Insolvency and Bankruptcy Board of India

Subject: Evolving Insolvency Jurisprudence, April to June, 2018.

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

A. Supreme Court

1. Swastik Coal Corporation Private Limited & Ors. Vs. Union of India & Ors [WP (Civil) No. 321/2018]

In view of the objections in Writ Petition (C) Nos. 99/2018 and 100/2018, the Hon'ble Supreme Court requested the President, National Company Law Tribunal to transfer both the matters to a Bench which consists of one Judicial and one Technical member.

In view of the request in Writ Petition (C) No. 115 of 2018, the Hon'ble Supreme Court allowed supply of a copy of the Resolution Plan(s) to the Corporate Debtors/Stakeholders, which was agreed by the Ld. Attorney General for India.

2. Anant Kajare Vs. Eknath Aher & Anr. [Civil Appeal No (s). 20971/2017]

The Hon'ble Supreme Court directed that a Sale-cum-Monitoring Committee be set up comprising the Resolution Professional, one SEBI representative, one Investor Representative and one Representative of CCIL and RTSCL and their associates / sister concerns. This Committee would then appoint Registered Valuers to value the properties that have been unearthed during the insolvency process of CCIL, RTSCL, and the assets of their associates/ sister concerns. After valuation has been done, each of these properties would be sold under the aegis of the NCLT. The Hon'ble Supreme Court attached all properties of CCIL, RTCSL as well as assets and other properties of their associate and sister concerns. The Hon'ble Supreme Court appointed M/s. Deloitte as the special

auditor to carry out forensic audit not only of CCIL and RTSCL, but also of their associates and sister concerns.

B. High Courts

1. SEL Manufacturing Company Ltd. & Anr Vs. Union of India & Ors]CWP No. 9131 of 2018[

An application was admitted under section 7 of the Code. The petitioner moved a writ petition challenging the admission, submitting several questions of facts. The Hon'ble High Court held that these questions of facts can be effectively adjudicated by the NCLAT in appeal proceedings for which efficacious and effective remedy has been provided under section 61 of the Code. It observed: "*Assuming that there is some merit in the petitioners' contention that all these issues were raised before the Adjudicating Authority and the same have not been decided on merits, yet it would not be a sufficient ground to entertain the writ petition. There is a sea of difference between 'erroneous exercise of jurisdiction' or 'lack of jurisdiction' in a Tribunal. The erroneous or failure to exercise jurisdiction by a Tribunal is a ground which can be effectively taken before the Appellate Authority*." It also observed that availability of an alternative remedy does not preclude a writ petition under Article 226, but facts and circumstances must justify it. Therefore, it declined to go into merits of respective contentions and relegated the petitioners to the alternative remedy of appeal as provided under the Code.

2. Mr. H. K. Sharma Vs. Union of India & Ors [WP Nos. 15812/2018 (GM – RES) & 21803-21929/2018 & 21930-21933/2018]

The Hon'ble High Court stayed the operation and implementation of the Companies (Registered Valuers and Valuation) Rules, 2017 as far as the petitioners were concerned. However, the stay has since been vacated.

C. National Company Law Appellate Tribunal

1. **State Bank of India Vs. D. S. Rajender Kumar [CA (AT) (Insolvency) No. 87 to 91/2018]**

The AA *vide* an order dated 23rd January, 2018 did not allow the financial creditors to proceed against the personal guarantors till the moratorium period came to an end. While disposing of the appeal against the said order, the NCLAT reiterated its decision in the matter of State Bank of India Vs. V. Ramakrishnan & Ors. It, however, made clear that order of moratorium would be applicable only to the proceedings against the CD and the personal guarantor, if pending before any court of law/tribunal or authority. The order of moratorium will not be applicable for filing application for triggering CIRP under sections 7, 9 or 10 of the Code against the guarantor or the personal guarantor under section 60 (2). If CIRP has been initiated against the CD, the insolvency and bankruptcy process against the personal guarantor can be filed under section 60 (2) before the same NCLT and not before the Debt Recovery Tribunal.

2 **Pr. Director General of Income Tax (Admn. & TPS) Vs. M/s. Spartek Ceramics India Ltd. & Anr. [CA (AT) (Insolvency) No. 160 of 2017]**

Two appeals were filed in pursuance to two notifications issued by Government under section 242 of the Code against two schemes of demergers sanctioned by the BIFR. In this context, the NCLAT considered several issues and ruled as under:

(a) The Executive can fill in the deficiency but cannot amend the substantive provision of the Code. It is a settled law that the legislature can authorise an executive authority to modify either existing or future laws but not any of the essential features. The executive authority cannot act beyond the powers delegated by the legislature. The Central Government is empowered to make such provisions not inconsistent with the provisions of the Code, which is necessary for removing the difficulties in giving effect to the Code.

