HSA ADVOCATES
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Restructuring & Insolvency

Monthly Newsletter

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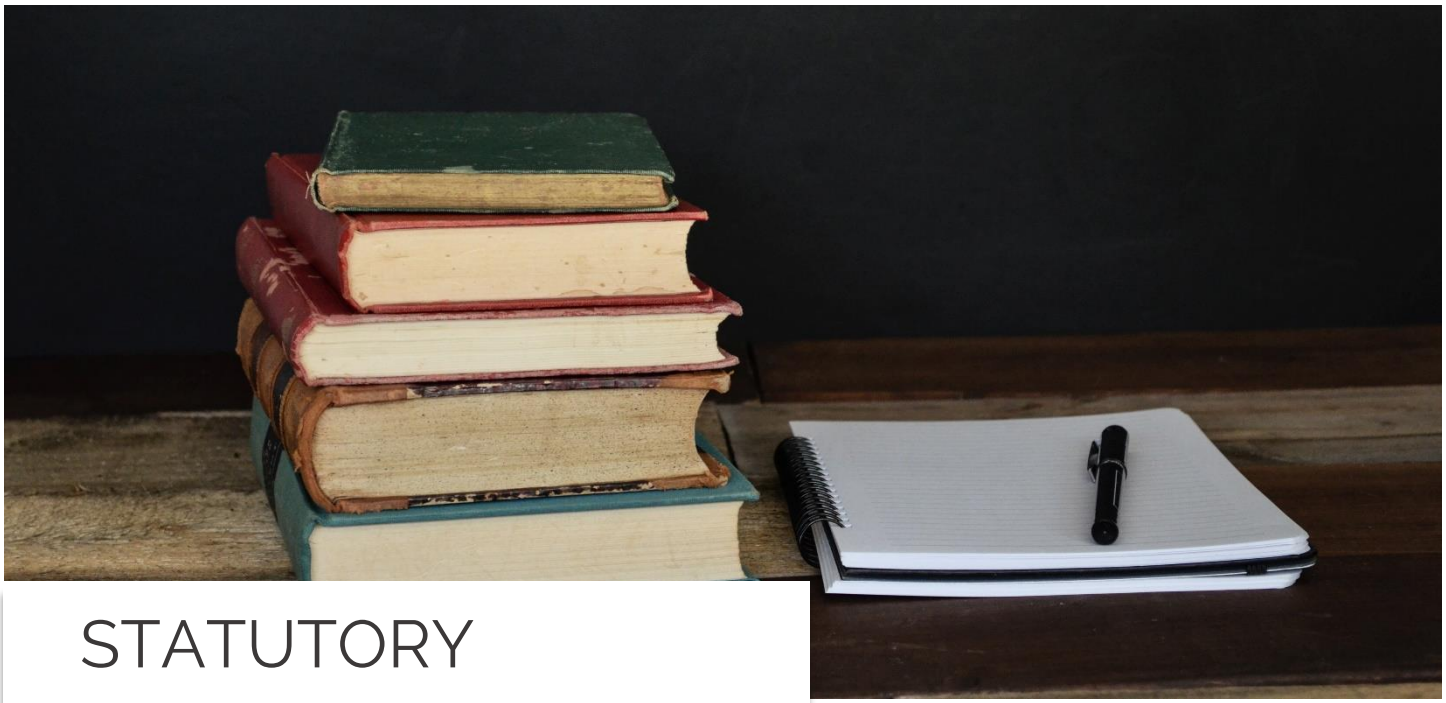


STATUTORY **UPDATES**

SEBI Press Release No. 61/2020 dated December 16, 2020

- In order to recalibrate the Minimum Public Shareholding (**MPS**) requirements for listed companies which are presently going under Corporate Insolvency Resolution Process (**CIRP**), the Board of the Securities and Exchange Board of India (**SEBI**) concluded a meeting on December 16, 2020 wherein certain key decisions were taken to facilitate the shareholding norms for such listed companies which seek to continue to remain listed post the CIRP.
- Presently, during CIRP where the Public Shareholding falls below 10%, such listed companies are required to bring the Public Shareholding to at least 10% within a period of 18 months from the said date and to 25% within 36 months. In this background, the SEBI, by the way of aforementioned press release, brought the following amendments:
  - Post the CIRP, such companies are now required to have a MPS of 5% at the time of their relisting, as against no minimum requirement at present.
  - Further, such companies will now be provided twelve months to achieve Public Shareholding of 10% and a further period of thirty-six months to reach 25% Public Shareholding from the date of admission of shares of these companies for re-trading on exchanges.
  - In furtherance to the above, it has been decided that the lock-in on equity shares allotted to the Resolution Applicant under the Resolution Plan shall not be applicable to achieve the requisite 10 % Public Shareholding requirement within twelve months.
  - Additionally, such companies seeking to continue to be listed on the stock exchange would also be required to make additional disclosures, such as specific details of Resolution Plan, including details of assets post-CIRP, details of securities continuing to be imposed on the companies' assets and other material liabilities imposed on the company. They shall also disclose the proposed steps to be taken by the incoming investor/acquirer for achieving the MPS and quarterly disclosure of the status of achieving the MPS.
- The proposed changes serve as a vote of confidence regarding the standing and stability of the company, to the investors who plan to invest into the shareholding of such company which has essentially arisen from insolvency. The lock-in limitation in our opinion is to assure that the company is in real terms running and not just a devised mechanism backed up by within the house support.

