**Insolvency and Bankruptcy Board of India**

**Subject- Status Note on the Evolving Insolvency Jurisprudence – December 2018 to February 2019.**

A brief of select judicial and quasi-judicial judgments and orders passed during December 2018 to February 2019, having a significant bearing on the evolving jurisprudence under the Insolvency and Bankruptcy Code, 2016 is as under:

## SUPREME COURT

1. **Jaipur Metals & Electricals Employees Organisation Vs. Jaipur Metals & Electricals Ltd. [Civil Appeal No. 12023-2018]**

   In this matter, the AA admitted an application under section 7 of the Code, considering that no liquidation order had been passed in the winding up proceedings pending before the High Court. While setting aside the said order, the High Court (HC) refused to transfer the winding up proceedings pending before it to the AA.

   While setting aside the order of the HC, the Supreme Court (SC) observed: "*It is thus clear that under the scheme of Section 434 (as amended) and Rule 5 of the 2016 Transfer Rules, all proceedings under Section 20 of the SIC Act pending before the High Court are to continue as such until a party files an application before the High Court for transfer of such proceedings post 17.08.2018. Once this is done, the High Court must transfer such proceedings to the NCLT which will then deal with such proceedings as an application for initiation of the corporate insolvency resolution process under the Code."*

   It further observed: "*..This being so, if there is any inconsistency between Section 434 as substituted and the provisions of the Code, the latter must prevail. We are of the view that the NCLT was absolutely correct in applying Section 238 of the Code to an independent proceeding instituted by a secured financial creditor, namely, …"*

2. **Vijay Kumar Jain Vs. Standard Chartered Bank & Ors. [Civil Appeal No. 8430 of 2018]**

   In the appeal against the decision of the NCLAT, not to give directions to the RP to provide all relevant documents including the insolvency resolution plans to members of the suspended Boards of Directors of the CD, the SC observed that *"…though the erstwhile Board of Directors are not members of the committee of creditors, yet , they have a right to participate in each and every meeting held by the committee of creditors, and also have a right to discuss along with members of the committee of creditors all resolution plans that are presented at such meetings under section 25(2)(i)…".* It held that *"… Therefore, a combined reading of the Code as well as the Regulations leads to the conclusion that members of the erstwhile Board of Directors, being vitally interested in resolution plans that may be discussed at meetings of the committee of creditors, must be given a copy of such plans as part of "documents" that have to be furnished along with the notice of such meetings."*

3. **Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd. [Civil Appeal No. 818 of 2018]**

   The SC considered whether the CIRP can continue, while winding up petition under section 433 (e) of the Companies Act is pending before the High Court. It held that CIRP is an independent proceeding which must be decided in accordance with the Code. It observed: *"Though, we are not interfering with the Appellate Tribunal's order dismissing the appeal, we grant liberty to the appellant before us to apply under the proviso to Section 434 of the Companies Act (added in 2018), to transfer the winding up proceeding pending before the High Court of Delhi to the NCLT, which can then be treated as a proceeding under Section 9 of the Code."*

4. **Swaraj Infrastructure Pvt. Ltd. Vs. Kotak Mahindra Bank Ltd. [Civil Appeal No. 1291 of 2019]**

   The SC considered an issue as to whether a secured creditor can file a winding up petition on the basis of a recovery certificate issued by the DRT and held that *"If the fact situation fits sub-clause (b) of Section 434(1), then a company may be said to be deemed to be unable to pay its debts. However, this does not mean that each one of the sub-clauses of Section 434(1) are mutually exclusive in the sense that once Section 434(1)(b) applies, Section 434(1)(a) ceases to be applicable…."*

   *"…We may only end by saying that cases like the present one have to be decided by balancing the interest of creditors to whom money is owing, with a debtor company which will now go in the red since a winding up petition is admitted against it. It is not open for persons like the appellant to resist a winding up petition which is otherwise maintainable without there being any bona fide defence to the same. .."*

5. **Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. [WP (Civil) Nos. 99 with WP (Civil) Nos. 100, 115, 459, 598, 775, 822, 849, and 1221 of 2018, SLP (Civil) No. 28623 of 2018 and WP (Civil) 37 of 2019]**

   Several petitions which were filed assailing the constitutional validity of various provisions of the Code, were dismissed by the SC and following observations were made:

   (1) The Code is for reorganisation and insolvency resolution of CDs in a time-bound manner.

   (2) The Code maximises the value of assets of CDs.

   (3) The Code promotes entrepreneurship as the persons in management of the CD are replaced by entrepreneurs.

   (4) As resolution plan takes off, the CD is able to repay its debts, which promotes credit market.

   (5) As the CD benefits from the resolution, the interests of all stakeholders are looked after.

   (6) The Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark.

(7) Even in liquidation, the liquidator can sell the business of the CD as a going concern.

(8) The Code ensures revival and continuation of the CD by protecting it from its own management and from liquidation.

(9) The Code is a beneficial legislation which puts the CD back on its feet, not being a mere recovery legislation for creditors.

(10) The Code bifurcates and separates the interests of the CD from that of its promoters / management.

(11) The resolution process is not adversarial to the CD but in fact, protective of its interests.

(12) The moratorium imposed by section 14 is in the interest of the CD itself, thereby preserving the assets of the CD during the resolution process.

(13) The timelines within which the resolution process is to take place protects the CD's assets from further dilution, and also protects all its creditors and workers.

(14) The appointment of members of the NCLTs have been regularly done.

(15) Administrative support for NCLTs needs to come from the Ministry of Law and Justice.

(16) Union of India shall set up Circuit Benches of the NCLAT within a period of 6 months.

(17) Most FCs are secured creditors, whereas most OCs are unsecured.

(18) Nature of loan agreements with FCs is different from contracts with OCs for supplying goods or services.

(19) FCs generally lend finance on term loan or for working capital that enables the CD to either set up and/or operate its business. On the other hand, contracts with OCs are relatable to supply of goods and services in the operation of business.

(20) Financial contracts generally involve large sums of money. Operational contracts have dues whose quantum is generally less.

(21) In the running of business, OCs can be many as opposed to FCs, who lend finance for the set up or working of business.

(22) FCs have specified repayment schedules, and defaults entitle them to recall a loan in totality whereas contracts with OCs do not have any such stipulations.

(23) There is difference in dispute resolution of FCs and OCs. Contracts with OCs can and do have private arbitration clauses for dispute resolution, whereas, in loan contracts no such facility.

(24) Operational debts tend to be recurring in nature and possibility of genuine disputes in case of operational debts is much higher when compared to financial debts.

(25) Goods supplied or services provided by OCs may be substandard or goods may not have been supplied at all. These qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well-documented and defaults made are easily verifiable.

(26) FCs are from the very beginning involved in assessing the viability of the CD. FCs can, therefore do, engage in restructuring of the loan as well as re-organisation of the CD's business when there is financial stress, which are things OCs do not and cannot do.

(27) There is an intelligible differentia between the FCs and OCs which has a direct relation to the objects sought to be achieved by the Code.

(28) Classification between FCs and OCs is neither discriminatory, nor arbitrary, nor violative of Article 14.

(29) The CD is served with a copy of the application filed with the AA and has the opportunity to file a reply before it and be heard by it before an order is made admitting the said application. What is also of relevant is that in order to protect the CD from being dragged into CIRP malafide, the Code prescribes penalties.

(30) A set-off of amounts due from FCs is a rarity. It may be considered at the stage of filing of proof of claims during the resolution process by the RP, and his decision is subject to challenge under section 60 of the Code.

(31) There is nothing in the Code which interdicts the CD from pursuing counterclaims in other judicial fora.

(32) Legislative Policy has shifted from "inability to pay debts" to "determination of default". There are four reasons for the same: (a) predictability and certainty; (b) interest of CD is to be safeguarded; (c) the cause of default is not relevant and protecting economic interest is relevant in case of financial stress; (d) liquidation can only be upon failure of resolution process.

(33) "Claim" gives rise to "debt" only when it is "due" and "default" occurs only when "debt" becomes "due and payable" and is not paid by debtor. This is why FC proves default and OC claims a right to payment of liability. When this is kept in mind, the differentiation in triggering of CIRP by FCs and OCs becomes clear.

(34) The CoC has the primary responsibility of financial restructuring. It assesses the viability of a CD by taking into account all available information as well as to evaluate all alternative investment opportunities that are available. It evaluates the resolution plan on the basis of feasibility and viability.

