Indian Insolvency Quarterly Roundup

PHOENIX LEGAL

Quarterly Review of Significant Insolvency Judgments

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Authored by:

Mr. Vasanth Rajasekaran

Mr. Saurabh Babulkar

Mr. Harshvardhan Korada

In recent times, several noteworthy judgments have been rendered by the Indian courts and tribunals in matters involving the insolvency law framework. Some decisions rendered in the first quarter of 2022 that discuss and set out the legal position concerning the interpretation and applicability of the provisions of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") have been summarized below:

1. BANK OF BARODA v. MBL INFRASTRUCTURES LIMITED & ORS.

Decision dated: 18 January 2022
Citation: 2022 SCC OnLine SC 48

Guarantor barred from being a resolution applicant under Section 29A(h) of IBC if guarantee invoked and insolvency proceedings initiated by similarly situated creditors.

Brief Facts: The respondent, M/s. MBL Infrastructures Limited, had obtained credit facilities which it failed to repay in accordance with the repayment terms and conditions. On account of such default, the personal guarantee of the guarantor was invoked by the lenders. Additionally, the lenders issued a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 ("**SARFAESI Act**") and also filed an application under Section 7 of the IBC before National Company Law Tribunal ("**NCLT**") Kolkata bench, which came to be admitted. Two resolution plans were received by the resolution professional, one of which was submitted by the guarantor. In the meanwhile, a new provision under Section 29A was introduced under the IBC Amendment Ordinance of 2017, which enlists all the persons not eligible to be a resolution applicant ("**RA**"). The provision under sub-section (h) of Section 29 A states that a person who "*has executed an enforceable guarantee in favour of a creditor, in respect of a corporate debtor under insolvency resolution process or liquidation under this code*" is not eligible to submit a resolution plan.

In the instant case, when the NCLT, Kolkata bench held that the guarantor was eligible to submit a resolution plan under Section 29A(h) of the Code, two appeals were filed before the National Company Law Appellate Tribunal ("**NCLAT**"), which were subsequently withdrawn. The guarantor's plan got approved by the Committee of Creditors ("**CoC**") with a majority of 78.5% votes. As the NCLT approved the guarantor's resolution plan in April 2018, the lenders challenged NCLT's order approving the resolution plan before NCLAT. During the pendency of the appeal, section 29A(h) was further amended in 2018 to state that anyone who has "*executed an enforceable guarantee in favour of a creditor, in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this code and such guarantee has been invoked by the creditor and remains unpaid in full or part*" is a person who is not eligible to submit be a resolution application. Despite this amendment, in August 2019, NCLAT also approved the guarantor's plan and upheld NCLT's previous order on this issue. Pursuant to NCLAT's reaffirmation, the

guarantor's resolution plan came into effect and a fundraising of INR 300 crores was approved of in MBL's annual general meeting. Aggrieved by the NCLAT's order, one of the lenders - Bank of Baroda challenged NCLAT's order before the Supreme Court. In the present case, while considering the facts of the case, it is also imperative to note that the guarantor's submission of a resolution plan took place alongside when the amendment was going on, and thus a judicial interpretation of Section 29A(h) of the IBC was also sought before the Supreme Court under this appeal.

Issue: Whether a guarantor can be eligible to be a resolution applicant and submit a resolution plan?

Decision: The Supreme Court held that the words "*such creditor*" under Section 29A(h) have to be interpreted to mean similarly placed creditors after the application for insolvency is admitted by the adjudicating authority. Therefore, the criteria for disqualification under the said provision is the invocation of a personal guarantee by a single creditor, even if the application for initiation of insolvency is filed by another creditor. Thus, once an application for insolvency resolution is admitted on behalf of 'a creditor' then the process would be one of rem, and thus, all creditors of the same class would have their respective rights at par with each other. The Apex Court also emphasised that its concern is only from the point of view of the corporate creditors and the corporate debtors. Any other interpretation would lead to an absurdity striking at the very objective of Section 29A, and hence, the IBC. Further, on the issue of whether the plan submitted by the guarantor is ineligible, the court held that the plan is put into operation since 18.04.2018, and as of now, the corporate debtor is a going concern. Therefore, the Court did not interfere with the guarantor's resolution plan while dismissing the appeal.