(b) In absence of any ground shown for removing any difficulty in giving effect to the provisions of the Code and as the Central Government cannot exercise powers conferred under section 242 of the Code for removing the difficulties arisen due to 'SICA Repeal Act, 2003' or omission of provisions

of the 'Companies Act, 2013', the NCLAT cannot act pursuant to impugned notification dated 24th May, 2017 to entertain the appeal.

(c) By virtue of the amendment of the SICA under the Eighth Schedule of the Code, an appeal or reference or inquiry before BIFR stands abated. In such cases, a company can make a reference within 180 days of commencement of the Code without any fee. If it prefers any application under section 10 beyond 180 days, it is required to pay the requisite fee. However, the demerger scheme already sanctioned cannot be treated as a resolution plan.

3. Mr. Chetan Sharma Vs. Jai Lakshmi Solvents (P) Ltd & Anr. [CA (AT) (Insolvency) No. 66 of 2017]

In this appeal, the appellant among other things challenged the admission of an application under section 8 of the Code. The NCLAT observed that the 'dispute' under section 5(6) of the Code must be between the corporate debtor and the operational creditors. A unilateral transfer of liability does not constitute a 'dispute' within the meaning of section 5(6) of the Code and an inter-se dispute between two groups of shareholders of the corporate debtor does not constitute a 'dispute' in reference to operational creditors.

4. Sharvan Kumar Vishnoi Vs. Crown Alba Writing Instruments P. Ltd. [CA (AT) (Insolvency) No. 253 of 2018]

The AA appointed Mr. Anurag Goel as RP on the ground that the appellant, Mr. Sharvan Kumar Vishnoi was already appointed as RP in another matter. The NCLAT observed that except for special circumstance and good reasons, the AA should not replace RP, if named and approved by the FC or CoC. Though it was not inclined to interfere with the impugned order of the AA, it made clear that the said order will not affect the career of the appellant.

5. **Mack Soft Tech Pvt. Ltd. Vs. Quinn Logistics India Ltd. [CA (AT) (Insolvency) No. 143 of 2017]**

In this matter, the appellant did not dispute that it had taken debt and did not repay. It, however, took the plea that the amount so paid was time barred. The NCLAT observed that there is a continuous cause of action as evident from the books of account of the appellant and hence the application under section 7 of the Code cannot be held to be barred by limitation.

6. **Tomorrows Sales Agency Pvt. Ltd. Vs. Rajiv Khurana, RP of Power Himalyas Ltd. & Ors. [CA (AT) (Insolvency) No. 162 of 2017]**

The NCLAT noted that it was not clear from resolution plan whether the resolution applicant had consent of 76% shareholders for transfer of their shares in favour of it. It observed: *"Prima facie, it appears that without following the procedure of transfer of shares in accordance with Companies Act, 2013 or taking consent of shareholders, if any, 'Resolution plan' is prepared for transfer / acquisition of share, one may allege that the same is violative under Section 30 (2) (e) of the Insolvency and Bankruptcy Code, 2016."*

7. **Rajputana Properties Pvt. Ltd. Vs. Ultra Tech Cement Ltd. & Ors. [IA No. 594 of 2018 in CA (AT) (Insolvency) No. 188 of 2018]**

The NCLAT held as under:

(a) While scrutinizing the resolution plan under section 30 (2), the RP cannot hold or decide as to who is ineligible under section 29A. Neither section 30 (2) nor any other provision in the Code confers such power on the RP to scrutinize the eligibility of Resolution Applicants.

(b) As per section 30 (2), the RP is required to examine whether resolution plan confirms the provisions as mentioned therein but he cannot disclose it to any other person, including Resolution Applicant(s), who has submitted the resolution plan. The resolution plan submitted by one or other Resolution Applicant being confidential cannot be disclosed to any competitor Resolution Applicant nor any opinion can be taken or objection can be called

for from other Resolution Applicants with regard to one or other resolution plan.

(c) The RP is not only required to give notice of the meeting to the members of CoC, but also to the members of suspended Board of Directors or partners of the corporate person, as the case may be. The OCs or their representatives are also to be informed to attend the meeting of CoC, if the amount of the aggregate dues is not less than ten percent of the debt.

(d) The CoC, while approving or rejecting one or other resolution plan, should follow transparent procedure. It should record the reason in brief while approving or rejecting one or other resolution plan. The members of suspended Board of Directors or its partners; OCs or their representatives and Resolution Applicant(s) are not mere spectators. They may express their views in the meetings of the CoC. Their views should be recorded and taken into consideration by the CoC before approving or rejecting one or other resolution plan.