Ministry of Corporate Affairs Notification dated December 22, 2020 for extension of the operation of Section 10A of the IBC

- On June 05, 2020, President of India promulgated Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 (**Ordinance**), wherein, Section 10A was inserted to the Insolvency and Bankruptcy Code, 2016 (**IBC**). The Section lays down that no Application for initiation of 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, which was due to expire on September 25, 2020 was further extended by the government for 3 months rounding up to December 25, 2020 via notification dated September 24, 2020 in the Gazette of India.
- In continuation to the above extension of suspension of operation of Sections 7, 9 and 10 of the IBC to initiate a fresh insolvency proceeding and to provide more relief period to the companies suffering from financial distress, the Central Government, vide the Notification dated December 22, 2020, issued by the Ministry of Corporate Affairs, in exercise of its powers under Section 10A of the IBC, has further extended the period of suspension by another three months, with effect from December 25, 2020 until March 25, 2021.
- This extension by the Central Government provides an extended breather to the companies going through financial distress in the wake of Covid-19. This is the third extension and now there is an imperative need to consider if such extensions are futile in nature and are just prolonging the inevitable outcome of initiation of CIRP of certain companies facing economic distress, especially when public money is involved.

RECENT JUDGMENTS

Anubhav Anilkumar Agarwal v. Bank of India & Anr

Judgment dated December 07, 2020 [Review Application (AT) No. 15 of 2020 in Company Appeal (AT) (Insolvency) No. 1504 of 2019]

Background facts

- An Application under Section 7 of the IBC was preferred by the Bank of India (**BOI**), the Financial Creditor, against RNA Corporation Pvt. Ltd (**RNA**), the Corporate Debtor, before the National Company Law Tribunal (**NCLT**), Mumbai to claim the dues from RNA to the tune of INR 80.73 Crores (Approx). The NCLT after acknowledging the default on the part of RNA admitted the Application vide order dated November 26, 2019.
- Mr. Anubhav Anilkumar Agarwal (**Appellant**), the Managing Director of RNA, challenged such order of admission by the NCLT before the National Company law Appellate Tribunal (**NCLAT**) on the grounds that the Application under Section 7 of the IBC was barred by Limitation and that same set of claim has also been claimed under the CIRP of M/s. Chambers Constructions Pvt. Ltd., therefore, as decided by the NCLAT in the matter of Vishnu Kumar Agarwal vs. Piramal Enterprises Ltd.[1] (Piramal Judgment), same set of claims cannot be availed by the Financial Creditor in two different Applications.
- The NCLAT vide order dated February 07, 2020 (**Impugned Order**) dismissed such Appeal stating that, firstly, RNA had issued a letter to BOI acknowledging the debt and agreeing to pay the amount before the expiry of the Limitation Period, such acknowledgement of debt by the debtor before the expiry of Limitation Period, in terms of Section 18 of the Limitation Act 1963, shifts the date of limitation on which the debtor agreed to make the payment, therefore the Application by BOI was made within the Period of Limitation. Secondly, the plea taken by the Appellant that same set of claims have been availed twice has been made without any proof on the record to suggest that it is with regard to the same debt wherein M/s Chamber Constructions Pvt. Ltd. had issued any guarantee.
- Aggrieved by the Impugned Order, Mr. Agarwal filed the present Review Application before the NCLAT. In the present Application, the Appellant while re-iterating the arguments made in the aforementioned Appeal has additionally argued that the NCLAT in the Impugned Order has made an inadvertent error by ignoring various documents placed on record by both the parties which suggested that a Deed of Guarantee was actually issued by M/s Chamber Constructions in respect of the same debt and same was also on record. Such ignorance by the Appellate tribunal constitutes an error apparent on the face of the record causing grave miscarriage of justice.
- Lastly, the Appellant in the present Review Application prayed that the NCLAT by the way of powers conferred by it under Section 420 of the Companies Act, 2013 and the inherent powers provided under Rule 11 of the NCLAT Rules 2016 (**NCLAT Rules**) should rectify the error apparent on the face of the record.

[1] Company Appeal (AT) (Insolvency) No. 346 of 2018

- *Per Contra*, the counsel on behalf of BOI argued that it is a settled position of law that the NCLAT does not have the power of review and has not been specifically conferred with the power to review its decisions beyond the inherent powers to correct arithmetical/ typographical errors. Furthermore, the power of review is not an inherent power and in absence of a power conferred either specifically or by necessary implication, power of review cannot be exercised. Therefore, the inherent powers as provided under Rule 11 of the NCLAT Rules cannot be invoked to seek a rehearing of the Appeal and/or reconsideration of judgment

Issue at hand?

- Can NCLAT utilize the inherent powers vested under Rule 11 of the NCLAT Rules, 2016 to review and reappreciate any evidence for finding out an error in the capacity of an Appellate Jurisdiction?

