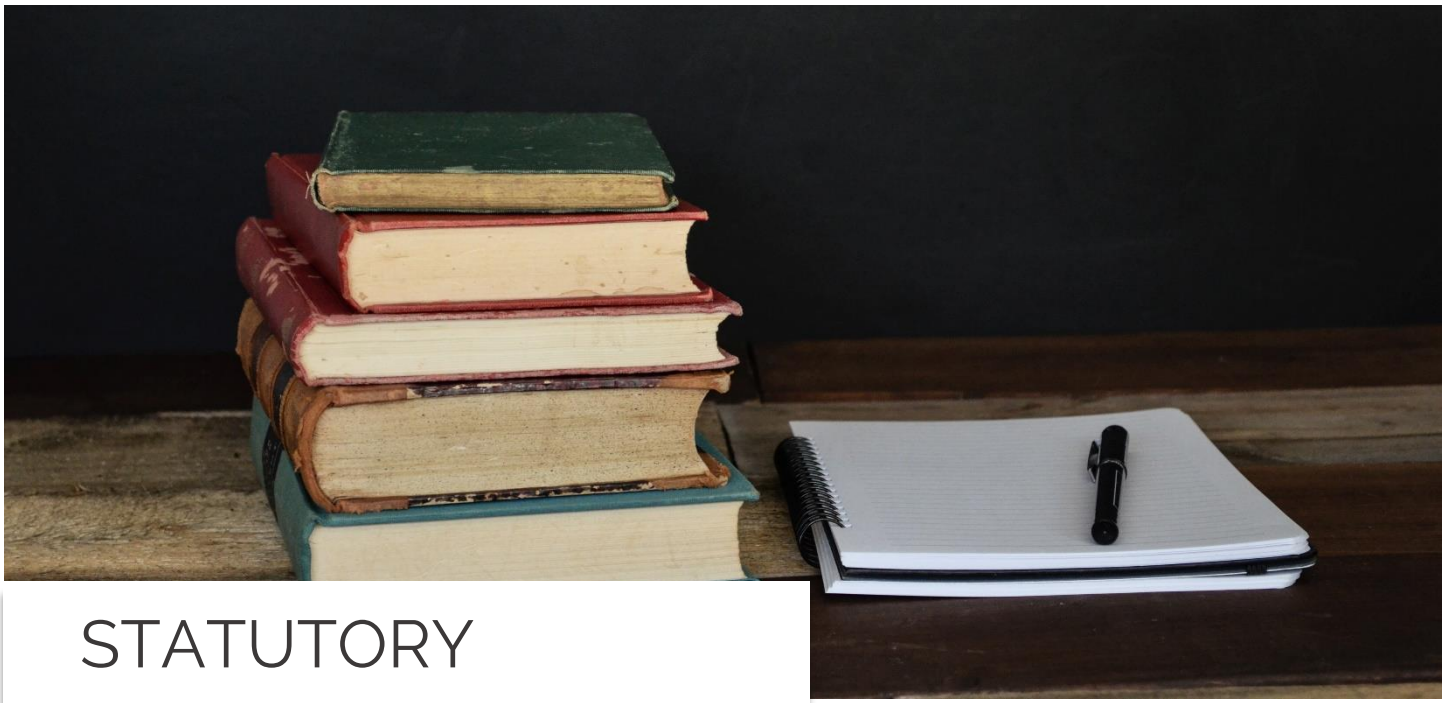
HSA ADVOCATES
HEMANT SAHAI ASSOCIATES

Restructuring & Insolvency

Monthly Newsletter

October 2020

TABLE OF **CONTENTS**



STATUTORY **UPDATES**

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2020

- On June 05, 2020, President of India promulgated Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 (**Ordinance**). This Ordinance now stands converted into an amendment act as on September 23, 2020 with President of India according his consent to Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 passed by Parliament.
- The key features of the Amendment are as follows:
  - It provides for insertion of Section 10A to Insolvency and Bankruptcy Code, 2016 (**IBC**) which lays down that no application for initiation of Corporate Insolvency Resolution Process (**CIRP**) shall be filed for any default arising on or after March 25, 2020 for a period of six months or for a further period of up to one year, as may be notified.
  - The proviso to Section 10A provides that no application for initiation of CIRP can ever be filed for a default occurring during the above-mentioned period. Hence, in effect, such defaults have been excluded from the ambit of 'default' under Section 3(12) of IBC. Consequently, any default arising in or after March 25, 2020 would be exempted from the rigors of the IBC for a period of six months i.e. up to September 25, 2020. This period can be further extended up to one year.
  - In addition to the above, the Amendment provides for insertion of Section 66(3) to IBC which provides for an absolute restraint on Resolution Professionals for filing applications pertaining to fraudulent trading or wrongful trading transactions in respect of such defaults against which initiation of CIRP is suspended as per Section 10A of IBC.
  - Ordinance dated June 05, 2020 stands repealed and anything done or any action taken under the Ordinance would be deemed to have been done or taken under the Amendment itself.

Ministry of Corporate Affairs Notification dated September 24, 2020 for extension of the operation of Section 10A of the IBC

- Section 10A was introduced in IBC with effect from June 05, 2020 and provided for a suspension of operation of Sections 7, 9 and 10 of IBC, for any default arising on or after March 25, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf.
- The above-mentioned period of six months was scheduled to end on September 25, 2020. Accordingly, Ministry of Corporate Affairs (**MCA**) vide a Gazette Notification dated September 24, 2020, extended the six-month long suspension of IBC provisions (Sections 7, 9 and 10) for another three months.
- The period has been extended primarily keeping in mind the resurrection of the economy which still needs time and impetus to get back on track. However, it is to be kept in mind that a mere suspension is just a temporary relief and would be futile if it is not complemented with schemes and policies to get the businesses back on track.

