ANALYSIS OF CASES PERTAINING TO THE INSOLVENCY AND BANKRUPTCY CODE, 2016—VOLUME 219

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Classification of creditors

Equitable treatment of creditors : If an "equality for all" approach recognising the rights of different classes of creditors as part of an insolvency resolution process is adopted, the secured financial creditors will, in many cases, be incentivised to vote for liquidation rather than resolution, as they would have better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved. This would defeat the entire objective of the Code which is to first ensure that resolution of distressed assets takes place and only if that is not possible should liquidation follow. Equitable treatment is only of similarly situated creditors. Fair and equitable dealing of operational creditors' rights under regulation 38 of the Regulations as amended involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Insolvency and Bankruptcy Code, 2016 and the Regulations have been met, it is the commercial wisdom of the requisite majority of the committee of creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors. By vesting the committee of creditors with the discretion of accepting the resolution plans only with financial creditors, operational creditors having no vote, the Code itself differentiates between the two types of creditors. Under regulation 39(4), the compliance certificate of the resolution professional as to the resolution process being successful is contained in form H to the Regulations. Quite clearly, secured and unsecured financial creditors are differentiated when it comes to amounts to be paid under a resolution plan, together with what dissenting secured or unsecured financial creditors are to be paid. And, most importantly, operational creditors

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are separately viewed from these secured and unsecured financial creditors in entry 5 of paragraph 7 of statutory form H. Thus, it can be seen that the Code and the Regulations, read as a whole, together with the observations of expert bodies and judgments of the courts, all lead to the conclusion that the equality principle cannot be stretched to treating unequals equally, as that will destroy the very objective of the Code—to resolve stressed assets. Equitable treatment is to be accorded to each creditor depending upon the class to which it belongs : secured or unsecured, financial or operational (*Standard Chartered Bank* v. *Satish Kumar Gupta, Resolution Professional of Essar Steel Ltd.* [2020] 219 Comp Cas 15 (NCLAT) reversed in *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* [2020] 219 Comp Cas 97 (SC)).

Petition by financial creditors

Petition by home buyer must be bona fide : Right of allottees and developer fell for consideration before the Supreme Court in *Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India* [2019] 217 Comp Cas 1 (SC). The Supreme Court taking into consideration the Real Estate (Regulation and Development) Act, 2016 held that there being no provision similar to that of section 88 of the 2016 Act in the Insolvency and Bankruptcy Code, 2016, it was meant to be a complete and exhaustive statement of the law in so far as its subject-matter was concerned. The "non-obstante clause" of the 2016 Act came into force on May 1, 2016 as opposed to the "non-obstante clause" of the Code which came into force on December 1, 2016. Therefore, they are complimentary to each other. It was held that the 2016 Act was in addition to and not in derogation of the provisions of any other law for the time being in force, also that the remedies under the 2016 Act to the allottees were intended to be additional and not exclusive remedies. Therefore, the provisions of the Code would apply in addition to the 2016 Act. The court also took note of section 19(4) of the 2016 Act whereunder, the allottee was entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under the Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of the Act. The Supreme Court also observed that the corporate debtor could refer to section 65 and point out that insolvency resolution process has been invoked fraudulently, with malicious intent, for any purpose other than the resolution or insolvency. The real estate devel-

oper may do so by pointing out, for example, that the allottee who has knocked at the doors of the National Company Law Tribunal was a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment. The developer can also point out that in a real estate market which is falling, the allottee does not, in fact, want to go ahead with its obligation to take possession of the flat/apartment under the 2016 Act, but wants to jump ship and really get back, by way of this coercive measure, monies already. Considering these observations of the Supreme Court the Appellate Tribunal in *Navin Raheja* v. *Shilpa Jain* [2020] 219 Comp Cas 589 (NCLAT) was of the view that the Adjudicating Authority before admitting a case can find out whether the application filed by trigger-happy allottees who would be able to ignite the process of removal of the management of the real estate project and/or lead the corporate debtor to its death. On facts the Appellate Tribunal set aside the admission order in observing that the petition under section 7 of the Code had been filed fraudulently with malicious intent for a purpose other than for the resolution or liquidation and the petitioner had moved the Adjudicating Authority for refund of money and not for the flat, by way of coercive measure. The fact that the corporate debtor had offered possession of the flat and had obtained a completion certificate immediately thereafter was also taken note of. It was of the view that the delay in granting approval by the competent authority could not be taken into consideration to hold that the corporate debtor had defaulted in delivering the possession. The corporate debtor was released from the rigours of the corporate insolvency resolution process.