Decision of the Tribunal

- The NCLAT, while re-iterating the Rule 11 of the NCLAT Rules, dismissed this Review Application. While arriving at this decision, the Bench headed by the Chairperson referred to the decision of the Appellate Tribunal in matter of *Action Barter Pvt Ltd v. SREI Equipment Finance Ltd & Anr*[2] wherein it was observed that the inherent powers under Rule 11 are merely declaratory in nature in the sense to pass orders to meet the ends of justice. Furthermore, Rule 11 cannot be invoked to revisit the findings returned as regards the assertion of facts and pleas raised in the Appeal and it is not open to re-examine the findings on questions of fact, how-so-ever erroneous they may be.
- In view of the above decision the NCLAT also added that the inherent power cannot be exercised in a manner that it would amount to sitting in Appeal over the findings recorded on appreciation of evidence. Reappraisal of evidence for examining correctness or otherwise of the finding would amount to sitting on an Appeal in disguise. Findings of fact, how-so-ever erroneous they may be, cannot be revisited and substituted within the limited scope of exercise of powers under Rule 11.
- Lastly, on the basis of the facts of the instant case, it was concluded that acceding to the prayer of Applicant would result in substituting the observations, the factual findings and reappraisal of evidence. Such act is beyond the ambit and scope of Rule 11 of NCLAT Rules and would amount to usurping the jurisdiction vested in a court of Appeal.

Our viewpoint

In our opinion, this judgment helps ensure that the nature of the inherent powers as provided under Rule 11 of the NCLAT Rules, 2016 is limited and cannot be abused by the Appellate Tribunal for every Application disguised as an Appeal in the name of meeting the ends of justice.

Action Ispat and Power Pvt Ltd v. Shyam Metalics and Energy Ltd

Judgment dated December 15, 2020 [Civil Appeal No. 4041 of 2020]

Background facts

- Action Ispat and Power Pvt Ltd (**AIPP**), the Appellant, approached Shyam Metalics and Energy Ltd (**SMEL**) for supply of a certain quantity of iron pellets. In respect of the same, AIPP was able to make only a partial payment as its unit had shut down and a sum of INR 4,55,00,000/- stood due and payable. Consequently, a Winding-up Petition under Sections 433(e) and (f), 434 and 439 of the Companies Act, 2013 was filed by SMEL before the Delhi High Court. The Ld. Single Judge, vide order dated August 27, 2018, admitted the petition and appointed an Official Liquidator to take all further steps that may be necessary in order to protect the premises and assets of AIPP.
- Thereafter, an Application was filed by the State Bank of India (**SBI**), a Secured Creditor of AIPP, seeking transfer of the Winding-up Petition to the NCLT, New Delhi in view of the fact that SBI had filed an Application under Section 7 of the IBC which remains pending before the NCLT. Vide order dated January 14, 2019, the petition was transferred to NCLT in exercise of the discretionary powers provided to the court under Section 434 of the Companies Act, 2013.
- To this effect, an Appeal was filed by AIPP challenging the order dated January 14, 2019 by the Ld. Single Judge permitting the transfer of the Winding-up Petition to the NCLT and the same was dismissed by a Division Bench of the Delhi High Court vide order dated October 10,2019. Aggrieved

[2] Company Appeal (AT) (Insolvency) No. 1434 of 2019

by the order of the Division Bench that upheld the transfer of Winding-up Petition to the NCLT, AIPP filed the present Appeal before the Hon'ble Supreme Court.

- The Counsel on behalf of AIPP argued that once a Winding-up Order has been passed by the Company Judge, Winding-up Proceedings alone must continue before the High Court and parallel proceedings under the IBC cannot continue. It was further argued that even independent proceedings under the IBC can only continue when the stage is before a Winding-up Order is passed. Therefore, such order of the Division Bench and the Ld. Single Judge allowing the transfer of the petition to NCLT is untenable as the Winding-up Order had already been passed and the company was already admitted into liquidation.
- Contradicting to the arguments advanced by the Appellant, the counsel on behalf of SBI argued that the Proviso 5 to Section 434(1)(c) of the Companies Act, 2013 makes it clear that a discretion is vested in the Company Court to transfer Winding-up Proceedings to the NCLT without reference to the stage of Winding-up. It was further argued that on a co-joint reading of Proviso 5 of Section 434(1)(c) and Section 238 of the Companies Act, 2013, it can be concluded that if no irreversible steps have been taken then such transfer can also be done post the stage of admission.

Issue at hand?

- Under what circumstances can a Winding-up Proceeding pending in a Court be transferred to the NCLT in exercise of the discretionary powers vested to a court under Sec. 434(1)(c) of the Companies Act, 2013?

