

Restructuring & Insolvency

Monthly Newsletter

June 2021

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STATUTORY UPDATES

The Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (recommendations) Guidelines, 2021

- Insolvency and Bankruptcy Board of India (IBBI) on June 1, 2021 issued guidelines for Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendations) Guidelines, 2021, (**Guidelines**), superseding the previous guidelines in this regard.
- **Purpose:** In terms of Section 16(3) of the Insolvency and Bankruptcy Code, 2016 (**IBC**), the IBBI is required to recommend a Panel of Insolvency Professionals (IPs) for appointment as an Insolvency Resolution Professional (**IRP**). By virtue of these guidelines, the IBBI intends to ease the process of appointment of the IRP by the Adjudicating Authority, by providing a Panel of Insolvency Professionals to the Adjudicating Authority, out of which the IRP on the initiation of Corporate Insolvency Resolution Process (**CIRP**) may be appointed.
- The Guidelines provide certain criteria basis which an Insolvency Professional may be included in the Panel of IPs and, thereafter, appointed by the Adjudicating Authority, which are enumerated here below:
 - There is no pending disciplinary proceeding against the Insolvency Professional that has been either initiated by the IBBI or the Insolvency Professional Agency (IPA) of which the Professional is a member.
 - The professional under consideration has not been convicted at any time in the last three years by a court of competent jurisdiction.
 - The professional under consideration has expressed his interest to be included in the Panel for the relevant period.
 - The professional under consideration has undertaken to discharge the responsibility as IRP, Liquidator, Resolution Professional or Bankruptcy Trustee, if and when appointed by the Adjudicating Authority.
 - The professional under consideration held an Authorization for Assignment (**AFA**), which remains valid till the validity of Panel.
- The aforementioned Panel shall have Zone wise list of IPs. An IP will be included in the Panel against the Zone where his registered office (address as registered with the Board) is located.

- **Panel of IPs:**
 - The Panel of Insolvency Professionals, prepared by the IBBI, shall be shared with the relevant Adjudicating Authority [NCLT and Debt Recovery Tribunal (**DRT**)].
 - The Panel shall be valid for six months and a new Panel will replace the earlier Panel every six months.
 - NCLT may select any name from the Panel for appointment of IRP, Liquidator, Resolution Professional or Bankruptcy Trustee for a CIRP, Liquidation Process, Insolvency Resolution or Bankruptcy Process relating to a corporate debtors and personal guarantors to corporate debtors, as the case may be.
 - DRT may pick up any name from the Panel for appointment as Resolution Professional or Bankruptcy Trustee, for an Insolvency Resolution or Bankruptcy Process for personal guarantors to corporate debtors, as the case may be.
- **Expression of Interest:** In order to select the Insolvency Professionals to be included in the Panel, the IBBI shall invite Expression of Interest from these professionals in 'Form A' by sending an e-mail to the respective registered email addresses with the IBBI. The expression of interest must be received by the Board in Form A by the specified date.
- Upon receiving the Expression of Interest, the eligible Insolvency Professionals in order to be included in the Panel will be evaluated and scored upon the volume of ongoing processes of each professional. The IP who has the lowest volume of ongoing processes will get a score of 100 and will be at the top of the Panel. The IP who has the highest volume of ongoing processes will get a score of 0 and other IPs will get scores between 0 and 100 depending on volume of their ongoing assignments. Where two or more IPs get the same score, they will be placed in the Panel in the order of date of their registration with the Board. This process for preparation of Panel of IPs will be undertaken by a team of officers of the Board, identified by a Whole-Time Member.
- **Obligations of IPs in the Panel:** The participating Insolvency Professional must understand that, in case such professional is selected in the Panel then such professional may not:
 - Withdraw its interest to act as IRP, Liquidator, Resolution Professional or Bankruptcy Trustee, as the case may be
 - Decline to act as IRP, Liquidator, Resolution Professional or Bankruptcy Trustee, as the case may be, if appointed by the AA
 - Surrender its registration to the IBBI or membership or AFA to his IPA; during the validity of the Panel
- **Miscellaneous conditions:** It is pertinent to note that in addition to the above-mentioned guidelines, the following conditions may be required to be expressly followed:
 - The Adjudicating Authority may require the IBBI to recommend an Insolvency Professional from or outside the Panel.
 - An Insolvency Professional in the Panel can be appointed as IRP, Liquidator, Resolution Professional or Bankruptcy Trustee, at the sole discretion of the Adjudicating Authority.
 - The submission of Expression of Interest is an unconditional consent by the IP to act as an IRP, Liquidator, Resolution Professional or Bankruptcy Trustee of any process relating to a corporate or individual debtor, as the case may be.
 - An Insolvency Professional who declines to act as IRP, Liquidator, Resolution Professional or Bankruptcy Trustee, as the case may be, on being appointed by the Adjudicating Authority, shall not be included in the Panel for the next five years, without prejudice to any other action that may be taken by the IBBI.



RECENT JUDGMENTS

Directorate of Economic Offences v. Binay Kumar Singhania & Ors

Order dated May 04, 2021 [Company Appeal (AT) (Insolvency) No. 935 of 2020]

