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INSOLVENCY & RESTRUCTURING

Monthly update | April 2020

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CONTENT

COVID LOCKDOWN AND IBC PROCEEDINGS

10 Key Considerations

Covid-19 has retarded the momentum of wheels of the Indian economy and the Corporates.

The Q&A chapter addresses many IBC related issues which have arisen because of the unprecedented outbreak of Covid-19.

What is the implication of the present lockdown) in the wake of Covid-19 outbreak on the timelines prescribed in respect of CIRP under the Code?

The IBBI has vide notification dated March 29, 2020 amended the CIRP Regulations by insertion of regulation 40C. Pursuant to regulation 40C, the lock down period shall be excluded for the purpose of computation of the time frame for completion of the various activities forming a part of the CIRP. Regulation 40A provides a comprehensive list of the activities required to be undertaken to complete the CIRP along with timelines.

What is the implication of the lockdown on the time limit prescribed for completion of CIRP under Section 12 of the Code?

Section 12 of the Code provides that CIRP is to be completed within 180 days with an outer limit of 330 days (inclusive of litigation). The NCLAT vide its order dated March 30, 2020, extended the time limit for CIRP by excluding the period of lockdown ordered by the CG and the State Governments, including the period as may be extended either in the whole or part of the country, from the CIRP period, for matters where the CIRP has been initiated and is pending before any bench of the NCLT or is pending in appeal before the NCLAT. Thus, the period of lockdown shall not form a part of the period of 180 days contemplated for completion of CIRP. Please note that the extension is applicable only in cases where the CIRP has already been initiated and the timelines provided under the Code in all other cases remains sacrosanct. Further, the NCLAT has also ordered that all interim orders and stay orders passed by NCLAT under the Code shall continue until the next date of hearing.

What is the implication of the lockdown on limitation prescribed for filing of an application under the Code?

The Supreme Court (**SC**) vide its order dated March 23, 2020, extended the period of limitation until further orders for filing of petitions/applications/suits/appeals/all other proceedings, irrespective of the limitation prescribed under the general law or special laws, whether condonable or not, with effect from March 15, 2020. SC exercised its power under article 142 read with article 141 of the Constitution and declared that the order is a binding within the meaning of article 141 on all courts/tribunals and authorities. Hence, the limitation period stands extended with effect from March 15, 2020. The Registrar, NCLT, Delhi has also issued a notice dated March 24, 2020 clarifying that the order of the SC will be binding on all the NCLTs.

What is the implication of the lockdown on the implementation of a resolution plan which has already been approved by the adjudicating authority (AA)? Has any extension been granted in so far as timelines for implementation of an approved plan is concerned?

The Code mandates the resolution plan to provide for an implementation schedule which inter alia covers timelines for various payment obligations. Regulation 40C extends the timeline for any activity that could not be completed due to the lockdown, in relation to a CIRP subject to the overall time provided under the Code. However, regulation 40C does not extend the timeline for any actions to be taken upon the completion of the CIRP. Once a plan is approved, the CIRP comes to an end. The actions contemplated above would arise only once the CIRP is completed and, therefore, the benefit of regulation 40C shall not be available in so far as timelines for implementation of an approved plan is concerned. The resolution applicant would therefore be required to adhere to the timelines contemplated in the plan for the various actions contemplated therein. The successful resolution applicant may be required to approach the NCLT for granting relief against strict adherence to the timelines contemplated in the plan.

Since there is no extension granted to the timeline contemplated for implementation of an approved plan, can the resolution applicant invoke Force Majeure? Further can a resolution applicant back out of a plan which has been approved or is pending approval by the CoC or is pending approval of the AA, in view of Covid-19?

Under the Indian laws, Force Majeure cannot be implied in a contract. Therefore, whether or not this relief will be available, will depend on whether the plan approved by the AA contains a specific provision on Force Majeure and also on the scope of the Force Majeure clause. A resolution applicant may be able to invoke rights of suspension or termination under Force Majeure (subject to the force majeure clause allowing such suspension/termination), if the clause specifies disease, epidemics, pandemics, quarantines or government intervention/declaration as force majeure events. In addition, presence of terminology such as 'extraordinary circumstances beyond control of the applicant' or similar phrasing in the plan may also be tested to trigger the clause for outbreak of Covid-19. In several landmark judgements, including in *Satyabrata Ghose v. Mugneeram Bangur and Co*. and *Energy Watchdog v. CERC*, SC has applied the following test to determine validity of Force Majeure events:

- Whether the event qualifies as force majeure under the contract?
- Whether the risk of non-performance was foreseeable and able to be mitigated?
- Whether performance is truly impossible?

In the absence of a specific provision in the plan, the availability of the relief of Force Majeure would depend on the ability of the resolution applicant to satisfy the test laid down under Section 56 of the Indian Contract Act, 1872 i.e. if the resolution applicant is able to factually demonstrate before a court that the purpose and underlying principles of the plan have been eroded/frustrated and the performance under the plan has become impossible. The essential element for a claim of frustration is impossibility of performance of its obligations and the party claiming frustration carries the burden of proof. In this context, it is important to remember that performance of the contract (in this context may be read as plan) becoming onerous or change in circumstances do not lead to frustration of the obligations in terms of the plan (Alopi Parshad and Sons Ltd. v. Union of India) – it will have to be proved on facts that the frustrating event has made implementation of the plan impossible. Similarly, the ability of the resolution applicant to back out from a plan already placed for approval before the CoC/approved by the CoC or pending approval of the AA would depend on the above-mentioned factors. Further, the possibility of invocation of the bid bond guarantee in the absence of a Force Majeure provision in the plan cannot be ruled out.

Resolution plans are usually unconditional and irrevocable and generally do not contain a Force Majeure clause. In our view, therefore, it would be important to seek an extension of time for implementation of the plan from the NCLT and/or the CoC, as the case may be. In view of the nature of the pandemic, the courts should be lenient in matters relating to extension of time or suspension of performance during the lock down period. However, backing out of an approved plan in the absence of a specific provision of force majeure which clearly absolves the resolution applicant from performance, may be difficult to achieve.

Would the CoC be entitled to invoke the performance bank guarantee in view of non-implementation of the plan during the lockdown period?

