**Insolvency and Bankruptcy Board of India**

**Subject: Status Note on evolving jurisprudence under the Insolvency and Bankruptcy Code, 2016 for the period December 2022 to February 2023.**

This note is for information of the Governing Board about selected orders passed during December 2022 to February 2023 having significant bearing on the evolving jurisprudence under the IBC. The court -wise summary of such orders is under: -

**SUPREME COURT**

**1. M/s. Shekhar Resorts Limited (Unit Hotel Orient Taj) Vs. Union of India &Ors. [Civil Appeal N0.8957 of 2022]**

While the moratorium in respect of the CD was in force, the Central Government launched the Tax benefit scheme, Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019" (SVLDRS) whereby on payment of pre-determined settlement amount under the scheme, the discharge certificate could be issued to the CD. The RP applied under this scheme and the Designated Committee (DC) determined Rs.1,24,28,500/- payable by the CD before the stipulated date. As the CD could not make any payment during the ongoing moratorium, on conclusion of CIRP, payment of the determined amount by the RP was refused as the last date for payment under the scheme had lapsed. The Allahabad High Court dismissed the WP filed by the RP against such refusal as the scheme had ceased to exist. In the appeal, the SC observed that the CD cannot be punished for being unable to deposit the determined amount due to its debarment on account of moratorium under the Code. While setting aside the order of the HC, Hon'ble SC held that CD was entitled for the benefit of scheme and observed no party should be left remediless and whatever the grievance the parties had raised before the court of law had to be examined on its own merits. No law would compel a person to do the impossible.

**HIGH COURT**

**2. Tata Steel BSL Ltd. Vs. Venus Recruiter Private Ltd. & Ors. [LPA 37/2021 and C.M. Nos. 2664/2021, 2665/2021 & 2666/2021]**

This appeal was filed before the Division Bench (DB) of Delhi HC against the Single Judge Order dated 26.11.2020, in *Venus Recruiters Pvt. Ltd. vs. Union of India & Ors.* wherein, it was held that an avoidance application filed under the Code cannot survive beyond the conclusion of CIRP and RP being functus officio cannot continue. The DB while setting aside the single judge bench order held that –

a. avoidance applications and CIRP are distinct and independent proceedings, and the RP does not become *functus officio* on the conclusion of the CIRP.

b. the nature of avoidance proceedings is such that they are likely to last beyond conclusion of CIRP, as they require investigation and discovery of suspect transactions. RP can continue to pursue the avoidance applications.

c. the AA has the power to adjudicate on all matters '*arising out of*' and '*in relation to*' insolvency resolution.

d. the timelines mentioned under Regulation 35A of CIRP Regulations for filing of an avoidance application by the RP are directory and not mandatory in nature and also, there is no mention of any time limit for adjudication of these applications by AA.

e. the benefit arising out of the adjudication of the avoidance application is not for the CD in its new avatar, but the benefit would accrue to the creditors.

**3. Welspun Steel Resources Private Limited Vs. Union of India [R/Special Civil Application No. 19387 Of 2022]**

Assets of the CD (ABG Shipyard Limited) were purchased in auction by the petitioners. The Directorate of Enforcement passed the provisional attachment order in respect of the 'specific assets' that were sold to the petitioners in the auction. The issue before the Gujrat High Court was, whether the assets acquired by the petitioners can at all be said to be 'proceeds of crime' as defined in section 2(1)(u) of the PMLA?

HC set aside the attachment order *viz-a-viz* the properties of petitioners and observed that the petitioners have acquired those assets which were not acquired as a result of criminal activity and, therefore, cannot be said to be 'proceeds of crime'. It further observed that "*if the authorities were given a free hand to pass orders of attachment of properties which were acquired by a successful bidder in a liquidation process, on a presumption that such acquisition was as a result of a criminal activity, could be contrary to the interest of value maximization of the corporate debtor's assets by substantially reducing the chances of finding a willing resolution applicant or a bidder in liquidation.*"

**4. Alliance Broadband Services Pvt. Ltd. Vs. Manthan Broadband Services Pvt. Ltd. [IA No. GA/3/2022 in CS/54/2019].**

FC had filed a civil suit praying for a decree with respect to the equity shares of the respondent in its possession. Subsequently, it also filed an application under section 7 of the Code which was admitted by the AA. As the CD was under liquidation, apprehending that the liquidator will take control and possession of its equity shares, the FC approached the Calcutta HC.