Second petition—When to be admitted : Once the Code gets triggered by admission of a creditor's petition under sections 7 to 9 of the Code, the proceeding that was before the Adjudicating Authority, being a collective proceeding, was a proceeding in rem. Therefore, when a petition is admitted under section 7/9 of the Code, a creditor who files another petition is directed to file its claim before the resolution professional appointed in the previous petition. In *Ess Investments P. Ltd.* v. *Lokhandwala Infrastructure P. Ltd.* [2020] 219 Comp Cas 568 (SC), the petition of the appellant was rejected by the National Company Law Tribunal on the ground that another petition by D had been admitted as against the corporate debtor in *Dalmia Group Holdings* v. *Lokhandwala Infrastructure P. Ltd.* [2020] 219 Comp Cas 558 (NCLT) with an unrecorded observation to file its claim before the interim resolution professional. However, the order of admission was set aside as the disputes between D and the corporate debtor had been settled *Aliasgar Mohammed Lokhandwala* v. *Dalmia Group Holdings*

[2020] 219 Comp Cas 566 (NCLAT). The Supreme Court held that the appellant could proceed against the corporate debtor before the National Company Law Tribunal seeking recall of the order of dismissal and revive its petition.

Date of default : The relevant date for computation of limitation for the purpose of filing a petition under section 7 of the Code would be the date of default. The date of passing of decree by the Debts Recovery Tribunal cannot be considered as date of default. As it only suggests that debt has become due and payable. The period of limitation of three years was to be counted from the date of default or date on which account declared as non-performing asset. The order of admission of the petition under section 7 of the Code by the Adjudicating Authority in *Stressed Assets Stabilisation Fund* v. *Saritha Synthetics and Industries Ltd.* [2020] 219 Comp Cas 227 (NCLT) was accordingly set aside by the Appellate Tribunal in *G. Eswara Rao* v. *Stressed Assets Stabilisation Fund* [2020] 219 Comp Cas 231 (NCLAT). The Appellate Tribunal observed that the Adjudicating Authority had failed to consider these facts and wrongly held that the date of default took place when the judgment and decree was passed by the Debts Recovery Tribunal on August 17, 2018. It held that in the absence of any acknowledgment under section 18 of the Limitation Act, 1963, the date of default or date of declaration of the account as non-performing asset was prior to 2004 and did not shift forward. Since the limitation had run out in the year 2007, the petition was found to be barred by limitation.

Limitation : Effect of acknowledgment : In *Deepakk Kumar* v. *Phoenix ARC P. Ltd.* [2020] 219 Comp Cas 461 (NCLAT), the order of the Adjudicating Authority in *Phoenix ARC P. Ltd.* v. *Sovereign Developers and Infrastructure Ltd.* [2020] 219 Comp Cas 448 (NCLT) was challenged by promoter of the corporate debtor, inter alia, on the ground of limitation. The Appellate Tribunal extensively discussed the aspect of limitation. According to the Appellate Tribunal as per section 18 of the Limitation Act, 1963, an "acknowledgment" is not limited in respect of the debt only, but in relation to "any property or right", which is the subject-matter of "lis" between the parties. There has to be an "acknowledgment", as per ingredients of section 18 of the Limitation Act, 1963 and it must be an unqualified one and the same will create fresh cause of action to a party/litigant to cement its claim on such "acknowledgment". The "acknowledgment" must be an "acknowledgment" of an existing liability. More importantly, an "acknowledgment of debt" must relate to an admission of existing relationship of a debtor and creditor and then intention to continue it should also be evident, as per decision in *Venkata* v. *Parthasarathi*, ILR 1893 (16)