(e) The Resolution Applicant(s) are entitled to be present when the resolution plans are opened and placed before the CoC as per section 30(5). At this stage, they may point out whether one or other Resolution Applicant is ineligible in terms of section 29A or not.

8. Quinn Logistics India Pvt. Ltd. Vs. Mack Soft Tech Pvt. Ltd. & Ors. [CA (AT) (Insolvency) No. 185 of 2018]

In this matter, the CIRP remained stayed for about 166 days due to an interim order passed by the AA. The AA failed to exclude the period of 166 days from the CIRP period. The NCLAT observed that it is always open to the AA to exclude certain period for the purpose of counting the total period of 270 days, if the facts and circumstances justify exclusion, in unforeseen circumstances. It listed out the following good grounds and unforeseen circumstances, for excluding the intervening period for counting of the total period of 270 days:-

(a) If the CIRP is stayed by a court of law or the AA or the Tribunal or the Supreme Court of India;

(b) If no RP is functioning for one or other reason during the CIRP, such as removal;

(c) The period between the date of order of admission/moratorium is passed and the actual date on which the RP takes charge for completing the CIRP;

(d) On hearing a case, if the AA or the Appellate Tribunal or the Hon'ble Supreme Court reserved the order and finally passed order enabling the RP to complete the CIRP;

(e) If the CIRP is set aside by the Appellate Tribunal or order of the Appellate Tribunal is reversed by the Hon'ble Supreme Court and CIRP is restored; and

(f) Any other circumstances which justifies exclusion of certain period.

Accordingly, the NCLAT excluded 166 days from the CIRP period in this matter.

9. Uttam Galva Metallics Ltd. Vs. State Bank of India [CA (AT) (Insolvency) No. 315 of 2018]

Two separate applications for admission under section 7 was under consideration of the AA, which passed two separate orders to list on 26th June, 2018 for pronouncement of orders. The CD approached the NCLAT to defer pronouncement of admission orders by the AA as the CD had already negotiated with a third party for investing money and the matter would be settled if the orders were not pronounced for four weeks. The NCLAT declined to allow the prayer with an observation that even if the applications were admitted, it would be open for the CDs or their promoter along with the proposed investor to negotiate with the FC and settle the claims and move the appropriate forum for relief.

10. Velamur Varadan Anand Vs. Union Bank of India & Anr. [CA (AT) (Insolvency) No. 161 of 2018]

A question arose as to whether to count 180 days of CIRP from the date of admission, as per the provision of the Code or from the date of knowledge of the RP. In this matter, the application was admitted on 16th August, 2017 and on receipt of the intimation, the IRP took charge on 14th September, 2017. The NCLAT accordingly directed the AA to exclude 30 days for the purpose of counting the period of CIRP.

11. **TATA Steel Ltd. Vs. Liberty House Group Pte. Ltd. & Ors. [CA (AT) (Insolvency) No. 198 of 2018]**

The NCLAT allowed the CoC to consider the resolution plans submitted by all the resolution applicants during the pendency of the appeal. It, however, made clear that while considering the resolution plans, the CoC should give reason for rejecting one or other resolution plan and also record the suggestions, if any, given by the Board of Directors or the OC or their representative. While accepting the resolution plan, the CoC will consider whether the resolution applicant(s) have made any provision with regard to other creditors such as 'secured creditors', 'unsecured creditors', 'employees' and 'Government dues'.

D. National Company Law Tribunal

1. **Punjab National Bank Vs. Bhushan Power and Steel Ltd. [CA No. 152 (PB) /2018 in CP (IB) /202 (PB) /2017]**

In this matter, the CoC had refused to entertain the resolution plan submitted by Liberty House as it was submitted after the due date. The AA examined this keeping in view the provisions of section 12 and 25 (2) (h) of the Code read with regulations 38 and 39 of the CIRP Regulations. It noted that a resolution applicant shall endeavour to submit a resolution plan 30 days before the expiry of the maximum period permitted under section 12 for completion of CIRP. Where a resolution plan has been submitted 30 days before the extended period of 270 days , the same has to be considered.The AA held that a resolution plan shall not be rejected on the ground of delay emanating from process document or any other document entirely circulated by the RP or the CoC**.** The rejection shall be on substantive ground as against flimsy one**.**

2. **Numetal Ltd. Vs. Satish Kumar Gupta RP and Anr. [IA Nos. 98, 110-112 & 121/ NCLAT/AHM/2018 in CP (IB) No. 40/7/NCLT/AHM/2017]**

In the matter, the resolution plans of Numetal Limited and Arcelormittal India Pvt. Ltd. (Resolution Applicants) were rejected by RP on the ground of disqualifications under section 29A of Code. While disposing of the applications of resolution applicants, the AA observed as under:

(a) Proviso to section 30 (4) of the Code provides that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of section 29A, he shall be allowed by the CoC such period, no exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A. The RP ought to follow provision of section 29A(c) read with section 30(4) for the purpose of affording the opportunity to the resolution applicants before declaring them ineligible.

