PHOENIX LEGAL

Indian Insolvency Quarterly Roundup

Quarterly Review of Significant Insolvency Judgements (April 2022 to June 2022)

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In recent times, several noteworthy judgments have been rendered by the Indian courts in matters relating to the law of insolvency in India. Some decisions rendered in the second quarter of 2022 that discuss the legal position concerning the interpretation and applicability of provisions of the Insolvency and Bankruptcy Code, 2016 have been summarised below:

1. *Indian Overseas Bank v. RCM Infrastructure Ltd.*

Citation: Civil Appeal No. 4750 OF 2021
Decision date: 18 May 2022

SARFAESI Proceedings Cannot Continue Against The Corporate Debtor Once The CIRP Commences And Moratorium Is Announced

Brief Facts: The appellant Indian Overseas Bank had extended certain credit facilities to the corporate debtor. However, the corporate debtor failed to repay the dues and the loan account of the corporate debtor became irregular. Subsequently, on 13 June 2016, the loan account of the corporate debtor came to be classified as a "Non-Performing Asset" (**NPA**). The appellant bank then issued a demand notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**SARFAESI Act**), calling upon the corporate debtor and its guarantors to repay the outstanding amount due to the appellant bank. Since the corporate debtor failed to comply with the demand notice and repay the outstanding dues, the appellant bank took symbolic possession of two secured assets mortgaged exclusively with it. The same was done by the appellant bank in the exercise of powers conferred on it under Section 13(4) of the SARFAESI Act read with Rule 8 of the Security Interest (Enforcement) Rules, 2002 (**Rules**). One of the said properties stood in the name of the corporate debtor and the other in the name of the Corporate Guarantor. An e-auction notice came to be issued by the appellant bank to recover the public money availed by the corporate debtor.

In the meantime, the corporate debtor filed a petition under Section 10 of the Insolvency and Bankruptcy Code, 2016 (**IBC**) before the National Company Law Tribunal (**NCLT**). In the first e-auction held on 06.11.2018, no bids were received. In the second e-auction which was scheduled on 12.12.2018, three persons became successful bidders by offering jointly a price of INR 32.92 crore for both the secured assets. On 13.12.2018, the sale was confirmed in favour of the successful bidders/auction purchasers in the public auction. Pursuant to this, the successful bidders deposited 25% of the bid amount, i.e., INR 8.23 crore including the earnest money deposit of the said amount and the appellant bank issued a sale certificate to them. The auction purchasers were directed to pay the balance 75% of the bid amount within 15 days, i.e., prior to 28.12.2018. However, on 28.12.2018, the auction purchasers addressed a letter to the appellant bank seeking handing over of peaceful and vacant possession of the secured assets and also prayed for an extension of time to pay the balance 75% of the bid amount till 08.03.2019. Nevertheless, the request made by the auction purchasers was accepted by the appellant bank on 29.12.2018. In exercise of its powers under Rule 9(4)(a) of the Rules, the appellant bank, extended the period till 08.03.2019 for payment of the balance 75% of the bid amount.

The NCLT admitted the petition filed by the ex-promoter of the corporate debtor. As a result of the said order passed under Section 10 of the IBC, the Corporate Insolvency Resolution

Process (**CIRP**) of the corporate debtor commenced. A moratorium as provided under Section 14 of the IBC was notified and an Interim Resolution Professional (**IRP**) was also appointed.

Upon coming to know about the admission of the insolvency petition filed by the corporate debtor, the appellant bank on 21.01.2019, filed its claim with the IRP. According to the appellant bank, since the balance 75% of the bid amount was not yet received on the said date, it was not excluded from the claim filed before the IRP. During the pendency of the CIRP, the appellant bank accepted the balance 75% of the bid amount, i.e., INR 24.69 crore. Upon receipt of the payment, the appellant bank submitted its revised claim to the IRP, and it also intimated the IRP about the successful sale of the said secured assets. Thereafter, the promoter of the corporate debtor filed an application praying before the NCLT to set aside the security realization during the CIRP period carried out by the appellant bank or in the alternative to cancel the impugned transaction. Pursuant to this, the NCLT passed an order setting aside the sale of the property owned by the corporate debtor. The appellant bank filed an appeal before the NCLAT, but, the same was rejected. Being aggrieved by the same, the appellant filed an appeal before the Supreme Court in this case.

Issues: Whether the bank could continue with the auction proceedings under SARFAESI once CIRP had been initiated and a moratorium was notified?

Decision: The Supreme Court observed that after the CIRP is initiated, there is a moratorium for any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the SARFAESI Act. The words "including any action under the SARFAESI Act" are significant in clarifying the legislative intent that after the CIRP is initiated, all actions including any action under the SARFAESI Act to foreclose, recover or enforce any security interest are prohibited. The Supreme Court further noted that Section 14(1)(c) of the IBC has an overriding effect over any other law. Finally, while dismissing the appeal, the Supreme Court held that the appellant bank could not have continued the proceedings under the SARFAESI Act once the CIRP was initiated and the moratorium was ordered.

