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

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Financial debt : definition

The Insolvency and Bankruptcy Code, 2016, makes intelligible differentia between financial creditor and operational creditor. The procedure prescribed for a operational creditor to file a petition under section 9 includes a notice as prescribed under section 8 of the Code. Whereas no such notice is required for filing a petition under section 7 of the Code. Therefore, it is essential of the debt to be financial debt as defined under section 5(8) of the Code for the creditor to eligible to make out a case under section 7. The admission of a petition under section 7 of the Code was challenged on the ground that the debt was not a financial debt. It was contended that as the amount given was not against consideration for time value of money but was only amount towards demurrage. The Appellate Tribunal looked into the agreements between the parties. It came to the conclusion that since the financial creditor was dependent on raw materials from the corporate debtor, it had advanced a loan to the debtor when it was in difficulty. It noticed that the agreement did not show that the amount was advance to be adjusted against price of future goods to be supplied as claimed by the corporate debtor. Since the agreement read with the promissory note executed by the debtor showed that interest was also payable it was clearly held to be a case of borrowing or lending for time value of money. Therefore, it held that there was no error in the order admitting the section 7 petition. *Gaurav Agrawal* v. *Tuf Metallurgical P. Ltd.* [2019] 8 Comp Cas-OL 12 (NCLAT).

Debt to be disbursed to debtor

In *Indiabulls Housing Finance Ltd.* v. *Rudra Buildwell Projects P. Ltd.* [2019] 8 Comp Cas-OL 101 (NCLAT), a flat buyer took a loan from a housing finance company. A tripartite agreement was entered into between the borrowers, the finance company and the builder in terms whereof the builder assumed the liability on account of interest payable by the borrower to the finance company during the period to be referred to as the "liability period", a term of 24 months. The finance company initiated proceedings against the builder but the petition was dismissed. The Appellate Tribunal approved the decision of the Adjudicating Authority and noted that the builder in terms of the agreement had assumed the liability to interest payable by the borrower to the finance company for a specific period and had

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paid the amount. It held that since the finance company had disbursed the loan amount for consideration of time value of money in favour of the borrower and not to the builder, the builder was not a corporate debtor of the finance company. The decision of the Adjudicating Authority in *Indiabulls Housing Finance Ltd.* v. *Rudra Buildwell Projects P. Ltd.* [2019] 8 Comp Cas-OL 89 (NCLT) that the petition under section 7 of the Code was not maintainable was affirmed.

Assignee as financial creditor

In *Edelweiss Asset Reconstruction Co. Ltd.* v. *Margra Industries Ltd.* [2019] 8 Comp Cas-OL 197 (NCLT), while admitting a petition under section 7 of the Code, the Tribunal observed that the creditor being the assignee could clearly be termed as the "financial creditor".

Proceedings against corporate guarantor

In *K. Paramasivam* v. *Karur Vysya Bank Ltd.* [2019] 8 Comp Cas-OL 635 (NCLAT) three borrowers failed to repay the debts payable to the financial creditors but proceedings initiated against the corporate guarantor instead of the borrowers. The promoter filed an appeal contending that the petition under section 7 was not maintainable against a corporate guarantor. Dismissing the appeal, the Appellate Tribunal held that the borrowers had borrowed the money against payment of interest from the bank and the corporate debtor had given the guarantee in respect of the item referred to in clause (a) of section 5(8). Therefore, it was held that the bank came within the meaning of financial creditor and the petition under section 7 was maintainable.

Pendency of proceeding before other forum

While affirming the decision of the Adjudicating Authority in *Edelweiss Asset Reconstruction Co. Ltd.* v. *Margra Industries Ltd.* [2019] 8 Comp Cas-OL 197 (NCLT), the Appellate Tribunal in *Vineet Khosla* v. *Edelweiss Asset Reconstruction Co. Ltd.* [2019] 8 Comp Cas-OL 205 (NCLAT), inter alia, observed that there was no provision which barred referring to the Code if already relief has been sought or pending in another forum. It also observed that at the stage of admission of the petition under section 7 of the Code, the Adjudicating Authority need not enter into the disputes raised.