(35) Since the FCs are in the business of money lending, they are best equipped to assess viability and feasibility of the business of the CD. Even at the time of granting loans, they undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. They are in a good position to evaluate the contents of a resolution plan.

(36) OCs, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business.

(37) The AA, while looking into viability and feasibility of resolution plans approved by the CoC, always go into whether OCs are given roughly the same treatment as FCs, and if they are not, such plans are either rejected or modified so that the OCs' rights are safeguarded.

(38) Regulation 38 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 strengthens the rights of OCs by statutorily incorporating the principle of fair and equitable dealing of their rights, together with priority in payment over FCs.

(39) OCs are not discriminated against FCs or Article 14 infracted either on the ground of equals being treated unequally or on the ground of manifest arbitrariness.

(40) The expert committees have been set up the Government to oversee the working of the Code. Thus, the report of ILC of March, 2018 after examining the working of the Code, thought it fit not to amend the Code so as to give OCs the right to vote.

(41) Regulation 30A(1) of the CIRP Regulations is not mandatory but is directory for the simple reason that on the facts of a given case, an application for withdrawal may be allowed in exceptional cases even after issue of invitation for expression of interest under Regulation 36A.

(42) After admission of creditor's petition under section 7 and 9 of the Code, the proceeding before the AA is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual CD is allowed to settle its claim.

(43) A party can directly approach NCLT for withdrawal or settlement at any stage if the CoC is not constituted which will be decided by the NCLT after hearing all the concerned parties.

(44) That withdrawal requires approval of CoC by 90% of voting power which is in the domain of the legislative policy.

(45) The CoC does not have the last word on the subject; if CoC arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT can always set aside such decision under section 60 of the Code.

(46) The evidence of default with an IU is only prima facie evidence of default, which is rebuttable by the CD.

(47) RP has no adjudicatory powers. He has administrative powers as opposed to quasi-judicial powers. The RP is really a facilitator of the resolution process, whose administrative functions are overseen by the CoC and by the AA.

(48) Under the CIRP regulations, the RP has to vet and verify claims made, and ultimately, determine the amount of each claim. Even when the RP is to make determination under regulation 35A, he is only to apply to the AA for appropriate relief on such determination as opposed to power of liquidator. When liquidator 'determines' such determination is quasi- judicial in nature.

(49) A statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing.

(50) A resolution applicant has no vested right for consideration or approval of its resolution plan and, therefore, no vested right is taken away by Section 29A.

(51) There is no vested right in an erstwhile promoter of a CD to bid for the immovable and movable property of the CD in liquidation. Section 29A not only applies to resolution applicants but also to liquidation.

(52) A person, who is unable to service its own debt beyond the grace period, is unfit to be eligible to become a resolution applicant. This policy cannot be found fault with.

(53) Neither can the period of one year be found fault with, as this is a policy matter decided by the RBI and which emerges from its Master Circular, as during this period, an NPA is classified as a substandard asset.

(54) Persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. All categories of persons mentioned in section 5 (24A) of the Code must be connected with the resolution applicant within the meaning of section 29A (j). The categories of persons who are collectively mentioned as 'relative' in explanation to section 5 (24A) need to have a connection with the business activity of the resolution applicant.

(55) Rationale for excluding MSMEs from eligibility criteria laid down in Section 29A (c) and 29A (h) of the Code is qua such industries, other resolution applicants may not be forthcoming which would not lead to resolution but liquidation.

(56) When the Code has worked hardship to a class of enterprises, the Committee constituted by the Government, in overseeing the working of the Code, has been alive to such problems, and the Government in turn has followed the recommendations of the Committee in enacting Section 240A. This is an important instance of how the executive continues to monitor the application of the Code and exempts a class of enterprises from the application of some of its provisions in

deserving cases. This and other amendments that are repeatedly being made to the Code, and to subordinate legislation made thereunder, based upon Committee Reports which are looking into the working of the Code, would show that the legislature is alive to serious anomalies that arise in the working of the Code and steps in to rectify them.

(57) Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners.

(58) The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster.

(59) The flow of financial resource to the commercial sector in India has increased exponentially as a result of financial debts being repaid.

(60) The defaulter's paradise is lost. In its place, the economy's rightful position has been regained.

**6. K. Sashidhar Vs. Indian Overseas Bank & Others [Civil Appeal 10673-2018]**

While dismissing appeals against the common order of the NCLAT, the SC made the following findings and rulings:

(1) The provisions in Part II of the Code is self-contained, providing for the procedure for consideration of the resolution plan by the Co C.

(2) If CoC approves the resolution plan by requisite percentage of voting share, it is imperative for the RP to submit the same to the AA. On receipt of such proposal, the AA is required to satisfy itself that the plan approved by CoC meets the requirements specified in section 30 (2). No more no less.

(3) If the resolution plan is expressly rejected by not less than 25% of voting shares of the FCs, the RP is under no obligation to submit the plan under section 30(6) to AA.

(4) The word "may" in section 30(4) is ascribable to the discretion of the CoC - to approve the resolution plan or not to approve the same. What is significant is the second part of the said provision, which stipulates the requisite threshold of "not less than seventy five percent of voting share of the financial creditors" to treat the resolution plan as duly approved by it. The stipulation of "not less than seventy five percent of voting share of the financial creditors" is the quintessence and is mandatory for approval of the resolution plan. Any other interpretation would result in rewriting of the provision and doing violence to the legislative intent.

(5) The members of the CoC need not participate during voting propria persona or in person but can do so through video conferencing or other audio or visual means as per regulation 23 of the CIRP Regulations.

(6) The *"percent of voting share of financial creditors"* approving vis-à-vis dissenting is required to be reckoned. It is not on the basis of members present and voting as such. At any rate, the approving votes must fulfil the threshold percent of voting share of the FCs. It is not possible to countenance any other construction or interpretation.

(7) The fact that the substantial or majority percent of FCs have accorded approval to the plan would be of no avail, unless it is approved by vote of not less than 75% of voting share of the FCs.

(8) The legislative intent is to uphold the opinion of the minority dissenting FCs. That must prevail, if it not less than specified percent (25%). The inevitable outcome of voting by not less than requisite percent of voting share of FCs to disapprove the proposed resolution plan, de jure, entails in its deemed rejection.

(9) The scrutiny of the resolution plan is required to pass through the litmus test of not less than requisite voting share – a strict regime. The resolution plan must appear, to not less than requisite voting share of the FCs, to be an overall credible plan, capable of achieving timelines specified in the Code generally, assuring successful revival of the CD and disavowing endless speculation.

(10) The AA is expected to deal with two situations. The first is when it does not receive a resolution plan under section 30(6) or when the plan has been rejected by RP for non-compliance of section 30(2) or when the plan fails to garner approval of not less than 75% of voting share of FCs and there is no alternate plan mooted before expiry of the statutory period. The second is when a resolution plan duly approved by not less than 75% of voting share is submitted before it under section 30(6) for its approval. In the first situation, the AA has no other option but to initiate liquidation process in terms of section 33(1).

(11) Upon receipt of a "rejected" resolution plan, the AA is not expected to do anything more; but is obligated to initiate liquidation process under section 33(1). The legislature has not endowed the AA with the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting FCs.

(12) The Code provides a swift resolution process to be completed within 270 days failing which, initiation of liquidation process is inevitable and mandatory. It grants paramount status to the commercial wisdom of the CoC, without any judicial intervention, for ensuring completion of the processes within time-limit. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual FCs or their collective decision before AA. That is not justiciable.

(13) The discretion of the AA is circumscribed by section 31 to scrutiny of resolution plan "as approved" by the requisite percent of voting share of FCs. The ground for rejection is limited to the matters specified under section 30(2).

(14) The powers and functions of the IBBI are delineated in section 196 of the Code. None of the functions of the IBBI directly or indirectly pertain to regulating the manner in which the FCs ought to or ought not to exercise their commercial wisdom during the voting on the resolution plan under section 30(4) of the Code.

(15) The jurisdiction bestowed upon the appellate authority is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in section 61(3), which is limited to matters "other than" enquiry into the autonomy or commercial wisdom of dissenting FCs. Thus, the prescribed authorities (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the Code and not act as a court of equity or exercise plenary powers.