Amendment to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

- Vide Notification dated September 24, 2020, Central Government through Ministry of Corporate Affairs (**MCA**) introduced amendments to Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (**Rules**), thereby providing 'electronic means' and 'by hand' as modes of serving a copy of the application (under Sections 7, 9 and 10 of the IBC) before filing it with the Adjudicating Authority. Additionally, now they also require the Applicant to serve a copy of the application to the Insolvency and Bankruptcy Board of India (**IBBI**) before filing it before the Adjudicating Authority.
- Further, at the end of Form 1, the declaration certificate has been amended to state that the Financial Creditor has paid the requisite fee and served a copy of the application by registered post/by speed post/by hand/by electronic means at the registered office of the Corporate Debtor and to IBBI. It has also created a requirement to attach Annex V comprising proofs of serving a copy of the application to the Corporate Debtor and IBBI. Similar amendments have been made to Forms 2, 5 and 6.
- Additionally, for the written communication by the proposed Interim Resolution Professional in Form 2, a disclosure of the assignments currently being handled is to be made. Lastly, a new addition after Form 5, i.e. Form 5A, has been inserted through this amendment under Section 9(3)(c) of the IBC, which is a list of the amounts credited to the account on behalf of the Corporate Debtor in the last three years, issued by a bank or a financial institution.
- These amendments have streamlined the rules and forms for filing applications before the Adjudicating Authority. The addition of electronic means of service is a welcome change in the present situation and eases the burden and other constraints of service by hand or by post. However, the implication of service of the application to the IBBI is yet to be seen and considering the workload which is predicted to increase significantly after completion of the period of suspension imposed by Section 10A of the IBC, such service may prove to be a futile exercise if the purpose of the same is solely to keep a general oversight over the proceedings under the IBC.

RECENT
JUDGMENTS

SREI Equipment Finance Ltd v. Rajeev Anand & Ors

Judgment dated September 08, 2020 in Civil Appeal No. 9245 of 2019 with Civil Appeal No. 1911 of 2020 and Civil Appeal No. 3112 of 2020

Background facts

- An application to initiate CIRP under Section 7 of the IBC was filed by the Appellant before the NCLT, with respect to a loan provided to the Corporate Debtor which had later been restructured into two loans. A counter affidavit was filed by the Corporate Debtor against this application which stated that though the amount had become due, the application was premature in as much as instalment payments that were agreed upon had not yet matured. This resulted in withdrawal of the said application (dismissed as withdrawn) with liberty to file a fresh application.
- Thereafter, a fresh application was filed wherein the Appellant contended that a sum of INR 18.86 Crore was still outstanding. This was countered by the Corporate Debtor by stating that the outstanding amount had been paid by the Corporate Debtor. However, the Appellant filed a supplementary affidavit explaining that the Corporate Debtor had paid the outstanding amount claimed in the earlier application. This was also admitted by the Corporate Debtor in the counter affidavit filed in response to the earlier application. Consequently, the NCLT admitted the subsequent Section 7 application on the finding that the amount claimed by the Financial Creditor therein was different from the two loans mentioned earlier.
- When an Appeal was subsequently filed with the NCLAT, it set aside the impugned NCLT order stating that the NCLT wrongly relied on documents filed in the earlier Application which was dismissed as withdrawn and opined that the Section 7 application was to be dismissed.
- Thus, Appellant preferred an Appeal before Supreme Court (**SC**) impugning the NCLAT order.

Issue at hand?

- Whether a document filed in the earlier application which was dismissed as withdrawn can be relied upon by the Adjudicating Authority in a fresh application?

Decision of the Court

- SC observed that NCLAT wrongly recorded that (1) there was no further evidence in support of the fact that any amount was outstanding, and (2) a document forming a part of the dismissed (as withdrawn) application could not be relied upon by the Adjudicating Authority.
- SC further observed that the documents evidencing an outstanding loan amount were produced before the NCLT and the admission made in the counter affidavit that was submitted in the first round of litigation can by no means be described as a 'document' in an earlier Petition that could not be relied upon. It was further observed that the counter affidavit filed by the Corporate Debtor in the earlier proceedings contained a clear admission of the debt being outstanding.
- The court set aside NCLAT order and restored NCLT order, thereby ordering that the resolution proceedings of the Corporate Debtor be resumed from the stage they were interrupted.

Our viewpoint

In our understanding, the Supreme Court was correct in its conclusion that a counter-affidavit for the mere reason of it being a part of an application dismissed as withdrawn cannot be disregarded and cannot form basis for dismissing a fresh application. An Affidavit should hold the same credibility even if it is part of records pertaining to a withdrawn application.

Siva Rama Krishna Prasad v. S Rajendran, Official Liquidator of M/s Krishna Industrial Corporation Ltd & Ors

With

Siva Rama Krishna Prasad v. M/s Krishna Industrial Corporation Ltd & Ors

Judgment dated September 04, 2020 in Company Appeal (AT) (Insolvency) No. 751 of 2020 and 752 of 2020

Background facts

- In this matter, the NCLAT clubbed two appeals arising out of an impugned order by NCLT, Chennai Bench, for liquidation of the M/s Krishna Industrial Corporation Ltd & Ors.
- The primary facts are that during the CIRP, the promoters of the Corporate Debtor were allegedly willing to settle the claims of creditors of Corporate Debtor. However, promoters had failed to submit a concrete plan regarding the same. Hence, NCLT allowed for commencement of liquidation of Corporate Debtor on the ground that no Resolution Plan was received during the CIRP period and promoter group did not provide any concrete information about prospective investor. It is pertinent to mention that promoters had filed an application before NCLT seeking abeyance of liquidation of Corporate Debtor on the ground that the debt-asset ratio was less and the promoters were willing to settle the claims of creditors. However, the said application was dismissed and the NCLT passed orders for commencement of liquidation proceedings of the Corporate Debtor. The Adjudicating Authority acknowledged that the Committee of Creditors had unanimously decided to liquidate the Corporate Debtor as no Expression of Interest was received even post extension of time.
- This led to the captioned appeals being filed before NCLAT, New Delhi.