This will depend on whether there is a Force Majeure clause in the plan which clearly covers the pandemic. In the absence of such provision, the CoC would, unless restrained by an order of a court of law, be legally entitled to invoke the performance bank guarantee. It is therefore important to enter into negotiations with the CoC for extension of time and/or seek directions from the AA for extension of timelines. Further, it may be advisable to apply to the AA for an order restraining invocation of the performance bank guarantee. The NCLT Principal Bench, New Delhi, Camp at Chennai is hearing urgent matters and an application of this nature should qualify as an urgent matter. In this context it may be stated that courts are usually reluctant to interfere in matters relating to invocation of the performance bank guarantee unless it can be demonstrated that such invocation is fraudulent or would result in irretrievable harm or injustice. In view of the ongoing pandemic, the courts are likely to take a view that invocation of the performance bank guarantee would cause irretrievable harm or injustice. In a situation where the performance bank guarantee has already been invoked, the applicant may approach the AA seeking relief against such invocation. The tribunal should be lenient in granting relief against such invocation in view of the pandemic.

What is the implication of COVID-19 on the threshold requirement for initiating CIRP or liquidation of corporate persons?

In order to prevent triggering of CIRP against the MSME sector, the ministry of corporate affairs has issued a notification dated March 24, 2020 whereby the threshold of default under Section 4 of the Code has been increased to INR 1 crore from the existing threshold of INR 1 lakh.

What are the extensions in timelines that have been provided under the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations)?

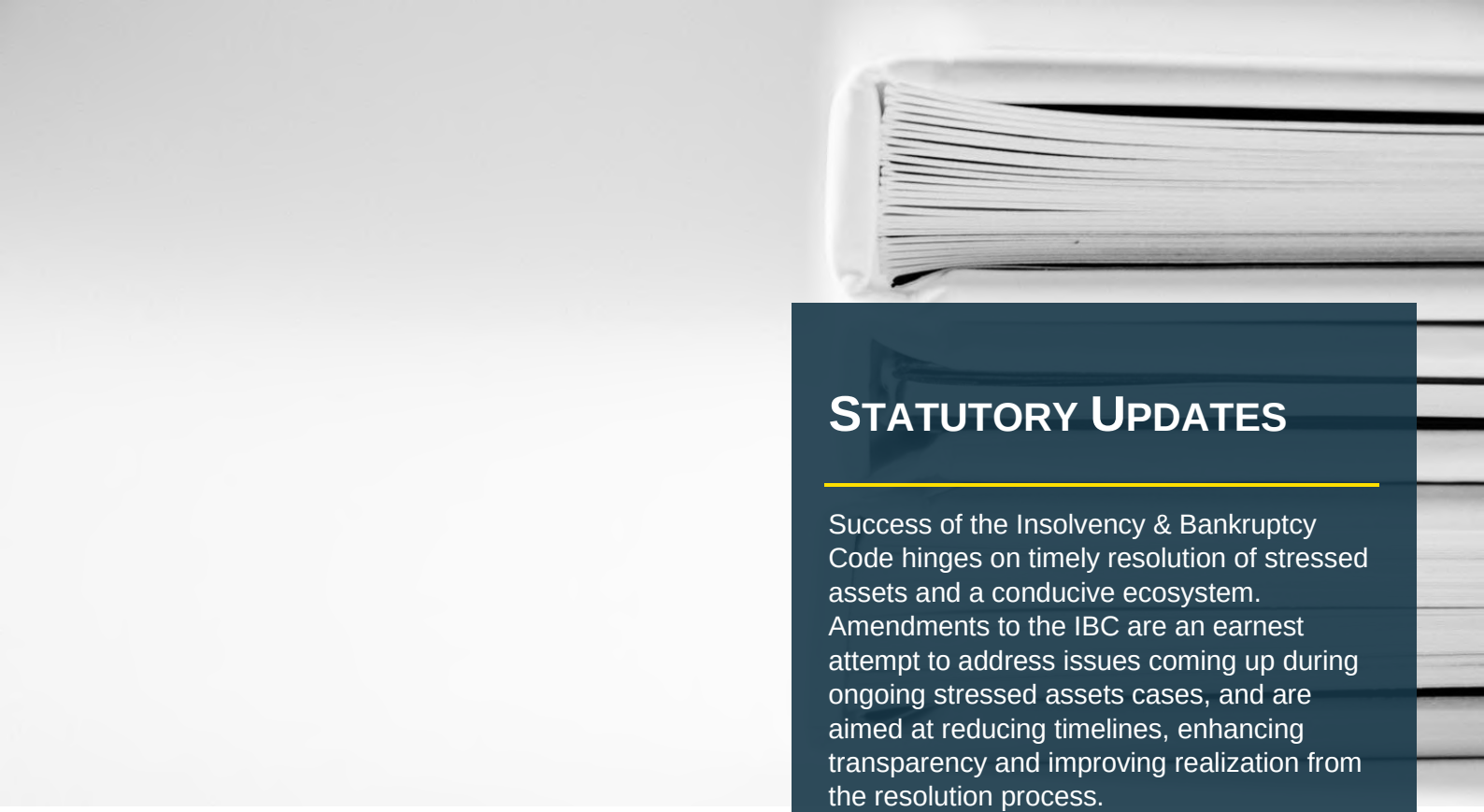
The IBBI has pursuant to an amendment dated March 28, 2020 to the IP Regulations provided the following reliefs under the IP Regulations: (a) For the financial year 2019-2020, the resolution professional and/or insolvency professional entity (IPE) is allowed pay his/its annual fee for maintaining his/its registration with the IBBI on or before June 20, 2020 instead of April 30, 2020; and (b) If an individual joins or ceases to be a director or partner of an IPE during the period between March 28, 2020 to December 31, 2020, then IPE can intimate IBBI within 30 days instead of 7 days.

Are urgent matters being heard by the AA? Has any procedure been prescribed for hearing urgent matters?

