

JUGEMENTS ON

SECTION 30

Indian Overseas Bank & Ors. v. Kamineni Steel & Power India Private Limited (NCLAT Delhi), Company Appeal (AT) (Insolvency) No. 335 of 2017, decided on 04.01.2018

The Hyderabad bench of the NCLT, in an insolvency petition against Kamineni Steel & Power India, allowed a resolution plan approved by 66.67% of its committee of creditors (CoC). The Hyderabad NCLT said in its order that Section 30 (4) does not say whether such percentage is out of the total voting share of the financial creditors or those present during meetings of the CoC. “Since IBC is a new code and still evolving, the above percentage has to be read with various circulars issued by the Reserve Bank of India.

The National Company Law Appellate Tribunal (NCLAT) has struck down an order passed by the bankruptcy court that approved a resolution plan for Kamineni Steel & Power despite the fact that it failed to receive the mandatory 75 per cent vote share, a pre-requisite according to the Insolvency and Bankruptcy Code (IBC) to get the plan endorsed by the court.

Ghanashyam Mishra v Edelweiss ARC

- Once a resolution plan is duly approved by the NCLT under Section 31(1), the claims provided in the resolution plan shall stand frozen and will be binding on all stakeholders involved, including the corporate debtor and its employees, members, creditors, the Central Government, any State Government or any local authority.
- On the date of approval of the resolution plan by the NCLT, all claims which are not part of the resolution plan shall stand extinguished, and no person shall be entitled to initiate or continue any proceedings in respect of such claims.
- The 2019 amendment to Section 31 of the IBC was declaratory and clarificatory in nature, and thus would have retrospective application.

Murli Industries Ltd. Vs. Assistant Commissioner of Income Tax

- **Held:** The Hon'ble Supreme Court, in context with raising subsequent claims has held that a Successful Resolution Applicant cannot suddenly be faced with undecided claims after the Resolution Plan is submitted by him, as it would lead to uncertainty about the amount payable by a Prospective Resolution Applicant who would successfully take over the business of the Corporate Debtor. It is accordingly held by the Hon'ble Supreme Court that once the plan is approved by Adjudicating Authority, it becomes binding on the Corporate Debtor, its employees, members, creditors, guarantors and other stakeholders including statutory bodies involved in the Resolution Plan. It is further held that the legislative intent behind this is to freeze all the claims so that the Resolution Applicant starts on a clean slate and is not flung with any surprise claims.

Sashidhar v. Indian Overseas Bank And Ors.

- The Supreme Court at the outset provided much-needed clarity on the scope of review by the NCLT, of a resolution plan "*as approved*" by the CoC and held that the NCLT's jurisdiction is limited to the NCLT being satisfied that the resolution plan meets the requirements specified in Section 30(2) of the Insolvency and Bankruptcy Code, 2016 .
- The Supreme Court further observed that the legislature, while enacting the Code, has consciously ensured that no ground is available to question the 'commercial wisdom' of the individual financial creditors or the collective decision of the CoC before the NCLT in approving or rejecting a resolution plan and such commercial considerations are outside the scope of judicial review
- Additionally, the Supreme Court also held that the amendments to the Code reducing the voting percentage for approval of a resolution plan from 75% to 66%, as well as the requirement to record reasons for approval or rejection of a plan by CoC are prospective and the decisions already taken by the CoC prior to the amendment cannot be undone.

Sesh Nath Singh vs Baidyabati Sheoraphuli Co

- That Law of limitation will be applicable in the proceedings before NCLT, NCLAT, DRT, DRAT after the incorporation of Section 238A of IBC.
- That the limitation for filing sections 7 & 9 applications under IBC is 3 years.
- That the condonation of delay can be granted without Section 5 Application it is totally upon the discretion of the Adjudicating authority whether to grant it or not.
- That the Proceedings under SARFAESI Act are Civil Proceedings and thus will get the benefit of exclusion of time under Section 14 of the Limitation Act where applicable.
- That Magistrate Courts will be considered as civil courts while exercising its power under SARFAESI Act.

India Resurgence ARC Pvt Ltd VS Amit Metaliks Ltd & Anr

- The Supreme Court has held that dissenting financial creditor, expressing dissent over the value of security interest held by it, cannot seek to challenge an approved Resolution Plan.
- Court has observed that Section 30 of the Insolvency and Bankruptcy Code, 2016 only seeks to amplify the consideration of the Committee of creditors, keeping in mind the equitable distribution to every creditor, expressing dissent over the value of security interest held by it.

JUGEMENTS ON

SECTION 33

Punjab National Bank Vs. Mr. Kiran Shah Liquidator of ORG Informatics Ltd.

- NCLAT held that after the liquidation the Committee of Creditors has no role to play and they are simply a claimant whose matters are to be determined by the Liquidator and cannot move an application for removal of Liquidator in absence of any provisions under the law.

JUGEMENTS ON

SECTION 43

Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited vs. Axis Bank Limited etc. etc.