2. DEVARAJAN RAMAN v. BANK OF INDIA LTD

Decision dated: 5 January 2022
Citation: 2022 SCC OnLine SC 14

NCLT must make a reasonable assessment of the fees and expenses payable to the IRP, and not pass orders in an ad-hoc manner.

Brief Facts: The appellant, is the resolution professional and Bank of India is the financial creditor. The appellant submitted a technical and financial bid for appointment as Interim Resolution Professional ("**IRP**"), and also filed a Section 7 application under IBC against the corporate debtor which was admitted by the NCLT with the appellant as IRP. However, the order was set aside on appeal, and the proceedings were remitted back to the NCLT to adjudicate costs of the Corporate Insolvency Resolution Process ("**CIRP**") that were to be paid to the appellant by the financial creditor. In pursuance of the order, the financial creditor reimbursed only INR 5,66,667 to the appellant, out of claimed total of INR

14,75,660. When the appellant approached the NCLT for the release of the remaining funds, the NCLAT allowed the application and directed the respondent to disburse funds to the appellant. The order of the NCLT was appealed against by the respondent before the NCLAT, which came to be rejected because expenses had been allowed in full and the consolidated amount allowed as the fee of the resolution professional for the entire period was not unreasonable. The NCLAT based its decision on the principle that fixation of fees is not a business decision depending on the commercial wisdom of the Committee of Creditors ("**CoC**"). Aggrieved by the same, the matter was brought before the Supreme Court in an appeal.

Issue: Whether the NCLT and NCLAT had considered the reasonableness of the fees claimed by the IRP?

Decision: The Apex Court noted that the appellant had previously submitted a technical and financial bid to the financial creditor, on the basis of which the assignment was awarded. It also made a note of the circular dated 12.06.2018 issued by the Insolvency and Bankruptcy Board of India ("**IBBI**"), according to which the insolvency professional had to ensure the reasonableness of fees payable to him. Even within the application filed with the NCLAT, the appellant had annexed a statement of costs, the amount which was reimbursed along with the balance dues. However, none of these aspects was considered by the NCLT, which only directed the respondent to pay an amount of INR 5,00,000 + GST towards the fee of appellant without considering the reasonableness or basis of the claim. Additionally, there were no reasons provided by either the NCLT or NCLAT for awarding the appellant the amounts as stated above. Thus, the Supreme Court observed that the NCLT and NCLAT had not adjudged the basis of the claim sufficiently, and set aside the orders of both NCLT and NCLAT and remanded the matter back to the NCLT for a fresh decision within an expedited timeline. It also noted that the tribunals must make a reasonable assessment of the fees and expenses payable to the IRP, and not pass orders in an ad-hoc manner; as an order without reasons would also amount to abdication of jurisdiction.

3. EDELWEISS ASSET RECONSTRUCTION COMPANY LTD. v. PETER BECK AND PETER VERMOEGENSVERWALTUNG LTD.

Decision dated: 5 January 2022
Citation: 2022 SCC OnLine NCLAT 4

There is no express provision regarding the re-initiation of CIRP in the IBC.

Brief Facts: An appeal was filed against the order passed by NCLAT, wherein the NCLAT gave an extra period of two weeks to the Successful Resolution Applicant ("**SRA**") to deposit INR 10 crores ("**Impugned Order**") even though the appellant had prayed that since the SRA had failed to implement the resolution plan as per its provisions, the CIRP should be re-initiated

along with reinstating the previous resolution professional and 90 days of extra period should be provided in CIRP to invite Expressions of Interest ("**EOI**") for inviting resolution plans.

The NCLAT had approved a resolution plan in respect of the corporate debtor, which was also upheld by the Hon'ble Supreme Court. The appellants in both the appeals had claimed that the resolution applicant was slow in the implementation of the resolution plan. It has further contended that despite a passage of over 3 years, the respondent had not implemented the resolution plan, causing financial damage to its stakeholders and financial creditors by not paying them their rightful share after the insolvency of the corporate debtor. The respondent also failed to furnish the bank guarantee of INR 10 crores for the period from the date of plan approval to the effective date, and the bank guarantee provided by the Appellant was refused by *Banque De Luxembourg* after being invoked by the appellant State Bank of India. It also was argued that providing a valid and subsisting bank guarantee to the implementation of the resolution plan is a necessary and binding condition in the resolution plan, which cannot be overlooked. Hence, it was prayed that the corporate debtor should not be sent into liquidation. The CIRP should be reinitiated along with the reinstatement of the previous resolution professional. An additional period of 90 days should be provided in CIRP to invite expressions of interest for inviting resolution plans.