The NCLT, Delhi on March 22, 2020 issued a notice to the effect that in case of unavoidable urgent matters, on application by the aggrieved party, through email to the registry NCLT Chennai, after service of notice to the other side, the Hon'ble Acting President sitting singly at Chennai will examine and pass necessary orders on Wednesday and Friday. Parties/counsels will not be provided an opportunity to make oral submissions. Application shall be verified by the respective counsel through affidavit by mentioning their bar enrolment number and the above process should not be abused. The application/communication shall be sent to the email id of Registrar, NCLT Chennai from the email id of respective counsel. Hearings are being conducted through video conference and issues being decided forthwith. On April 7, 2020, the NCLT Delhi has issued a further notice directing parties to file joint memo of written submissions to avoid delays, avoid filing reply and rejoinder and memo and to arrive at decisions quickly. However, in the event the situation demands grant of ad-interim relief by NCLT even before filing of the memo, non-filing of the memo will not become a hindrance to NCLT in granting such relief.

Have any guidelines been issued on what constitutes urgent matters?

The NCLT has not issued any guidelines on what constitutes urgent matters. However, it has in its notice dated March 22, 2020 stated that in so far as matters under the Code is concerned, extension of time, approval of resolution plan and liquidation will not be construed as urgent matters. These matters will be taken up as soon as regular benches start functioning, until such time such applications shall not be filed



STATUTORY UPDATES

Success of the Insolvency & Bankruptcy Code hinges on timely resolution of stressed assets and a conducive ecosystem. Amendments to the IBC are an earnest attempt to address issues coming up during ongoing stressed assets cases, and are aimed at reducing timelines, enhancing transparency and improving realization from the resolution process.

INSOLVENCY AND BANKRUPTCY (AMENDMENT) ACT, 2020

- On March 13, 2020, the Insolvency and Bankruptcy Code (Amendment) Bill, 2020, which was passed by both the houses of the Parliament, received the President's assent to become a law in the form of the Insolvency and Bankruptcy Code (Amendment) Act, 2020 (**Amendment Act**).
- Some of the salient features of the Amendment Act are as under:
  - By way of the Amendment Act, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 has been repealed. The Amendment Act also provides that it shall be deemed to have come in force on the December 28, 2019.
  - The proviso to Section 5(12) of the IBC has been deleted thereby making it clear that even in cases where the IRP is not appointed by the NCLT in the order for admission of the application for initiation of insolvency proceedings, the insolvency commencement date would be the date of admission of an application for initiating insolvency proceedings by the NCLT under Sections 7, 9 or 10.
  - Section 7 of the IBC has been amended and a minimum threshold for initiating CIRP for a certain category of financial creditors has been put in place. Consequently, the financial creditors who are allottees under a real estate project may initiate CIRP against the corporate debtor by filing a joint application comprising of not less than 100 (one hundred) such allottees under the same real estate project or not less than 10% of the total number of such allottees under the same real estate project, whichever is less. Further, the financial creditors falling in the category of creditors referred to in Section 21(6A) (a) and (b) may file a joint application for initiating CIRP against the corporate debtor comprising of not less than one hundred of such creditors in the same class or not less than 10% of the total number of such creditors in the same class, whichever is less.
  - Explanation II has been inserted to Section 11 of the IBC, consequent to which, a corporate debtor is now permitted to initiate CIRP proceedings against other corporate debtors.
  - An explanation has been inserted to Section 14 of the IBC, consequent to which, a license, permit, registration, quota, concession, clearances or a similar grant or right etc. given by the Central Government, State Government, local authority, sectoral regulator or any other authority shall not be suspended or terminated on the grounds of insolvency, subject to there being no default in payment of current dues arising for the use or continuation of the license, permit, etc. during the moratorium period.
  - Sub-section (2A) has been inserted to Section 14 of the IBC, consequent to which, where the IRP/RP considers the supply of goods / services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of

such goods or services shall not be terminated or interrupted during moratorium, except where the corporate debtor has not paid dues arising from supply during moratorium.

- Section 16(1) of the IBC has been amended, consequent to which the NCLT has to appoint an IRP on the insolvency commencement date itself i.e. the date on which the application for initiation of CIRP proceedings is admitted. Earlier, the NCLT had to appoint an IRP within 14 days from insolvency commencement date.
- The proviso to Section 23(1) of the IBC has been amended to the effect that it clarifies that the RP shall continue to manage the operations of the corporate debtor after the expiry of the CIRP period, until an order approving the resolution plan or appointing a liquidator is passed by the NCLT
- Section 32A has been inserted which provides that the corporate debtor will not be liable for an offence committed prior to the commencement of CIRP from the date the resolution plan is approved by the NCLT. However, the approved resolution plan must result in change in the management or control of the corporate debtor as prescribed in Section 32A. The said Section further discharges the corporate debtor from any prosecution that has been instituted against it during the CIRP on the approval of the resolution plan, however, the officer who is default in case of a company and a designated partner in case of an LLP shall continue to be liable for any such offence committed by the corporate debtor. In respect to such a scenario, this Section also safeguards the property of the corporate debtor from actions such as attachment, seizure, retention or confiscation of such property.

- We are of the opinion that the instant Amendment in the IBC attempts to cater to the interests of all stakeholders and fine tune certain aspects of the insolvency resolution process, so as to make it more efficient. It provides comfort to corporate debtors by introducing additional thresholds for initiation of insolvency proceedings by certain categories of financial creditors. It clarifies the date of appointment of the IRP and further clarifies the term and tenure of the RP. Further, it ensures that the corporate debtor functions as a going concern during the CIRP by ensuring that the licenses, permits, concessions, clearances etc. granted to the corporate debtor are terminated or suspended during the moratorium period. The Amendment also ensures the supply of goods / services deemed essential by the RP. Moreover, the instant Amendment attempts to provide a clean slate to the successful resolution applicant by providing much needed protection from criminal proceedings arising out offences committed by previous management.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) (SECOND AMENDMENT) REGULATIONS, 2020

- On March 25, 2020, the IBBI notified the IBBI (CIRP) Amendment Regulations, 2020 and consequently, amended the IBBI (CIRP) Regulations, 2016 pertaining to Form B under regulation 40.
- The salient features of the said Amendment are as under:
  - Under the amended Regulations, an operational creditor can file his claim under the said form with the Interim Resolution Professional (**IRP**) and the filing of such form shall be accompanied by a fee of INR 500 on and from October 30, 2020 and INR 500 for each month of delay post October 1, 2020.
- This is a significant amendment since it fast tracks filing of claims by the operational creditors other than workmen or employees with the IRP who would then be in a position to make provision for payment of such amounts from the resolution plan as mandated by IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2019 and also place the same before interested companies approaching the IRP with resolution plans for the Corporate Debtor.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) (THIRD AMENDMENT) REGULATIONS, 2020

- On March 29, 2020, the IBBI notified the IBBI (CIRP) Amendment Regulations, 2020 and consequently, amended the IBBI (CIRP) Regulations, 2016 pertaining to timelines for submission of claims to be 14 days and the period of lockdown imposed by the Central government not to be counted. With the lockdown being extended till May 3, 2020, this period will continue to be excluded from calculation of timeline for submitting claims.
- In our opinion, this is a welcome step which would ensure that a lot of such corporate debtors would not go into liquidation merely because of inaction on part of the stakeholders on account of the ongoing lockdown, which is genuinely beyond the control of the stakeholders.

