Insolvency and Bankruptcy Board of India

Subject: Evolving Insolvency Jurisprudence, December, 2019 to February, 2020.

A brief of select judicial and quasi-judicial orders issued during December, 2019 to February 2020 having a significant bearing on the evolving jurisprudence under the Insolvency and Bankruptcy Code, 2016 (Code) is as under:

1. Avoidance Transactions- Mortgage Transactions by subsidiary company for securing loans/ facilities of the holding company

Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Bank Limited Etc. Etc. [Civil Appeal Nos. 8512-8527 of 2019 and other petitions]. The Supreme Court held:

a. Preferential Transactions under section 43 of the Code- In order to find out whether a transaction or transfer of property or an interest thereof of the CD falls within the ambit of section 43, ordinarily, the following questions shall have to be considered as to whether the transfer-

(i) is for the benefit of a creditor or a surety or a guarantor;
(ii) is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the CD;
(iii) has the effect of putting the creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets being made in accordance with section 53;
(iv) had been for the benefit of a related party (other than an employee); whether the same was made during the period of two years preceding the insolvency commencement date; and if such transfer had been for the benefit of an unrelated party, whether the same was made during the period of one year preceding the insolvency commencement date;
(v) is not an excluded transaction in terms of section 43(3).

b. Related party transactions- The mortgage deeds entered by the CD (JIL) to secure the debts of JAL amount to creation of security interest for the benefit of JAL. JAL as a holding company of CD, is a creditor and also surety of JIL. It is a related party to the CD. The CD owed antecedent financial debts as also operational debts and other liabilities towards JAL. The impugned transactions had been of transfers for the benefit of JAL, who is a related party of JIL, and is its creditor and surety by virtue of antecedent operational debts as also other facilities extended by it; and the impugned transactions have the effect of putting JAL in a beneficial position than it would have been in the event of distribution of assets being made in accordance with section 53. Thus, the CD has given a preference in the manner laid down in section 43(2).

c. Look back period in terms of section 43(4)- Preference is given to JAL, who is a related party of JIL. Hence, the look-back period is two years preceding insolvency commencement date as per section 43(4)(a). Therefore, the transaction until the date of insolvency commencement shall fall under scanner. The transactions had been in the nature of deemed preference to the related party JAL by JIL (CD) during the look back period of two years, which is covered under section 43(4).

d. Ordinary course of business/financial affairs – Section 43(3)(a) calls for purposive interpretation so as to ensure that the provision operates in sync with the intention of legislature and achieves the avowed objectives. Section 43(3)(a) shall mean that, for the purposes of sub-section (2), a preference shall not include the transfer made in the ordinary course of the business or financial affairs of the CD and the transferee. It remains trite that an activity could be regarded as 'business' if there is a course of dealings, which are either actually continued or contemplated to be continued with a profit motive. The ordinary course of business or financial affairs of the CD cannot be taken to be that of providing mortgages to secure the loans and facilities obtained by its holding company and that too at the cost of

its own financial health. JIL was already reeling under debts with its accounts with some of the lenders having been declared NPA; and it was also under heavy pressure to honour its commitment to the home buyers. The SC concluded that the transfers were not made in the ordinary course of business/financial affairs of the CD, JIL.

e. Duties and responsibilities of RP under section 25 w. r. t. section 43- The RP is ordinarily required to do the following, step wise-

(i) sift through the entire cargo of transactions relating to the property or an interest of the CD backwords from the date of commencement of CIRP and up to the preceding two years;

(ii) identify the persons involved in the transactions and putting them in two categories; one being of the persons who fall within the definition of 'related party' in terms of section 5(24) and another of the remaining persons;

(iii) identify in which of the said transactions of the preceding two years, the beneficiary is a related party of the CD and which beneficiary is not, with each sub-set requiring different analysis. The sub-set concerning unrelated party / parties shall further be trimmed to include only the transactions of preceding one year from the date of commencement of insolvency;

(iv) examine every transaction in each of these sub-sets to find out whether (a) the transaction is of transfer of property or an interest thereof of the CD; and (ii) the beneficiary involved in the transaction stands in the capacity of creditor or surety or guarantor qua the CD;

(v) the shortlisted transactions to be scrutinised to find if the transfer in question is made for or on account of an antecedent financial debt or operational debt or other liability owed by the CD;

(vi) such of the scanned and scrutinised transactions that are found covered under section 43(2)(a), shall have to be examined as to whether the transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets per section 53. If answer to this question is in the affirmative, the transaction under examination shall be deemed to be of preferential within a relevant time, provided it does not fall within the exclusion provided under section 43(3);

(vii) after carrying out the aforesaid volumetric and gravimetric analysis of the transactions on the defined coordinates, the RP shall apply to the AA for necessary orders in relation to the transaction that had passed through all the positive tests of sub-section (4) and sub-section (2) as also negative test of sub-section (3) of section 43.

f. Undervalued and fraudulent transactions - As the transactions are held as preferential, it is not considered necessary to examine whether the transactions are undervalued and/or fraudulent too. The said questions are open for examination in an appropriate case. The composite application under sections 43, 45 and 66 should not have been filed by the IRP since in the scheme of the Code, the parameters and the requisite enquiries as also the consequences in relation to these aspects are different and such difference is explicit in the related provisions. In preferential transaction, the question of intent is not involved and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving preference at a relevant time. An undervalued transaction requires a different enquiry under sections 45 and 46 in which the AA is required to examine the intent, if such transactions were to defraud the creditors. Specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied under sections 45, 46 and 47 or section 66.

g. Lenders of JAL are not FCs of JIL- It is the FC who lends finance on a term loan or for working capital that enables the CD to set up and/or operate its business; and who has specified repayment schedules with default consequences. The most important feature is that an FC is, from the very beginning, involved in assessing the viability of the CD who can, and indeed, engage in restructuring of the loan as well as reorganisation of the CD's business when there is financial stress. Hence, an FC is not only about *in terrorem* clauses for repayment of dues; it has the unique parental and nursing roles too. In short, the FC is the one whose stakes are intrinsically inter-woven with the well-being of the CD.

h. Essentials to constitute "financial debt" and "financial creditor" - The basic elements for a debt to become 'financial debt' for the purpose of Part II of the Code is a disbursal against the consideration for time value of money. A transaction stated in sub-clauses (a) to (i) of section 5(8) would be 'financial debt' only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. If a CD has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of 'debt' under section 3(10). However, it would

remain a debt alone and cannot partake the character of a 'financial debt' within the meaning of section 5(8). The lenders of JAL, on the strength of the mortgages in question, may fall in the category of secured creditors. But mortgages, being neither towards any loan, facility or advance to the CD nor towards protecting any facility or security of the CD, do not constitute 'financial debt' within the meaning of section 5(8).

2. Liquidation value in resolution process

(a) M/s. Maharashtra Seamless Limited Vs. Padmanabhan Venkatesh & Ors. [Civil Appeal No. 4242 of 2019]

The resolution plan containing an upfront payment of Rs. 477 cr. was approved. One of the promoters of the CD and Indian Bank appealed against the same. The NCLAT directed the resolution applicant to modify the resolution plan so as to increase the upfront payment of Rs.477 cr. to Rs.597.54 cr. by paying an additional Rs. 120.54 cr. This was to make it at par with the average liquidation value, failing which the order of approval of the resolution plan would be treated to be set aside. In the appeal moved by the resolution applicant, the SC considered the following:

(i) whether the scheme of the Code contemplates that the sum forming part of the resolution plan should match the liquidation value or not

(ii) whether section 12A is the applicable route through which a successful resolution applicant can retreat

While addressing the first issue, the SC observed that there is no provision in the Code or the regulations which states that the bid amount has to match the liquidation value arrived and the NCLAT has proceeded on equitable perception rather than commercial wisdom. It ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. While addressing the second issue, the SC held that the exit route prescribed under section12A is not applicable to a successful resolution applicant and is available only to the applicants invoking sections 7, 9 and 10.