Issue: Whether additional time could be granted for the extension of the CIRP for invitation of fresh EOIs in the event respondent is found in default of implementation of the Resolution Plan?

Decision: The NCLAT held that, in the instant matter, the issue of non-adherence of the timelines in accordance with the approved resolution plan is quite apparent. The failure to provide a valid bank guarantee, in terms of approved resolution plan, to the satisfaction of the monitoring agency and the financial creditors is also a major default. There is no express provision regarding the re-initiation of CIRP in the IBC. The NCLAT was of the opinion that it would serve the interests of justice if the Corporate Debtor is not sent into liquidation but its insolvency is resolved so that it continues to be a going concern, as that would be in the interest of the Corporate Debtor's stakeholders and creditors. The NCLAT directed the SRA that an enforceable bank guarantee of INR 10 crores, as is required to be submitted under the approved resolution plan, should be submitted within 30 days of the passing of the order. In case INR 10 crores has been deposited with the corporate debtor by the successful resolution applicant in lieu of the bank guarantee, that amount will be either adjusted against the pending amounts to be paid by the resolution applicant or refunded to him within a period of 30 days.

4. BANK OF MAHARASHTRA AND ORS. v. VIDEOCON INDUSTRIES LTD AND ORS.
Decision dated: 5 February 2022
Citation: 2022 SCC OnLine NCLAT 6

The business decisions taken by the CoC in exercise of its commercial wisdom are non-justiciable by the NCLT or the NCLAT. Thus, the CoC is vested with a duty of trust and care, and that its decision on commercial matters is non-justiciable.

Brief Facts: Videocon group was founded in the year 1984 and Videocon Industries Limited ("**VIL**") is a listed company on the National Stock Exchange and the Bombay Stock Exchange. Videocon groups's telecom business had obtained 21, 2G telecom licences, which were cancelled at a later date. VIL and Bharat Petroleum Corporation Limited had jointly bought oil and gas assets through a "joint venture". VIL availed loan facilities from a consortium of bankers led by the State Bank of India ("**SBI**"), wherein VIL was repaying the agreed upon instalments to the consortium of lenders till 2015. From May 2016, VIL, along with 13 other companies of Videocon group, were classified as 'SMA2' due to late payment of instalments in the year 2016 and onwards. SBI filed an application under Section 7 of the IBC to initiate the CIRP against 15 entities of the Videocon group. It further filed an application for the substantive consolidation of the corporate debtors. The NCLT passed a consolidation order and partially allowed SBI's application, directing the consolidation of 13 out of the 15 Videocon Group companies.

A Trademark Licence Agreement ("**TLA**") was executed between the appellant, Electrolux Home Products INC Singapore, and Electrolux Kelitor Limited which were merged into the corporate debtor. The agreement specified that the appellant was entitled to terminate the TLA if the corporate debtor underwent any event that resulted in the Dhoot family no longer being in control. Thus, the Appellants were entitled to terminate the TLA once the corporate debtor was admitted to the CIRP, as the Dhoot family lost control of the corporate debtor. The CIRP against the corporate debtor was initiated from 11.06.2018. The appellant filed an application before the NCLT seeking a declaration that the termination of the TLA was valid and a direction that the resolution professional be prohibited from using the trademark in any manner. The NCLT, in the impugned order, held that the TLA should continue for at least a year from the date of approval of the plan, as per the existing terms and conditions as a transitional agreement. The appeals before the NCLAT arose out of this order passed by the NCLT, wherein it had approved the resolution plan submitted by the resolution applicant. Multiple appeals were filed before the NCLAT under Section 61 of the IBC to quash and set aside the impugned order.

Issues:
1. Whether the NCLT could direct the parties to continue the TLA as a transitional agreement?

2. Whether the Adjudicating Authority ("**AA**") can make modifications to the resolution plan without remanding it back to the CoC?

