to-day functioning of the corporate debtor, which provides a clear indication to its
insolvency, warranting the resolution process being put in place.

III. The law has not gone into defining goods or services – hence, one has to rely on general usage of the terms so used in the law, with due regard to the context in which the same has been used.

IV. The BLRC recommends the treatment of lessors/landlords as operational creditors. However, the Legislature has not completely adopted the BLRC Report, and only the claim in respect of goods and services are kept in the definition of operational creditor and operational debt u/s Sec 5(20) and 5(21) of the Code. The definition does not give scope to the to interpret rent dues as operational debt. The Legislature did not include here the reference to rent dues of property. Thus, it is clear that a claim in respect of the provision of goods or services is covered under the operational debt.

V. For an amount to be classified for an operational debt under Code, 2016, it is provided: Firstly, the amount falls within the definition of "claim" as defined under Section 3(6) of the Code; Secondly, such a claim should claim within the confines of the definition of a 'debt' as defined under Section 3(11), meaning it should be by way of a liability or obligation due from any person; Thirdly, such a "debt" should fall strictly within the scope of an "Operational Debt" as defined under Section 5(21) of the Code, i.e. the claim
should arise in respect of:

(i) provision of goods or services including employment or

(ii) A debt in respect of the repayment of dues arising under any law for the time being in force and payable either to the Central Government, any State Government or any local authority.

The word "*in relation to Government*" or local authority and the dues owed to it, has been given a wide platform. It is important to see whether persons other than the Government or local authority can claim the benefit, that any debt owed should be construed as an 'operational debt' other than those classified as 'financial debt'.

Thus, only if the claim by way of debt falls within one of the three categories as listed above, can be categorised as an operational debt. In case if the amount claimed does not fall under any of the categories mentioned as above, the claim cannot be categorised as an operational debt, and even though there might be a liability or obligation due from one person, namely Corporate Debtor to another, namely Creditor other than the Government or local authority, such a creditor cannot categorise itself as an "Operational Creditor" as defined under Section 5(21) of the Code, 2016.

NCLAT held that lease of immovable property cannot be considered as a supply of goods or rendering of any services and thus, cannot fall within the definition of 'Operational Debt.

VI. In case of lease of immovable property, Default can be determined, on the basis of evidence. While exercising summary jurisdiction, the Adjudicating Authority exercising its power under Code cannot give finding regarding default in payment of lease rent, because it requires further investigation. once an operational creditor has filed an application which is otherwise complete the Adjudicating Authority must reject the application u/s 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility, the Adjudicating Authority is to see whether there is a plausible contention which requires further investigation and the "dispute" is not a patently feeble legal argument or an assertion of fact, unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. In the case in hand, the Respondent lessor has filed the petition for the realisation of enhanced lease rent from the lessee. Thus understanding for not increasing the rent of a period of 6 years is a question of fact, which requires further investigation. Thus in the present case, there was a pre-existing dispute, which is proved by the issuance of notice under Section 106 of the TP Act, much before the issuance of demand notice, under Section 8 of the I&B Code. Based on the above, the application filed under Section 9 of the I&B Code could not have been admitted.

NCLAT has held that we are of the considered opinion that the alleged debt on account of purported enhanced rent of leasehold property does not fall within the

definition of the operational debt in terms of Section 5(21) of the Code. On the above basis, it is clear that appeal deserves to be allowed.

13. After the liquidation the CoC has no role to play-Punjab National Bank vs Mr. Kiran Shah Liquidator of ORG Informatics Ltd.-NCLAT

Case Citation: 16(IBC)16/2020

In the CIRP of M/s. ORG Informatics Limited (Corporate Debtor), the CoC of which the 'Punjab National Bank' is the lead Bank, decided to move application for liquidation of the Corporate Debtor. The Resolution Professional was asked to move an application for liquidation u/s 33 & 34 of the Code. The said application has been accepted by the Adjudicating Authority, Ahmedabad Bench by impugned order dated 20.11.2019. The Resolution Professional has been asked to continue as Liquidator.

NCLAT has held that after the liquidation the Committee of Creditors has no role to play and they are simply a claimant whose matters are to be determined by the Liquidator and cannot move an application for removal of Liquidator in absence of any provisions under the law.