Background facts

- Bengal Polypet, the Operational Creditor, filed an Application under Section 9 of the IBC for initiating CIRP against Pincon Spirits Ltd (**Corporate Debtor**). The NCLT, Kolkata Bench vide order dated July 19, 2018 admitted the application and appointed the Interim Resolution Professional (**IRP**). Subsequently, Binay Kumar Singhania (**Liquidator**) was appointed as Resolution Professional (**RP**) and vide order dated September 30, 2019, he was appointed as Liquidator.
- Meanwhile, an FIR was lodged against Pincon Group, the group company of Corporate Debtor, alleging fraudulent transactions by receiving deposits from the public at large. Accordingly, the Directorate of Economic Offences, Government of West Bengal (**DEO**) attached and sealed the registered office of the Corporate Debtor and filed a charge sheet under Sections 406, 409, 420 and 120B of the Indian Penal Code, 1860 and under Section 3(1)(e) of the West Bengal Protection of Interest of Depositories in Financial Establishment Act, 2013 (**WBPIDFE Act**) against 41 accused persons. The Designated Court of Economic Offences vide Judgment dated October 03, 2020, convicted Monoranjan Roy, Director of the Corporate Debtor and others for the offence and directed that the property will be in custody of the court for realization of dues of the depositors under Sections 15 to 18 WBPIDFE Act subject to the decision of the appellate court, thereby directing the DEO to look after all the properties till realization of such liability.
- Since the registered office of the Corporate Debtor was attached and sealed by DEO which contained all the documents essential to conduct the liquidation process, the Liquidator filed an Application under Sections 33(5), 60(5)(c) and 238 of the IBC seeking for de-attaching the assets of the Corporate Debtor and handing over the possession of assets to the Liquidator for the purpose of liquidation process.
- To this effect, the Counsel for the DEO opposed the application on the ground that the assets claimed by the Liquidator are not assets of the Corporate Debtor since the assets purchased by the Corporate Debtor were from the amount transferred from the group company which collected deposits fraudulently. Thus, the Counsel for the DEO contended that the assets of the Corporate Debtor are outside the purview of Section 14(1)(a) of the IBC and the declaration of moratorium under Section 14 of the IBC is not applicable to the proceedings initiated under Section 3 of the WBPIDFE Act, 2013, and the legal proceeding initiated by the DEO are not a bar under Section 33(5) of IBC.
- After hearing the submissions of both parties, the NCLT vide judgment dated February 19, 2020 allowed the application filed by the Liquidator, directing the DEO to de-attach all the assets and restore possession thereof to the Liquidator. The NCLT held that provision under Section 3 of WBPIDFE Act, 2013 is inconsistent with Section 14 of the IBC and therefore, Section 14 and Section 33(5) of the IBC will prevail over Section 3 of WBPIDFE Act.
- Aggrieved by the decision of NCLT, the DEO filed an appeal before the NCLAT.

Issues at hand?

- Whether the property of Corporate Debtor who is not a financial establishment as defined under Section 2(e) of WBPIDFE Act can be attached?
- Whether High Court of Calcutta in WP No. 24110 (W) of 2016 vide order dated April 23, 2019 directed that the assets of the Corporate Debtor should be kept outside the purview of sale?
- Whether the provision of Section 14 as well as Section 33(5) of the IBC shall prevail over Section 3 of the WBPIDFE Act?

Decision of the Tribunal

- NCLAT referred to Sections 5 and 14 of the WBPIDFE Act and held that the assets acquired either in the name of a financial establishment or in the name of any other person on behalf of such financial establishment can also be attached under the WBPIDFE Act. NCLAT found that the findings of the Designated Court of Economic Offences will be binding on the Corporate Debtor given the fact that although it was a party before the Designated Court, it did not raise any objection under Section 14(3) of the WBPIDFE Act that the properties were wrongfully attached and produced before the same court.
- One of the arguments of Counsel for the Respondents was that the High Court of Calcutta in WP No. 24110 (W) of 2016 in its order dated April 23, 2019, whereby the assets of the Corporate Debtor were directed to be kept outside the purview of sale, is binding on the Designated Court and thus, appeal is liable to be dismissed. In this regard, NCLAT, after perusal of the aforesaid order passed by the High Court, observed that the High Court did not direct for de-attaching the assets of the Corporate Debtor and therefore, it did not direct that such assets to be kept outside the purview of such sale.
- NCLAT noted that WBPIDFE Act and the IBC are legislated on two different fields with two different aims. It was observed that Section 3 of the WBPIDFE Act, 2013 provides punishment for individuals responsible for the management of the Corporate Debtor in relation to fraudulent deposits accepted by such Corporate Debtor and its subsequent failure to make repayment. Such individual cannot take advantage of Section 14 of IBC as it is not applicable to the criminal proceeding, or any penal action taken pursuant to the criminal proceedings or any Act which has essence of crime or crime proceeds. After carefully analyzing the facts of the case, NCLAT noticed that the moratorium had been declared against the Corporate Debtor pursuant to attachment of assets by the DEO and production before the Designated Court of Economic Offences. Thus, NCLAT held that Section 14 of the IBC has no overriding effect on Section 3 of the WBPIDFE Act.
- NCLAT placed reliance on the decision of *Manish Kumar v. Union of India & Anr*¹, which upheld the constitutional validity of Section 32-A of IBC 'Liability of prior offences' and held that there must be resolution plan which is approved by the NCLT under Section 31 of the IBC, for invoking the bar against proceeding against property of the Corporate Debtor in relation to an offence committed before the commencement of CIRP. The NCLAT noted that in the instant case, no resolution plan was approved resulting in change of control of the Corporate Debtor, thus, there is no bar to take action against the property of the Corporate Debtor in connection with the offence.
- NCLAT further clarified that by the combined reading of sub-Sections (1) and (2) of Section 32-A, it is clear that the bar against action against the property of the Corporate Debtor is available, not only to it but also to any person who acquires such property under the CIRP or liquidation proceedings. Therefore, the director and the property of the Corporate Debtor cannot get immunity from the prosecution and the attached property, which is confiscated by the Designated Court of Economic Offences, cannot be de-attached by DEO.
- In view of the above, NCLAT allowed the appeal and set aside the order of NCLT providing liberty to the Liquidator to take legal action available.

Our viewpoint

By way of this judgment, NCLAT has emphasized that each legislation is enacted to operate in its own sphere and to deal with the specific issues that it seeks to address. WBPIDFE Act, 2013 seeks to protect depositors' interests from money collection schemes in state, whereas IBC is to protect interests of all stakeholders and creditors of Corporate Debtor. However, where the rule of harmonious construction cannot effectively be applied, IBC, being a special enactment of Parliament will prevail by virtue of the non-obstante clause contained in Section 238 of IBC, in event of an apparent conflict.