HC observed that NCLT and NCLAT are constituted under sections 408 and 410 of the Companies Act, 2013 without specifically defining the power and functions but section 60 of the Code describe the powers and jurisdiction of the AA . It observed that as per section 60(5) of the Code, the petitioner can approach the AA instead of the HC. It held that the object of section 60(2) of the Code is to group together, (a) CIRP or liquidation proceedings of a CD, and (b) insolvency resolution/ liquidation/ bankruptcy proceedings of the corporate guarantor or personal guarantor of the same CD before a single forum. The HC held that section 238 of the Code has an overriding effect in any other law for the time being in force. Section 430 of the Companies Act itself provides an additional bar that no injunction shall be granted by any civil court in respect of any action taken or to be taken in pursuance of any power conferred on the NCLT by the Companies Act. It observed the matter in issue in the suit can be more appropriately and effectively decided and adjudicated by the AA.

**5. Sree Metaliks Ltd. vs. Additional Director General & Ors. [W.P.(C) No. 3119/2021 & CM APPL. 9461/2021]**

The CIRP against the CD was initiated on 30.01.2017 and the RP had addressed an email to Directorate of Revenue Intelligence (DRI) in response to a summon issued by it. Thereafter,

the resolution plan approved by the AA was stayed by the NCLAT but subsequently approved on 13.12.2018. A Show Cause Notice (SCN) was issued by DRI on 18.07.2019 i.e., after the approval of Resolution Plan. The SCN was issued as the CD had availed the benefits under the Export Promotion Capital Goods Scheme (EPCG) but had failed to fulfil its export obligation under the scheme before the commencement of the Code.

Delhi HC did not accept the plea that the CD was aware of its liability to the Customs Department and the statutory department was not required to file its claim before the IRP/RP but was only supposed to file proof of claim. Further, the liability of the assessee under the , the Customs Act is a first charge on its property as held by SC in Rainbow Papers case. The HC did not accede to these pleas and on the strength of rationale in judgment of Hon'ble Supreme Court in *Ghanshyam Mishra and Sons vs Edelweiss ARC Ltd.,* it held that once the resolution plan is approved by the AA, all the claims stand frozen.

**6. <u>Sudipa Nath Vs. Union of India & Ors. (High Court of Agartala)</u>**
**<u>WP(C) (PIL) 04 of 2023</u>**

This PIL was filed before the HC of Agartala praying to declare section 66(1) of the Code as null and void being violative of Article 14. The HC, while dismissing the PIL, observed that the law confers jurisdiction on NCLT to fix the liabilities on the persons responsible for conducting business of CD which is fraudulent or wrongful. Section 66(1) contemplates an application only by the RP; and the said provision restricts the power of NCLT subject to the satisfaction that any business of the CD has been carried on with intent to defraud creditors or the CD or for any fraudulent purpose and to pass an order, is only against such person who are responsible for the conduct of such fraudulent business of the CD and to make them personally liable to make such contributions to the assets of the CD.

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL(NCLAT)**

7. **Pramod Kumar Pathak Vs. ARFAT Petrochemicals Pvt. Ltd.** [**Company Appeal (AT) (Insolvency) No.312 of 2022**]

On 24.05.2017, Central Government notified that a rehabilitation scheme sanctioned and under section 18 of Sick Industrial Companies (Special Provisions) Act, 1985, shall be deemed to be an approved resolution plan under section 31(1) of the Code. Relying on the said notification, appellant sought CD's liquidation on the ground that rehabilitation scheme has been breached, therefore CD be liquidated. HC held that sanctioned scheme of rehabilitation cannot be termed as resolution plan within the meaning of section 5(26) of the Code. The rehabilitation scheme not being resolution plan, there is no question of CD committing breach of implementation of the plan.

