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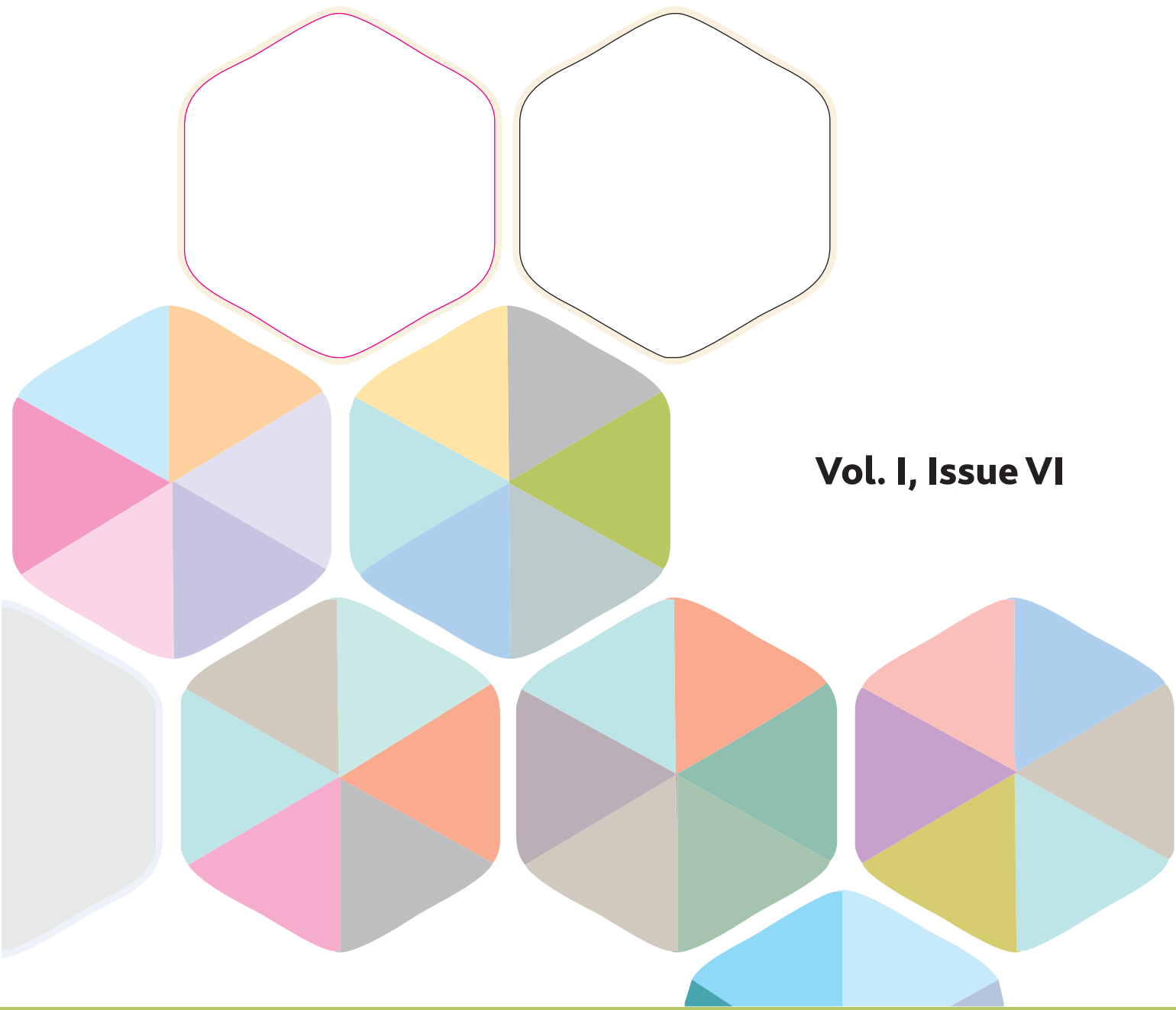
Insolvency Round-Up



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INSOLVENCY ROUND-UP

Volume I, Issue VI

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Contents

MORATORIUM APPLICABLE ON ORDER GIVEN BY THE ITAT

In the recent Order dated 04.09.2017 given by the Coordinated Division Bench of the Hon'ble Delhi High Court, namely Justice S. Murlidhar and Justice Prathiba M. Singh, in the **PR. Commissioner of Income Tax-6, New Delhi v. Monnet Ispat & Energy limited**, the Hon'ble Court has observed that the Moratorium period under Section 14 of the Insolvency and Bankruptcy Code ("**the Code**") announced by the National Company Law Tribunal (**"NCLT"**) would be applicable to the order of the Income Tax Appellate Tribunal (**"ITAT"**)in respect of the tax liability of the Assess.

In the instant case, the NCLT has admitted the application of State Bank of India, financial creditor by its order dated 18th July 2017 against the Monnet Ispat Energy Ltd (**"Corporate Debtor"**) under section 7 of the Code. The question to decide before Hon'ble Delhi High Court was whether the order given by the ITAT against the Corporate Debtor will be stayed by the moratorium applicable under section 14 of the Code.
While answering the question in affirmative, the Hon'ble High Court has quoted the judgment of the Hon'ble Supreme Court i.e. **M/s Innoventive Industries Ltd. v. ICICI Bank** wherein the Hon'ble Apex Court has observed that Section 238 of the Code unambiguously provide that the Code will apply, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Section 14(1)(a) of the Code states, inter alia, that on the 'Insolvency Commencement Date' the Adjudicatory Authority (AA) shall by order declare moratorium for prohibiting "the institution of suits or continuation of pending suits or proceeding against the corporate debtor including execution of any judgment, degree or order in any court of law, tribunal, arbitration panel or other authority".