Limitation

Restructuring of loan : The Limitation Act, 1963 is applicable to the proceedings under the Code. Therefore, any petition that is to be filed under the Code has to be within the prescribed period of limitation. However, such period of limitation can be extended by acknowledgment of the debt

by the debtor. Restructuring of loan would also give fresh lease to the limitation as held by *Punjab National Bank* v. *Kut Energy P. Ltd.* [2019] 8 Comp Cas-OL 233 (NCLT). A petition filed within 3 years of restructuring of loan was found to be within limitation.

Applicability of article 62 : In a recent decision the Supreme Court in *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Co. (India) Ltd.* [2019] 8 Comp Cas-OL 250 (SC) has further clarified the application of the Limitation Act to the provisions of the Code wherein mortgaged property was involved. It held that article 62 of the 1963 Act was applicable only to suits and that a petition which was filed under section 7 of the Code fell only within the residuary article 137 of the 1963 Act. The decision of the Appellate Tribunal in *Gaurav Hargovindbhai Dave* v. *Asset Reconstruction Co. (I) Ltd.* [2019] 7 Comp Cas-OL 431 (NCLAT) reversed (see also *Bank of India* v. *Amitech Textiles Ltd.* [2019] 8 Comp Cas-OL 540 (NCLT)). In *Sagar Sharma* v. *Phoenix ARC P. Ltd.* [2019] 8 Comp Cas-OL 581 (SC), the Supreme Court held that the Appellate Tribunal had held that article 62 (erroneously stated to be article 61) of the Act was attracted to the facts of the case, considering that there was a deed of mortgage which was executed between the parties. It was held it would be open for both sides to argue the case on the facts on the footing that article 137 of the Act alone would apply. The decision of the Appellate Tribunal in *Sagar Sharma* v. *Phoenix ARC P. Ltd.* [2019] 8 Comp Cas-OL 577 (NCLAT) was reversed.

Acknowledgment in Whatsapp : Accepting the modern ways of communication, in *Val-Met Engineering P. Ltd.* v. *Trusted Aerospace Engineering P. Ltd.* [2019] 8 Comp Cas-OL 287 (NCLT), it was held that since there was no bar on relying upon the whatsapp messages, which had been exchanged between the parties as they were admissible under section 65B of the Indian Evidence Act, 1872, the whatsapp messages had been exchanged between the parties wherein the corporate debtor assured the creditor that it would make the payments to the financial creditor was taken as acknowledgment of debt to bring the petition under section 7 of the Code within 3 years of such message within the period of limitation. For this purpose the Adjudicating Authority relied on the decision of *Bhandari Hosiery Exports Ltd.* v. *In-Time Garments P. Ltd.* [2019] 8 Comp Cas-OL 286 (NCLAT) decision cited supra wherein dispute raised in whatsapp message was taken to hold that there were pre-existing dispute between the parties.

Section 23 of the Limitation Act : In *Vashdeo R. Bhojwani* v. *Abhyudaya Co-operative Bank Ltd.* [2019] 8 Comp Cas-OL 551 (SC), a recovery certificate dated December 24, 2001 was issued for the amount due and the

creditor filed a petition under section 7 of the Code on July 21, 2017 was admitted on that ground that since the cause of action was continuing no limitation period would attach. On appeal against this order the creditor contended that section 23 of the Limitation Act, 1963, would apply as a result of which limitation would be saved. However, the Supreme Court negated the contention and held that when the recovery certificate dated December 24, 2001 was issued, this certificate injured effectively and completely the debtor's rights as a result of which limitation would have begun ticking. The claim held to be was time barred.

Jurisdiction of Adjudicating Authority

In terms of section 60(1) of the Code, the Tribunal, where the registered office of the corporate debtor had jurisdiction and not the Tribunal where properties of the corporate debtor was situated. (*Naresh Kumar Sharma* v. *Oriental Bank of Commerce* [2019] 8 Comp Cas-OL 329 (NCLAT) affirming *Oriental Bank of Commerce* v. *Shekhar Resorts Ltd.* [2019] 8 Comp Cas-OL 324 (NCLT)).