14. If any amount is payable during the CIRP towards the instalment to the Insurer, the IRP will take care of the same-Shyam Pradhan & Anr. vs Anand Chandra Swain-NCLAT

Case Citation: 17(IBC)17/2020

The Appellant is the agent of Ship Owners Protection Limited, London (SOPL) (an Insurance Company), who has insured the Corporate Debtor- M/s. Kei-Rsos Maritime Limited.

NCLAT upheld the decision of NCLT and held that merely, because the CIRP has been initiated against Corporate Debtor by an Agent or Insurer and as during the CIRP, the Corporate Debtor is to continue as a going concern, the Adjudicating Authority rightly passed the order directed the Insurer to continue with the Insurance. If any amount is payable during the CIRP towards the instalment to the Insurer, the Interim Resolution Professional will take care of the same.

15. 30 days for appeal file u/s 61(2) count from the date of issuance of certified copy-Damodar Valley Corporation Vs. Divya Jyoti Sponge Iron Pvt. Ltd. & Ors. – NCLAT

Case Citation: 18(IBC)18/2020

In terms of Section 420 (3) of Companies Act, 2013, the Tribunal after passing an order is required to send a copy of every order passed under the said section to all

the parties. The Adjudicating Authority also follows the said provision being binding. Referring to this, learned counsel for the Appellant submitted that free copy of the order was not supplied to the Appellant though earlier they filed review application.

NCLAT held that in terms of the Section 61(2) provision, if we count from the date of issuance of certified copy i.e. 28th August, 2019, we find that the appeal has been filed beyond 30 days of the said order. This Appellate Tribunal is empowered to condone delay for a period not exceeding 15 days after expiry of the aforesaid period of 30 days, if it is satisfied that there is sufficient cause for not filing such appeal. Even if it is accepted that there was a sufficient cause in not preferring the appeal during period of vacation i.e. 2nd October, 2019 to 13th October, 2019, the delay having exceeded more than 15 days beyond 30 days, we hold that this appeal under Section 61 is not maintainable being barred by limitation.

16. The Resolution Plan once approved & reached finality, all the dues stand cleared in terms of the plan & now no issue can be raised before any Court of Law or Tribunal-S.A. Pharmachem Pvt. Ltd. vs Alok Industries Ltd. & Ors.-NCLAT

Case Citation: 20(IBC)20/2020

Issue in this appeal that the Operational Creditors supplied goods during the CIRP to keep the Company as a going concern. It was at this stage for the first time that the Appellant(s) came to know a sum had been set aside for payment of CIRP and thereafter on the basis of verbal information, it had an apprehension that the amounts due against the goods supplied during the CIRP' period, 'Interim Resolution Professional' cost would not be paid to him and in fact the payments made against Pre-CIRP invoices would be se-off against the same.

NCLAT held that after the plan has reached finality, it is binding on all the stakeholders including the Operational Creditors, Financial Creditors and others. How the distribution is to be made on the basis of the approved plan is for the Monitoring Committee to see. No individual decision can be given either by the Adjudicating Authority or by this Appellate Tribunal on the basis of individual claim of one or other Operational Creditors, Financial Creditors and others after such approval, once the matter is brought to the notice of the Adjudicating Authority and this Appellate Tribunal by the Resolution Professional on behalf of the Monitoring Committee that the CIRP have been paid. The Resolution Plan once approved and reached finality, all the dues stand cleared in terms of the plan and now no issue can be raised before any Court of Law or Tribunal.

17. Financial debt issue in the matter of Mr. K.N. Mahesh Prasad vs M/s. MedinnBelle Herbalcare Private Limited-NCLAT

Case Citation: 22(IBC)22/2020

The Appellant-Mr. K.N. Mahesh Prasad claiming to be Financial Creditor filed an application u/s 7 of the Code for initiation of the CIRP against M/s. MedinnBelle Herbalcare Private Limited (Corporate Debtor). The Adjudicating Authority Principal Bench, New Delhi dismissed the application taking into consideration the nature of transaction held that it is a pure and simple advancement of loan denuded of any element of time value for money. Therefore, such a transaction would not acquire the status of a 'financial debt'.