(b) The CoC is also creature of the statute and can be termed as an instrumentality of state and, are under the statutory obligation to follow the mandate of the Code, the basic principle of administrative law and law of the land.

(c) The nature of duties assigned to a RP is similar to a public servant, as he is being an appointee of the Code.

3. Bank of Baroda and Binani Cements Limited & Ors.Vs Vijay Kumar V. Iyer, RP [CA (IB) Nos. 201, 210, 227, 233, 234, 245, 246 and 249/KB/2018 and IA (IB) Nos. 248, 343 and 344 /KB/2018 in CP (IB) No. 359/KB/2018]

Several applications challenging the resolution process and seeking impleadment were filed before the AA. While disposing of these applications, the AA made several observations:

(a) "The question is whether an adverse decision can be taken by the CoC as against an applicant who has submitted a prospective bidding plan without giving an opportunity for hearing? In a case of this nature the applicant being a leading company in India who is capable of taking over a corporate debtor like the debtor in hand and can compete with other bidders denying an opportunity to hear the applicant is quite unjust and arbitrary.";

(b) "Ld. Sr. Counsel for the RP submits that RP's hand is locked from doing anything as per the process document and hence he cannot take a decision for reconsideration of an offer placed before him by an applicant who was not

ranked as first. …… If he can only identify the bidders on the advice of the CoC why he appointed advisors of his own? No valuable answers forthcoming. All answers based on process document which according to us not legally binding on RP. ……. Whenever an offer comes which would be in the interest of all stakeholders then no doubt he is duty bound to accept the offer and to be placed before the CoC…";

(c) *"None of the above objections are substantive objections which can be raised in a case of this nature where the RP as well as CoC is duty bound to ensure maximization of value within the time frame prescribed by the code. Such an object in finding out bidder who can offer maximum bid amount so as to safeguard the interest of all stakeholders of the corporate debtor is lacking in the case in hand from the side of the RP as well as from the side of the CoC….. So can a revised offer subsequent to the submission of a resolution plan amounts to violation of section 25(2) (h)? Our answer is not.";*

(d) *" ... not considering the revised offer of the applicant that the offer was not made in accordance with the process document and to consider it would be a deviation of the process laid down in the process document by the CoC does not inspire our confidence….. The reason that the process document does not permit the resolution professional and the CoC in considering the revised offer of the applicant have no legal force at all. Even if the process document restricts CoC and the Resolution Professional which has been made by the CoC for their own convenience and for guidelines to the resolution applicant as well as to the Resolution Professional that is not a ground to deny a participant right in participating in the bidding process.";*

(e) *"Non consideration of revised offer is found without assigning substantive reasons and refusal to consider it is found on flimsy grounds on the strength of Process Documents and time line fixed in evaluation criteria. The entire decisions of RP as well as CoC in respect of identifying one resolution plan from among six plans and denying opportunity to have negotiation so as to raise the bid amount by the willing bidders other than H1 bidder is found vitiated that they have acted against the objective of the code and against the interest of various stakeholders of the corporate debtor and also acted unfairly, arbitrarily and against the interest of the competing bidders including the applicant Ultra Tech.";*

(f) *"Upon the above said factors we come to a legitimate conclusion that the process of selection and identification of one plan alone when there is other competing bidders is evidently available and who showed willingness to offer full satisfaction of the claim of all stakeholders claim denying opportunity to them from participating the bidding process even if CIRP period of 270 days ever expired is found filed with irregularity and in violation of the objective of the Code and Regulations."; and*

