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ANALYSIS OF CASES PERTAINING TO THE INSOLVENCY AND BANKRUPTCY CODE, 2016—VOLUME 220

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Limitation

The law assists those that are vigilant with their rights, and not those that sleep thereupon is the meaning of the maxim *"Vigilantibus Et Non Dormientibus Jura Subveniunt"*. Any person claiming something as his right must enforce it within a reasonable time. In most case, the concerned statute prescribes the time period within which it can be exercised. The Limitation Act, 1963 is an Act to consolidate and amend the law for the limitation of suits and other proceedings and for purposes connected therewith. In respect of the petitions filed under section 7 and section 9 of the Code, the Supreme Court has settled the issue in *B. K. Educational Services P. Ltd.* v. *Parag Gupta and Associates* [2019] 212 Comp Cas 1 (SC) by stating that the 1963 Act was applicable to the petitions under sections 7 and 9 of the Code from the inception of the Code. It was clarified that the right to sue accrued when default occurred. It was further observed that the "right to sue", therefore, accrued when a default occurred. If the default had occurred over three years prior to the date of filing of the petition, the petition would be barred under article 137 of the 1963 Act, save and except in those cases where, in the facts of the case, section 5 of the 1963 Act might be applied to condone the delay in filing such petition. This view was reiterated by the Supreme Court in *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Co. (India) Ltd.* [2019] 8 Comp Cas-OL 250 (SC). Thereby the general understanding of the Adjudicating Authority and the Appellate Tribunal in *Neelkanth Township and Construction P. Ltd.* v. *Urban Infrastructure Trustees Ltd.* [2018] 2 Comp Cas-OL 49 (NCLAT), *Parag Gupta and Associates* v. *B. K. Educational Services P. Ltd.* [2018] 2

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Comp Cas-OL 695 (NCLAT), *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Co. (I) Ltd.* [2019] 7 Comp Cas-OL 431 (NCLAT) and other cases were overruled. Thus, it is very clear that the petitions under sections 7 and 9 have been filed within 3 years from the date of default. However, this limitation period can be extended if there is an acknowledgment of debt by the debtor in terms of section 18 of the 1963 Act. Section 18 of the 1963 Act provides for a fresh period of limitation from the time when the acknowledgment of debt signed before the expiration of the prescribed limitation period. The prerequisite for application of section 18 of the Act would be that the acknowledgment must be made within the original prescribed period or before expiration of validly extended period. This principle has been applied by the Adjudicating Authority in *Union Bank of India* v. *U. P. State Spinning Co. Ltd.* [2020] 220 Comp Cas 335 (NCLT). In this case the debt of the corporate debtor was declared a non-performing asset on March 7, 2013 in terms of the statement of the corporate debtor. Even after the declaration of the debtor's account as a non-performing asset, there was correspondence between the financial creditor and corporate debtor regarding the payment of the debt, which the corporate debtor had admitted by filing the counter affidavit and lastly on July 30, 2018 by sending the letter, acknowledging the debt of the financial creditor. Therefore, in view of section 18 of the 1963 Act, it was held that a fresh period of limitation would start from July 30, 2018 and not from March 7, 2013 the date on which the corporate debtor claimed its account was declared as a non-performing asset. In *C. Shivakumar Reddy* v. *Dena Bank* [2020] 9 Comp Cas-OL 339 (NCLAT), the petition under section 7 of the Code was held to be time-barred as there was nothing on record to suggest that the corporate debtor had acknowledged the debt. A petition under section 9 of the Code was dismissed by the Adjudicating Authority on a finding that the date of default of the debt due to the petitioner was July 8, 2013 and no acknowledgment of debt or any other circumstances were shown to extend the period of limitation beyond the period of 3 years expiring on July 8, 2016 (*Bhawani Industries P. Ltd.* v. *Inderjit Forgings P. Ltd.* [2020] 220 Comp Cas 357 (NCLT)). In *Bank of Baroda* v. *Pithampur Poly Products Ltd.* [2020] 220 Comp Cas 300 (NCLT), the petition was held to be within limitation on the ground that the corporate debtor had been acknowledging that the debt was due to the financial creditor which was evident from their offer of 4 one-time settlement proposals to the financial creditor in 2019, though the same were rejected by the financial creditor for the offer of lower amount compared to their claimed amount. Taking a contrary view, the Appellate Tribunal in *Bimalkumar Manubhai Savalia* v. *Bank of*