In *Punjab National Bank* v. *Divya Jyoti Sponge Iron P. Ltd.* [2019] 8 Comp Cas-OL 378 (NCLT), it was held that approval or rejection of a resolution plan was within the rights of the committee of creditors and the Adjudicating Authority could only see whether plan approved by the committee of creditors meets the requirements under section 30(2) of the Code. On this point the Appellate Tribunal approved the decision of the Adjudicating Authority in *Sunil Jain* v. *Punjab National Bank* [2019] 8 Comp Cas-OL 392 (NCLAT). The scope of interference with the decision of the committee of creditors is thus very limited.

Recognition of bankruptcy order by foreign court

Provisions of cross border insolvency are not that clearly imbedded in the Code. Adoption of UNCITRAL Model Law on Cross Border Insolvency is still not done. Currently cross-border insolvency provisions are in sections 234 and 235 of the Code. For now, cross-border insolvency can be enforced only if India enters bilateral treaties with foreign Governments. In *State Bank of India* v. *Jet Airways (India) Ltd.* [2019] 8 Comp Cas-OL 451 (NCLT), the Adjudicating Authority refused to recognise the bankruptcy order passed by a court in Netherlands as against the corporate debtor. The Adjudicating Authority took note of the fact that sections 234 and 235 were yet to be notified and held that the Adjudicating Authorities are not empowered to entertain orders passed by courts in foreign jurisdictions in cases where the registered office of the corporate debtor is situated in India, and the jurisdiction specifically lies with the court. On an appeal the

Appellate Tribunal took note of the fact that the interim resolution professional was required to collate the claims of all offshore creditors or take control and custody of the assets of the corporate debtor situated outside India, in the Netherlands or other places. Therefore, it observed that the resolution professional was required to reach an arrangement or agreement with the administrator appointed pursuant to the proceeding initiated in the Netherlands. Pursuant to these directions, the administrator and the resolution professional filed an agreement termed as "cross border insolvency protocol". The Appellate Tribunal held that the Dutch trustee being equivalent to the resolution professional had a right to attend the meeting of the committee of creditors as an observer without any right to vote in such meetings. The Dutch trustee or administrator was required to work in co-operation with the resolution professional and, if any suggestion was required to be given, he could give it to the resolution professional. The draft of the cross border insolvency protocol was made final and was directed to be treated as a direction of the Appellate Tribunal. The observations of the Adjudicating Authority that the Dutch court had no jurisdiction in the matter of corporate insolvency resolution process of the corporate debtor and the consequential directions as given to the resolution professional in respect of offshore proceedings were to be set aside. The Appellate Tribunal in *Jet Airways (India) Ltd.* v. *State Bank of India* [2019] 8 Comp Cas-OL 468 (NCLAT) tried to find a way in respect of the debtor who had assets in different countries despite lack of provisions to guide it.

Operational debt : Definition

Section 5(21) of the Code defines "operational debt" to mean a claim in respect of the provision of goods and services among other things. A claim based on a settlement agreement for compensation on account of alleged defect in goods supplied by the debtor would not qualify as an operational debt. The claim being not an operational debt, the debtor could not be held, under the Code, to have defaulted in paying the debt. *Posco Daewoo Corporation* v. *Mohana Cotton Ginning P. Ltd.* [2019] 8 Comp Cas-OL 332 (NCLT).

Pre-existing dispute

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

> "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 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."