(b) State Bank of India Vs. M/s. Accord Life Spec Private Limited Through Director & Ors. [Civil Appeal No. 9036 of 2019]

The NCLAT remitted the matter of resolution of *M/s. Orchid Pharma* after finding that under section 30(2) of the Code together with the principle of maximisation of value of assets of the CD, a resolution plan which contains lesser than liquidation value cannot be accepted. The SC while setting aside the judgment of the NCLAT relied on its judgment in *Maharashtra Seamless Limited Vs. Padmanabhan Venkatesh & Ors.*, where it was held that a resolution applicant does not have to match the liquidation value.

3. Treatment of Claims

(a) **Insolvency proceedings cannot be used to defeat a claim existing prior to CIRP**- *Sirpur Paper Mills Ltd. Vs. I.K Merchants Pvt. Ltd. (Formerly known as I.K Merchants) [A.P. No. 550 of 2008]*

The HC considered the issue whether an application under section 34 of the Arbitration and Conciliation Act, 1996 to set aside an arbitral award, should be kept in abeyance on initiation of CIRP under the Code by the OCs. It observed that the award-holder could not have filed a claim before the IRP since the application to set aside arbitral award was not decided in his favour and hence there was no final or adjudicated claim. Therefore, the question of the respondent / award-holder approaching the AA for filing the claim at the time of initiation of CIRP does not arise. The HC observed that once moratorium under section 14 against continuation of proceedings against the CD is over, no further embargo remains for continuing to hear suits and other proceedings to which the CD is a party. It held that the petitioner being the CD / award-debtor cannot be permitted to take refuge under the provisions of the Code for relegating the claim of the respondent award-holder to a limbo for an indefinite period

of time on the plea of the respondent not having gone before the AA and that there is no basis for relegating section 34 to the backburner.

(b) State Bank of India Vs. Adhunik Metaliks Ltd. [CA No. 118/CTB/ 2019 connected with TP No. 44/CTB/2019 in CP(IB)No. 373/KB/2017]

The liquidator filed application under section 60(5) of the Code read with rule 11 of the NCLT Rules, 2016 to seek clarity about the treatment of claims of workmen and employees on and from the period when the CD was supposed to be revived. In accordance with the resolution plan a monitoring committee was constituted. The AA held that the claims received during the period under question can neither be treated as part of insolvency resolution process costs nor do they fall under liquidation cost and hence, cannot be accorded priority over other dues.

(c) Infonet Asia Private Ltd. [MA/1397/2019 in CP/536/IB/CB/2017]

An application was filed under section 30(6) by the RP seeking approval of the resolution plan. The AA observed that if the claim involved in the admitted claim is already treated in the plan, such proceeding shall be withdrawn, whereas the reliefs sought against the CD in any suit or application are not made as part of the plan, and when it has not yet been determined by court of law, the resolution plan is subject to the outcome of those pending proceedings, because in reorganisation, litigation qua against the CD will be passed on to the person taking it.

(d) Santosh Wasantrao Walokar Vs. Vijay Kumar V. Iyer and Anr. [CA(AT)(Ins) No. 871-872,924,925,863,867,880-881/ 2019]

In the appeals, the significant issue was whether the claims that are not dealt with under the resolution plan can be held to be extinguished under the provisions of the Code. The NCLAT while relying on the judgment of the SC in *Essar Steel*, held that all claims must be submitted to and decided by the RP so that a prospective resolution applicant knows exactly who has to be paid in order that it may then take over and run the business of the CD.

(e) M/s. Tata Steel BSL Ltd. Vs. Varsha & Anr. [SLP (Civil) Diary No. 36520/2019]

OC filed a summary suit for recovery of amount against *Bhushan Steel Ltd*. When the suit was under trial, one of the FCs filed an application for initiation of CIRP. The appellant / OC also filed its claim in the CIRP. After approval of the resolution plan, the resolution applicant filed an application before the civil court for dismissal of the recovery suit filed by the OC. The civil court rejected the application on the ground that the proceedings under the Code does not extinguish the rights to continue a recovery suit. A writ petition was filed before the HC challenging the decision of the trial court. The HC held that since the claim of the OC has not crystallised, the suit before the civil court would be relevant for determining the amount due from the petitioner to be satisfied from the approved amount; hence, the civil suit cannot be extinguished. However, in the appeal, the SC while issuing the notice, stayed the operation of the judgment of the HC as well as the proceedings before the trial court.

(f) Anandram Developers Pvt. Ltd. [MA/151/2019 in CP/603/IB/2017]

Application was filed under section 60(5) seeking direction against the RP to take steps to sell a larger extent of property belonging to the CD after protecting the interest of the applicant as regards an undivided share of land held by the CD. The AA observed that the claim made by the applicant is with respect to the property and not in relation to money. The applicant had extended credit facilities to a third-party company and the said third party agreed to convey the property in the name of applicant and in pursuance of the same, a sale deed was executed. The RP did not accept the claim and, subsequently, liquidation of the CD was ordered. Hence, the AA directed that a decision in relation to the claim made by the applicant is required to be taken by the liquidator under section 36 of the Code as to what

constitutes a liquidation estate. Based on the claim which is to be preferred and upon calling for the claims by the liquidator, the applicant is required to stake the claim appropriately in respect of the property before the liquidator in terms of section 38. The liquidator is thereafter to determine, after verification of claims whether the claim is to be admitted or rejected in part or in whole and also decide the nature of interest in the property over which the applicant seeks to impose its claim.

(g) Skipper Textiles Pvt. Ltd. [CA(IB)No. 1328/KB/2019 in CP(IB) No. 1702/KB/2019]

The issue was whether the amount of an uninvoked corporate guarantee could be considered as a claim under the Code. The AA noted that claim has wider scope than debt. A claim may be due or may not be due, but debt must be a claim which is due. Application under section 7 or 9 can be filed in respect of default of debt, whereas, no such action can be taken in respect of claim unless it becomes due and payable and default occurs. It observed that even accounting and business practice do not recognise uninvoked corporate guarantee as a debt due or ascertained liability as on a particular date. Thus, uninvoked corporate guarantee cannot be considered as debt due and payable. Even if uninvoked corporate guarantee is considered as claim, the same cannot be considered for determining voting share of an FC.

4. Overriding effect of Code

(a) Mr. Ajay Kumar Bishnoi Vs. Tap Engineering [CRL OP (MD) No. 34996/ 2019 and others]

A Petition under section 482 of the Code of Criminal Procedure, 1973 (Cr. PC) was filed by a former director of CD for quashing the complaints under section 138 read with section 141 of the Negotiable Instruments Act, 1881 (NI Act). The issue for consideration was whether the statutory effect of section 31(1) of the Code is extinguishment of criminal prosecution. The HC observed that the object of the Code is to provide insolvency resolution of a CD in a time bound manner for maximisation of value of assets. It has not been enacted to provide succour to those who by their misconduct contributed to defaults of the CD. The HC, declined to invoke its inherent powers under section 482 of the Cr. PC in favour of the petitioner and held:

(i) criminal proceedings under section 138 of the NI Act cannot be terminated. Where the proceedings under section 138 of the NI Act had already commenced and during the pendency, the company gets dissolved, the directors and the other accused cannot escape from liabilities by citing its dissolution.
(ii) section 238 of the Code prevails over section 421 of the Cr. PC;
(iii) though it has been held in more than one case that the fine imposed by a criminal court cannot be held to be a money claim or recovery against the CD, and post-conviction, the process of recovery of the fine / compensation from the assets of the CD will have to be undertaken only in terms of the Code;
(iv) approval of resolution plan is of no avail to the erstwhile director of the CD. The armour fashioned by the Code is custom made. It will fit the CD alone. The protective shield will not fit the erstwhile director at all. It was never designed for him.
(v) inherent powers of the HC are meant to be exercised only to prevent the abuse of process of law or to secure the ends of justice.