(16) From the legislative history there is contra indication that the commercial or business decisions of FCs are not open to any judicial review by AA/ NCLAT.

(17) The CoC is called upon to consider the resolution plan under section 30(4) after it is vetted and verified by RP as being compliant with all the statutory requirements specified under section 30(2).

(18) The RP is not required to express his opinion on matters within the domain of the financial creditors, to approve or reject the resolution plan, under section 30(4).

(19) By this amendment, a new norm and qualifying standard for approval of a resolution plan has been introduced. That cannot be treated as a declaratory / clarificatory or stricto sensu procedural matter as such. The amendment Act makes it expressly clear that it shall be deemed to come into force on 6th June, 2018. There is no indication in the amendment Act that the legislature intended to undo and/or govern the decisions already taken by the CoC of the concerned CDs prior to 6th June, 2018.The amendment Act will have prospective application and apply only to the decision of CoC taken on or after that date concerning the approval of plan. The amendment to regulation 39(3) of the CIRP Regulations can not have retrospective effect so as to impact the decision of the CoC taken before amendment of the said regulation.

## High Courts

7. **Cushman and Wakefield India Private Limited Vs. Union of India & Anr. [W.P.(C) 9883/2018, CM No. 38508/2018 along with W.P.(C) 9889/2018, CM No. 38522/2018, W.P.(C) 9890/2018, CM No. 38524/2018 and W.P.(C) 9927/2018, CM No. 38673/2018]**

Rule 3(2) of the Companies (Registered Valuers and Valuation) Rules, 2017 was challenged as violative of Articles 14, 19(1)(g) and 301 of the Constitution of India. While dismissing the petitions, the HC held that " *The objective and intention behind laying down the impugned Rule is clearly to introduce higher standards of professionalism in valuation industry, specifically in relation to valuations undertaken for the purpose of Companies Act and IBC, 2016. The impugned Rule obviates the possibility of conflict of interest on account of diverging interests of constituent /*

*associate entities which resultantly shall undermine the very process of valuation, being one of the most essential elements of the proceedings before NCLT."*

8. **Liberty House Group Pte Ltd. Vs. State Bank of India & others [CS (COMM) 1246/2018 & IAs No.16056/2018 (u/O XXXIX R1&2 CPC) & 16060/2018 (u/O II R-2 CPC) & CS(COMM) 1247/2018 & IAs No.16061/2018 (U/O XXXIX R1&2 CPC) & 16065/2018 (u/O II R-2 CPC)]**

The HC concluded that it has no jurisdiction over the subject matter of the suit and, *inter alia*, observed as:

*"The corporate debtor, the RP, resolution applicant, the entitlement of SBI to be the beneficiary of the BBG, the CoC, the resolution plan and the NCLT as the Adjudicating Authority, all are creation of the Code. The entire transaction is in the ambit of the Code."* It held:*"…Since the questions raised in these suits arise out of or in relation to insolvency resolution and the NCLT has jurisdiction to entertain the same. The jurisdiction of this Court will also be barred by Section 231 of the Code…"*

It further observed: "*..This Court as the Civil Court of Original Jurisdiction to be not having jurisdiction to entertain the dispute subject matter of the present suits."*

## National Company Law Appellate Tribunal

9. **Edelweiss Asset Reconstruction Co. Ltd. Vs. Synergies Dooray Automotive Ltd. & Ors. [CA (AT) (Insolvency) No. 169 to 170-2017]**

The order of the AA approving the resolution plan was challenged on two major grounds:

a. that on the eve of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 coming into force on 1st December, 2016, Synergies Casting Ltd., a related party of the CD, assigned its debt (accounting for 78% of voting power) to an NBFC, Millennium Finance Limited, with the ulterior motive of reducing the voting share of the appellant and such assignment was illegal. The NCLAT held: *"The Appellant doesn't have any locus standi to question those documents in the insolvency proceedings initiated under 'I&B Code' on a farfetched argument that they are going to be effected if the rights of 'Synergies Castings Limited' and 'Millennium Finance Limited' are recognized basing on the Assignment Agreements in question and the Appellant cannot assume jurisdiction to question the documents in question basing on baseless allegations, apprehension etc. … In the result, we hereby declare that both 'Synergies Castings Limited' and 'Millennium Finance Limited' were eligible to execute the assignment agreements in question and all rights flow those agreements to 'Millennium Finance Limited'."*

b. It was argued that the resolution plan provided for merger and amalgamation, which is not permissible, being violative of section 30(2)(e) of the Code. It was noted that a resolution plan may provide for merger or consolidation of the CD with one or more persons in terms of regulation 37(1)(c) of the CIRP Regulations. It was held: *"The 'I&B Code' is a code by itself and Section 238 provides over riding effect of it over the provisions of the other Acts, if any of the provisions of an Act is in conflict with the provisions of the 'I&B Code'"*

10. **Consolidated Engineering Co. & Anr. Vs. Golden Jubilee Hotels Pvt. Ltd. [CA (AT) (Insolvency) No. 501-2018]**

    The Hon'ble NCLAT held that *"...Adjudicating Authority has rightly held that 10% of total debt for the purpose of representation in ''Committee of Creditors' is to be calculated on the basis of the claim as collated and noticed by the 'resolution professional'. It cannot be based on amount claimed by all the 'Operational Creditors', till it is verified and compared. If the claim of 'Operational Creditors, on verification is found to be less than 10%, the 'Operational Creditors' have no right to claim representation in the meeting of the 'Committee of Creditors'."*

11. **SKS Power Generation Chattisgarh Ltd. Vs. V Nagarajan (in the matter of M/s Cethar Ltd. & Ors.) [CA (AT) (Insolvency) No. 206-2018]**

    The RP filed an application under sections 43, 45, 180 and 186 of the Code. The AA by the impugned order, while granting the interim prayer, directed R10 to repay Rs.158 crore to the CD and restrained R 2 from realising the bank guarantee issued on behalf of the CD. The NCLAT allowed the appeal and remitted the matter to the AA with an observation: *".. the impugned order dated 24th April, 2018 was passed by the Adjudicating Authority without deciding question as to whether the application under Sections 43 and 45 of the 'I&B Code' is maintainable or not and as impugned order is not a speaking/reasoned order…"*.

12. **Export Import Bank of India & Anr Vs. Astonfield Solar (Gujarat) Pvt Ltd & Anr [CA (AT) (Insolvency) No. 754 of 2018]**

    In terms of a 'Deed of Pledge of Securities' dated 28th March, 2013 entered into between the CD and the FCs, the shareholders have no voting right on the occurrence of a default. Yet, they approved the decision of the Board of Directors for initiation of CIRP under section 10 of the Code. Hence, the admission of the CD into CIRP on such voting is not legal. While disagreeing with this, the NCLAT held: *".. we hold that the shareholder has a right to decide whether approving or disapproving the decision be proceeded with the corporate insolvency resolution process under Section 10 of the I&B Code. Such right does not stand curtailed by Deed of Pledge dated 28th March, 2013."*.

13. **Rajendra K. Bhuta Resolution Professional (For Guruashish Construction Private Limited) Vs. Maharashtra Housing and Area Development Authority [CA (AT) No. 119 of 2018]**

    Application of moratorium on the land of Maharashtra Housing and Area Development Authority (MHADA), was rejected by the AA, against which the RP filed the appeal.

    The land, which was allotted in favour of a society on which the CD constructed the building in question, originally belonged to 'Bombay Housing & Area Development Board' and was vested in MHADA in the year 1966, pursuant to the Maharashtra Housing and Area Development Authority Act, 1966 with all rights, liabilities and obligations.

    The NCLAT held that *"On perusal of record, we find that pursuant to the 'Joint Development Agreement' the land of the 'Maharashtra Housing and Area Development Authority' was handed over to the 'Corporate Debtor' and 'except for development work' the 'Corporate Debtor' has not accrued any right over the land in question. The*

*land belongs to the 'Maharashtra Housing and Area Development Authority' which has not formally transferred it in favour of the 'Corporate Debtor'. Hence, it cannot be treated to be the asset of the 'Corporate Debtor' for application of provisions of Section 14(1) (d) of the 'I&B Code'."*

14. **Insolvency and Bankruptcy Board of India Vs. Wig Associates Private Limited & Ors. [IA No.1950 of 2018 in CA (AT) (Insolvency) No. 415 of 2018]**

    The NCLAT observed that ***"****This is a serious matter in which allegation has been levelled not only against the 'Successful Resolution Applicant' but also against the erstwhile 'Resolution Professional'. Non-compliance of the observations made by this Appellate Tribunal in its earlier order is also alleged."*

    During the hearing on 5th February 2019, Bank of Baroda, the 4th Respondent, submitted that the RP in compliance to the order of NCLAT filed appeal.