Following the above ratio of the **Innoventive Industries Ltd vs. ICICI Bank Case**, the Hon'ble Delhi High Court held that the execution of the Order given by the ITAT in respect of the tax liability will be stayed until the approval of the Resolution Plan. The Hon'ble Delhi High Court adjudged the similar question in **CCT South Delhi vs. Monnet Ispat & energy Ltd.,** wherein relying on the order of the above mentioned case, held that the moratorium period will be applicable to the execution of Order passed by the ITAT.

NO BAR TO INITIATE PROCEEDINGS UNDER IBC PENDING WINDING UP PROCEEDINGS IN HIGH COURT

Recently, the Hon'ble High court of Bombay in the Company Application[1] made in Company Petition No. 434 of 2015[2] held that application for initiating Corporate Insolvency Resolution Process (CIRP) under Section 7, 9 and 10 of Insolvency and Bankruptcy Code 2016 (I&B Code/the Code) by Financial Creditor, Operational Creditor and Corporate Debtor respectively can still subsist even if the winding up proceedings are pending before Hon'ble High Court.

The Hon'ble High Court have in detail discussed the arguments put forward by all the parties to the Application including the interveners who have filed an application for intervening. The brief facts of the matter which was before the Hon'ble High Court of Bombay was that against the Respondent/Applicant, the Petitioner company had filed a winding up petition before the Hon'ble High Court of Bombay. During the time when the petition was pending, the Respondent Company (Applicant in present Company Application) moved to BIFR under SICA regulations. In December 2016 when I&B Code 2016 came into effect, SICA got repealed and a window of 180 days were given to Companies who have their reference pending before BIFR to make an application under Section 10 of I&B Code 2016 before the Adjucating Authority i.e. NCLT.

The Respondent Company accordingly filed an application under Section 10 of the Code before Hon'ble Adjudicating Authority, NCLT of Ahemdabad. The Petitioner thereafter filed a Company Application before the Hon'ble High Court in the Company Petition already pending to stay the proceedings under I&B Code 2016 filed by the Respondent. The Hon'ble High Court vide its order of July 2016 stayed the said proceedings. Another Company Application in the same Company petition was thereafter filed by the Respondent Company against the stay order of the Hon'ble High Court w.r.t proceedings before NCLT Ahemdabad. The Hon'ble High Court of Bombay vide its order dated 5th January 2018 vacated the stay order earlier passed w.r.t proceedings under I&B Code 2016 pending before Hon'ble Adjudicating Authority, Ahemdabad and allowed the Company Application filed by Respondent/Applicant Company.

Some of the issues which were discussed and decided in the said application are been discussed herein after:

a) Background and Object-Purpose of Insolvency Code

While relying on the decision of Hon'ble Supreme Court of India in Innoventive Industries Limited V/s ICICI Bank, the Hon'ble High Court held that "it is apparent from a reading of the object and purpose for which the I&B Code 2016 has been enacted is to set up Insolvency and Bankruptcy resolution process, which has to be implemented in a strict time bound manner, by the appointment of an IRP and creation of a creditors Committee. These are powers which can be exercised only by NCLT (Adjuditicating Authority) and not by the Company Court. It is for this reason that pending the Insolvency Resolution Process a moratorium is provided under Section 14 of IBC."

b) Fundamental Distinction between Companies Act and I&B Code 2016

The Hon'ble High Court held that the fundamental distinction between the two is that under the Companies Act winding up would be a matter for the Court alone to decide. On the other hand, in I&B Code 2016, there is a paradigm shift in as much as it displaces the management of the Company and an IRP is appointed and the Creditors Committee is left to decide the fate of the Company.

c) Admission of a winding up petition does not entail stay of NCLT proceedings.

While discussing the fate of proceedings pending if any under the I&B Code 2016 before NCLT (Adjudicating Authority), the Hon'ble High Court observed that admission of the winding up petition by the

1 *Company Application No. 572 of 2017 of High Court of Bombay*

2 *Jotun India Private Limited V/s PSL Limited*

Jurisdictional High Court would not mean that NCLT either losses jurisdiction or cannot exercise jurisdiction in case of a petition which is filed by another creditor. The Hon'ble Court further observed that the legislature while enacting I&B Code 2016 was well aware of an existing law i.e. the Companies Act, as well as the fact that the Company petitions that may have been filed prior to I&B Code coming into force may have been admitted and pending final disposal in the jurisdictional high Court. In case the intention of legislature was that those winding up petitions which the jurisdictional high court remain seized, would have primacy over NCLT proceedings then the legislature would have clarified so either in I&B Code 2016 or in the transfer rules notification dated 7th December 2016. On the contrary, as per the Hon'ble High Court, the provisions of Section 64(2) of I&B Code 2016 would indicate that the legislature did not intend that the Company Court would have the power to injunct proceedings before NCLT.

The court further discussed the provisions of SICA wherein in case any reference is pending before BIFR, the proceedings against the Company stays till the said time.

d) Remedy for people under Section 6 of I&B Code 2016

The Hon'ble Court discussed that in case the argument that if one accepts the argument of Petitioners that pending winding up proceedings, the application made under I&B Code 2016 cannot be made or if made will remain stay then it would mean that there is no right available for any person covered under Section 6 of I&B Code 2016 to file a proceedings under I&B Code 2016, in respect of a company, against whom a winding up petitions is retained in the High Court. Such an interpretation is not supported by the language of I&B Code 2016. The court observed that there is express as well as implied intention on the part of the legislature to (i) take away the right to file winding up petitions under Companies Act, 1956; and (ii) to apply the provisions of I&B Code without exception to all proceedings undertaken regarding insolvency resolution and revival of the companies. This language is apparent from the peremptory and express language of Sections 14, 63 and 64(2) of I&B Code 2016.