(b) Maharashtra State Electricity Transmission Company Limited Vs. Sri City Private Limited and Ors. [CA(AT)(Ins) No. 1401/2019]

(c) Appeal was filed against the order of the AA approving a resolution plan submitted by the respondents on the ground that in the plan there was an arbitrary provision for ex-parte termination of long term bulk power purchase agreement with CD for a period of 25 years as per Maharashtra State Electricity Regulatory Commission (MERC) Transmission Open Access Regulations, 2005. The NCLAT held that keeping in view the *Essar Steel* judgment and the

provisions of section 238 of the Code, the resolution plan which has been approved by the CoC in its wisdom, cannot be found faulty.

(d) Rajendra K. Bhutta Vs. Maharashtra Housing and Area Development Authority and Another [Civil Appeal No. 12248/2018]

A tripartite agreement was entered between parties by execution of a loan agreement between the CD and the Union Bank of India. There was a joint development agreement (JDA) with the Maharashtra Housing and Area Development Authority (MHADA). On default in paying the loan amount, an application under section 7 was filed, which was admitted. After imposition of moratorium, the respondents issued a notice to the CD for termination of the JDA. The CD was asked to handover possession of the land and all structures to MHADA. The application to restrain MHADA from taking the possession was dismissed by the AA stating that section 14(1)(d) of the Code does not cover licenses to enter upon land in pursuance of JDA and that such licences would only be personal and not interests in property. On appeal, the NCLAT held the land belongs to MHADA and cannot be treated to be an asset of the CD for application of the provisions of section 14(1)(d). Hence, an appeal was filed before the SC. The SC held that when it comes to any clash between the MHADA Act and the Insolvency Code, on the plain terms of Section 238 of the Insolvency Code, the Code must prevail. It observed that the moratorium under section 14 of the Code is for alleviating corporate sickness; a statutory status quo is pronounced the moment an application is admitted under the Code, so that the insolvency resolution process may proceed unhindered by any of the obstacles that would otherwise be caused and that are dealt with by section 14. On the question as to whether section 14(1)(d) would statutorily freeze 'occupation' that may have been handed over under the JDA. It held that section 14(1)(d) of the Code, when it speaks about recovery of property "occupied", does not refer to rights or interests created in property but only actual physical occupation of the property and set aside the order of the NCLAT.

5. Applicability of moratorium

(a) Clutch Auto Ltd. [(IB)-15(PB)/2017]

(b) Liquidator filed two applications, one against the Municipal Corporation Faridabad (MCF) to de-seal the land of the CD and hand it over to him, and another for directions for relinquishment of security interest by the secured creditor to liquidation estate. In the former application, the AA observed that the property was sealed by MCF during moratorium in violation of section 14. It directed the MCF to de-seal the property and to file claim with regard to tax dues. In the latter application, the AA held that when the secured creditor notified the fact that their intention is not to relinquish their security interest, the liquidator is bound to verify the same. If the liquidator comes to a conclusion that the claimants have security interest over the assets of the CD, he shall permit the creditor to utilise the right under section 52 of the Code. The AA observed that seeking a direction against the creditors compelling them to relinquish their security interest over the assets of CD is not supported by any provision of the Code.

(c) India Infoline Finance Limited & Anr. Vs. The State of West Bengal & Ors. [WP 20171(W) of 2019]

The petitioner alleged that the police refused to act on the FIR on the reason that CIRP of the CD was pending. The HC observed: *"…agreeing with the principle that a moratorium under Section 14 might not, in certain circumstances, directly stop a criminal proceeding from going on, however, in the present case, as is evident from the affidavit-in-opposition of the police, the police has done its level best up to the time when the moratorium started operating, and the order in connection with the CIRP was passed. Since any action of the police will have to be based on investigation on the subject matter of the transaction, which is directly within the purview of the CIRP, it is to be deemed that the police cannot take further steps in the matter unless and until the CIRP culminates, in a resolution or otherwise."*

6. Applicability of Limitation to the processes under the Code

(a) Mr. Sagar Sharma and Anr. Vs. Phoenix ARC Private Limited and Ors. [CA(AT)(Ins) No. 177/2019 & I.A Nos. 3392/2019]

Application for initiation of CIRP filed by FC was admitted by the AA. The NCLAT dismissed the appeal filed on the grounds of limitation and held that since the Code has come into force since 1st December, 2016, the limitation period would trigger from that day itself. However, SC observed that the date of coming into force of the Code does not and cannot form a trigger point of limitation for applications and remitted the matter to the NCLAT for further orders. The NCLAT noted that the application was filed on 29th September, 2017 after three years of the cut-off period of default. There was nothing on record to suggest that the appellant acknowledged the debt within three years in terms of section 18 of the Limitation Act, 1963. Moreover, the FC was not even in the picture and the debt was assigned subsequently. Thus, the application is barred by limitation.

(b) Sh. G. Eswara Rao Vs. Stressed Assets Stabilisation Fund and Anr. [CA(AT)(Ins) No.1097/2019]

The appellant challenged the order of admission on the ground that the debt was barred by limitation. The AA, taking into consideration that the DRT had allowed an application for recovery of debt, with future interest, pending litigation, held that the application for initiation of CIRP is not barred by limitation. The NCLAT observed that CD failed to pay the debt prior to 2004 due to which the application before the DRT was filed but an order passed by the DRT or any suit cannot shift the date of default. The order passed by the DRT only suggests that debt has become due and payable. It does not result into shifting forward the date of default as decree has to be executed within a specified period.

(c) V. Hotels Limited Vs. Asset Reconstruction Company (India) Limited [CA(AT) (Ins) No. 525/ 2019 and 627/2019]

The NCLAT observed that for the purpose of filing a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has to be made in writing duly signed by the party against whom such property or right is claimed. In this matter, the FC failed to bring on record any acknowledgment in writing by the CD acknowledging the liability in respect of debt. The NCLAT held that the books of account cannot be treated as an acknowledgment of liability in respect of debt payable to the FC signed by the CD.

(d) Sesh Nath Singh and another Vs. Baidyabati Sheoraphuli Cooperative Bank Ltd. and another [CA(AT)(Ins) No. 672 of 2019]

FC initiated action against the CD under the SARFAESI Act, 2002 by serving a demand notice. A possession notice under section 13(4) of the said Act was also passed by the District Magistrate. Subsequently, the FC filed an application under the Code which was admitted. This was challenged before the NCLAT on the ground of limitation. The NCLAT held that since respondent was prosecuted within the limitation period under SARFEASI Act, it is entitled to the exclusion of time period under section 14(2) of the Limitation Act and the application under Section 7 of the Code is within the limitation period, after exclusion of this period.

