Insolvency and Bankruptcy Board of India

Subject: Status Note on evolving jurisprudence under the Insolvency and Bankruptcy Code, 2016 for the period December, 2021 to January, 2022

A brief of selected judicial and quasi-judicial orders passed during December, 2021 to January, 2022 having significant bearing on the evolving jurisprudence under the Insolvency and Bankruptcy Code, 2016, is as under:

Supreme Court

1. **Committee of Creditors of Amtek Auto Limited through Corporation Bank Vs. Dinkar T. Venkatsubramanian and others [Civil Appeal No. 6707 of 2019]**

The SC observed that the approved resolution plan has to be implemented at the earliest and that is the mandate under the Code. The obligations under the approved resolution plan must be performed mutually and simultaneously by both the parties and the entire resolution process should be completed within the period stipulated under section 12 of the Code.

2. **E S Krishnamurthy & Ors. Vs. M/s Bharath Hi Tech Builders Pvt. Ltd. [Civil Appeal No 3325 of 2020]**

The SC held that the AA while dismissing section 7 application and allowing settlement, has acted outside the terms of its jurisdiction and it is empowered only to verify whether a default has occurred or not and must then either admit or reject an application. These are the only two courses of action which are open to the AA in accordance with section 7(5). It also observed that while the AA and the Appellate Authority can encourage settlements, they cannot direct the parties by acting as courts of equity.

3. **Ngaitlang Dhar Vs. Panna Pragati Infrastructure Private Limited & Ors. [Civil Appeal Nos. 3665-3666 with 3742-3743 of 2020]**

The SC held that the procedure adopted by the CoC and RP, while rejecting the request of revision of bid and confirming the bid of another application so as to complete the CIRP within set timeline, was fair, transparent and equitable and they approved the said resolution plan only after giving sufficient opportunity to all the prospective applicants and there was no material irregularity whatsoever. It accordingly set aside the order of the NCLAT which interfered with the commercial wisdom of CoC and reiterated that ‘commercial wisdom’ has been given paramount status without any judicial intervention and that it is not open to the AA or the NCLAT to interfere except on the limited grounds provided under sections 30(2) and 61(3) of the Code.

4. **Devarajan Raman Vs. Bank of India Limited [Civil Appeal No. 3160 of 2020]**

AA directed the FC to pay an amount of Rs. 5,00,000/- plus GST towards the fee of the RP. On an appeal by RP, contending inadequacy of the fee, NCLAT dismissed the appeal and observed that fixation of fee is not a business decision depending upon the commercial wisdom of the CoC. SC while setting aside the orders of AA and NCLAT noted that NCLAT has proceeded in an *ad hoc* manner. It further held that both the orders suffer from an abdication in the exercise of jurisdiction, as, in the absence of any reasons either in the order of the AA or the NCLAT, it is impossible for the court to deduce the basis on which the payment of an amount of Rs 5,00,000/- together with expenses was found to be reasonable.

5. **Bank of Baroda & Anr. Vs. MBL Infrastructures Limited & Ors. [Civil Appeal No. 8411 of 2019]**

AA approved the resolution plan of personal guarantor of the promoter against whom guarantee was invoked by a few creditors. NCLAT upheld the order of AA. On appeal, SC observed the following:

- Once a person executes a guarantee in favour of a creditor for credit facilities availed by a CD, and the matter has been admitted, and the guarantee having been invoked, the bar *qua* eligibility would certainly come into play;
- Once application by FC is admitted, the process would be one of *rem*, and therefore, all creditors of the same class would have their respective rights at par with each other;
- What is required to earn a disqualification under the said provision is a mere existence of a personal guarantee that stands invoked by a single creditor, notwithstanding the application being filed by any other creditor seeking initiation of insolvency resolution process; and
- If the submission of the plan is maintainable at the time when petition was filed, and thereafter, by the operation of the law, a person becomes ineligible, which continues either till the time of approval by the CoC, or adjudication by the authority, then the subsequent amended provision would govern the question of eligibility of resolution applicant to submit a resolution plan.