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India [2020] 220 Comp Cas 546 (NCLAT), has held that one-time settlement offer not accepted by the financial creditor could not be treated as an acknowledgment of debt. Since there was no acknowledgment issued by the corporate debtor prior to expiry of 3 years or from the date of default, the order of admission of the Adjudicating Authority in *Bank of India* v. *Radheshyam Agro Products P. Ltd.* [2020] 220 Comp Cas 535 (NCLT) was reversed. Interestingly, in *Uniword Telecom Ltd.* v. *Taurus Exports P. Ltd.* [2020] 220 Comp Cas 4 (NCLT), the Adjudicating Authority took note of section 25(3) of the Indian Contract Act, 1872. According to section 25(3) of the 1872 Act, an agreement made without consideration is void, unless it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. In any of these cases, such an agreement is a contract. Illustration (e) thereunder provides that "A owes B Rs. 1,000 but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract". In this case the last invoice was issued on January 11, 2011. Thereafter, on July 20, 2015 and August 3, 2016 the corporate debtor had admitted the past dues, which were beyond the threshold of limitation. Subsequently, both parties had executed a memorandum of understanding on August 16, 2018 whereby the debtor had agreed to make payment within 6 months, i. e., by February 15, 2019. The Adjudicating Authority was of the view of the section 25(3) of the 1872 Act would overshadow section 18 of the 1963 Act. It was held that the matter was within the purview of the law of limitation under article 137 thereof.

Exclusion of period of stay : In *Bank of Baroda* v. *Pithampur Poly Products Ltd.* [2020] 220 Comp Cas 300 (NCLT), the corporate debtor had filed a writ petition before the High Court and the High Court had granted stay against any coercive action. The stay was vacated only on March 7, 2018 and the financial creditor was permitted to take appropriate steps for recovery. The financial creditor filed the petition on August 21, 2018. It was held that the The petition had been filed within the limitation period as a clear cause of action arose only after vacation of the stay by the High Court on March 7, 2018.

Corona effect on limitation : The Supreme Court invoking its powers under article 142 of the Constitution of India and taking suo motu notice of challenge faced by the country on account of the Covid-19 virus and resultant difficulties that might be faced by litigants across the country in filing their petitions, applications, suits or appeals and all other proceedings

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within the period of limitation prescribed under the general law of limitation or under special laws (both Central or State), ordered that irrespective of the limitation prescribed under the general law or special laws, whether condonable or not, the period of limitation in all such proceedings, shall stand extended with effect from March 15, 2020 till further orders to be passed by the Supreme Court. The unexpected and unprecendented epidemic faced by the Country and the world required such an order of exception (*Cognizance for Extension of Limitation, In re* [2020] 220 Comp Cas 447 (SC)). The Appellate Tribunal in *Suo Motu, In re* [2020] 220 Comp Cas 449 (NCLAT), taking note of the above order of the Supreme Court also passed similar orders. It held that the period of lockdown ordered by the Central Government and the State Governments including the period as may be extended either in whole or part of the country, where the registered office of the corporate debtor was located, should be excluded for the purpose of counting of the period for resolution process under section 12 of the Code in all cases where "corporate insolvency resolution process" had been initiated and pending before any Bench of the National Company Law Tribunal or in appeal before the Appellate Tribunal. It was further ordered that any interim order or stay order passed by this Appellate Tribunal in any one or the other appeal under the Code was to continue till next date of hearing to be notified later. The Appellate Tribunal also relied on the decision in *Quinn Logistics India P. Ltd.* v. *Mack Soft Tech P. Ltd.* [2018] 208 Comp Cas 432 (NCLAT), wherein it was held that it was always open to the Adjudicating Authority or the Appellate Tribunal to exclude certain period for the purpose of counting the total period of 270 days for completion of the insolvency resolution process, if the facts and circumstances justify exclusion, in unforeseen circumstances. Covid-19 pandemic is definitely one such unforeseen circumstances.