7. Reverse CIRP to protect the interests of home buyers

Flat Buyers Association Winter Hills-77, Gurgaon Vs. Umang Realtech Pvt. Ltd. through IRP & ORS [CA(AT)(Ins) No. 926/2019]

Application filed by two home buyers under section 7 for initiation of CIRP of the CD was admitted by the AA. Later, the applicants and the Flat Buyers' Association approached the NCLAT praying that there should not be any third-party resolution applicant. The NCLAT observed that home buyers do not have expertise to assess 'viability' or 'feasibility' of a CD as compared to traditional FCs i.e. banks / financial institutions. Moreover, as FCs can bear hair-cut, home buyers are unable to do so. Basing on the observations of 'economic experiments' by the SC in *Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors. (2019 SCC online SC 1478),* the NCLAT discussed the concept of 'Reverse CIRP' without the approval of a third-party resolution plan. It took note that one of the promoters of CD, namely, *M/s Uppal Housing Pvt Ltd*. agreed to remain outside of CIRP but continue to provide financial support to ensure that CIRP reaches success and the allottees may take possession of their flats / apartments without any third party intervention. The NCLAT observed:

(i) If CIRP is initiated against one project, it cannot affect any other project of the same real estate company. Therefore, all assets of the company are not to be maximised. CIRP should be project based as per approved plan by the competent authority.
(ii) 'Secured creditor' such as 'financial institutions/ banks', cannot be provided with the asset (flat/apartment) by preference over the allottees (Unsecured FCs) for whom the project has been approved.
(iii) The refund to allottees cannot be allowed in view of the decision of the SC in of *Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors.* However, after offering allotment, allottee can request IRP/ promoter whoever in charge to find out a third party to purchase the flat and get the money back after or during completion of project. It is also open to an allottee to reach an agreement with the promoter (not the CD) for refund of the amount.
(iv) It is very difficult to follow the process in normal course in a CIRP and a 'Reverse CIRP' can be followed in the cases of real estate infrastructure companies in the interest of allottees and survival of real estate companies and to ensure completion of the projects which provides employment of large number of unorganised workmen. The NCLAT directed as follows:

a. The promoter to cooperate with IRP and disburse the amount from outside lender, not as promoter, and to ensure that the project is completed within time frame by it i.e. 30th June, 2020.
b. The disbursement of the amount which has been made by *M/s Uppal Housing Pvt. Ltd.* and the amount as will be generated from dues of allottees during CIRP should be deposited in the account of CD which will be used to keep the CD as a going concern.
c. The allottees to deposit their balance amount and pay 90% without penal interest, by 15th March, 2020.
d. The allottees in whose favour possession has been offered and clearance has been given by the competent authorities are bound to pay the cost of registration and to deposit registration cost to get flat / apartment registered in their favour after paying all the balance amount in terms of agreements.

e. The allottees are allowed to form residents' welfare association and get it registered to empower them to claim the common areas.
f. After completion of the process by 30th August, 2020, if it is completed, CIRP be closed. Thereafter unsold flats / apartments be handed over to promoter / *M/s Uppal Housing Pvt. Ltd*.
g. During CIRP, the IRP can sell the unsold flat / apartments by way of a tripartite agreement between purchaser, IRP and promoter (Uppal Housing Pvt. Ltd.).
h. If promoter fails to comply with the undertaking and fails to invest as FC or does not cooperate with IRP / RP, the AA will complete the CIRP.

8. Filing GST Returns during CIRP

Kiran Global Chem Limited [MA/1298/2019 in IBA/130/2019]

The RP sought permission to have access to GST Portal Account to file GST returns during CIRP and to pay the net GST liability from the date of commencement of CIRP till its completion, notwithstanding non-payment of arrears for the period prior to CIRP. The AA observed that the tax authority cannot raise objection saying since no provision has been made in GST or in its software to accept such accounts, the business happening in the market after initiation of CIRP through debtor company will come to stand still and in such situation no company under CIRP can function as going concern. It directed the authorities to allow the CD to have access to its GST Net Portal Account and permit the RP to file GST Returns of the CD generated after commencement of CIRP without insisting upon payment of past dues.

9. Direct liquidation

M/s. GNB Technologies (India) Private Limited [C.P.(IB) No. 167/BB/2019]

Application was filed by the CD u/s 10 of the Code for the initiation of its CIRP. The AA directed liquidation of the CD without admission and appointment of IRP. It observed that there is no possibility to revive the Company as it has sold its plant and machinery long time back and closed down its operations for more than 5 years back and there is hardly any possibility of any resolution plan likely to be received during first stage of CIRP, if initiated, and thus it would be just and proper to put the CD under the liquidation process, in order to liquidate the Company, rather than to put it in CIRP in the first instance.

10. Initiation of CIRP against Financial Service Provider

Dewan Housing Finance Corporation Ltd. [C.P. (IB)-4258/ MB/2019]

RBI, as appropriate regulator, submitted an application to initiate CIRP against DHFL, an FSP on default in repayment of the ECB advanced by SBI, Singapore. On finding that the debt in question is qualified to be a financial debt, the AA admitted the application.

11. Tax Authorities as secured creditor

(a) Tourism Finance Corporation of India Ltd. Vs. Rainbow Papers Ltd. & Ors. [CA(AT)(Ins) No. 354 of 2019 and other appeals]

The NCLAT disposed of four appeals with the findings: (a) whether a person is a secured or unsecured creditor is a question of fact normally determined by the RP or the CoC. It has no jurisdiction to decide the same in an appeal preferred under section 61(3) of the Code. (b) the CoC

has made distribution in terms of section 30(4) and it has no jurisdiction to question the distribution so made. (c) As regards the claim made by the Sales Tax Officer in terms of section 48 of the Gujarat Value Added Tax, 2003, which creates a first charge over the property of the CD having a security interest, in view of the Statement of Objects and Reasons of the Code read with section 53, the Government cannot claim first charge over the property of the CD. Section 48 cannot prevail over section 53. Therefore, the Appellant- State Tax Officer does not come within the meaning of secured creditor under section 3(30) read with section 3(31) of the Code. It further held that as Sales Tax Department filed its claim at belated stage after the plan had been approved by the CoC, the RP had no jurisdiction to entertain the same. (d) The Regional Provident Fund Commissioner submitted that successful resolution applicant is supposed to pay the total provident fund amount, but only a part of the amount has been allowed by the RP. The NCLAT observed that as no provision of the Employees' Provident Funds and Miscellaneous Provision Act, 1952, is in conflict with any of the provisions of the Code, and, in terms of section 36(4)(iii), provident fund and gratuity fund are not the assets of the CD and therefore, there is no need to consider overriding effect of section 238 of the Code. It directed the successful resolution applicant to release full provident fund and interest in terms of the provisions of the Employees Provident Funds and Miscellaneous Provision Act, 1952.

(b) Principal Commissioner of Income Tax Central -2, Chennai Vs. C. Ramasubramanian, Resolution Professional for Surana Corporation Ltd. [CA(AT)(Ins) No. 1290 of 2019]

The AA declined to extend the attachment order of the Income Tax Department, since the CD was under liquidation process. In the appeal, the Department contended before the NCLAT that as per Income-tax Act, 1961, the appellant is a secured OC; however, in Form B of CIRP Regulations, there is no provision made for secured OCs to claim as secured OC. The NCLAT allowed the Department to make a claim before the liquidator as a secured creditor; with a communication to the Chairperson, IBBI and the Secretary, MCA to note for any necessary correction, where required.

12. Jurisdiction of RP to investigate whether CD is an MSME or not

Amit Gupta Promoter/ Shareholder M/s. Varanasi Auto Sales Pvt. Ltd. Vs. Yogesh Gupta, Resolution Professional of M/s. Varansi Auto Sales Pvt. Ltd. [CA(AT)(Ins)No. 903/2019]

The AA found that the appellant had failed to establish that CD was an MSME. Hence the CD is not exempt from the provisions of section 29A in terms of section 240A of the Code. The NCLAT observed that there is no reason why the prospective resolution applicant who claims eligibility on the basis that the CD is an MSME should not provide necessary Memorandum Certificate. The RP cannot go into investigations and enquiries whether or not a CD is an MSME, and the AA is also not expected to do so on such evidence or give findings on such issues. It observed that under the MSMED Act, even if getting Memorandum Certificate for a given enterprise may be optional, if advantage is to be taken under MSME Act, the applicant must take pains to get the Memorandum Certificate to seek benefits under IBC.