Mad 220. An unequivocal and unqualified admission of the "debt" is to be established and simple admission of debt is sufficient in so far as the "acknowledgment" is concerned. An "acknowledgment" is to be in writing, the same is to be within the period of limitation and is to be signed by a litigant party whom the property or right is claimed. The decision of the Supreme Court in *Hiralal* v. *Badkulal*, AIR 1953 SC 225 was taken note of wherein the decision of the Privy Council in *Maniram* v. *Seth Rupchand* (33 IA 165 (PC)) was quoted with approval that "an unconditional acknowledgment was enough to furnish a 'cause of action' for it implied a promise to pay". Further, a part-payment is an acknowledgment of a particular fact and that the limitation period would be extended from the date of such payment. The 2010 judgment of the Chhattisgarh High Court in *Dena Bank* v. *Chameli Bai*, AIR 2010 Chhattisgarh 49 was also taken note of. The High Court had held that by means of section 19 read with article 1 of the Limitation Act, 1963, a fresh extended limitation of three years is to be calculated from the close of the year in which the last item admitted or proved as entered in the account established. It was also to be pointed out that an acknowledgment by a borrower shall bind the guarantors as well according to the decision in *Om Prakash* v. *UCO Bank*, AIR 2005 MP 234. The proposition in *Hasan Chand Sons* v. *Gaj Singh*, ILR 1961 (11) Raj 365 that when a plaintiff has concurrent remedies had availed of one remedy and remained unsuccessful, then, he cannot seek the benefit under section 14 of the Limitation Act, when instituting an alternate remedy as per the decision was also noted. That pendency of the DRT proceedings was not a bar for commencement of "insolvency resolution process" and time spent in insolvency proceedings is not to be excluded for filing an execution case based on money decree, secured against an insolvent as expounded in *Yeshwant Deorao* v. *Walchand Ramchand*, AIR 1951 SC 16 was also considered. The observation of the Supreme Court in *B. K. Educational Services P. Ltd.* v. *Parag Gupta and Associates* [2019] 212 Comp Cas 1 (SC), that "the right to sue" accrues when a default occurs and if the delay had occasioned over three years before the date of filing of application, the application would be barred under article 137 of the Limitation Act, was also considered. The Appellate Tribunal was of the view that special provisions have been made in the Bankers' Books Evidence Act, 1891 for banker's book whereby certified copy of an entry in such a book is admissible in evidence, could be brushed aside. However as held in *Chandradhar Goswami* v. *Guahati Bank*, AIR 1967 SC 1058 mere entries in the bank's books of account or mere copies thereof are not sufficient to charge a person with liability except where the person accepts the correctness of entries

as per the decision. On facts the Appellate Tribunal found that the assigned debt and the new/fresh loan for additional funding were not in dispute and further that on June 9, 2016 a letter of acceptance was entered into between the parties in regard to the restructuring, settling, outstanding amount, in respect of the assigned debt as well as the new loan, etc., in spite of this fact, the corporate debtor was given an adequate opportunity to pay the outstanding balance amount, had not made the payments, defaulted and also stopped making payments to the financial creditor after May 31, 2017. The plea that the petition under section 7 of the Code was barred by limitation was found untenable.

In *Ashish Kumar* v. *Vinod Kumar Pukhraj Ambavat* [2020] 219 Comp Cas 431 (NCLAT) the Appellate Tribunal affirmed by the decision of the Adjduciating Authority in *ASREC (India) Ltd.* v. *R. K. Jain Construction (India) P. Ltd.* [2020] 219 Comp Cas 427 (NCLT). It was contended that the petition was barred by limitation. The Appellate Tribunal found that the debt was acknowledged extending the period of limitation from time to time. Since a fresh period of limitation started after the acknowledgment of debt as per provision of section 18 of the Limitation Act. Therefore, the petition was held to be not barred by limitation.

