ANALYSIS OF CASES PERTAINING TO THE INSOLVENCY AND BANKRUPTCY CODE, 2016—IN VOLUME 217

Poornima (N.)[1]

***Pioneer Urban Land and Infrastructure Ltd.* case**

The Insolvency and Bankruptcy Code, 2016 was passed by Parliament on May 28, 2016. Petitions were filed against the real estate developers under the Code by the allottees who had entered into "assured returns/committed returns" agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration up front at the time of execution of the agreement, the developer undertook to pay a certain amount to the allottees on a monthly basis from the date of execution of the agreement till the date of handing over of possession to the allottees. The National Company Law Appellate Tribunal on July 21, 2017 in *Nikhil Mehta and Sons* v. *AMR Infrastructure Ltd.* [2018] 2 Comp Cas-OL 88 (NCLAT) held that amounts raised by the developers under assured return schemes had the "commercial effect of a borrowing", which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code. In *Chitra Sharma* v. *Union of India* [2018] 210 Comp Cas 609 (SC) representative of the home buyers, i. e., the allottees, were allowed to participate in meetings of the committee of creditors in order that their interests be protected. Similar orders were passed in *Bikram Chatterji* v. *Union of India* (Writ Petition (Civil) No. 940 of 2017). Given these orders by the Supreme Court, the Insolvency Committee Report suggested that amendments be made in the Code seeking to clarify, as a matter of law, that allottees of real estate projects are financial creditors. Pursuant to the report, on August 17, 2018 Parliament passed the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 incorporating 3 amendments by inserting (i) *Explanation* to section 5(8)(f) defining financial debt, (ii) section 21(6A)(b), and (iii) section 25A providing for rights and duties of the authorised representatives of the financial creditors. Validity of these amendments were challenged in the *Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India* [2019] 217 Comp Cas 1 (SC) and it has been upheld by the Supreme Court.

Real Estate (Regulation and Development) Act, 2016 in addition to Code and not in derogation : The court clarified that the provisions of the Real Estate (Regulation and Development) Act, 2016 were in addition to and

---

1. B.Com, LL.B, Consultant.

not in derogation of the provisions of any other law for the time being in force and under section 89 of the Act it was to have effect notwithstanding anything inconsistent contained in any other law for the time being in force. The contention that the Act being a special enactment which dealt with real estate development projects and must, therefore, be given precedence over the Code, which is only a general enactment dealing with insolvency generally was negated. The court observed that (page 60 of 217 Comp Cas) :

> "From the introduction of the *Explanation* to section 5(8)(f) of the Code, it is clear that Parliament was aware of the RERA, and applied some of its definition provisions so that they could apply when the Code is to be interpreted. The fact that RERA is in addition to and not in derogation of the provisions of any other law for the time being in force, also makes it clear that the remedies under the RERA to the allottees were intended to be additional and not exclusive remedies. Also, it is important to remember that as the authorities under the RERA were to be set up within one year from May 1, 2016 remedies before those authorities would come into effect only on and from May 1, 2017 making it clear that the provisions of the Code, which came into force on December 1, 2016 would apply in addition to the RERA."

Code to have overriding effect over the Act : It was made clear that even by a process of harmonious construction, the Act and the Code must be held to co-exist, and, in the event of a clash, the Act must give way to the Code. The Act was not a special statute which, in the case of a conflict, would override the general statute, viz., the Code. The Supreme Court observed that the Code and Act operated in completely different spheres.