Considering the above, SC held that the resolution plan submitted by the promoter of CD was not maintainable due to his ineligibility under section 29A(h) of the Code. However, SC disposed of the matter without disturbing the approved plan on merits considering socio economic factors viz., the employment of several workers and that the CD as a running concern.

High Court

6. **Nitin Jain Liquidator PSL Limited Vs. Enforcement Directorate through: Raju Prasad Mahawar, Assistant Director PMLA [W.P.(C) 3261/2021, CM APPLs. 32220/2021, 41811/2021, 43360/2021, 43380/2021]**

The Delhi HC considered the issue as to whether the authorities under PMLA would retain the jurisdiction to proceed against a CD once it has gone into liquidation under the Code. It noted that the judgement in *Directorate of Enforcement Vs. Axis Bank* was passed prior to the insertion of section 32A in the Code and it is now eclipsed by the introduction of section 32A. It held that from the date when the AA approved the sale of the CD as a going concern, the cessation as contemplated under section 32A did and would be deemed to have come into effect.

7. **Murli Industries Limited Vs. Assistant Commissioner of Income Tax & Ors. [Writ Petition No. 2948 of 2021 with 2965 of 2021]**

After the CIRP with regard to the CD was admitted and a resolution plan was passed, the Income Tax department issued notice to it on the ground that the income chargeable to tax for AY 2014-15 had escaped assessment. The Bombay HC observed that: "*once the public announcement is made… it would be expected from all the stakeholders to diligently raise their claim. The Income Tax authorities in that sense, ought to have been diligent to verify the previous years' assessment… and to raise the claim... In the present case, the Income Tax Authorities failed to do so and therefore, the claim stood extinguished.*"

8. **Adarsh Jhunjhunjwala Vs. State Bank of India & Anr. [WPO 1548 of 2021]**

The Calcutta HC observed that there is no bar to proceed under Wilful Defaulter Guidelines and under section 95 of the Code for insolvency of the personal guarantor of CD as the purpose of two proceedings is completely different. The HC observed that the principles applied for moratorium in respect of corporate insolvency cannot be applied to personal insolvency. It is essentially for this purpose that the legislature has applied moratorium under section 14 to the CD as a whole and moratorium under section 96 is restrictively applied to the debt and its purpose is to facilitate repayment/resolution of the debt to all categories of debtors. It observed that: "*A plain reading of the two Sections would clearly indicate that the Moratorium U/s. 14 aims at protecting the "Corporate Debtor" and none else. The object and purpose is to protect the image of the juristic person to enable smooth passage of a Resolution Plan. The value of the Corporate Debtor must be protected and kept away from the acts and omissions of its promoters and shareholders. This would make the CD more attractive and would generate more interest in prospective suitors."* The SC also held that: "*to stay wilful defaulter proceedings, criminal proceeding or quasi criminal proceeding under any Moratorium under Section 96 would defeat the object and purpose of the part III of the IBC*".

National Company Law Appellate Tribunal

9. **Mr. C. Raja John Vs. Mr. R. Raghavendran & Ors. [Company Appeal (AT) (CH) (Ins) No. 207 of 2021]**

The RP rejected the resolution plan of promoter of CD being MSME on two grounds i.e. (i) the eligibility norm of net worth of Rs. 2 crores was not met under section 25(2)(h), and (ii) the DIN was under default making him ineligible under section 29(A)(e). The AA observed that as the MSME certificate was obtained in 2020, the applicant was trying to play a fraud in order to gain backdoor entry to the assets of the CD in the guise of projecting it as an MSME. On appeal, the NCLAT noted that (i) an MSME certificate from State Government was issued to CD in 2013 and subsequently by Government of India in 2020, and (ii) the Hon'ble Madras HC in another matter had directed for reactivation of DIN of the promoter. Considering these facts, it observed that as "*the Corporate Debtor is an MSME…. it is not necessary for the Promoters to compete with other Resolution Applicants to regain the control of the Corporate Debtor*." Accordingly, it (i) allowed the promoter to file/submit net worth certificate to the RP and submit a resolution plan, and (ii) observed that the appellant will not fall under section 29A(e) in view of the directions of the Hon'ble Madras HC.