From the pleadings made by the parties, NCLAT found that the amount allegedly stated to be the 'debt' is:

a) Was not borrowed against the payment of interest.
b) It is not the amount accepted/ raised under any credit facility.
c) The amount has not been raised pursuant to any 'Note Purchase Facility' or issue of Bonds, Debentures, loan stock etc.
d) The amount does not arise of any liability in respect of hire purchase contract, or lease or any other instrument to suggest that the Appellant is deemed as finance or capital lease.
e) The amount has not been raised under any other transaction including any forward sale or purchase agreement having the commercial effect of borrowing.
f) It is not the amount of any derivatives transaction entered into.
g) The amount is not against any counter indemnity.
h) It is not the amount of any liability in respect of any guarantee.

18. If the delay in possession of real estate is not due to the Corporate Debtor but force majeure, it cannot be alleged that the Corporate Debtor defaulted in delivering the possession-Navin Raheja vs Shilpa Jain and Others-NCLAT

Case Citation: 23(IBC)23/2020

The 1st and 2nd Respondents- allottees had booked an apartment in the Residential Project- 'Raheja's Sampada' being developed by the Corporate Debtor. In pursuance of the same, the Corporate Debtor issued a joint allotment letter dated 03.08.2017 and executed a Flat Buyer's Agreement dated 03.08.2012. They disbursed total Rs.86,62,691/- to the Corporate Debtor on different date. It was alleged that as per Clause 4.2 of the Buyer's Agreement, possession of the Apartment was to be provided within 36 months commencing from 03.08.2012 which came to an end on 03.08.2015 but the construction was not completed. As per Clause 4.2, in case the construction is not complete within time the Corporate Debtor is under obligation to pay the allottee(s) compensation @ Rs.7/- per sq. ft. of the super area per month for the

entire period of such delay. The said Clause 4.2 also postulates that the aforesaid compensation @ Rs. 7/- per sq. ft. of the super area per month for the entire period of such delay was to be adjusted at the time of conveying the apartment and not earlier and it will be treated as distinct charge.

On filing of the application under Section 7, the Corporate Debtor took specific plea that the notice of possession was issued as back as on 15.11.2016 and in spite of repeated request to take possession, the allottees have refused to take possession. Further, the 'Corporate Debtor' stated that as far as the processing of its application for obtaining an Occupation Certificate was concerned, the same was under the control of the concerned Government/ Competent Authority and any delay on account of the actions inactions and omissions on the part of the Government/ or Authority it was beyond the reasonable control of the 'Corporate Debtor'/ Promoter. In the circumstances, in terms of Clause 4.2 of the Flat Buyer's Agreement a 'force majeure' condition will be applicable.

The questions arise for considerations:

1. *Whether the 'Corporate Debtor' can be held to have committed default, if apartment/ flat/ premises is otherwise ready but offer of possession was delayed due to the reasons beyond the control of 'Corporate Debtor' such as absence of clearance by the Competent Authorities/ Government(s), etc.? and;*

2. *Whether application under Section 7 was filed by the 1st and 2nd Respondents 'fraudulently or with malicious intent for any purpose other than for the resolution of insolvency or liquidation' as defined under Section 65 of the 'I&B Code' called for any penal action?*

Held:

- Before admitting such case, it will be desirable to find out whether the allottees have come for refund of the money or to get their apartment/ flat/ premises by way of resolution. If the intention of the allottees only for refund of money and not possession of apartment/ flat/ premises, then the 'Corporate Debtor' may bring it to the notice of the Adjudicating Authority as held by the Hon'ble Supreme Court.
- The Adjudicating Authority before admitting an application under Section 7 filed by allottee(s) will take into consideration the decision of the Hon'ble Supreme Court in "Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors".

- If the delay is not due to the 'Corporate Debtor' but force majeure, as noticed above, it cannot be alleged that the 'Corporate Debtor' defaulted in delivering the possession.

19. The burden of proof to show that any review application pending before High Court is on the Corporate Debtor-M/s Ugro Capital Limited vs M/s Bangalore Dehydration and Drying Equipment Co. Pvt. Ltd. (BDDE)

Case Citation: 24(IBC)24/2020

Brief facts of the case are that the Plaintiff/Appellant filed an Application u/s 7 of the Code in furtherance of the judgment and decree dated 22.05.2015 and 06.08.2015 respectively, passed by the Hon'ble Delhi High Court, wherein a sum of Rs.8,04,43,637/- along with past interest, pendent-lite and future interest @ 21% per annum commencing from 23.03.2012 till the realisation of the decree, was awarded in favour of the Appellant and against M/s BT & FC Private Limited (Principal Borrower), Mr M.V. Muralidhar, Mrs Padma Muralidhar, Mrs Soumya Muralidhar and the Respondent herein (Defendant No.1 to 5 in the said suit). In consequence to it, a decree dated 22.05.2015 and 06.08.2015 was drawn and passed by the Hon'ble High Court of Delhi, which was filed before the Adjudicating Authority/ NCLT, Bangalore by the Appellant along with Petition/Application filed u/s 7 of the Code. Adjudicating Authority rejected the same on ground that review pending before the Hon'ble High Court of Delhi.