Ex parte order of admission : In *Ashish Kumar* v. *Vinod Kumar Pukhraj Ambavat* [2020] 219 Comp Cas 431 (NCLAT) the Appellate Tribunal refused to interfere with the ex parte order passed by the Adjudicating Authority in *ASREC (India) Ltd.* v. *R. K. Jain Construction (India) P. Ltd.* [2020] 219 Comp Cas 427 (NCLT). The Appellate Tribunal took note of the fact that the Adjudicating Authority had proceeded ex parte, when the corporate debtor made no representation, despite service of notice.

Petition by operational creditors

Issuance of valid demand notice : Issuance of a demand notice or a copy as prescribed under section 8 of the Code is the first step in the process of initiating corporate insolvency resolution process by any operational creditor. That the demand notice must be a valid one and pertaining to the operational debt due from the debtor to the creditor goes without saying. An order of admission was set aside by the Appellate Tribunal as the demand notice, though issued in the name of the corporate debtor, but the amount claimed by the demand notice did not relate to the corporate debtor but to another company. It was held that the service of demand notice could not be treated as valid and proper service. The order admitting the petition filed on the basis of such notice was set aside (*Anil Syal* v. *Sanjeev Kapoor* [2020] 219 Comp Cas 480 (NCLAT)).

Failure to issue reply notice : Section 8(2) of the Code enjoins the corporate debtor to brings to the notice of the operational creditor within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1), (a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute ; (b) the payment of unpaid operational debt. Failure to do so would be detrimental to the corporate debtor. If the corporate debtor fails to raise the existence of a dispute or produce documents showing the payment the operational-creditor has the right to file an application under section 9 of the Insolvency and Bankruptcy Code, 2016. In *Dhingra Trading Co.* v. *Amazing India TV P. Ltd.* [2020] 219 Comp Cas 553 (NCLT), the creditor showed that the demand notice was duly delivered upon the corporate debtor at its registered mail id, but no reply was sent by the debtor and no dispute was raised within the prescribed period of days from the date of receipt of the notice. Since the corporate debtor had failed to raise any "existence of disputes" or show that the operational debt raised by the operational creditor had been paid. Therefore, the petition which was otherwise completed and was admitted.

Service of demand notice/petition : In *Indiacorp Law* v. *Paadm International Hotels P. Ltd.* [2020] 219 Comp Cas 475 (NCLT), the creditor had issued a demand notice dated February 2, 2019 under section 8 of the Code. The notice was sent by speed post at the registered address of the corporate debtor as reflected in the master data, which was duly delivered on the corporate debtor in terms of the tracking report. The corporate debtor had neither raised any dispute to the notice nor made any payment towards the outstanding dues. A copy of the petition had also been served through speed post as well as through e-mail at the address as reflected on the Ministry of Corporate Affairs' website, which was duly delivered to the corporate debtor. The affidavit of service was filed along with the tracking report and copy of e-mail sent at the registered address in terms of the master data. The notice was sent back from the registered address of the corporate debtor with a remark "there is no person with this name" but the e-mail did not return nor bounce. Even if the notice was returned, if sent at the correct available address it was to be treated as served under section 27 of the General Clauses Act, 1897 as held by the Supreme Court in *Madan and Co.* v. *Wazir Jaivir Chand* [1989] 1 SCC 264. Therefore, service of the petition was considered as complete. Considering other factors, the petition was admitted.