NCLAT relied on the decision of SC in *M/s Spartek Ceramics India Ltd. vs. Union of India & Ors.*, which laid down that Notification dated 24.05.2017 travels beyond the scope of removal of difficulties order under Section 242 of the Code. It observed that: "*When the Notification dated 24.05.2017, is not a valid Notification, there is no occasion to accept the submission that approved Rehabilitation Scheme dated 07.01.2005, which is foundation of the Application filed by the Appellant under Sections 33 read with Section 34 can be treated as a Resolution Plan within the meaning of IB Code."*

**8. Paramvir Singh Tiwana & Ors. Vs. Puma Realtors Pvt. Ltd. & Anr. [Company Appeal (AT) (Insolvency) No. 554 of 2021]**

On challenge to the resolution plan providing differential treatment to OCs, the NCLAT held that differential treatment to OCs is solely based on the commercial decision of the CoC and any differential treatment between the class of creditors, based on the nature of business involved, cannot be construed as 'material irregularity'. It observed that "*so long as the provisions of the Code and the regulations have been met, it is the Commercial Wisdom of the requisite majority of the CoC which is to negotiate and accept the Resolution Plan, which may involve differential payments to different classes of Creditor, together with negotiating with a Prospective Resolution Applicant for better or different terms which may also involve differences in amounts of distribution between the different classes of Creditors.*" It also suggested that the IBBI and the Government may take effective steps to make necessary amendments to protect the class of 'FCs' /Homebuyers from imposition of any haircuts, and likewise take essential measures to safeguard the interest of OCs in the resolution plans.

9. **Income Tax Department Vs. M/s. Indianroots Shopping Ltd. & Ors. [Company Appeal (AT) (Insolvency) No. 32 of 2022]**

In this case, CoC consisted only of OCs. The AA directed the Income Tax Department and the Excise and Taxation Department (Government of Haryana), the two major OCs having voting share of 96.75% in the CoC, to pay CIRP dues and expenses in proportion to their voting share in CoC. The order of AA was challenged on the ground that the CoC's decision was taken in their absence and is not legal in view of the requirement of 51% of voting share in CoC decisions, as stipulated in section 21(8). The NCLAT dismissed the appeal and held that there was no illegality in holding of the meeting of CoC. The NCLAT found that RP took necessary care to ensure the presence of two most important members of the CoC. Both OCs had chosen not to participate in the CoC meeting making the compliance of section 21(8) impossible. The NCLAT further observed that both the OCs did not challenge the decision of the CoC and, thus, accepted it without any objection or demur. When the OCs did not pay their share of CIRP cost, the erstwhile RP later appointed as liquidator was forced to prefer IA seeking directions to the OCs to pay their respective share of the CIRP cost. It is at this stage that both the OCs raised the issue of illegality of the decision taken in the 7th meeting of CoC, which is after a lapse of substantial period. Accordingly, the OCs were directed to pay the CIRP costs.

**10. Mathuraprasad C Pandey & Ors. Vs. Partiv Parikh, RP of M.V. Omni Projects (India) Ltd. & Anr. [Company Appeal (AT) (Ins) No. 201/2021 with 266/2021]**

While approving the resolution plan, the AA modified the resolution plan to the extent that "*if any member of Resolution applicants has entered into or stand as guarantor in the individual capacity, in that event, he shall not be covered with any immunity given under the Resolution Plan.*" The NCLAT found that AA has exceeded its jurisdiction by modifying the resolution plan. It observed that if a resolution plan is submitted before the AA which is in compliance with section 31(1) as well as section 30, such resolution plan has to be approved by the AA since in section 31 word "*shall*" has been incorporated with proviso that the AA must be satisfied that the resolution plan has provisions for its effective implementation. It is clear that mandate of legislation is either to approve the resolution plan or to reject. However, there is no provision for making alteration or modification in the resolution plan.

**11. Siti Networks Ltd. Vs. Assets Care and Reconstruction Enterprises Ltd. & Anr. [Comp. App. (AT) (Ins.) No. 1449 of 2022]**

A loan sanctioned by FC to the CD was classified as NPA, and CIRP proceeding was initiated. Subsequently, the FC assigned the debt to another person and informed the CD. The issue was whether the assignee could be permitted to continue section 7 proceedings under the Code. NCLAT held that there is no prohibition in the Code or the Regulations from continuing the proceeding by an assignee. Section 5(7) of the Code which defines *'financial creditor'* includes a person to whom such debt has been legally assigned or transferred to. By virtue of assignment, an assignee becomes the FC and it has every right to continue the proceeding which was initiated by the original FC/assignor.