Issue at hand?

- Whether Committee of Creditors is capable of retraction and withdrawal of its decision for approval of a Resolution Plan before the said Resolution Plan is approved by the Adjudicating Authority?

Decision of the Tribunal

- NCLAT addressed both the appeals and upheld the orders passed by Adjudicating Authority. The Appellate Tribunal opined that Adjudicating Authority had no option except ordering for liquidation when there was no Expression of Interest by any prospective Resolution Applicant.
- It was also noted that the contention of Appellant that a Settlement Plan could not be imposed on Committee of Creditors for consideration when it lacked material details about proposed investor.

- The NCLAT took note of the explanation under Section 33(2) inserted vide an amendment to the IBC in 2019, which provides that Committee of Creditors may take the decision to liquidate a Corporate Debtor at any point of time after its constitution and before the confirmation of a Resolution Plan, including at any time before preparation of Information Memorandum.
- In furtherance of the same, NCLAT observed that even after recommending a Resolution Plan for approval, the Committee of Creditors could recall its decision, provided the Resolution Plan had not already been approved by the Adjudicating Authority.
- In view of the above, NCLAT dismissed the Appeals and upheld that the impugned orders with the observation that even in the event of liquidation, the Appellant could still take recourse to Section 230 of the Companies Act, 2013 by submitting a scheme for revival of the Corporate Debtor, subject to eligibility of the applicant.

Our viewpoint

The judgment passed by the NCLAT reemphasizes the relevance of the commercial wisdom of the Committee of Creditors. However, at the same time, it also specifies that the decision to approve the Resolution Plan can only be withdrawn if it has not been approved by the NCLT. It is pertinent to mention that in terms of Section 31(1) of the IBC, once the Resolution Plan is approved by the NCLT, it would be binding on the Corporate Debtor and its employees, members, creditors (including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed), guarantors and other stakeholders involved in the Resolution Plan.

Sagufa Ahmed & Ors v. Upper Assam Plywood Products Pvt Ltd & Ors

Judgment dated September 18, 2020 in Civil Appeal Nos. 3007-3008 of 2020

Background facts

- The Appellants were shareholders of Upper Assam Plywood Products Private Limited and moved an application before the Guwahati Bench of the National Company Law Tribunal for winding up of the company. This application was dismissed by the NCLT on October 25, 2019 and a certified copy of the order was received by the Appellant on December 19, 2019 (after filing an application for the certified copy on November 21, 2019).
- Thereafter, the Appellant filed an Appeal before the NCLAT on July 20, 2020. The Appeal was filed along with an application for condonation of delay.
- The Appellants relied on Section 421(3) of the Companies Act, 2013, which provides that appeal from orders of Tribunal has to be filed within forty-five days and a delay of another forty-five days beyond the first forty-five days can be condoned by the Appellate Tribunal on sufficient cause being provided by the Appellant.
- However, by an order dated August 04, 2020, the NCLAT dismissed the application for condonation of delay on the ground that the Tribunal has no power to condone the delay beyond a period of 45 days. Consequently, the Appeal was also dismissed.
- It is against the dismissal of both the application for condonation of delay as well as the Appeal that the Appellants filed the captioned Civil Appeals before SC.

Issues at hand?

- The contentions raised by the Appellants were twofold namely
  - That the NCLAT erred in computing the period of limitation from the date of the order of the NCLT, contrary to Section 421(3) of the Companies Act, 2013
  - That the NCLAT failed to take note of the lockdown as well as the order passed by the Supreme Court on March 23, 2020 in Suo Motu Writ Petition (Civil) No.3 of 2020, extending the period of limitation for filing any proceeding with effect from March 15, 2020 until further orders

Decision of the Court

- Regarding the first contention, SC observed that Rule 50 of the National Company Law Tribunal Rules, 2016 mandates the Registry of NCLT to send a certified copy of the final order to the parties concerned free of cost. However, Rule 50 also enables the Registry of the NCLT to make available the certified copies with cost as per schedule of fees in all other cases.
- SC further observed that it is true, as contended by the Appellants, that the period of limitation of 45 days prescribed in Section 421(3) of the Companies Act, 2013 would start running only from the date on which a copy of the order of the Tribunal is made available to the person aggrieved.
- The Court acknowledged that if the Appellants had chosen not to file an application for the certified copy of the order, but to await the receipt of a free copy of the order in terms of Rule 50, they could have relied upon Section 421(3) of the Companies Act, 2013 for fixing the date from which limitation would start running. But in this case, they chose to apply for a certified copy after 27 days of the pronouncement of the order.
- It was stated that upon receipt of the order on December 19, 2019, the period of limitation cannot be stopped from running. From December 19, 2019, the date on which the counsel for the Appellants received the copy of the order, the Appellants had a period of 45 days to file an Appeal. This period expired on February 02, 2020. According to the Appellant, this period expired on March 18, 2020, if a further extension of forty-five days is considered. However, the Appellant filed the Appeal only on July 20, 2020. The Court specifically observed that the lock down was imposed only on March 24, 2020 and there was no impediment for the Appellants to file the Appeal on or before March 18, 2020.
- Regarding the second contention, SC observed that Appellant cannot take refuge under the said order since what was extended by the above order of this Court was only 'the period of limitation' and not the period up to which delay can be condoned in exercise of discretion conferred by statute. The Court stated that the order of March 23, 2020 was passed with an intention to benefit only vigilant litigants who were prevented in exercising their rights due to the pandemic and the lockdown restrictions and not the litigants who sleep over their rights.
- Therefore, the Court observed that the Appellants cannot claim the benefit of the order dated March 23, 2020 for enlarging the period up to which delay can be condoned.
- In view of the above, the Supreme Court dismissed the Civil Appeals.