Inclusion not discriminatory : The petitioners had contended that treating the allottees to be financial creditors is discriminatory inasmuch as unequals are treated equally, equals are treated unequally, and both are without any intelligible differentia having any nexus with the objects of the Code. The court applied the principle that "far greater deference is accorded to economic legislation, as the Legislature is given free play in the joints and is at liberty to conduct economic experiments in public interest". The decisions in *Swiss Ribbons P. Ltd.* v. *Union of India* [2019] 213 Comp Cas 198 (SC), *State of Gujarat* v. *Shri Ambica Mills Ltd.* [1974] 4 SCC 656, *Ram Krishna Dalmia* v. *Justice S. R. Tendolkar* [1959] SCR 279 were also relied on in this aspect. The court observed that (page 79 of 217 Comp Cas) :

"It is a proceeding in rem which, after being triggered, goes completely outside the control of the allottee who triggers it. Thus, any allottee/home buyer who prefers an application under section 7 of the Code takes the risk of his flat/apartment not being completed in the near future, in the event of there being a breach on the part of the developer. Under the Code, he may never get a refund of the entire principal, let alone interest. This is because, the moment a petition is admitted under section 7, the resolution professional must first advertise and find a resolution plan by somebody, usually another developer, which has then to pass muster under the Code, i. e., that it must be approved by at least 66 per cent. of the committee of creditors and must further go through challenges before the National Company Law Tribunal and National Company Law Appellate Tribunal before the new management can take over and either complete construction, or pay out or refund amounts. Depending on the kind of resolution plan that is approved, such home buyer/allottee may have to wait for a very long period for the successful completion of the project. He may never get his full money back together with interest in the event that no suitable resolution plan is forthcoming, in which case, winding up of the corporate debtor alone would ensue. On the other hand, if such allottee were to approach the Real Estate Regulatory Authority under the RERA, it is more than likely that the project would be completed early by the persons mentioned therein, and/or full amount of refund and interest together with compensation and penalty, if any, would be awarded. Thus, given the bona fides of the allottee who moves an application under section 7 of the Code, it is only such allottee who has completely lost faith in the management of the real estate developer who would come before the National Company Law Tribunal under the Code hoping that some other developer takes over and completes the project, while always taking the risk that if no one were to come forward, corporate death must ensue and the allottee must then stand in line to receive whatever is given to him in winding up. Given the reasons of the Insolvency Committee Report, which show that experience of the real estate sector in this country has not been encouraging, in that huge amounts are advanced by ordinary people to finance housing projects which end up in massive delays on the part of the developer or even worse, i. e., failure of the project itself, and given the state of facts which was existing at the time of the legislation, as adverted to by the Insolvency

Committee Report, it is clear that any alleged discrimination has to meet the tests laid down."

It was held that classifying real estate developers was founded upon an intelligible differentia which distinguished them from other operational creditors and was not arbitrary as it had a rational relation to the objects of the Code.

Validity of 21(6A) and 25A : The court took note of the fact that the allottees may not be a homogenous group. However, it observed there were only two ways in which they can vote on the committee of creditors—either to approve or to disapprove of a proposed resolution plan. Sub-section (3A) goes a long way to ironing out any creases that may have been felt in the working of section 25A in that the authorised representative now casts his vote on behalf of all the financial creditors that he represents. If a decision taken by a vote of more than 50 per cent. of the voting share of the financial creditors that he represents is that a particular plan be either accepted or rejected, it is clear that the minority of those who vote, and all others, will now be bound by this decision. Reiterating its observation made in *Swiss Ribbons P. Ltd.* v. *Union of India* [2019] 213 Comp Cas 198 (SC) it again observed that "the Legislature must be given free play in the joints to experiment. Minor hiccups that may arise in implementation can always be sorted out later". Challenge to the machinery provisions contained in sections 21(6A) and 25A of the Code was repelled.

Money disbursed by allottee amounts to "debt" : According to the definition of "financial debt" in section 5(8) a "debt" must be "disbursed" against the consideration for time value of money. Considering the term "disbursement" as defined in the *Black's Law Dictionary* (10th edition), it was held that the expression "disburse" would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression "disbursed" referred to money which has been paid against consideration for the "time value of money". In short, the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money. Thus an allottee "disburses" money in the form of advance payments made towards construction of the real estate project. The court further observed that (page 104 of 217 Comp Cas) :

"That this is against consideration for the time value of money is also clear as the money that is 'disbursed' is no longer with the allottee, but, as has just been stated, is with the real estate developer who is legally obliged to give money's equivalent back to the allottee, having used it in the construction of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by way of instalments than he would if he were to pay for the ultimate price of the flat/apartment)."