2. *Sunil Kumar Jain And Others v. Sundaresh Bhatt And Ors.*

Citation: Civil Appeal No. 5910 of 2019
Decision date: 19 April 2022

Claims For Payment Of Wages/Salaries Of Only Those Workmen/Employees Who Actually Worked During The CIRP Are To Be Included In The CIRP Costs

Brief Facts: M/s ABG Shipyard Limited, he Corporate Debtor (**CD**), is a private sector Ship Building Yard with its manufacturing activities at Dahej Yard and Surat Yard in Gujarat and having its corporate office at Mumbai. Prior to the initiation of Corporate Insolvency Resolution Process (**CIRP**), the CD had over 1000 workmen and employees, out of which the appellants herein are the 272 employees and workmen employed at Mumbai Head Office and Dahej Yard of the CD. Vide order dated 25.04.2018, the Adjudicating Authority (defined below) directed the Resolution Professional (**RP**) to deposit INR 2,75,00,000 in the Registry of the Adjudicating Authority to satisfy the outstanding salaries/wages for the period before the CIRP. However, the order was contingent upon the outcome of IA No. 348/2017, which was

filed by the appellant praying to direct the RP to utilize the amount of INR 9,75,33,236 to be received from the Indian Coast Guard solely for employees/workmen.

By 2019, since no agreed resolution plan could be adopted of the CD, the RP filed an application for liquidation, which was admitted by the National Company Law Tribunal, Ahmedabad Bench, Ahmedabad (**Adjudicating Authority**), that then passed an order of liquidation of the CD and appointed the respondent herein as Liquidator. At the time of the Liquidation Order, IA No. 348/2017 was also disposed and hence the earlier relief of INR 2,75,00,000 was also not available to the Appellants in the case. This order by the Adjudicating Authority of not granting any relief with regard to certain claim relating to salary was appealed before the Appellate Tribunal of National Company Law Appellate Tribunal, New Delhi (**NCLAT**), wherein the same was dismissed as well. Finally, the instant appeal was filed by the workmen/employees of CD, after being dissatisfied by the NCLAT Order.

The workmen/ employees contended that the salaries/wages and the dues payable to them during the CIRP period will be qualified as CIRP costs under Section 5(13) of the Insolvency and Bankruptcy Code, 2016 (**IBC**) and are liable to be disbursed even prior to the amount distributed under Section 53 of the IBC. It was further submitted that the provident fund, gratuity and pension fund amounts remain outside the liquidation under Section 36(4) of the IBC. On the other hand, the respondent contended that the wages and salaries claimed by the appellants who have done no work during the CIRP period and have not assisted the RP/Liquidator during the CIRP, would not fall within the parameters of CIRP costs within the definition of Section 5(13)(c) of the IBC.

Issues: Whether wages/ salaries of the workmen/ employees during the CIRP period and the amount due and payable to the respective workmen/ employees towards Pension Fund, Gratuity Fund and Provident Fund be given priority in case of liquidation of the Corporate Debtor?

Decision: After delving into the relevant provisions and the legislative history with respect to workmen/employee's dues towards the wages/salaries including the amount due and payable towards provident fund, gratuity and pension fund, the Supreme Court held that even though the RP is under an obligation to maintain the Corporate Debtor as a going concern, there is a serious dispute whether the CD was operational during the CIRP or not and whether the concerned workmen/employees actually worked during the CIRP or not. Therefore, the Appellant's claim of the CD being a going concern in itself cannot be accepted without actually enquiring about the facts and the status of the CD. Accordingly, the appellants were directed to submit their claims before the Liquidator and prove that during CIRP, IRP/RP managed the operations of the CD as a going concern and that they actually worked during the CIRP, and for the Liquidator to then adjudicate such claims in accordance with law and on its own merits. The Supreme Court decided that the claims of the workmen/employees can be included as CIRP costs only if it can be verified that the Corporate Debtor was indeed operating as a going concern and that the workers/employees actually worked during the CIRP.

3. *IndusInd Bank Ltd. v. Rajendra K. Bhuta*

Citation: 2022 SCC OnLine NCLAT 201
Decision date: 26 April 2022

The Resolution Professional Is Not Entitled To Fee When The Insolvency Proceedings Are Stayed.

Brief Facts: The present case stems from an appeal that was filed against the Order passed by the National Company Law Tribunal, Mumbai (**NCLT**), wherein the application by the Resolution Professional (**RP**) for reimbursement of INR 30,81,719 had been allowed. In the instant case, the Corporate Insolvency Resolution Process (**CIRP**) was initiated by order dated 05.03.2018 and the Committee of Creditors (**CoC**) was formed on 25.06.2018, subsequent to which the Insolvency Resolution Professional (**IRP**) was appointed.