13. Timeline of approval by the CCI

Arcelormittal India Pvt. Ltd. Vs. Abhijit Guhathakurta, Resolution Professional of EPC Construction India Ltd. & Ors. [CA(AT)(Ins) No. 524/2019]

The NCLAT held that proviso to sub-section 31(4) of Code which relates to obtaining the approval from the CCI under the Competition Act, 2002 prior to the approval of such resolution plan by the CoC, is directory and not mandatory. It is always open to the CoC, which looks into viability, feasibility and commercial aspect of a resolution plan to approve the resolution plan subject to such approval by CCI, which may be obtained prior to approval of the plan by the AA under section 31 of the Code.

14. Misuse of process of Code

Relcon Infra Projects Limited [CP(IB)3980/MB/C-IV/2018]

The issue raised was whether the OC being an unregistered partnership firm can initiate CIRP in terms of section 69 of the Indian Partnership Act, 1932. The AA held that provisions of section 69(2) of the said Act applies to suits and therefore cannot apply to proceedings under the IBC. It also noted that it may be prudent to leave the parties to work out their remedies under other laws before a civil court, rather than decide the issue under summary proceedings which the Code. Contemplating and admitting the application in such circumstances would amount to gross misuse of the Code and abuse of process of law.

15. Processes under the Code vis-à-vis Enforcement Action under the PMLA

(a) JSW Steel Ltd. Vs. Mahender Kumar Kandelwal & Ors. [CA(AT)(Ins)No. 957,1034,1035,1055,1074,1126,1461/2019]

The appellant- successful resolution applicant had preferred an appeal against the Enforcement Directorate's jurisdiction for attachment of properties of the CD under PMLA after approval of the resolution plan. During the pendency of the proceedings, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 was promogulated w.e.f. 28th December, 2019, and a new section 32A has been inserted in the Code which gave protection to the assets of the CD acquired by a successful resolution applicant by way of a resolution plan approved by AA against criminal liability of the erstwhile directors / promoters of the CD. The NCLAT noted that CBI which is making investigation has not alleged any act of money laundering or other acts against successful resolution applicant or its management and also noted the stand of MCA that successful resolution applicant is not a related party to the CD. It held that a plain reading of section 32A(1) and (2) clearly suggests that the Directorate of Enforcement / other investigating agencies do not have the powers to attach assets of a CD, once a resolution plan stands approved and the criminal investigations against the CD stands abated. Section 32A of the Code does not in any manner suggest that the benefit provided thereunder is only for such resolution plans which are yet to be approved. Further, there is no basis to make distinction between a resolution applicant whose plan has been approved post or prior to the promulgation of the Ordinance. It further observed that it is clear that subsequent promulgation of the Ordinance is merely a clarification in this respect. Therefore, it is ex facie evident that the Ordinance being clarificatory in nature, must be made applicable retrospectively. On the issue of related party, it held that where a party for the purpose of its business, if mandated by the Central Government to join hands and are forced to form a consortium or as joint associate, such person (resolution applicant) cannot be held ineligible in terms of section 32A(1)(a) on the ground of being related party. It observed that the competent persons to deal with the question of eligibility of a resolution applicant under section 29A of the Code are the RP, CoC and the AA and not any other party including the ED. It clarified that the suspended board does not stand revived on account of completion of CIRP and does not interfere with the interim management mechanism. The board of directors would be constituted as per resolution plan and existing board stands vacated and any action taken by interim management (monitoring

committee) deemed to be valid without requiring any further action / ratification from reconstituted board so that the operations of the CD during pendency of appeal is not affected. On the issue of undecided claims, it held that the appellant being the successful resolution applicant cannot be asked to face with undecided claims after the plan submitted and accepted by the CoC. On the issue of subsidiary, joint venture or associate companies of CD, it held that it would be open to the CD to decide whether it will continue with such right of subsidiary companies, associate companies, joint venture companies or any other companies in which the CD has share. It further held that the company on approval of the plan shall stand declassified as promoter / part of promoter / group of promoters of any company or entity, including any subsidiaries companies, associate companies, joint venture companies.

(b) In the matter of M/s. Nathella Sampath Jewelry Private Limited [MA/1147/2019 & MA/547/2018 in CP/129/IB/CB/2018]

After the admission of the CD into the CIRP, the Enforcement Directorate provisionally attached 37 immovable properties approximately valued at Rs.382.44 cr., including all properties mortgaged with the FCs of the CD, directors, guarantors and related parties. Due to the same, it has been very difficult to obtain resolution applicants to submit resolution plans despite the publication of EOIs twice. However, on account of pending proceedings before the PMLA Authorities, the CIRP came to a standstill. As a result, CoC passed the resolution of liquidation and the RP has filed application for the same before the AA. The AA ordered liquidation of the CD and appointed the RP to act as the liquidator. It also observed that ordering liquidation soon after completion of CIRP period will not have any bearing on PMLA proceedings, because action against erring management will not be affected by this order.

16. Jurisdiction of Adjudicating Authority

(a) Union of India, Through Serious Fraud Investigation Office (SFIO) Vs. Maharashtra Tourism Development Corporation & Anr. [CA(AT)(Ins) No. 964-965 of 2019]

Union of India appealed against the order of AA directing the SFIO to investigate into fraud and siphoning of funds by the CD. The NCLAT relied on *Mr. Lagadapati Ramesh Vs. Mrs. Ramanathan Bhuvaneshwari* [CA(AT)(Ins) No. 574 of 2019] wherein it was held that the section 212 of the Companies Act, 2013 does not empower the NCLT or AA to refer the matter to the Central Government for investigation by SFIO even if it notices the company defrauding creditors and others. However, in terms of section 213(b) of the said Act, it can direct the Central Government to investigate through inspectors and after investigation, if case is made out, Central Government may decide whether the matter may be investigated by SFIO. It held that AA is not competent to straight away direct any investigation to be conducted by the SFIO.

(b) Directorate of Economic Offences Vs. Binay Kumar Singhania & Ors. [CA(AT)(Ins) No. 1361-1362/2019]

The AA slapped a cost of five lakh rupees on the delinquent officer of the Directorate of Economic Offences, for not cooperating with RP in compliance of directions of the HC. The NCLAT noted that though the conduct of officer for not extending cooperation may be violative of direction of the HC which may render contempt of court, however, the same couldn't be linked with the order of liquidation. It held that while passing the order of liquidation, the AA exceeded its jurisdiction in slapping the appellant with liability of costs, which in fact was the penalty imposed for the alleged contumacious conduct.

(c) Beacon Trusteeship Limited Vs Earthcon Infracon Pvt Ltd & Anr. [Civil Appeal No. (s) 7641/2019]

The AA admitted application for CIRP. The appellant approached after exhausting remedy before NCLAT, before the SC on the ground that the CIRP proceeding was initiated in collusive manner. It held that the plea of collusion could not have been raised for the first time in the appeal before the NCLAT or in the present appeal, and thus, it relegated the appellant to the remedy before the AA.