The Hon'ble High Court further discussed that it is also clear from the Companies (Removal of Difficulties) Fourth Order that in fact what is saved are only the proceedings of winding up pending before the jurisdictional High Court and not the Company itself in relation to which such proceedings are saved. Such a Company is still subject to the provisions of I&B Code 2016, if invoked and only post notice winding up proceedings, which are retained by High Court, are saved. This does not mean that IBC is inapplicable to the said Company, if it is invoked.

The transitional provisions cannot in any way affect the remedies available to a person under I&B Code 2016, vis-à-vis the Company against whom a winding up petition is filed and retained in the High Court, as the same would amount to treating I&B Code as if it did not exist on the statue book and would deprive persons of the benefit of the new legislation. The same is contrary to the plain language of IBC. The High Court made a step ahead and observed that if the contentions of the petitioner were to be accepted, it would mean that in respect of companies, where a post notice winding up petition is admitted or a provisional liquidator appointed, provisions of I&B Code 2016 can never apply to such companies for all times to come. The mere fact that post notice winding up proceedings are to be "dealt with" in accordance with the provisions of the Companies Act, 1956 does not bar the applicability of the provisions of I&B Code 2016 in general to proceedings validly instituted under I&B Code 2016, or does it mean that such proceeding can be suspended.

e) No power to Injunct

The Hon'ble High Court, held that NCLT is not a court subordinate to the High Court and hence as prohibited by the provisions of Section 41(b) of the Specific Relief Act, 1963 no injunction can be granted by the High Court against a Corporate Debtor from institution of proceedings in NCLT. Similarly, under the Companies Act, 1956 there being no provision wherein proceedings under NCLT instituted under I&B Code 2016 can be injuncted. The Court further observed that there is an express bar contained in Section 64(2) of I&B Code which prevents any court, tribunal or authority from granting any injunction in respect of any action taken, or to be taken, in pursuance of any power conferred on NCLT under I&B Code 2016.

It is to be noted that apart from Hon'ble High Court of Bombay, the Ld National Company Appellate Tribunal (NCLAT) also vide its order dated 01.12.2017 in

Company Appeal. (AT) (Insolvency) No. 81/2017[3] held that where if any winding up proceedings has been initiated against the Corporate Debtor by the Hon'ble High Court or Tribunal or Liquidation Order has been passed, in such case the application under Section 10 is not maintainable. However, mere pendency of a petition for winding up, where no order of winding up or order of liquidation has been passed, cannot be ground to reject the application under Section of the I&B Code 2016.

The Ld NCLAT also discussed that the word "Liquidation" under I&B Code 2016 can be considered as Synonymous to the word "winding up" mentioned in Companies Act, 2013. While discussing the same the Appellate Authority observed that in a case where a winding up proceedings has already been initiated against a Corporate Debtor by the Hon'ble High Court or Tribunal or Liquidation order has been passed in respect to the Corporate Debtor, no application under Section 10 can be filed by the Corporate Applicant in view of ineligibility under Section 11(d) of I&B Code 2016 "a Corporate Debtor in respect of whom a liquidation order has been made, is not entitled to make application under I&B Code 2016".

3 *Unigreen Global Private Limited V/s Punjab National Bank and others*

CASE NOTE: SETTLEMENT FOR REPAYMENT BETWEEN BUILDER AND BUYER IS "FINANCIAL DEBT"

The National Company Law Tribunal (**NCLT**), New Delhi, Bench-III in the case of *Ajay Kumar Gupta & Anr, and Mrs. Poonam Gupta* vs. *IERO Fiveriver Pvt. Ltd. [C.P. No. IB-355/ND/2017]* held that the amount payable by a builder to buyer under a settlement deed resulting from non-fulfillment of obligations (relating to allotment and possession) is "financial debt" under Section 5(8) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "**IBC**") and the buyer can file application under Section 7 as "Financial Creditor" for the recovery of the same.

BACKGROUND FACTS:

Mr. Ajay Kumar Gupta and Mrs. Poonam Gupta (hereinafter "Applicants" or "Financial Creditors") entered into an agreement (hereinafter referred to as "**Plot Buyer's Agreement**") dated 27.06.2011 with IERO Fiveriver Pvt. Ltd. (hereinafter referred to as "**Corporate Debtor**") for the purchase of a plot in Haryana promoted by the Corporate Debtor under the project "IERO FIVERIVER". As per the Plot Buyer's Agreement, the plot was required to be handed over to the Applicants within a period of maximum 42 months (3 years 6 months) but the possession was not granted even after the lapse of 5 years, though a sum of Rs. 90 (ninety) lacs was remitted to the account of the Corporate Debtor on account of allotment and delay in possession of the plot. Thereafter, a Settlement agreement dated 15.02.2017 was entered between the Applicants and the Corporate Debtor for the repayment of the money received by the Corporate Debtor from the Applicants along with the agreed interest @ of 9% per annum for which the tax had to be deducted at source. The repayment had to be done in installments, pursuant to which two cheques issued in favor of the Applicants were dishonored and returned by the bankers for the reason "insufficient funds". The dishonor of cheques was communicated to the Corporate Debtor, who acknowledged the default and hence, going forward the Applicants filed the application under Section 7 of IBC.