¹ 2021 SCC Online SC 30

Sirpur Paper Mills Ltd v. I.K. Merchants Pvt Ltd

Judgment dated May 07, 2021 [A.P. 550 of 2008]

Background facts

- In arbitration proceedings between Sirpur Paper Mills Ltd (**Petitioner/Award debtor**) and I.K. Merchants Pvt Ltd (**Respondent/Award holder**), a Sole Arbitrator was appointed on March 02, 2006. The Arbitral Award was delivered on July 07, 2008 for a sum of INR 3,21,927.70 at 9% p.a. in favor of the Respondent. Subsequently, the Petitioner filed an application on October 31, 2008 under Section 34 of The Arbitration and Conciliation Act, 1996 (**Arbitration Act**) before Calcutta High Court (**HC**) for setting aside of the award.
- Meanwhile, CIRP was initiated against the Petitioner as the Corporate Debtor and an amount was demanded by the Respondent as on March 31, 2014 which featured in the Information Memorandum. The NCLT vide order dated May 16, 2018 approved the Resolution Plan submitted by JK Paper Ltd.
- Thereafter, the Section 34 application was taken up for hearing on December 11, 2019 wherein the Petitioner contended that such application cannot be proceeded since CIRP under the IBC was already initiated against the Petitioner as the Corporate Debtor. The Petitioner further submitted that since the management of the Petitioner was taken over by JK Paper Ltd, the successful Resolution Applicant following the approval of a Resolution Plan and the Respondent had also not made any efforts to place their claim before the RP, the said application under Section 34 cannot be proceeded with against the Petitioner.
- HC vide judgment dated January 10, 2020 rejected the Petitioner's contentions and held that the CIRP cannot be used to defeat a dispute which existed prior to initiation of CIRP of the Corporate Debtor. It was further held that the Respondent could not have filed a claim before the NCLT since there was no final or adjudicated claim on the date of initiation of the CIRP against the Petitioner. Aggrieved by the decision of HC, the Petitioner applied for recalling of the earlier judgment, however the same was rejected by an order dated February 03, 2020.
- Aggrieved by such rejection, the Petitioner again urged before the HC by filing the instant application to set aside the award dated July 07, 2008.
- The Petitioner relied upon Section 31 of IBC and contended that a successful Resolution Applicant cannot be faced with undecided claims after the resolution plan has been accepted. On the other hand, the Respondent argued that upon filing of the application under Section 34 of the Arbitration Act, the award automatically is stayed and thus, the Respondent could not approach the NCLT for lodging its claim. The Respondent also contended that with the filing of Section 34 application, the dispute raised by the parties amounts to a pre-existing dispute which takes the Respondent outside the purview of the IBC.

Issue at hand?

- Whether the claim of an award holder can be frustrated on the approval of a resolution plan under Section 31 of the IBC?

Decision of the Court

- HC was of the view that the judgment dated January 10, 2020 needs to be re-looked keeping in mind the ratio reached by the SC in the cases of Committee of Creditors of Essar Steel India Ltd v. Satish Kumar Gupta² and Ghanshyam Mishra & Sons Pvt Ltd v. Edelweiss Asset Reconstruction Co Ltd³, wherein it was held that once a resolution plan is approved under Section 31 of IBC, a Creditor cannot initiate proceedings for recovery of claims which are not part of such Resolution Plan. Additionally, HC noted that for a claim to be considered by the RP and later by the CoC for approval of the Resolution Plan, the said claim must feature in the Information Memorandum prepared by the RP and provided to the Resolution Applicant which will ultimately take over the business of the Corporate Debtor.
- HC ruled that the principle of *res judicata* would not apply to the instant case as there was significant shift in the law in Petitioner's earlier litigation and the case in hand. The HC went on to observe that the Respondent had sufficient opportunity to approach the NCLT for appropriate relief, however it failed to do so. Further, HC noted that the Respondent was under an obligation to take

² (2020) 8 SCC 531

³ 2021 SCC OnLine SC 313

active steps under the IBC by filing a claim before the RP instead of waiting for the adjudication of the application under Section 34 of the Arbitration Act.

- HC placed its reliance on *Board of Control for Cricket in India v. Kochi Cricket Pvt Ltd*⁴, wherein it was clarified that pending Section 34 applications would also be governed by the new Section 36 added by the 2016 amendment which came into effect from October 23, 2015, which required the Court to grant an order of stay of the operation of the arbitral award on a separate application for stay taken out by the Award debtor. HC noted that Section 36(2) clarifies that filing of an application for setting aside of an award under Section 34 will not by itself make the award unenforceable unless the award is stayed by an order of Court in an application made in the manner provided under Section 36(3) of the Arbitration Act. Thus, it held that the Petitioner would not get the benefit of the award being automatically stayed upon filing of the application and the Respondent would be free to enforce the award against the Petitioner in the absence of an application for stay of the award under the amended Section 36 of the Act.
- In view of the foregoing, the HC held that pre-existing and undecided claims which have not been submitted before the RP would be treated as extinguished upon approval of the Resolution Plan under Section 31 of the IBC. Therefore, in the present case, the HC disposed of the Section 34 application as infructuous since the claim of the Respondent had been extinguished upon approval of the Resolution Plan under Section 31 of the IBC.

Our viewpoint

According to the decision of the HC, the arbitral award holder's claim would stand extinguished upon approval of a resolution plan by the NCLT. The decision, although correct on technical parameters, does not meet the ends of justice because an award holder's mere failure to lodge a claim in the CIRP would amount to missing the bus.

Kanwar Raj Bhagat v. Gujarat Hydrocarbons and Power SEZ Ltd & Anr

Order dated May 11, 2021 [Company Appeal (AT) (Insolvency) Nos. 1096 and 1109 of 2020]

Background facts

- SREI Infrastructure Finance Ltd (**Financial Creditor**) had granted a loan of INR 100 crore to Gujarat Hydrocarbons and Power SEZ Ltd (**Corporate Debtor**) wherein Assam Company India Ltd (**ACIL**) was a corporate guarantor and the holding company of Corporate Debtor. However, as the Corporate Debtor failed to repay the loan amount and interest, the Financial Creditor filed an application against the Corporate Debtor and guarantors including ACIL under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 before the Debt Recovery Tribunal.
- In the interregnum, a Debt Repayment and Settlement Agreement (**DRSA**) was entered into by the Financial Creditor, Corporate Debtor, ACIL and Aditya Kumar Jajodia. Subsequently, the DRSA was terminated vide cancellation agreement.
- Thereafter, an Application under Section 7 of the IBC was filed for initiation of insolvency proceedings against ACIL. The NCLT, Guwahati vide order dated October 26, 2017, admitted the Application, and imposed a moratorium under Section 14 of the IBC upon ACIL.
- During the course of the CIRP of ACIL, the Financial Creditor filed its claim amounting to INR 648.81 crore, however, the RP partly admitted the claim only to the tune of INR 247.27 crore. Being aggrieved by the rejection of the part claim, the Financial Creditor filed an application under Section 60(5) of the IBC before the NCLT, Guwahati, which was later dismissed. Meanwhile, the NCLT, Guwahati approved the Resolution Plan submitted by BRS Ventures Investment Ltd.
- Subsequently, the Financial Creditor filed an Application Debtor before the NCLT, Delhi under Section 7 of the IBC to initiate CIRP against the Corporate Debtor based on the same set of debt and default against which CIRP of ACIL was already initiated. The NCLT, Delhi vide order dated November 18, 2020, admitted the Application, and appointed Rakesh Kumar Agarwal as the IRP of the Corporate Debtor.
- Aggrieved by the order of the NCLT, Delhi dated November 18, 2020, Kanwar Raj Bhagat, the Ex-Director of the Corporate Debtor and BRS Ventures Investment Ltd., the successful Resolution Applicant in the CIRP of ACIL filed Appeals before the NCLAT.