Held:

It is pertinent to mention that Corporate Debtor in its reply had taken the plea that the judgment and decree are not final and Review Application is pending before the Hon'ble High Court of Delhi. Based on the statement made in reply by the Corporate Debtor the Adjudicating Authority has presumed pendency of Review Application, whereas no document was placed on record to show the pendency of the Review Application. The burden of proof was also on the Corporate Debtor, who had contended before the Adjudicating Authority that decree is not final and Review Application is yet pending, but Adjudicating Authority has presumed the pendency of the Review Application for not filing of any document by the Petitioner regarding Review Application. The above finding of the Adjudicating Authority is incorrect because the burden of proof to show that the review application is pending was on the Corporate Debtor.

It is important to point out that the definition of creditor provided in Sec 5(10) of the I&B Code provides that "Creditor means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decreeholder." Based on the decree of the Court this petition was filed U/S 7 of the Code. Since the definition of word creditor in I&B

Code includes decreeholder, therefore if a petition is filed for the realisation of decretal amount, then it cannot be dismissed on the ground that applicant should have taken steps for filing execution case in Civil Court.

20. The period from date of notice u/s 13(2) of SARFEASI Act to date of order passed by the court will be excluded for filing application u/s 7-Sesh Nath Singh vs Debi Fabtech Private Ltd-NCLAT

Case Citation:

Facts:

The Appellants are the Directors of M/s Debi Fabtech Pvt Ltd(Corporate Debtor) against whom the CIRP has been initiated and completed on 25.4.2019. The Appellants are Mr. Sesh Nath Singh and Mr. Akshay Kumar Singh, Directors of the Corporate Debtor filed this appeal u/s 61 of the IBC.

The account of the corporate debtor was declared NPA on 31.03.2013 and Demand Notice under Section 13(2) of SARFEASI Act, 2002 was issued on 18.01.2014. Thereafter on 13.2.2014 notice under Section 13(4) of SARFEASI Act, 2002 was issued to corporate debtor. On 19.12.2014 the Corporate Debtor filed a writ petition bearing No.33799(W) of 2014 against the financial creditor challenging the notice under Section 13(2) of SARFEASI Act, 2002. Hon'ble Kolkata High Court by order dated 24.7.2017 restrained financial creditor from taking any steps against the corporate debtor under the SARFEASI Act, 2002 till further orders. Before that on 24.12.2014 possession notice under Section 13(4) of SARFEASI Act, 2002 alongwith Rule 9 of Security Interest (Enforcement) Rules 2002 has been issued against the corporate debtor and the possession order was issued on 11.5.2017 by the District Magistrate, Hooghly. On 27.8.2018, financial creditor has filed application under Section 7 of IBC before the Adjudicating Authority, NCLT, Kolkata Bench, Kolkata.

Issue:

Appellants issue that the account of Corporate Debtor was declared NPA on 31.03.2013 whereas the application u/s 7 of IBC has been filed on 27.08.2018 i.e. after about 5 years and 5 months from the date of accrual of cause of action.

Held:

NCLAT has held that the Respondent is entitled for the exclusion of time period under Section 14(2) of Limitation Act i.e. the period of 3 years and 6 months. After exclusion of this period the application filed under Section 7 of I&B Code is within limitation period. In such circumstances the application under Section 7 is within limitation and there is no force in the argument that the application is time barred.