CONTENTIONS BY THE CORPORATE DEBTOR:

It was argued that the Applicants are not "Financial Creditors" under Section 5(7) and the debt cannot be categorized as "financial debt" under Section 5(8) of the IBC and hence, the application is not maintainable. It was also contended that the deduction of tax at source under Section 194A of the Income Tax Act, 1961 in relation to the interest paid by the Corporate Debtor does not change the status of the Applicants from a flat buyer to a financial creditor. The deduction of tax at source (TDS) is a statutory obligation and the Income Tax Act does not make a classification as to the payment of interest. Also, to rely upon the deduction of income tax in relation to interest payment by financial creditors in order to establish "debt" under IBC is not provided for.

Further, the Corporate Debtor placed reliance on the Settlement Agreement to state that nowhere have the Applicants been classified as "Financial Creditors" and the respondent herein as "Corporate Debtors" and thus, there was no intention of the parties to classify themselves as such.

DECISION:

It was held that the Settlement Agreement abrogated the Plot Buyer's Agreement and the Settlement Agreement entered between the Corporate Debtor and Applicants gives the cause of action for the application under Section 7 of the IBC. The parties on their own volition had entered into the said Settlement Agreement whereby the amount paid by the Applicants has been treated as a debt repayable along with interest and hence the Applicants herein can be classified as "Financial Creditors".

Thus, reference to the definition of "financial debt" and "financial creditor" under Sections 5(8) and 5(7) respectively shows that there is a debt in fact owed to the Financial Creditors under the Settlement Agreement towards repayment of the amounts received by the Corporate Debtor along with the

interest @ 9% per annum and the said debt can be classified as "financial debt". Further, the cheques return memo clearly discloses the default in the payment of debt due to the Financial Creditors by the Corporate Debtor. The endorsement made by the bankers also show that the cheques have been returned for the reason of "insufficient funds". To conclude, it was held that a default has been committed in terms of Section 3(12) of "financial debt" as defined under Section 5(8) and that the Financial Creditor who can be classified as falling within the definition under Section 5(7) is entitled to invoke the provisions of IBC.

EFFECT OF SETTLEMENT BETWEEN THE PARTIES AFTER ADMISSION OF APPLICATION UNDER IBC CODE: AN UPDATE

Going forward from the write-up on the subject-topic[4] we hereby discuss recent judgments thereafter on the issue of what happens to the proceedings initiated under Insolvency & Bankruptcy Code 2016 ("I&B Code") where the parties to the application pending before the adjudicating authority have arrived at a mutual settlement amongst themselves.

As earlier written about, on case to case basis there may be a very little scope that the application, after admission, may be permitted to be withdrawn. However, in entirety the mandate of Rule 8 of the Adjudicating Authority Rules is to be applied in letter and spirit. So far as the issue of allowing settlement between parties arising out of insolvency petitions is concerned, the NCLT and NCLAT have ruled that post admission of application, withdrawal of petitions cannot be sought on grounds that the matter has been settled between the parties. On the cost of repetition, it is reiterated that Rule 8 (*Withdrawal of application*) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (the 'Adjudicating Authority Rules') provides as under:

> "*The Adjudicating Authority may permit withdrawal of the application made under rules 4[5], 6[6] or 7[7], as the case may be, on a request made by the applicant before its admission.*"

In the matter titled "*Parker Hannifin India Private Limited versus Prowess International Private Limited*"[8] the Corporate Debtor filed an application for withdrawal of petition on the ground that they had arrived at an amicable resolution and hence, he is no longer inclined to pursue the petition. The Kolkata Bench of the NCLT observed:

> "*After the admission, the Petition acquires the character of Representative suit and through publication of notices in Newspapers, applications have been invited from all the creditors of the company to file their claim. After admission of application under IBC 2016, the Petition cannot be dismissed on the basis of compromise between Operational Creditor and Operational Debtor, because other creditors have a right to file their claim. After admission of petition under IBC 2016, the nature of petition changes to a Representative Suit and the lis does not remain only between Operational Creditor and Operational Debtor. Hence, they alone have no right to withdraw the petition after admission.*"

Further, in the matter of *Aryan Mining & Trading Corporation (P) Ltd. versus Ganesh Sponge (P) Ltd.*[9] the application was filed jointly by both parties for withdrawal of original application in terms of settlement between parties. The Kolkata Bench of the NCLT observed:

> " … *The above rule clearly permits withdrawal of application under Insolvency & Bankruptcy Code only before admission. In this case, it is undisputed that the petition has been admitted and order has been passed for initiating CIRP. Therefore, in compliance of Rule 8 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, permission cannot be given to withdraw the petition.*"

In light of various appeals of similar nature filed before the Supreme Court, the Honorable Court in the matter titled *Uttara Foods and Feeds (P) Ltd. versus Mona Pharmachem*[10] laid down a similar view as in the *Lokhandwala* case (supra). With a view to obviate

4 *Volume I Issue II of Insolvency Round Up newsletter*
5 *Application by financial creditor*
6 *Application by operational creditor*
7 *Application by corporate applicant*
8 *I.A. No. 2226/KB/2017; order dated May 29, 2017*
9 *CA(IB) No.322/KB/2017; order dated August 3,2017*
10 *Civil Appeal No. 18520 of 2017*

unnecessary appeals in matters where terms of settlement have been reached between parties, the Hon'ble Court also assigned the Ministry of Law and Justice to make amendments to the relevant Rules so as to include such inherent powers. The Hon'ble Apex Court observed that the Government should amend the provision regarding the inherent power of NCLT and NCLAT[11] to allow withdrawal of petitions filed under Insolvency Code in case the matter is settled by the parties. Currently, under Rule 8 of the Adjudicating Authority Rules, Adjudicating Authority cannot exercise their inherent powers to allow withdrawal of petition after it has been admitted by the Adjudicating Authority. As a result, appeals against order of NCLAT are being filed before Supreme Court which alone can exercise its powers under Article 142 of the Constitution to allow withdrawal of cases filed under I&B Code where agreement has been reached between the parties. The Apex Court held that:

> *"… instead of all such orders coming to the Supreme Court as only the Supreme Court may utilize its powers under Article 142 of the Constitution of India, the relevant Rules be amended by the competent authority so as to include such inherent powers. This will obviate unnecessary appeals being filed before this Court in matters where such agreement has been reached.*
>
> *On the facts of the present case, we take on record the settlement between the parties and set aside the NCLAT order."*

In furtherance of the said recommendation, the MCA vide *Notification No. 35/14/2017* dated November 16th, 2017 has constituted an Insolvency Law Committee to take stock of the functioning and implementation of the Code, identify issues that may be impacting the efficiency of the corporate insolvency resolution regime and make suitable recommendations. The Committee will submit its recommendation within 2 months of its first meeting, which is expected to come out soon now.

11 *As per Rule 11 of NCLAT Rules, nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal.*

SECTION 30(4) CONUNDRUM: DIVERGENT VIEWS TAKEN BY NCLT MUMBAI AND NCLT HYDERABAD BENCH

Section 30 (4) of the Insolvency and Bankruptcy Code("IBC/Code") that deals with Submission of resolution plan is in the midst of spotlight because of opposite views taken by Adjudicating Authority at Mumbai, NCLT Mumbai[12] and Adjudicating Authority at Hyderabad, NCLT Hyderabad[13]. It will be apt to produce the relevant section of the code at this stage

"…*The committee of creditors may approve a resolution plan by a vote of not less than seventy five per cent of voting share of the financial creditors*…"

The moot point of legal debate that emerged in the two orders of two Adjudicating Authorities was whether the approval by a committee of creditors (CoC) is of a mandatory nature i.e. no resolution plan can be valid without an approval of seventy five percent of voting share of financial creditors or it "***may"*** be approved by a CoC by a majority of less than seventy five per cent and finally accepted by the adjudicating authority using its discretion under Section 31 (2) of the code. The view taken by the two benches is as follows:

ADJUDICATING AUTHORITY, NCLT MUMBAI

The Bombay bench of NCLT framed the issue whether the adjudicating authority has jurisdiction to exercise over a decision taken by CoC as contemplated in the Code. The Bench delved into the overall scheme of the Code and observed that it has been replete in the provisions of the Code mandating resolution approved by CoC means a resolution with vote not less than 75% of the voting share of CoC, and when for passing a resolution, a cap is set out as an inbuilt measure in a statute without leaving any ambiguity to the judiciary, the Adjudicating authority does not have any jurisdiction to alter the cap given by the legislation. Section 21 (8) was pressed into assistance for the proposition that in addition to all other sections wherever 75% voting aspect has been mentioned to be given to the resolution of CoC, it has been categorically mentioned that all decisions of CoC shall be passed with vote not less than 75% of voting share of Financial Creditors.

The Bench hereinafter elucidated on the aspect as to how the Insolvency and Bankruptcy Code came into force for consolidation of various laws so as to have a single law for insolvency and bankruptcy. The proposition that reorganization or restructuring is the primacy of the Code was negative as there were many attempts like SICA, JLF which all failed. The Bench observed that the phrase "insolvency resolution of corporate persons" mentioned in the statement is inclusive of liquidation process for which the mandate of the statute, objects of the enactment and the report of the Committee who drafted the legislation was referred. The raison d'être for leaving everything to the domain of creditors according to the bench is because their stake is stuck in the Corporate Debtor and therefore they are the right persons to take a decision on their stake. In light of this, it was observed that the creditors had to attain super majority to take any decision in respect to sacrifice of their rights.

Furthermore the bench rescued itself from interpreting the provisions with any purposive interpretation when the terms are clear and straight and left that prerogative to NCLAT & the Apex Court i.e. Hon'ble Supreme Court.

NCLT HYDERABAD

The Hyderabad bench however took a diametrically opposite view on the moot point. The order of the Bench has been dissected under three heads. Firstly, it was held that the IBC is a new concept evolved with a certain objects to achieve in financial sector and timelines. Thus, bankers are duty bound to refer to instruction/guidelines issued by RBI from time to time for insolvency of a Company. As a result RBI circular No.RBI/2016-17/299/DBR.BP.BC.No.67/21/.04.048/2016-17; dated 5th May, 2017 in which it is stressed for early identification of stressed Assets and timely implementation of a Corrective Action Plan to preserve the economic value of stressed

12 *CP (IB) No. 11/10/HDB/2017*

13 *MA 557,530,529 & 590/2017,IA 72/2017 in C.P 01/I&BP/2016*

assets was referred. In para 4 of the Notification, RBI changed the percentages and Number required for Approval of a corrective action plan.,

"…the decisions agreed upon by a minimum of in the JLF would be 60 percent of creditors by value and 50 percent of creditors by number…"

Secondly, in contradistinction with the Mumbai Bench it was concluded that the main preamble of the IBC is the resolution of the Corporate Debtor rather than the liquidation of the Corporate Debtor. Finally, relying on the word "*may*" in Section 30(4) it was observed that the CoC can approve a plan with less than 75 percent too and it was incumbent upon the Adjudicating Authority to use its judicial discretion under Section 31 (2) to approve or reject the plan when it doesn't touch the ceiling of 75 percent wherein it had to consider the spirit of the code and to grant due consideration for the socio economic benefit/cause/etc. The Bench was swayed by the consideration that the Corporate Debtor was located in a remote district and was providing job opportunities to the marginalized sections of the society.