(g) *"Here, in this case the resolution professional is a chartered accountant by profession. However he failed to take business decisions so as to run the corporate debtor by his own. He managed to run the company by appointing about 22 representatives who are from his own partnership. Truly running an insolvent company pending exploration of a resolution process by him alone is not an easy task. A resolution professional like the RP in a case of this nature need some basic training in regards handling the resolution independently, efficiently so as to tackle with the multiple question may arises for consideration form different stakeholders in the courses of resolution. Whenever a question arise even if answerable by the RP independently or with advice from his advisors, he comes to Adjudicating Authority for having determination so that he is not exercising his own effort to see that all the questions posed to him during the process is answered justifiably. He shift that burden too to the Adjudicating Authority. So also in a case of this nature nobody taking care of operational creditors claim. At least minimum amount as required under the Code is not offered to those creditors in the plan of revival. But because of the supremacy of financial creditors who has control over the process, their claims neglected or rather ignored. It is time to recognise their voice also in the Committee of Creditors. While there was a need for reforms the Regulations to endure that it is not misused or misinterpreted, there cannot be any question on the fact that independence and competency of a resolution professional is essential for preserving the object of the code in a transparent manner giving no room to have interruption from any corner. Hopefully, we believe that IBBI take note of all the above observations and to do the needful review of the Code and Regulations."*

4. SBJ Exports & Mfg. Pvt. Ltd. Vs. BCC Fuba India Limited [CP/659/2016]

The AA noted that in the meeting of the CoC on 5th February, 2018, the two FCs expressed their views in favour of liquidation of the CD subject to the approval of Competent Authority, while the period of 180 days for the CIRP was to come to an end on 12th February, 2018. The approval of the Oriental Bank of Commerce representing 35.59% of vote sharing came on 7th February, 2018 whereas the approval of the Axis Bank representing 64.41% came only on 16th February, 2018. The AA observed: *"A strange phenomena has developed in so far as the functioning of CoC is concerned. In a number of cases it has now been seen that Members of the CoC are nominated by Financial Creditors like Banks without conferring upon them the authority to take decision on the spot which acts as a block in the time bound process contemplated by the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code'). Such like speed breakers and roadblocks obviously cause obstacles to achieve the targets of speedy disposal of the CIR process*." Accordingly, it directed the RP to bring this order to the notice of the CoC and directed service of this order to IBBI for taking suitable action in respect of the conduct of the Members of CoC in the present matter as well as in the day to day functioning of the Members of CoC generally speaking.

5. Sunrise Polyfilms Pvt Ltd. Vs. Punjab National Bank [IA 27 of 2018 in CP (IB) No. 89/7/NCLT/AHM/2017]

The RP filed an application praying for an order of liquidation. The AA noted that the RP did not invite application for resolution plan and straight away decided to go for liquidation. It observed: *"The very object/intention of the Code is to revive a company under the CIRP and not to liquidate it. In the instant case it is clear that the resolution professional has omitted to perform his statutory duties and responsibilities nor the COC seems to have shown much interest and made efforts to achieve the object of the Code for exploring the possibilities for revival of the company."* Accordingly, it directed the RP to act as per section 25 of the Code.

6. Mussadi Lal Kishan Lal Vs. Ram Dev Int. Ltd. [(IB)-178 (PB)/2017]

The State Bank of India is a member of the CoC. The name of Mr. K.V. Somani, who has been on the panel of erstwhile State Bank of Hyderabad which is now merged with State Bank of India, was proposed by the CoC to act as the RP by replacing the earlier RP, Mr. Rakesh Kumar Jain. The AA observed: "In such like circumstances, the proposed Resolution Professional cannot be regarded as independent umpire to conduct CIRP as required by well settled practice and therefore, we cannot accept the request made by the learned Counsel for the CoC and reject the application."

7. Bango Industries Vs. UT Limited [CP (IB) No. 08/KB/2018]

The OC filed an application under section 9 of the Code. The CD contested it, inter alia, on the ground that the debt, if any, was barred by limitation. The AA noted that the date of default was in 2012 but the corporate debtor had acknowledged its liability in the letter sent to the OC in 2015. Therefore, the application filed by the OC is well within the limitation period which is three years from the date of acknowledgement of debt by the CD.

8. M. K. Shah Exports Ltd. Vs. Assam Company India Ltd. [IA No. 24 of 2018 in CP (IB) / 20/GB/ 2017]

The applicant filed an application seeking a direction to RP / CoC to relax the eligibility criteria regarding requirement of minimum tangible net worth of Rs.400 crore on the ground that it was high, arbitrary, and unreasonable. The applicant contended that net worth of major tea industry players in India are between Rs.96 crore to Rs.292 crore, and, therefore, none of them would participate in the process. The AA observed: *"The above revelation, in my considered opinion, serve to show that the criteria so fixed …. cannot escape being found arbitrary, unreasonable and, therefore, unsustainable in law thereby offering this Authority a ground to invoke its extraordinary jurisdiction to rectify the illegalities so noticed in the eligibility criteria, …".*