10. **Rajat Metaal Polychem Pvt. Ltd. Vs. Resolution Professional [Company Appeal (AT) (Ins) No. 979 of 2021]**

An application was filed by the appellant raising the grievance that the RP has not accepted his claim in full and has discredited the interest amount. AA dismissed appellant's application on the grounds that against the rejection of the claim by RP there is no provision to file an appeal and, after approval of the resolution plan the AA cannot direct the RP to accept or consider the claim of the applicant. On appeal, NCLAT noted that the resolution plan has not yet received approval by the AA and the same is under consideration before the AA against which an objection has already been filed by the appellant. NCLAT observed that when the resolution plan was submitted and pending consideration, the AA is not deprived of its jurisdiction to issue suitable direction. It was also observed that even if there is no right of appeal given to claimant, he is entitled to make grievances regarding any claim made against the CD by virtue of section 60(5)(b) of the Code. The order of AA was set aside.

11. **Mr. T. Prabhakar Vs. Mr. S Krishnan & Ors. [Company Appeal (AT) (CH) (Ins) No. 217 of 2021]**

The NCLAT held that debenture holders are undoubtedly the 'financial creditors' under the Code. There is no fetter in the law for the debenture holders, who are FCs, to file an insolvency resolution application seeking to initiate CIRP against the CD without adding the debenture trustee in the application, more so when the trust deed gives the right to them.

12. **State of West Bengal Vs. Keshav Park Private Limited & Anr. [Company Appeal (AT) (Insolvency) No. 330-331 of 2020]**

The NCLAT held that mere issuance of a letter by the CD calling the representative of the OC with all the papers to settle the dispute cannot be considered as an 'acknowledgement of debt' in terms of section 18 of the Limitation Act, 1963.

13. **Prakash Chandra Kapoor & Anr. Vs. Vijay Kumar Iyer, (Liquidator) & Anr. [I.A. 2484 of 2021 in Company Appeal (AT) (Insolvency) No. 140 of 2021 with other IAs]**

The NCLAT noted that regulation 47 of the Liquidation Regulations being directory and procedural law should not be construed as an obstruction but as an aid to justice. Extension of time under liquidation may be allowed only on the satisfaction that there exist exceptional circumstances. It ordered extension of time to enable sale as a going concern, as prayed for, and held that what is mandated in the Code, in section 35(1)(e), is to carry on business for 'beneficial liquidation', the regulation, therefore, cannot override the objective of 'beneficial liquidation' provided under the Code.

14. **Bishal Jaiswal Vs. Asset Reconstruction Company (India) Ltd. & Anr. [Company Appeal (AT) (Insolvency) No. 385 of 2020 and 903 of 2021]**

The NCLAT observed that an application under section 7 of the Code is not akin to a plaint in a civil suit; it is a procedural requirement. The requirement in procedural rule is not to be read in a manner which may preclude an affected party from bringing other materials on record to bring home his point. Without amending the relevant column in section 7 application, the FC can bring relevant materials on record before the AA by way of supplementary affidavit, rejoinder affidavit and the additional affidavit as there is no statutory prohibition on the same.