On 11.07.2018, the suspended board of directors filed an appeal before NCLAT which was ultimately dismissed, so the matter was taken to the Supreme Court. The Supreme Court, on 26.11.2018 passed an interim order staying the insolvency proceeding. Subsequently, the civil appeal was allowed by the Supreme Court on 02.09.2019 and the application filed by the financial creditor was held to be barred by time.

The appellant had submitted that when the Supreme Court had stayed the insolvency proceedings, there is no entitlement of fee to be paid to the RP. However, the RP refuted the said submission made by the appellant and contended that even when insolvency proceedings were stayed, certain expenses were incurred by the RP which payment cannot be denied.

Issues: Whether the Resolution Professional is entitled to fee for the period of time when the insolvency proceedings are stayed?

Decision: The NCLAT noted that as the Supreme Court by interim order dated 26.11.2018 had stayed the insolvency proceedings, the RP should not be entitled for any fee after 26.11.2018. The RP was, however, held to be entitled for a fee from 13.06.2018 to 25.11.2018. Accordingly, the appeal was partly allowed by the NCLAT.

4. *Reserve Bank of India v. SREI Infrastructure Finance Ltd.*

Citation: IA (IB) No. 75/KB/2021 in CP (IB) No. 295/KB/2021
Decision date: 17 May, 2022

Question Of Prevalence Will Not Arise When The IBC And RBI Guidelines Are Two 'Disjoint Sets'

Brief Facts: The Applicant in the instant case is Mr. Hemant Kanoria, who is a shareholder SREI Infrastructure Finance Limited (**SIFL**) and SREI Equipment Finance Limited (**SEFL**) as well as a member of the suspended Board of Directors of SIFL. SIFL and SEFL are Financial Service Providers, where SEFL is a subsidiary of SIFL. Both the companies had defaulted in repayments to financial facility providers, including Axis Bank Ltd. and UCO Bank (**bankers**). On 23.03.2021, KPMG Assurance and Consulting Services LLP (**KPMG**) was appointed by the

bankers as an auditor for SIFL, as per the circular issued by the Reserve Bank of India (**RBI**). SIFL and SEFL went under Corporate Insolvency Resolution Process (**CIRP**) from 08.10.2021, following which the Administrator appointed BDO India LLP (**BDO**) as the transaction auditor of SEFL and SIFL, under the IBC, to probe vulnerable transactions. As per the RBI Circular, KPMG was required to complete the audit and give a report within a period of three months from the date of the Joint Lenders Forum (**JLF**), which was within 24.06.2021. However, KPMG continued with the audit of SIFL even after the initiation of CIRP. It was only in 22.12.2021 when the report was completed and subsequently, circulated to the bankers.

Accordingly, it was contended by the Applicant that, despite the Applicant's written requests to stop finalising the audit report on account of the CIRP being commenced, KPMG continued with the audit. It was also alleged that as KPMG had conducted the audit without consulting the management and sending a 'draft report', followed by a 'preliminary report' and 'final report' to the lenders behind the back of the management, the report seemed to be tailored to suit the requirements of the lenders, who wanted to "implicate" the ex-management of the SREI entities. It was also submitted by the Applicant that once a transactional auditor has been appointed under the IBC, a previous audit cannot continue. Thus, there cannot be a parallel forensic audit without consulting the management at the instance of the bankers. Further, the IBC being recognised as a complete Code and having an overriding effect, the Applicant sought for an order of restraint against the bankers from proceeding with the audit being conducted by KPMG. Lastly, it was also submitted by the Applicant that as he is a stakeholder of the Corporate Debtor, he has locus standi to file the application in view of Section 31 of the IBC.

While KPMG admitted that its report was incomplete, it also submitted that the same was completed on 22.12.2021 and was circulated on 28.12.2021 and 29.12.2021 to the bankers. Further, the Banks have contended that the Applicant's prayer of not using the report by KPMG for any purposes is devoid of any legal ground, as the report is not hit by the moratorium under section 14 of the IBC. They also contended that the breach of timelines under the RBI Circular is a matter that has to be resolved between the Banks and the RBI, and thus, the Applicant cannot seek stoppage of audit on the ground.

The present application is filed under section 60(5) of the IBC in order to set aside the appointment of KPMG and restraining the bankers from conducting or proceeding with the process of audit through KPMG.

Issues:

1. Whether the Applicant has *locus*?
2. Whether this Adjudicating Authority has jurisdiction?
3. Whether the Code will prevail over the RBI guidelines?
4. Whether two audits can continue simultaneously?

Decision: On the first issue, the NCLT held opined that the Applicant is admittedly one of the shareholders of SIFL and SEFL and was a member of the superseded Board of Management. While *locus* as a member of the superseded board may be in question, there is no question that the application is maintainable in the Applicant's capacity as a shareholder, as he is an important stakeholder in the process, and thus, would have *locus.*

While deliberating upon the issue of jurisdiction, the NCLT observed that the audit commissioned by the lenders was under the aegis of the RBI circulars. As RBI has the authority of issuing binding directions, the circulars issues, too, had statutory force. Thus, it was held that the NCLT, with the powers vested under the IBC, lacks the jurisdiction to stop an audit commissioned under RBI circulars, the intent of which is altogether different.