Decision: For the first issue, the NCLAT relied on the judgement of the Hon'ble Supreme Court in the case of *Tata Consultancy Services Limited v. Vishal Ghisulal Jain Resolution Professional*. *SK Wheels Pvt. Ltd.*, 2021 SCC OnLine SC 1113, wherein the Apex Court had observed that the NCLT does not have any residuary jurisdiction to entertain the contractual dispute that had arisen dehors the insolvency of the corporate debtor. Therefore, the NCLAT, in the instant case, held that the NCLT had made an error in permitting the TLA to continue as a transitional arrangement for a year, and that it was upon the parties to decide the continuity of the same, as per mutual understanding. Thus, the matter was remanded back to the CoC for review in accordance with the law.

As far as the second issue was concerned, the NCLAT took cognizance of the several reasons that were mentioned by the financial creditors for remanding the matter back to the CoC for its reconsideration. This primarily included safeguarding the interest of all the stakeholders and the public money. It further observed that, in the instant case, the CoC was primarily composed of public sector banks and financial institutions dealing with public money, whereby they were acting as custodians of public trust and discharging a statutory role. It further held that the CoC is vested with a duty of trust and care, and that its decision on commercial matters is non-justiciable. The NCLAT relied on the principle that commercial wisdom is totally in the domain of the CoC, and that the business decisions taken by the CoCs are non-justiciable by the NCLT or the NCLAT. The Apex Court finally held that NCLT is not empowered to suggest any modifications in the plan, and reiterated the well-established principle that an authority who has the power to take a decision has equally the power to review the said decision.

5. M/S. VISISTH SERVICES LIMITED v. S. V. RAMANI

Decision dated: 11 January 2022
Citation: 2022 SCC OnLine NCLAT 24

A 'going concern sale' on an 'as is where basis' does not dissolve the corporate debtor, rather, it forms a part of the liquidation estate wherein the entire business, including assets and liabilities, including all contracts, licences, concessions, agreements, benefits, privileges, rights or interests, is transferred to the purchaser.

Brief Facts: An application for CIRP was filed under Section 10 of the IBC by the corporate debtor. Thereafter, an order of liquidation was passed, following which the appointed liquidator issued advertisements inviting bids from prospective buyers through an e-auction for the sale of the corporate debtor as a 'going concern'. Owing to the said advertisement, the appellant submitted the Earnest Money Deposit ("**EMD**") of INR 37,10,000 to the

liquidator. However, the payment, as alleged by the appellant, was conditional in nature as there was no clarification on terms of the contract. The condition in dispute was that, if any litigation arises from any source, the EMD amount and the bidding document purchase amount was to be refunded within three days, to which the liquidator replied that no changes could be made to the information document for the auction, since it was published in the public domain. Hence, either the EMD will be forfeited, or the contract will be performed as per the original bid offer. Thus, an affidavit was filed by the Appellant, along with an application to the adjudicating authority, seeking directions for the 'approval of the sale' as a 'going concern'. The relief was sought for approval without transfer of any liabilities in a 'going concern sale' of such nature, and if there existed any impediment, the appellant sought withdrawal from the bid, and refund of the amount paid. The NCLT denied the relief to the appellant. Aggrieved by the same, an appeal was filed under Section 61 of the IBC against the impugned order passed by NCLT.

Issues

1. Whether the sale of corporate debtor as a 'going concern' in liquidation proceedings includes its liabilities?
2. Whether the appellant herein can withdraw from the bid after payment of the EMD, and seek for refund of the amount paid on the ground that the offer made by the bidder was a 'conditional offer'?

Decision: For the primary issue, while relying upon Regulation 32A of the IBBI (Liquidation Process) Regulations, 2016 and the IBBI Discussion Paper dated 27.04.2019 on the corporate liquidation process, the NCLAT held that as per Regulation 32(e) of the IBBI (Liquidation Process) Regulations, 2016, a 'going concern sale' on an 'as is where basis' does not dissolve the corporate debtor, rather, it forms a part of the liquidation estate wherein the entire business, including assets and liabilities, including all contracts, licences, concessions, agreements, benefits, privileges, rights or interests, is transferred to the purchaser. Therefore, it was concluded that the sale of a company as a 'going concern' means sale of both its assets and liabilities, if it is stated on 'as is where is basis'.