Our viewpoint

The judgment delivered by the Supreme Court is a true representation of the Latin maxim *Vigilantibus Non Dormientibus Jura Subveniunt*, (The laws serve the vigilant, not those who sleep) as mentioned by SC itself. It can also be considered as a clarification of the order dated March 23, 2020 and will bring quietus to many cases which were filed belatedly on account of the lockdown despite expiry of limitation.

Shailesh Chawla & Anr v. Vinod Kumar Mahajan & Ors

Judgment dated September 23, 2020 in Company Appeal (AT) (Insolvency) No. 571 of 2020 & Company Appeal (AT) (Insolvency) No. 572 of 2020

Background facts

- This Appeal in the NCLAT arose from the order of NCLT, Chandigarh Bench, dated March 23, 2020 wherein the NCLT directed to send a copy of the order to the IBBI to consider initiation of prosecution under Section 70 r/w Section 236 of the IBC, after declaring that the directors and any person associated to the management (of a company under CIRP) has a duty to co-operate with the Interim Resolution Professional, as laid down under Section 19 of the IBC.
- Aggrieved against the NCLT order, the Appellants filed an Appeal before the NCLAT stating multiple grounds as to why the Appellants were not liable to be prosecuted for misconduct in the course of CIRP (Section 70). The Appellants submitted that:
  - The Appellants were not in a position to furnish the documents required by the Insolvency Resolution Professional as:
    - The documents/information was in the Corporate Debtor's factory, which had been taken over by Union Bank of India under the SARFAESI Act

    - The soft copies were in a laptop, which was allegedly misplaced, and a FIR had been lodged regarding the same
  - The order passed by NCLT was violative of principles of natural justice and the Independent Directors, 'Sleeping Directors' and Non-Executive Directors who are not involved in the day-to-day affairs of the company cannot be held liable for acts beyond their control and mandate.
  - The NCLT surpassed its jurisdiction by referring the matter to the IBBI.
- The Respondents, on the other hand, submitted inter alia that there is no term as 'Sleeping Directors' in any of the statutes and that the 'Independent Directors' were responsible under Section 19 of the IBC as Section 19 extends even to a person associated with the management of the Corporate Debtor.

Issues at hand?

- Whether the NCLT assumed its jurisdiction wrongly by sending the order to the IBBI for consideration of prosecution for misconduct?
- Whether the 'Independent Directors' on account of not having control over the affairs of the company, are free from liability to cooperate with the Insolvency Resolution Professional under Section 19 of IBC?

Decision of the Tribunal

- The NCLAT observed that the NCLT did not overstep its by jurisdiction by referring the case to IBBI as it was well within its ambit to make a recommendation for considering the aspect of commencement of proceedings and not a recommendation for initiation of criminal proceedings and in this regard, it is for the IBBI to take a final call under Section 236 r/w Section 70 of the IBC.
- Further, the NCLAT also took note of the fact that on the day that the factory of the Appellant was taken into possession by Union Bank of India, there was no machinery or inventory in the premises, and it was empty. Thus, the ground that the information required to be submitted was in the possession of the Bank was declared to be flawed.
- Eventually, the NCLAT opined that upon a mere reading of Section 19 of the IBC, it is clear that the obligation imposed by the provision extends to the personnel and promoters of the Corporate Debtor, wherein the term 'personnel' includes employees, directors, managers, key managerial personnel, designated partners and employees, if any of the Corporate Debtor by means of Section 5(23) of the IBC. Thus, despite being Independent Directors, the Appellants were not free from the said responsibility. It also observed that there is no term or phrase as 'Sleeping Directors' in any statute, neither Companies Act and nor the IBC. Thus, reliance upon the same was rejected.
- It also held that the Appellants failed to render assistance and cooperation to the Interim Resolution Professional as required under Section 19 and no defences were available under the IBC to the Independent Directors, thereby rejecting the Appeals.

Our viewpoint

This is an extremely important judgment in as much as it rightly clarifies the ambit of Section 19 of the IBC, which would be used by Insolvency Resolution Professionals/Resolution Professionals in conducting CIRPs effectively and efficiently.

Bishal Jaiswal v. Asset Reconstruction Company (India) Ltd & Anr

Order dated September 25, 2020 in Company Appeal (AT) (Insolvency) No. 385 of 2020

Background facts

- Corporate Power Limited availed a loan from Consortium Lenders (Infrastructure Finance Co. Ltd., State Bank of Hyderabad, State Bank of Bikaner & Jaipur State Bank of India, State Bank of Patiala and State Bank of Travancore) for setting up a coal-based plant in the State of Jharkhand. The loan comprised of credit facilities aggregating to INR 2175,00,00,000 for the Phase-I project and INR 2387,00,000 for the Phase-II project. However, the Corporate Debtor failed to repay the dues under the facilities granted by the aforesaid Banks.
- Thereafter, State Bank of India issued a loan recall notice dated March 27, 2015 which was replied by the Corporate Debtor on March 28, 2015. The Consortium Lenders issued notices on June 20,

2015 under Section 13(2) of the SARFAESI Act demanding a total amount of INR 5997,80,02,973, but the Corporate Debtor failed to repay the loan amount.