The NCLT, on the question whether IBC will prevail over RBI guidelines, observed that the Code and the RBI circulars work in different fields and are disjoint sets. As there is no possibility of conflict between the two, the question of one prevailing over the other shouldn't rise. While noting the allegation of the Applicant that the report was tailored to suit the requirements of the lenders, who wanted to "implicate" the ex-management of the SREI entities, the NCLT opined that the matter cannot be examined by then, since they lack the jurisdiction to do so. However, the applicant has the liberty to raise its concerns before an appropriate judicial forum.

Coming onto the last issue of whether the two audits can continue simultaneously, the NCLT reiterated the fact that as the scope and purpose of the two audits are not the same, there can be no objection as to whether the two audits going on in parallel, notwithstanding the institution of CIRP against the corporate debtor. Further, considering that the KPMG audit is over, there is only the audit commissioned by the Administrator that may be ongoing.

5. *Saraf Chits Private Limited & Anr. v. KAD Housing Private Limited*

Citation: (IB)-255(ND)/2021
Decision date: 25 May 2022

CIRP Against A Corporate Debtor Cannot Be Initiated Solely On The Basis Of The Unpaid Amount Of Interest Where The Entire Principal Amount Has Already Been Discharged

Brief Facts: In the present matter, M/s Saraf Chits Private Limited and M/s. VKSS International Private Limited (**Financial Creditors**) filed an application under the Section 7 of the Insolvency nd Bankruptcy Code, 2016 (**Code**) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a prayer to initiate CIRP against KAD Housing Private Limited (**Corporate Debtor**). As per Part IV of the Application which denoted detailed particulars of the total financial debt by the Corporate Debtor and its default thereon, the un-paid amount was shown as INR 1,76,04,484. The date of default was in July 2019, however, during the course of proceedings the Corporate Debtor had paid the principal amount of INR 1.5 Crore and only an amount of INR 64 lakh was left to be paid towards the interest component. This was highlighted by the Counsel for the Applicants during the course of hearing on 08.12.2021. In furtherance of the same, on 19.04.2022 the Applicants contended the maintainability of the present application by relying on the fact that the principal amount was discharged only during the pendency of the proceedings and not before the default date. Additionally, it was submitted that as the statutory definition of the term 'financial debt' under Section 5(8) of the Code included interest as well. Therefore, even though it is only the interest amount that is remains unsettled, the present application is maintainable in the eyes of law and CIRP shall be initiated.

Issues: The primary issue under consideration before the Tribunal was, "Whether the CIRP can be initiated / triggered solely on the basis of the un-paid amount of interest when the entire principal amount of debt has been discharged by the Corporate Debtor?"

Decision: While deliberating upon the issue involved in the present matter, the Tribunal noted that a plain reading of all the relevant definitions will unravel that interest is not included in the term "debt" per se. Rather, the "interest" can be claimed as "financial debt" only if such debt exists. Similarly, the NCLAT in the matter of *S. S. Polymers v. Kanodia Technoplast Ltd*., Company Appeal (AT) (Insolvency) No. 1227 of 2019, observed that when the total debt was paid by the Corporate Debtor before the admission of an application under Section 9 of the Code; the application filed solely to realise interest would be pursued as being filed with malicious intent. Additionally, it would be barred according to the principles of the Code as well as within the nature of Section 65 of the Code. Therefore, considering the statutory definitions envisaged under the Code, the Tribunal was of the view that a non-payment of only the interest cannot be the reason to trigger the resolution process under the Code. Such an intention is not within the purview of the preamble of the Code. The Tribunal while dismissing the petition by the applicants ruled that CIRP against a Corporate Debtor cannot be initiated/triggered solely on the basis of the un-paid amount of interest where the entire principal amount has already been discharged by the Corporate Debtor.

6. *Omega Laser Products B.V v. Anil Agrawal*

Citation: Company Appeal (AT) (Insolvency) No. 194 of 2022
Decision date: 10 May, 2022

Arrears Of Salary Due Beyond A Period Of 3 Years Would Be Barred By Limitation For The Purposes Of Initiating CIRP

Brief Facts: Omega Icehill Pvt. Ltd. is the Corporate Debtor in the instant case, and its Managing Director, Mr. Anil Agrawal is the Operation Creditor, who had filed a petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**IBC**) before NCLT, New Delhi (**Adjudicating Authority**), seeking initiation of CIRP against the Corporate Debtor, for arrears of salary not paid to him between 16.01.2010 to 14.05.2019. In the application, Mr. Agrawal contended that he was entitled to a salary of INR 3 Lakhs p.m. as remuneration from 16.01.2010, which was revised from 01.08.2014 to INR 4 Lakhs p.m. However, the payment made to him by the Corporate Debtor was short of the agreed sum and the arrears were promised to be paid when the financial health of the Corporate Debtor improves. On 14.05.2019, Mr. Agrawal was removed from the position of Managing Director by the Corporate Debtor without clearing his salary dues, and accordingly, the Section 9 petition was filed claiming salary arrears of INR 1,29,34,187 along with interest. The Adjudicating Authority admitted the petition and had initiated CIRP against the Corporate Debtor.