This has been reiterated by the Supreme Court in *K. Kishan* v. *Vijay Nirman Co. P. Ltd.* [2018] 4 Comp Cas-OL 112 (SC). Thus it is clear that a dispute that is existing prior to issuing of the demand notice is a ground to dismiss a petition under section 9 of the Code. In *Vivek Pasricha* v. *Dr. Amit Sachdeva* [2019] 8 Comp Cas-OL 65 (NCLAT), the Appellate Tribunal set aside an admission order as it found that a petition under sections 241, 242 and 247 of the Companies Act, 2013 filed by the operational creditor was pending before the National Company Law Tribunal. Therefore, it was of the view that during the pendency of the petition for payment of salary, without waiting for the decision of the National Company Law Tribunal, the petition under section 9 could not have been filed. It held that "there is a pre-existence of dispute with regard to salary payable to the first respondent and matter is pending for decision before the 'National Company Law Tribunal', New Delhi prior to the issuance of demand notice under section 8(1), we hold that the application under section 9 of the I and B Code filed by the first respondent was not maintainable". The order of the Adjudicating Authority in *Dr. Amit Sachdeva* v. *Axiss Dental P. Ltd.* [2019] 8 Comp Cas-OL 59 (NCLT) was reversed. See also *Bhandari Hosiery Exports Ltd.* v. *In-Time Garments P. Ltd.* [2019] 8 Comp Cas-OL 286 (NCLAT) affirming *Bhandari Hosiery Exports Ltd.* v. *In-Time Garments P. Ltd.* [2019] 8 Comp Cas-OL 279 (NCLT), *Duane Morris and Selvam LLP* v. *Simhapuri Energy Ltd.* [2019] 8 Comp Cas-OL 314 (NCLT), *Aacharang Metals* v. *Constructive Tube P. Ltd.* [2019] 8 Comp Cas-OL 362 (NCLT) and *Lasa Engineers P. Ltd.* v. *Devas Engineering Systems P. Ltd.*

[2019] 8 Comp Cas-OL 482 (NCLAT) affirming *Lasa Engineers P. Ltd.* v. *Devas Engineering Systems P. Ltd.* [2019] 5 Comp Cas-OL 428 (NCLT).

Debt must be crystallised

That the "Code is not intended to be a substitute for a recovery forum" is an often repeated caution as seen from the decisions of the Supreme Court in *Mobilox Innovations P. Ltd.* v. *Kirusa Software P. Ltd.* [2017] 205 Comp Cas 324 (SC) and *Transmission Corporation of Andhra Pradesh Ltd.* v. *Equipment Conductors and Cables Ltd.* [2018] 4 Comp Cas-OL 532 (SC). In terms of sections 6, 7, 8 and 9 of the Code, "occurrence of default is essential for initiating proceedings under Chapter II of the Code. Default is defined under section 3(12) of the Code as "non-payment of debt . . .". And debt has been defined under section 3(11) of the Code to mean "a liability or obligation in respect of a claim which is due . . .". A combined reading of these makes it clear that unless a claim is crystallised and is due it cannot be called a debt. There cannot be a default to in respect of such claims. Relying on these principles the Adjudicating Authority in *Jagan Pampapathy* v. *Wipro Ltd.* [2019] 8 Comp Cas-OL 74 (NCLT) dismissed a petition filed by the petitioner on the ground that an amount of Rs. 2,13,252 was due towards certain fixed costs entitlement payable to him for his engagement with the company as a senior domain consultant. The exact words used by the Tribunal being "the 'claim' is not yet converted into 'debt', but it is still 'dispute in existence' and the Insolvency and Bankruptcy Code, 2016 is not meant for chasing the payment". This order was affirmed by the Appellate Tribunal in *Jagan Pampapathy* v. *Wipro Ltd.* [2019] 8 Comp Cas-OL 83 (NCLAT) where in it was found that dispute was in existence prior to the issuance of demand notice. Existence of dispute is a factor to hold that a claim had not yet become a debt that was due.

Joining of operational creditors

A petition under section 7 of the Code can be filed by a financial creditor either by itself or jointly with the other financial creditors but can an operational creditor file a petition singly if co-creditor does not join him ? In *M. Gagan Bothra* v. *Alam Industries (I) Ltd.* [2019] 8 Comp Cas-OL 104 (NCLT), the Adjudicating Authority was of the view that such a petition was maintainable. It held that the petition was on behalf of the co-owners of the rented premises, who had signed the rental agreement jointly being the co-owners of the property which was rented out to the corporate debtor. It was found not to be a case joining of two separate claims. Therefore, held that a single claim could not be bifurcated for filing separate claims.