15. **Mr. Kushan Mitra Vs. Mr. Amit Goel & Anr. [Company Appeal (AT) (Insolvency) No. 128 of 2021 & I.A. 2340 of 2021 and 2413 of 2021]**

The NCLAT noted that as can be seen from section 5(8) of the Code and the principals laid down by the SC in *'Anuj Jain Case',* consideration for time value of money is an essential element for the amount to fall within the ambit of 'financial debt'. The debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces for disbursal against consideration for time value of money. It observed that: *"…the legislature has included such financial transactions in the definition of 'Financial Debt' which are usually for sum of money received today to be paid over a period of time in a single or series of payments in the future. In Black's Law Dictionary the expression 'Time Value' has been defined 'as the price associated with the length of time that an investor must wait until an investment matures or the related income is earned".* It held that in the instant case, refund of share application money, in the event of non-allotment of shares attracts interest as provided for under section 42(6) of the Companies Act, 2013 and, therefore, qualifies the essential ingredients of definition of financial debt' under section 5(8) of the Code in terms of consideration paid for time value of money.

16. **BSE Limited Vs. KCCL Plastic Limited [Company Appeal (AT) (Insolvency) No. 134 of 2021]**

The Bombay Stock Exchange Limited (BSE) filed this appeal against the order of the AA whereby application to initiate CIRP under section 9 was dismissed on the grounds that certain pages in the agreement between the OC and the CD were blank, there was no seal/signature of the parties and therefore the agreement so filed is not valid in the eyes of law and cannot be relied upon. The NCLAT upheld the order of the AA while also noting that the applicant is claiming 'listing fees' which comes under the ambit of 'regulatory dues' that are not to be covered under 'operational debt', as suggested by the Insolvency Law Committee.

17. **Cotton Casuals (India) Private Limited Vs. Kanchan Dutta & Anr. [Company Appeal (AT) (Ins) No. 206 of 2021 with Contempt Case (AT) No.17 of 2021 in CA (AT) (Ins) No. 206 of 2021]**

The Appellant contended that he is not entitled to pay transfer fee to the West Bengal Industrial Development Corporation Ltd. for the transfer made by the Liquidator on the grounds that transfer of assets under the Code is an involuntary transfer and that there is no mention of transfer fee under the invitation for EoI. The NCLAT noted that the scheme under the Code, especially section 35, reinforces the principle that sale by a liquidator under the Code is a sale on behalf of the CD and such sale cannot be termed to be an involuntary sale. The submission that transfer fee cannot be levied when sale is made by a liquidator under the Code was rejected. Further, invitation for EoI cannot be read like a statute; its intendment needs to be looked into. The document contains a clause where *"all other duties payable in connection with purchase of Sale Assets"* is to be paid by the transferee and the transferee cannot absolve himself from payment of liability to pay transfer fee.

18. **Prerna Singh Vs. Committee of Creditors M/s Xalta Food and Beverages Pvt. Ltd. & Ors. [Contempt Case (AT) No. 03 of 2020 in Company Appeal (AT) (Insolvency) No. 104 of 2019]**

The NCLAT observed that as per regulation 31 of the CIRP Regulations, insolvency resolution process costs (IRPC) include amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d). Due to moratorium period, the lessor could not recover the possession of the property from the CD. Thus, the right of lessor to recover rent is affected on account of moratorium. Therefore, the lessor is entitled to recover the rent and which shall be included in IRPC.

19. **Axis Bank Limited Vs. Value Infracon India Private Limited & Anr. [I.A. No. 1502 of 2020 & I.A. No. 1503 of 2020 in Company Appeal (AT) (Insolvency) No. 582 of 2020]**

The issue before NCLAT was as to whether the appellant bank can be considered as a 'FC' on account of its having sanctioned and releasing housing loans to some of the allottees who have purchased flats/units in the project floated by the CD. The NCLAT held that it is definitely not the scope and objective of the Code to consider banks/financial institutions which have advanced loans to homebuyers to be considered as FCs and include them in the CoC, specifically in the light of the fact that the liability to repay the home loan is on the individual homebuyers. This would defeat the very spirit and objective of the Code aiming at resolution and maximisation of the assets of the CD.

