Insolvency and Bankruptcy Board of India

Subject: Status Note on Evolving Insolvency Jurisprudence, January to March, 2018

A brief of select judicial and quasi-judicial orders issued during January-March, 2018 having significant bearing on the evolving jurisprudence under the Insolvency and Bankruptcy Code, 2016 is as under:

A. Supreme Court

Shivam Water Treaters Pvt. Ltd. Vs. Union of India & Ors. [SLP (C) No.1740/2018]

The Hon'ble Supreme Court observed: *"Having heard the learned counsel for the parties, we are only inclined to request the High Court to address the relief limited to any action taken by the respondents or any order passed by the NCLT. Barring this, the High Court should not address any other relief sought in the prayer clause. The High Court is requested not to enter into the debate pertaining to the validity of the Insolvency and Bankruptcy Code, 2016 or the constitutional validity of the National Company Law Tribunal."*.

B. High Courts

a. Jotun India Private Limited Vs. PSL Limited [Company Petition No.434 of 2015]

The Hon'ble High Court held: "*NCLT is not a court subordinate to the High Court and hence as prohibited by the provisions of Section 41 (b) of the Specific Relief Act, 1963 no injunction can be granted by the High Court against a corporate debtor from institution of proceedings in NCLT."* It further held: "*.. since the IBC is admittedly a successor statute to SICA, and Section 64 (2) of IBC being pari-materia to Section 22 of SICA, the argument that the Company Court has the power to injunct proceedings before NCLT in cases of pending winding up petitions is entirely misplaced and contrary to legislative intent."*. It ordered: "*……. In the circumstances, there is no bar on NCLT Ahmedabad from proceeding with IBC application."*.

b. Akshay Jhunjhunwala & Anr. Vs. Union of India & Ors [WP No. 672/2017]

The issue for consideration was whether the treatment of a FC on a pedestal higher than an OC and bestowing a higher or better right to the FC is just and proper or whether the same offends any provision of the Constitution of India. The Hon'ble High Court observed that the Bankruptcy Law Reforms Committee gives a rationale to the FCs being treated in a particular way vis-à-vis

an OC in insolvency proceedings with regard to a company. The rationale of giving a particular treatment to a FC in the process of the insolvency of a company under the Code cannot be said to offend any provisions of the Constitution of India. It relied on two pronouncements of the Hon'ble Supreme Court:)i(In Bhavesh D. Parish & Ors., the Supreme Court expressed the view that the Court should be slow in staying the applicability of a piece of legislation particularly in the economic spheres even if arguable points are raised unless such provisions are manifestly unjust or glaringly unconstitutional.)ii(In P. Laxmi Devi, the Supreme Court held that the Courts while dealing with legislations particularly in economic matters should presume in favour of the constitutionality of a statute.

c. Dr. Vidya Sagar Garg Vs. Insolvency and Bankruptcy Board of India [W.P. (C) 9520/ 2017, CM Appl. 38726-38727/2017]

The petitioner challenged an order of the IBBI rejecting his application seeking registration as an IP on the ground that he is not a fit and proper person as he has been charge-sheeted. He contended that he had no role in the alleged infraction of law and he had filed an application for discharge. The Hon'ble High Court held that the writ petition was pre-mature and allowed the petitioner liberty to approach the High Court, once the discharge application is disposed of by the trial court.

C. National Company Law Appellate Tribunal

a. Quantum Limited Vs. Indus Finance Corporation Ltd. [CA (AT) (Ins) No. 35 of 2018]

An appeal had been filed against an order of AA rejecting the extension of time on the ground that there is no provision to file such application after the expiry of 180 days of CIRP. The NCLAT held that in terms of section 12)2(of the Code, a RP can file an application to AA for extension of the period of CIRP only if instructed to do so by the CoC by a vote of 75% of the voting shares. The provision does not stipulate that such application is to be filed before the AA within 180 days. If within 180 days, a resolution is passed by the CoC by a majority vote of 75% of the voting shares instructing the RP to file an application for extension of period, the AA should allow time up to 90 days beyond 180th day. The NCLAT accordingly extended the period of resolution process for another 90 days and excluded the period between 181st day and passing of the order by the NCLAT for all purposes. It observed that it is the duty of the AA to find out whether a suitable resolution plan is there to be approved instead of going for liquidation, which is the last recourse on failure of resolution process.