As for the second issue, the NCLAT held that the appellant accepted all the conditions, and that it was a case of concluded contract where no refund of EMD amount is possible. The NCLAT particularly noted the terms and conditions, and observed that after paying the EMD amount and accepting the bid, the appellant cannot now say that it was not a concluded contract. If the appellant had had any apprehensions and conditions about the liabilities, the appellant could have exercised their choice of not participating in the bid. Having participated, the appellant cannot propose certain conditions subsequent to their participation and putting in their bid. In essence, the appellant/ bidder cannot wriggle out of the contractual obligations arising out of acceptance of his bid, and thereby, the appellant

cannot be entitled to the EMD amount, or the amount paid towards the bid purchase document, if he does not comply with the terms of the contract. Thus, the appeal failed and was dismissed.

6. M/S CONSOLIDATED CONSTRUCTION CONSORTIUM LIMITED v. M/S HITRO ENERGY SOLUTIONS PRIVATE LIMITED

Decision dated: 4 February 2022
Citation: 2022 SCC OnLine SC 142

Debt arising out of advance payment made for supply of goods and services is an operational debt.

Limitation for filing a Section 9 application under the IBC does not commence when the debt becomes due but only when a default occurs.

Brief Facts: The appellant was awarded a project for light fittings by the Chennai Metro Rail Limited ("**CMRL**"). Pursuant to this project, the appellant placed three purchase orders with a sole proprietorship firm called M/s Hitro Energy Solutions ("**Hitro**"), who were required to supply the light fittings manufactured by a company named M/s Thorn Lighting India Pvt. Ltd. ("**TLIPL**"). As Hitro requested the appellant for an advance of INR 50,00,000, the appellant requested the same from CMRL and they issued a cheque directly in favour of Hitro as advance payment. CMRL terminated the contract for light fittings and demanded a refund of the amount of INR 50,00,000 from the appellant. CMRL also informed that, since the amount has already been realized towards the cheque, the said amount would be deducted towards the dues outstanding from CMRL to the appellant, in case the said amount of INR 50,00,000 is not returned. The appellant instantly paid an amount to CMRL and instructed Hitro to return the same. In the meantime, the respondent company was incorporated and in its Memorandum of Association ("**MoA**"), one of the objectives was "*to take over the existing proprietorship firm viz. M/s Hitro Energy Solutions having its registered office at Chennai.*" Since, the aforesaid amount was not refunded by the respondent, the appellant again requested the respondent to refund the same, and also undertook to indemnify the respondent if at all CMRL raised any claim against the respondent for the refund of the amount of INR 50,00,000. However, the respondent denied the request on the ground that as the money was received directly by CMRL, they'll refund the amount to their accounts instead. In furtherance to this, they also stated that they were never privy to the information regarding the termination of contract, and were intimated about the same only via the appellant's letter. After a series of meetings and communication between the parties, Hitro failed to remit the amount it received from CMRL.

The appellants once again demanded the refund, but this time along with the interest @18% per annum. The respondent refused to make any payment on the ground that the light

fittings ordered by the appellant were lying in their warehouse completely unused and the same resulted in losses to the respondent. Being left with no other option, the appellant issued a demand notice dated 18.07.2017, under Section 8 of the IBC and demanded payment of 'debt' amounting to INR 83,13,973 due and payable as on such date. The respondent, however, denied that any debt was payable by them. When an application under section 9 was filed before the NCLT, the respondent contended that there was no privity of contract between them and the appellant as Hitro was a separate legal entity. However, the NCLT rejected this argument and proceeded to initiate the insolvency resolution. Feeling aggrieved with the NCLT's order, the respondent filed an appeal before NCLAT. The NCLAT reversed the judgement of NCLT and held that the appellant being a 'purchaser' cannot be said to be an operational creditor under the IBC, as it never supplied any goods or provided any services to the corporate debtor i.e., the respondent. Ultimately, an appeal was filed by the judgement debtor under Section 62 of the IBC before the Supreme Court of India.

Issues:

1. Whether the appellant, being a purchaser of the corporate debtor, can be an operational creditor under the IBC?
2. Whether the corporate debtor was responsible for the debts of Hitro?
3. Whether the application is barred by limitation under Section 9 of the IBC?