Considering the precise language of section 5(8)(f) the court observed that (i) the sub-clause was a residuary provision which is "catch all" in nature and, (ii) that the words "any amount" and "any other transaction" meant that amounts that are "raised" under "transactions" not covered by any of the other clauses, would amount to a financial debt if they had the commercial effect of a borrowing. Even though the borrowing may be temporary, yet the court felt that the expression "borrow" was wide enough to include an advance given by the home buyers to a real estate developer for "temporary use" i. e., for use in the construction project so long as it is intended by the agreement to give "something equivalent" to money back to the home buyers.

Allottees financial creditors from inception : The court held that the allottees/home buyers were included in the main provision, i. e., section 5(8)(f) with effect from the inception of the Code, the *Explanation* being added in 2018 merely to clarify doubts that had arisen.

Conclusion

In a nutshell it has been held that (i) Amendment Act to the Code did not infringe articles 14, 19(1)(g) read with article 19(6) or 300A of the Constitution of India. (ii) The 2016 Act was to be read harmoniously with the Code, as amended by the Amendment Act. In the event of conflict that the Code will prevail over the RERA. Remedies that are given to the allottees of flats/apartments are therefore concurrent remedies, such the allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, the RERA as well as the triggering of the Code. (iii) Section 5(8)(f) as it originally appeared in the Code being a residuary provision, always subsumed within it the allottees of flats/apartments. The *Explanation* together with the deeming fiction added by the Amendment Act is only clarificatory of this position in law.

Section 7/9 petition : Limitation

Time-barred debt : Application of the Limitation Act, 1963 to the petition filed under the Code has been once and for all put to rest by the decision of the Supreme Court in *B. K. Educational Services P. Ltd.* v. *Parag Gupta and Associates* [2019] 212 Comp Cas 1 (SC) wherein it has been held that the 1963 Act was applicable to petition under sections 7 and 9 of the Code from inception of the Code and that the expression "debt due" in definition sections of the Code referred to debts that were "due and payable" in law, i.e., debts that were not time-barred. This point was further elaborated by the Supreme Court in *Jignesh Shah* v. *Union of India* [2019] 217 Comp Cas 139 (SC) wherein the court considered section 238A into the Code. In this case winding up petitions filed before the Code came into force were converted into petitions filed under the Code. The court held if such a petition is found to be time-barred on the date of its filing, then section 238A of the Code will not give a new lease of life to such a time-barred petition. It was observed that limitation, being procedural in nature, would ordinarily be applied retrospectively, save and except that the new law of limitation cannot revive a dead remedy and that application that is filed in 2016 or 2017, after the Code has come into force, cannot suddenly revive a debt which is no longer due as it is time-barred. On facts it was held that since "right to sue" accrued when a default occurred, the petition filed 3 years thereafter would be barred under article 137 of the 1963 Act.

Exclusion of certain period : In *Gouri Prasad Goenka* v. *Punjab National Bank* [2019] 217 Comp Cas 418 (NCLAT) the period wherein the corporate debtor was declared a sick industrial unit by the BIFR under section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 whereby the secured creditors could not to take any coercive action against it till repeal of Act was excluded from computation limitation for the purpose of section 7 petition on account of the statutory bar. The petition under section 7 of the Code had been filed by the financial creditor in May, 2018, i. e., within three years from the date of enforcement of section 7 of the Code. This was further strengthen by the fact that there was acknowledgment of the outstanding debt on the part of the corporate debtor and as on the date of such acknowledgment the debt was not time barred and the insolvency resolution process was initiated within the period of limitation in terms of article 137 of the Limitation Act, 1963, computed from such date.