MINISTRY OF CORPORATE AFFAIRS NOTIFICATION DATED MARCH 13, 2020

- The Ministry of Corporate Affairs pursuant to the power given to it under Section 410 of the Companies Act, 2013 has constituted National Company Law Appellate Tribunal (NCLAT), Chennai Bench at Chennai, which will take up appeals against the orders of benches of National Company Law Tribunal (NCLT) having jurisdiction of Karnataka, Tamil Nadu, Kerala, Andhra Pradesh, Telangana, Lakshadweep and Puducherry.
- Consequently, the Bench of the NCLAT at New Delhi will be known as the Principal Bench of the NCLAT which will continue to hear appeals against orders other than those in the jurisdiction of Chennai Bench of the NCLAT.
- This is step which will ease the pressure on NCLAT, New Delhi and would also reduce the travel conundrums for many advocates and parties.
- While the bench has been set up, it is likely to take some time before matters start being taken up there.

MINISTRY OF CORPORATE AFFAIRS NOTIFICATION DATED MARCH 24, 2020

- Vide Notification dated March 24, 2020, the Central Government has increased the minimum amount of default for the purpose of Section 4 of the IBC (which specifies the minimum amount of default for matters related to insolvency and liquidation) from INR 1 lakh to INR 1 crore.
- As a result of the above, the minimum threshold for filing applications under Section 7,9 or 10 of the IBC has been increased from INR 1 lakh to INR 1 crore.
- In our opinion, this amendment would provide some comfort to the corporate debtors who are reeling from the impact of Covid-19 on business operations and would give them an opportunity to come out of the slump and get back on track. This would be in the best interest of the corporate debtors as well as the economy at large.

DEBT RAISED FROM THE SPECIAL WINDOW FOR AFFORDABLE AND MIDDLE-INCOME HOUSING INVESTMENT FUND TO BE TREATED AS INTERIM FINANCE

- By way of Notification dated March 18, 2020 and pursuant to the powers conferred under Section 5(15) of the IBC, the Central Government notified that a debt raised from the Special Window for Affordable and Middle-Income Housing Investment Fund I would be included in the ambit of 'interim finance'.
- The Notification further clarifies that the expression "Special Window for Affordable and Middle-Income Housing Investment Fund I" means the fund sponsored by the Central Government for providing priority debt financing for stalled housing projects, as an alternate investment fund and registered with the Securities and Exchange Board of India to provide financing for the completion of stalled housing projects that are in the affordable and middle-income housing sector.
- By way of this Notification, the Central Government has widened the scope of 'interim finance' which may be raised by the RP during the CIRP.

SEPARATE GSTIN NUMBER TO BE GENERATED FOR COMPANIES IN CIRP OR UNDERGOING CIRP

- Pursuant to the notification dated March 21, 2020, and in exercise of the powers conferred by Section 148 of the Central Goods and Services Tax Act, 2017, the Government notified that the corporate debtors undergoing the CIRP proceedings and being managed by an IRP or RP shall follow the following special procedure, from the date of the appointment of the IRP/RP till the period they undergo the CIRP, as mentioned below:
  - Within 30 days from the date of appointment of IRP / RP, Corporate Debtors will be liable to take a new registration in each of the States or Union territories where the corporate debtor was registered earlier. In case of companies that are already under CIRP, a separate GSTIN number will have to be applied for within 30 days from the date of such notification.
  - After obtaining registration, the corporate debtors would have to file the first return for the intervening period between commencement of insolvency and obtaining GST registration.
  - This amendment brings much needed clarity on the procedure pertaining to GST to be adopted by the IRP/RP of the corporate debtor and would ensure that the corporate debtor complies with the GST requirements and continues to function as a going concern.

RECENT JUDGEMENTS

By interpreting, clarifying and sometimes even modifying the Insolvency & Bankruptcy Code, judgements and orders by courts and other fora have played an important role in the evolution of the Insolvency & Bankruptcy framework in India.

MANOJ K. DAGA V. ISGEC HEAVY ENGINEERING LTD & ORS.

COMPANY APPEAL (AT) (INSOLVENCY) NO. 1113 OF 2019

- In this case, Mr. Manoj K. Daga, a Director of the Corporate Debtor, M/s. Shree Vishnu Power & Energy Pvt. Ltd, preferred an Appeal against the impugned order dated September 27, 2019 passed by the NCLT admitting an Application under Section 9 of the IBC filed by an operational creditor, ISGEC Heavy Engineering Limited and directing for commencement of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.
- It is pertinent to mention that vide an interim order dated October 23, 2019, the NCLAT directed that the Interim Resolution Professional (IRP) would ensure that the Company shall remain a going concern, and all payments via bank cheques shall be made with the prior approval of the IRP.
- However, it came to the knowledge of the IRP that without its prior approval, the Directors of the Corporate Debtor had made significant withdrawals, including cash withdrawals, starting within two days of the interim order dated October 23, 2019. The IRP contended that this action was violative of Sections 14, 17 and 19 of the IBC.
- In response to the aforementioned, the Directors contended that such amounts had been withdrawn for the purpose of running the corporate debtor as a going concern.
- The NCLAT, taking the above into account, held that the Directors had acted in an illegal manner in withdrawing the money from the accounts once the moratorium had been applied. Further, the said acts prima facie disclosed serious contempt, violating mandate of law of IBC. In view of the same, the NCLAT dismissed the Appeal and permitted the IRP to continue with the CIRP proceedings. The NCLAT further permitted the IRP to move the NCLT or any other authorities including Police authorities to pursue the matter with regard to money illegally withdrawn from the accounts of the Corporate Debtor so as to trace the money and get it back in the Company accounts.
- It was further observed that the illegal withdrawals can, inter alia, be treated as criminal misappropriation and criminal breach of trust. In addition to the above, the NCLAT directed for initiation of contempt proceedings against the directors of the Corporate Debtor.