A Dutch company named Omega Laser Products B.V. (**Appellant**) and the shareholder of the Corporate Debtor, thereafter, had filed an appeal against the said order before the NCLAT, challenging the initiation of CIRP against the Corporate Debtor. The Appellant, while refuting the fact that the salary was never fixed at INR 4 Lakhs p.m. or more, submitted that the pay slip of Mr. Agrawal dated April 2019 that indicated that he was drawing a gross salary of only INR 3,43,100. Further, it was also contended that there was no Employment Agreement or

Board Resolution to validate the increase in salary. Additionally, as salary arrears were due since 2010, therefore, a part of the alleged operational debt (claims prior to 2016) was even 'barred by Limitation' in view of Article 7 of the Limitation Act, 1963 (**Limitation Act**). However, on the other hand, the respondent contended that there was always a promise from the Corporate Debtor's end to pay the arrears of Mr. Agrawal's salary. Reliance was placed on the minutes of meeting of shareholders' meet dated 12.05.2016, wherein it was recorded stated that the transactions between the three Companies i.e. Omega Group, Omega Engineering and Corporate Debtor needed to be settled by actual transfer of funds as per legal roles. Further, on the issue of limitation it was contended that the cause of action was a continuing one, hence, claims were not time barred.

Issues: Whether arrears in salary due beyond a period of 3 years would be barred by limitation for the purposes of initiating CIRP?

Decision: The NCLAT observed that the minutes of meeting dated 12.05.2016 and other emails being relied upon by the Respondent had no 'specific approval' and were all a mere 'proposal' under discussion, in respect of which no resolution for acceptance was ever passed before the Board of Directors. Further, there was no crystallized quantum of amount which can be claimed as salary/remuneration fixed by the Board of Directors in accordance with Section 196 of the Companies Act, 2013. As the correspondence relied upon did not give any definitive quantum of salary to have been accepted by way of any Resolution by the Board of Directors, to fall within the ambit of the definition of 'acknowledgement of debt' as contemplated under Section 18 of the Limitation Act. Therefore, the Tribunal held that the Section 9 Application filed on 27.08.2021 is 'barred by Limitation' as the claims of INR 96,92,000 and INR 18,00,000 pertain to the period prior to 31.03.2016 and more than three years have lapsed since.

7. *Aditya Kumar Tibrewal v. Om Prakash Pandey*

Citation: Company Appeal (AT) Insolvency No. 583 of 2021
Decision date: 6 April 2022

Timeline Prescribed Under Regulation 35A Of The CIRP Regulations Is Directory In Nature

Brief Facts: The Corporate Debtor (**CD**) in the instant case is M/s. Sri Balaji Forest Products Private Limited, against whom an application under section 7 of the Insolvency and Bankruptcy Code (**IBC**) was filed, and subsequently, Corporate Insolvency Resolution Process (**CIRP**) was initiated vide Order dated 18.10.2019 of the National Company Law Tribunal (**Adjudicating Authority**). The Resolution Professional (**RP**) constituted the Committee of Creditors (**CoC**). On numerous requests and reminders issued by the Appellant, the Ex-Director of the CD did not extend any cooperation nor provided the relevant documents pertaining to the CD, therefore, an application under Section 19(2) of the IBC was filed in which by Order dated 09.12.2019, the Adjudicating Authority directed suspended directors of the CD to extend cooperation in the CIRP. Due to numerous hindrances in conducting the CIRP caused by the suspended directors, the RP initiated 'Contempt Proceedings' against the suspended directors on which the Adjudicating Authority issued a Notice as well.

On 15.01.2020, the suspended directors shared the Lease Deed dated 30.11.2016 executed by the CD in favour of Respondent by which all land, plot and machinery had been for a period of 29 years. On the Audited Balance Sheet, transaction audit report was finalised. After which the RP, under Section 43 and 45 read with Section 49 and Section 66 and 60(5) of the IBC, filed an application seeking for various reliefs under Section 49 and Section 66 of the IBC. In the said Application, while the Adjudicating Authority issued notice to the suspended directors and other Respondents who were impleaded, however none of the Respondents including suspended directors chose to file any Reply to the Application. Accordingly, the Adjudicating Authority vide Order dated 26.02.202 rejected the application of the RP on the ground that it was hit by Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), Regulations, 2016 (CIRP Regulations) and by Section 46 of the IBC. Aggrieved by this order, the RP filed an Appeal before the National Company Law Appellant Tribunal (**NCLAT**).