b. Tarini Steel Company Pvt. Ltd. Vs. Trinity Auto Components Ltd. & Anr. [CA (AT) (Ins) No. 75/2018]

An appeal was filed against the impugned order of the AA approving a resolution plan with certain modifications. The appellant contended that the AA has no jurisdiction to make any modification to the resolution plan after it was approved by the CoC. Without expressing any opinion, the NCLAT gave liberty to the appellant to withdraw the resolution plan if it was not satisfied with the amendment made therein and, in that case, the AA would allow the same and proceed with liquidation.

c. Devendra Padamchand Jain (RP) Vs. State Bank of India & Others [CA (AT) (Ins) No. 177 of 2017]

Being unhappy with the services of the RP, the AA removed him vide the impugned order and appointed another IP as liquidator. The RP stated in the appeal that the AA has no jurisdiction to replace him and a RP can be replaced only for the reasons mentioned in section 34 of the Code. The NCLAT held that the AA has jurisdiction to remove the RP, if it is not satisfied with his functioning, which amounts to non-compliance of section 30)2(of the Code.

d. M/s. Subasri Realty Private Limited Vs. Mr. N. Subramanian & Anr. [CA (AT) (Ins) No. 290 of 2017]

The NCLAT clarified that after the appointment of the RP and declaration of a moratorium, the Board of Directors stands suspended, but that does not amount to a suspension of Managing Director, or any of the directors or officers or employees of the CD. To ensure that the CD remains a going concern, all the directors/employees are required to function and to assist the RP who manages the affairs of the CD during the moratorium. If one or other officer or employee had the power to sign a cheque on behalf of the CD prior to the order of moratorium, such power does not stand suspended on suspension of Board of Directors nor can it be taken away by the RP. If the person empowered to sign cheque refuses to function on the direction of the RP or misuse the power, it is always open to the RP to take away such power after notice to the person concerned.

e. Innoventive Industries Limited Vs. Kumar Motors Private Limited [CA (AT) (Ins) No. 181 of 2017].

The issue was whether an application under section 7 of the Code can be rejected on the ground of pendency of a winding up proceeding against the CD. In this case, as the High Court has

already admitted the winding up proceedings and ordered for winding up of the CD, the NCLAT held that the question of initiation of CIRP against the same CD does not arise.

f. State Bank of India Vs. Mr. V. Ramakrishnan and M/s. Veesons Energy Systems Pvt. Ltd. [CA (AT) (Ins) No. 213 of 2017]

The CD invoked section 10 of the Code which was admitted, and an order of moratorium was passed. Even after declaration of the moratorium, the SBI continued to take measures under SARFAESI Act, 2002 and proceeded against the property of the personal guarantor. The AA restrained the SBI from proceeding against the personal guarantor till the period of moratorium was over. The issue involved was whether moratorium is applicable on the property of the CD as well as of the personal guarantor. The NCLAT observed that the resolution plan, if approved by the CoC and also by the AA, is not only binding on the CD but also on its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan, including the personal guarantor. Therefore, it held that the moratorium will not only be applicable to the property of the CD but also on the personal guarantor.

g. Sandeep Kumar Gupta (RP) Vs. Stewarts & Lloyds of India Ltd. & Anr. [CA (AT) (Ins) No. 263 of 2017]

The Appellant RP has challenged the appointment of another IP as Liquidator on the ground that as per section 34)1(of the Code, the RP can only act as liquidator for the purpose of liquidation and he can be replaced by the AA only on the ground mentioned in section 34)4(. The NCLAT found that the AA was not satisfied with the performance of the RP and, therefore, it held that the AA was well within its jurisdiction to engage another person as RP or Liquidator. It further held that if any person is appointed out of the list of RPs made available by the IBBI to the AAs, it should be treated to be an appointment of RP/Liquidator on the recommendation of the IBBI.

h. State Bank of India Vs. SKC Retails Ltd.]CA)AT( )Ins(No. 08 & 43 of 2018[

The AA, vide impugned orders, directed that the CoC to bear the rest of expenses incurred by the IRP in proportion to the amount claimed. The NCLAT held that as per regulation 33)1(of the IBBI)Insolvency Resolution Process for Corporate Persons(Regulations, 2016, the applicant is liable to incur the expenses of RP and, thereafter, the applicant will get the amount reimbursed by CoC to the extent the amount is ratified by the CoC.