Financial debt

The amount borrowed for commercial purpose would be a financial debt in terms of section 5(8)(f) of the Code. In *Sangita Fiscal Services P. Ltd.* v. *Duncans Industries Ltd.* [2020] 220 Comp Cas 470 (NCLT), a petition filed under section 7 of the Code was challenged by the corporate debtor on the ground that no time value of money was involved and that there being no fixed schedule for repayment of loans and, therefore, it was not a financial debt. The Adjudicating Authority took into consideration that (i) in the written deeds of agreement had been executed wherein the creditors had been addressed as lender, (ii) that the term "finance" was defined as "temporary finance" to be granted by the lender to the corporate debtor against

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their present or future stock of tea in terms of the discharge schedule forwarded by the company, (iii) that a resolution under section 293(1)(d) of the Companies Act, 1956 had been passed by the shareholders of the corporate debtor to enable the company and its directors to borrow loans not exceeding Rs. 1,200 crores and avail of temporary finance within the limit of borrowing of the corporate debtor, (iv) that the financial creditors were approached by the corporate debtor and that disbursement could be made in intervals or instalments, (v) that interest element also existed. It held that the transactions of loan or advance were specifically covered under section 5(8) of the Code as these had been borrowed against interest. It was not in dispute that the amount had been given as advance. The effect in the hands of the corporate debtor was that it amounted to a borrowing for commercial purpose. Therefore, in terms of section 5(8)(f) of the Code the transaction had the trappings and commercial effect of a borrowing. Hence, for this reason also it was held to be a financial debt.

Petition by home buyer

Though a home buyer has been included within the definition of a financial creditor under section 5(7) of the Code, the petition has to be bona fide. The provision of the Code cannot be invoked without any default on the part of the promoter/builder. It cannot be used to seek refund of money. A petition filed by a home buyer was dismissed by the Adjudicating Authority in *Aaj Finance and Credit Ltd.* v. *Keltech Infrastructures Ltd.* [2020] 220 Comp Cas 36 (NCLT), it was held that in terms of the agreement dated October 1, 2016 between the parties, the promoter was required to complete the building within 12 months from the date of signing the agreement or within further a grace period of 180 days. The execution of the agreement dated October 1, 2016 was not denied by the parties. The agreement was to be the fresh bargain as entered into between the parties thereby giving a go by to the earlier memorandum of understandings as well as the loan transaction of Rs. 50 lakhs. Since under the terms of the agreement the possession of the flat booked was to be given on April 1, 2018 as the agreement dated October 1, 2016 stipulated that possession would be given within 18 months, i. e., 12 months plus grace period of 6 months. The petition filed on January 4, 2018 was found to be well before the period fixed under the agreement dated October 1, 2016. The petition was dismissed as premature as on the date of filing of the petition no default was established, especially when possession also seemed to have been offered before the completion of the date for possession as given in the agreement. This order was affirmed by the Appellate Tribunal in *Aaj Finance and Credit Ltd.* v. *Keltech Infrastructures Ltd.* [2020] 220 Comp

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Cas 43 (NCLAT). A petition filed by the allottee for refund of money on the ground of delay was dismissed by the Adjudicating Authority as on the facts it was found that the occupation certificate was applied for by the corporate debtor on July 5, 2018 and it was received on May 31, 2019 and the e-mail for the termination of the agreement was sent on December 8, 2018 which was 5 months after the occupation certificate was obtained from the authorities by the corporate debtor. Hence the corporate debtor had fulfilled its obligation of applying for the occupation certificate within the time frame. Also by letter dated June 14, 2019 the corporate debtor had written to the financial creditor stating that the apartment was ready for possession. *Parvesh Magoo* v. *IREO Grace Realtech P. Ltd.* [2020] 220 Comp Cas 116 (NCLT) affirmed in *Parvesh Magoo* v. *IREO Grace Realtech P. Ltd.* [2020] 220 Comp Cas 120 (NCLAT).

Petition against tea company

The Supreme Court in *Duncans Industries Ltd.* v. *A. J. Agrochem* [2019] 217 Comp Cas 320 (SC), considering the overriding effect of the Code and the provision in section 16G(1)(c) of the Tea Act, 1953, inter alia, held that no prior consent of the Central Government before initiation of the proceedings under section 7 or section 9 of the Code in respect of a tea company would be required and even without such consent of the Central Government, the insolvency proceedings under section 7 or section 9 of the Code initiated by the operational creditor shall be maintainable. Following this decision the Adjudicating Authority in *Sangita Fiscal Services P. Ltd.* v. *Duncans Industries Ltd.* [2020] 220 Comp Cas 470 (NCLT) held that the application challenging the maintainability of the petition due to conflict between the provisions of the Code and the 1953 Act was infructuous.