15. **S. C. Sekaran Vs. Amit Gupta & Ors. [CA(AT) (Insolvency)495 & 496-2018]**

    Appeals were filed by the management of the CDs against the liquidation order passed by the AA in June 2018, following the failure of resolution and for keeping the companies as "going concern" even during the period of liquidation. . The NCLAT directed the Liquidator, *inter alia*, that *"He will verify claims of all the creditors; take into custody and control of all the assets, property, effects and actionable claims of the 'corporate debtor', carry on the business of the 'corporate debtor' for its beneficial liquidation etc. as prescribed under Section 35 of the I&B Code…".* But before the sale of the assets, the liquidator was further directed to consider the provisions of Section 230 of the Companies Act, 2013 and it was held: "*Before taking steps to sell the assets of the 'corporate debtor(s)' (companies herein), the Liquidator will take steps in terms of Section 230 of the Companies Act, 2013. The Adjudicating Authority, if so required, will pass appropriate order. Only on failure of revival, the Adjudicating Authority and the Liquidator will first proceed with the sale of company's assets wholly and thereafter, if not possible to sell the company in part and in accordance with law*". It was further directed that the process undersection 230 shall be completed within ninety days.

16. **M/s Dynepro Private Limited Vs. Mr. V. Nagarajan [CA (AT) No. 229 and 262-2018]**

    The NCLAT adjudicated on the issue whether the AA has jurisdiction to decide the claim and/or counter claim between the parties involved under section 60 (5) of the Code.

    It held that *"As the claim is not against the Corporate Debtor or its subsidiaries but includes inter-se claim for the same very material, such dispute cannot be decided by the Adjudicating Authority under Sub-section (5) of Section 60 of the I&B Code. It is only after completion of the period of moratorium and it is finally decided that the material belongs to the Corporate Debtor and order is accordingly passed, it is open to the persons to file a suit before appropriate forum claiming right and title over the material in question and for filing such suit claiming right over the material the moratorium period has to be excluded for the purpose of counting the period of limitation."*

It also observed *"From sub-section (6) of Section 60 it is clear that after period of moratorium, a suit or application can be filed against the Corporate Debtor for which an order of moratorium has been made under the Part II and in such case, the period during which such moratorium is in place shall be excluded for the purpose of counting the limitation."*

17. **Ferro Alloys Corporation Ltd. Vs. Rural Electrification Corporation Ltd. [CA (AT) (Insolvency) No. 92 of 2017]**

On the issue of initiating CIRP against the corporate guarantor, without initiating the process under the Code against the principal debtor, the NCLAT held:

*"The position of law is manifested in the I&B Code including the definitions which require harmonious and purposeful reading and reasoning…"* It was observed that *"Insolvency Resolution Process under Section 7 of the I&B Code can be initiated against the guarantor who is a 'corporate person' and who by operation of law ipso facto becomes a 'corporate debtor' by satisfying the ingredients of the terms as defined under Section 3(8)."* It was further held: *"A guarantee becomes a debt or as soon as the guarantee is invoked against it whereinafter a guarantor ('corporate guarantor') becomes a 'corporate debtor' in terms of the I&B Code."* With reference to the provisions of contract law, it observed: *"The I&B Code does not exclusively delineates and/or prescribes any inter-se rights, obligation and liabilities of a guarantor qua 'financial creditor'. Thus, in absence of any express provision providing for inter-se rights, obligation and liabilities of guarantor qua 'financial creditor' under the Code, the same will have to be noticed from the provisions of the Indian Contract Act, which exclusively and elaborately deals with the same."* The NCLAT held that *"….we hold that it is not necessary to initiate 'Corporate Insolvency Resolution Process' against the 'Principal Borrower' before initiating 'Corporate Insolvency Resolution Process' against the 'Corporate Guarantors'. Without initiating any 'Corporate Insolvency Resolution Process' against the 'Principal Borrower', it is always open to the 'Financial Creditor' to initiate 'Corporate Insolvency Resolution Process' under Section 7 against the 'Corporate Guarantors', as the creditor is also the 'Financial Creditor' qua 'Corporate Guarantor'."*

18. **Dr. Vishnu Kumar Agarwal Vs. M/s Piramal Enterprise Ltd. [CA(AT)(Insolvency) 346/2018]**

The shareholder filed two appeals against two different orders of initiation of CIRP against two corporate guarantors. The issue pertained to the initiation of two CIRPs against two corporate guarantors simultaneously for the same set of debt and default.

It held that *"There is no bar in the 'I&B Code' for filing simultaneously two applications under Section 7 against the 'Principal Borrower' as well as the 'Corporate Guarantor(s)' or against both the 'Guarantors'. However, once for same set of claim application under Section 7 filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor' ('Principal Borrower' or 'Corporate Guarantor(s)'), second application by the same 'Financial Creditor' for same set of claim and default cannot be admitted against the other 'Corporate Debtor' (the 'Corporate Guarantor(s)' or the 'Principal Borrower'). Further, though there is a provision to file joint application under Section 7 by the 'Financial Creditors', no*

*application can be filed by the 'Financial Creditor' against two or more 'Corporate Debtors' on the ground of joint liability ('Principal Borrower' and one 'Corporate Guarantor', or 'Principal Borrower' or two 'Corporate Guarantors' or one 'Corporate Guarantor' and other 'Corporate Guarantor'), till it is shown that the 'Corporate Debtors' combinedly are joint venture company."*

19. **Ashok B. Jiwrajka, Director of Alok Infrastructure Ltd. Vs. Axis Bank Ltd.[Company Appeal (AT) (Insolvency) No. 683 of 2018]**

    An application under section 7 of the IBC was admitted by the AA against Alok Infrastructure Limited, a subsidiary of Alok Industries Limited. The erstwhile Director of Alok Infrastructure Limited filed an appeal before the NCLAT, challenging the admission of application against Alok Infrastructure Limited, given the fact that a CIRP was already pending against the holding company, Alok Industries Limited. The NCLAT in its order held that, "*such submission cannot be accepted as a separate Corporate Insolvency Resolution Process has been initiated against another Corporate Debtor which is separate from the Corporate Insolvency Resolution Process initiated against 'Alok Infrastructure Ltd.', of which the Appellant is the Director*". It reiterated that the holding company and subsidiary company are separate legal entities, with different debts and default thereof. Hence, it did not stay the CIRP initiated against Alok Infrastructure Limited.

20. **Export Import Bank V. CHL Limited [CA(AT) (Insolvency) No. 51 of 2018]**

    An Application under section 7 of the IBC was dismissed by the AA on the ground that liability of the surety was not co-extensive with that of the 'principal borrower' by reason of Clause 4 of the 'Deed of Guarantee', which was an agreement contrary to the general law of surety's co-extensive liabilityas contained in Section 128 of the Indian Contract Act, 1872'.

    The NCLAT held that "*the 'Corporate Guarantees' given by the Respondent can be invoked only "In the event of a default on the part of the borrower". The said 'Corporate Guarantee' cannot be invoked as on date, since there is no fresh demand made by the Appellant to the 'principal borrower' for the recalculated interest and consequently there is no debt that is due and/or payable hence there is no default by the 'principal borrower' with respect to interest*."

    While dismissing the appeal, it noted that *"There is another aspect, which disentitles the Appellant to proceed in the present appeal. The process under the 'I&B Code', once set in motion, is irreversible and leads to exceptional and serious consequences. If the appeal is allowed that would mean suspension of the Board of Directors of the 'Corporate Guarantor', appointment of 'Interim Resolution Professional', so on and so forth. A running business, which has made no default, would be put under resolution process. On the other hand, if the 'principal borrower' pays the amount, if any, found payable upon reconciliation of accounts, it would confirm that there never existed any debt which is due and payable or defaulted by the 'Corporate Guarantor'. The actions that would follow on allowing of this appeal cannot be reversed and the 'Corporate Guarantor' cannot be compensated in any manner."*

21. **Shri Kishore Shankar Signapurkar Vs. Prakash Dattatraya Naringrekar, RP [Contempt Case (AT) No. 04-2019 in CA(AT)(Insolvency) 739 of 2018]**

    The Promoter filed a contempt case on the ground that the RP is not ensuring that the company remains a going concern. The NCLAT dismissed the contempt case on the ground that "*no case is made out to initiate any case of contempt against the Resolution Professional*".