- The above-mentioned Banks assigned the debt in favor of Asset Reconstruction Company (India) Limited (ARCIL). Thereafter, the Financial Creditor filed an application before the NCLT, Kolkata Bench for initiation of CIRP against the Corporate Debtor.
- It is pertinent to mention that the Corporate Debtor admitted and acknowledged its debt in the balance sheets inter alia for the years ending March 31, 2015, March 31, 2016 and March 31, 2017.
- In view of the above, the NCLT, Kolkata Bench passed the order dated February 19, 2020 for admitting CP (IB) No. 23/KB/2019 titled *Asset Reconstruction Company (India) Ltd vs. Corporate Power Limited* and directed for initiation of CIRP of Corporate Power Limited.
- It is against the abovementioned order of admission by the NCLT that the captioned Appeal was filed before the NCLAT. The Appeal was filed mainly on the ground that the NCLT failed to consider that the State Bank of India, the predecessor in interest of the Financial Creditor had declared the accounts of the Corporate Debtor as NPA on February 28, 2014. The application under Section 7 of the IBC was filed in December 2018. Therefore, the application is allegedly barred by Limitation. The Appellant further contended that in terms of judgment passed by the NCLAT in the matter of *V. Padmakumar v. Stressed Assets Stabilization Fund (SASF) & Anr* (**V Padmakumar**), the entries in a balance sheet do not amount to acknowledgement of debt in terms of Section 18 of the Limitation Act, 1963.
- In addition to the above, and amongst other grounds, the Appellant also took the ground that the judgment passed by the Supreme Court in the matter of *Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Pvt. Ltd & Anr* had allegedly settled that Section 18 of the Limitation Act, 1963 is not applicable to insolvency cases.
- ARCIL inter alia contended that the majority opinion of the judgment of 5 member bench of the NCLAT in the matter of V Padmakumar is per incuriam and warrants reconsideration, since it does not consider the numerous judgments by the Supreme Court and the various High Courts across the country holding that entries in a balance sheet amount to acknowledge of debt in terms of Section 18 of the Limitation Act, 1963.

Issue at hand?

- The primary issue at hand before the 3 member bench of the NCLAT was that whether entries in a balance sheet amount to acknowledge of debt in terms of Section 18 of the Limitation Act, 1963 and consequently, whether the majority opinion of the judgment of 5 member bench of the NCLAT in the matter of V. Padmakumar is per incuriam, being contrary to the settled law by the Supreme Court and the various High Courts across the country?

Decision of the Tribunal

- Vide order dated September 25, 2020, after hearing the parties, the 3 member bench of the NCLAT doubted the correctness of the judgment passed by the 5 member bench of the NCLAT in the matter of V. Padmakumar wherein the majority decision was that entries in a balance sheet do not amount to acknowledge of debt in terms of Section 18 of the Limitation Act, 1963. Some of the reasons for the same were:
  - There is consistent view of the Supreme Court and High Court of Allahabad, Calcutta, Delhi, Karnataka, Kerala and Telangana that the entries in the Balance Sheet of the Company be treated as an acknowledgement of debt for the purpose of Section 18 of Limitation Act, 1963.
  - In V. Padamakumar's case, minority view is in the line of settled law. However, in the majority judgment, no reasons have been assigned for disagreement with this view.
  - In support of majority judgment in V. Padamakumar's case, none of the precedent were cited before the 3 member bench of the NCLAT hearing the present Appeal.
  - In V. Padamakumar's case, it is discussed that the balance sheet of the company is prepared pursuant to Section 92 of the Companies Act, 2013 and filing of Balance Sheet/Annual Return being mandatory under Section 92(4) of the Companies Act, 2013, failing of which attracts penal action under Section 92(5) and (6) of the Act. However, in the present case, the NCLAT observed that a balance sheet is not an Annual Return but is a Financial Statement, which is defined under Section 2(40) of the Companies Act, 2013.
  - In V. Padamakumar's case it is held that the Balance Sheet is required to be prepared under the obligation casted under Section 92 of the Companies Act, 2013. Therefore, it cannot amount to an acknowledgement for Section 18 of the Limitation Act, 1963. The acknowledgement should be voluntary and cannot be given under compulsion of law or with the threat of any

penalty/punishment. However, the Calcutta High Court and High Court of Delhi held that merely on the ground that the Balance Sheet of a company is prepared under the compulsion of law or in discharge of statutory duty, it cannot be held that the balance sheet of the company cannot amount to an acknowledgement of liability.