Our viewpoint: This judgment expressly lays down the consequences for violation of moratorium by the directors of the Corporate Debtor and specially for making illegal withdrawals from the accounts of the Corporate Debtor. It is now clear that such withdrawals may be treated as criminal misappropriation and criminal breach of trust. This decision ensures that the protection of the interests of the stakeholders of the Corporate Debtor from the misdeeds of the erstwhile directors.

V. PADMAKUMAR V. STRESSED ASSETS STABILISATION FUND (SASF) & ANR.

COMPANY APPEAL (AT) (INSOLVENCY) NO. 57 OF 2020

- Stressed Assets Stabilisation Fund (**SASF**) filed an Application under Section 7 of the IBC for initiation of CIRP against the Corporate Debtor, M/s Uthara Fashion Knitwear Ltd., which was admitted by the NCLT, Chennai Bench vide order dated November 21, 2019.
- In this case, IDBI granted a term loan to the Corporate Debtor in the year 2000. Thereafter, the Corporate Debtor's account was declared as Non-Performing Asset (**NPA**) on May 29, 2002. Consequently, IDBI approached the Debts Recovery Tribunal (**DRT**) under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (**RDDBFI Act**). The matter was decreed on June 19, 2009 and the Recovery Certificate was issued on August 31, 2009, which was reflected in the Balance Sheet dated March 31, 2012.
- In view of the above, the Appellant argued that the Application under Section 7 of the IBC filed in the year 2019 was time barred. Given conflicting judgments of the NCLAT itself, this case was referred to a larger bench of 5 members.
- In the present Appeal, the primary issues were whether the aforesaid Application filed under Section 7 in the year 2019 was barred by limitation and, whether reflection of debt in a Balance Sheet of the Corporate Debtor prepared pursuant to Section 92 of the Companies Act, 2013 amounts to acknowledgment of debt.
- With regard to the first issue, the NCLAT observed that a suit for recovery of money can be filed only when there is a default of dues. Even if the decree is passed, the date of default cannot be shifted forward to the date of decree or date of payment for execution as a decree can be executed within specified period i.e. 12 years. If it is executable within the period of limitation, one cannot allege that there is a default of decree or payment of dues. Therefore, a Judgment or a decree passed by a Court for recovery of money by Civil Court/ DRT cannot shift forward the date of default for the purpose of computing the period for filing an application under Section 7 of the IBC.
- With regard to the second issue, the NCLAT relied upon its decision in *Sh. G Eswara Rao v. Stressed Assets Stabilisation Fund* and reiterated that the Balance Sheet/Annual Return of the Corporate Debtor cannot be treated to be an acknowledgment in terms of Section 18 of the Limitation Act, 1963.
- In view of the above, the NCLAT held that the Application under Section 7 of the IBC was barred by limitation. It is relevant to note that regarding the question pertaining to Balance Sheets/Annual Returns being treated as acknowledgment, Justice Cheema passed a dissenting opinion holding that as per settled law appearing from the Judgments of the High Court of Delhi and other High Courts, Balance Sheets can be looked into to see if there is acknowledgement of debt. Further, in few cases, even the Supreme Court has looked into Balance Sheets and Books of Account to see if there is Acknowledgement of Liability. Hence, If the amount borrowed is shown in the Balance Sheet, it may amount to Acknowledgement. Justice Cheema further stated that Annual Returns/Audited Balance Sheets, one time settlement proposals, proposals to restructure loans, by whatever names called, cannot be simply ignored as debarred from consideration and in every given matter, it would be a question of applying the facts to the law and vice versa, to see whether or not the specific contents, spell out an acknowledgement.
- In view of the above, Justice Cheema held that the present Appeal should be placed before the regular Bench to consider whether or not the audited Balance Sheets and OTS proposals referred would on facts read with the law, amount to acknowledgements, so as to save limitation.

Our viewpoint: In our opinion, we agree with Justice Cheema's dissent since in various cases, the Supreme Court has reviewed the balance sheets of companies to ascertain if there is an acknowledgment in terms of Section 18 of the Limitation Act. These decisions of the Supreme Court are law of the land and are binding on all Courts. In view of the same, they have to be strictly followed.