**12. <u>Hero Fincorp Ltd. Vs. Hema Automotive (P) Ltd. (NCLAT New Delhi)</u>**

**<u>(Company Appeal (AT) (Insolvency) No.1540 of 2022)</u>**

The RP filed an application before AA for liquidation of CD as approved by CoC. The AA declined to pass the order of liquidation as the sole CoC had passed the resolution for liquidation even before the last date of receiving EoI and failed to adopt a judicious approach of exploring the possibility of resolution. AA directed the CoC to reconsider its decision. On appeal by FC, the NCLAT observed that the explanation to section 33 states that the CoC can decide to liquidate the CD before confirmation of the resolution plan, including at any time before the preparation of Information Memorandum (IM). In the present case, invitation for EoI was issued but an agenda for revising eligibility criteria and before extension of timelines for submission in EoI could be issued, CoC decided to liquidate the CD. There is no material on record to indicate that CoC had taken into consideration the explanation to sub-section (2) of section 33 of the Code before taking decision to liquidate CD. NCLAT while dismissing the appeal observed that , the obligation of the AA to direct for liquidation shall rise only when decision of the CoC is in accordance with the Code. Accordingly, judicial review of the decision of the CoC in such particular case is not precluded.

**13. Rourkela Steel Syndicate Vs. Metistech Fabricators Pvt. Ltd. & Or matters CA (AT)(Insolvency) No. 924 of 2022**

OC filed appeal against the order of AA dismissing its application on the ground that the application was barred in terms of the provisions of the section 69(2) of the Partnership Act. The said provision bars filing of a suit by or on behalf of an unregistered partnership firm against any third party. NCLAT held that application under section 9 of the Code cannot be considered to be a suit and the provisions of the section 69(2) of the Partnership Act are not attracted in respect of application filed by an unregistered firm for initiating corporate insolvency resolution processes against a CD.

**14. Hem Singh Bharana Vs. Pawan Doot Estate Pvt. Ltd. & Ors[CA (AT) (Insolvency) No. 1481 of 2022]**

In this case, while the resolution plan before AA was pending for approval, Ex Promoter submitted revised settlement proposal under section 12A of the Code. Appellant/ Ex-promoter submitted that mere fact that resolution plan has been approved by the CoC, there is no bar with CoC accepting the Settlement Proposal under section 12A of the Code. NCLAT dismissed the appeal and relied on the judgment of SC in *Ebix Singapore Pvt. Ltd. vs. Committee of Creditors of Educomp Solutions Limited and Anr,* wherein it has been held that after approval by the CoC of a Resolution Plan, CoC itself is bound by its decision and cannot be allowed to go back from its decision and pass any other resolution.

**15. Priyal Kantilal Patel v IREP Credit Capital Pvt. Ltd. & Anr.[ CA (AT) (Insolvency) No. 1423 of 2022]**

FC filed application under section 7 seeking initiation of CIRP. Subsequently, consent terms were entered between the parties along with other stakeholders, after which FC agreed to withdraw the CIRP application. It was agreed that in the event of default of the consent terms, the FC would be at liberty to revive the CIRP. Thereafter, the CD defaulted in making payments as per the consent terms. The FC instead of restoring the earlier petition, filed the fresh application, which got admitted by AA. CD challenged that the breach of consent terms cannot be treated as a financial debt. NCLAT held that the nature of financial debt would not change on account of breach of the consent terms. It was further observed that FC had not filed the subsequent petition for default in the settlement agreement. Rather, the subsequent petition was filed over original financial debt, which was extended by the FC to CD. Since the consent terms provided for restoration of section 7 petition, the mere fact that instead of reviving the earlier petition a fresh petition has been filed by the Financial Creditor, would be no ground for rejection of the subsequent petition.