⁴ (2018) 6 SCC 287

Issue at hand?

- Whether the second Application under Section 7 of IBC is not maintainable against the Corporate Debtor as for the same debt and default, CIRP has already been taken place against the Corporate Guarantor and the Financial Creditor has accepted the amount in full and final settlement of all its dues?

Decision of the Tribunal

- NCLAT upheld the decision of NCLT, Delhi wherein the second application against Corporate Debtor was admitted and held that the second application under Section 7 of IBC against the Corporate Debtor for the same debt and default is maintainable and the Financial Creditor can recover the remaining dues from the Corporate Debtor. While arriving at this decision, NCLAT referred to decision of State Bank of India v. Athena Energy Ventures Pvt Ltd⁵, wherein it was held that the financial creditor can simultaneously or one after another initiate CIRP against the Corporate Debtor as well as the Corporate Guarantor.
- NCLAT further perused the respective clauses of the approved resolution plan and noted that it cannot be said that the Financial Creditor accepted the claim amount in full and final settlement of all its dues. However, the right of recovery of debt of Financial Creditor available against the Corporate Guarantor had extinguished. In this regard, NCLAT placed reliance on the case of Gouri Shankar Jain v. Punjab National Bank & Anr⁶, which dealt with the issue on whether liability of the personal guarantor would stand extinguished on the Financial Creditor receiving the payments in terms of a Resolution Plan in respect of a company undergoing CIRP under IBC. In this case, the High Court of Calcutta ruled that liability of the personal guarantor is not extinguished upon approval of the Resolution Plan.
- Furthermore, NCLAT took note of the fact that the Financial Creditor filed Application under Section 7 of IBC within the extended time provided under Section 18 of the Limitation Act, 1963 beyond three years from the date of default as the Corporate Debtor had specifically acknowledged the debt in the cancellation agreement of DRSA. Thus, it held that the Application was not barred by limitation.

Our viewpoint

NCLAT's decision that after the right to recovery against a Corporate Guarantor has been extinguished, an application under Section 7 of IBC against the Corporate Debtor can be filed for recovery of remaining dues is remarkable as it erases the future ambiguity pertaining to this issue. Through this judgment, NCLAT has reiterated that a Creditor reserves the right to recover the entirety of its dues from both the Corporate Debtor as well as the Corporate Guarantor, and that the approval of a Resolution Plan in the CIRP of one of the parties does not extinguish the dues of another party.

Regional Provident Commissioner EPFO v. Vandana Garg & Anr

Order dated May 12, 2021 [Company Appeal (AT) (Insolvency) No. 50 of 2021]

Background facts

- GVR Infra Projects Ltd (**Corporate Debtor**) had defaulted in payment of dues, including employees' share of contributions which were deducted from their wages. Thereafter, an application for initiation of Corporate Insolvency Resolution Process (**CIRP**) of the Corporate Debtor was filed under Section 7 of the IBC by Reliance Capital Ltd.
- During the CIRP, the Regional Provident Commissioner of Employee Provident Fund Organization (**Appellant**) filed its claim in Form-B as an operational creditor for an amount of INR 1,95,01,301 before Vandana Garg (**RP**), which was later admitted by the RP. The Appellant also sought clarification from the RP with respect to the amount payable by the Corporate Debtor, in response to which the RP stated that the claim already admitted would be settled as per the resolution plan.
- Subsequently, the NCLT, Chennai Bench vide its order dated July 20, 2020 approved the Resolution Plan submitted by UV Asset Reconstruction Co Ltd, allocating the Appellant's claim as per Form-B in conformity with Section 30(2) of IBC.
- The Appellant preferred an appeal before the NCLAT, Chennai Bench seeking to enhance its claim towards the provident fund from the said amount to the tune of INR 2,84,69,747.00.

⁵ 2020 SCC OnLine NCLAT 774

⁶ 2019 SCC Online Calcutta 7288

Issue at hand?

- Whether the approved Resolution Plan which waves off the major proportion of provident fund dues owed by the Corporate Debtor violates Sections 36(4)(a)(iii) and 30(2)(e) of IBC?

Decision of the Tribunal

- At the outset, NCLAT placed reliance on *The Committee of Creditors of Essar Steel India Ltd v. Satish Kumar Gupta*⁷, wherein it was held that a successful Resolution Applicant cannot suddenly be faced with undecided claims pursuant to approval of the Resolution Plan submitted by him.
- NCLAT noted that applicability of Section 36(4)(a)(iii) of the IBC, which provides that all sums due to any workmen or employee from the provident fund are not included in the liquidation estate assets, arises at the stage of the formation of liquidation estate by the Liquidator. NCLAT observed that it had dealt with a similar issue in hand in the case of *Savan Godiwala v. Apalla Siva Kumar*⁸ and held that in the instant case, the Corporate Debtor had not gone into liquidation but under insolvency resolution proceedings and, thus, Section 36 of IBC cannot be applied.
- Regarding compliance of the approved resolution plan with Section 30(2) of IBC, the NCLAT referred to the recent case of *Ghanashyam Mishra & Sons Pvt Ltd v. Edelweiss Asset Reconstruction Co Ltd*⁹, wherein the SC held that the once a Resolution Plan is approved by the NCLT, the claims as provided in the resolution plan shall stand frozen so that the Resolution Applicant starts on a clean slate and there are no surprises.
- NCLAT further noted that there was no justification provided by the Appellant for raising the enhanced claim of INR 2,84,69,797, which was much higher than the amount claimed in its Form-B.
- In view of the above, the NCLAT dismissed the present appeal and held that after approval of the Resolution Plan under Section 31 of the IBC, all claims that are not part of the Resolution Plan shall stand extinguished and no person is entitled to initiate or continue any proceedings regarding a claim that is not part of the Resolution Plan. Thus, the Appellant's claim amounting to INR 1,95,01,301, would stand frozen and will be binding on all the stakeholders since the enhanced claim amount was not part of the Resolution Plan as approved by NCLT.