Decision: For the first issue, several judgments such as *Pioneer Urban Land and Infrastructure Limited v. Union of India*, (2019) 8 SCC 416 were relied upon in order to determine what an 'operational debt' is and who can be considered as an 'operational creditor' under the Code. The Apex Court concluded that while Section 5(21) of IBC defines 'operational debt' as a claim in respect of provision of goods and services, the operative requirement is that the claim must bear some nexus with the provision of goods or services, without specifying who is to be the supplier or receiver. Even CIRP Regulation 7(2)(b)(i) & (ii) also indicated that the regulation is broad enough to include all forms of contracts for the supply of goods and services between the operational creditor and corporate debtor, including the ones who received the goods or services. Further, section 8(1) of the Code read with Rule 5(1) and Form 3 of the Application Rules, 2016 allows an operational creditor to issue either demand notice or an invoice. Thus, making it sufficiently clear that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt. It was, therefore, held that the appellant was in fact an 'operational creditor' in terms of the IBC, even if it was a purchaser.

The Supreme Court, in the second issue, rejected the contention that there was no privity of contract between the appellant and the respondent on the ground that the MoA clearly stated that they intended to take Hitro and no amendment in the same was carried out in terms of Section 13 of the Companies Act, 2013. Therefore, the Apex Court held that the

Respondent would be considered as having taken over Hitro and will be, thus, liable to pay its debts.

Lastly, with respect to the bar on limitation, the Apex Court rejected the contention of the respondent that the debt was barred by limitation. While relying on its earlier judgement in *BK Educational Services (P) Ltd v. Parag Gupta & Associates*, (2019) 11 SCC 633 the Court held that limitation commences on the date of default and not on the date when debt becomes due. Therefore, the claim of the appellant was found to be within the period of limitation, on the ground that although the cheque of INR 50,00,000 was issued on 07.11.2013, but the default occurred on 02.03.2017, when the respondent denied the demand of the appellant to refund the debt. Thus, the Section 9 Application was not barred by limitation. Subsequently, the appeal was allowed, and the order passed by the NCLAT was set aside.

7. M/S. THARAKAN WEB INNOVATIONS PVT LTD v. CYRIAC NJAVALLY

Decision Dated: 14 February 2022
Citation: 2022 SCC OnLine Ker 498

No application can be filed after 24.03.2020 regarding an amount where the default is less than INR 1 Crore. The litmus test is whether there exists a default as defined in Section 4 of IBC, on the date of the application.

Brief Facts: A writ petition was filed to challenge the order of the NCLT, Kochi bench under the IBC. The petitioner, M/s Tharakan Web Innovations, is a private limited company engaged in the activities of developing software and promoting advancement in the field of information technology. The respondent, i.e. Cyriac Njavally, filed an application before the NCLT Kochi bench, while claiming to be an operational creditor and the petitioner to be corporate debtor under the provisions of the IBC. The respondent claimed that the amounts due to him had not been paid. However, the petitioner claimed that the petition filed by the respondent before the NCLT was not maintainable before the NCLT. The petitioner disputed the alleged debts in their counter statement by stating that the amounts were actually due from the respondent to the petitioner. It was also submitted that the respondent is a former director and shareholder, who had sold the entirety of the shares after stepping down as director and the application had been filed only as a disgruntled director seeking to discredit the company and its shareholders. The petitioner further claimed that the application is not maintainable as Section 4 of the IBC was amended on 24.03.2020, wherein it categorically specified INR 1 crore as the minimum threshold for amount of default. The NCLT held that the application is maintainable as the notification under Section 4 would not save the petitioner from the initiation of insolvency proceedings with respect to defaults which had taken place before the pandemic and the resultant financial crisis.

Issues:

1. Whether the amendment of Section 4 of IBC will be applicable to cases where the default had occurred prior to the date of amendment.
2. Whether the prospects of the amendment have to be decided on the basis of the defaulted amount or on the basis of the date of default?

Decision: With respect to the first issue, the Kerela High Court held that the petitioner could have filed an application before the NCLT before 24.03.2020. But, after 24.03.2020, the right to approach the NCLT stood modified and it is only when there is a minimum default of INR 1 crore that an application can be filed. As such, from the date of amendment, Part II of the IBC can apply only to matters relating to insolvency and liquidation of corporate debtors, where the minimum amount of default is INR 1 Crore. The application of Part II itself is taken away with effect from 24.03.2020 as far as defaults less than INR 1 Crore are concerned and hence no application can be filed after 24.03.2020 regarding an amount where the default is less than INR 1 Crore. The litmus test is whether there exists a default as defined in Section 4 of IBC, on the date of the application.