Decision of the Court

- The Supreme Court (**SC**) on the issue of whether the transfer could be made post admission of the Winding-up Petition and appointment of the liquidator, observed that initially the IBC provided for transfer of proceedings relating to winding-up of companies to the NCLT at a stage as might be prescribed by the Central Government. However, this was done away by of introduction of the Companies (Transfer of Pending Proceedings) Rules, 2016 (**Transfer Rules, 2016**). Rule 5 and 6 of the Transfer Rules,2016 compulsorily transferred all Winding-up Proceedings pending before High Courts to the NCLT at a stage 'prior' to the service of the petition in terms of Rule 26 of the Companies (**Court**) Rules, 1959.
- However, the limited scope of transfer was that post notice and preadmission of Winding-up Petitions, parallel proceedings would continue under both statutes. Therefore, to eliminate the issue of parallel proceedings, fifth proviso to Section 434(1)(c) of the Companies Act, 2013 was added, which clearly vested a discretion in the Company Court to transfer Winding-up Petition to the NCLT without any reference to the stage of winding-up. Thus, even post admission of a Winding-up Petition, and after the appointment of a Company Liquidator, the same could be transferred to NCLT in exercise of the Court's discretionary power.
- On the issue of how such discretion should be exercised by a Court, the Supreme Court while re-iterating the provisions of the Companies Act, particularly Sections 278, 279, 281 and 290 was of the opinion that so long as no actual sales of the immovable or movable properties have taken place, nothing irreversible is done which would warrant a Company Court staying its hands on a transfer Application made to it by a creditor or any party to the proceedings the Court can exercise the powers conferred t it under Section 434(1) (c) of the Companies Act, 2013.
- It only where the Winding-up Proceedings have reached a stage where it would be irreversible, making it impossible to set the clock back that the Company Court must proceed with the winding-up, instead of transferring the proceedings to the NCLT
- Further, determination of whether such an irreversible stage had been reached or not would depend on the facts and circumstances of each case. In regard to the present case, the Court observed that although the Liquidator had taken possession and control of the registered office of AIPP and its factory premises, records and books, but no irreversible steps were taken towards its Winding-up. Thus, the decision of the Company Judge and the Division Bench of the Delhi High Court was upheld.

Our viewpoint

The judgement is of considerable relevance as it reaffirms the position against pursuance of parallel proceedings against the Corporate Debtor and helps in efficient distribution of the load of company petitions. It also provides clarity on the scope of the discretion that is exercisable by the courts under Section 434(1)(c) of the Companies Act, 2013 while considering a case for transfer of winding-up proceedings.

Mohan Lal Jain v. Lalit Modi & Ors

Order dated December 16, 2020 [Company Appeal (AT) (Insolvency) No. 944 of 2020]

Background facts

- Mohan Lal Jain, the Appellant, in the capacity of Liquidator of Kaliber Associates Pvt. Ltd, the Corporate Debtor, approached the NCLT, New Delhi to take action against preferential transaction and Fraudulent/ Wrongful trading via filing an Avoidance Application under Section 43 and Section 66 of the IBC. The NCLT while dismissing such Application via order dated February 27, 2020 (**Impugned Order**) observed that it would be beyond the scope its of powers to look into the transactions which attract the provisions of Sections 43 and Section 66 of the IBC. Although as a remedy, the NCLT offered to refer the matter to the Ministry of Corporate Affairs or an Investigation Agency.
- Aggrieved by the Impugned Order of the NCLT, the Appellant filed the present Appeal before the NCLAT.
- In its submissions, the Appellant relied on the decision of the SC in the matter of *Embassy Property Developments Pvt Ltd v. State of Karnataka and Ors.*[3] wherein it was held that NCLT is vested with the power to inquire into (i) Fraudulent initiation of proceedings as well as (ii) Fraudulent transactions.
- Therefore, in view of the above, the Appellant while stating that the jurisdiction of the NCLT was rightly invoked prayed that the NCLT should be directed to look into such transactions.

Issue at hand?

- Does the NCLT have the power to adjudicate issues preferred under Section 43 and Section 66 of the IBC regarding Preferential and Fraudulent transactions?

Decision of the Tribunal

- The NCLAT allowed the present Appeal and directed the NCLT to look into such alleged dealings in accordance with law in an expedited manner. While arriving at the said decision, the NCLAT observed that it is a settled position of law that allegations of preferential transactions as also Fraudulent/ Wrongful trading carried on by the Corporate Debtor during the Insolvency Resolution Process can be inquired into by the NCLT and the Impugned Order was not in conformity with the statutory provisions and the dictum of the Hon'ble Apex Court. Therefore, liable to be set aside.

Our viewpoint

The said judgment is a blessing in disguise for parties, especially creditors who have been shortchanged by the promoters due to the Fraudulent and Preferential nature of the transactions. This judgment also lays a guiding principle for the NCLT in exercising its powers to adjudicate issues raised under Section 43 and Section 46 of the IBC.

Amit Khaneja & Ors v. IL&FS Financial Services Ltd

Judgment dated December 18, 2020 in W.P.(C) 3580/2020

Background facts

- Mr. Amit Khaneja along with others (Petitioners) had availed various credit facilities from IL&FS Financial Services Ltd (**IL&FS**), the Respondent, from 2006 to 2018. However, due to defaults in repayment by the Petitioners, after issuing a loan-recall notice, the account of the Petitioner was classified as a Non-Performing Asset (**NPA**) on July 01, 2018. Subsequently, IL&FS took physical possession over one of the properties mortgaged by the Petitioners while a receiver was appointed in respect to the second mortgaged property pursuant to filing of an Application under Section 14 of the SARFAESI Act by the IL&FS.
- Thereafter, the Petitioners approached the Debt Recovery Tribunal (**DRT**) by filling an Application seeking quashing of proceedings initiated by IL&FS under the SARFAESI Act. In view of the fact that the DRT did not grant any interim relief in the said Application, a Writ Petition was filed by the Petitioners by the petitioners before the Delhi High Court, wherein, vide order dated November 03,

[3] 2019 SCC Online SC 1542

2018 the Delhi High Court issued directions to the Petitioner that the entire dues were to be cleared within 12 months. However, the Petitioners failed to comply with the same. Subsequently, the Application filed before the DRT seeking quashing of proceedings initiated by IL&FS was also dismissed vide order dated July 19, 2019. Consequently, possession of both the mortgaged properties was obtained by IL&FS.