22. **Sanjay Kumar Ruia Vs. Catholic Syrian Bank Ltd. & Anr. [Company Appeal (AT) (Insolvency) No. 560 of 2018]**

    The issues raised were (i) whether a CIRP initiated under sections 7, 9 or 10 can be converted as a 'fast track CIRP" under section 55; (ii) whether CoC has jurisdiction to replace the RP after completion of 270 days; and (iii) whether AA is empowered to decide the resolution cost, including the fee payable to the RP. The NCLAT held: *"The 'Fast Track Corporate Insolvency Resolution Process' is different from 'Corporate Insolvency Resolution Process' against such 'Corporate Debtor(s)' as may be notified by the Central Government in terms of clauses (a), (b) & (c) of sub-section (2) of Section 55."* It observed *"...the Adjudicating Authority exceeded its jurisdiction by extending the period of 90 days after completion of 270 days of the 'Corporate Insolvency Resolution Process' wrongly exercising its power under sub-section (2) of Section 55 which is not applicable.* The NCLT held that *"...after completion of 270 days, the 'Committee of Creditors' ceased to exist and thereby they have no jurisdiction to replace a 'Resolution Professional' under Section 22 of the Code'. Even if the decision to replace the 'Resolution Professional' is taken prior to 270 days, in absence of any order passed by the Adjudicating Authority, such decision cannot be entertained on completion of 270 days. However, the ground taken by the 'Committee of Creditors' can be looked into by the Adjudicating Authority to decide whether the same 'Resolution Professional' should be allowed to continue as 'liquidator' of the 'Corporate Debtor'."* It was further held that *"...the Adjudicating Authority had no jurisdiction to decide the resolution cost including the fee of the 'Resolution Professional'"*

23. **Committee of Creditors of Essar Steel (India) Ltd. Through State Bank of India Vs. Satish Kumar Gupta & Ors. [CA(AT) (Insolvency) No. 03 of 2019]**

    The NCLAT observed: "*It is not clear as to why after the decision of the Hon'ble Supreme Court and the approval of the 'Committee of Creditors' and placement of the 'Resolution Plan', the Adjudicating Authority, Ahmedabad Bench, has adjourned the twice*." It further observed: "*We hope and trust that the Adjudicating Authority will pass final order in one or other way in terms of Section 31 of the 'I&B Code' taking into consideration the decision of the Hon'ble Supreme Court in "Arcelormittal India Private Limited" (Supra). In case the Adjudicating Authority do not pass any order in accordance with law on an early date, it will be open to the Appellant to bring this fact before this Appellate Tribunal*."

24. **M/s Prasad Gempex Vs. Star Agro Marine Exports Pvt. Ltd. & Ors. [CA(AT)(Insolvency) 291 of 2018]**

    The appellant assailed the rejection of its claim as FC, as OC and as a resolution applicant. The NCLAT held that the *"Resolution Professional has no adjudicatory*

*authority."* It further observed: *"We allow the appellant to file claim in terms of sub-section (6) of section 60 of the Code before the appropriate court of law or may file appropriate application against the corporate debtor, if the resolution plan is approved and do not take proper care of the applicant. In case the resolution plan is not approved and the order of liquidation is passed, in such case, it will be open to the appellant to file claim before the liquidator in accordance with the provisions as referred to above and the liquidator will decide the claim under section 40 of the I & B Code."*

25. **Tata Steel Limited Vs. Liberty House Group Pte Ltd. & Ors. [CA(AT)(Insolvency) 198-2018]**

    The appellant objected the improved financial offers submitted by JSW Steel to CoC appointed in resolution process of Bhushan Power and Steel Limited.

    NCLAT noticed that the process document for the CIRP of the CD does not curtail the powers of the CoC to maximise value and as per this process document, CoC have absolute discretion, but without being under any obligation, to update, amend or supplement the information at any point in time.

    The NCLAT held that *"granting more opportunity to all the eligible Resolution Applicants to revise its financial offers, even by giving more opportunity, is permissible in law. However, all such process should be complete within the time frame."*

    Further the NCLAT held that *"…only the members of the 'Committee of Creditors' who attend the meeting directly or through Video Conferencing, can exercise its voting powers after considering the other requirements as may be specified by the Board. Those members of the 'Committee of Creditors' who are absent, their voting shares cannot be counted."*

26. **Jogendra Kumar Arora Vs. Dharmender Sharma & Anr. [CA (AT)(Insolvency) 94 & 95 of 2019]**

    The appeal was preferred by the shareholder against the admission order of the AA. During the hearing of appeal, the OC submitted that parties have settled. However, the FCs opposed it by contending that they have submitted their claims before the RP. The NCLAT allowed the withdrawal application by exercising inherent powers under rule 11 of the NCLT Rules, 2016, in light of the judgment of the SC in the matter of Swiss Ribbons and directed the CD to pay Rs. 14.5 lakhs to the RP for expenses incurred.

27. **Gammon India Limited Vs. Neelkanth Mansions and Infrastructure Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 698 of 2018]**

    The appellant 'Gammon India Limited' filed petition under the Companies Act, 1956 for winding up of Neelkanth Mansions and Infrastructure Pvt. Ltd. ('Corporate Debtor'). After the enactment of the IBC, 2016, the case was transferred from the HC to the AA. The Appellant, thereafter, filed Form-5 under Section 9 of the Code for initiation of the CIRP against the CD. However, the AA dismissed the application as unmaintainable as it observed that the Respondent was a partnership firm by associated companies of the Appellant of which the Respondent was one of the partners. The appellant relied on the definition of 'firm' under Section 79(16) of the Code and submitted that a firm means a body of individuals carrying on business in partnership whether or not registered under Section 59 of the Indian Partnership Act, 1932, and therefore, it makes abundantly clear that only when a firm is comprised of individuals,

that is to say natural persons only, the provisions of Part III of IBC will get attracted. In case, two or more persons (whether artificial or legal) and who are not individuals, are carrying on a business in partnership, then application for insolvency resolution against such partnership cannot be entertained by the Adjudicating Authority due to lack of jurisdiction. NCLAT held that the amount due is from partnership firm and not any partner and thus AA has rightly held that the application under Section 9 was not maintainable against one of the members of the partnership firm (Respondent herein) and rightly rejected the said application.

## National Company Law Tribunal

28. **IDBI Bank Vs. Anuj Jain (Interim Resolution Professional Jaypee Infratech Limited & Ors.) [IA No. 217 /2018 in CP No. (IB) /77 /ALD /2017]**

The FCs who are members of the CoC filed application under section 60(5) of the Code to declare 9th August, 2018, being the date the SC remitted the matter back to the AA, as the insolvency commencement date in the CIRP. They contended that the cut off date for considering the quantum of claim was 9th August, 2017 but not 9th August, 2018, the date of order of AA, since they have not been paid interest during the period from 9th August, 2017 to 9th August, 2018, which would affect their voting share and therefore, correct financial position cannot be ascertained without inviting fresh claim as on 1st September, 2018. It was further contended that under the proviso to definition of 'insolvency commencement date', where IRP is not appointed, it shall be the date on which IRP is appointed and that the SC made it clear that proceedings were to be re-commenced from the 'stage of appointment of IRP'. However, RP contended that the cut off date should be 9th August, 2017 and the SC has not changed the date of CIRP commencement . He also pointed out that if the commencement of insolvency process were to be taken as 9th August, 2018, the avoidable transactions would become infructuous, since the transactions U/Ss 43,45 and 66 of the Code are linked with the date of insolvency commencement and a few transactions would fall out from two years period.

AA held that IRP was appointed in the order of admission, therefore, proviso to the definition of 'insolvency commencement date', is not applicable. Further, the SC did not set aside the admission order passed by it on 9.08.2017. The SC also did not set aside the appointment of IRP vide its order dated 09.08.2017. Since the SC did not disturb the statutory definition of 'insolvency commencement date' given in section 5 sub section 12 of the Code. It observed that the SC only dealt with the revival of the CIRP and renewed the period of 180 days prescribed u/s 12(3) of the Code.