Necessity to file affidavit in terms of section 9(3)(b) : The Adjudicating Authority in *Sangeeta Goel* v. *Roidec India Chemicals P. Ltd.* [2020] 219 Comp Cas 539 (NCLT) has rejected the petition filed under section 9 of the Code on the ground of pre-existing dispute between the parties and further on the ground that the petitioner failed to comply with the statutory provision of section 9(3)(b) of the Code. While affirming the decision on the ground of existence of pre-existing dispute, the Appellate Tribunal observed that only in a situation where the corporate debtor within ten days of the receipt of the demand notice, has not sent the reply to the operational creditor can an affidavit to that effect be submitted in terms of section 9(3)(b) of the Code. Making it clear that in a case where such notice has been sent, in reply to the demand notice by the corporate debtor "an affidavit to that effect cannot be given". Since the corporate debtor within ten days of receipt of the demand notice had raised a dispute in respect of the unpaid operational debt, it was held the affidavit in compliance with section 9(3)(b) could not be submitted and there was no default in not providing the affidavit in compliance with section 9(3)(b) of the Code (*Sangeeta Goel* v. *Roidec India Chemicals P. Ltd.* [2020] 219 Comp Cas 545 (NCLAT)).

Ex parte order of admission : While considering a petition under section 9 of the Code, the Adjudicating Authority is under a duty to verify as to whether any pre-existing dispute existed or not. This has to be done even if the corporate debtor fails to appear before it. Only by observing that the corporate debtor have not come forward to dispute the petition would not be sufficient to initiate the corporate insolvency resolution process, if the record already showed existence of dispute. In *Rays Power Experts P. Ltd.* v. *Siwana Solar Power P. Ltd.* [2020] 219 Comp Cas 516 (NCLT), a petition filed by the operational creditor was admitted by the Adjudicating Authority on the ground that the corporate debtor had failed to reply to the demand notice and had not raised any dispute in respect of the corporate debt. In fact the order of admission was passed ex parte. This order was set aside by the Appellate Tribunal in *Vinod Mittal* v. *Rays Power Experts P. Ltd.* [2020] 219 Comp Cas 523 (NCLAT). The Appellate Tribunal took note of the fact that the earlier correspondence between the parties showed that there were disputes regarding installation and functioning of the project. This according to the Tribunal was a pre-existing dispute regarding installation and operation of the project. It held that the Adjudicating Authority should have found pre-existing dispute as the e-mail dated October 20, 2016 was already before it. The Appellate Tribunal observed that starting of the corporate insolvency resolution process against a functional company

was a serious matter and parties could not be allowed to play hide and seek. Initiation of the corporate insolvency resolution process against the corporate debtor was quashed. A cost of Rs. 5 lakhs was imposed on operational creditor and of Rs. 2,50,000 on the director of the operational creditor.

Date of default : An application filed on January 7, 2019 beyond the period of three years as per article 137 of the Limitation Act, 1963, against the date of default on August 28, 2015 was held not maintainable (*Ridhi Sidhi Glasses (India) P. Ltd.* v. *Integrity Windows and Doors P. Ltd.* [2020] 219 Comp Cas 220 (NCLT)).

Existence of dispute : As against a petition under section 7 of the Code wherein dispute regarding a debt would be a relevant factor as long disbursement of loan and default is proved, a petition under section 9 of the Code would not stand if it is shown that dispute existed between parties regarding the operational debt. The decision of the Adjudicating Authority in *IMECO Ltd.* v. *BEML Ltd.* [2020] 219 Comp Cas 376 (NCLT) dismissing section 9 petition was affirmed by the Appellate Tribunal in *IMECO Ltd.* v. *BEML Ltd.* [2020] 219 Comp Cas 397 (NCLAT). The Appellate Tribunal held that apart from the payments claimed by the operational creditor being based on the back-to-back principle incorporated in the memorandum of agreement, the operational creditor itself having raised the dispute through the medium of a writ petition with regard to part of the claim much prior to the issuance of demand notice and the matter being still under judicial scrutiny, no fault could be found with the finding recorded by the Adjudicating Authority that there was a pre-existing dispute between the parties qua the operational debt or part thereof.