20. BSE Ltd. Vs. Asahi Infrastructure & Projects Ltd. [Company Appeal (AT) (Insolvency) No. 346 of 2019]

BSE filed an application under section 9 for default by the CD in payment of listing fees as per Listing Agreement. The AA rejected the application holding that dues of 'regulatory fee' cannot be termed as an 'operational debt'. The NCLAT upheld the decision of AA in appeal and observed that: *"When the Insolvency Law Committee has categorically in the Report,... held that 'regulatory dues' need not be included in the definition of 'operational debt', the said opinion of experts, cannot be brushed aside. The recommendations given by Insolvency Law Committee Report is in line with the object of the Code. In event, it is held that (for) all kind of dues including 'regulatory dues', the insolvency resolution process can be triggered, then the entire purpose of the object of the IB Code will be lost and insolvency proceedings will turn into recovery proceedings for the dues of creditors, which is not the object of the IB Code, as has been laid down by the Hon'ble Supreme Court in Swiss Ribbons Private Limited and Anr. (supra) and other judgments."*

21. In the matter of Krrish Realtech Private Limited [Company Appeal (AT) (Insolvency) Nos. 1008, 1009 & 1010 of 2021]

On the issue as to whether the AA while considering application of pre-packaged insolvency under section 54C of the Code can hear objectors/interveners before admission, the NCLAT observed that there is no prohibition on hearing/giving opportunity to an objector or interveners to file their objections. However, hearing of objectors or interveners is not a matter of course and has to be limited to exceptional cases as the proceedings under the Code are time bound.

22. M/s. Visisth Services Limited Vs. S. V. Ramani & Ors. [Company Appeal (AT) (Ins) No. 896 of 2020]

On the issue as to whether the successful bidder can withdraw from the bid after payment of the EMD and seek for refund of the amount paid on the ground that the offer made by the bidder was a 'conditional offer', NCLAT noted that by paying the EMD amount and accepting the bid, the successful bidder cannot now say that it was not a concluded contract. The bidder is bound by the terms and conditions of the bid document and no communication to the liquidator stating that it is a conditional offer, is sustainable. It was observed that if the bidder is allowed to withdraw from

the bid at this stage and seek refund on the ground that their conditional offer has not been accepted, then the liquidation process would be a never ending one, defeating the scope and objective of the Code. NCLAT dismissed the appeal, holding that the bidder cannot wriggle out of the contractual obligations arising out of acceptance of his bid and he cannot be entitled to the EMD amount and the amount paid towards the bid purchase document, if he does not comply with the terms of the contract.

23. Srei Multiple Asset Investment Vs. IDBI Bank Ltd. & Ors. [Company Appeal (AT) (Ins) No. 593 of 2020]

An appeal was filed against the order of AA that approved the resolution plan submitted by Arcelor Mittal India Private Limited (AMIPL), on the grounds that AMIPL is the SRA of Essar Steel India Ltd. (ESIL) who is one of the shareholders of the CD, thereby making it ineligible to be a resolution applicant of CD under section 29A of the Code. NCLAT noted that AMIPL took over the management and control of ESIL on December 16, 2019, whereas the resolution plan with regard to the CD was submitted by AMIPL in November, 2019 which came to be approved by the CoC on December 6, 2019, i.e., prior to taking over the management and control of ESIL. NCLAT observed that the SRA who takes over the company as the going concern unless and otherwise declared as ineligible under the provisions of the Code cannot be treated as ineligible. NCLAT while dismissing the appeal, observed that section 29A(c) would not be applicable to resolution applicants who acquire a CD pursuant to a prior resolution plan approved under the Code.