*The AA also observed* that the insolvency commencement date has relevance in deciding whether the particular transactions is avoidable or not under Section 43 & 45 of the Code.

29. **Anuj Jain (Interim Resolution Professional For Jaypee Infratech Limited) In the matter of IDBI Bank Ltd. Vs. Jaypee Infratech Ltd. [CA No. 225/2018 in CP No. (IB) 77/ALD/2017]**

Regulation 13(2) of the CIRP Regulations require the IRP to display the list of creditors on the website of the CD. The IRP, however, submitted that information of the

investment in flats is private in nature and displaying the name and other personal details of allottees (creditors) without their permission may amount to breach of privacy. The AA noted that regulation 13(2) of the said Regulations does not affect the right to life and personal liberty of any allottee. It observed: "*…the right to acquire hold and dispose property is no longer a fundamental right, it is only a statutory right. Therefore, allottees have got a right to acquire their flats & plots from the Corporate Debtor and when such is the case, publication of their names in the list of creditors is not going to affect their privacy or fundamental right, especially when they became part of the Committee of Creditors…. ".* It held: *"… Regulation 13(2)(b) is a fair, just and reasonable regulation that would help to have effective resolution process."*

30. **State Bank of India Vs. ARGL State Bank of India Vs. ARGL [(IB)-531-(PB)-2017]**

    The RP filed an application to withdraw his earlier application seeking approval of resolution plan, which was submitted by the Liberty House Group PTE Limited and approved by the CoC, on the ground that the resolution applicant was not willing to proceed with the resolution plan. The AA observed: "*The CIR Process is a time bound process and those who participate in the resolution process must be serious customers and not the one with casual approach. Having succeeded in the Resolution Plan, the somersault taken by the Liberty House put the whole CIR process and the machinery to quandary. Such an unsavoury stance of the Liberty House would only attract adverse comments from any fair minded person particularly when there is no justifiable reason for Liberty House to drag its feet. …. Viewed in that light the bona fide of the Liberty House becomes doubtful. We cannot appreciate the Liberty House when it argued that despite the relaxation of the condition concerning furnishing of performance bank guarantee he may be permitted to walk out of the Resolution Plan and no reason on that score be recorded."* The AA also noted that in a few other CIRPs (Amtek Auto Limited, Adhunik Metaliks Limited), where resolution plans have been approved, the successful resolution applicant, Liberty House has been dragging its feet. The AA, however, allowed the withdrawal application and imposed a cost of Rs.1 lakh on the Liberty House.

31. **State Bank of India Vs. Adhunik Metaliks Ltd. [CA (IB) No. 1069, 1072, 1138 /KB/2018 in CP(IB)373/KB/2017]**

    An application was filed by CoC for non-compliance of terms in the approved resolution plan by the resolution applicant and their failure to pay upfront amount of Rs. 410 crores. It was submitted that CoC did not agree on payment in instalment as ordered. AA observed that *"… So it appears to me that granting permission to the CoC for acting upon the terms stipulated in the resolution plan does not arise for consideration in an application of this nature filed for passing any order for liquidation under section 33 (3) of the Code. However,, it is made clear that I am not restraining the Committee of Creditors in proceedings further as per the terms stipulated in the Resolution Plan."*

    The resolution applicant also filed another application seeking certain directions to implement the resolution plan by 'the Long Stop Date' as defined in the Resolution Plan and opposed the application filed by CoC u/s 33 (3) of the Code. AA further

observed that resolution applicant committed breach of terms in payment as per resolution plan, and refused to give any interim relief.

32. **State Bank of India Vs. Adhunik Alloys & Power Ltd [ CA NO. 1086 & 1092 /KB/2018 in CP NO. 387/KB/2017]**

One of the FCs filed an application under section 60(5) of the Code on the premise that resolution plan approved by the CoC provided discriminatory distribution of payments and created classes among the FCs on the purported nature of security interest held by them and is an attempt to borrow and apply the provisions of liquidation process to the CIRP. The applicant did not agree on the sharing pattern by CoC, and wanted the sharing as per voting share. However, the said method was approved by CoC, wherein applicant voted in favour. The AA observed that the applicant FC had voted in favour of the resolution plan, which attracted the principle of estoppel or acquiescence. AA also observed *as "Even if it is contrary to any of the provisions of law, as the proposition held in All India Power Engineers Federation and others that "a statutory right can also be waived by the party for whose benefit certain requirement or conditions had been provided for by a statute subject to the condition that no public interest is involved therein", the said right if any was consciously waived by the IFCI. This proposition is squarely applicable in the case in hand, therefore, even, if such a right was held by IFCI, that right is waived by giving express consent to the methodology."* The AA held that *"Methodology approved is the distribution of upfront payment not based on voting share but based on the security interest held by each creditors and on the basis of voting shares of the respective financial creditors. It is not exclusively based on security interest as alleged. It appears to me that the law, settled subsequent to the voting that assenting and dissenting creditors to be treated equally, doesn't affect the methodology for distribution passed by the CoC since it was passed by majority vote share considering security interest as well as voting shares. That decision being binding on the CoC, nothing prevented the IFCI to challenge the methodology before the date of approval of the plan by the CoC…".* Therefore, the application was rejected.

33. **M/s. Edelweiss Asset Reconstruction Co. Ltd. Vs. AML Steel & Power Ltd [MA/630/2018 in CP/632/IB/2017]- 11.12.2018**

An application was filed by the RP under section 60(5)(c) seeking exclusion of time from the CIRP period as factory is located in Naxalite prone area in Jharkhand, and therefore, he could not secure the custody of the assets of the CD and was unable to show the factory premises to the prospective resolution applicants. He had approached the police and local authorities seeking co-operation and assistance to take over the possession of the factory. The AA held that *"…it appears to us that the Resolution Professional as well as the CoC genuinely made their efforts to ensure the Resolution Plan be approved within the time frame, in spite of their efforts, they have failed to succeed in processing the Resolution Plan for the Resolution Professional is not in a position to have free access with the premises of the factory."* Therefore, unutilized time has been excluded. It was also observed by AA that the promoter and directors did not provide documents and assistance as directed.

**34. M/s Belthangady Taluk rubber Grower's Marketing & Processing Co-operative Society Limited Vs. Falcon Tyres Ltd. [CP (IB) NO.01/BB/2017]**

The AA admitted application for initiation of the CIRP. The CIRP commenced and RP and other professionals appointed incurred fee and expenses. However, the NCLAT set aside the aforesaid order of the AA and directed the AA to fix fees of the RP. The RP then filed an application seeking direction to the CD to pay a sum of Rs.1.38 crore towards his fee and expenses incurred by him as IRP and RP. The AA observed that there are no hard and fast rules for payment of fee for IRP/RP, but it depends on facts and circumstances and the work involved in a given case. Hence, the AA fixed Rs.2 lakh per month as fee for IRP/RP, in addition to actual expenses.

**35. State Bank of India Vs. Coastal Project Ltd [CP (IB) No.593 /KB/2017] –**

In the matter, SBI initiated CIRP against Coastal Projects Limited (CD) under section 7 of the Code, which was admitted. Resolution plan by the resolution applicant underwent various negotiations, deliberations at different meetings convened by the CoC, and RA submitted its revised plan to the RP. However, the CoC rejected it. Meanwhile, the extended period of CIRP was about expire. The resolution applicant approached the AA for reconsideration of the resolution plan by CoC.

The AA held that *"Proviso to Sec. 12 mandate that the AA shall not pass an order for extension of the period of CIRP under section 12 for more than once."* Therefore, it did not entertain the request of the RA for reconsideration of the resolution plan after the expiry of 270 days.