- Pursuant to this, a One Time Settlement (**OTS**) proposal regarding repayment of the entire outstanding debt by the Petitioners on or before March 27, 2020 was agreed on between the parties. However, IL&FS, via letter dated May 26, 2020, revoked the said OTS proposal as the debt amounts could not be paid by the Petitioners in the period prescribed by IL&FS in the OTS.
- Subsequently, this Writ Petition was filed by the Petitioners challenging the revocation of the OTS proposal by IL&FS. The primary ground taken by the Petitioners is that according the RBI Circulars on 'COVID-19 Regulatory Package dated March 27, 2020, April 17, 2020 and May 23, 2020 and the RBI Policy Guidelines titled 'Statement on Development and Regulatory Policies' , a moratorium was imposed on all principal payments and interests thrusted thereupon in order to mitigate the burden of debt brought about due to the pandemic and the revocation of the OTS proposal by IL&FS would run contrary to these Circulars and Guidelines.
- Per Contra, while challenging the maintainability of the said Writ Petition by the Petitioners, the counsel on behalf of IL&FS argued that, IL&FS has already invoked its statutory rights under the SARFAESI Act, therefore, once SARFESI proceedings have been commenced, only the DRT would have powers to intervene, and no intervention is permissible in Writ jurisdiction. It was further argued that neither of the RBI Circulars protect any defaulters under the garb of the pandemic, if they did not honor the loans which had become payable by or before the pandemic broke out.

Issues at hand?

- Whether the RBI Circulars on 'Covid-19 Regulatory Package' and the RBI Policy Guidelines titled 'Statement on Development and Regulatory Policies' would be applicable in the defaults occurred prior to the implementation of the said Guidelines and Circulars?

Decision of the Court

- The Court was of the opinion that the Circulars of the RBI and the Guidelines thereunder relate to reliefs to be granted for payments of interest and declaration of accounts as NPAs etc., during the Covid-19 pandemic. These Circulars and policy Guidelines cannot lend any support to the cases where defaults are prior to the outbreak of the pandemic. In the present case, it was observed that not only did the Petitioners commit the default in 2018, but they could not repay the amount for a period of two years prior to the outbreak of the pandemic, even after being given repeated opportunities. Thus, the said Circular and Guidelines would not be applicable in the present case.
- Moreover, the Court observed that the OTS proposal in this case was given after the default had already been committed and legal proceedings in this regard had already been commenced and completed. Thus, there was no scope to consider any mitigating factor as no financial stress had been caused due to the pandemic and the legality of the revocation of the OTS in May 2020 could not be tested on the benchmark of the recent RBI Circulars and the policy Guidelines inasmuch as the same would be independent of the said Circulars and Guidelines. Accordingly, the writ petition was dismissed.

Our viewpoint

This decision of the High Court provides a clearer picture to the applicability of the RBI Guidelines and Circulars in order grant relief to the borrowers who have genuinely suffered and are suffering due to the global economic shutdown on account of the spread of Covid-19. The said judgment also enunciates the nature of RBI Circulars and Guidelines as applicable to defaults that arose during the Covid-19 pandemic. Thus, in our opinion it can be concluded that the advantage is not extended to the defaulters who committed the default prior to the outbreak of the pandemic.

Rajendra Narottamdas Sheth & Anr v. Chandra Prakash Jain & Anr

Judgment dated December 18, 2020 [Company Appeal (AT) (Insolvency) No. 621 of 2020 – December 18, 2020]