Issues:

1. Whether an application by the Resolution Professional relating to a transaction covered under Secs. 43, 45, 49 and 66 is mandatory to be filed within the period of 135th Day of the Insolvency Commencement Date and in event, the Application is filed beyond such period, the same is liable to be rejected due to non-compliance of Regulation 35A of CIRP Regulations, 2016?
2. Whether time period prescribed under Regulation 35A of the CIRP Regulations, 2016 is mandatory or directory?
3. Whether Transaction claimed to be defrauding the Creditor under section 49 and fraudulent trading or wrongful trading within meaning of Section 66 can be questioned only within time period as prescribed under Section 46 i.e., one year or 2 years respectively and Application alleging defrauding the Creditors and transaction to be fraudulent trading or wrongful trading is liable to be rejected if it is filed beyond the period prescribed under Section 46 of the Code?

Decision: For the first and second issue, the NCLAT noted that Regulation 35A prescribes a period during which RP has to form an opinion whether corporate debtor subjected to has been any transaction covered under Section 43,45, 50 or 66 and the period during which he shall make a determination and a period of 135th day of insolvency commencement date during which he shall apply to the Adjudicating Authority. The expression used in Regulation 35A: "shall form an opinion" "shall make a determination" and he "shall apply to the Adjudicating Authority ". Therefore, what the intend and purpose of using the expression "shall" in Regulation 35A of the CIRP Regulations has to be looked into. In the present case, NCLAT held, the Appellant came to know about the fraudulent transaction i.e. lease deed dated 30.11. 2016 only on 15.01.2020, when the Respondent shared lease deed with the RP. Thus, the Application filed by the RP was obviously filed beyond the period of 135th Day of Insolvency Commencement Date.

Timelines prescribed under the IBC are intended to safeguard the interests of the CD; action taken by RP beyond the time prescribed in Regulation 35A of the CIRP Regulations is prohibited as it may cause serious general inconvenience or injustice to the CD. However, in the instant case, there was no cooperation by the Suspended Directors of the CD, documents and assets were not handed over to the RP, and so, the RP had to move an application under

Section 19(2) of the IBC. Therefore, the non-compliance of Regulation 35A of the CIRP Regulations shall depend on the facts of each case as to whether there are genuine reasons to consider the Application on merits even filed beyond 135th day. Finally, while relying on a catena of judgments, wherein the Supreme Court had held various timelines under the IBC not being mandatory in nature, the NCLAT too, observed that as per the law laid down on the interpretation of provisions of IBC, the same shall be applicable to the interpretation of Regulation 35A of CIRP Regulations, and thus, the timeline prescribed in Regulation 35A of CIRP Regulations will be directory in nature and not mandatory.

On the third issue on the transactions covered by Section 49 and 66 of the IBC not to be rejected on the ground that the application has been filed beyond the period prescribed under Section 46 of the IBC. The NCLAT held that the timeline prescribed for transactions under Section 46 does not cover the transactions covered by Sections 49 and 66 of the Code.

8. *N.C. Goel & Maya Goel v. Piyush Infrastructure India Private Limited*

Citation: CP (IB) No.453/ALD/2019
Decision date: 13 May 2022

Issuance Of Post-Dated Cheques Does Not Amount To An Unqualified Admission Of Debt

Brief Facts: Sh. N.C. Goyal and Ms. Maya Goyal (**Applicants**), had filed an application under Section 7 of the Insolvency & Bankruptcy Code, 2016 (**IBC**) against Piyush Infrastructure India Pvt. Ltd. (**Corporate Debtor/Respondent**), seeking for initiation of Corporate Insolvency Resolution Process (**CIRP**) for defaulting on repayment of an amount of INR 12,00,000.

It was submitted by the Applicants that the Corporate Debtor paid interest to Ms. Maya Goel on 09.04.2016 for an amount of INR 12,000, and to Mr. N.C. Goel on 04.06.2016 which was of the amount of INR 6,000. Post-dated cheques were also given for repayment of principal amount starting from 15.01.2018. However, in its reply, the Respondent claimed that that no interest has ever been paid to the Financial Creditor, and that there is no written agreement between the parties to substantiate this fact. Further, since no interest was payable, the said transaction could not be considered as being in the nature of a financial debt within the meaning of section 5(8) of the IBC. It has also been contended that the transactions pertain to the period from 2012 to 2014, and thus, the application would be barred by limitation. The Respondent also submitted that the post-dated cheques were never presented for payment and the Applicants had approached the Tribunal with unclean hands.

Issues:
1. Whether the Application is barred by limitation?
2. Whether issuance of Post-dated cheques would qualify as admission of debt?