**36. Merchem Limited (Ms. Nitrex Chemicals India Limited Vs Ravindra Beleyur and Ors) [MA /523/2018 in CP/ 689/(IB)/CB/2017]**

An unsuccessful resolution applicant filed an application seeking rejection of the resolution plan approved by the CoC on the grounds that its plan was superior, the CoC did not record its satisfaction of the feasibility and viability of the approved plan, etc. The AA noted that reasonable opportunity of being heard was not given to the applicant and the same is in violation of the principles of natural justice. It observed: " *Thus, it is clear that though the resolution applicant has no voting right in the CoC; and it is the CoC to approve or reject the resolution plan, an opportunity ought to have been provided to the resolution applicant to attend the meeting of the CoC in which the Resolution Plan is to be considered, to make his representation and to express his view point on the Resolution Plan submitted to the CoC. Therefore, the application of the Resolution Applicant is allowed and the CoC is directed to consider the plan afresh submitted by the Applicant by providing it reasonable opportunity of being heard…".*

**37. Affinity Finance Services Pvt. Ltd. Vs. Kiev Finance Limited [IA No. 905/KB/2018 in CP (IB) No. 110/KB/2018]**

The Liquidator filed an application under section 12(2) read with section 60(2) of the Code with a request to recall and revoke the order of liquidation of the CD passed by the AA, on the ground that after order of liquidation was passed, one prospective resolution applicant has shown interest to submit a resolution plan. The AA held: *"The order of liquidation of the Corporate Debtor passed by the authority cannot be reviewed or revoked as prayed by the RP.".* It, however, pointed out that the RP can

sell the CD as a going concern as per regulation 32 of the IBBI (Liquidation Process) Regulations, 2016.

**38. M/S. Nag Yang Shoes Pvt. Ltd. [MA/661/2018 in TCP/431/2017]**

An application was filed under Rule 11 of the NCLT Rules, 2016 to direct the Liquidator to extend the last date of payments. In this case an e-Auction of the assets of the CD in liquidation was held on 26.10.2018. The Applicant was H1, and he was required to deposit 25% within 24 hours and 75% within 15 days. The Applicant deposited 25% after 3 days, sought some time for payment of rest of the amount, and it was acceded to by the liquidator. However, in spite of extension of time, applicant could not adhere to the time lines. Therefore, liquidator cancelled the proposed sale to the applicant and proceeded to sell to H2. The Applicant, in total, paid 57% which was forfeited. It was contended by the applicant that the Liquidator has no authority to forfeit the amount and the process adopted by the Liquidator to go with H2 is not in accordance with law.

The NCLT held that there is no provision in the Code to give extension of time as far as the bidding process is concerned. Moreover, the Liquidator has negotiated with the second highest bidder who has already made payment, which is equivalent to the amount offered by the applicant, being the highest bidder. The H2 being in a position to make the payment of the same amount, has become the successful bidder and made the payment well in time and therefore, application was dismissed.

**39. Vijay Rochlani Vs. Shantai Exim Ltd. [C.P (IB)- 1712(MB)/2017]**

The applicant under section 7 stated that the CD approached him for short term financial assistance with assurance to repay it. The CD contended that it is solvent and capable of repaying its dues and there was no loan taken by it from the applicant. The CD stated that it was only internal arrangement since the applicant's wife is sister of directors of the CD and she has filed divorce petition. Therefore, Rs.50 lakh was retained for final decision of the Family Court. AA admitted the application under section 7 on the ground(s) that transaction is covered under section 5(8), as element of interest is involved in the transaction and TDS was deducted on such interest payment. The CD has booked the loan amount under the head of short-term borrowings in the Balance Sheet. Further, it held that NCLT is a legal forum to deal summarily the insolvency proceedings. The cause of action triggers as and when CD has refused to return the loan and held that a financial debt is to be examined in the light of the definition that a financial debt means a debt along with interest which is disbursed against the consideration for the time value of money.

**40. Orchid Pharma Limited [MA/92/2018 in CP/540/IB/CB/2017]**

The RP filed an application under sections 43 and 66 of the Code stating that the CD promoter-director made fraudulent payment on the ground that CD entered into a loan agreement for debt of Rs. 25 crore, however the creditor made a claim for Rs. 12.01crore only and for the balance Rs. 13 crores, no documents have been provided.

AA observed that RP has developed the case on his own assumption after R1 had filed its response. The application has not been filed with any definite information showing the CD has made preferential payment or carried on fraudulent trading. The transaction is not satisfying the test under section 43 for the reason that it has been entered into

beyond a period of 2 years and R1 is not related to CD, to which RP has only contested of it being a shareholder of the CD. As for applicability of section 66, AA noted that payment to creditor in ordinary course of business cannot be considered to be fraudulent. If at all the payment has been made other than in ordinary course of business, at the most it could be considered as a preferential transaction but not as fraudulent transaction because payment was made towards the creditor, the subject matter jurisdiction under two heads is different. Also, this transaction does not satisfy the test of section 66 i.e. transaction to defraud creditors or for fraudulent purpose. The application was dismissed as misconceived.

41. **M/s Karpagam Spinners Pvt. Ltd. & Anr. [MA/99/2018 in TCP/225 (IB)/2017]**

The Regional Provident Fund Commissioner filed application for according first priority to the EPFP dues over all other dues as envisaged in Section 11 (2) of the EPF&MA,1952.

The AA relied upon the Judgments of the SC in PR. Commissioner of *Income Tax vs. Monnet Ispat and Energy Ltd. and M/s Innovative Industries Ltd Vs. ICICI Bank* regarding the overriding effect of the Code under section 238 and held that *"…the verification and admission of the claim of the applicant viz, EPFO has been correctly been recorded by the liquidator vide his statement of verification, admission, rejection and determination of quantum of claim dated 23.04.2018. Therefore, the application filed by the applicant viz, EPFO is devoid of merits and stands rejected"*

42. **Small industries Development Bank of India Vs. Tirupati Jute Industries Limited [CP(IB) 508/KB/18]**

The Resolution Plan submitted by M/s K.L. Jute Products Pvt. Ltd. was submitted for approval to AA. The resolution applicant made it clear in the resolution plan that the plan is subject to extinguishment of all claims (except criminal proceedings) against the CD and gave a list of conditions for exemption of all taxes/dues by the Government/local authorities, disposal of all proceedings pending against the CD relating to such dues. The AA while rejecting the plan ordered for liquidation and observed that *"In my considered opinion, such plan which was subject to so many conditions and the conditions which cannot be complied within reasonable period of time, ought not to have approved by the CoC."*

The AA held that it has no jurisdiction to hold that lease is bad in law and pass order of eviction of the lessee. The AA further held that *"I do not question commercial wisdom of CoC herein but it appears to me that the CoC did not consider the legal implications while approving plan. They approved the plan ignoring the provision of section 30(2)(e) of I&B Code. I hold that resolution plan submitted for my approval is in contravention of above provisions of law. It cannot be approved by this authority."* The AA also observed that *"It is seen from the record that RP did not give correct advise when he submitted K.L. Jute's plan for approval of CoC. In my considered opinion, in such a situation it would not be proper to appoint the present RP as the Liquidator."*

**43. Asset Reconstruction Company (India) Pvt. Ltd. Vs. Shivam Water Treaters Pvt. Ltd. [CP(IB)-1882/MB/2018]**

While submitting the status report, the RP stated that the officers of the CD did not hand over the required documents and the information to him and created hindrance in the CIRP.

The NCLT held that *"we have passed the order that RP is acting as an officer of the Court and any hindrance in the working of the CIRP will amount to contempt of court."* It passed the order for police assistance and directed the Police Commissioner to provide police assistance to RP and his team so that the RP can take control of the entire unit. It passed a direction that *"Ex- Director of the corporate debtor Mr. Gaurav Dave and all other Directors are directed to appear in person before this Bench on 31.1.2019, failing which order shall be passed under the Contempt of Court Act."*

**44. Edelweiss Asset Reconstruction Company Ltd. Vs. Bharati Defence and Infrastructure Ltd. [CP 292/I&B/NCLT/MAH/2017]**

The RP filed an application before the AA for the approval of the resolution plan of a resolution applicant who was also a FC. The AA rejected the resolution plan and ordered for liquidation of the CD, observing it to be in contravention of the provisions of the law. The AA, *inter alia*, observed that resolution plan did not give due consideration to the interest of all stakeholders and contained a lot of uncertainties and speculations. As regards various relaxations and waivers sought in the plan, the AA held that these would be subject to approval by the concerned authorities. It held: *"We are of the view that it would be inappropriate to approve such a plan, which contravenes the law, and which is prejudicial and causing injustice to the existing employees/ workers/ consultants."*

The AA further held: *"If the ultimate object in the resolution plan is to sell the company, then it can be achieved by allowing the sale as a going concern during the liquidation process"*

**45. Essar Steel Asia Holding Ltd. Vs. Satish Kumar Gupta [IA No. 430/NCLT/AHM/2018 in CP (IB)39/7/NCLT/AHM/2017]**

Rejecting the interim application of Essar Steel Asia Holdings Ltd (ESAHL) as non-maintainable within the ambit and scope of Section 12A and Section 60 (5) of the Code, it was held that ESAHL did not have a *locus standi* to make an offer for debt resolution as a resolution applicant. Earlier, ESAHL had asserted its right to redeem ESIL for ₹54,389 crore in a settlement offer.