Background facts

- M/s. R.K Infratel Ltd (**R.K Infratel**), the Corporate Debtor, had approached the Union Bank of India (Respondent Bank), the Financial Creditor, for sanctioning of term loans amounting to INR 20,24,00,000/- in order to roll out a dark fibre broadband, Internet and Lease Lines at Surat. R.K Infratel defaulted in the repayment of the loan and was thereafter classified as a NPA on September 30, 2014 by the Respondent Bank.
- Subsequently, the Respondent Bank issued Recall Notice dated October 01, 2014 demanding the outstanding dues reflected in the Statement of Accounts. Due to no action taken on part of R.K Infratel, the Respondent Bank filed DRT Proceeding under Section 19 of Recovery of Debts Due to Banks and Financial Act, 1993 to recover INR 19,78,94,660.32. A counter claim was filed by R.K Infratel under Section 17 (1) of the SARFAESI Act against the Respondent Bank based on disputed calculation of the amount due, the dispute still remains pending.
- Meanwhile, an Application for initiation of CIRP was preferred by the Respondent Bank against the R.K Infratel under Section 7 of the IBC before the NCLT, Ahmedabad on April 25, 2019 and an admission order vide order dated June 01, 2020 (**Impugned Order**) was passed by the NCLT admitting the preferred Application.
- Aggrieved by the admission order of the NCLT, Mr. Rajendra Narottamdas Sheth and Smt. Heenaben Rajendra Kumar Sheth (**Appellants**), in the capacity of being the members of the suspended Board of Director of R.K Infratel filed an Appeal before the NCLAT.
- The Appellants in the Appeal before the NCLAT contested that the Application under Section 7 of the IBC preferred by the Respondent Bank was filed in 2019 whereas the account of R.K Infratel was classified as a NPA in October 2014, thus, as per Section 137 of the Limitation Act the Period of Limitation is three years and the Respondent Bank failed to file the Application under the stipulated time. Therefore, the Application is time barred and liable to be dismissed.
- In order to support the above contention, the counsel for the Appellants argued that the payments made after declaration of NPA would not give benefit of Section 19 of the Limitation Act if the NPA had not been regularized by the Bank and the date of default continued to be mentioned as date of NPA.
- Additionally, it was also argued that the Application filed under Section 7 of the IBC by the Respondent Bank was defective as the same was not supported by a valid Power of Attorney. Lastly, it was argued that the Principles of Natural Justice were violated and that the admission order was passed ex-parte because the counsel on behalf of the Appellant was not given an opportunity to be heard.
- On the contrary, the counsel for the Respondent Bank argued that R.K Infratel had made the instalments and given the acknowledgement of debt in writing even after the account was classified as a NPA which not only gives benefit under Section 19 but also under Section 18 of the Limitation Act. Therefore, the date of NPA would not shift but when instalments are paid and acknowledgments are given of the existing liability the Period of Limitation would get extended.

Issues at hand?

- Are the provisions of the Limitation Act applicable on 'Applications' made under the provisions of the IBC?
- Was the Application to initiate the CIRP of R.K Infratel filed under Section 7 of the IBC by the Respondent Bank barred by limitation?

Decision of the Tribunal

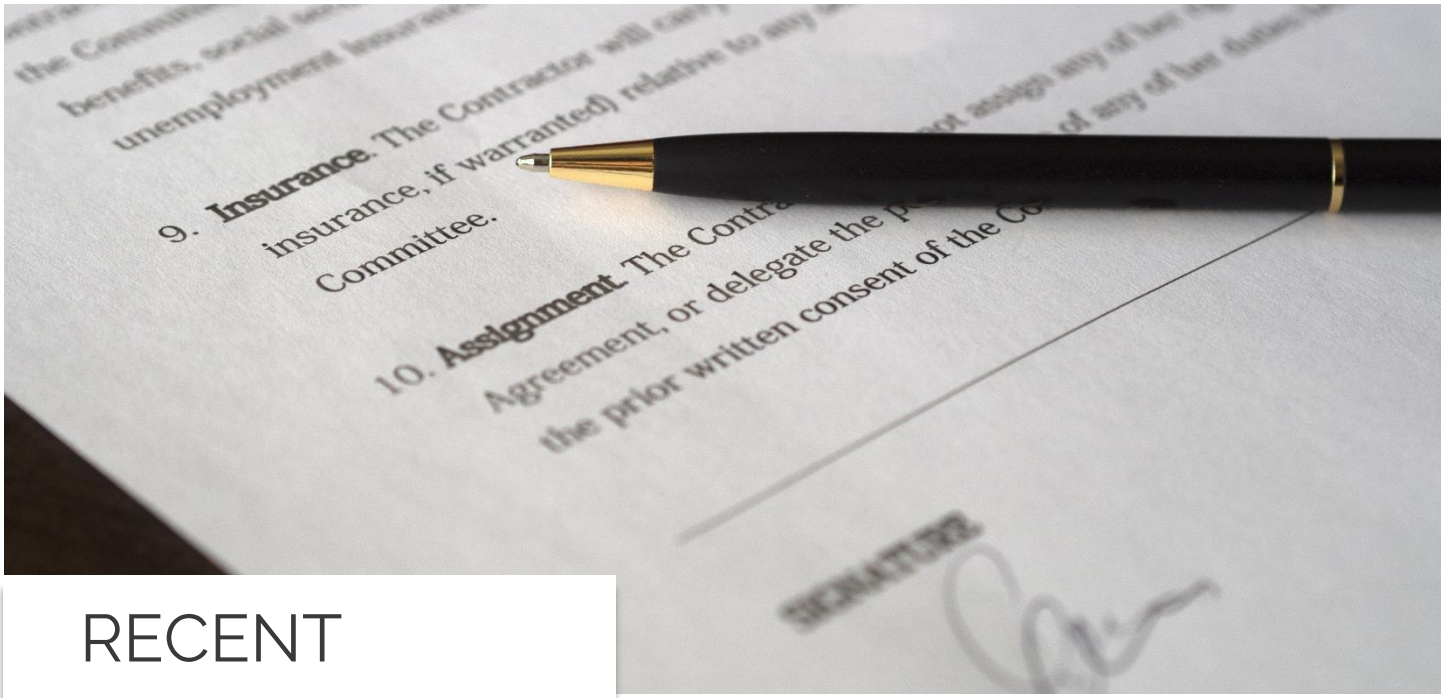
- The NCLAT in the said case scrutinized every argument contested by the counsels of both the parties and thereafter referred to Section 238-A of the IBC in order to recognize the extent of application of provisions of the Limitation Act with respect to proceedings under IBC.