9. RBL Bank Limited. Vs. MBL Infrastructure Limited. [CA (IB) Nos. 238, 270 & 280/KB/2018 in CP (IB) No. 170/KB/ 2017]

In this matter, the AA answered two questions, namely (a) whether the AA has power to extend the time limit prescribed under section 12 of the Code, and (b) whether reconsideration of vote in respect of approval of resolution plan is permissible. The AA noted that the very objective of the Code is resolution of failing CD and its liquidation. It also noted that in this case, the CIRP could not be completed within the statutory period by acts beyond control of applicants and non-exclusion of time would cause grave injustice to them. Accordingly, it excluded the period of stay and time taken by it for disposal of a CA from CIRP period. It, however, observed: *"...if we are satisfied that grave injustice would be occurred if a prayer of extension for a no fault of applicant is occurred this Adjudicating Authority can extend the time limit provided under section 12 of the Code. However, we are not asked to extend the time limit as provided under section 12 of the Code but to exclude the period due to litigation and upon the above said finding we already held that exclusion of period due to litigation is liable to be allowed in a case of this nature. So we are not holding that we can extend the period of CIRP as prescribed under section 12 of the Code."*

10. Dhaivat Anjaria RP in the matter of State Bank of India Vs. Electrosteel Steel Limited [CA (IB) Nos. 271, 277 & 281 / 2018 in CP No. 361/KB/2017]

In this matter, the RP filed an application for approval of resolution plan submitted by Vedanta Limited and approved by the CoC. It was submitted that the Konkola Copper Mines (KCM), which is a connected party of the Vedanta Limited, has been convicted by a foreign court to pay a fine, in default imprisonment for three years and this punishment is much more severe than what (punishable for two years or more) is contemplated in section 29A(d). The AA observed: *"it appears to us that an offence punishable with imprisonment is different with that of an offence punishable with imprisonment or fine. The KCM in the case in hand, was found guilty of an offence punishable with imprisonment or fine for a term not exceeding 3 years or both. So there was no imprisonment, disqualification as stated under Clause (d) of Section 29A of the Code."*

11. Punjab National Bank Vs. Rana Global Ltd. [(IB)/196 9ND)/2018]

The AA noted that the IRP did not take steps merely because of a typographical error in his name, while his address and registration number were correct, in the order of admission. It found inexplicable as to why the FC considered it fit after more than a month to seek correction in the order. It observed: *"Such a lackadaisical attitude in such proceedings is inexplicable. It would be necessary and expedient to bring it to the notice of IBBI for an appropriate action.".*

12. Vistar Financiers Pvt. Ltd. Vs. Datre Corporation Limited [CA No. 209 of 2018 in CP (IB) No. 441/KB/2017]

One of the FCs of the CD filed an application under section 60 (5) of the Code seeking recall of the order of admission. The AA held that it has no power to recall or review its own orders under the Code. It observed: *"No doubt Section 60 (5) of the IBC states that this Tribunal can entertain and dispose of any question of priorities or any question of law or facts, arising out of or in relation to the Insolvency Resolution or liquidation proceeding of the Corporate Debtor or corporate person under this Code. If above provision of law is considered, we feel that the prayer to recall and cancel our own Order of Admission of CIRP would not come within the purview of the above section. Moreover, the Order of Admission of CIRP is appealable order u/s 32 of IBC."* It also observed: "*Before parting with, it appears to me that we have to endorse my appreciation to the work rendered by the Resolution Professional, Rakesh Kumar Aggarwal for seeing that the Resolution Plan is approved by the CoC so as to give a rebirth to the dying company."*

13. M/s. Universal Bamboo Vs. Hindustan Paper Corporate Ltd. [(IB) /273/ND/2018]

An application was filed by an OC for initiation of CIRP. The CD objected that OC, being a sole proprietorship concern, does not have any legal status. The OC submitted that this is a curable defect and it has submitted an amended petition in the name of the proprietor. The AA held: *"While such an amendment may be permitted in other civil proceedings, amendment of petition under the Code cannot be entertained as it would tantamount to proceedings de novo and relegating it back to the initial stage with the name of the Operational Creditor totally replaced. We*

are accordingly of the opinion that the petition in the name of the firm is not maintainable, neither is it amenable to amendment."