i. Dakshin Gujarat VIJ Company Ltd. Vs. M /s. ABG Shipyard Ltd. & Anr.]CA)AT( )Ins(No. 334 of 2017[

The issue was whether the order of 'Moratorium' will cover the current charges payable by the CD for supply of water, electricity etc. or not. The NCLAT observed that there is no prohibition or bar on payment of current charges of essential services. Such payment is not covered by the order of "Moratorium". If any cost is incurred towards the supply of the essential services during the "Moratorium", it may be accounted towards 'Insolvency Resolution Costs', but law does not stipulate that the suppliers of essential goods including the electricity or water to be supplied free of cost, till completion of the 'Moratorium'.

j. Mr. M. Nandagopal Vs. Virtous Urja Limited]CA)AT( )Ins(Nos. 285 & 286 of 2017[

The NCLAT set aside the order)s(passed by the AA appointing RP, declaring moratorium, freezing of account, etc;. and declared action, if any, taken by the RP under the said orders as illegal. It, however, directed: "*The Adjudicating Authority will fix the fee of* '*Resolution Professional*'*, and the* '*Corporate Debtor*' *will pay the fees for the period he has functioned*.".

D. National Company Law Tribunal

a. In the matter of Vedikat Nut Crafts Pvt. Ltd.])IB(-40)PB(/2017[

After perusing records, the AA could not see any reason for not inviting resolution plan despite the fact that even a period of one month as balance period of 180 days was still available. It observed: "*The aforesaid reason given by the Committee of Creditor to jump to the conclusion of seeking liquidation of the company without seeking extension of time of 90 days, without inviting expression of interest by the prospective resolution plan applicant falls foul of legal provisions and fair play. It presents a tell-tale story of the irregularity committed. To say the least such a decision is arbitrary and cannot be sustained*." Accordingly, it directed the RP to float expression of interest as per the provision of section 25)2()h(of IBC. It noted that in this matter, the RP is an advocate practising for many years and yet he engaged a counsel. It observed: *"However, we needed the assistance of the Resolution Professional, when he appeared today we found that there was hardly any necessity to engage another counsel. It was avoidable*." .

b. In the matter of Gupta Energy Pvt. Ltd. [MA 24, 80 & 110/2018 in C.P. No. 43/I&BP/2017]

The AA made several important observations in this matter:

a. It made clear that the AA has neither jurisdiction to question the actions of the CoC nor any discretion to examine the resolution plan to dig into, as to whether resolution plan is better or the liquidation better. As per the statute, the CoC is the competent authority and it cannot transgress into the jurisdiction of CoC.

b. CoC is not a statutory authority; it is only a decision taking body, like general body of a company, in respect to a CD.

c. "may", used in section 30)4(of the Code is indeed a discretion given to CoC either to reject or accept the resolution plan with 75% voting despite the plan in all respects is correct. Such phraseology cannot be misconstrued as requisite of 75% as directory.

d. The super majority provided for the decisions taken by CoC is substantive law to achieve the purpose and object of the Code. The purpose of 75% voting approval is to decide 100% creditors' stake as well as other stakeholders' stake. When many stakeholders' rights are involved, a Court cannot alter the requisite authority mentioned by the statute to take a decision on the rights of the stakeholders. If at all any such alteration is made to the approval of the CoC, two anomalies will come: one is violation of the law, and the other is the alteration of the rights of the stakeholders bereft of statutory approval. If anybody ventures to alter this majority means, it is playing with the rights of the parties.

e. A resolution plan accepted by voting in CoC with less than 75% cannot even be looked into by the AA under section 31 of the Code.

c. Punjab National Bank Vs. Divya Jyoti Sponge Iron Pvt. Ltd. [CP (IB) No. 363/KB/2017]

The AA took judicial notice of exaggerated insolvency resolution cost, inclusive of fixation of fee of RP in a lump sum manner by the CoC without applying its mind in regards fate of CD, the volume, nature and complexity of CIRP. It observed that it is time to have legitimate guidelines or regulation so as to safeguard and to ensure the prospects of revival of a dying CD. It hoped that the IBBI would frame necessary regulations/ guidelines for fixation of fees and resolution cost by a RP.

d. In the matter of Roofit Industries [MA 701 in C.P. 1055/I&BP/2017]