Acknowledgment of debt : In *Mrs. Kanchan Ostwal* v. *MEC Shot Blasting Equipment P. Ltd.* [2019] 217 Comp Cas 567 (NCLT), the Adjudicating Authority admitted a petition under section 9 of the Code in respect of invoices were raised in 2011 on the ground that the corporate debtor had acknowledged its debt by letter dated January 30, 2016 and issued cheques in lieu of payment of the debt. It relied on section 25(3) of the Indian Contract Act, 1872 to hold that the matter was within limitation. However, this order was set aside by the Appellate Tribunal upon settlement between the parties in *Ruchita Modi* v. *Mrs. Kanchan Ostwal* [2019] 217 Comp Cas 575

(NCLAT). In *K. R. V. Uday Charan Rao* v. *Bank of India* [2019] 217 Comp Cas 592 (NCLAT) also, the Appellate Tribunal affirmed the admission of a section 7 petition stating that limitation would start from the date of accrual of right and that the accrual of right was also to be noticed from the date of confirmation or acknowledgment of the debt and to be read along with section 18 of the Limitation Act, 1963. Since on March 17, 2015 the corporate debtor had acknowledged the debt, the petition under section 7 was held not barred by limitation.

Financial debt

One of the key aspect for any amount to be covered under section 5(8) of the Code as financial debt would be its disbursement against consideration for time value. Payment of interest on the amount disbursed is a vital clue to decide if the amount gets covered under section 5(8) of the Code. In *Saregama India Ltd.* v. *Home Movie Makers P. Ltd.* [2019] 217 Comp Cas 276 (NCLAT), the marketing agreements and subsequent correspondence exchanged between the parties it was not mentioned that the amount paid by the appellant was repayable with interest over a period of time in a single or series of payments in future. Therefore, it was held that the appellant had not disbursed money against the consideration for the time value and its claim was not a "financial debt".

Existence of debt

Existence of debt and its default is essential for initiation of petition under section 7 of the Code. Existence of dispute especially proceedings pending in other forums owing to disputes between parties would not affect existence of debt. Along as there was a debt due and payable which was more than Rs. 1 lakh and it had been defaulted by the debtor, the petition was to be admitted (*Vinayaka Exports* v. *Colorhome Developers P. Ltd.* [2019] 217 Comp Cas 450 (NCLAT)).

Proceedings against Tea company : Consent of Central Government

The Tea Act, 1953 has been enacted to provide for the control by the Central Government of the tea industry, including the control, in pursuance of the International Agreement now in force, of the cultivation of tea in, and of the export of tea from, India and for that purpose to establish a Tea Board and levy a duty of excise on tea produced in India. Section 16G(1)(c) of the Act, prohibits initiation of winding up proceedings in respect such company under control of Central Government or for the appointment of receiver in respect thereof shall lie in any court except with the consent of the Central Government. Since by Notification No. S. O. 260(E), dated January 28, 2016, the Tea Board of India (Ministry of

Commerce and Industries) had taken over the affairs and management of the corporate debtor, the Adjudicating Authority was of the opinion that a petition under section 9 of the Code could not be admitted unless the operational creditor sought consent from the Central Government in terms of section 16G(1)(c) of the Tea Act, 1953 in *A. J. Agrochem* v. *Duncans Industries Ltd.* [2019] 215 Comp Cas 361 (NCLT). The Appellate Tribunal in *A. J. Agrochem* v. *Duncans Industries Ltd.* [2019] 215 Comp Cas 367 (NCLAT) reversed the decision of the Adjudicating Authority on this point to hold that section 16G(1)(c) of the Act related to winding up and that the proceedings on an application under section 9 of the Code were not proceedings for winding up but for initiation of the corporate insolvency resolution process to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from the corporate debt by liquidation. Therefore, it was held that section 9 of the Code occupied a different field than section 16G(1) of the Act and there was no conflict between these provisions. This view was affirmed by the Supreme Court in *Duncans Industries Ltd.* v. *A. J. Agrochem* [2019] 217 Comp Cas 320, 335 (SC). The court observed that :