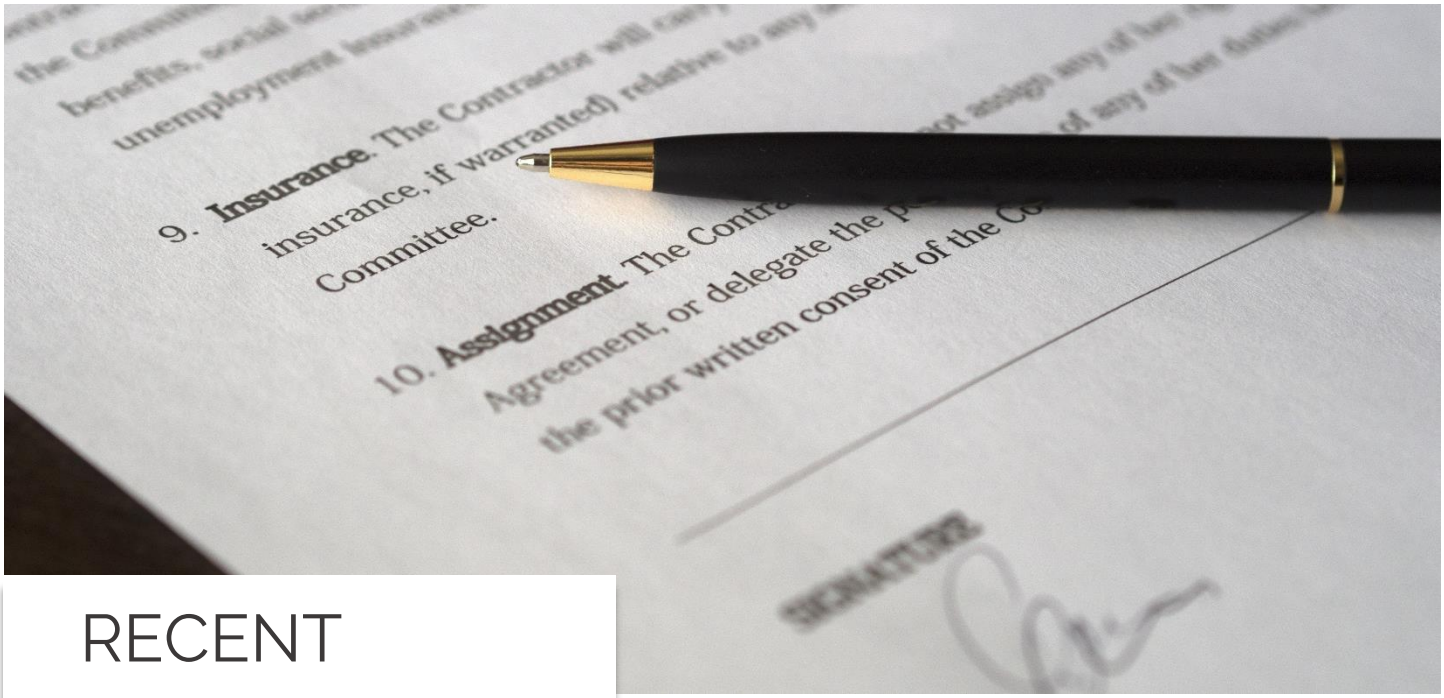
- The Balance Sheet is a material document attached with sanctity that must be submitted to Registrar of Companies and is used for obtaining a business loan or investments. The directors of the company after making judgments and estimates that are reasonable and prudent cannot resile without permission of the Tribunal.
- Section 397 of the Companies Act, 2013 provides that the documents filed for the purpose of Companies Act, and Rules made thereunder by a Company with the Registrar shall be admissible in any proceedings thereunder.

- Accordingly, 3-member bench referred the question of law to the Acting Chairperson of the NCLAT for constitution of a 5-member bench to reconsider the decision in V. Padmakumar.

Our viewpoint

This is an extremely relevant order for Banks/Financial Institutions and asset reconstruction companies since it gives them a hope for extension of limitation periods for exercising their legal remedies in cases of defaults. Moreover, this order brings the law in consonance with the law settled by the Supreme Court and the High Courts across the country.

The reference for constituting a bench of 5 judges for reconsidering the Padmakumar Judgment was made in accordance with the procedure laid down by the SC in Pradeep Chandra Parija & Ors. v. Promod Chandra Patnaik & Ors. The said judgment of the Supreme Court lays down the procedure to be followed where a bench of lesser strength disagrees with a judgment passed by a bench of larger strength. The reference has been made strictly in terms of the said judgment. It remains to be seen whether the bench of 5 judges reconsiders its previous Padmakumar Judgment.



RECENT **DEALS**

SC completes resolution of Khandoba Prasanna Sakhar Karkhana Ltd by Sai Agro (India) Chemicals