Petition against guarantor

A financial debt includes a debt owed to a creditor by the principal borrower and the guarantor. A just omission or failure on the part of a guarantor to pay the financial creditor, when the principal sum is claimed will come within the scope of default under sections 3 and 12 of the Insolvency and Bankruptcy Code, 2016. The proceedings under section 7 of the Code can be initiated by a financial creditor who had taken a guarantee in respect of debt against the guarantor for failure to repay the money borrowed by the principal borrower. In *Union Bank of India* v. *Surana Metals Ltd.* [2020] 220 Comp Cas 54 (NCLT), the Adjudicating Authority admitted a petition against a corporate debtor who was the guarantor to a loan granted to an individual. On default by the individual the debtor-principal

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borrower, the financial creditor had filed the petition as against the corporate debtor as it had undertaken to repay the debt in case of default by the original borrower. The Appellate Tribunal in *Laxmi Pat Surana* v. *Union Bank of India* [2020] 220 Comp Cas 59 (NCLAT) affirmed this decision of the Adjudicating Authority.

Admissibility of petition as against individual guarantors : The Code is divided into four parts. The provisions of Part I and Part II were brought into effect from December 1, 2016 the provisions of Part III were not notified immediately. Certain portion of Part III were notified with effect from December 1, 2019 by Notification No. 4126, dated November 15, 2019. Part III of the Insolvency and Bankruptcy Code pertains to fresh start, insolvency and bankruptcy of individuals and firms where the amount of default is not less than one thousand rupees. However, by this notification only part relating to the personal guarantors to the corporate debtors have been given effect to from December 1, 2019. These provisions could not be invoked prior to this date. Any personal guarantor can be proceeded against under the Code only from December 1, 2019 and not prior thereto. Considering this position the Adjudicating Authority dismissed the petitions filed against the personal guarantors of the corporate debtors in *L and T Infrastructure Finance Co. Ltd.* v. *Dineshchand Surana* [2020] 220 Comp Cas 366 (NCLT) and *State Bank of India* v. *Vijaraj Surana* [2020] 220 Comp Cas 379 (NCLT).

Dispute in relation to operational debt

In *Mobilox Innovations P. Ltd.* v. *Kirusa Software P. Ltd.* [2017] 205 Comp Cas 324 (SC), the Supreme Court in pages 373 and 374 of 205 Comp Cas has observed that :

> "It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under section 9(5)(ii)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the 'existence' of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the 'dispute' is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the court does not need to be satisfied that the defence is

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> likely to succeed. The court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

Applying the ratio of this decision of the Supreme Court, the Adjudicating Authority in *Transmec India P. Ltd.* v. *Saflow Products P. Ltd.* [2020] 220 Comp Cas 280 (NCLT), held that the petition was to be dismissed as pre-existing dispute existed. The Adjudicating Authority took note of the fact that the corporate debtor by e-mails dated November 1, 2017 and November 13, 2017 had clearly raised a dispute regarding the delay in delivery of goods which was prior to the issuance of the demand notice dated August 5, 2018. However, the dispute must in relation to quality of goods supplied or services rendered. It cannot be vague. Where the e-mail relied on by the corporate debtor at the most indicated some disputes but did not disclose what it was, the order admitting the petition in *Capedge Consulting P. Ltd.* v. *India Techs Ltd.* [2020] 220 Comp Cas 482 (NCLT) was upheld. The Appellate Tribunal observed that for the purpose of section 9 of the Code, the relevant issue would be whether there was dispute regarding the quality of services rendered. Since the corporate debtor was not able to show any dispute with regard to the quality of services rendered by the creditor, it refused to interfere with the order of admission (*George Vinci Thomas* v. *Capedge Consulting P. Ltd.* [2020] 220 Comp Cas 490 (NCLAT)).

Moratorium

The effect of declaration of a moratorium was that a prohibition was enforced for recovery against the corporate debtor. The prohibition was also towards institution of any suit or execution of any judgment, decree or order of any court of law, Tribunal, arbitration panel, etc. In *Videocon Industries Ltd.* v. *State Bank of India* [2020] 220 Comp Cas 76 (NCLT), the Adjudicating Authority admitted a petition under section 7 of the Code and also declared a moratorium in terms of section 14 of the Code. A notice dated October 22, 2018 was thereafter issued by the Ministry of Petroleum and Natural Gas (Exploration Division) demanding allocation of 100 per cent. of the sale proceeds in favour of the Government with immediate effect for recovering the provisional sum of US $314 million together with applicable interest towards the unpaid Government share of profit petroleum. On the application by the resolution professional the Adjudicating Authority held that the effect of declaration of "moratorium" was that prohibition was enforced for recovery against the corporate debtor. Prohibition was also towards institution of any suit or execution of any judgment,