21. The decision for collating the claim, if any, taken by the Resolution Professional, the same being judicial or quasi-judicial, the NCLT cannot sit in Appeal-Dipco Private Limited Vs. Mr. JayeshSanghrajka-NCLAT

Case Citation: 29(IBC)29/2020

The Appellant -Dipco Private Limited also filed an application u/s 60(5) against the decision of the Resolution Professional of Vistra ITCL (India) Limited and M/s Aasan Corporate Solutions Private Limited alleging that there is no debtor-creditor relationship between the Corporate Debtor and the aforesaid Vistra ITCL (India) Limited and M/s Aasan Corporate Solutions Private Limited. It was alleged that the Resolution Professional wrongly accepted their claims, resulting in reduction of voting shares of Appellant – Dipco Private Limited in the CoC. It was also alleged by the Appellant – Dipco Private Limited that Vistra ITCL (India) Limited, IIFL Trustee Ltd. and another Financial Creditor are attempting to defend their inclusion in CoC', claiming themselves to be Financial Creditors without any documentary evidence. The aforesaid Miscellaneous Applications were rejected by the Adjudicating Authority with a direction to the Resolution Professional to proceed with the decisions taken in the meeting of the CoC as regards the approval of the Resolution Plan.

NCLAT has held that as per Section 60(5), though the NCLT is empowered to entertain or dispose of any application or proceeding by or against the Corporate Debtor or Corporate Person, it does not invest the NCLT with the jurisdiction to re-determine and collate the claim. The decision for collating the claim, if any, taken by the Resolution Professional, the same being judicial or quasi-judicial, the NCLT cannot sit in Appeal. In the present case, though the Adjudicating Authority has no jurisdiction, but for the purpose of transparency, considered the documents relied upon by the Respondents in support of their claim and observed that the basic principle is that "Documents speak for themselves", a simple verification of the above documents in fact are sufficient enough to conclude that the Corporate Debtor has a liability to pay the amounts as claimed in the documents.

It is not in dispute that the CoC had approved the 'Plan' and only thereafter at that stage, the Appellant and another moved applications u/s 60(5) against collation of claim by the Resolution Professional, by the time, the period of CIRP was to conclude and had completed during the pendency. The Adjudicating Authority has rightly dismissed the application.

22. Adjudicating Authority per se is not to be involved in the commercial wisdom area of the CoC, particularly, in the approval of commercial side of Resolution Plan/Modified Resolution Plan-Santosh Wasantrao Walokar Vs. Vijay Kumar V.Iyer-NCLAT

Case Citation: 32(IBC)32/2020

The questions that arise for consideration in the appeal and answered by NCLAT as under:

1. Whether the approval of Resolution Plan and the distribution/payment to various stakeholders therein was in accordance with the provisions of IBC Code.

When the Adjudicating Authority is satisfied that the Resolution Plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub- section, satisfy that the resolution plan has provisions for its effective implementation. Where the Adjudicating Authority is satisfied that the Resolution Plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the Resolution Plan. The Resolution Plan submitted by the Resolution Applicant is conditional and provides for the conditions for the implementation of the plan.

2. Scope and ambit of jurisdiction of Adjudicating Authority and Appellate Tribunal while approving Resolution Plan. Whether a conditional Resolution Plan can be approved?

The Adjudicating Authority and Appellate Authority cannot go into the feasibility and viability of the Resolution Plan which requires commercial wisdom of the Committee of Creditors. The Adjudicating Authority and Appellate Authority has to go by the various propositions of law stated above accordingly to which they have to go by the commercial wisdom of committee of creditors while approving the Resolution Plan. The given Resolution Plan is conditional but since according to the express directions given by Supreme Court in the various cases stated above. The Adjudicating Authority per se will have to go the Commercial wisdom of Committee of Creditors.

3. Whether those claims that are not dealt under the resolution plan can be held to be extinguished under the provisions of the IB Code?

The Hon'ble Supreme Court in Essar Judgment has vividly dealt with this issue. A successful Resolution Applicant cannot suddenly be faced with "undecided" claims

after the Resolution Plan submitted by him has been accepted as this would amount to an extra amount coming up for payment after the debts have been dealt by the Resolution Applicant and the Resolution Plan has been approved. This would throw into uncertainty amounts payable by a prospective Resolution Applicant who successfully takes over the business of the Corporate Debtor. All claims must be submitted to and decided by the Resolution Professional so that a prospective Resolution Applicant knows exactly who has to be paid in order that it may then take over and run the business of the Corporate Debtor. Therefore, claims that are not submitted or are not accepted or dealt with by the Resolution Professional and such Resolution Plan submitted by the Resolution Professional is approved then those claims would stand extinguished.

4. Whether the Adjudicating Authority has power to modify its own order?

Section 420(2) of the Companies Act, 2013 provides as under:

The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties.