> "Section 16G(1)(c) refers to the proceeding for winding up of such company or for the appointment of receiver in respect thereof. Therefore, as such, the proceedings under section 9 of the IBC shall not be limited and/or restricted to winding up and/or appointment of receiver only. The winding up/liquidation of the company shall be the last resort and only on an eventuality when the corporate insolvency resolution process fails . . . Therefore, the entire 'corporate insolvency resolution process' as such cannot be equated with 'winding up proceedings'. Therefore, considering section 238 of the IBC, which is a subsequent Act to the Tea Act, 1953, shall be applicable and the provisions of the IBC shall have an overriding effect over the Tea Act, 1953. Any other view would frustrate the object and purpose of the IBC. If the submission on behalf of the appellant that before initiation of proceedings under section 9 of the IBC, the consent of the Central Government as provided under section 16G(1)(c) of the Tea Act is to be obtained, in that case, the main object and purpose of the IBC, namely, to complete the 'corporate insolvency resolution process' in a time-bound manner, shall be frustrated."

The court held that the Code would have an overriding effect over the Tea Act, 1953 and that no prior consent of the Central Government before initiation of the proceedings under section 7 or section 9 of the IBC would be required.

Certificate from financial institutions : Whether mandatory

Section 9(3) of the Code provides that "(3) The operational creditor shall, along with the application furnish— . . . (c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available". In *Smart Timing Steel Ltd.* v. *National Steel and Agro Industries Ltd.* [2017] 204 Comp Cas 503 (NCLAT), the Appellate Tribunal taking note of the word "shall" in section 9(3) of the Code held that a copy of the certificate from the financial institutions was mandatory. The argument that foreign companies having no office in India or no account in India with any "financial institution" would suffer in recovering the debt from the corporate debtor was not to be accepted on the ground that apart from the Code, there were other provisions for recovery. This order has been affirmed by the Supreme Court by a decision dated August 18, 2017 in *Smart Timing Steel Ltd.* v. *National Steel and Agro Industries Ltd.* [2019] 217 Comp Cas 502 (SC). However, this does not seem to be correct position of law as seen in paragraph 28 in *Macquarie Bank Ltd.* v. *Shilpi Cable Technologies Ltd.* [2018] 1 Comp Cas-OL 644, 676 (SC). The Supreme Court referring to the above decision observed that :

> "Whether or not there is a merger, it is clear that the order dated August 18, 2017 is not 'law declared' within the meaning of article 141 of the Constitution and is of no precedential value. Suffice it to state that the said order was also a threshold dismissal by the Supreme Court, having heard only learned counsel appearing for the appellant."

The court in *Macquarie Bank Ltd.* v. *Shilpi Cable Technologies Ltd.* [2018] 1 Comp Cas-OL 644 (SC) went on to hold that requirement of certificate from financial institution maintaining accounts of operational creditor was procedural and not directory in nature and that occurrence of default could be proved by means of other documentary evidence. However, this subsequent change in view of the Supreme Court was of no help to the creditor who filed another petition but it was dismissed on the ground of res judicata. The Appellate Tribunal in *Smart Timing Steel Ltd.* v. *National Steel and Agro Industries Ltd.* [2019] 217 Comp Cas 503 (NCLAT) held that the observations made by the Adjudicating Authority that the second petition on the same cause of action was not maintainable were correct.

Section 10 petition : Approval of annual general meeting

Section 10(3)(c) of the Code provides the application filed under section 10 must be accompanied with the special resolution passed by the shareholders of the corporate debtor or the resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be. Thus approval of the shareholders is one of the essential aspect in filing a section 10 application. Since the application was filed without approval of the annual general meeting and as the plan submitted was against the provisions of section 65 of the Code with malicious intent for a purpose other than resolution of insolvency and liquidation, the order of admission of section 10 application was set aside (*Ashapura Minechem Ltd., In re* [2019] 216 Comp Cas 573 (NCLT)) set aside in *Armada Singapore Pte. Ltd.* v. *Ashapura Minechem Ltd.* [2019] 217 Comp Cas 298 (NCLAT)).