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decree or order of any court of law, Tribunal, arbitration panel, etc. Once the "moratorium" was declared such an action on the part of the GoI, Ministry of Petroleum, was not legal as far as the Code was concerned now fully applicable on the corporate debtor. The concerned Government authority was directed not to press or implement the impugned notice dated October 22, 2018 during the commencement of the insolvency proceeding and as long as the "moratorium" was applicable on this corporate debtor. It observed that the most, the Ministry of Petroleum could lodge its claim of any legally enforceable right of recovery to the appointed resolution professional, being not rendered remediless, as prescribed under the Code.

Effect on proceedings under the Prevention of Money-Laundering Act, 2002 : A resolution professional appointed under the Code does not have any personal stake in the resolution process. He only represents the interest of creditors, their committee having appointed and tasked him with certain responsibility under the said law. The moratorium enforced in terms of section 14 of the Code cannot come in the way of the statutory authority conferred by the Act on the enforcement officers for depriving a person (may be also a debtor) of the proceeds of crime. A contrary view would defeat the objective of the Prevention of Money-Laundering Act, 2002 by opening an escape route. After all, a person indulging in money-laundering cannot be permitted to avail of the proceeds of crime to get a discharge for his civil liability towards his creditors for the simple reason that such assets are not lawfully his to claim. The objective of the legislation in the Act being distinct from the purposes of the three other enactments, viz., the Recovery of Debts and Bankruptcy Act, 1993 (in its original form and moniker Recovery of Debts Due to Banks and Financial Institutions Act, 1993), Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 and the 2016 Code, the latter cannot prevail over the former. There was no inconsistency. The purpose, the text and context are different (*Deputy Director, Directorate of Enforcement of Delhi* v. *Axis Bank* [2020] 220 Comp Cas 147 (Delhi)).

Effect on compromise decree : A compromise decree was passed in a suit filed against the corporate debtor by the petitioner. Since the company failed to pay the amount in terms of the decree, the petitioner filed a contempt petition before the civil court. The company contended that it was prevented by operation of law from paying the balance amount to the petitioner in satisfaction of the compromise decree as its petition under section 10 of the Code had been admitted and a moratorium had been declared. The Delhi High Court was of the view that since the power and manage-

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ment of the board of the company now vested in the interim resolution professional, preferential treatment could not be given to the petitioner, over the other financial and operational creditors, to discharge their liability under the compromise decree. The disbursement of payments by the company to clear the liabilities towards its creditors, including the petitioner, would be governed by the proceedings under the Code. It held that the company and its directors were prevented by law from satisfying the decree in favour of the petitioner and there was no wilful disobedience of the compromise decree. The court was of the view that any direction by the court in the contempt proceedings would virtually amount to overriding the proceedings under the Code which were the appropriate proceedings for determining the settlement of claims of the petitioner in the order of priority amongst the list of claimants therein.

Insolvency commencement date

Section 12 of the Code provides that the corporate insolvency resolution process should be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process. The period can be extended but not exceeding ninety days. The Insolvency and Bankruptcy Code (Amendment) Act, 2019 inserted a proviso to section 12(3) with effect from June 6, 2018. The proviso provided that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor. In sections 7, 9 or 10 of the Code it is not enjoined upon the Adjudicating Authority to appoint the interim resolution professional simultaneously with the admission of the application or on the same date, on which the admission order was passed. Section 16 of the Code says that the Adjudicating Authority shall appoint the interim resolution professional within 14 days from the insolvency commencement date, that means 14 days time is given to the Adjudicating Authority to appoint an interim resolution professional even from the insolvency commencement date. This is a time space given to the Adjudicating Authority to appoint the interim resolution professional depending upon the facts and circumstances of the case. In a given case, if the Adjudicating Authority is not in a position to appoint the interim resolution professional in the order admitting the application, then, it can appoint the interim resolution professional within 14 days. In such cases only the proviso to section 12 of the Code would come into operation, i. e., where the interim resolution professional is not appointed in the