Delivery of demand notice

For the initiation of the corporate insolvency resolution process under section 9 of the Insolvency and Bankruptcy Code, 2016 by the operational creditor, the operational creditor is required to deliver the demand notice upon the corporate debtor under section 8 of the Code. The main object of section 8 is that this ensures that operational creditors, whose debt claims are usually smaller, are not able to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It may also facilitate informal negotiations between such creditors and the corporate debtor, which may result in a restructuring of the debt outside the formal proceedings and that is the reason in section 8 of the Code, the words, "deliver a demand notice of unpaid operational creditor" are mentioned instead of "sending a demand notice of unpaid operational creditor". In *Premraj Packagings P. Ltd.* v. *Unnao Distilleries and Breweries Ltd.* [2019] 8 Comp Cas-OL 244 (NCLT), In the absence of delivery of the demand notice as required under section 8, the petition filed by the operational creditor was found to be incomplete and not maintainable.

Inability to pay debt

In *Ketki Shah Talati* v. *Kasata Hometech (India) P. Ltd.* [2019] 8 Comp Cas-OL 298 (NCLT), pointed out that the present regime under the Code shifts from "inability to pay" under (section 433(e) of the Companies Act, 1956) to "existence of default". Therefore, held that the fact that the corporate debtor that it was a going concern with over 100 employees, an asset value of more than Rs. 39 crores, and an inventory of finished and unfinished stock of more than Rs. 80 crores were not relevant factors in deciding a section 9 petition.

Petition against a company whose name was removed from the Register of Companies

The question as to whether a petition under section 7 or 9 of the Code can be initiated against the corporate debtor whose name was struck off the Register of Companies was answered by the Appellate Tribunal in the affirmative. It held that the Tribunal under the Companies Act, 2013 was the Adjudicating Authority in terms of section 60(1) of the Code. Therefore, if an application is filed by the creditor (financial creditor or operational creditor) or workman (operational creditor) before the expiry of twenty years from the publication in the Official Gazette of the notice under section 248(5) of the Act, it is open to the Adjudicating Authority to give such directions and make such provisions as deemed just for placing the name

of the company and all other persons in the same position nearly as may be as if the name of the company had not been struck off from the Register of Companies. Especially since a company, whose name has been removed from the Register of Companies can be liquidated under the Code. The rationale as explained by the Tribunal was that even though the name of the corporate debtor may be struck off, but its assets may continue. Further that in view of the provisions of section 252(3) read with section 248(7) and (8) of the Act, it held that petitions under sections 7 and 9 of the Code will be maintainable against the "corporate debtor", even if the name of a "corporate debtor" had been struck off (*Hemang Phophalia* v. *Greater Bombay Co-operative Bank Ltd.* [2019] 8 Comp Cas-OL 263 (NCLAT)).

Duties of resolution professional

Delay by the resolution professional to decide the claim of the landowner for more than 4 months. The inaction on the part of the resolution professional in taking a decision with respect to the claim of the applicant was held to be an abuse of the powers given to him under the Code and contrary to justice and public policy. It was held that the landowner was just not entitled to receive the licence fee but also, he had no right to possession of the premises. Since the tenancy rights automatically got terminated, the moment default in payment of rent was committed and the resolution professional was directed to hand over possession of the premises forthwith to the applicant along with Rs. 1 lakh as cost (*Amar Universal P. Ltd., In re* [2019] 8 Comp Cas-OL 504 (NCLT)).

Resolution plan : Dissenting secured creditor

In *Hero Fincorp Ltd.* v. *Rave Scans P. Ltd.* [2019] 8 Comp Cas-OL 1 (NCLAT), it was held that the dissenting creditor cannot be discriminated against in resolution plan and direction were given to bring terms on par with those stipulated for other similarly situated secured financial creditors. On appeal the Supreme Court in *Rahul Jain* v. *Rave Scans P. Ltd.* [2019] 8 Comp Cas-OL 612 (SC) considered unamended and amended regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, pertaining to the mandatory contents of a resolution plan. It held that the resolution process began well before the amended regulation came into force (in fact, January, 2017) and the resolution plan was prepared and approved before that event. Therefore, it was of the view the observations of the Appellate Tribunal, requiring the resolution applicant to match the payout (offered to other financial creditors) to the dissenting creditor was not justified.