Decision: On the issue of limitation, the NCLT held that Ms. Maya Goel has given the loan amount in the Financial Year 2011-12, 2012-13 and 2013-14 whereas Mr. N.C. Goel has given loan in the Financial Year 2011-12, 2013-14 and 2015-16. As the date of default can only be calculated when the tenure of the loan is established, or when there is a demand for repayment. In the absence of any documentation, it was observed that receipt of interest was

only evidenced through two letters of the Respondent, thus, the claim remained unsubstantiated.

Further, for the second issue, the NCLT held that the copies of the post-dated cheques issued by the Respondent cannot be taken to be unqualified admission of debt. In summary jurisdiction, without adequate documentation, it is difficult to establish the purpose for which the money was lent and accepted., or to establish whether there was any interest required to be paid. The NCLT thus observed that the petition seemed to be filed with the intention of recovering money and not for the resolution of the corporate debtor. Therefore, while dismissing the section 7 petition, it further held that IBC should not be allowed to be used as an easy way of recovery of money.

9. *CFM Asset Reconstruction Pvt. Ltd. v SS Natural Resources Pvt. Ltd. & Anr.*

Citation: Company Appeal (AT) (Insolvency) No. 396 of 2022
Decision date: 19 April 2022

Corporate Debtor Cannot Be Sent Into Liquidation Just Because Liquidation Value Is More Than The Value Of The Resolution Plan

Brief facts: The corporate debtor, Ramsarup Industries Limited, under Section 10 of the Insolvency and Bankruptcy Code, 2016 (**IBC**) approached the NCLT, Kolkata (**Adjudicating Authority**) and was accordingly admitted to Corporate Insolvency Resolution Process (**CIRP**) on 08.01.2018. Subsequently, a resolution plan was submitted by the Successful Resolution Applicant (**SRA**), SS Natural Resources Ltd., which was also approved by the Committee of Creditors (**CoC**) and the Adjudicating Authority. A monitoring agency to oversee the implementation of the successful resolution plan was constituted consisting of 6 members, i.e. the Resolution Professional, 2 members of SRA, 3 representatives of CoC including the appellant, CFM Asset Reconstruction Pvt. Ltd. (**CFM-ARC**), and Punjab National Bank along with Axis Bank Limited. The SRA had gone in appeal before the NCLAT stating that the Adjudicating Authority had altered its Resolution Plan by imposing additional financial obligations. However, the NCLAT dismissed the appeal vide an order dated 04.03.2021 and directed the Monitoring Agency to commence the implementation of the Resolution Plan, failing which, an application for liquidation of Corporate Debtor was liable to be moved before NCLT. The SRA went in appeal before the Supreme Court challenging the order dated 04.03.2021. Vanguard Credit & Holdings Pvt. Ltd. (**Vanguard**) had also filed an appeal before the Supreme Court to claim the land upon which Corporate Debtor's factory was situated. However, all the appeals were dismissed by the Supreme Court as well.

The Monitoring Agency convened its meeting 20.05.2021, wherein the SRA had expressed its willingness to implement the Resolution Plan subject to certain conditions – it declined to give consent for release the upfront payment to meet CIRP cost, and objected to the utilization of performance security until the Vanguard appeal was pending before the Supreme Court. Seeing this, other members of Monitoring Agency apprised the SRA and demanded for an unconditional implementation of the Resolution Plan. Pursuant to this, three appeals were filed, two by CFM-ARC and one by SRA against the erstwhile Resolution Professional and the Appellant, seeking directions to cooperate in the implementation of the approved Resolution Plan. The Adjudicating Authority only allowed the appeal filed by the

SRA and granted 5 days' time to transfer sum of INR 322 Crores in the account of the Corporate Debtor, and dismissed the remaining applications, including CFM-ARC's which was against the SRA and the Monitoring Agency seeking liquidation of the Corporate Debtor. Aggrieved by the same, CFM-ARC filed an appeal before the NCLAT Delhi claiming that the Adjudicating Authority had erred in law by not sending Corporate Debtor into liquidation.

The appellant contended that when the appeal was dismissed on 04.03.2021, no steps were taken by the SRA for implementation of the Resolution Plan and therefore, application for liquidation was filed by the Appellant; the same was even confirmed by the Supreme Court vide its order dated 04.05.2021and by rejecting the application for Liquidation, the Adjudicating Authority has disregarded these orders. It was further submitted that the plan offer of the SRA was much less than the Liquidation value of the assets and the objective of maximization of assets could only be achieved through Liquidation. However, on the other hand, it was contended by the Respondent that liquidation is being pressed just to serve the interest of the Appellant and the unsuccessful resolution applicant. It was also submitted that total bid amount offered by the SRA was more than liquidation value and now it has been held by the Supreme Court that Resolution Plan can be approved even if it is of less amount than the liquidation value. Thus, the Respondent pleaded that the CD need not be sent for liquidation.

Issues: Whether the CD can be sent into liquidation for the reason that the liquidation value happens to be more than the value of the Resolution Plan?