Our viewpoint

In our opinion, the NCLAT did not consider certain protective provisions laid down in Sections 10 and 12 of Employees Provident Fund and Miscellaneous Provisions Act, 1952 (**EPF Act**). The entire objective of enacting EPF Act is to protect the rights of workmen and employees. The issue of inconsistency between the provisions of IBC with EPF Act along with the non-obstante clause in Section 11 of EPF Act and the overriding effect of Section 238 of IBC should have been considered by NCLAT. It is pertinent to highlight that in the case of *Som Prakash Rekhi v. Union of India*, the SC held that as per the provisions of the EPF Act, the workmen or employees right to claim full provident fund with interest and damages will never be extinguished.

Moreover, in the event the approved Resolution Plan contravenes any provisions of law for the time being in existence as per Section 30(2)(e), on examination by the RP, he cannot present the said Resolution Plan before the CoC for its approval under Section 30(3) of IBC. The NCLT as circumscribed by the supervisory role envisaged under Section 31(1) of IBC needs to satisfy itself that the Resolution Plan approved by the CoC meets the requirements set out in Section 30(2) of IBC before it passes an order of approval. Therefore, in the instant case, the approval of the Resolution Plan by the NCLT may lead to legal challenges and further ambiguities.

⁷ Supra Note 2.

⁸ 2020 SCC OnLine NCLAT 191.

⁹ Supra Note 3.

Lalit Kumar Jain v. Union of India & Ors

Judgment dated May 21, 2021 [Transferred case (Civil) No. 245 of 2020 and other writ petitions]

Background facts

- On November 15, 2019, the Ministry of Corporate Affairs, in exercise of the powers conferred by Section 1(3) of IBC, issued notification (**Impugned Notification**) enforcing certain provisions of Part III of IBC relating to initiation of insolvency proceedings against the Personal Guarantors to Corporate Debtors with effect from December 1, 2019. The Impugned Notification brought into force Sections 2(e), 78 (except with regard to fresh start process), 79, 94 to 187, 239(2)(g) to (i), 239(2)(m) to (zc), 240 (zn) to (zs), and 249.
- Additionally, the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantor to Corporate Debtors) Rules, 2019 (**Rules**) were issued on November 15, 2019, and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 (Regulations) were notified on November 20, 2019. The Rules and Regulations provide a detailed procedure permitting creditors to initiate insolvency proceedings against Personal Guarantors to Corporate Debtors.
- Since several guarantors who were, in most cases, individuals associated with corporate persons as either promoters or directors (**Petitioners**) and had furnished personal guarantees to banks and financial institutions to secure the repayment of debts, insolvency proceedings under Part III of IBC were initiated against them. This, in turn, led to a string of challenges and thus, several petitions challenging the Impugned Notification were filed before various High Courts.
- As most of the petitions filed before the High Courts which arose in various proceedings preferred under Article 32 of the Constitution of India involved common questions of law in relation to provisions of the IBC, SC transferred all such matters to itself under Article 139A of the Constitution of India to expeditiously adjudicate the common issues at hand and avoid any conflicting decisions.
- The Petitioners challenged the constitutional validity of the Impugned Notification, primarily on the following grounds:
 - The power exercised by the Central Government (**CG**) vide the Impugned Notification was arbitrary and ultra vires, as CG selectively implemented provisions of Part III of IBC with respect to Personal Guarantors to Corporate Debtors, despite partnership firms and other individuals falling within the scope of Part III of IBC as well.
 - The Impugned Notification failed to notify Section 243 of IBC, which repeals Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 and by not repealing these statutes, the Impugned Notification created two self-contradictory legal regimes for insolvency proceedings against Personal Guarantors to Corporate Debtors.
 - Once a resolution plan for a Corporate Debtor is approved, all outstanding claims against the Debtor and the Corporate Debtor, consequently, are extinguished.
- In accordance with Section 128 of the Indian Contract Act 1872 (**Contract Act**), liability of a Guarantor is co-extensive with that of the Corporate Debtor and conclusion of insolvency proceedings against a corporate debtor, i.e., after approval of resolution plan, would amount to extinction of all claims against the Personal Guarantor.

Issues at hand?

- Whether the Impugned Notification which provides selective application to Personal Guarantors was a result of excessive delegation, and the CG has acted in excess of the powers vested to it under Section 1(3) of IBC?
- Whether there is any inconsistency between the provisions enforced through the Impugned Notification and the IBC, especially with respect to Section 243 of IBC?
- Whether the Impugned Notification overlooks the co-extensive nature the liability of Personal Guarantor with that of the Principal Debtor, upon approval of Resolution Plan?

Decision of the Court

- At the outset, SC rejected the Petitioners contention that the CG has no authority to bring into force the provisions of IBC only in relation to Personal Guarantors to Corporate Debtors. While arriving at this decision, SC after perusing the dates on which various provisions of IBC had been notified, took note that the CG had followed a stage-by-stage process of bringing the provisions of IBC into force, keeping in mind the similarities and dissimilarities of the subject matter of the provisions and the objective of the IBC.
- Regarding the first issue, SC noted that different provisions of IBC were enforced at different times by CG depending upon the objective of IBC and there is no compulsion in IBC that a particular provision should

be made applicable at the same time to all individuals (including Personal Guarantors) or not at all. SC clarified that there is sufficient indication in IBC that the Personal Guarantors to Corporate Debtors are a distinct class of individuals and are treated differently from other categories of individuals, especially gaining recognition after the amending Act of 2018, in Sections 2(e) and 60 of IBC, although they are dealt with through the same adjudicatory process and by the same forum, i.e., NCLT as that of Corporate Debtors. SC referred to report of the Working Group of Individual Insolvency (Regarding Strategy and Approach for Implementation of the Provisions of the Insolvency and Bankruptcy Code, 2016)¹⁰ which recognized a nexus between a Personal Guarantor and a Corporate Debtor, as opposed to individuals and partners in firms. SC went on to observe that the Impugned Notification simply makes the provisions of IBC applicable in respect of Personal Guarantors to Corporate Debtors, as another such category of persons to whom IBC has been extended. Thus, it held that the Impugned Notification is not an instance of legislative exercise or amounting to impermissible and selective application of provisions of IBC. It further held that the Impugned Notification was issued within the powers granted by the Parliament and such exercise of powers in issuing the Impugned Notification under Section 1(3) of IBC is not ultra vires. Furthermore, Section 2(e) of IBC which deals with the application of the Code to Personal Guarantors to Corporate Debtors, as was amended to take retrospective effect, was held not to suffer from any non-application of mind.