It is hoped that the appellate forums will provide much needed clarity to this crucial provisions to balance the interest of all stakeholders in the insolvency resolution process.

DEMAND NOTICE UNDER SECTION 8 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 CAN BE FILED BY LAWYER ON BEHALF OF THE OPERATIONAL CREDITOR & PROVISION UNDER SECTION 9(3)(C) OF THE CODE IS NOT MANDATORY

Under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as, the "**Code**"), for operational creditors to initiate a corporate insolvency resolution process (hereinafter referred to as "**CIRP"**), two steps are required to be followed. The first step is that the creditor has to deliver a demand notice under Section 8 of the Code to the Corporate Debtor regarding the non-payment of dues and then subsequently if there is no dispute raised by the Corporate Debtor or there is the absence of payment, the CIRP can be initiated under the provisions of Section 9 of the Code. In a recent judgment, the Hon'ble Supreme Court had the opportunity to settle the law on two issues that were impeding the right of the Operational Creditors in initiating the CIRP against the Corporate Debtors.

The Hon'ble Supreme Court, on 15.12.2017 delivered a landmark judgment in the case of Macquarie Bank v. Shilpi Cables[14], wherein the Hon'ble Supreme Court settled the law on two important issues under the Code. The first issue was whether the provision under Section 9 (3)(c) of the Code which mandates that in order to trigger CIRP against the Corporate Debtor, ""*a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor.*" is mandatory or not?. This issue is specifically relevant to the foreign operational creditors who could not maintain accounts with the recognized financial institutions and thus were prevented from initiating the CIRP since such institutions were unable to produce the requisite certificate. The second issue for consideration before the Hon'ble apex court was that whether a demand notice of an unpaid Operational Debt under Section 8 can be issued by a lawyer or an authorized representative on behalf of the Operational Creditor.

14 *Civil Appeal 15135/2017*

The present case had come before the Hon'ble Supreme Court by the way of a Special Leave Petition wherein the NCLAT order dated 1 August 2017 was being challenged which had upheld the NCLT decision wherein the application to initiate CIRP had been dismissed on the ground that provision under Section 9 (3) of the Code had not been complied with. It was also held that the demand notice under Section 8 cannot be issued by a lawyer.

The Hon'ble Supreme Court began with the detailed review of the Code and the provisions of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016. The Hon'ble Supreme Court took a very pragmatic approach and differed with the narrow view taken by the NCLT/NCLAT and came to the conclusion that the requirement under section 9(3)(c) is not a "*condition precedent to triggering the insolvency process under the Code*". The certificate is only a piece of evidence to confirm the existence of the debt rather than being a precondition. The Hon'ble Court held that the provision in question is merely directory in nature, and not mandatory. The Court also noted that since the provisions of the Code are open to the triggered by a foreign creditor, there is no need to impose procedural hurdles in the way of such creditors. Hon'ble Supreme Court also left open the possibility that foreign creditors may offer evidence of the debt through means other than a certificate by a "financial institution".

On the second issue, the Hon'ble Supreme Court looked at the language of Section 8, with particular emphasis on the word "delivering" of the demand notice. It observed that usage of such a word hinted towards the intention of the legislature that it was not mandatory for the Operational Creditor to send the notice itself through its own employees or officers. The Hon'ble Supreme Court also observed that the Adjudicating Authority Rules provide that for demand

notice under Section 8 & 9 of the Code, provide for the signature of the person "authorized to act" and thereby it has to be construed widely that the person that can sign and deliver the demand notice on the behalf of the Creditor has to include a lawyer acting on behalf of the client. The Hon'ble Supreme Court had also looked at the Advocates Act and held that the expression "practice" is of an "extremely wide import, and would include all preparatory steps leading to the filing of an application before a Tribunal" and thereby the notice can be sent by its lawyer. Based on the aforementioned reasoning, the Hon'ble Supreme Court allowed the appeal and set aside the orders passed by the NCLAT.

REGULATORY UPDATES

AMENDMENT TO INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS REGULATION, 2016:

On 31st December 2017, The Insolvency and Bankruptcy Board of India **("IBBI/the Board")** has amended Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

IBBI has substituted the definition of "dissenting financial creditor". Now the dissenting financial creditor also includes financial creditor abstained from voting for the resolution plan, approved by the committee.

IBBI has amended sub clause (3) of the Regulation 35, stating that the Resolution Professional will provide the liquidation value to every member of the committee in electronic form, on receiving an undertaking from the member to the effect that such member shall maintain confidentiality of the liquidation value. IBBI has inserted Sub clause (4) in the Regulation 35 stating that Resolution professional will also maintain the confidentiality of the liquidation value.

The IBBI has made one more amended to the Regulation 39 stating that now the resolution applicant has to submit the resolution plan within the given time frame in the invitation made under clause (h) of the section 25(2)

- Same above amendment has been made to Insolvency and Bankruptcy Board of India (Fast Track Insolvency Process for Corporate Person) Regulations 2017.