- The Supreme Court after carefully analyzing each provision of Section 43, stated that the intention of the parties is not important to determine whether the transaction is preferential and for clarity in the categorization of a transaction as preferential

Jaypee Infratech Ltd v. Axis Bank Ltd and Ors.

- The Supreme Court, while examining Section 43 of the Code, clarified that merely giving a preference and putting the beneficiary in a better position was not enough. For a preference to become an offending one for the purpose of Section 43, another essential requirement was that such event of giving preference ought to have happened during the relevant time as specified in Section 43(4) of the Code. Furthermore, it has to be ensured that the offending transaction does not fall within the exceptions listed in Section 43(3) which deals with transactions made in the ordinary course of business or transfers creating security interest which secure new value for the corporate debtor. An important observation made by the court was that in the event the above ingredients were satisfied, the transaction would be preferential *irrespective of whether the transaction was in fact intended or even anticipated to be so.*

JUGEMENTS ON

SECTION 66

Mohan Lal Jain, in the capacity of Liquidator of Kaliber Associates Pvt Ltd v. Lalit Modi & Ors

- The Liquidator approached the Adjudicating Authority to invoke Sections 43 and 66 of the Code, in regard to preferential transactions and fraudulent trading/ wrongful trading wherein the Adjudicating Authority referred the matter to Ministry of Corporate Affairs, with directions that explanation of the opposite party, if required, can be offered to the Investigating Agency.
- The Appellant submitted that the Resolution Professional/Liquidator rightly invoked the jurisdiction of Adjudicating Authority as specifically provided by Section 43 and Section 66 of the IBC and it was not permissible for the Adjudicating Authority to abdicate its powers and refer the matter to the Ministry of Corporate Affairs or an Investing Agency.
- NCLAT held that the impugned order, to the extent of disposal of CA-1342/2019 is not in conformity with the statutory provisions and the dictum of the Hon'ble Apex Court.

JUGEMENTS ON

SECTION 238

Nitin Jain, Liquidator, PSL Limited.

v. Enforcement Directorate

- In this case, it was argued by relying on Section 238 of IBC that liquidation must be exclusively governed by the provisions of the IBC. Therefore, any orders passed must be held to prevail over proceedings initiated or pending under any other laws for the time being in force. In lieu of fairness, the rights of *bona fide* creditors must not be staked for any misdeed of the management of the corporate debtor.
- The Delhi High Court ruled that the power under the Prevention of Money Laundering Act, 2002 (“PMLA”) to attach properties ceases to exist when an order of liquidation has been delivered under the Insolvency and Bankruptcy Code, 2016 (“IBC”).

Innoventive Industries vs ICICI Bank Ltd

- SC held that any state law cannot override Insolvency and Bankruptcy Code.
- Any Scheme of Corporate Debt Restructuring shall not affect the rights of creditors to move under the Code unless otherwise is stated.

JUGEMENTS ON

SECTION 238A

Sagar Sharma & Anr. Vs. Phoenix Arc Pvt. Ltd.

- Hon'ble Supreme Court held that it clear beyond any doubt that for applications that will be filed under Section 7 of the Code, Article 137 of the Limitation Act will apply.
- It was further held that, the date of coming into force of the IBC Code does not and cannot form a trigger point of limitation for applications filed under the Code.
- Further, The Supreme Court ruled that the limitation period would commence from the date of IBC coming into force.

Gaurav Hargovindbhai Dave vs. ARC India Ltd.

Limitation Period Under IBC:

- The Supreme Court held that Article 62 of the Limitation Act, 1963 is applicable only to suits, and the present application would fall within the residuary Article 137 of the Limitation Act, 1963. It further held that the time period would be calculated from July 21, 2011 i.e. when the right to sue accrued. Since 3 (three) years have elapsed since then in 2014, the section 7 application filed in 2017 was held to be clearly out of time.

B.K Educational Services Pvt Ltd. Vs. Parag Gupta & Associates. (SC)

- **On Point of Limitation Act in I&B Code, 2016**
- The provisions of Limitation Act shall so far as may be, apply to the proceedings or appeals before the Adjudicating Authority.
- The Supreme Court in this case has held that the Limitation Act applies to IBC right from the inception and not from notification of Section 238A.

B. K. Educational Services Pvt. Ltd. Vs. Parag Gupta and Associates

- The introduction of section 238A gave rise to the questions whether the amendment was clarificatory in nature and whether the provisions of the Limitation Act applied to Insolvency applications from the inception.
- The Supreme Court held that 1) the provisions of the IB Code were not meant to resurrect time barred claims 2) the expression 'debt due' as defined in the IB Code referred only to debts that were not time barred on the date the creditor filed the application under the IB Code, 3) the provisions of section 238A were clarificatory and 4) provisions relating to limitation were procedural and for these reasons they would apply retrospectively. The Supreme Court relying on section 433 of the Companies Act, 2013 (which makes the provisions of the Limitation Act applicable to proceedings before the NCLT) also held that the NCLT would have to decide applications made to it under the IB Code in the same manner as it exercises jurisdiction under the Companies Act.