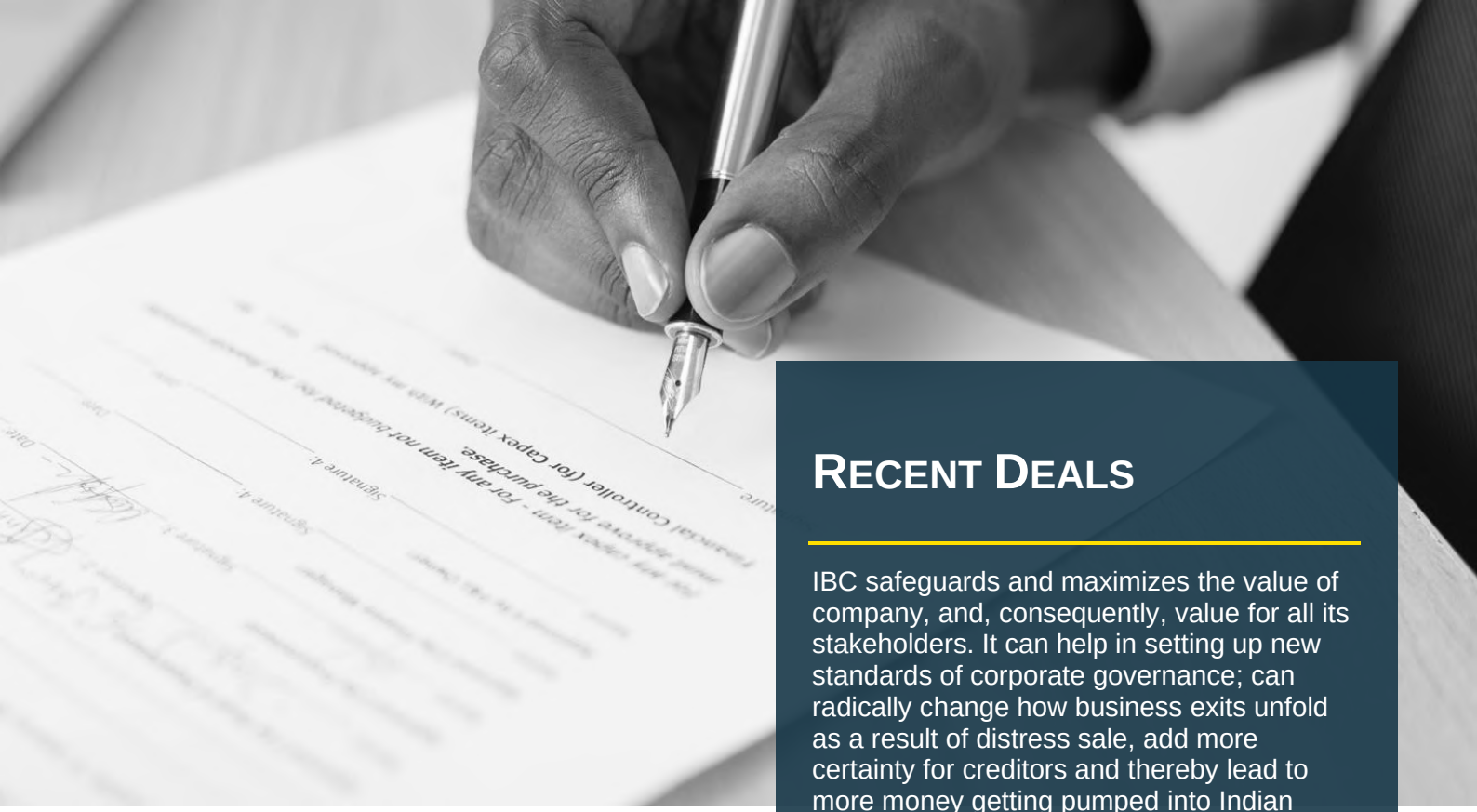
ISHRAT ALI V. M/S COSMOS COOPERATIVE BANK LTD. & ANR.

COMPANY APPEAL (AT) (INSOLVENCY) NO. 1121 OF 2019

- In this case, M/s Cosmos Cooperative Bank Ltd filed an Application under Section 7 of the IBC against Micro Dynamics Pvt Ltd., the NCLT, Mumbai Bench admitted the said Application by way of the impugned order dated September 23, 2019. Consequently, Ishrat Ali, Director & Shareholder of the Corporate Debtor filed the present Appeal challenging the order of NCLT on the ground that the Application of the Financial Creditor was barred by limitation.
- The primary issue was whether action taken under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (**SARFAESI Act**) can be counted for the purpose of exclusion of the period of limitation under Section 14(2) of the Limitation Act, 1963.
- The findings of the NCLAT were:
  - In terms of Section 14(2) of Limitation Act, for excluding the time period utilized in collateral proceedings, the applicant should have been prosecuting another civil proceeding with due diligence, whether in a court of first instance or of appeal or revision against the same party and for the same relief.
  - An action taken by the Financial Creditor under Section 13(2) or Section 13(4) of the SARFAESI Act cannot be termed to be a civil proceeding before a Court of first instance or appeal or revision before an Appellate Court and other forum, and, therefore, cannot be counted for the purpose of exclusion of the period of limitation under Section 14(2) of the Limitation Act, 1963.
  - Application under Section 7 of the IBC is sought for resolution of a Corporate Debtor or liquidation on failure and not for money claim or suit. A person can only benefit from Section 14 (2) of Limitation Act when application under Section 7 is prosecuted with due diligence in a court of first instance, appeal or revision which has no jurisdiction.
  - In present case, the account of the Corporate Debtor was classified as NPA on March 30, 2014 and the demand notice under Section 13(2) of the SARFAESI Act was issued on December 06, 2014, thereafter. Furthermore, the bank had taken possession of the assets on January 16, 2017.
- Taking all the above findings into consideration, the NCLAT held that the Application under Section 7 was barred by limitation and accordingly, set aside the NCLT's order.

Our viewpoint: This judgment relies on the law laid down by the Supreme Court in *Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd*.

It is pertinent to note that vide order dated March 03, 2020, the Supreme Court has issued notice in the review petition filed by Asset Reconstruction Company (India) Ltd in Review Petition (Civil) Diary No. 39025 of 2019 and has also directed the same to be heard in open court. It will be an interesting review to follow, which will eventually settle the law.



RECENT DEALS

IBC safeguards and maximizes the value of company, and, consequently, value for all its stakeholders. It can help in setting up new standards of corporate governance; can radically change how business exits unfold as a result of distress sale, add more certainty for creditors and thereby lead to more money getting pumped into Indian businesses.

RESOLUTION OF ODISHA SLURRY PIPELINE INFRASTRUCTURE LTD BY ARCELORMITTAL INDIA

- The NCLT, Cuttack Bench, vide an order dated March 02, 2020, approved the resolution plan submitted by M/s ArcelorMittal India Pvt Ltd (**ArcelorMittal**) for the acquisition of M/s Odisha Slurry Pipeline Infrastructure Ltd. (**OSPIL**) for a consideration of approximately INR 2,359 crore.
- The CIRP of OSPIL commenced on May 14, 2019 following an order passed by the NCLT, Cuttack Bench. Thereafter, after following the due process, the Resolution Professional of OSPIL shortlisted two resolution plans, one by ArcelorMittal and the other by Thriveni Earthmovers Pvt Ltd (Thriveni Earthmovers), amongst which, the resolution plan submitted by ArcelorMittal was approved by 100% voting in the 8th CoC meeting held on December 06, 2019.
- Thriveni Earthmovers filed an Application before the NCLT against the approval of the resolution plan submitted by ArcelorMittal but they withdrew the same on February 24, 2020. Similar applications against approval were also filed by one SREI Infrastructure Finance Ltd., one of the Financial Creditors of OSPIL. However, the NCLT approved the resolution plan submitted by ArcelorMittal.
- It is relevant to note that OSPIL operates a pipeline which connects iron ore mines in Dabuna to Essar Steel's palletisation plant in Paradip. The said pipeline was commission by Essar Steel and these pellets play a significant role in meeting the raw material needs for Essar Steel's Plant at Hazira in Gujarat.