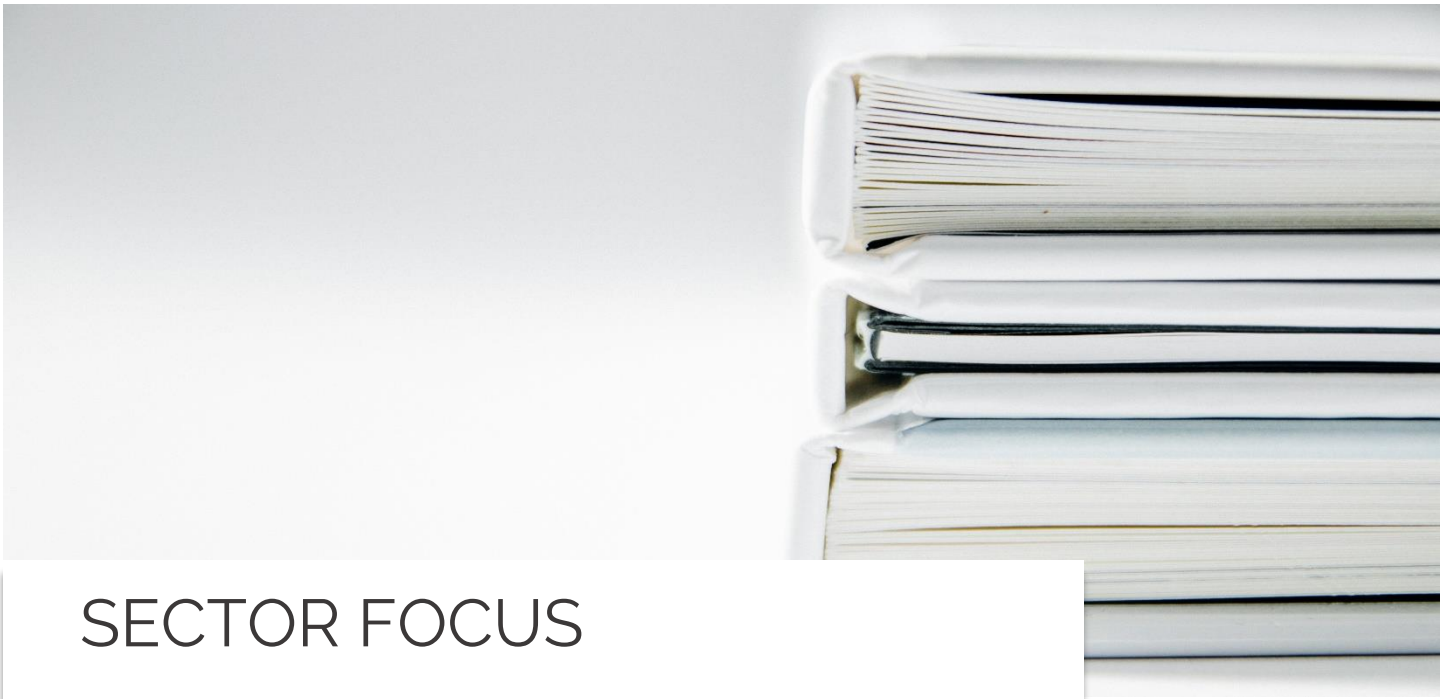
- The Karad Urban Cooperative Bank Limited initiated CIRP proceedings under Section 7 of the IBC against M/s. Khandoba Prasanna Sakhar Karkhana Ltd. The National Company Law Tribunal, Mumbai Bench admitted the said application on January 01, 2018.
- Thereafter, the Committee of Creditors was formed which approved the Resolution Plan submitted by Sai Agro (India) Chemicals in its 8th meeting held in February 2019. Subsequently, the Director/Promoter of the Corporate Debtor also filed an application seeking permission to file a Resolution Plan which was rejected, and the Successful Resolution Applicant's Plan was approved by the Adjudicating Authority.
- The Director/Promoter then filed an Appeal with the National Company Law Appellate Tribunal, which was allowed and the matter was remanded back to the Adjudicating Authority with a direction to send back the Resolution Plan to the Committee of Creditors. The NCLAT identified four grounds for the same:
  - The Resolution Plan suffered from issues of viability and feasibility.
  - The liquidation value mentioned by the Successful Resolution Applicant in its Plan tallied exactly with the value obtained by the Resolution Professional, which indicated that there could have been a breach of confidentiality.
  - That some particular plant and machinery shown as part of the assets of the Corporate Debtor actually belonged to another company and a Bank had taken possession of the same under the SARFAESI Act. However, the Resolution Plan did not take note of the same.
  - That the advertisement issued by the Resolution Professional inviting Expression of Interest was in violation of Regulation 36A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 since the invitation contained therein was for outright sale of the Corporate Debtor as a going concern.
- When the said decision of the NCLAT was challenged before SC, it was observed that the issue pertaining to plant and machinery had already been taken note of by the Resolution Professional, the Committee of Creditors and the Successful Resolution Applicant during the approval of the Plan. Further, the Expression of Interest in question was issued when the unamended regulations were in force and was thus valid. The breach of confidentiality was ruled out by material facts and communication presented to the Court and it was observed that the NCLAT had erred in providing relief which were not connected to the factual matrix.
- Accordingly, vide judgment dated September 04, 2020, the impugned order of the NCLAT was set aside and the order of the NCLT was restored, thereby finalizing the deal.

Resolution of Technovaa Plastic Industries Pvt Ltd by Kankriya Enterprises Pvt Ltd

- An application to initiate CIRP against Technovaa Plastic Industries Pvt Ltd under Section 9 of the IBC was admitted on November 12, 2018 by the National Company Law Tribunal, Ahmedabad Bench. It is notable that the Committee of Creditors formed thereafter comprised of only Bank of Baroda, as the sole Financial Creditor holding 100% voting rights. After seeking an exclusion of 160 days from the total time period considered for concluding the CIRP and an additional extension to submit Expression of Interest, the Committee of Creditors received four Resolution Plans which were below liquidation value and were thus rejected.
- In the ninth and final meeting of the Committee of Creditors, plans by Kankriya Enterprises Pvt Ltd and joint-bidders Pee Cee Pack Industries and Aristo Flexi Pack, were considered. Kankriya Enterprises emerged as the successful Resolution Applicant with 100% votes, providing a consideration of INR 42.90 Crore to the creditors including CIRP costs.
- The Resolution Plan submitted by Kankriya Enterprises Pvt Ltd was approved by NCLT, Ahmedabad Bench vide order dated September 04, 2020.

Resolution of Uttam Value Steels Ltd by New-York based CarVal Investors and Nithia Capital

- On September 09, 2020, NCLAT dismissed the Appeal filed against the approval of the Resolution Plan for Uttam Value Steels Ltd by NCLT, Principal Bench.
- It is pertinent to mention that a consortium comprising of CarVal Investors LLC and Nithia Capital Resources LLP submitted a Resolution Plan for the Corporate Debtor which was approved by the Committee of Creditors and subsequently, NCLT. Under Resolution Plan, Resolution Applicant has proposed a definitive settlement amount of INR 818.19 Crore, contingent payments of INR 260 Crore to Financial Creditors and 5% equity participation has been offered to the Financial Creditors.
- Thereafter, an Appeal was filed before NCLAT by some of the Corporate Debtor's Operational Creditors praying for setting aside of the order approving the Resolution Plan on the grounds that firstly, it lacked a prior approval from the Competition Commission of India which is mandatory and secondly, the Resolution Applicant had misrepresented the existence of a Director who, for the requirements of the Plan, was an industry expert which would assist the Successful Resolution Applicants in running the steel-making business of the Corporate Debtor. Lastly, it had initially been proposed that a performance bank guarantee amounting to INR 250 Crore would be submitted to secure the upfront payment under the Resolution Plan. However, after one year, the Financial Creditors unilaterally diluted the said amount to INR 50 Crore while approving the Plan. It was stated that such dilution had the propensity to harm the interests of all creditors involved.
- The NCLAT observed that the requirement of obtaining approval of Competition Commission of India prior to the approval of such Resolution plan was complied with since the approval had been obtained in June 2019 and approval of the Resolution plan has been made by the Adjudicating Authority in April 2020/May 2020.
- Further, it was observed that the aforementioned industry expert was associated with the Successful Resolution Applicant in a different capacity. In addition to the same, a responsibility was fixed on the Resolution Applicant that the industry expert i.e. Dr. Sittard should continue for next one year or for such extended period till the Corporate Debtor stands on its feet.
- Lastly, regarding the variation of Performance Bank Guarantee, it was observed that same had only occurred in the event of the pandemic after prior approval of Committee of Creditors and in consonance with terms of Request for Resolution Plans. With this justification, NCLAT dismissed the Appeal. By way of same, a consortium comprising of CarVal Investors LLC and Nithia Capital Resources LLP is set to take over Uttam Value Steels Ltd.