EDElweiss asset reconstruction co. ltd vs birla cotsyn (I) Ltd (NCLT- MUM)

DUE AMOUNT REFLECTED IN BALANCE SHEET- FRESH LIMITATION STARTS FROM THAT PERIOD

- The due amount was of 2012. the corporate debtor argued that it is beyond limitation.
- The financial creditor presented the balance sheet of 2016- 17 which reflected the due amount.
- Therefore, It was held by the Hon'ble members that it is logical to assume that the debts falling due in 2012 and reflecting in the balance sheet of 2016-17, would have reflected in the intervening balance sheet as well. Hence, the ground for limitation argued by the Corporate debtor doesn't survives.
- **THE SAME ISSUE WAS DEALT IN TJSB SAHAKARI BANK vs unimetal castings ltd.**

JUDGEMENTS ON

PERSONAL GUARANTOR

Intec Capital Ltd. Vs. Eastern Embroidery Collections Pvt. Ltd.

NCLAT held that the Respondent 'Eastern Embroidery Collections Private Limited' was the Corporate Guarantor of the Principal Borrower 'Eastern Overseas', and not a Personal Guarantor. Therefore, in terms of Sub-section (7) and (8) of Sec 3 of I&B Code, 2016 is a Corporate Debtor. Further, the applicable Rules would be 'Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016'. Therefore, we are of the considered opinion that the Adjudicating Authority committed an error in holding that action should have been initiated against the Personal Guarantor of the Corporate Debtor under Section 95 of the Code instead of proceeding against the Corporate Debtor. In the circumstances stated above, Appeal deserves to be allowed, and the impugned order passed by the learned Adjudicating Authority is liable to be **set aside**.

Pramod Kumar Mittal Vs. UCO Bank

- Learned Counsel for the Bank submits that Personal Guarantor has not filed any Reply before the Adjudicating Authority(AA) and without filing any Reply before the AA this Appeal was filed by the Personal Guarantor.
- NCLAT held that the Application has not yet been admitted or rejected under Section 100 of Code, 2016. The stage has not yet come therefore it shall be open for the Personal Guarantor to raise all the issues regarding the admissibility of the Application. Further it held that any observations in the AA's Order need not be treated any finding of the default of the Personal Guarantor, Adjudicating Authority shall independently shall consider the question of default while passing order under Section 100 of the IBC.

JUDGEMENT ON

Whether Whatsapp Conversations between parties can
be admitted as evidence?

Satya Sadasiva Basava Prasad Maley Vs. Pattela Projects Private Ltd

- The Supreme Court held that oral evidence cannot suffice as Section 65 B (4) is mandatory requirement of law.
- According to Section 65 B (4) of The Indian Evidence Act, requires a certificate to be produced where a statement in evidence is sought to be given which identifies the electronic record containing the statement and describes the manner in which it is produced, and gives particulars of the device.

JUDGEMENT ON

POWER OF ADJUDICATING AUTHORITY

Kiran Shah, 'Resolution Professional' of KSL and Industries Ltd Vs.

Enforcement Directorate, Kolkata

- The NCLAT held that the 'Adjudicating Authority' (NCLT) is not empowered to deal with the matters falling under the purview of another authority under PMLA.

Vikram Puri (Suspended Director) Vs. Universal Buildwell Pvt. Ltd.

- **Power of Adjudicating Authority**
- **Issue:** Whether Adjudicating Authority has jurisdiction to issue non-bailable warrant against any person or party?
- **Held:** Rule 77 of NCLAT Rules, 2016 which is contained in Part-XIII of the Rules provides for 'Procedure for examination of witnesses, issue of Commissions'. This Rule specifically provides that the provisions of Order XVI of the Code of Civil Procedure, 1908 shall apply in the matter of summoning and enforcing attendance of any person.
- Further, The provision of Rule 77 of the NCLAT Rules, 2016 read with Order XVI Rule 10 of Civil Procedure Code fully empowers the Adjudicating Authority to issue a Non-Bailable Warrant for enforcing attendance of a person. The power exercised by the Adjudicating Authority in issuing a Non-Bailable Warrant to the Appellants is thus well within jurisdiction of the Adjudicating Authority and the submission of the Counsel for the Appellants that Adjudicating Authority is not clothed with any power to issue Non-Bailable Warrant has to be rejected.

JUDGEMENT ON

FORM 3 & 4

Neeraj Jain Director of M/s Flipkart India Private Limited Vs. Cloudwalker Streaming Technologies Private Limited

- The NCLAT made clear that the copy of the invoice is not mandatory if the demand notice is issued in Form 3 of the Application to Adjudicating Authority Rules 2016 provided the documents to prove the existence of operational debt and the amount in default is attached with the application.

a'XYKno Capital Services Private Limited vs. RATTAN INDIA POWER LIMITED

- The NCLT observed that, “ The CD in its written submission has stated that the alleged email dated 06.12.2016 filed by the OC in its rejoinder has been categorically denied to have been issued by the CD on which the affidavit under Section 65B of the Indian Evidence Act has been placed on record, payment of TDS by the CD does not amount to acknowledgement of Debt.