CIRCULAR NO. IP/001/2018 ON INSOLVENCY PROFESSIONAL TO USE REGISTRATION NUMBER AND REGISTERED ADDRESS IN ALL HIS COMMUNICATION:

On 3rd January 2018, the Board has directed that the Insolvency Professional in all his communications, whether by way of public announcement or otherwise to a stakeholder or to an authority, shall prominently state: (i) his name, address and email, as registered with the IBBI, (ii) his Registration Number as an insolvency professional granted by the IBBI, and (iii) the capacity in which he is communicating, instead of using different addresses and emails while communicating with the stakeholders.

CIRCULAR NO. IP/002/2018 ON INSOLVENCY PROFESSIONAL TO ENSURE COMPLIANCE WITH PROVISION OF THE APPLICABLE LAWS:

On 3rd January 2018, the board has directed that while acting as an Interim Resolution Professional, a Resolution Professional, or a Liquidator for a Corporate Person under the Code, Insolvency Professional shall exercise reasonable care and diligence and take all necessary steps to ensure that the corporate person undergoing any process under the Code complies with the applicable laws.

It is further clarified that if a corporate person suffers any loss, including penalty, if any, on account of non-compliance of any provision of the applicable laws, such loss shall not form part of insolvency resolution process cost or liquidation process cost under the Code and Insolvency professional will be responsible for the non-compliance of the provision of the applicable laws.

CIRCULAR NO. IP/003/2018 ON INSOLVENCY PROFESSIONAL NOT TO OUTSOURCE HIS RESPONSIBILITIES:

The board vide its circular dated 03.01.2018 had directed that an insolvency resolution professional shall not outsource any of his duties and responsibilities under the Code. It was the board's observation that a few insolvency professionals are advising the prospective resolution applicants to submit a certificate from another person to the effect that they are eligible to be the resolution applicant. This requirement amounts to outsourcing responsibilities of an insolvency professional to another person.

CIRCULAR NO. IP/004/2018 ON FEES PAYABLE TO AN INSOLVENCY PROFESSIONAL AND TO OTHER PROFESSIONALS APPOINTED AN INSOLVENCY PROFESSIONAL.

The board vide its circular dated 16.01.2018 had clarified that for calculating the Insolvency Resolution Process Cost under Regulation 31 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the fees payable to the person acting as a resolution professional will only be included that is the fees defined under Section 5(13) of Insolvency and Bankruptcy Code 2016 (the Code). The fees w.r.t other professionals appointed by Insolvency Resolution Professional shall not form part of the insolvency resolution process cost. Such other professionals appointed by an insolvency professional shall raise bills/invoices in his/its name towards such fees and such fees shall be paid to his/its bank account.

Furthermore, it is also again clarified that an insolvency professional shall render services for a fee which is a reasonable reflection of his work, raise bills/invoices in his name towards such fees, and such fees shall be paid to his bank account.

CIRCULAR NO. IP/005/2018 W.R.T DISCLOSURES TO BE MADE BY INSOLVENCY PROFESSIONAL AND OTHER PROFESSIONALS APPOINTED BY INSOLVENCY PROFESSIONALS CONDUCTING RESOLUTION PROCESSES.

The Board vide circular dated 16.01.2018 clarified that in the interest of transparency to be followed by Insolvency Professional it has been decided that that Insolvency Professional as well as every professional appointed by insolvency professional for a resolution process shall make the following disclosures along with time lines to the Insolvency Professional Agency:

i. **By an Insolvency Professional to the Insolvency Professional Agency of which he is a member:**

Disclosure to be made within three (3) days of	Relationship of the Insolvency Professional with
appointment of Insolvency Professional.	corporate Debtor
appointment of the other professional.	other professionals (Registered Valuer(s)/ Accountant(s)/Legal Professional(s)/Other Professinal(s)) as appointed by him
the constitution of Committee of Creditors	Financial Creditor(s)
the agreement with the Interim finance provider(s).	Interim Finance Provider(s)
the supply of information memorandum to the prospective resolution applicant.	Prospective resolution applicant(s)
of such notice or arising	If relationship with any of the above comes to notice or arises subsequently.

ii. An insolvency professional shall ensure disclosure of the relationship, if any, of the other professional(s) engaged by him to the Insolvency Professional Agency.

Disclosure to be made within three (3) days of	Relationship of the Insolvency Professional with
appointment of the other Professional.	The insolvency professional
appointment of the other professional.	Corporate Debtor
the constitution of Committee of Creditors	Financial Creditor(s)
the agreement with the Interim finance provider(s) or three days of the appointment of the other Professional, whichever is later.	Interim Finance Provider(s)

the supply of information memorandum to the prospective resolution applicant three days of the appointment of the other Professional, whichever is later.	Prospective resolution applicant(s)
of such notice or arising	If relationship with any of the above comes to notice or arises subsequently.

The term ***"relationship"*** has also been defined in the circular by the Board. As per the same said circular ***"relationship"*** mean any one or more of the four kinds of relationships at any time or during the three years preceding the appointment:

A. Where the Insolvency Professional or the other Professional, has derived 5% or more of his/its gross revenue in a year from professional services to the related party;

B. Where the Insolvency Professional or the other Professional, has been a Shareholder, Director, Key Managerial Personnel or Partner of the related party;

C. Where a relative (Spouse, Parents, Parents of Spouse, Sibling of Self and Spouse, and Children) of the Insolvency Professional or the other Professional, as the case may be, has a relationship of Kind A or B above with the related party;

D. Where the Insolvency Professional or the Other Professional, as the case may be, is a partner or director of a company, firm or LLP, such as, an Insolvency Professional Entity or Registered Valuer, the relationship of kind A, B or C of every partner or director of such company, firm or LLP with the related party.