(d) Unimark Remedies Limited [MA 1406/2019 in CP 197/I&B/NCLT/MAH/2018]

The NCLT Mumbai Bench referred a matter to the President, Principal Bench owing to a dissent judgment in a matter whether fresh valuation to be ordered. The valuation of plant and machinery of the CD being Rs. 241.63 cr. and intangible assets being Rs. 205.65 cr. as on 31.03.2018 was reduced by Rs.200 cr. As on 31-03-2018, value under the head plant and machinery and value of intangible assets to be reduced 'zero'. The dissenting FCs objected to the valuation report on the ground, inter alia, that resolution plan is for a meagre amount and is not based on any appropriate and fair price discovery mechanism and the valuation of pharmaceutical companies are different with other companies. The issues were whether AA has jurisdiction of judicial review and appoint an independent valuer to conduct fresh valuation and also whether there is any error apparent on the face of valuation report submitted by two valuers contrary to accounted balance sheets of the CD. The AA held that it has jurisdiction of judicial review and appoint an independent valuer to conduct fresh valuation of Intangible assets of CD. The AA observed that there is no element of fraud but by comparing the value assigned to the intangible assets in the year 2017-2018 states that it is an error apparent on the face of it. It held that the value of intangible assets of a going concern making profits even during CIRP cannot be stripped of under the premise of warning letters. It held that no legal rights of any of the parties is affected if the exercise of fresh valuation is carried out, at best would assist the better valuation of CD as a going concern, though there were only two resolution applicants willing to infuse funds and revive the CD.

17. Commercial Wisdom of CoC

(a) In the matter of M/s. Jain Mfg. (India) Pvt. Ltd. [CA No. 142/2019 in CP(IB) No. 422/ALD/2018]

In the application filed under section 60(5) of the Code by the promoter and the MD of the suspended board of directors, the AA held that as the CoC has voted in majority in favour of one entity as FC, the suspended management as well as RP have no locus to challenge the commercial wisdom and decision of the CoC with regard to determination of respondent as an FC.

(b) Tourism Finance Corporation of India Ltd. Vs. Rainbow Papers Ltd. & Ors. [CA(AT)(Ins) No. 354 of 2019 and other appeals]

The NCLAT held that as the CoC has made the distribution in terms of section 30(4), the NCLAT has no jurisdiction to question the distribution so made.

18. Implementation of resolution plan after Liquidation Order

Liberty House Group Pte. Ltd. Vs. State Bank of India & Ors. [CA(AT)(Ins) No. 724, 725, 870/2019]- The successful resolution applicant prayed to allow it to comply with the resolution plan and to set aside the earlier order passed by AA ordering liquidation of the CD. The NCLAT directed the resolution applicant to deposit all monies as provided in the resolution plan including that of CIRP costs and money towards contingency claims as per the implementation clause in the plan. It stayed the liquidation order and directed the resolution applicant to ensure implementation

of the plan in its letter and spirit. It observed that it will also be open to the resolution applicant to move IBBI to withdraw the complaint before the Ld. Special Judge, Cuttack.

19. Invocation of Writ Jurisdiction by the High Courts

(a) M/s Embassy Property Development Private Ltd. Vs. State of Karnataka & Ors. [Civil Appeal No. 9170-9172 of 2019]

The Government of Karnataka passed an order rejecting the proposal of deemed extension of mining lease to CD on the account of contraventions of the statutory rules and terms and conditions of the lease deed. On application filed by RP, the AA held that the order of the Government is in violation of the moratorium declared in terms of section 14(1) of the Code and directed to execute supplemental lease deed in favour of the CD. The Government of Karnataka filed a writ petition against the order of the AA, in which the HC gave an interim stay of operations of the direction.

Against the impugned interim order of the HC, appeals were filed before the SC. It dealt with two issues (i) whether the HC can interfere in writ jurisdiction with an order passed by the AA under the Code ignoring the availability of a statutory remedy of appeal under the NCLAT and (ii) whether questions of fraud can be inquired into by the NCLT / NCLAT in the proceedings initiated under the Code. It was held that the Code is a single unified umbrella Code, covering the entire gamut of the law relating to insolvency resolution of corporate persons and others in a time bound manner. It further noted that the relation between Government of Karnataka under the mining lease is not just contractual but also statutorily governed. It held that the NCLT did not have jurisdiction to entertain an application against the Government of Karnataka for a direction to execute Supplemental Lease Deeds for the extension of the mining lease. Since the NCLT chose to exercise a jurisdiction not vested in it in law, the HC was justified in entertaining the writ petition on the basis that NCLT was coram non judice. It held that the NCLT has jurisdiction to enquire into allegations of fraud. As a corollary, NCLAT will also have jurisdiction. Hence, fraudulent initiation of CIRP cannot be a ground to bypass the alternative remedy of appeal provided in Section 61. However, it observed that they would not have jurisdiction to adjudicate upon disputes such as those arising under MMDR Act, 1957 and rules made thereunder, especially when the disputes revolve around decisions of statutory or quasi- judicial authorities, which can be corrected only by way of judicial review of administrative action. Hence, the HC was justified in entertaining the writ petition.

(b) Kotak Investment Advisors Limited and Anr. Vs. Mr. Krishna Chamadia and Ors. [WP (L) No. 3621 of 2019]

The petitioners claimed that their bid was the highest, and hence it ought to have been accepted, however, the second highest bid was accepted. They challenged the process adopted by the RP before the AA, which was rejected against which they approached the HC in writ proceedings. The HC held that it would be highly unsafe to entertain the petition, all the more when the petitioners have an alternate efficacious remedy of filing an appeal against the impugned order in terms of sections 32 and 61 of the Code. It also noted that the Code must be allowed to operate and run its full course. Merely because in exceptional cases, the HC can intervene in writ jurisdiction does not means that it is obliged to intervene in each and every order of the AA.

(c) Mr. Anand Rao Korada Resolution Professional Vs. M/s. Varsha Fabrics (P) Ltd. & Ors. [Civil Appeal Nos. 8800-8801 of 2019]

Industrial Development Corporation of Orissa Ltd. divested 100% of its shareholding in Hirakud Industrial Works Limited (HIWL) as per Share Purchase Agreement (SPA). Later on, HIWL sold their

stake to Indo Wagon Engineering Ltd. and shut down the company. Hirakud Workers Union filed a writ petition before the Odisha HC praying cancellation of the SPA and for payment of the arrears and current salaries of the workmen. The HC directed the Deputy Labour Commissioner to recover the workmen's dues by sale of some parcel of assets of HIWL by means of public auction. During the pendency of proceedings before the HC, an FC filed application for CIRP of HIWL. AA admitted the application and declared moratorium.

RP filed an appeal before the SC, challenging the order of the HC for auction of assets on the ground that CIRP had already commenced, the proceedings before the HC ought to be stayed. The SC observed: *"In view of the provisions of the IBC, the High Court ought not to have proceeded with the auction of the property of the Corporate Debtor – Respondent No.4 herein, once the proceedings under the IBC had commenced, and an order declaring moratorium was passed by the NCLT…..If the assets of the Respondent No.4- Company are alienated during the pendency of the proceedings under the IBC, it will seriously jeopardise the interest of all the stakeholder"* It also noted: *"It is open for Respondent No. 13 – Hirakud Workers' Union to file an application under Regulation 9 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 for payment of arrears, salaries and other dues before the competent authority."*

20. *Judicial review of procedural irregularities*

Kamal K. Singh Vs. Union of India and Ors. [WP (L) No. 3250 of 2019]

The petitioner challenged the order of AA in the matter of *Rolta India Ltd.* [*CP (IB) No. 4375/NCLT//MB/2018*] and also the constitutionality of section 231 of the Code regarding bar of Civil Court's jurisdiction but did not press the prayer challenging section 231.
Later an application under section 7 of the Code was filed and on hearing the parties, AA reserved the order. It was stated that one of the members of the Bench demitted office on 23rd October, 2019 as he was appointed as member of the NCLAT. Though the order in the matter was reserved, it was not listed on 22nd October, 2019 (the date of passing the order) in the cause list for 'pronouncement'. The petitioner submitted that on 8th November, 2019, RP entered and took possession of CD. The petitioner submitted that on inspection it was noticed that an additional cause list dated 22nd October, 2019 was uploaded on the website of AA and it featured only one item under "Order". The additional cause list was created on 5th November, 2019 and uploaded. The HC observed that the impugned order was passed in an illegal manner in violation of the Rules 150 and 152 (2) of the NCLT Rules, 2016 (Rules) and against the principal of natural justice, which resulted in losing the control and directorship of the CD. The Rules mandate that the order has to be pronounced. The HC while issuing writ of certiorari set aside the order of admission on the ground that NCLT did not pronounce the order as per due procedure prescribed in the Rules.