Rule 154 of the NCLT Rules, 2016 provides that:

(1) Any clerical or arithmetical mistakes in any order of the Tribunal or error therein arising from any accidental slip or omission may, at any time, be corrected by the Tribunal on its own motion or on Application of any party by way of rectification.

According, the NCLT does not have power to modify its own order but can only correct mistake apparent from the record. The Hon'ble Supreme Court has held in "Assistant Commissioner, Income Tax, Rajkot Vs. Saurashtra Kutch Stock Exchange Limited" that a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish it, can be said to be an error apparent on the face of record and can be corrected. An error cannot be said to be apparent on the face of the recorded if one has to travel beyond the record to see whether the judgment is correct or not. An error apparent on the face of the record means an error which strikes on mere looking and does not need long-drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. To put it differently, it should be so manifest and clear that no court would permit it to remain on record. This does not include the power to modify any substantial part of the judgment which determines rights of one party or the other.

5. *Whether the initiation of CIRP was vitiated in view of the pendency of winding up petition before the Hon'ble High Court of Bombay, Nagpur Bench?*

The Hon'ble High Court of Bombay had granted leave to the Respondents to initiate CIRP vide order dated 02.11.2018 and put the matter to rest by retrospectively validating the CIRP. Overriding effect has also been given to the IB Code over any other law in force and therefore, the Adjudicating Authority had rightly initiated Insolvency proceedings by admitting application of Edelweiss Asset Reconstruction Company Ltd., under Section 7 of IB Code.

23. The Code has the overriding effect on the provision of Maharashtra Value Added Tax Act, 2002 creating first charge – Sales Tax Department, State of Maharashtra vs New Phaltan Sugar Works Ltd. & Anr – NCLAT

Case Citation: 34(IBC)34/2020

Appellant, Sales Tax Department, State of Maharashtra has submitted that the Appellant does not fall within the definition of Financial Creditor or Operational Creditor under the Code, 2016, it having first charge in terms of Section 37 of the Maharashtra Value Added Tax Act, 2002, therefore, Resolution Plan is not binding on the Appellant who was not a member of the CoC which has reduced the claim of the Appellant.

NCLAT referring Essar Steel case and has held that the Resolution Plan approved in terms of the impugned order reducing claim of the Appellant is not open to question even on the ground that the same contravenes the provisions of Maharashtra Value Added Tax Act, 2002. Admittedly, Section 37 of the aforesaid act creating first charge on the property of the assesse/ dealer in regard to any amount of tax, penalty, interest etc. has overriding effect as far as there is a contract to the contrary but the same has been subjected to any provision regarding creation of first charge in any Central Act in force. It is not in controversy that the Code has the overriding effect over other laws as specifically provided under Section 238, thus provisions of the Code shall have effect notwithstanding anything inconsistent therewith contained in any other law. First charge under the Maharashtra Value Added Tax Act, 2002 has thus to yield and can neither supersede the IB Code Mechanism nor run parallel to it. The argument advanced on behalf of the Appellant that the tax leviable under the Maharashtra Value Added Tax Act, 2002 is not an operational debt is equally fallacious as a liability or obligation arising in respect of a payment of dues under any law and payable to Central Government, State Government or any local authority falls within the ambit of Operational Debt as defined under Section 5(21) of the Code, thereby, bringing the Appellant within the fold of 'Operational Creditor'. In view of the finding that the Appellant is an' Operational Creditor' and provision of Maharashtra Value Added Tax Act, 2002 creating first charge in its favour get

eclipsed under the over-riding effect of provisions of the Code, Appellant cannot claim priority in distribution of money in an approved resolution plan. The business decision taken by the CoC in its commercial wisdom reducing the Appellant's claim to 1% (in Company Appeal (AT) (Insolvency) No. 155 of 2020)/ NIL (in Company Appeal (AT) (Insolvency) No. 156 of 2020 is beyond the pale of challenge before the Adjudicating Authority or even before this Appellate Tribunal.