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admission order. In case, if the interim resolution professional is appointed subsequently, i. e., within 14 days from the date of admission, then the insolvency commencement date shall be the date on which interim resolution professional is appointed by the Adjudicating Authority. The insolvency commencement date is very crucial for calculation of various time period in the Code. Especially since one of the objects of the Code is time bound resolution of corporate insolvency. In *IDBI Bank Ltd.* v. *Anuj Jain* [2020] 220 Comp Cas 313 (NCLT), the Supreme Court by an order dated August 9, 2018 directed recommencement of the resolution process from the stage of appointment of the insolvency resolution professional and extended the period prescribed by another 180 days from the date of the order. The question arose as to what would be the insolvency commencement date for the purpose of calculating the quantum of claim amounts for all types and classes of creditors : August 9, 2017 being the date of admission order passed by the Adjudicating Authority or August 9, 2017 being the date of the Supreme Court's order. The Adjudicating Authority held that the Supreme Court in its decision had clearly said that the recommencement of the resolution process was from the stage of appointment of the interim resolution professional by the order dated August 9, 2017. Therefore, a conjoint reading of section 5(12) and section 16 of the Code and the Supreme Court's order clearly showed that the insolvency commencement date, was August 9, 2017. It was of the view that reviving of the period prescribed under the statute by another 180 days commencing from August 9, 2018 could not be equated with the insolvency commencement date. The Supreme Court considering the fact that the home buyers were treated as financial creditors and they had to be included in the committee of creditors and the entire process had to be undertaken, exercising its powers under article 142 of the Constitution of India, had extended the statutory period of 180 days from August 9, 2018. According to the Adjudicating Authority it could not be said that the insolvency commencement date itself was August 9, 2018. Especially since the admission order passed by the Authority on August 9, 2017 or the appointment of the interim resolution professional was not set aside by the Supreme Court. It was of the view that the statutory definition of insolvency commencement date given in section 5(12) of the Code was not disturbed. The interim resolution professional had not been prevented by the Supreme Court from taking claims and therefore, the claim amounts should be calculated taking August 9, 2017 the insolvency commencement date as the cut-off date. Interest would also be calculated only till the cut-off date on the claims preferred by the various classes of creditors.

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Committee of creditors to be independent

The purport and object of section 5(24), (24A) read with proviso to sub-section (2) of section 21 of the Code is that a party which has vested interest/relation with the corporate debtor should not become a part of the committee of creditors for the reasons that the decisions of the committee must remain independent, as the committee is the pivot of the insolvency and resolution process. The decision of the committee has far reaching consequences, which will have effect on the corporate debtor for its survival or liquidation and realization of the debt of the creditors. Therefore, the institution of the committee needs to be completely independent and free from any kind of influence based on vested interest either of the promoters or their close relatives who may have stakes being creditors with respect to the corporate debtor. The provisions of section 5(24), (24A) of the Code appear to be incorporated to fulfil the said purport and object. The provisions of section 5(24), (24A) of the Code cannot said to be exhaustive but are inclusive. Therefore, the terms "related party" used in the said provisions with respect to purposive and contextual interpretation so that intended object could be achieved. A "related party" to the corporate debtor shall have no right of representation, participation or voting in the meeting of the committee of creditors of the corporate debtor. These words of the Adjudicating Authority in page 334 in *Asset Reconstruction Co. (India) Ltd.* v. *Gopal Krishna Raju* [2020] 220 Comp Cas 327 (NCLT) sufficiently explains as to why a committee of creditors have to be an independent body.

Resolution plan

Scope of review by Adjudicating Authority : Section 31(1) of the Code provides for approval of resolution plan upon satisfaction that the resolution plan as approved by the committee of creditors meets the requirements as referred to in section 30(2). The effect of approval would make the resolution plan binding on the corporate debtor and its employees, members, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, creditors, guarantors and other stakeholders involved in the resolution plan. It is also necessary that the Adjudicating Authority to ensure that the plan contains provisions of effective implementation. Requirements in terms of section 30(2) are that (a) the plan provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor ; (b) that it provides for the payment of debts of