RE-ORGANISATION OF BANKS

- On March 04, 2020, the Union Cabinet approved the consolidation of 10 public sector banks (**PSBs**) into 4 entities, a move which was initially announced in August, 2019. The specifics of the deal are as under:
  - Oriental Bank of Commerce and United Bank of India shall amalgamate into Punjab National Bank. Vide a Press Release dated March 28, 2020 issued by the RBI, it has been notified that all branches of Oriental Bank of Commerce and United Bank of India shall function as branches of Punjab National Bank from April 01, 2020. Further, the customers, including depositors of Oriental Bank of Commerce and Union Bank of India will be treated as customers of Punjab National Bank with effect from April 01, 2020.
  - Syndicate Bank will amalgamate into Canara Bank. Vide a Press Release dated March 28, 2020 issued by the RBI, it has been notified that all branches of Syndicate Bank will function as branches of Canara Bank from April 01, 2020. Further, the customers, including depositors of Syndicate Bank will be treated as customers of Canara Bank with effect from April 01, 2020.
  - Andhra Bank and Corporation Bank shall amalgamate into Union Bank of India. Vide RBI's Press Release dated March 28, 2020, it has been notified that all branches of Andhra Bank and Corporation Bank will function as branches of Union Bank of India from April 01, 2020. Further, the customers,

including depositors of Andhra Bank and Corporation Bank will be treated as customers of Union Bank of India with effect from April 01, 2020.

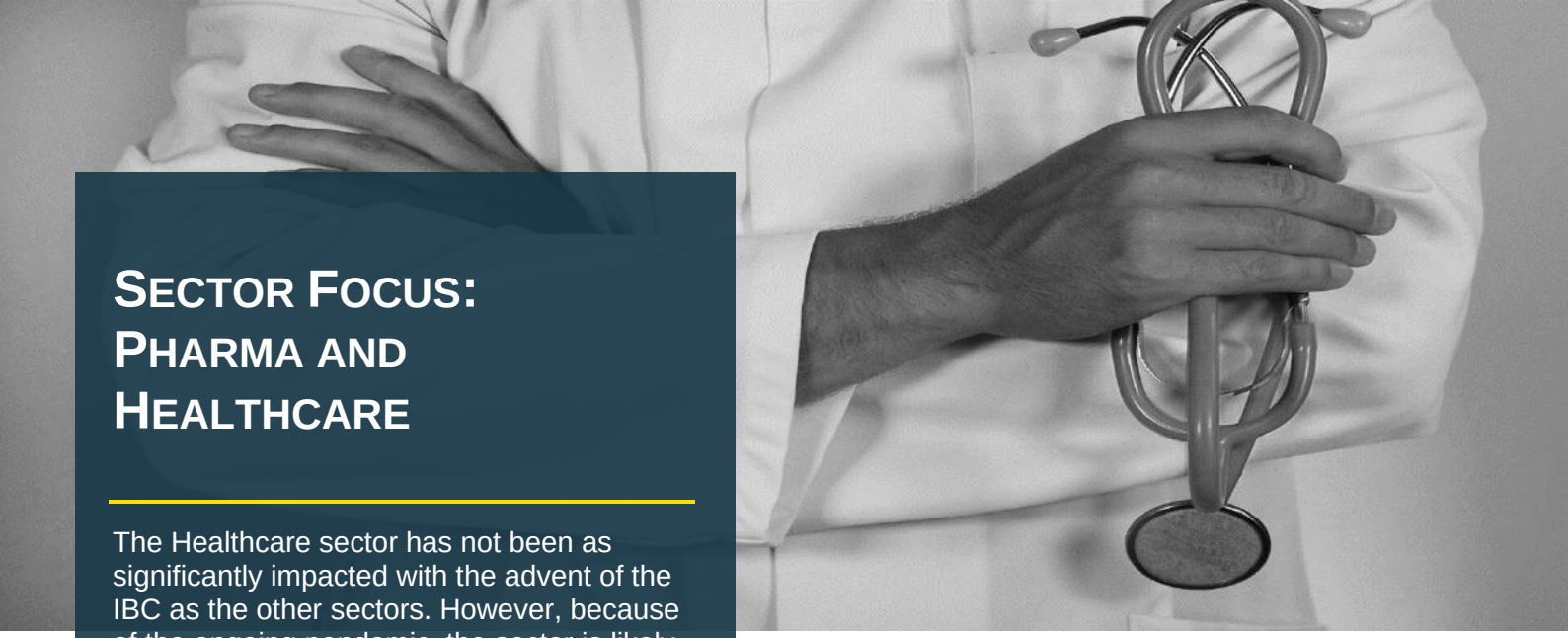
- Allahabad Bank shall be amalgamated into Indian Bank. Vide RBI's Press Release dated March 28, 2020, it has been notified that all branches of Allahabad Bank will operate as branches of Indian Bank from April 01, 2020. Last year, Finance Minister Ms. Nirmala Sitharaman had announced that the merger between Allahabad Bank and Indian Bank would result as the seventh largest bank in India with total business size of approximately INR 8.08 lakh crore.

YES BANK TAKEOVER BY STATE BANK OF INDIA

- On March 05, 2020, the Reserve Bank of India (**RBI**) issued a Press Release and announced its decision to impose a moratorium on Yes Bank Ltd **(Yes Bank**) under Section 45 of the Banking Regulations Act, 1949 by reason of absence of a credible revival plan, and also declared that it would supersede the Board of Directors of Yes Bank for a period of 30 days owing to serious deterioration of the financial position of the bank. Accordingly, the depositor's cash withdrawal was capped to a limit of INR 50,000.
- Thereafter, on March 06, 2020, the RBI released its draft Reconstruction Scheme pertaining to Yes Bank according to which State Bank of India was to be the investor bank.
- Thereafter, on March 13, 2020, the 'Yes Bank Ltd. Reconstruction Scheme, 2020' was notified by the Government of India.
- On March 20, 2020, the RBI issued a Press Release stating that the RBI has appointed Shri R Gandhi (former Deputy Governor, RBI) and Shri Ananth Narayan Gopalakrishnan (Associate Professor, S P Jain Institute of Management and Research) as additional directors on the board of Yes Bank, w.e.f. March 26, 2020 for a period of two years.
- As reported, State Bank of India has invested INR 6050 Crore for approximately 49% stake in Yes Bank. ICICI Bank, HDFC, Axis Bank, Kotak Mahindra Bank, Bandhan Bank, Federal Bank and IDFC First Bank have also invested in Yes Bank.