Decision: The NCLAT came to the conclusion that there was no lack of intention on the part of the SRA for implementation of the plan after the Judgment of the NCLAT. Further, it was also noted that the Order of the Adjudicating Authority giving five days' time as a last opportunity to transfer the amount in the CD's Account can in no manner be said to be contrary to the orders passed by the NCLAT dated 04.03.2021. NCLAT also noted that the Appellant was born only on 23.04.2021 i.e., after the passing of the Impugned Judgment and is pressing for Liquidation to realize its dues to the maximum. It was, thus, held that though certain delay has occurred in the implementation of the Resolution Plan, but this fact cannot interfere in the NCLAT's Appellate Jurisdiction. While dismissing the appeal and relying on the judgments passed by the Supreme Court, such as *Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.,* (2020) 15 SCC 1, the NCLAT held that primary focus of the IBC is to ensure revival and continuance of the CD. Therefore, the CD cannot be sent into liquidation just because liquidation value is more than the value of the Resolution Plan.

10. *Steel Strips Ltd v. Avil Menezes, Resolution Professional of AMW Autocomponent Ltd.*

Citation: CA(AT)(Ins.) No. 89/2022
Decision date: 18 April 2022

Fresh Resolution Plan Cannot Be Considered By The Coc Once It Has Already Approved A Resolution Plan

Brief Facts: On 01.09.2020, by an Order, the Corporate Insolvency Resolution Process (**CIRP**) was initiated against the Corporate Debtor, AMW Auto Component Ltd, wherein the last date for submission of the Expression of Interest was 15.12.2020. The Adjudicating Authority

granted extension of 90 days' time. The Committee of Creditors (**CoC**) has fixed 19.04.2021 as final date of submission of the Resolution Plan. Despite the fact that the Appellant submitted its Resolution Plan on 24.04.2021, the Resolution Professional communicated that the CoC considered the late submission of Resolution Plan and that the CoC has also granted a one-time opportunity to all the Prospective Resolution Applicants in the final list to submit a Resolution Plan or a revised Resolution Plan till 09.05.2021. Additionally, even a further extension of 60 days' time was allowed beyond 270 days. On 26.07.2021, the Adjudicating Authority allowed eight weeks' time to complete the CIRP. The Appellant submitted its revised Resolution Plan on 24.04.2021 with addendum of 27.08.2021. In the CoC meeting dated 21.09.2021, the Resolution Plan of the Appellant was considered and voting was conducted from 28.08.2021 till 21.09.2021. The Appellant's plan was approved by the CoC with 98.55% voting share. The Letter of Intent was issued by the Resolution Professional to the Appellant on 21.09.2021. In pursuance of which, the Appellant submitted the Bank Guarantee of INR 20 Crores on 23.09.2021. Thereafter, the Resolution Professional filed an approval application before the NCLT. Subsequently, Triton Electric, one of the respondents filed an application before the NCLT seeking permission for submitting a resolution plan before the COC and same was allowed by NCLT Ahmedabad vide its order dated 18.01.2022. The Appellant aggrieved by the said order has filed the present Appeal before the National Company Law Tribunal (**NCLAT**).

It was contended by the Appellant that the period for submitting an Expression of Interest and the Resolution Plan had long expired and the name of Triton Electric was not included in the final prospective list of the Resolution Applicants, therefore, the party had no authority to submit any Expression of Interest/Resolution Plan. It was further contended that even the Adjudicating Authority had no jurisdiction to permit the CoC to consider the Resolution Plan of the Triton Electric when the Resolution Plan of the Appellant has already been approved by the CoC, which fully comply with the provisions of the Code. On the other hand, it was contended by Triton Electrics that it has submitted a joint resolution plan which also deals with the sister concern of corporate debtor, and that the Appellant itself submitted its resolution plan after the due date and therefore, cannot question the submission of plan by Triton Electric on the ground of delay.

Issues: Whether the Triton Electric could submit a new Resolution Plan after the Resolution Plan has already been approved by the CoC?

Decision: The NCLAT observed that the CoC could not, as per existing law, consider the Resolution Plan of Triton Electric after approval of the plan of the Appellant. While relying on the Supreme Court judgment of *Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited*.

The NCLAT held that the finality has been attached to the Resolution Plan of the Steel Strips which was approved by the CoC, which finality could not have been taken away by the impugned order passed by the Adjudicating Authority. Additionally, late and unsolicited bids by Resolution Applicants after the original bidder becomes public upon passage of the deadline for submission of the plan is a reason for deviation of the original objective and timeline under the Code and therefore, while setting aside the order passed by NCLT, the

NCLAT here held that the resolution plan of Triton Electric cannot be considered after the approval of plan of Steel Strips and after the CIRP period is over.

***** ***The authors would like to acknowledge the research and assistance rendered by Ms. Diya Dutta, a student of the Maharashtra National Law University, Mumbai.***