- In this context, reference was made to the decision of the SC in the matter of *B.K. Educational Services v. Parag Gupta*[4] and *Babulal Vardharji Gurjar v. Veer Gurjar*[5], whereafter it was concluded that a co-joint reading of Section 5 and Section 137 of the Limitation Act highlights the fact that there was no intention to give new lease of life to debts which are time-barred, but, on the hindsight also makes it clear that the Limitation Act is applicable on the Applications under Section 7 and 9 of IBC.
- Thereafter, the Appellate Tribunal discussed the issue regarding whether the present Application preferred by the Respondent Bank is barred by Limitation. In view of the same, it was observed that Section 18 applies to not merely suits but also Applications and where before expiry of the prescribed period for an Application an acknowledgment is made, the Section provides for computing fresh Period of Limitation from the time when the acknowledgment was so signed. Perusal of Section 19 shows that where payment is made on account of a debt or interest before expiration of the prescribed period by the person liable to pay, a fresh Period of Limitation shall be computed from the time when the payment was made. Therefore, the date of NPA will not shift, it will remain the foundational date and Period of Limitation gets triggered from that date.
- Applying the above observations to the facts of the present case and after acknowledging the Statement of Accounts reflecting various transactions between the parties and thereafter the debt confirmation letter dated April 07, 2016 issued by the R.K Infratel to the Respondent Bank even after the account was classified as a NPA, the NCLAT was of the opinion that even if the payments were made after the Account was declared NPA, if the Account was not regularized then benefit under Section 19 cannot be taken. Section 19 of the Limitation Act, 1963 is not subject to any qualification/exception that after Account is declared NPA, if the debtor makes payments on account of debt, the Section would not be applicable.
- However, it may be clarified that Limitation issue is decided on facts and law both and it differs from case to case. Therefore, when prescribed period is computed in accordance with the Limitation Act and basis the facts of this matter, Section 18 and 19 do appear to be attracted. Thus, the NCLAT dismissed the present Appeal and upheld the Impugned Order stating the Application for initiation of CIRP was well within the Period of Limitation.

Our viewpoint

This decision given by Justice A.I.S Cheema is in favor of applicability of Section 18 of Limitation Act to the IBC proceedings, similar to his dissenting opinion in *V. Padmakumar vs. Stressed Assets Stabilisation Fund (SASF) & Anr.* which still remains in the headlines due to the widely criticized majority opinion to a restrictive applicability of Section 18 of the Limitation Act. The approach adopted to co-jointly read and thereafter apply Section 18 and Section 19 of the Limitation Act with respect to acknowledgement of debt and effect of consequential payment after an account has been declared as a NPA in order to identify the Period of Limitation brings a sigh of relief to the creditors who have been defaulted by huge amounts by the borrowers. Incidentally, in *Bishal Jaiswal v. ARCIL*, a bench of 5 judges of the NCLAT, while hearing a reference by a bench of 3 judges held that the reference is not maintainable, but also interpreted the Babulal judgment to say that Section 18 of the Limitation Act is altogether not applicable to proceedings under the IBC. In view of the evident diversion of opinion within the NCLAT itself, it is very clear that this issue will have to be settled by the SC only.

[4] (2018) SCC Online SC 1921
[5] (2020 SCC OnLine SC 747)



RECENT **DEALS**

NCLT, Mumbai Bench gives nod to Reliance Infratel Ltd Resolution Plan submitted by Reliance Projects & Property Management Services Ltd

- Reliance Infratel Ltd (**RIL**), the Corporate Debtor, a fully owned subsidiary of Reliance Communication was admitted to insolvency after the NCLT, Mumbai vide order dated May 15, 2018 admitted an Application for initiation of CIRP of RIL.
- The Admission Order was challenged by certain shareholders of RIL before the NCLAT, however, in view of the subsequent developments and deliberations, the Appellants withdrew the Appeal. The NCLAT vide Order dated April 30, 2019, permitted the withdrawal of the Appeal and directed the NCLT to resume with the CIRP of RIL in accordance with law.
- The appointed Interim Resolution Professional (IRP) issued public announcement inviting claims from creditors, whereafter, the Committee of Creditors (CoC) was constituted.
- Thereafter, the appointed Resolution Professional of the Corporate Debtor, Mr. Anish Niranjan Nanavaty, issued Form-G on July 15, 2019 inviting Expressions of Interest (**EoI**) from Prospective Resolution Applicants (**PRAs**). Plans were received from Bharti Airtel Ltd, Reliance Digital platform & Project Services Ltd (**Reliance Digital**), VFSI Holdings Pte Ltd and UV Asset Reconstruction Company Ltd.
- Subsequent to deliberations and discussions, Reliance Digital emerged as the successful Resolution Applicant and the Plan was approved by a 100% majority of the members of the CoC of RIL in the 19th CoC meeting held on March 02, 2020.
- The Resolution Plan proposes an upfront payment of INR 3,720 crores to creditors (including CIRP costs), it is estimated that the lenders will have to take at least a 60% haircut in their recovery.
- It is pertinent to note that, Doha Bank, one of the Financial Creditors of RIL, filed an Application which is yet to be adjudicated, challenging the admission of claims of few other Creditors and thereby disputing the decision of the Resolution Professional recognizing the Indirect Lenders of RIL as Financial Creditors.
- Finally, in view of the above, the NCLT while approving the Resolution Plan by Reliance Digital vide order dated December 03, 2020 was of the opinion that the pendency of such an Application would not create an impediment in the approval of the Resolution Plan, however, the distribution of payments to the Financial Creditors shall be subject to the orders passed in the Application.
- It is of utmost importance that the resolution applicant is well equipped to handle the reigns of the corporate debtor so that the organization keeps functioning as a going concern. In the present scenario the successful resolution applicant being part of a successfully run conglomerate with diverse expertise and experience will add to the value of the organization which in essence demonstrates one of the positive aspects of revival and rehabilitation.