Claim before resolution professional

Managerial remuneration in excess of prescribed limit : The claim submitted by the joint managing director of the corporate debtor was rejected by the resolution professional as it was found to be in excess of prescribed limits under the Companies Act, 2013 and in terms of section 197(1) of the Act required approval of the Central Government. The Appellate Tribunal in *R. Balarami Reddy* v. *Sutanu Sinha* [2020] 219 Comp Cas 281 (NCLAT) held that (page 285) :

> "It is matter of record that CoC dealt with the claim of the appellant in meeting dated April 26, 2018 as well as August 7, 2018 but did not support the appellant with regard to his claim for salary in excess of what is permissible under section 197 of the Companies Act. The appellant appears to have been aware that he was drawing excess salary which was being picked up on the basis that approval of Central

> Government was awaited and on two occasions, admittedly the excess drawn was returned. Being in managerial position, this may have happened in the company (which is now stated to have gone in liquidation) because of being related party. The appellant was related party as reflected from the minutes of CoC meeting dated April 26, 2018 (annexure A of reply) in item No. 9. The CoC which includes the lead and other lenders did not approve and there is nothing to show that the Central Government permitted payment of excess remuneration and when this is so, there appears to be no reason to find fault with the impugned order and we do not find any reason to interfere. We do not find any substance in the argument that it was responsibility of this resolution professional to move the Government for necessary permission. When the claim is submitted in Form D, the amount claimed must have support from record to spell out dues payable and the applicant cannot expect the resolution professional and CoC to go and get the necessary permissions."

The Adjudicating Authority's order permitting the resolution professional to pay the dues of the claimant but not to the tune of amount which was paid by the corporate debtor in excess on anticipation that lender and the Central Government would accord its permission and which was also shown as receivable in the books of account of the corporate debtor was not interfered with.

Committee of creditors

Sub-committee : Under section 21(8) of the Code, all decisions by the committee of creditors can be taken by a 51 per cent. majority vote, unless a higher percentage is required under other specific provisions of the Code. When it comes to the exercise of the committee of creditors' powers on questions which have a vital bearing on the running of the business of the corporate debtor, section 28(1)(h) of the Code provides that though these powers are administrative in nature, they shall not be delegated to any other person, meaning thereby, that the committee of creditors alone must take the decisions mentioned in section 28 and not any person other than such committee. When it comes to approving a resolution plan under section 30(4), this power also cannot be delegated to any other body as it is the committee of creditors alone that has been vested with this important business decision which it must take by itself. However, this does not mean that sub-committees cannot be appointed for the purpose of negotiating with resolution applicants, or for the purpose of performing other ministerial or administrative acts, provided such acts are in the ultimate analysis approved and ratified by the committee of creditors (*Committee of*

Creditors of Essar Steel (India) Ltd. v. *Satish Kumar Gupta* [2020] 219 Comp Cas 97 (SC) reversing *Standard Chartered Bank* v. *Satish Kumar Gupta, Resolution Professional of Essar Steel Ltd.* [2020] 219 Comp Cas 15 (NCLAT)).

Resolution plan

Liquidation value : In *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh* [2020] 9 Comp Cas-OL 683 (SC), the Supreme Court held that there was no provision in the Code or Regulations under which the bid of any resolution applicant has to match liquidation value arrived at in the manner provided in regulation 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Following this decision, the Supreme Court set aside the decision of the Appellate Tribunal in *Accord Life Spec P. Ltd.* v. *Orchid Pharma Ltd.* [2020] 219 Comp Cas 285 (NCLAT), wherein the plan approved by the Adjudicating Authority was set aside on the ground that the amount offered in favour of the stakeholders in the resolution plan was less than the liquidation value (*State Bank of India* v. *Accord Life Spec P. Ltd.* [2020] 219 Comp Cas 290 (SC)).

Standalone offer : An e-mail sent by the resolution applicant revising the commercial offer on the plan submitted on July 18, 2019 which had been rejected by the committee of creditors cannot be considered as a resolution plan in accordance with the provisions of the Code read with the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. A standalone commercial offer could not be considered under the provisions of the Code as the resolution plan under the Code was required to have certain mandatory contents, which were provided in the Code read with the Regulations (*SREI Multiple Asset Investment Trust Vision India Fund* v. *Suprio Kumar Chaudhary* [2020] 219 Comp Cas 298 (NCLT)).