21. Foreign Assets deemed to be assets of CD-*State Bank of India Vs. Videocon Industries Limited and Ors. [MA 2385/2019 in C.P(IB) 02/MB/2018]*

Application was filed before the AA to direct RP to treat all assets, properties, rights, claims, benefits of all the group companies of the CD as its assets and properties, and also to make moratorium applicable on foreign assets. The AA noted that a special purpose vehicle (SPV) is a legal entity created to fulfil narrow, specific or temporary objectives. SPVs are generally created to limit the financial risk and exposure so also to mask it from the risk of insolvency of the parent company. The advantage anyone would achieve by way of the creating such structure is to ring fence the assets held by it from the unlimited risks and liabilities and to protect it from insolvency

of the parent company. It held that in case the assets are not considered to be the assets of a single economic entity, then by no stretch of imagination, the effective resolution of ongoing CIRP of the 13 companies would meet the objective envisaged under the Code and hence will be forced into liquidation.

22. Insurance cover as an Essential Service

Shyam Pradhan Vs. Ananda Chandra Swain [CA(AT)(Ins) No.15 of 2020]

Application was filed before the AA for stay of the operation of termination letters issued by M/s *Ship Owners Protection Limited (SOPL)*, which provided protection and indemnity cover, to the CD. The IRP submitted that during the subsistence of moratorium, essential services as defined in regulation 32 of the CIRP Regulations cannot be terminated, which was accepted by the AA. SOPL filed an appeal against the aforesaid order of the AA. While dismissing the appeal, the NCLAT ruled that because CIRP has been initiated against CD by an agent or insurer and as during the CIRP the CD has to continue as a going concern, it directed the insurer to continue with the insurance.

23. Role of CoC after liquidation

Punjab National Bank Vs. Mr. Kiran Shah, Liquidator of ORG Informatics Ltd. [CA(AT)(Ins) No. 102 of 2020]

The lead bank in the CoC challenged the appointment of the Liquidator after the AA passed liquidation order. The NCLAT held that after the liquidation order, the CoC has no role to play and they are simply claimants, whose matters are to be determined by the Liquidator and hence cannot move an application for his removal.

24. Miscellaneous

(a) Vinay Kumar Mittal & Ors. Vs. Dewan Housing Finance Corporation Ltd. & Ors. [Civil Appeal No. 654-660/2020]

The respondents subscribed to NCDs of DHFL which were issued through a public offer. It became payable due to early redemption of private placement due to downgrading in ratings of the NCDs which DHFL failed to pay. The RBI filed an application under section 227 and 239 of the Code read with rule 5 and 6 of the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 against insolvency resolution of DHFL, which was admitted by NCLT, Administrator was appointed and moratorium imposed. The HC restrained DHFL from making any further payments to any unsecured creditors and secured creditors except in cases where payments are to be made on a pro-rata basis to all secured creditors out of its current and future receivables. The fixed deposit holders as aggrieved by the orders of the HC restraining from making any payments towards their fixed deposits, challenged the order of the HC before SC. The SC held that since the depositors are being represented by the AR before the CoC, they are free to raise all points and contentions before the CoC, the Administrator, and if necessary, before the AA.

(b) M/s Ess Investments Pvt. Ltd. Vs. Lokhandwala Infrastructure Pvt. Ltd. & Anr. [Civil Appeal No(s) 324/2020 with C.A No. 325/2020, SLP 222 and 451/ 2020]

The application of appellant was rejected by the AA on the ground of admission of CIRP of the CD on the application by one of the applicants and observed that other applicants may file claims before the IRP. Since, the CD settled its disputes with the applicant, the order of admission was cancelled. The other creditors, whose applications were rejected and directed to file claim, approached the SC to seek

relief in the matter. The SC held that since the disputes between the CD the applicant who initiated CIRP has been settled, it will be open to the appellant to proceed against the CD before the AA by seeking a recall of the earlier order and revival of its application.

(c) Committee of Creditors, M/s. Smartec Build Systems Pvt. Ltd. Vs. B. Santosh Babu & Ors. [CA(AT)(Ins) No. 48 of 2020]

The AA Bench passed the liquidation order of the CD on the recommendation of the CoC. After the order was passed, the CoC refused to pay the cost and the fees of the IRP. An application was moved by the IRP before the AA which directed the CoC to pay the fees. Appeal was filed by the CoC challenging the direction of the AA. The NCLAT held that since the IRP performed his duty, constituted the CoC and continued to function even beyond 30 days after he moved the application of liquidation, the CoC should pay the fees and the cost incurred by him. It also imposed a cost on the CoC with the cost of Rs. 1,00,000 for filing such a frivolous application.

(d) Shameek Breweies Pvt. Ltd. Vs. Manoj Kumar Agarwal & Anr. [CA(AT)(Ins) No. 843 of 2019]

Application for withdrawal was filed by the promoters under section 12A which was approved by the AA. Subsequently, MCA moved application stating that the promoters are absconding and left India and the ED had also initiated proceedings against them. The AA recalled its order of withdrawal and allowed the CIRP to continue. After passing of 270 days, one of the FCs of the CD, filed an application before the NCLAT to direct the promoters of the CD, to provide money in terms of withdrawal. The NCLAT did not direct promoters to provide funds since they have neither challenged the order of withdrawal nor aggrieved at the recall order.

(e) Navin Raheja Vs. Shilpa Jain & Ors. [CA(AT)(Ins) No. 864 of 2019]

The allottees booked apartment in the residential project developed by the CD. The possession of the apartment was to be provided within 36 months but construction was not completed before the due date. Due to failure of the CD to deliver the project on time, an application under section 7 was filed. The CD stated that possession would be delivered on time subject to the force majeure clause in the agreement. In this case, the CD applied for an occupation certificate to the Government and obtaining the same on time was beyond the reasonable control of the CD. As and when it was obtained, the possession would be issued to the allottees. The allottees instead of taking possession, initiated an application for CIRP after a period of two years from the notice of possession. Two major issues came up before the NCLAT:

(i) whether the CD can be held to have committed default, if the apartment is otherwise ready but the offer of possession was delayed due to reasons beyond the control of the CD such as absence of clearance by competent authorities?

(ii) whether the application under section 7 was filed with fraudulent or malicious intent for any other purpose other than for the resolution of insolvency or liquidation under section 65 of the Code?

The NCLAT held that due to the presence of the force majeure clause which includes delay in grant of completion / occupation certificate by the Government and / or any other public or competent authority, the CD reserves the right to alter or vary the terms or suspend the scheme. The allottee is not left remediless since it has the right to cancel and seek refund with an interest of 9% per annum. When the appellant agreed to pay, the allottees wanted a higher percentage of money @18%. Since the CD offered possession but was delayed due to obtaining the approval, it cannot be said that it defaulted in delivering possession. It also noted that, the allottees are

liable to penalty under section 65 because they refused to accept the money as well as to take possession of the flat, but the same was not imposed on them.