24. Association of aggrieved Workmen of Jet Airways (India) Ltd. Vs. Jet Airways (India) Ltd. & Ors. [Company Appeal (AT) (Ins) No. 643 of 2021 & I.A. No.1700 of 2021]

On the issue as to whether copy of NCLT approved resolution plan be provided to the workmen, NCLAT observed that scheme of the Code indicates that after resolution plan is approved by AA, it no longer remains a confidential document, so as to preclude Regulator and other persons from its access. It further observed that workmen who have challenged a resolution plan under section 61(3) of the Code is entitled to know the contents of the resolution plan to effectively prosecute its appeal. Resolution plan even though, is not a confidential document after its approval, cannot be made available to each and to anyone who has no genuine claim or interest in the process and, its access can be denied in proper and appropriate cases. NCLAT held that the appellant is entitled for the relevant part of the resolution plan relating to the claim of the workmen and employees and, directed the SRA to share it with the appellant.

25. 63 Moons Technologies Limited formerly known as Financial Technologies (India) Ltd. Vs. The Administrator of Dewan Housing Finance Corporation Limited & Ors. [Company Appeals (AT) (Insolvency) No. 454, 455 and 750 of 2021]

NCLAT while deciding the issue as to whether SRA can appropriate recoveries aggregating to Rs.45,000 crore from avoidance applications filed under section 66 of the Code, made certain observations as under: -

- The Code does not have any provision restricting the resolution applicant to avail the benefits of avoidance proceedings initiated under section 66, but it can't be presumed that the Code authorizes the resolution applicant for the same.
- The purpose of providing transactions and penalizing improper trading actions are primarily aimed at swelling the asset pool available for distribution to creditors and, the Code allows the AA to restore the position prior to such transaction or trading by inter-area investing the recoveries with the CD.
- Any decision taken by the CoC which strikes at the very heart of the Code cannot simply be upheld under the garb of commercial wisdom.
- The CoC cannot countenance incorporating any term in the resolution plan which is contrary to the law or which otherwise makes the resolution plan illegal.
- The law does not permit CoC to exercise judicial function. There is a vast difference between the exercise of commercial wisdom during CIRP and the exercise of adjudicatory powers by the AA under the Code.

NCLAT while referring to the Delhi HC's judgment in the case of the *Venus Recruiters Private Limited Vs. Union of India & Ors*., allowed the appeal and held that the CoC's decision to approve a resolution plan which contains such unlawful stipulations, is illegal making the plan unsustainable. The resolution plan was sent back to the CoC for reconsideration.

26. Dheeraj Wadhawan Vs. The Administrator Dewan Housing Finance Corporation Limited [Company Appeal (AT) (Insolvency) No. 785 of 2020 & 647 of 2021]

Erstwhile directors/guarantor of DHFL filed an appeal against AA's order that disentitled them to attend the CoC meetings as member of the erstwhile Board of Directors. On the difference between the 'supersession of Directors' under the RBI Act, 1934 and the 'suspension of Directors' under the Code, NCLAT observed that in 'supersession', the Board of Directors vacates their office and there is finality attached to it. The superseded directors who have been removed or deemed to have demitted office and are not holding the position of director on the CIRP commencement date, cannot be considered a director simpliciter to benefit from participating in the meeting of CoC. It further observed that "*after vacation or removal from the office of the Director, the said person cannot claim their entitlement to participate in the CoC of the Corporate Debtor. A removed Director from the Board of Directors cannot interfere in the Company's affairs per contra a suspended Director always remains on the Board.*"

27. Union Bank of India Vs. Mr. Kapil Wadhawan & Ors., [CA (AT) (Ins) 370, 376-377 & 393 of 2021 and other appeals]

The issue before the NCLAT was at to whether after approval of the resolution plan by the CoC and pending AA's approval, the AA can direct the CoC to convene a meeting and place the settlement proposal for consideration. NCLAT while relying on the ratio of the SC's judgment in *Ebix Singapore Private Limited Vs. Committee of Creditors of Educomp Solutions Ltd*., observed that there was no scope for negotiations between the parties once the CoC has approved the resolution plan. The contractual principles and common law remedies, which do not find a rope in the wording or the intent of the Code, cannot be imported in the intervening period between the acceptance of the CoC approved resolution plan and the approval by the AA. It further observed that once the requirements of the Code have been fulfilled, the AA and the NCLAT are duty-bound to abide by the discipline of the statutory provisions and they do not have an unchartered jurisdiction in equity.