Resolution Plan of Multiwal Duplex Pvt Ltd

- Mr Manish Agarwal, the Resolution Professional of Multiwal Duplex Pvt Ltd (**Multiwal Duplex**), the Corporate Debtor, placed the approved Resolution Plan by Marinaindia Traexim Pvt. Ltd. (**Marinaindia**), the Successful Resolution Applicant, before the NCLT, Allahabad for approval under Section 30(6) and Section 31(1) of the IBC.
- The CIRP of Multiwal Duplex was initiated subsequent to the admission order dated September 12, 2019 by NCLT, Allahabad bench. Subsequently, a public announcement for the collation of claims in terms of Regulation 6(1) of the CIRP Regulations was made and the CoC of the Corporate Debtor was constituted.
- The Appointed Resolution Professional published the Form G inviting the EoI on October 31, 2019, in response to which only one Resolution Plan by Marinaindia was submitted. In the 7th meeting of the CoC held on March 23, 2020, the Plan submitted by Marinaindia was deliberated upon and thereafter put to voting. However, due to nation-wide lockdown the same could only be put to vote and approved by a 100% majority on May 31, 2020 by the Committee. The Plan offered INR 13 Crore distributable to the Financial Creditors as per Section 53 of the IBC.
- The Bench while approving the Plan vide order dated December 16, 2020 condoned the delay beyond 180 days and directed the Resolution Professional to act as the 'Monitoring Agency' to monitor and supervise the proper implementation of the approved Plan.

Resolution Plan approved for Castex Technologies Ltd

- The NCLT, Chandigarh Bench, vide an order dated December 15,2020, approved the Resolution Plan for Castex Technologies Ltd (**Castex Technologies**), the Corporate Debtor, formerly known as Amtek India Limited, primarily involved in manufacturing of motor vehicle parts and accessories. The approved Plan was submitted by Deccan Value Investors L.P & DVI Pe Mauritius Ltd (**DVI**).
- The CIRP of Castex Technologies was initiated subsequent to the order dated December 20, 2017 by NCLT, Chandigarh admitting a Section 7 Application under the IBC which was preferred by State Bank of India, one of the Financial Creditor of Castex Technology.
- During the CIRP, initially the Resolution Plan by Liberty House Group (**Liberty Group**) was approved by the CoC of Castex Technologies and the same was placed for approval before NCLT as required under the provisions of the IBC. However, during the pendency of the Application for approval, Liberty Group made a default in complying with the agreed terms of the approved Plan and therefore an Application for withdrawal of the pending Application for approval of the Plan was made. The NCLT vide order dated March 15, 2019 allowed the Application for withdrawal of the approved plan and subsequently the Plan by Liberty was withdrawn followed by an invitation of fresh EoI's. However, being aggrieved by the said order Liberty Group preferred an appeal before the NCLAT, the said appeal remains pending for further adjudication before the NCLAT.
- Subsequently, the Resolution Professional of Castex Technologies received four Resolution Plans which were presented and discussed in the meeting of the CoC. The Plan submitted by DVI was declared H1 and the same were thoroughly negotiated and analysed by the CoC and finally approved by a majority of 71.77% votes on March 16, 2020.
- The approved Plan was placed for approval under Section 30(6) and Section 31(1) of the IBC before the NCLT. However, during the course of the proceedings, DVI filed an Application under Section 60(5) of the IBC before the NCLT seeking a declaration that the approved Resolution Plan stands terminated and invalidated by efflux of time, on the grounds that various conditions as mentioned under the Request for Resolution Plan have not been complied.
- In view of the above, the NCLT was of the opinion that the filing of the present Application was not only being done under peculiar circumstances but was also taking place under the supervision of the NCLAT. Hence, the contention of DVI regarding the Long Stop date being July 17, 2020 and non-approval of the Plan by the NCLT before the said date made the Plan infructuous, was found to be untenable. Consequently, the Resolution Plan submitted by DVI was duly approved with directions in terms of furnishing the balance of the Performance Bank Guarantee.
- The object behind the enactment of the code and the intent of the legislature was to ensure continuity of operations and liquidation was only the last resort therefore such instances of the adjudicating authority going all the way out for upkeeping the spirit and intent of the code is laudable.

CONTRIBUTIONS BY:

Abhirup Dasgupta | **Partner**

Avishek Roy Chowdhury | **Associate**

Pratik Ghose | **Partner**

Ishaan Duggal | **Associate**

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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