- Regarding the second issue, SC opined that there is no incongruity in provisions enforced by the Impugned Notification and the IBC. SC noted that Section 243 of IBC which provides for the repeal of the personal insolvency laws has not yet been notified as the non-obstante provision under Section 238 gives IBC overriding effect over other prevailing enactments. Further, Parliament merged the provisions of Part III of IBC with the process undertaken against the corporate debtors under Part II, for the purpose of Section 60(2) of IBC, i.e., proceedings against Personal Guarantors along with Corporate Debtors. SC held that there appears to be sound reasons why the forum of adjudicatory insolvency processes, the provisions of which are disparate is to be common, i.e., through NCLT since NCLT would be able to consider the whole picture about the nature of the assets available, which would enable the CoC in framing realistic plans while considering the prospect of realizing some part of the Creditors' dues from Personal Guarantors.
- Lastly, SC held that sanction of a Resolution Plan and its finality imparted to it by Section 31 of IBC does not discharge the Personal Guarantor's liability given that the same was a result of an involuntary act i.e., by operation of law, or due to liquidation, or insolvency proceeding. SC placed reliance on the provisions of the Contract Act relating to 'contract of guarantee' and the case of State Bank of India v. V. Ramakrishnan & Ors¹¹, wherein it had held that the Guarantor cannot escape the liability under Section 134 of the Contract Act since a resolution plan which has been approved may include the provisions for payments to be made by the Guarantor. Consequently, the approval of a resolution plan does not discharge the Guarantor of any liability. Further, SC observed that the involuntary acts of the Principal Debtor which leads to the loss of security does not absolve the liability of a Guarantor and the liability of the Guarantor would very much continue, and the Creditor can still realize the same from the Guarantor in terms of Section 128 and 134 of the Contract Act, as was held in the case of Maharashtra State Electricity Board Bombay v. Official Liquidator, High Court, Ernakulam & Anr.¹² and Committee of Creditors of Essar Steel India Ltd v. Satish Kumar Gupta.¹³
- In view of the above, SC upheld the vires and constitutional validity of the Impugned Notification and the transferred petitions in the instant case were dismissed accordingly.

Our viewpoint

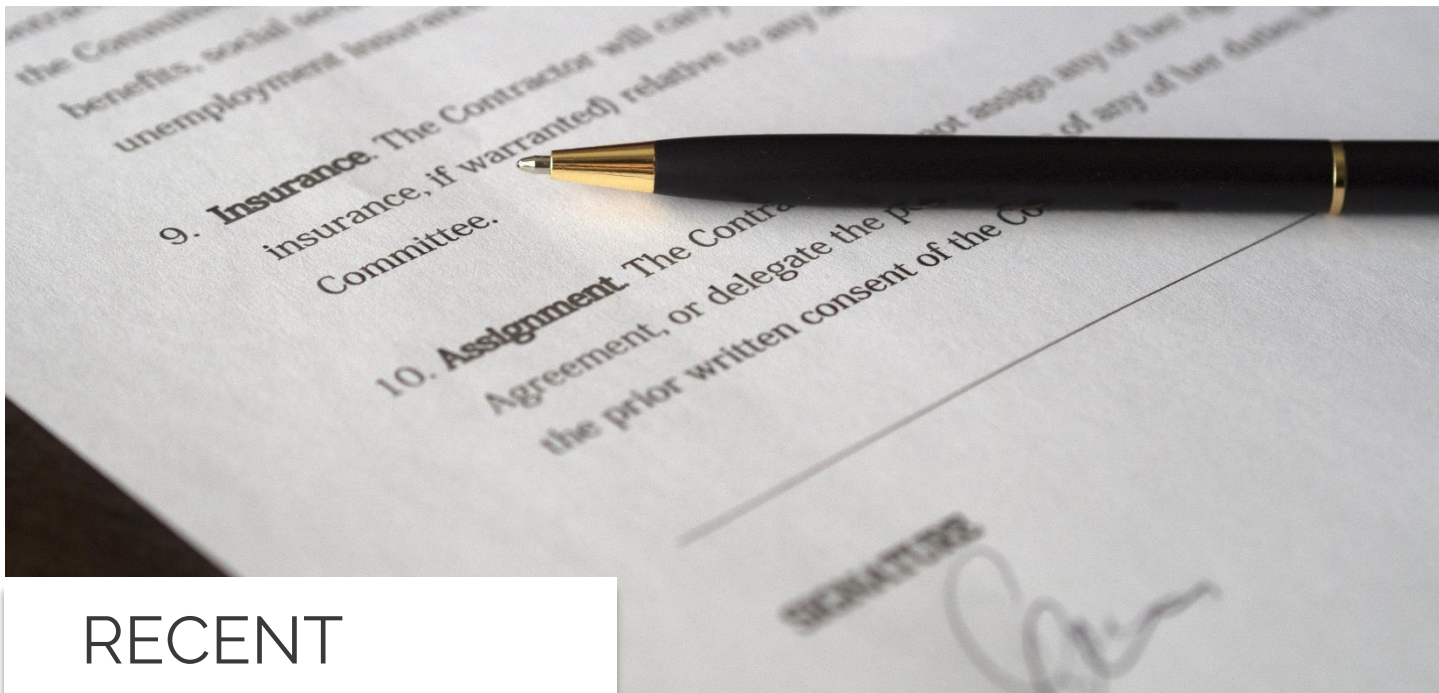
The protracted debate as to the treatment of Personal Guarantors under the IBC has been finally put to rest by SC by way of this judgment and has paved the way for Creditors in better recovery of loans and multiple litigations to commence against Personal Guarantors to Corporate Debtors. It enhances the position of Creditors and will speed up the CIRP as they will be allowed to proceed separately against Personal Guarantors even while insolvency proceedings against the Corporate Debtor are pending. It is not only beneficial but will avoid arbitrariness, unnecessary litigations and will be a step forward to ensure that the law is authoritatively settled in furtherance of the spirit of IBC. It is imperative to mention that the SC has reiterated the legal position that once a Resolution Plan approved by the CoC takes effect, it is then binding on the Guarantor and for this reason, a Guarantor cannot escape its payment obligations as laid down in the Resolution Plan. The verdict would surely ensure stringent credit discipline in the future by making the promoters accountable and they will be extremely careful in giving personal guarantees.