With respect to the second issue, the court relied on the on judgement of Hon'ble Supreme Court in *Manish Kumar v. Union of India*, 2021 SCC OnLine SC 30 where the Supreme Court held that the IBC is not enacted to provide for a manner of recovery of debts by the creditors rather, it is to provide for insolvency resolution. The purpose of the IBC is to protect the rights of the debtors as well as the creditors. By providing for insolvency resolution in case of corporate debtors whose debt is above a specified amount, it can be seen that the very purpose is not to include cases where the debt is lesser than the said amount. None of the rights available to a creditor as against a debtor are taken away in the process.

8. STANDARD SURFA CHEM INDIA PVT. LTD. v. KISHORE GOPAL SOMANI

Decision Dated: February 14, 2022
Citation: Company Appeal (AT) (Insolvency) No. 684 of 2021

The satisfaction of the claims of the creditor while ensuring asset maximisation is the underlying principle of the IBC, and it cannot be overridden on account of meagre delays induced by a force majeure event.

Brief Facts: The appellant was the successful bidder in the auction proceedings for the Pondicherry unit of the property of the corporate debtor, i.e., Advanced Surfactants India Ltd. The liquidator issued a letter of intent, stipulating a 90-day timeline for making the full payment for completing the auction proceedings. The said timeline was supposed to expire on 03.06.2021 but on 25.05.2021 the appellant sought an extension for the completion of the auction proceedings, in conformance with Rule 11 of the NCLT Rules, 2016. The listing of the application was delayed, with it finally being listed in August 2021. However, the adjudicating authority dismissed the aforementioned application as infructuous. The

liquidator of the respondent, the corporate debtor, refused to grant any extension of time for the completion of the auction process, despite being empowered to do so by the terms of the "E-Auction Process Information Document" governing the auction, and also despite him recognising the genuine difficulties being faced amidst the pandemic. The liquidator also neglected Regulation 47A of the Liquidation Process Regulation, 2016, which states that the period of lockdown imposed by the Central Government in the wake of the COVID-19 outbreak shall not be counted for the purposes of computation of the timeline in relation to any liquidation process. The present appeal was filed to set aside the order passed by the NCLT and the consequential letter issued by the liquidator whereby the appellant's bid in the E-Auction for the sale of assets of the corporate debtor was terminated.

Issues:

1. Is the NCLT and the liquidator justified in refusing to grant an extension to the appellant without considering Regulation 47A of the Liquidation Process Regulation, 2016?
2. Whether the appellant is entitled to the exclusion/extension of the time for the period of lockdown imposed due to the COVID-19 outbreak, as stipulated under Regulation 47A of the IBBI (Liquidation Process) Regulation, 2016?

Decision: The NCLAT, while setting aside the order given by the NCLT, stated that the relevance of Regulation 47A in the instant case is doubtful because the lockdown was declared by the state of Tamil Nadu and not the Central Government. While Regulation 47 deals with the model timeline for the liquidation process, it is only directory in nature, and cannot be considered a deadline. To substantiate this point, the NCLAT also relied on the case of *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*, 2019 SCC OnLine SC 1005 in which it was held that the timeline provided under Section 7 of the IBC is directory in nature, and only in special/ exceptional circumstances, can it be extended. The NCLAT also stated that Regulation 47A acts as a guiding factor to complete the liquidation process in a time bound manner. Further, it noted that the "E-Auction Process Information Document" provides discretion to the liquidator to extend the timeline. Judicial notice has been taken of the impact that COVID-19 has had all around the country. In the special circumstances, the liquidator ought to seek permission of the NCLT to extend the timeline. However, the NCLT failed to consider that the satisfaction of creditor claims while ensuring asset maximisation is the underlying principle of the IBC, and it cannot be overridden on account of meagre delays induced by a force majeure event. Due to all such reasons, the NCLAT concluded by allowing this appeal and setting aside the impugned order.