24. Assets of subsidiary of the Corporate Debtor are not included in the liquidation Estate-The Assistant Provident Fund Commissioner & Recovery Officer Employees Provident Fund Organization vs Florind Shoes Pvt. Ltd. (CD) & Ors.-NCLAT

Case Citation: 38(IBC)38/2020

In this matter, NCLAT has held that as in terms of provisions of Section 36(4)(d) of the Code assets of its subsidiary did not fall within the ambit of liquidation Estate. Learned counsel for the Appellant vehemently tried to stress that under sub-Section 3(a) of section 36 of the Code assets over which the Corporate Debtor has ownership right including all rights and interests herein as evidenced in the balance sheet of the Corporate Debtor or an information utility etc. comprise the liquidation Estate of Corporate Debtor. However, the provision itself has been subjected to the exclusion clause engrafted in sub-Section 4 and assets of subsidiary of the Corporate Debtor are not included in the liquidation Estate.

25. Adjudicating Authority had no jurisdiction u/s 31 to allow the rectification in the approved Resolution Plan-QVC Exports Pvt. Ltd. vs RP Deloitte Touche Tohmatsu India LLP-NCLAT

Case Citation:40(IBC)40/2020

The Adjudicating Authority(AA) has allowed the Application for rectification of the Resolution Plan already approved and implemented. Appellant submits that the Company Cosmic Ferro Alloys Limited was admitted under the CIRP on 16.01.2017. The Appellant and the Respondent No.1 had jointly submitted the Resolution Plan for taking over the Company. The same was approved unanimously by the CoC, and after that, the Resolution Plan was further approved by the AA vide its order dated 11.10.2018. Given the approved Resolution Plan, Appellant QVC Exports Private Limited was to hold 34% of the paid-up equity shares, of and in the Company, the Cosmic Ferro Alloys Limited and the Respondent No.1 was to hold 51% paid-up equity shares and 15% of the paid-up equity shares were to be allotted to a Trust namely Cosmic Ferro Alloys ESOP Trust. The approved Resolution Plan got executed, and the shares were allotted as per the terms of the approved Plan. All money in respect of 34% shares were paid by the Appellant and is the rightful owner of 34% paid-up equity shares of and in the Company.

The Company Application was filed before the Adjudicating Authority to make rectification in the approved Resolution Plan, after 13 months of the completion and conclusion of the CIRP. The Adjudicating Authority allowed the Company Application by the impugned order, resultantly reducing the shareholding of the Appellant to 10% from 34%.

The following issue arises:

- Whether the Hon'ble Adjudicating Authority had jurisdiction to entertain an application for rectification of Resolution Plan and making substantial changes in the Plan, after a lapse of 13 months of the completion of CIRP, even after the approval and implementation of the Resolution Plan?
- Whether the Hon'ble Adjudicating Authority had the jurisdiction to alter a Resolution Plan submitted by the appellant and the Respondent No.1 as co-applicants in the Resolution Process, without there being any consent on the part of the Appellant?
- Whether substantial rectification of the Resolution Plan resulting in a change in shareholding of the shareholders could be brought under the purview of the typographical/arithmetic/clerical error?

Held:

The Adjudicating Authority was having no role in interfering in terms of the approved Resolution Plan, which was executed 13 months back. The Adjudicating Authority has failed to consider that Resolution Plan was submitted jointly by Applicant and Respondent No.1 and the Rectification Application, for amendment in approved Resolution Plan has been filed by only one of the Resolution Applicant, i.e. Respondent No.1. When approved Resolution Plan was submitted by Applicant and Respondent No.1 jointly, then one party had no right to move the rectification of the said Resolution Plan, without the consent of another party. But the Adjudicating Authority has allowed this Application without any cogent reasons. It is clear that the order which has attained finality cannot be reviewed under the inherent powers of the Court. This power can only be exercised to correct clerical errors or arithmetical mistakes in the judgment. By the impugned order the Adjudicating Authority has changed terms of Resolution Plan based on the application of one of the Resolution Applicant without even consent of the Appellant, even though he was the joint applicant in the Resolution Plan.

NCLAT has held that the Adjudicating Authority had no jurisdiction to entertain an application for rectification of Resolution Plan and making substantial changes in the Plan, after a lapse of 13 months of the completion of CIRP, even after the approval and implementation of the Resolution Plan on the pretext of rectification of clerical or typographical error in the order.

Since the Appellant and Respondent, No 1 was the joint Resolution Applicant. Therefore, any application for rectification of the Resolution Plan could have been moved by both the Resolution Applicants. Thus the Adjudicating Authority had no jurisdiction to allow amendment in the Resolution Plan, submitted by the appellant and the Respondent No.1 as co-applicants in the Resolution Process, without there being any consent on the part of the Appellant.

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