**16. Jindal Stainless Ltd. v Mr. Shailendra Ajmera [CA (AT) (Ins.) No. 1058 of 2022]**

In this case, after the closure of Challenge Process, Shyam Sel and Power Ltd, one of the Resolution Applicant filed the revised plan after the last date of submission of amended resolution plan. AA directed CoC to consider the revised resolution plan of Shyam Sel and Power Ltd. Against this order of AA, Jindal Stainless Ltd., one of the RA preferred an appeal before NCLAT. The question that arose for consideration was, whether after closure of Challenge Process on 15.07.2022 and consequent receipt of Resolution Plan by 18.07.2022, the AA could have directed for consideration of the revised plan submitted by Shyam Sel and Power Ltd. ? NCLAT while relying on Supreme Court judgment in *Ngaitlang Dhar vs. Panna Pragati Infrastructure Private Limited & Ors.*, set aside the order passed by AA and directed the RP to initiate fresh voting process on the resolution plans received in the due time. It further held that after adoption of Swiss Challenge method to find out the best plan, one resolution applicant cannot be allowed to submit a revised plan.

**17. Shri Guru Containers Vs. Jitendra Palande NCLAT CA (AT) (Ins.) No. 106 of 2023**

OC's application to initiate against CD was allowed by AA and IRP was appointed. As the CoC could not constituted for want of submission of claims, further processes could not be conducted in the absence of financial records. The steps taken by IRP to get the information from the OC and the suspended directors of CD, including filing application under section 19 of the Code, did not yield any results. Consequently the IRP filed an application for termination of CIRP against CD and seeking discharge from the duties and reimbursement of costs towards the duties performed. AA allowed the application of IRP and directed OC to reimburse IRP, the total CIRP costs incurred in the discharge of his duties.

NCLAT, while disposing of the appeal observed that the IRP has taken steps to secure information in terms of provisions of the Code and the details were communicated to the OC. The IRP despite being diligent in his duty, the scope of CIRP related work was limited due to information getting stonewalled and consequently no claims submitted. NCLAT allowed the payment of IRP's with some modification in the quantum of fee and observed that the reasonableness of fee is context specific, but the fee claimed should be commensurate and consistent with work properly undertaken by the IRP.

**18. Rohit Motawat Vs. Madhu Sharma, Proprietor Hind Chem Corporation & anr. CA (AT)(Insolvency) No. 1152 of 2022**

AA admitted the application filed by OC against CD for the amount due aggregating to Rs. 38,58,994/- (without interest calculation), out of which Rs. 9,97,122/- was paid in due course of proceeding. The interest has been claimed by the OC on the basis of invoices containing a stipulation that 21% interest shall be chargeable if the amount due is not repaid timely. The NCLAT observed that it is only the interest that is pending for payment for which the application under section 9 of the Code is not maintainable considering the fact that the spirit of the Code is for 'resolution of debt' and not for 'recovery'.

**19. Mrs. C.G. Vijyalakshmi Vs. Shri Kumar Rajan, Resolution Professional & Or matters Comp. App. (AT) (CH) (Ins.) No. 29/2021 & I.A. No. 251/2021, 44/2021 & I.A. Nos.96 & 245/2021**

Post approval of the resolution plan by the AA, several appeals were filed, challenging the resolution plan whereunder 35.13% of their 'Provident Fund' and 'Gratuity Claims' were admitted. RP admitted claim of secured financial creditors of Rs.209.09 Crores which is much more than the liquidation value of Rs.162.70 crores and therefore the liquidation value payable to OCs including the employees under Section 53(1) was NIL. NCLAT held that the amount lying to the gratuity on employees/workman cannot be made available to the creditors and is not liable to attachment under any decree or order of any Court as per section 10 of the EPF Act, 1952. The amount lying as gratuity and EPF are not part of liquidation estate.

20. **Rajeev Srivastava Vs. Ahluwalia Contracts (India) Limited and Ors. CA (AT) (Ins.) No. 976 of 2022**

The AA allowed the section 9 application filed without serving section 8 notice under the Code. The NCLAT observed that the procedure is apparently for an application which is filed in terms of the provisions of the Code but the legislature perceived another situation in the matters relating to of a winding up petition under Companies Act, 1956, already filed before the High Court, on account of non-payment of debt and subsequently transferred to AA. There is no dispute that a demand notice was served under section 434(1)(a) of the Act, 1956. Held that there is no requirement of issuance of a fresh notice under Section 8 of the Code as it cannot be read as a part of the 'submission of information' as provided in first proviso to Rule 5 of the Rules, 2016.