¹⁰ Available at https://ibbi.gov.in/uploads/resources/Final-Report_of_WG_on_Indiv_Insol-Aug_2017.pdf

¹¹ (2018) 17 SCC 394.

¹² 1982 (3) SCC 358.

¹³ Supra Note 2.



RECENT DEALS

Resolution of Aeon Manufacturing Pvt Ltd

- The NCLT, Kolkata Bench, vide an order dated May 11, 2021 approved the Resolution Plan submitted by Indo Polysacks Pvt Ltd, the Successful Resolution Applicant, in the CIRP of Aeon Manufacturing Private Limited, the Corporate Debtor.
- Vide order dated October 30, 2019, the NCLT, Kolkata Bench admitted the Company Petition filed by the Financial Creditor, i.e., Bank of India under Section 7 of the IBC and ordered for initiation of the CIRP of Aeon Manufacturing Pvt Ltd.
- The Resolution Professional issued Form-G inviting EoIs from Prospective Resolution Applicants. Pursuant to the public announcement, EoIs were received from 5 Prospective Resolution Applicants. Thereafter, Resolution Plans were received and after numerous revisions of the Resolution Plan, CoC in its 16th meeting held on February 24, 2021, after detailed discussions, approved the revised Resolution Plan submitted by Indo Polysacks Pvt Ltd by 100% voting share.
- The Resolution Plan by Indo Polysacks Pvt Ltd provides for a total payment of INR 9.41 crore against an admitted debt of INR 145.80 crore. A perusal of the same suggests that the creditors will have to take a massive haircut of 62.02%.
- The NCLT while approving this plan stated that waivers and concessions with regard to the claims of the Creditors and other stakeholders shall be waived off considering that the same have been dealt with during the CIRP of the Corporate Debtor and have been approved by the majority of the CoC. However, any concessions or waivers claimed by Indo Polysacks Pvt Ltd regarding any statutory dues or penalty shall only be granted after Indo Polysacks Pvt Ltd has approached the competent authority of Government/Semi Government/Central or Local Authority for such relief/claim or waiver.

NCLT, Kolkata Bench gives nod to Resolution Plan submitted by Glix Securities Pvt Ltd for resolution of R.D. Rubber Reclaim Ltd

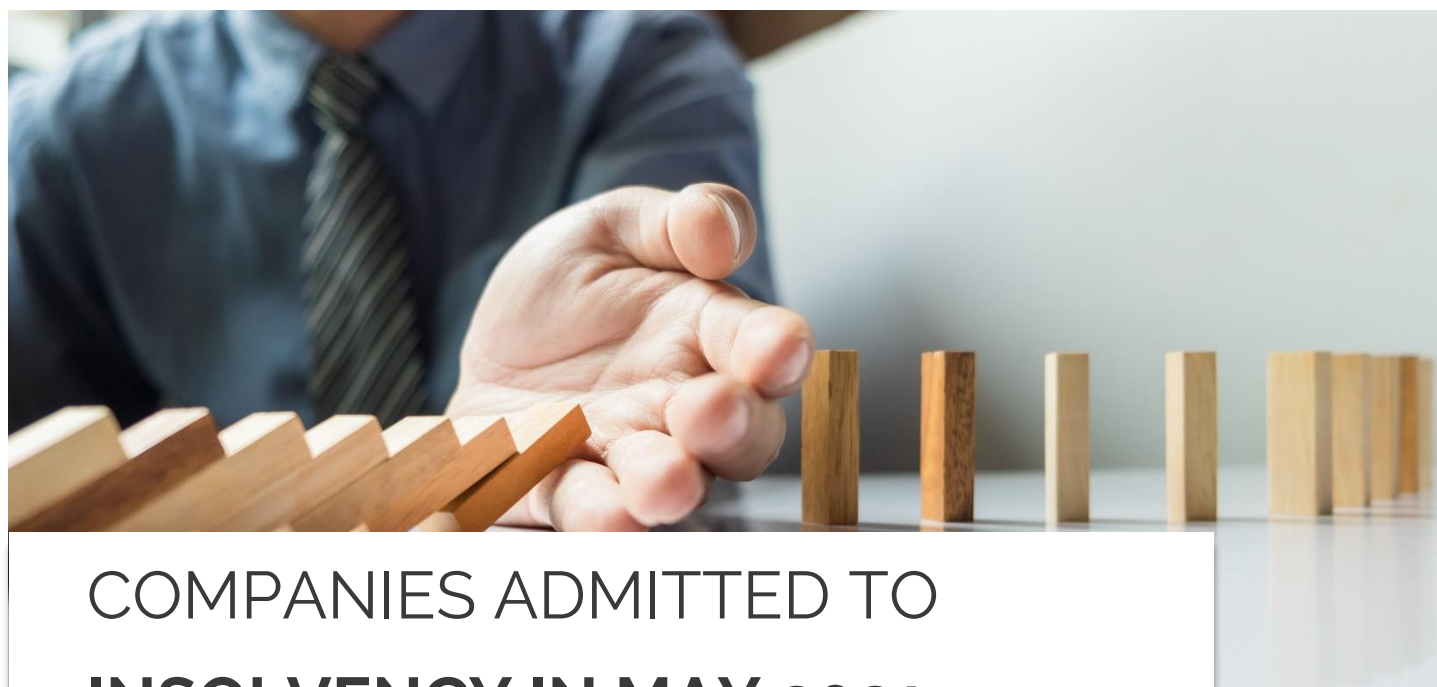
- Mamta Binani, the Resolution Professional of R.D. Rubber Reclaim Ltd (**Corporate Debtor**), placed the approved Resolution Plan of Glix Securities Pvt Ltd (**Successful Resolution Applicant**), before the NCLT, Kolkata for approval under Section 30(6) and Section 31(1) of the IBC.
- CIRP of R.D. Rubber Reclaim Ltd was initiated subsequent to the admission order dated October 25, 2019 by NCLT, Kolkata 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.
- Resolution Professional published the Form G inviting the EoI, in response to the same, 5 EoIs and subsequently, 2 (two) Resolution Plans were received. In the 14th meeting of the CoC held on November 06, 2020, the Plan submitted by Glix Securities Pvt Ltd was approved by a 100% majority and provides for a total payment of INR 10.52 crore against the admitted debt of INR 38.48 crore.
- Application for approval of Resolution Plan was approved by NCLT vide order dated May 11, 2021.