Committee of creditor : Inclusion of member

After constitution of the committee of creditors, without its permission, the resolution professional was not competent to entertain more applications after three months to include one or other person as financial creditor. (*Asset Reconstruction Co. (India) Ltd. (ARCIL)* v. *Koteswara Rao Karuchola* [2019] 217 Comp Cas 554 (NCLAT)).

Resolution plan

Powers of the Adjudicating Authority : Powers of the Adjudicating Authority under section 31 of the Code while approving a resolution plan was up for consideration before the Appellate Tribunal *Prasad Gempex* v. *Star Agro Marine Exports P. Ltd.* [2019] 217 Comp Cas 409 (NCLAT) deciding an appeal from *Union Bank of India Ltd.* v. *Star Agro Marine Exports P. Ltd.* [2019] 217 Comp Cas 399 (NCLT). The Adjudicating Authority while approving a resolution plan, observed that from the plan approval date, all inquiries, investigation and proceedings, whether civil or criminal, suits, claims, disputes, proceedings in connection with the corporate debtor or affairs of the corporate debtor, pending or threatened, present or future in relation to any period prior to the plan approval date, or arising on account of implementation of the resolution plan, would stand withdrawn and dismissed. The Appellate Tribunal held that the Adjudicating Authority had no jurisdiction to pass any order with regard to any matter pending before the court of criminal jurisdiction and the Adjudicating Authority could not prohibit the aggrieved person from filing a claim before the court of competent jurisdiction or an application before the appropriate forum. Since such an order was contrary to the decision of the Appellate Tribunal in *Dynepro P. Ltd.* v. *V. Nagarajan, Resolution Professional, Cethar Ltd.* [2019] 6 Comp Cas-OL 672 (NCLAT), that part of the order was set aside. But rest of the order approving the plan was not to be interfered with.

Right of others to intervene : In *Next Orbit Ventures* v. *Print House (India) P. Ltd.* [2019] 217 Comp Cas 415 (NCLAT), the committee of creditors were directed by the Adjudicating Authority to convene its meeting and to consider the resolution plan submitted by S along with others who submitted the resolution plan within the due date including their objections. One of the resolution applicants challenged this order contending that the resolution plan submitted by S was not realistic and should not be considered. The Appellate Tribunal, inter alia, observed that if one or other resolution plan was found to be more viable and feasible and would maximise the assets of the corporate debtor, balancing all the stakeholders by maximising the assets of the financial creditor or the operational creditor and others, no right accrued to any individual applicant to stall such process.

Liquidation

Compromise or arrangement during liquidation : promoter's ineligibility: *Y. Shivram Prasad* v. *S. Dhanapal* [2019] 214 Comp Cas 83 (NCLAT)and *S. C. Sekaran* v. *Amit Gupta* [2019] 6 Comp Cas-OL 250 (NCLAT) are cases to the point that in a liquidation proceeding under the Code, a petition under sections 230 to 232 of the 2013 Act was maintainable. This especially so as the main objective of the Code is resolution or revival of the corporate debtor and not its death. This principle was applied by the National Company Law Appellate Tribunal once again in *Jindal Steel and Power Ltd.* v. *Arun Kumar Jagatramka* [2019] 217 Comp Cas 169 (NCLAT). An unsecured creditor of the company challenged the direction of the National Company Law Tribunal for taking steps for financial scheme of compromise and arrangement between the promoter and the corporate debtor through the liquidator in terms of section 230 of the 2013 Act. The creditor contended that in a liquidation proceeding under the Code the scheme for compromise and arrangement could not be made in terms of sections 230 to 232 of the Act and the promoter was not eligible to file an application for compromise and arrangement, while he was ineligible under section 29A of the Code to submit a resolution plan. The Appellate Tribunal, while holding that a petition under sections 230 to 232 of the 2013 Act was maintainable in a liquidation proceeding under the Code, the Appellate Tribunal held that even during the period of liquidation, for the purpose of sections 230 to 232 of the Act, the corporate debtor was to be saved from its own management, meaning thereby the promoters, who were ineligible under section 29A. The proviso to section 35(f) which prohibited the liquidator to sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who was not eligible to be a resolution applicant was taken note of. It was held that a promoter, if ineligible under section 29A could not make an application proposing a scheme of compromise and arrangement for taking back the immovable and movable property or actionable claims of the corporate debtor. The order of the Tribunal in *Gujarat NRE Coke Ltd. (in liquidation)* v. *Arun Kumar Jagatramka* [2019] 212 Comp Cas 638 (NCLT) was set aside.