(f) iValue Advisors Pvt. Ltd. Vs. Srinagar Banihal Expressway Ltd. [CA(AT)(Ins) No. 1142/2019]

An application under section 9 was filed by an MSME as OC for default of payment of dues against CD. The CD objected the application on the ground of pre-existence of dispute under the MSMED Act, 2006, since OC has approached the MSME Council for payment. Looking at the pendency of application before MSME Council, AA rejected the application on the ground of pre-existence of dispute. The NCLAT held that AA erred in concluding that since OC has moved the MSME Counsel, it showed pre-existing dispute. The OC had a relief open under the MSME Act and utilising the same does not mean that there is a pre-existing dispute. It referred section 17 and 18 of MSMED Act and held that the context of 'dispute' in section 18 takes colour from section 17 of the MSME Act and is different from the context of section 5(6) read with section 8 of the Code.

(g) State Bank of India Vs. M/s. Metenere Limited [C.P No. IB-639(PB)/2018]

The CD raised objection to the appointment of IRP on the ground that he was an ex-employee of SBI, with a service period of over 39 years and thus, there is an apprehension of bias since the FC was the employer of the proposed IRP. The AA held that in the view of aforesaid facts, the IRP is unlikely to act fairly and cannot be expected to be an independent umpire and directed FC to substitute him.

(h) Tecpro Systems Limited [C.P No. (IB)-197(PB)/2017]

Resolution plan was approved by the CoC, which was subsequently approved by the AA. The resolution applicant did not implement the resolution plan even after passage of eight months from the date of approval of resolution plan. Since, it was not viable to grant any extension for such implementation, CoC passed a resolution for liquidation. Thus, the AA, in view of the non-implementation of the approved resolution plan, ordered liquidation and in terms of regulation 36B(4A) of the CIRP Regulations, performance guarantee amount was forfeited.

(i) Indian Overseas Bank Vs. M/s Rathi TMT Saria Pvt. Ltd. [(IB)-938(PB)/2018]

Application under section 12(2) and (3) was filed for extending CIRP period. The resolution for extension was passed by the CoC with a 98.6% voting share authorising the RP to move the application. The AA allowed the application and granted an extension.

(j) Infonet Asia Private Ltd. [MA/1397/2019 in CP/536/IB/CB/2017]

Resolution plan contained relief for withdrawal of suit / application pending against CD. The AA observed that if the claim involved in the admitted claim is already treated in the plan, such proceedings shall be withdrawn, whereas the reliefs sought against the CD in any suit or application are not made as part of the plan, and when it has not yet been determined by a court of law, the resolution plan is subject to the outcome of those pending proceedings, because in reorganisation, litigation qua against the CD will be passed on to the person taking it. The plan was approved subject to modification of withdrawal clause.

(k) M/s NN Enterprises Vs. Relcon Infra Projects Limited [CP(IB)3980/MB/C-IV/2018]

The issue before the AA was whether the OC, being an unregistered partnership firm, can initiate CIRP in terms of section 69 of the Indian Partnership Act, 1932. It held that the provisions of section 69(2) of the Act, applies to 'suits', and therefore, cannot apply to 'proceedings' under the Code. On the issue of suppression of material information by OC, AA observed that there were business transactions between parties and there was assurance between parties to set off the dues. In the circumstances, it may be prudent to leave them to work out their remedies under other laws before a civil court, rather than decide the issue under summary proceedings under the Code. Admitting application in such circumstances would amount to gross misuse of the Code and abuse of process of law.

(l) M/s ASG Hospital Private Limited [CP(IB)-12/9/JPR/2019]

In an application under section 9, the issue before the AA was whether the lease consideration and attached security deposit fall within the definition of operational debt and whether the applicant is an OC. The AA held that the claim of the applicant arising out of lease of immovable property does neither fall in the category of goods or services including employment nor is a debt of repayment of dues arising under any law.

(m) Neeraj Jain Vs. Cloudwalker Streaming Technologies Private Limited and Flipkart India Pvt. Ltd. [CA(AT)(Ins) No. 1354/2019]

The AA admitted the application for initiation of CIRP under section 9, against which an appeal was filed. The issues before the NCLAT were:

(i) whether it is the discretion of the OC, or the nature of the operational debt that determines the issuance of notice in Form 3 or Form 4 under section 8 (1) of the Code

(ii) whether or not, copy of the invoice is a mandatory requirement for issuance of demand notice under section 8(1) of the Code, in Form 3 of the AA Rules

(iii) whether or not for filing an application, under section 9 of the Code in Form 5 under sub-rule (1) of rule 6 of the AA Rules, the submission of a copy of the invoice is mandatory, although the demand notice is served in Form 3

The NCLAT on first issue observed that the form that is used depends on the nature of the operational debt and the applicability of Form 3 or Form 4 depends on whether invoices were generated during the course of transaction or not. On second issue, it observed that a copy of invoice is not mandatory if the demand notice is issued in Form 3. Further, while addressing the third issue, it observed that submission of a copy of the invoice along with the application in Form 5 is not a mandatory requirement. Hence the appeal was allowed and CD was released from the rigours of insolvency.

(n) PNB Housing Finance Ltd. Vs. J.S.S Buildcon Pvt. Ltd. [CA(AT)(Ins) No. 103/2020]

The appellant disbursed loan to the allottees pursuant to a tripartite agreement executed among the FC, allottees and the CD. On behalf of the allottees, the amount was disbursed in the account of CD. On the failure of the CD to make payment, the FC moved an application against the CD which was rejected by the AA. The NCLAT referred to clause 14, which stipulates that on default by the buyers or mortgagor of borrowers, the appellants would have the right to enforce security by sale and in such case, the builder will accept the purchaser as a buyer and comply with the necessary formalities as the appellants have the right to sell the property as a mortgager.

(o) JM Financial Asset Reconstruction Company Ltd. Vs. Finquest Financial Solutions Pvt. Ltd. and Ors. [CA(AT)(Ins)No.593/2019]

Secured FC filed application under section 60(5) read with section 52 and regulation 37 of the Liquidation Process Regulations to sell off its secured assets to realise its security interest in the liquidation proceeding. The AA directed the liquidator to handover symbolic possession of the assets to the secured FC. The NCLAT held that only one secured creditor can enforce its right for realisation of its debt out of the secured assets as per section 52. It also held that the AA has no jurisdiction to entertain the application under section 52(6) in absence of any cause of action as per section 52(5). It noted that for realisation of security interest by a secured creditor, it has to inform the liquidator and the liquidator is required to verify such security interest and permit the secured creditor to realise it. If a secured creditor directly applies the AA for recovery of secured assets under section 52(6), such application is not maintainable. It remitted the matter to the liquidator to proceed in accordance with section 53 read with section 52.

(p) Committee of Creditors of Metalyst Forging Ltd. Through State Bank of India Vs. Deccan Value Investors LP and Ors. [CA(AT)(Ins) No. 1276, 1281 of 2019]

Resolution plan was approved by the CoC and was placed before the AA for its approval. In the meantime, the RP called upon one of the resolution applicants to submit the performance guarantee to which they conveyed their decision to withdraw the resolution plan and sought approval of the AA. The AA refused to approve the plan and directed the RP/CoC to invite fresh bids. The AA also noted that the resolution applicant will not be entitled to refund the amount of the bid bond guarantee in case fresh bid of resolution applicant is not accepted. The CoC challenged the order of rejection of resolution plan. The resolution applicant also challenged the order with regard to forfeiture of bid bond guarantee. During the hearing, the AA ordered that it would be open to the CoC to go through other resolution plans and approve the same as observed by the AA. The resolution applicant provided another offer to the CoC which was deemed to be not viable and feasible. The CoC challenged the order of the AA rejecting the initial resolution plan.

The NCLAT on appeal observed that the Code does not confer any power and jurisdiction on the AA to compel specific performance of a plan by an unwilling resolution applicant. In the absence of any procedural infirmity and having not proceeded in the manner as was required, it held that the plan approved was violative of section 30(2)(e). It also did not give any relief to the resolution applicant with regard to forfeiture of bid bond guarantee. Further, it allowed the CoC to go through other resolution plans.