SECTOR FOCUS

PAPER & PULP

- The Indian paper and pulp industry accounts for approximately 1.6% of the world's paper and paperboard production. It is the 15th largest in the world and provides employment to approximately 1.3 million people, thereby contributing significantly to the nation's GDP.
- This sector has been significantly impacted by IBC proceedings, owing to the trend of digitalization and growing popularity of virtual learning platforms, has been constituently witnessing a downward trend in its revenues. Various companies in this sector have undergone or are currently, undergoing the insolvency route, as can be seen from the following statistics.

Admitted[1]	Closed[2]	Ongoing
191	76	115

- Ballarpur Industries Ltd, one of the nation's most prominent manufacturer of writing and printing paper, is undergoing CIRP proceedings vide order dated January 17, 2020 passed by the NCLT, Mumbai Bench in an application preferred under Section 7 of the IBC by M/s Finquest Financial Solutions Pvt Ltd. There was a default to the tune of INR 68,10,47,170 on account of default to repay the term loan granted by State Bank of Travancore and subsequently disbursed by State Bank of India post their merger. This debt was later assigned to M/s Finquest Financial Solutions Pvt Ltd, which initiated the CIRP proceedings.
- Sainsons Pulp and Paper Ltd, a manufacturer of MG Kraft Paper (Agro Based) of North India, had preferred an application under Section 10 of IBC for voluntary initiation of CIRP proceedings before the NCLT, Chandigarh Bench. The said application was admitted by the NCLT, Chandigarh Bench vide order dated March 03, 2020. The Corporate Applicant had availed term loans and credit limit to the tune of INR 105.90 Crore from the State Bank of India as per the last restructuring data available. The amount of default as per the Notice dated May 28, 2011 under Section 13(2) of SARFAESI Act was INR 101.69 Crore out of which the Bank recovered INR 17.10 Crore from the sale of assets. In addition to the aforementioned term loan and credit limit, the Corporate Applicant defaulted on an unsecured loan amounting to INR 3,86,20,000/- and operational debt to the tune of approximately INR 4,86,000/-. The enterprise is currently undergoing CIRP proceedings before the NCLT, Chandigarh Bench and recently, an application was preferred by the Resolution Professional praying for exclusion of the lockdown period from the CIRP period, which was allowed by the NCLT, Chandigarh Bench vide order dated September 15, 2020.

[1] As per IBBI Quarterly Newsletter, April-June 2020

[2] Out of Total Closed – 14 have been Appeal/Reviewed, 11 have been withdrew under Section 12A, Resolution was approved for 17 and Liquidation has commenced for 34

- The CIRP proceedings for Windsor Paper Pvt Ltd commenced vide an order dated September 4, 2020 passed by the NCLT, Ahmedabad Bench in an application preferred by an Operational Creditor of the Corporate Debtor under Section 9 of IBC. The application was initiated by the Operational Creditor for an outstanding principal sum on account of professional fees for consultancy services relating to tax, secretarial matters, assistance in statutory audit and legal consultancy
- In the present circumstances with the demand for paper and pulp products dwindling to an all-time low, the Government should introduce special incentives and rehabilitation packages as this sector is a mass employment generator and a major contributor to our economy. This needs to be critically balanced by carefully phasing out usage of paper and pulp so as to simultaneously cater to the environment which is equally important (if not more) to our economy.

CONTRIBUTIONS BY:

Abhirup Dasgupta | **Partner**

Avishek Roy Chowdhury | **Associate**

Pratik Ghose | **Partner**

Ishaan Duggal | **Associate**

HSA
AT A GLANCE

FULL-SERVICE CAPABILITIES

- BANKING & FINANCE
- COMPETITION & ANTITRUST
- CORPORATE & COMMERCIAL
- DEFENCE & AEROSPACE
- DISPUTE RESOLUTION
- ENVIRONMENT, HEALTH & SAFETY
- INVESTIGATIONS
- LABOR & EMPLOYMENT
- PROJECTS, ENERGY & INFRASTRUCTURE
- PROJECT FINANCE
- REAL ESTATE
- REGULATORY & POLICY
- RESTRUCTURING & INSOLVENCY
- TAXATION
- TECHNOLOGY, MEDIA & TELECOMMUNICATIONS

GLOBAL RECOGNITION

STAY CONNECTED

www.hsalegal.com

mail@hsalegal.com

HSA Advocates

PAN INDIA PRESENCE

New Delhi

81/1 Adchini
Sri Aurobindo Marg
New Delhi – 110 017

Phone: (+91) (11) 6638 7000

Email: newdelhi@hsalegal.com

Mumbai

Construction House, 5th Floor
Ballard Estate
Mumbai – 400 001

Phone: (+91) (22) 4340 0400

Email: mumbai@hsalegal.com

Bengaluru

Aswan, Ground Floor, 15/6
Primrose Road
Bengaluru – 560 001

Phone: (+91) (80) 4631 7000

Email: bengaluru@hsalegal.com

Kolkata

No. 14 S/P, Block C,
Chowringhee Mansions
Kolkata – 700 016

Phone: (+91) (33) 4035 0000

Email: kolkata@hsalegal.com