Cost and expenses

The Supreme Court has held that a bare reading of regulation 33(3) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, indicates that the petitioner is to bear expenses incurred by the resolution professional, which shall then be reimbursed by the committee of creditors to the extent such expenses are ratified. On facts since no committee of creditors was ever appointed as the interim resolution process did not reach that stage, whatever the expenses fixed by the Adjudicating Authority would have to be borne by the petitioning creditor (*S3 Electricals and Electronics P. Ltd.* v. *Brian Lau* [2019] 8 Comp Cas-OL 549 (SC)).

Time-limit for completion of resolution process

Time bound completion of the resolution process is one of main objective of the Code. Therefore, generally the time prescribed under the Code are to be strictly followed. However, under exceptional circumstances the Supreme Court does exercise its powers under article 142 of the Constitution of India to make an exception. In *Jaiprakash Associates Ltd.* v. *IDBI Bank Ltd.* [2019] 8 Comp Cas-OL 655 (SC), the Supreme Court did exercise such powers. Home owners were included within the meaning of "financial creditors" but no regulation was framed under the Insolvency and Bankruptcy Code, 2016, as to how the voting share of thousands of allottees would be counted as members of the committee of creditors. By the time a decision was arrived at by the Adjudicating Authority time prescribed elapsed. The Appellate Tribunal excluded 90 days for the purpose of counting the 270 days, to enable the resolution professional and the committee of creditors to call for fresh resolution plans and to consider them, if so required, and after negotiations pass appropriate orders under section 30(5) of the Code preferably within a period of 45 days. Further appeals were filed before the Supreme Court to questioning the powers of the National Company Law Tribunal or the National Company Law Appellate Tribunal, as the case may be, to exclude any period from the statutory period in exercise of inherent powers sans any express provision in the Code in that regard. The court took note of the fact that there was complete unanimity between all the stakeholders including the appellants that the liquidation of the corporate debtor must be eschewed as it would do more harm to the interests of the stakeholders, in particular the large number of home buyers, who aspired to have their home at the earliest. Therefore, it felt that relief was to be granted in exercise of the plenary powers under article 142 of the Constitution of India. Section 12 of the Code had been recently amended to limit the maximum period for

insolvency resolution to 330 days from the insolvency commencement date which in the case was August 9, 2018 in the light of the direction given in *Chitra Sharma* v. *Union of India* [2018] 210 Comp Cas 609 (SC). It was felt that the case was a classic example of how the entire process had got embroiled in litigation because of confusion or lack of clarity in respect of foundational processes to be followed by the committee of creditors. Especially not a case one party was trying to march over the other by resorting to unnecessary or avoidable litigation. It took note of the fact that the application for clarification made by the home buyers on September 17, 2018 at the earliest opportunity after commencement of the resolution process pursuant to the order dated August 9, 2018 passed by the Supreme Court remained pending for quite some time. It observed as (page 669 of 8 Comp Cas-OL) :

> "Suffice it to note that an extraordinary situation had arisen because of the constant experimentation which went about at different level due to lack of clarity on matters crucial to the decision making process of CoC. Besides that, in view of the recent legislative changes, the scope of resolution plan stands expanded which may now include provision for restructuring the corporate debtor including by way of merger, amalgamation and demerger and more so the power bestowed on the CoC to consider not only the feasibility and viability of the resolution plan but also the manner of distribution proposed, which may take into account the order of priority amongst the creditors. Additionally, the recently inserted section 12A enables the Adjudicating Authority to allow the withdrawal of an application filed under section 7 or section 9 or section 10, on an application made by the applicant with the approval of 90 per cent. voting share of the CoC. Similarly, sub-regulation (7) of regulation 36B inserted with effect from July 4, 2018 dealing with the request for resolution plans unambiguously postulates that the resolution professional may, with the approval of the Committee, reissue request for resolution plans, if the resolution plans received in response to earlier request are not satisfactory, subject to the condition that the request is made to all prospective resolution applicants in the final list. In the present case, finally only two bidders had participated and submitted their resolution plan which was placed before the CoC and stated to have been rejected. However, applying the principle underlying regulation 36B(7), we deem it appropriate to permit the IRP to reissue request for resolution plans to the two bidders (Suraksha Realty and NBCC)

and/or to call upon them to submit revised resolution plan(s), which can be then placed before the CoC for its due consideration."