Further, the Insolvency Professional Agency shall disseminate such disclosures on its website within three (3) working days of receipt of the disclosure. The Insolvency Professional shall provide a confirmation to the Insolvency Professional Agency that the appointment of every other professional has been made at arm's length relationship.

The disclosures provided above needs to be made for ongoing resolution processes also and the due date for the ongoing processes was 31.01.2018.

It is to be noted that as per the circular any wrong disclosure or delay disclosure shall attract action against the Insolvency Professional and the other professional as per the provisions of the law.

RELAXATION IN THE PROVISIONS W.R.T LEVY OF MINIMUM ALTERNATE TAX (MAT)

The Central Board of Direct Taxes have issued a circular w.r.t relaxation of norms relating to Minimum Alternate Tax (MAT) for the Corporate Debtors against whom the Corporate Insolvency Resolution Process (CIRP) has been initiated under Section 7 (by Financial Creditors) or under Section 9 (by Operational Creditors) of Insolvency and Bankruptcy Code. At the moment, the relaxation is w.r.t Financial Year 2017-18 (Assessment Year 2018-19)

AMENDMENT IN COMPANIES ACT, 2013 VIS A VIS INSOLVENCY AND BANKRUPTCY CODE, 2016

The Central Government had notified the Companies (Amendment) Act, 2017 (Amendment Act) on 3rd January 2018 wherein the following sections of the Companies Act, 2013 have been amended to accommodate the requirements of Insolvency and Bankruptcy Code 2016:

- Section 53: Section 53 of Companies Act, 2013 deals with prohibition on issuance of shares at discount. The amendment now allows the companies to issue their shares at discount to its creditors when their debts are been converted into equity pursuance to any statutory resolution plan (under IBC or any debt restructuring scheme of RBI);
- Section 197: Section 197 of Companies Act, 2013 deals with overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits. As per the Section the approval of shareholders in the general meeting of the Company is required in case the managerial remuneration

is exceeded beyond 11% of the net profits. The amendment now allows that the companies who have defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, will now have to take prior approval of such lenders for payment of managerial remuneration. The approval from lenders needs to be taken prior to the approval of shareholders in general meeting.

- Section 247: Section 247 of Companies Act, 2013 deals with Valuation by registered valuers, Further the section bars a registered valuer from undertaking valuation of any assets in which he has a direct or indirect interest or becomes so interested at any time during or after the valuation of assets. The amendment now prohibits a registered valuer from undertaking the assignment of valuation of assets in which he has direct or indirect interest or becomes so interested at any time during the three years prior to his appointment as valuer or three years after valuation of assets was conducted by such valuer.

IS THE SUPPLY OF ESSENTIAL GOODS OR SERVICES DURING MORATORIUM PERIOD NEEDS TO BE WITHOUT ANY CHARGES?

Section 14(2) of the Insolvency and Bankruptcy Code, 2016 (I&B Code 2016) provides that during the moratorium period the supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted so that Corporate Debtor keeps running as Going Concern. However, the I&B Code 2016 is silent with respect to the situation wherein the supply of essential goods or services has been terminated before the insolvency date or order for initiating the Corporate Insolvency Resolution Process (CIRP) has been passed by the Adjudicating Authority (AA). Furthermore, the I&B Code 2016 is also silent w.r.t cost to be paid w.r.t such supply of essential goods or services during the Mortarium period.

Recently, National Company Law Appellate Authority (NCLAT) have come across the following issues for deciding in case of Uttarakhand Power Corporation Limited V/s M/s ANG Industries Limited (Company Appeal (AT) (Insolvency) No. 298 of 2017.

(i) Whether the outstanding charges due to which the electricity supply was disconnected prior to the insolvency date need to be paid at first instance before restoring the electricity during the moratorium period in terms of Section 14 (2) of the I&B Code 2016?

(ii) Whether during the moratorium period under Section 14, for the supply of the electricity, the charges are liable to be paid on month to month basis?

In the case before the Hon'ble NCLAT, Uttarakhand Power Corporation limited (Appellant) had disconnected the supply of electricity of ANG Industries Limited (Respondent/Corporate Debtor) prior to the Order of the Adjudicating Authority dated 31.08.2017. The Insolvency Resolution Professional (IRP) who was appointed to undertake the insolvency resolution process filed an application before Adjudicating Authority to seek an order of restoration of electricity supply. The Ld Adjucating Authority vide its order dated 9th October 2017 (impugned order) directed the Appellant to restore the electricity so that the Corporate Debtor remains going concern.

The Appellant challenged the impugned order before the Hon'ble NCLAT. The Hon'ble Appellate Authority after hearing the contentions of both the parties held that the Appellant cannot recover the dues unpaid w.r.t period prior to the insolvency order however they can submit the claim before the Resolution professional like other operational creditors.

Further, w.r.t the dues which are w.r.t current period i.e. after insolvency order date the appellants are entitled to be paid for such charges and the Insolvency Resolution Professional is required to pay the amount on behalf of the Corporate Debtor on month to month basis. Furthermore, in case the Insolvency Resolution Professional fails to pay the same the Appellant the charges due, the Appellant can give a notice and disconnect the electricity supply.

Meaning thereby, even though the I&B Code 2016 provides for supply of essential goods or services to the Corporate Debtor during the moratorium period, the above referred judgment of Hon'ble NCLAT clarified that the Insolvency Resolution Professional needs to pay for such supply of essential services received during the Moratorium period and if not then the supply can be terminated or suspended or interrupted.

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NOTES

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