28. State Bank of India, Stressed Asset Management Branch Vs. Mahendra Kumar Jajodia [Company Appeal (AT) Insolvency No. 60 of 2022]

AA rejected an application filed under section 95(1) of the Code on the ground that no CIRP or liquidation process is pending against the CD. In appeal, NCLAT observed that, *"the use of words 'a' and 'such' before National Company Law Tribunal clearly indicates that Section 60(2) was applicable only when a CIRP or Liquidation Proceeding of a Corporate Debtor is pending before NCLT. The object is that when a CIRP or Liquidation Proceeding of a Corporate Debtor is pending before 'a' NCLT the application relating to Insolvency Process of a Corporate Guarantor or Personal Guarantor should be filed before the same NCLT. This was to avoid two different NCLT to take up CIRP of Corporate Guarantor. Section 60(2) is applicable only when CIRP or Liquidation Proceeding of a Corporate Debtor is pending, when CIRP or Liquidation Proceeding are not pending with regard to the Corporate Debtor there is no applicability of Section 60(2)".* It was also observed that the section 60(2) does not in any way prohibit filing of proceedings under section 95 of the Code even if no proceeding is pending before AA.

29. Union Bank of India Vs. Mr Dinkar T. Venkatasubramanian RP of Amtek Auto Limited & Ors. [Company Appeal (AT) (Insolvency) No. 729 of 2020]

AA rejected an application filed by FC for modification of the approved resolution plan of the SRA, that provided for a deduction of ₹ 34 crores, i.e., the amount paid to the vendors of the CD against the 'Letter of Credit Bank Guarantee' facility which continued during the CIRP period, under the instructions of the RP to keep the CD as a going concern, out of the distribution amount payable to the FC under the resolution plan. NCLAT observed that the phrase used in section 17(1)(d) of the Code that financial institution "*shall act on the instructions of the IRP*" does not mean that it authorizes IRP/RP to compel the financial institution for maintaining the accounts of the CD to continue the non-fund based facility comforted by Bank Guarantee, and non-compliance with such instructions of RP cannot be considered a violation of section 17(1)(d) of the Code. It

directed that the said amount be treated as CIRP costs and should not be deducted out of the distribution amount payable to the FC under the resolution plan.

30. Mr. Vallal RCK Vs. M/s Siva Industries and Holdings Ltd (In Liquidation) & Anr. [Company Appeal (AT)(CH)(Insolvency) No. 211 & 212/2021]

NCLAT, in the appeal against AA's order rejecting the settlement proposal of promoter and ordering liquidation of the CD, noted that the promoter of the CD being ineligible to project a resolution plan by virtue of section 29A of the Code had embarked upon the aspect of furnishing a settlement proposal which is akin to a resolution plan. It further observed that if the CIRP is initiated, it cannot be set aside or withdrawn except for any illegality, to be exhibited or if it is without jurisdiction or for some other justiciable ground; and just because a promoter desires to pay all dues including the default amount, it cannot be a ground to set aside the CIRP. NCLAT while concurring with the order of AA, observed that projected settlement proposal plan of the promotor is not a settlement simpliciter as envisaged under section 12-A of the Code rather it is a business restructuring plan. It upheld the liquidation order of the AA.

31. Mrs. Nidhi Rekhan Vs. M/s. Samyak Projects Private Limited [Company Appeal (AT) (Ins) No. 1035 of 2020]

AA rejected section 7 application holding that appellant who in pursuance of an agreement invested certain sums in return of flats and an assured return of 24% per annum with absolute discretion to cancel or rescind the allotment of flats booked through the agreement, is not a FC under the Code. On appeal, NCLAT observed that the said agreement did not have the necessary elements of a builder-buyer agreement, but it is an agreement which is more in the nature of detailing and protecting an investment made by the appellant. It further observed that the status of FC cannot be provided to a person who, in the garb of an allottee comes in the project as a speculative investor and for no reason cancels the allotment. Upholding the order of AA, it was held that the appellant, who is a speculative investor, cannot claim status and benefits as FC under explanation (i) of section 5(8)(f) of the Code.