**21. Noble Marine Metals Co WLL Vs. Kotak Mahindra Bank Ltd. & Ors. Company Appeal (AT) (Insolvency) No. 653 of 2022**

AA, while considering the approval of resolution plan approved by 87.22% of voting share of one of the FC IDBI Bank, another FC objected to the resolution plan in which a mandatory clause allowing release of personal guarantee of the promoters is in violation of the Contract Act. Considering the objection, AA remitted the resolution plan back to the CoC for reconsideration in accordance with law. On appeal by the resolution applicant, the NCLAT held that resolution plan approved by CoC is binding between the SRA and the CoC. It observed that the mandatory clause in resolution plan which violates the provision of section 128 of Contract Act, has to be treated to be violation of section 30(2)(e) of the Code. Further, it is important to understand that reconsideration is being asked only with regard to a particular

clause which was included in the resolution plan i.e., relating to release of personal guarantee of the promoters The present is a case where CoC is not asking to withdraw from the plan or asking for reviewing the entire resolution plan rather CoC has asked for leave of the AA for deleting clause on the release the promoters from personal guarantee wherein the resolution applicant/appellant herein, has also consented before the AA. The NCLAT while disposing of the appeal held that resolution plan can be sent back for reconsideration if the mandatory clause impedes the provisions of other laws.

22. **Greater Noida Industrial Development Authority (GNIDA) Vs. Roma Unicon Designex Consortium and Ors. Company Appeal (AT) (Insolvency) Nos.180, 629 & 630 of 2022**

Greater Noida Industrial Development Authority (GNIDA) had allotted land for the residential / Large Group Housing to a consortium consisting of – (i) M/s Earth Infrastructures Limited; (ii) Raus Infras Ltd.; and (iii) M/s. Shalini Holdings Limited. As per builders' scheme, the consortium formed a Special Purpose Company (SPC)- a separate corporate legal entity with the name M/s Earth Towne Infrastructures Pvt. Ltd. ("Earth Towne"). The Earth Infrastructure Limited ("CD") had three projects on this leased land.

Section 7 application was admitted against the CD. GNIDA had sent a letter to the Resolution Professional (RP) claiming dues on the subsidiary of the CD namely Earth Towne arising out of the Lease Deed. The RP did not consider the claim of GNIDA and proceeded with the CoC meetings.

The resolution plan was submitted by Alpha Corp Development Pvt. Ltd (ACDPL) for two projects a d another resolution plan of Roma Unicon Designex (RUD) for one Project were approved by AA. The RUD had sought direction from AA to the GNIDA to transfer the lease land in its favour for smooth implementation of resolution plan, which AA allowed. GNIDA filed appeal before NCLAT.

NCLAT held that the transfer of plot as per terms and conditions of the lease could not have been affected without approval of the GNIDC. Resolution plan could not have contained clause for transfer of land without there being any approval of the GNIDC for such transfer. Further direction by AA to the GNIDC to transfer while waiving of its entitlement and charges is clearly contrary to the terms and conditions of the lease and not in a public interest. GNIDC is a necessary party. Assets of the subsidiary company cannot be dealt with in the CIRP Process of holding company without the permission of the Lessor. The RP was well aware that the project land is a leased-out land. Dues of public authority cannot be so casually and negligently dealt with by RP. Further treatment of assets of subsidiary company, it was observed that the assets of the subsidiary Company cannot be dealt with, in the CIRP of the CD i.e. the holding Company. Holding Company and subsidiary Company have separate legal status and the assets of subsidiary cannot be taken into consideration. Thus lifting of corporate veil between the subsidiary and holding company is impermissible as they are two distinct companies and holding company does not own the assets of the subsidiary.

23. **Vistra ITCL (India) Limited vs Torrent Investment Private Limited and Ors.[ CA(AT) (Ins.)No. 132, 133,134, 137 and139 of 2023]**

These appeals are preferred against the order of the AA in the IAs pertaining to challenge mechanism in the CD i.e., Reliance Capital Limited. The AA held that although value maximization is the right of the CoC, it should be exercised in a regulated and time bound

manner and value maximation should not be a endless process. Further, the extension of challenge mechanism was held to be an afterthought and violative of Regulation 39(1A).