It observed on the submission on the right of redemption of property as substantial right as *"We follow Article 300A of the Constitution of India, which speaks as such that no one shall be deprived of his property except save authority of law. By a plain reading of the above stated constitutional provision of Article 300A, it is settled Legal position that there are reasonable restrictions in the right of property and such right to property can be curtailed…"* .

The AA held that "*Therefore to consider and examine the scope of the settlement within the purview of Section 60(5) of the Code would not be proper when the specific provisions for settlement of debts under Section 12A have already been incorporated in the Code and if such an application for settlement is considered under the provisions*

*of Section 60 (5) of the Code, it may amount to deviation from the expressed statutory provisions because it is a settled legal position that if a particular thing is not allowed to do directly, it cannot be done indirectly*."

**46. Amar Remedies Limited [MA No. 524 of 2018 In CP (IB) 1053 (MB)/2017]**

The AA rejected the petition filed by the CD/ applicant under section 10 of the Code, on the ground of suppression of the material facts, knowing them to be material, *viz.* regarding the order of the Hon'ble High Court, whereby the corporate person was wound up, and was directed to file affidavit of claim before the Official Liquidator.

On the contention of corporate applicant that there is no requirement to furnish any additional information, the AA observed that transparency is hallmark in today's corporate world. There is no bar to provide any additional information in support of the petition in addition to the details sought in the prescribed form.

The AA observed that, *".... it is clear that after liquidation order passed in a winding-up petition against the corporate debtor then it is barred from filing a petition under section 10 of the Code. Here the corporate debtor has not only suppressed the material fact that the winding up petition has not only been filed and admitted, but liquidation order has also been passed against the corporate applicant/ corporate debtor liquidator has been directed to expedite liquidation proceedings expeditiously. The corporate applicant suppressed this material fact, knowing it to be material, and filed the petition under section 10 and in contravention of Rule 10 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The alleged act of the corporate applicant is punishable under section 77 (a) of the Insolvency and Bankruptcy Code 2016. The Registrar of Companies, Mumbai is directed to lodge prosecution against the corporate applicant under section 77(a) of the insolvency and bankruptcy code in 2016.*

*Since the petition has been filed under section 10 of the Insolvency and Bankruptcy Code 2016 after the suppression of the material facts, which were known to be material, therefore the petition is rejected with cost ₹ 10 lakhs which shall be paid by the Corporate Applicant. The cost will be deposited in the account of the Prime Ministers National Relief Fund."*

**47. Amtek Auto Limited [CA. Nos. 567/2018 & 601/2018 in CP (IB) No. 42/Chd/Hry/2017]**

An Application was filed by all the FCs for a declaration that the resolution applicant-M/s Liberty House Group PTE Limited and its promoters have knowingly contravened the terms of the RP, having failed to implement the same and the reinstatement of the CoC to run the CD, as a going concern.

The AA observed: *"There being a clear default in implementing the Plan within the time stipulated in the Resolution Plan, the instant application deserves to be allowed with liberty to any Member of the Committee of Creditors or the Resolution Professional file a complaint before the Insolvency and Bankruptcy Board of India or the Central Government with a prayer to file the criminal complaint on the ground of corporate debtor having intentionally and wilfully contravened the terms of the Resolution Plan, for which we are restraining ourselves from making any observations either way. ."*

It held: *"Since the approved Resolution Plan cannot be now implemented because of the default in making payment as per the terms of the Resolution Plan, the period when the Resolution Plan was submitted by DVI till the disposal of the instant application can only be reconsidered by the Committee of Creditor by reconstituting it and not by initiating fresh process, which would defeat the fresh binding timelines provided under the Code to complete the process. No matter if the corporate debtor ultimately has to face liquidation, but the permission to restart the process, make advertisement and invite fresh plans etc., would defeat he very mandate of Section 12 of the Code. The Committee of Creditors can only discuss the Resolution Plan which was submitted by DVI only by exclusion of certain period of time while calculating 270 days."*

**48. Sterling SEZ and Infrastructure Limited [M.A 1280/2018 in CP 405/ 2018]**

While observing that the Adjudicating Authority under PMLA does not have jurisdiction to attach the properties of the CD undergoing CIRP, the AA observed as *"The purpose and object of IBC is for resolution of the Corporate Debtor by maximizing the value that can be received by the Creditors and stake holders. The IBC provides for timelines within which the resolution has to be arrived at. The PMLA's object is also to recover the property from wrong doers and compensate the affected parties by confiscation and sale of the assets of the wrong doer apart from imposing punishment. Here the beneficiaries are the creditors of the Corporate Debtor. The criminal proceedings before PMLA will take a longer time and by the time there will be an erosion in the value of assets. However, considering the overriding provisions of Section 238 of IBC which is the later legislation, when compared to the earlier legislation of PMLA, the provisions of IBC will prevail and hence considering the economic interest of the beneficiaries, the IBC will provide solution at the earliest to the Corporate Debtor as well as to the Creditors. The case laws cited above also favours a resolution by IBC instead of waiting for a long period to get the benefit under the PMLA. Further, the quantum of amount locked in the assets of the Corporate Debtor can be released at the earliest when resolution is found through IBC instead of taking a long route under PMLA. This is the economic aspect of the case."*

It further held that *"…the attachment order dated 29.05.2018 and the Corrigendum dated 14.06.2018 issued by Respondent and as confirmed by the Adjudicating Authority under PMLA Court is a nullity and non-est in law in view of Sections 14(1)(a), 63 and 238 of IBC and the Resolution Professional can proceed to take charge of the properties and deal with them under IBC as if there is no attachment order. The concerned sub-registrars are directed to give effect to this order and remove their notings of attachment, if any, in their file in respect of properties belonging to the Corporate Debtor. It is needless to mention that the attachments in respect of the properties of the Corporate Debtor only are covered in this order."*

**49. M/s JHV Distilleries and Sugar Mills Limited [CP/IB/221/KB/2018]**

The AA passed an order of liquidation of the CD in the manner as laid down in Section 33, of the Code, while taking note of the fact that *"…the Committee of Creditors seems to have not fully co-operated with the Resolution Professional so as to have a successful completion of the CIRP. The Resolution Professional was unable to get the details of the assets. The Resolution Professional was unable to complete the valuation of the*

*assets of the Corporate Debtor...".* It further observed that *"the Committee of Creditors has not taken any due interest in completing the process by getting a prospective Resolution Applicant, I find no other alternative other than to pass an order of liquidation..."*

50. **Avinash Raj Constructions Private Ltd. [CP (IB) 994/KB/2018]**

The AA rejected the application filed by the FC for initiation of the CIRP of CD. Reliance was placed on the provisions of Section 186(2) and (3) of the Companies Act, 2013 and it was noted that *"Financial Creditor was not in position to give any loan to anybody as claimed by them. Unless conditions stated in Sub-Sections (2) and (3) of Section 186 of the Companies Act, 2013 are fulfilled. There is nothing on record to show that the Financial Creditor gave loan after complying above conditions. Hence, the transaction as portrayed by the Financial Creditor against the Corporate Debtor cannot be recognized as the transaction of loan cannot be said to be 'financial debt'."*

51. **Asset Reconstruction Company (India) Limited Vs. Viceroy Hotels Ltd. [CP(IB)219/7/HDB/2018]**

An application under section 60(5) of the Code was filed for declaring the resolutions of CoC to have been passed/approved by requisite majority under the provisions of IBC, 2016.

The AA observed that *"Resolution No. 7 which was considered by CoC is for conducting of forensic audit of corporate debtor. This resolution is not for making the changes in the appointment/ terms of contract of statutory auditors or internal auditors of corporate debtor. Resolution no. 7 is for taking steps for conducting forensic audit of the accounts of corporate debtor. Resolution No. 7 does not fall with in sec 28(1)(m) of the Code. It does not fall under any of the provision of section 28 of the Code then for its approval it needs to be approved by a voting of not less than 51% of Financial Creditors."*