The CD had nine immoveable properties. Since the CIRP period of 180 days ended on 26th December, 2017 and no resolution plan for CD was received except for B-42, Gummidipoondi Factory, the applicant filed application for liquidation under section 33 of the Code. Considering the fact that resolution plan was submitted only in respect of one property, the AA held the view that the resolution plan could not be considered as a resolution plan under the Code and

accordingly, it ordered liquidation of CD. To the RP's plea that he is not willing to act as a liquidator of CD, the AA underscored that the Code provides that where the AA passes an order for liquidation of a CD, the RP appointed for the CIRP shall act as a liquidator.

e. In the matter of Burn Standard Company Ltd. [C.P. (IB) No. 244/KB/2017]

The AA observed that the resolution plan, approved in this matter by the CoC with 100% voting share, *was a unique one.* It did not provide for the revival of the CD but for its closure by discharging its debts to all stakeholders, inclusive of staff and workmen. It was styled as a repayment plan of its debt, on the basis of a budgetary allocation of Rs. 417 crore by the Ministry of Railways for 2018-19 to Burn Standard Co. It approved the plan on being satisfied that the same meets with the requirements of section 30 (2) of the Code.

f. State Bank of India Vs. Electrosteel Steels Limited [CA (IB) No. 202 & 203/KB/2018, CP (IB) No. 361/KB/2017]

The appellant alleged that two of the resolution applicants)Tata Steel and Vedanta Limited(were not eligible to submit the resolution plans in view of clause)d(read with clauses)j) and (i(of section 29A of the Code. It contended that the RP did not consider objections in respect of ineligibility of resolution applicants. The AA observed that it cannot make a decision to hold that the Resolution Applicants are eligible or ineligible. It observed that the RP as well as CoC are equally responsible for safeguarding the interests and assets of a CD under CIRP and would take as much caution to ensure that an applicant under the purview of section 29Aof the Code is not qualified for submission of a resolution plan. It accordingly advised that the objections would be considered by the CoC for an independent decision in regard to application of section 29A.

g. State Bank of India Vs. Ghotaringa Minerals Ltd [CP (IB) No. 758/ KB /2017]

The CD submitted that application for initiation of CIRP as against the CD without exhausting the remedy available to the applicant as against the principal borrower was not maintainable. It was held that law is settled regarding the liability of a guarantor and guarantor's liability being co-extensive with that of the principal borrower, there is no legal bar in initiating action against the CD who is a guarantor.

h. LML Ltd. (Corporate Debtor) [**CP NO**. (**IB**) **ALD**/**2017 with CA No**. **73**/**2018**]

The RP submitted the report for initiation of liquidation process. The AA observed that the RP has failed to submit the progress report within 270 days and that he filed the application for

liquidation on 19th March, 2018, after issuance of notice by the AA for submission of progress report/ resolution plan. The RP was not careful in following the timeline prescribed under the Code, and therefore, it was not proper to appoint the RP as liquidator in the case. It directed the RP to handover all the documents to the liquidator to be appointed.

i. Indian Bank Vs. Kadevi Industries Limited [CP (IB) 10/7/HDB/2017]

In the second meeting of CoC, Mr. Prabhakar, promoter of CD identified Netiol)Singapore(Pte Ltd. along with its consortium partner as resolution applicant. There were several rounds of modifications to the resolution proposal. However, this could not be finally approved, extension of 90 days was sought. The extended period of 90 days expired, but resolution plan was not approved. Consequently, the order of liquidation was passed on 9th January, 2018. While passing the order of liquidation, the AA observed *"…This implies that all the parties involved in the entire CIRP process are hand in glove and made untruthful / wilful false submissions to the Adjudicating Authority. Therefore, the Adjudicating Authority has taken issue seriously and imposes a cost of Rs. 1,00,000/- (Rs. One Lakh only) each on the Financial Creditors/CoC and on the corporate debtor."* It warned the RP to be careful in all his future assignments and sent strong signals to all the resolution applicants to be genuine/ truthful in the entire CIRP.

j. Innovsource Private Limited Vs Getit Grocery Private Ltd. [IB- 295(PB)/2017]