Sale of assets to promoter : Section 35(1)(f) of the Insolvency and Bankruptcy Code, 2016, makes it clear that the liquidator cannot sell the assets of the corporate debtor to persons who are ineligible in terms of section 29A of the Code. A member, shareholder or promoter who is ineligible under section 29A of the Code cannot take over the corporate debtor by way of arrangement and scheme under sections 230-232 of the Companies Act, 2013. Even if section 52(4) of the Code, is silent relating to sale of secured assets to one or other persons, the *Explanation* below section 35(1)(f) of the Code makes it clear that the assets cannot be sold to persons who are ineligible under section 29A. If during the liquidation process assets cannot be sold to a person who is ineligible under section 29A, the provision will not only be applicable to the liquidator but also to the secured creditors, who opt out of section 53 to realise their claim in terms of section 52(1)(b) read with section 52(4) of the Code. Section 52 does not create any right in favour of one or other secured creditor to realise its security interest. In the *State Bank of India* v. *Anuj Bajpai (Liquidator)* [2019] 217 Comp Cas 547 (NCLAT) condition imposed on the secured creditor availing of its option to enforce its security interest under section 52 of the Code not to sell the assets to the erstwhile promoters or directors was affirmed.

Transfer of proceedings : *Effect of winding up order* : As seen above, liquidation or winding up is not the objective of the Code. What would be the effect of winding up order where the proceedings are transferred to the Adjudicating Authority in terms of rule 5(1) of the Companies (Transfer of Pending Proceedings) Rules, 2016 was considered by a Division Bench of the Delhi High Court in *Action Ispat and Power P. Ltd.* v. *Shyam Metalics and Energy Ltd.* [2019] 217 Comp Cas 356 (Delhi). The fact that proceedings under the Code independent and had an object different from the one envisaged under the scheme of liquidation provided in the company law was taken note of. It was held that the scope of the proceedings before the National Company Law Tribunal was wider—with the object of preserving the company and its business or commercial activities. Therefore, it was of the opinion that when transfer of a winding up petition could be an aid in achieving the objective, it ought to be allowed in the interest of justice and the court must be sensitive to the scheme and object of the Code ; running of parallel proceedings will indeed be futile, create chaos and confusion. It was of the view that an order passed by the company court admitting the petition and ordering its winding up was not irrevocable and ; on the day when the winding up order is passed, the company does not stand dissolved and that such an order of winding up can be recalled by the company court in exercise of the inherent powers the court recognized in rule 9 of the Companies (Court) Rules, 1959. It held that (page 376) :

> ". . . merely because the learned company judge had ordered the winding up of the appellant-company on August 3, 2004 it does not follow that the appellant-company should necessarily be liquidated and dissolved. The other options available, namely, to resolve/revive the appellant-company can and should always be explored for which purpose the National Company Law Tribunal is invested with jurisdiction, unless irrevocable steps towards liquidation have already been undertaken."

The court has also observed that the process under the Code meant to find the best possible solution in a given case, which was beneficial to the company concerned as well as its creditors and other stakeholders. Since in the interest of equity and justice, and keeping in mind the special nature of the Code, the company judge had found it fit to transfer the winding up petition to the National Company Law Tribunal on the application of secured creditor, it refused to interfere with the decision of the company judge, and that too, on the asking of the erstwhile management.

End of Volume 217