14. M/s. Stanbic Bank Ghana Limited Vs. M/s. Rajkumar Impex Pvt. Limited [CP /670/IB/2017]

FC, M/s Stanbic Bank Ghana Limited had extended a loan to M/s Rajkumar Impex Ghana Limited (principal borrower), a wholly owned subsidiary of Rajkumar Impex Private Limited (Guarantor). On default, the FC initiated proceedings against principal borrower in Ghana and against guarantor before the English Court. While the proceedings before Ghana Court was in process, the English Court passed an order dated 8th August, 2017 against guarantor. On the basis of the said order, the FC filed an application under section 7 of the Code for initiation of CIRP of the guarantor. While admitting the application, the AA observed: "*we hereby admit the petition as the petitioner has made out a prima facie case and also proved that there is debt due payable by the Principal Borrower and there is decree made against the Respondent/Guarantor. This Tribunal has no jurisdiction to enforce the foreign decree; however, there is no bar in it taking cognizance of the foreign decree."*

15. Punjab National Bank Vs. Vindhya Vasini Industries Limited [MA 44 of 2018 in CP (IB) /1170 (MB) /2017]

The CoC passed a resolution for liquidation of the CD. While considering the application for liquidation, a question was raised whether the process of liquidation can also be initiated against a property belonging to a mortgagor to the Bank. The AA noted that the debt in question was intricately linked with the property mortgaged and can not be segregated in the process of liquidation proceedings. It allowed the liquidator to liquidate the said property under section 60 (2) of the Code.

16. Sri Renga Creative Apparels India Pvt. Ltd. Vs. Aruppukotai Sri Jayavilas Ltd. [MA /103/IB/2018 in TCP /527/(IB) /CB/2017]

During the CIRP, the matter was settled between the OC and CD while the FC did not have any objection. The AA released the CD from CIRP and recalled the order of admission. However, it made clear that the CD shall pay the expenses of public announcement and other miscellaneous expenses which have been incurred by the IRP during the CIR process.

17. Mr. Anuj Jain, RP for Jaypee Infratech Ltd. Vs. Manoj Gaur & Ors. [CA No. 26/2018 in CP No. (IB) / 77/ ALD/2017]

The RP filed an application under sections 43, 45, 48, 60 (5) (a) and 66, read with section 25 (2) (j) of the Code seeking direction that transactions entered into by promoters and directors of the CD creating mortgage of 858 acres of immovable property owned and in possession of the CD, to secure the debt of related party, namely, Jaiprakash Associates Ltd. (JAL) by way of mortgage deeds dated 12th May, 2014, 4th March, 2016, 24th May, 2016, 29th December, 2016, and 7th March, 2017 are fraudulent and wrongful transactions within the meaning of section 66 of the Code. He also sought directions against promoters and directors of the CD to make such contributions to the assets of the CD as the AA may deem fit and direction to lenders of JAL to release or discharge security interest created by the CD over its immovable property. The AA held that the mortgage of land of the CD in favour of lenders of JAL amounts to transfer of interest in the property of the CD for the benefit of the creditor, i.e. JAL, and putting it in a beneficial position vis-à-vis other creditors is a preferential transaction. It, however, declared the transactions which were executed during the look back period, that is, from 10th August, 2015 to 9th August, 2017 (date of commencement of CIRP) as fraudulent, preferential and undervalued as defined under section 66, 43 and 45 respectively of the Code. It accordingly passed an order for release of the security interest created by the CD in favour of lenders of JAL under section 44(1)(c) of the Code. It also passed an order under section 48(1)(a) of the Code that the properties mortgaged by way of preferential and undervalued transactions shall be deemed to be vested in the CD. It excluded the mortgage deed dated 12th May, 2014 for 100 acres of land executed by the CD in favour of ICICI Bank against the facility agreement dated 12th December, 2013.

18. Gujarat NRE Coke Ltd. (In Liquidation) [CA (CAA) No. 198/KB/2018]

The company went into liquidation under the Code. The promoter of the company filed an application under sections 230 to 232 of the Companies Act, 2013, for obtaining sanction regarding scheme of compromise and arrangement between the petitioner and the secured / unsecured creditors, foreign convertible currency bonds and shareholders of the CD. The AA allowed the application under the aforesaid sections and appointed liquidator as the Chairperson of the meetings for scheme of compromise and arrangement.

19. Wig Associates Pvt. Ltd. [MA No. 435 of 2018 in CP No. 1214/I & BC/ NCLT/MB/MAH/2017]

The AA considered the issue whether the resolution plan submitted by a resolution applicant who is related to the CD can be approved after section 29A of the Code has come into force on 23rd November, 2017. It noted that the proceedings under the Code are continuous proceedings and, therefore, cannot be halted, altered or changed once commenced till is finalization. It observed that once a game is started in a playground, it is unfair to alter the rule of the game once started till it finishes. So, one must not be allowed to change rules of a game midway so as to get a desired result. It held: *"The admitted factual position is that the Petition was "Admitted" on 24th August, 2017 by an Order of NCLT Mumbai, as against that the Ordinance was pronounced on 23rd of November 2017. It is hereby held that the impugned Resolution plan is eligible for due adjudication.*"