9. PUNJAB NATIONAL BANK v. AMRIT HATCHERIES PVT. LTD. AND ORS.

Decision Dated: February 14, 2022

Citation: Company Appeal (AT) (Insolvency) No. 449 of 2021

Brief Facts: A batch of appeals seeking interrelated reliefs were filed by the appellants against the order of NCLT, Kolkata. In terms of the factual backdrop, CIRP was initiated by an operational creditor Mangturam Noranglal against corporate debtor Amrit Hatcheries Pvt. Ltd. Two properties were mortgaged to financial creditor Punjab National Bank ("**PNB**"), who had 83% voting share in the CoC. One of the properties in Howrah was allegedly sold by PNB via e-auction to Haldiram Incorporation Pvt. Ltd. before the commencement of CIRP and a 'sale certificate' under SARFAESI Act was also issued. The property in Bankura, on the other hand, was finalised to be sold to Skylark Feed Pvt. Ltd. before the commencement of CIRP, but the full payment had not occurred. Only the bid amount was paid. In both cases, the corporate debtor did not exercise the right of redemption available to it. On commencement of CIRP, the IRP took possession of the property in Howrah and refused to hand over physical possession back to PNB. In this regard, proceedings were initiated before the Debt Recovery Tribunal ("**DRT**") by the corporate debtor, wherein it prayed for an injunction against the sale of Howrah property during the moratorium imposed by Section 14. However, after the commencement of CIRP, the resolution professional did not appear in any proceedings, accordingly, the case was dismissed for want of prosecution.

When the matter went to the NCLT, it held unambiguously that both the properties are assets of the corporate debtor because the sales by way of e-auction were illegal, and since no resolution plan was received, liquidation was to commence. Thus, the incoming liquidator was directed to take possession of both properties from the so-called purchasers and include them in the liquidation estate. The aforesaid decision was appealed by various parties before the NCLAT, which were thus disposed of through a common judgment.

Issues:

1. Was the sale of the Howrah property validly executed under the provisions of the SARFAESI Act and Transfer of Property Act, 1882? Did the liquidator have the right to obtain possession of the property?
2. Did the liquidator have the right to obtain possession of the Bankura property, given that the sale certificate was issued after the commencement of CIRP?

Decision: Two individual opinions were issued in the order – an assenting and dissenting opinion respectively. The first assenting opinion examined various judgments to note that certain compliances are necessary to affect any 'sale', and that the provisions of the IBC assume supremacy by virtue of Section 238. Therefore, the moratorium under Section 14 would be applicable over competing provisions in other legislations. With respect to the Howrah property, it was held that since the case before the DRT was dismissed and the fate of the sale was subject to the outcome of the case, the sale certificate was without any registration and in violation of commitment at the DRT. Additionally, even though the sale certificate was claimed to be issued prior to CIRP, the same was not made available to the CoC. The Bankura property's sale certificate was issued post commencement of CIRP,

meaning the provisions of the IBC are to assume precedence. Thus, the order of the NCLT directing the Liquidator to take possession of both properties was correct in law.

The dissenting opinion differed on the question of the sale of Howrah property. The member noted that the sale of the property was confirmed, along with the issue of sale certificate, prior to the commencement of the CIRP. Thus, the resolution professional did not have the authority to assume possession of the property. Furthermore, the NCLT lacked the authority to direct the RP to assume possession of a property sold under the provisions of the SARFAESI Act. This was also because according to newly amended Section 13(8) of the SARFAESI Act, the borrower's right of redemption remains unless the same is voluntarily waived when prescribed conditions are not. In the instant case, despite multiple opportunities since 2018, the corporate debtor did not exercise its right of redemption or complete the necessary formalities. Additionally, the requirement of a sale certificate is absent within the SARFAESI Act – making the second order of the NCLT directing possession to the liquidator to be contradictory to its first order recognising the validity of the sale. The member noted that 'possession' of both properties took place under Rule 8 of the SARFAESI Rules prior to the imposition of moratorium. Furthermore, since a sale certificate is not required, there is no distinction between 'symbolic' and 'actual' possession indicating that either of them would suffice as 'possession' under the SARFAESI regime. Therefore, the NCLT had no jurisdiction under Section 60(5) of the IBC to step into a transaction initiated under a different legal regime and prior to commencement of CIRP. The moratorium under Section 14 is also inapplicable. The member also noted that no relief was sought with respect to the Bankura property that required redressal.

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