National Company Law Tribunal

32. Mr. Ashutosh Agarwala Vs. Joint Commissioner of State Tax & Ors. [IA 2422/2020 in C.P.(IB)- 2640/(MB)/ 2019]

The AA, on the application of RP filed against the orders of State Tax Authorities of West Bengal and Maharashtra attaching all the bank accounts of CD and seeking directions against the tax authorities from issuing any further notices/seizure/attaching of assets of CD without leave of the Tribunal and giving access to the RP for bank accounts of CD, observed that section 14 of the Code, *inter alia*, bars any institution of suits, continuation of pending suits or proceedings against CD including execution of any judgment, decree or order in any court of law, tribunal or arbitration

panel or any other authority. Further, section 238 of the Code has overriding effect on all other laws which includes State GST Act and Central GST Act which are in contravention to the Code.

33. Seaview Merchants Private Limited Vs. Ashish Vincom Private Limited [C.P (IB) No. 2011/KB/2019]

The AA while rejecting section 7 application, observed that inter-corporate deposits are financial debts but in a transaction of a deposit of money or a loan, a relationship between the parties must come into existence. Mere transfer of money from one account to another would not constitute loan/deposits unless the intention of the parties are considered and substantiated with valid documents. Further, as envisaged under rule 3(d) of NCLT Rule, 2016 a *"financial contract"* would encompass setting of the terms of the financial debt, including the tenure of the debt, interest payable and date of repayment. FC has failed to satisfy about existence of financial contract between the parties. AA observed that: "*the trend of granting unsolicited Inter Corporate Deposit by the Creditors and earning large slab of interest thereon, as compared to the normally charged interest rate and then taking the passage under the Code for recovering the interest and principal dues on default of payment of interest would make the Adjudicating Authority wear the hat of a debt-recovery mechanism.*"

34. Union Bank of India Vs. Ms. Vandana Garg (Erstwhile RP/Monitoring Committee Chairperson of Jyoti Structures Limited) & Ors. [IA 2025 of 2021 in CP No. 1137/MB/2017]

Applications were filed by the dissenting and abstaining FCs praying that the discrimination in payment under the resolution plan on the basis of the assenting and dissenting/abstaining FC be modified to the extent that all secured FCs *inter alia* be treated equally for payment of plan value subject to their individual exposure with the same terms as that of assenting FCs. The AA observed that section 30(2)(b) of the Code provides for the payment of debts of the dissenting FCs in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with section 53(1) of the Code in the event of liquidation. Explanation 1 to section 30(2)(b) of the Code further clarifies that distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors. It further observed that any increase in the claim amount of the assenting FCs due to the invocation of BG cannot be a ground for challenge by the dissenting/abstaining FCs on the grounds of discrimination. BG invocation and the revision in the amounts of assenting FCs is as per the terms of the resolution plan and the decision to include the invoked amount of the BG to the fund-based debts is a commercial decision of the CoC.

35. CBRE South Asia Private Limited Vs. M/s. United Concepts and Solutions Private Limited [(IB)-797(ND)2021]

An application was filed under Section 9 of the Code, whereby the applicant had claimed a total amount of Rs.1,39,84,400/- as operational debt, out of which Rs.88,50,886/- was the principal

amount and Rs.51,33,514/- was the interest component. AA observed that, "*interest" can be claimed as 'Financial Debt', but neither there is any provision nor there is any scope to include the interest to constitute as the 'Operational Debt'*. It held that the interest amount cannot be clubbed with the principal amount of debt to arrive at the minimum threshold of Rs.1 Crore for complying with the provision of section 4 of the Code. The application was dismissed by AA.