Resolution of Lemon Electronics Ltd

- Resolution Process of Lemon Electronics Ltd came to an end vide an order dated May 13, 2021 passed by NCLT, New Delhi wherein it approved the Resolution Plan submitted by Mridul Tobie Inc in the Corporate Insolvency Resolution Process of the Corporate Debtor.
- CIRP commenced on February 27, 2020, following an order passed by NCLT, New Delhi Bench for admitting Section 9 Application filed against the Corporate Debtor by Fine Group Corporation Ltd. Thereafter, after following the due process, Resolution Plan of Mridul Tobie Inc was approved with 99.61% votes in the 8th meeting of Committee of Creditors held on January 08, 2021.
- The said Resolution Plan offers a total payment of INR 19.78 crore against the Liquidation Value of INR 95.58 lakh.
- This is a positive outcome especially under the current economic contraction.

Resolution Plan for resolution of DHFL approved

- The NCLT, Mumbai Bench on June 07, 2021 approved the Resolution Plan submitted by Piramal Group for the resolution of beleaguered Dewan Housing Finance Ltd (**DHFL**), which has been reeling from the insolvency process since 2019.
- DHFL had gone bankrupt with more than INR 90,000 crore in debt to various lenders, including banks, mutual funds and individual investors who kept fixed deposits with the company.
- The plan put forward by Piramal Group offers to pay INR 37,250 crore which includes INR 12,700 crore in upfront cash, INR 3,000 crore in interest income on DHFL's books and INR 19,550 crore worth of non-convertible debentures to be repaid over 10 years.
- The plan was approved by a 94% of the voting share of the CoC.
- The approval of the Resolution Plan comes after stay order dated May 25, 2021 passed by the NCLAT on the order of the NCLT, giving a back door entry to the promoter of DHFL by asking the CoC of DHFL to consider the settlement offer of INR 91,000 Crores offered by Kapil Wadhawan, the former promoter of the DHFL.
- Aggrieved by the stay order of the NCLAT, Wadhawan has filed a plea before SC on May 31, 2021. The said plea before the Supreme Court is yet to be listed.



COMPANIES ADMITTED TO INSOLVENCY IN MAY 2021

Companies admitted to insolvency

#	Name of Corporate Debtor	NCLT Bench	Industry
1	Ahitri Spinning Mills Pvt Ltd	Ahmedabad	<u>Textile</u> Provides spinning, weaving and finishing services.
2	Bharucha & Motivala Infrastructure Pvt Ltd	Mumbai	<u>Construction and contractor services</u> Involved in designing, building, project construction management, EPC jobs etc.
3	Blue Frog Media Pvt Ltd	Mumbai	<u>Media & Entertainment</u> Involved in production, recording and promotion of music.
4	Clarion Townships Pvt Ltd	New Delhi	<u>Real Estate</u> All activities related to real estate business.
5	Cox & Kings Financial Services Ltd	Mumbai	<u>Finance</u> Operates as a financial planner and provides services including but not limited to foreign exchange, student loan financing etc.
6	Delhi Diamonds Pvt Ltd	New Delhi	<u>Jewelry</u> Involved in business of manufacturing and wholesaling of finished diamonds.
7	Fabtech Sugar Ltd	Mumbai	<u>Manufacturing</u> Manufacturing of Sugar.
8	Indo Alusys Industries Pvt Ltd	New Delhi	<u>Manufacturing</u> Involved in the business of aluminum extrusion and in the production of aluminum extruded products.
9	Megha Granuels Pvt Ltd	Guwahati	<u>Manufacturing</u> Involved in manufacturing and exporting of Woven Polypropylene Bags, Tarpaulins and Ferro Alloys in India.
10	Muktar Minerals Pvt Ltd	Mumbai	<u>Mining</u> Involved in the business of mining & quarrying and specialises in offering Iron Ore Mining.

11	Nature India Communique Ltd	New Delhi	<u>Services</u> Engaged in the business of providing consultancy service such as tax consultancy, business and financial management consultancy. Also involved in the business of providing logistical support.
12	Prithvi Greens Agro Pvt Ltd	New Delhi	<u>Manufacturing</u> Involved in manufacturing various food products like dairy products, tomato ketchup, pickles, packaged drinking water, etc.
13	Rajesh Construction Co Pvt Ltd	Mumbai	<u>Real Estate</u> All activities related to real estate business.
14	Rise India Padhopadhaa Pvt Ltd	New Delhi	<u>Services</u> Involved in the business of providing educational services and Career Counselling.
15	Sare Facility (Gurgaon) Services Pvt Ltd	New Delhi	<u>Real Estate</u> All activities related to real estate business.
16	SDS Infratech Pvt Ltd	New Delhi	<u>Real Estate</u> All activities related to real estate business especially construction of residential properties.
17	Unity Appliances Ltd	Mumbai	<u>Manufacturing</u> Involved in manufacturing and trading of electrical appliances.
18	Wizcraft International Entertainment Pvt Ltd	Mumbai	<u>Services</u> Provides communication and entertainment services. It is involved in designing and management of television, theatrical, and sports events

Companies directed to be liquidated

#	Name of Corporate Debtor	NCLT Bench	Industry
1	BHA Associates Pvt Ltd	New Delhi	<u>Textile</u> Involved in manufacturing of apparels.
2	Divine Alloys & Power Co Ltd	Kolkata	<u>Manufacturing</u> Involved in manufacturing of iron and steel.
3	Earth Mover Consultancy Pvt Ltd	Kolkata	<u>Manufacturing</u> Involved in manufacturing of chemicals and products thereof.
4	EPC Constructions India Ltd	Mumbai	<u>Services</u> Involved in the business of providing logistical support to exporters. Also involved in business of providing EPC contract services.
5	Jurong Engineering (India) Pvt Ltd	Chennai	<u>Construction</u> Involved in construction, civil engineering and allied activities.
6	On-Dot Couriers and Cargo Ltd	New Delhi	<u>Cargo</u> Involved in providing logistical support such shipment and cargo services.
7	Radius Infratel Pvt Ltd	New Delhi	<u>Internet Service Provider</u> Involved in the business of providing Fiber to the Home and Nano Access Network Operation solutions.
8	Trans Gulf Frozen Food Containers Pvt Ltd	New Delhi	<u>Food & Beverages</u> Involved in production, processing and preservation of meat, fish, fruit vegetables, oils and fats.

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