An application was filed under section 9 of the Code. It did not propose the name of any IP to act as IRP. While admitting the application, the AA observed: *"The Insolvency and Bankruptcy Board of India vide its letter dated 01.01.2018 has recommended a panel of Insolvency Professionals for appointment of Insolvency Resolution Professional in compliance with Section 16)3( )a(of the Code in order to cut delay. The list of recommended Insolvency Professionals provides instant solution to the Adjudicating Authority to pick up the name and make appointment. It helps in meeting the time line given in the Code and the unnecessary time wasted firstly in asking the Insolvency and Bankruptcy Board of India to recommend the name and then to appoint such Interim Resolution Professional by the Adjudicating Authority."*.

k. Alchemist Asset Reconstruction Co. Ltd. Vs Moser Baer India Limited [(IB)-378(PB)/2017]

The applicant wanted to submit claim after last date for filing the claim. The AA observed that public announcement of a CIRP is required to be made by IRP by incorporating the information indicated in section 15*(1), including* the last date of submission of claims. There is no provision

in the Code for extending the period beyond the last date for submission of claims. However, regulation 12 of the IBBI *(*Insolvency Resolution Process for Corporate Persons*)* Regulations, 2016 has provided that a creditor can submit the proof of claim even after the stipulated date mentioned in the public announcement till the approval of a resolution plan by the CoC. It held*: "The aforesaid regulation comes in direct conflict with the provisions of Parliamentary Statute with the provision of section 15(1)(c) of the Insolvency & Bankruptcy Code. We do not think that by subordinate legislation the timeline provided by Insolvency & Bankruptcy Code could be eroded in such a manner as to cause delay in the Corporate Insolvency Resolution Process.".*

l. RP)In the matter of Orchid Pharma( ]CA/26/IB/2018 in CP/540/)IB(/2017[

The CIRP of Orchid Pharma Limited commenced on 17th August, 2017. The shareholders passed a resolution for the appointment of M/s. CNGSN & Associates LLP as the statutory auditor for a period of five years commencing on 1st April, 2017. However, the erstwhile auditor was not willing to give NOC unless the RP cleared 50% of its outstanding dues. The RP took up the matter with the AA, which directed: *"The earlier auditor, M/s SNB Associates, is directed to issue NoC as well as transfer the necessary papers to the newly appointed auditor of the corporate debtor, M/s. CNGSN & Associates. It has been noted by this tribunal that the dues of the earlier audit has been admitted to the extent of Rs.1,23,69,272 and it has been included as the operational credit with respect to the corporate debtor*.".

m. In the matter of M/s. Gujarat NRE Coke Limited]C.P.)I.B.(No. 182/KB/2017[

After failure of resolution even during the extended period, the AA appointed the RP as liquidator. An affidavit filed by workmen and employees emphasized that the regulations provide for slump sale of assets and, therefore, permits sale of the business of the CD, including all its assets and properties, as a going concern and Hon'ble Supreme Court and High Courts have often directed sale of assets of the company as a going concern to preserve employment, particularly when CD is a going concern. Accordingly, the AA directed: "*The Liquidator shall try to dispose of the Corporate Debtor company as a going concern after publication of notice in newspaper with the reserve price which shall be equal to the total debt amount including interest and maximum period applicable for trying the sale of the Corporate Debtor as a going concern will be only three month from the date of the order if the process of sale as a going concern is failed during this period, then process of the sale of the assets of the company will be according to the provisions of sale of asset of the Corporate Debtor prescribed under section 33, Chapter VI of the Insolvency & Bankruptcy Board of India (Liquidation Process)*

Regulations, 2016. In case it is not concluded within this period, the order of this Court directing the sale of the company as a going concern shall stand set aside and corporate debtor to be liquidated in the manner as laid down in Chapter III of the Liquidation process provided in Insolvency & Bankruptcy Code.".

n. M/s. Brasher Boot Company Limited Vs. M/s. Forward Shoes)India(Private Limited]CA/41/IB/2017 in TCP/205/)IB(/2017[

The AA had already granted extension of time for a period of 30 days which has expired. Further extension of time has been sought. Section 12)3(of the Code empowers the AA to extend the duration of CIRP beyond 180 days for such further period not exceeding 90 days. The proviso to the said section, however, provides that extension of the period of CIRP shall not be granted more than once. The issue, therefore, is whether extension can be granted for second time where the extension has been granted earlier for 30 days. The AA held that the language of section 12)3(speaks the intention of the legislature. The provision cannot take away the effect of the main provision or to remove any doubt in relation to its implementation. If another extension is not granted beyond the extension of 30 days, it will render section 12)3(of the Code otiose. Accordingly, the AA granted extension for a further period of sixty days.