While deliberating on the nature of satisfaction required under section 31 of the Code, the AA held: *"The **'satisfaction'** as mandated in the statute can either objective or subjective or both, but it is a condition precedent. Naturally "satisfaction" is to be recorded in writing with reasons after proper application of mind. The pros and cons of the scheme is required to be studied before recording subjective satisfaction. If the CoC has submitted the scheme of Resolution after visualising the advantage and dis-advantage then such proposal can be termed as just and equitable fit for according satisfaction. An **'objective satisfaction'** revolves around the object of enactment of the Code as enshrined in*

*the Preamble of the I & B Code i.e. to revive the financially stressed corporate body. And the **'subjective satisfaction'** depends upon logical analysis of the Financial Data supplied so as to match with the business model of the Corporate Debtor. A methodical scrutiny of Financial Statement is expected before concurring with approval of the CoC. Per contra, absence of recording of subjective satisfaction may lead to situation that, being sanctioned without judicial analysis, thus may not be sustainable in the eyes of law. There are no two views, and must not be, that this I & B Code provides greater accountability both on the Insolvency Professional, as also on CoC, mainly comprise of lender Banks. Their approval of a Resolution Plan ought to be judged with due diligence. Therefore, in our humble interpretation the recording of an analytical 'satisfaction' is a condition precedent before granting of approval."*

20. M/s Takkshill Enterprises Vs. M/s IAP Company Pvt. Ltd. [CA No. 60, 69 and 70 /C /III/ND/2018 in CP /IB/446/ND/2017]

In order to avoid administrative delays in communication of reference by the AA to the Board and recommendation of an IP for appointment as IRP, IBBI prepares a panel of IPs in accordance with the 'Insolvency Professionals to act as Interim Resolution Professionals or Liquidators (Recommendation) Guidelines, 2017. The IBBI forwarded a panel of IPs for appointment as IRP/Liquidator for the period 1st January, 2018 to 30th June, 2018. The AA appointed one of the IPs from the panel to act as IRP for the CIRP of the CD. Instead of discharging the functions as IRP, he filed an application for discharge, effectively subverting the provisions of the Code. The AA directed a notice to IBBI and made it as a party to the application, more by way of assistance. The IBBI filed a detailed reply. While dismissing the application of the IP with costs of Rs.50,000, the AA observed: "The practice of IRP's appointed by NCLTs based on panel provided by IBBI and subsequently trying to resile from their consent earlier given and that too upon appointment by the Adjudicating Authority (AA) is strongly required to be eschewed and is to be nipped in the bud at the earliest opportunity." It directed IBBI to initiate such actions as contemplated under several of the regulations framed by it in relation to IPs for this purpose and treat the application as a compliant of an aggrieved person.

21. Marvel Business Pvt. Ltd. Vs J.R. Organics Ltd. [CP / A No. (I &B) No. 12/ALD/2017]

The AA rejected the application filed under section 7 of the Code for initiation of CIRP as occurrence of default was not proved and application was incomplete. More importantly, the applicant suppressed facts. Since application was made with manipulation in documents, it attracted provisions of section 75 of the Code. Accordingly, the application was rejected with a cost of Rs.5 lakh.

22. State Bank of India Vs. Orissa Manganese & Minerals Limited [CA (IB) Nos. 371, 398, 402, 470 and 509/KB/2018 in CP (IB) No. 371/KB/2018]

FC filed an application against the decision taken by CoC in respect of distribution of upfront payment which is allegedly against the provisions of the Code and regulations. While dismissing the application, the AA held: "*CoC is the fit person to take its own business decision. We find no reason to disturb or sit on the decision of the CoC taken on by majority vote share. The application requires no consideration and it is liable to be dismissed."* It noted that instances of challenging resolution plans by unsuccessful resolution applicants is on increase and it is one among the reason for delay in approval of resolution plan. In this case, some the application was filed without any valid grounds. Accordingly, the AA dismissed the application with a cost of rupees one lakh.

23. Union Bank of India Vs. Paramshakti Steel Limited [MA No. 243/2018 in CP No. (IB) / 727/(MB)/2017]

While making physical verification of debtors appearing in the records of the CD, the RP found that some of them are not even aware of the CD. The AA suggested the RP to initiate all steps available under the Code to proceed against the promoters/directors of the CD. It also suggested the police authority to assist the RP in unravelling the fraud. It observed: "*By looking at the sincere efforts of this RP in revelation of all these things before this Bench, the Registry is further directed to communicate this order as well to IBBI, so that IBBI also will be conversant with the progress that is taking place in this case."*