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operational creditors in such manner as may be specified by the Board which shall not be less than—(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53 ; or (ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor ; (c) that it provides for the management of the affairs of the corporate debtor after approval of the resolution plan ; (d) that the implementation and supervision of the resolution plan ; (e) that it does not contravene any of the provisions of the law for the time being in force ; and (f) that it conforms to such other requirements as may be specified by the Board. Thus, apart from the provisions of effective implementation, the Adjudicating Authority's review is only limited to check if the above points had been taken care of by the committee of creditors. the commercial wisdom of the committee of creditors in approving or rejecting a resolution plan was essentially based on a business decision, which involved evaluation of the resolution plan based on its feasibility besides the committee of creditors being fully informed about the viability of the corporate debtor. This point has been explained in *K. Sashidhar* v. *Indian Overseas Bank* [2019] 213 Comp Cas 356 (SC), wherein the Supreme Court held that the discretion of the Adjudicating Authority (National Company Law Tribunal) is circumscribed by section 31 of the Code to scrutinise the resolution plan "as approved" by the requisite percentage of voting share of financial creditors. Even in that enquiry, the grounds on which the Adjudicating Authority can reject the resolution plan are in reference to matters specified in section 30(2) of the Code, when the resolution plan does not conform to the stated requirements. This point was also approved by the Supreme Court in *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* [2020] 219 Comp Cas 97 (SC) wherein it has observed that 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

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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. In *Rai Bahadur Shree Ram and Co. P. Ltd.* v. *Bhuvan Madan, Resolution Professional of Ferro Alloys Corporation Ltd.* [2020] 220 Comp Cas 110 (NCLAT), taking note of the above points, the Appellate Tribunal held that the appellants could not question the commercial wisdom of the committee of creditors in rejecting the settlement proposal emanating from the appellants, with the requisite majority and in approving the resolution plan. No material irregularity in the corporate insolvency resolution process before the resolution professional had been demonstrated. The fact that the Adjudicating Authority had declined to direct reconsideration of the settlement proposal of the appellants which had already been rejected did not impinge upon the legality and conformity of the approved resolution plan with the conditions stated in section 32 of the Code. In *Rural Electrification Corporation* v. *Ferro Alloys Corporation Ltd.* [2020] 220 Comp Cas 518 (NCLT), the Adjudicating Authority while approving the resolution plan has observed that the decision of the committee of creditors in the approval of the resolution plan was paramount and the Adjudicating Authority had no power to go into the evaluation aspects of the resolution plan. Since the plan was approved by the committee of creditors after evaluation and after giving all participants equal opportunity, the plan was approved by the Adjudicating Authority. The Appellate Tribunal affirmed this decision in *IMR Metallurgical Resources AG* v. *Ferro Alloys Corporation Ltd.* [2020] 220 Comp Cas 528 (NCLAT).

Power to rectify resolution plan : The Adjudicating Authority allowed an application for rectification of the resolution plan presented by two resolution applicants jointly which had already been approved and implemented. This order was set aside by the Appellate Tribunal in *QVC Exports P. Ltd.* v. *United Tradeco FZC* [2020] 220 Comp Cas 128 (NCLAT) held that the Adjudicating Authority had no jurisdiction to entertain an application for rectification of resolution plan and make substantial changes in the plan, after a lapse of 13 months of the completion of the corporate insolvency resolution process, even after the approval and implementation of the resolution plan, on the pretext of rectification of clerical or typographical error in the order. Since the appellant and respondent No. 1 were joint resolution applicants, any application for rectification of the resolution plan could have been moved by both the resolution applicants. The Adjudicating Authority had no jurisdiction to allow amendment in the resolution plan, submitted by the appellant and respondent No. 1 as co-applicants in the resolution process, without there being any consent on

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the part of the appellant. Taking note of section 60(5) of the Code, the Appellate Tribunal in page 138 of 220 Comp Cas observed that :

> "Since rectification of the resolution plan does not involve the question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code, therefore it is not permitted to modify the resolution plan under the guise of inherent powers of the Tribunal."

Liquidation

The object of the Code is to be provide for insolvency resolution of corporate persons, firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders. Liquidation of the corporate person is to considered only if it is not possible to revive the corporate debtor despite efforts. In *Edelweiss Asset Reconstruction Co. Ltd.* v. *Falcon Tyres Ltd.* [2020] 220 Comp Cas 346 (NCLT), despite the efforts of the resolution professional and the committee of creditors to revive the operations of the corporate debtor, the company could not be revived. The Adjudicating Authority had also exercised its discretion in granting sufficient time in order to exhaust all possibility of getting solution to the issues. Therefore, there was no other alternative for the Adjudicating Authority except to initiate the liquidation proceedings, as per extant provisions of the Code, in respect of the corporate debtor.

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