ACQUISITION OF F.M. HAMMERLE TEXTILES LIMITED BY M/S NEW RAM TRADERS

- The NCLT, Chandigarh Bench, vide order dated March 13, 2020 approved the resolution plan submitted by M/s New Ram Traders in the CIRP of F.M. Hammerle Textiles Ltd, the Corporate Debtor, for a resolution amount of approximately INR 64.33 crore.
- Vide order dated June 27, 2017, the NCLT, Chandigarh Bench admitted the Company Petition filed by the Corporate Debtor under Section 10 of the IBC and ordered for commencement of the CIRP.
- During this long but ultimately successful insolvency resolution process, there were certain minor impediments in the way, such as, an appeal instituted by Andhra Bank, a Corporate Guarantee Holder before the NCLAT, wherein the NCLAT directed for the reconstitution of the COC with Andhra Bank as a member, and State Bank of India's rejection of the resolution plan due to which the Resolution Professional filed an application for the liquidation of the Corporate Debtor. However, vide order dated September 17, 2019 on an application filed by the Resolution Applicant for extension of CIRP period & reconsideration of the resolution plan, the NCLT observed that the CoC shall reconsider the revised and final resolution plan to be submitted by M/s New Ram Traders.
- Thereafter, in the 16th meeting of the CoC held on September 23, 2019, the CoC approved the revised plan with amendments as submitted M/s New Ram Traders by 100% of voting share in favour of the same.



SECTOR FOCUS: PHARMA AND HEALTHCARE

The Healthcare sector has not been as significantly impacted with the advent of the IBC as the other sectors. However, because of the ongoing pandemic, the sector is likely to face significant headwinds.

- The Healthcare sector has not been as significantly impacted with the advent of the IBC as the other sectors. However, because of the ongoing pandemic, the sector is likely to face significant headwinds. In view of the same, it is important to understand the bearing that the IBC has had on this sector in the recent past.

  - Vide order dated December 16, 2019, the NCLT Kochi Bench ordered for liquidation of Raihan Healthcare Pvt Ltd (**Raihan**). The CIRP was initiated against the Corporate Debtor, Raihan vide order dated March 20, 2019 passed by the NCLT, Chennai Bench admitting a Section 7 IBC Petition filed by Union Bank of India. Thereafter, the CIRP was conducted following the due process. However, since the erstwhile successful Resolution Applicant, Sabine Hospitals Healthcare & Research Centre Pvt Ltd withdrew its Resolution Plan by reason of disagreement with the CoC, the NCLT provided the new Applicant, M/s M. J. Infrastructure & Builders Pvt Ltd one week's time to finalise the upfront fees sought by the Resolution Professional basis which the Bench would extend the time for the new applicant to submit a Resolution Plan for the consideration of the CoC. However, the new Resolution Applicant failed to make the finalize their views on the upfront funding within the provided time period and filed an application for grant of 3 weeks' time period for formulation and submission of a Resolution Plan. Considering the same, the NCLT rejected the Applicant's application and ordered for the liquidation of the Corporate Debtor, Raihan.

  - Vide order dated December 30, 2019 and January 08, 2020, the NCLT Chennai Bench approved the takeover of Frontier Lifeline Pvt Ltd by the Resolution Applicant, First Step Ventures Ltd under Section 230 of the Companies Act, 2013. The CIRP against the Corporate Debtor was admitted by the NCLT vide order dated August 02, 2018. However, since no feasible Resolution Plan was received within the statutory time period for completion of CIRP, the Corporate Debtor was ordered to be liquidated. The Resolution Applicant, First Step Ventures Ltd appealed before the NCLAT wherein the Financial Creditors were permitted to consider First Step's Resolution Plan as a scheme under Section 230 of the Companies Act, 2013. Consequently, 97.58% of the secured creditors and 96.10% of the unsecured creditors of Frontier Lifeline Pvt Ltd voted in favour of the plan and the NCLT, Chennai Bench approved the same.

  - On February 28, 2020, the Supreme Court of India set aside NCLAT's order dated November 13, 2019 rejecting the Resolution Plan submitted by Dhanuka Laboratories for the Corporate Debtor, Orchid Pharma Ltd (formerly Orchid Chemicals & Pharmaceuticals Ltd). The CIRP against the Corporate Debtor was initiated vide order dated August 17, 2017 passed by the NCLT, Chennai Bench. Thereafter, in June, 2019 the NCLT approved the Resolution Plan submitted by Dhanuka Laboratories in the CIRP of the Corporate Debtor. However, vide order dated November 13, 2019, the NCLAT set aside the NCLT's order for approval of the Resolution Plan on the basis that the Resolution Plan is offering less than the liquidation value, which is against the provisions of the IBC. The State Bank of India, one of the Financial Creditors, approached the Supreme Court contending that the Appellate Tribunal erred while overriding the commercial wisdom of the CoC. Consequently, the Supreme Court, relying on its judgement in Maharashtra Seamless Limited v. Padmanabhan Venkatesh & Ors wherein it was held that no provision in the IBC or Regulations provide that the bid of any Resolution Applicant has to match liquidation value, set aside the NCLAT's order dated November 13, 2019 and restored the NCLT's order for approval of the Resolution Plan.

- We are of the opinion that in the current situation, this sector needs to be specifically protected. This can be ensured by way of a sector specific moratorium on actions under Sections 7, 9 and 10 of the IBC. The RBI can also direct banks to waive off the interest component on loan payments to be made by such companies for a prolonged time period. In addition to the aforementioned, there can be tax relaxations as well. It is to be appreciated that this sector is currently under utmost stress and these difficult times call for extreme actions. This would not only be in the best interest of the sector but the nation and its public at large.

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