Limited judicial review of approved plan : After a resolution plan is approved by the requisite majority of the committee of creditors, the plan must then pass muster of the Adjudicating Authority under section 31(1) of the Code. The Adjudicating Authority's jurisdiction is circumscribed by section 30(2) of the Code. Only a limited judicial review is available, which can in no circumstance trespass upon a business decision of the majority of the committee of creditors. It has to be within the four corners of section 30(2) of the Code, in so far as the Adjudicating Authority is concerned, and section 32 read with section 61(3) of the Code, in so far as the Appellate Tribunal is concerned. The non-obstante clause of section 60(5) speaks of any other law for the time being in force, which obviously cannot include the

provisions of the Code itself. Section 60(5)(c) is in the nature of a residuary jurisdiction vested in the National Company Law Tribunal so that the National Company Law Tribunal may decide all questions of law or fact arising out of or in relation to insolvency resolution or liquidation under the Code. Such residual jurisdiction does not in any manner impact section 30(2) of the Code which circumscribes the jurisdiction of the Adjudicating Authority when it comes to the confirmation of a resolution plan, as has been mandated by section 31(1) of the Code. A harmonious reading, therefore, of section 31(1) and section 60(5) of the Code would lead to the result that the residual jurisdiction of the National Company Law Tribunal under section 60(5)(c) cannot, in any manner, whittle down section 31(1) of the Code, by the investment of some discretionary or equity jurisdiction in the Adjudicating Authority outside section 30(2) of the Code, when it comes to a resolution plan being adjudicated upon by the Adjudicating Authority (*Committee of Creditors of Essar Steel (India) Ltd.* v. *Satish Kumar Gupta* [2020] 219 Comp Cas 97 (SC) reversing *Standard Chartered Bank* v. *Satish Kumar Gupta, Resolution Professional of Essar Steel Ltd.* [2020] 219 Comp Cas 15 (NCLAT)).

Investigation

The Adjudicating Authority (Tribunal) in law is not empowered to order an investigation directly, to be carried out by the Central Government. An Adjudicating Authority (Tribunal) as a competent or appropriate authority in terms of section 213 of the Companies Act, 2013, has an option to issue notice in regard to the charges or allegations levelled against the promoters and others after following the due procedure enshrined under section 213 of the Act. In case an ex facie or prima facie case is made out, the Tribunal is empowered to refer the matter to the Central Government for an investigation by Inspectors and upon such investigation, if any action is required to be taken and if the Central Government subjectively opines that the subject matter in issue needs an investigation through the Serious Fraud Investigation Office, it may proceed in accordance with law. The Tribunal or the Adjudicating Authority, on receipt of an application or complaint of breach of the relevant provisions of the Insolvency and Bankruptcy Code, 2016 and the Companies Act and after satisfying itself that there are attendant circumstances pointing out fraudulent or wrongful trading, has jurisdiction to refer the matter to the Central Government for an investigation by Inspectors to be appointed by the Central Government. If an investigating authority after completion of investigation comes to a conclusion that any offence punishable in terms of section 213 read with section 447 of the Act or under sections 68, 69, 70, 71, 72 and 73 of the Code are made

out, the Central Government may refer the matter to the Special Court itself or may even require the Insolvency and Bankruptcy Board of India or to authorise any person as per section 236(2) of the Code to file a complaint. Accordingly the order of the Adjudicating Authority in *Shree Ram Lime Products P. Ltd.* v. *GEE Ispat P. Ltd. and Ms. Pooja Bahry* v. *Vijay Pal Garg* [2020] 219 Comp Cas 247 (NCLT) was affirmed by the Appellate Tribunal in *Vijay Pal Garg* v. *Pooja Bahry* [2020] 219 Comp Cas 260 (NCLAT). The Appellate Tribunal was of the view that the matter was to be referred to the Secretary, Ministry of Corporate Affairs, for carrying out an investigation by an Inspector or Inspectors following the due procedure in accordance with section 213 of the Companies Act, 2013. If the matter needed to be examined by the Serious Fraud Investigation Office, the Central Government was directed to do so.