Appeal was filed by a Vistra ITCL India Ltd (VIIL) who is the authorized representative of bondholders. The NCLAT considered the provisions of the Code along with the clauses of the RFRP. It observed that regulation 36B (7) empowers the RP/Administrator to reissue the RFRP with the approval of the CoC if satisfactory plans are not received. Further, clause 3.17.17 of the RFRP reserves the right of the CoC to enter into negotiation with the RAs even after the receipt of resolution plan and before it is put to vote; clause 4.2.4 empowers the CoC to annul the resolution plan and call for a revised or new plan and clause 4.2.9 gives a discretion to the CoC to not continue with the submission process even after receipt of the highest financial plan.

The NCLAT observed that the provision of regulation 39(1A) was inserted to allow for improvements or modifications in the plan, and not to put fetters on the powers of the CoC to take actions after receipt of plan post the challenge mechanism. The CoC is not cancelling the challenge process but only extending it. The requirement of price discovery was evident from the fact that between 28.08.2022 and 21.12.2022 (i.e., the first instance when resolution plan was received and the outcome of challenge mechanism) the plan value of IIHL increased from 4000 crores to 8110 crores and Torrents Plan increased from 4000 crore to 8640 crores. There was also a substantial increase in the upfront amount, in fact, Torrent offered the entire amount upfront. The CoC in its meeting held that even this offer was sub optimal and non-satisfactory.

The NCLAT held that the CoC in the meeting held on 06.01.2023 has noted that the plan of IIHL was not compliant to its bid. The NCLAT referred to section 30(4) of the Code and observed that after the plan is submitted, the CoC has to consider its feasibility and viability and then it is put to vote. Therefore, receipt of plan after challenge does not circumscribe the power of the CoC. NCLAT relied on the judgements of SC regarding the commercial wisdom of CoC in the case of K.Sashidhar Vs. Indian Overseas Bank & Ors. In the matter of *Food Corporation of India vs Kamdhenu Cattle Feeds Industries (1993 SCC 71) SC* held that the highest tenderer does not have the right to have its tender accepted. Inadequacy of the highest bid could be a cogent ground for negotiating with the tenderer; so also in the matter of *Arcelor Mittal India Pvt Ltd vs Satish Kumar Gupta and Ors, SC* held that a resolution applicant has no vested right to have its plan considered.

## NATIONAL COMPANY LAW TRIBUNAL

### 24. M/s Packwell (India) Ltd. Vs. M/s Emgee Cables and Communication Ltd. [IA No. 15/JPR/2022 in CP No. (IB)-601/ND/2018]

The liquidator filed an application before AA, seeking directions to carry out the auction of properties of the CD which were attached by the order of Deputy Director, Directorate of Enforcement. AA directed to lift the order of attachment of the properties of the CD under the Prevention of Money Laundering Act, 2002. AA observed that "*…the IBC creates a specific bar with respect to proceedings that may be initiated under the PMLA by virtue of the provisions contained in Section 32A. Moreover, Section 32A cannot possibly be read as being applicable prior to a Resolution Plan being approved or a liquidation measure being enforced. Further, it can therefore be construed that the objective and intention of the Code is providing a free hand to the creditors if the properties of the Corporate Debtor are attached then it will jeopardize the Liquidation Process.*"

**25. Mr. Manish Kumar Baldeva Liquidator Vs. Sales Tax Officer [IA No. 1300/MB/C-I/2020 In C.P (IB) No.1267 /MB/C-I/2017]**

The sales tax department attached the properties of the CD in 2015 for non-payment of tax dues. CIRP was initiated against the CD in the year 2017 and the sales tax department filed a claim of Rs. 101.87 crores, which was admitted by the liquidator. On the application filed by the liquidator for release of the attached properties, AA held the attached assets would not form part of the liquidation estate. It observed that the time gap between the attachment order and initiation of CIRP is two years and the attachment order had attained finality. Relying on SC judgment in *State Tax Officer vs Rainbow Papers Limited,* AA held that the sales tax department is a secured creditor under section 53 (1)(e)(ii) of the Code.