Taking an overall view of the matter, the court deemed it just, proper and expedient to issue directions under article 142 of the Constitution of India to all concerned to reckon 90 days extended period from the date of this order instead of the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019. It also clarified that the case must be treated as a precedent.

In *Alpha Corp Development P. Ltd.* v. *Earth Infrastructure Ltd.* [2019] 8 Comp Cas-OL 375 (NCLAT), the Appellate Tribunal extended the period by another 90 days in view of the third proviso to sub-section (3) of section 12. The resolution applicant was to be allowed to move before the committee of creditors and resolution professional and direct completing of the process within 90 days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, i. e., with effect from August 16, 2019.

Liquidation

Sale of assets by secured creditor : The right of a secured creditor who opts to stay outside the liquidation process and opts to enforce its security interest is protected under the Code. All that has to be seen by the liquidator at this juncture is whether the secured creditor complies with the provisions of section 52(3) of the Code, i. e., the records of such security interest are maintained by an information utility and whether the secured creditor complies with regulation 37 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. A sale by secured creditor is an exception carved out in section 35(1)(f) of the Code which deals with the powers of the liquidator to sell the assets of the corporate debtor. The power of the liquidator is subject to section 52 of the Code which deals with secured creditors's option in case of liquidation of the corporate debtor. The Adjudicating Authority in *Anuj Bajpai (Liquidator)* v. *State Bank of India (No. 1)* [2019] 8 Comp Cas-OL 402 (NCLT) considered whether the restriction in respect of sale of assets by a liquidator under section 35(1)(f) to persons disqualified under section 29A of the Code would apply to a secured creditor exercising its option to enforce its security interest. Answering in the affirmative, the Authority observed in paragraph 13 that (page 411) :

"This restriction is definitely limited to the scope and ambits of section 52 of the Code wherein secured creditor is provided with certain exclusive rights and options during the commencement of liquidation proceedings. Section 52 is silent about a restriction as per the proviso

annexed to section 35(1)(f) according to which a liquidator is not entitled to sell an immovable property to any person not eligible to be a resolution applicant. Section 29A has given a long list of disqualification of such persons demarcated as 'disqualified persons' for submission of a resolution plan. The intent of the introduction of section 29A is not to give benefit to defaulters. The defaulters disqualified under section 29A should not get any benefit under this code. This is a clear message conveyed through section 29A. A defaulter must not be benefitted by entering into those very assets through side doors, otherwise not permitted to enter from the front doors, for e.g. by submission of resolution plan. Therefore, it is logical as well as legally justifiable to extend the scope of section 29A while dealing with the liquidation of the assets a debtor company. The hon'ble Legislatures were very much aware about this attempt of the defaulters to indirectly take control of the stressed assets, therefore, restriction was imposed in the proviso annexed to clause (f) of section 35(1). As far as section 52 is concerned, the scope is limited to grant rights to a financial creditor for sale of a property. Naturally, that right should not give permission to a financial creditor to sell that property to a defaulter/promoter/director. Therefore, it is necessary as well as need of the hour to read the rights enshrined under section 52 along with the proviso to clause (f) of section 35(1) as well as section 29A of the Code."

Thus relying on decision of the Supreme Court in *Swiss Ribbons P. Ltd.* v. *Union of India* [2019] 213 Comp Cas 198 (SC), the Tribunal held that section 52, therefore, was not out of Chapter III, i. e., liquidation process, but within the Chapter, hence would to apply to the secured financial creditors if they exercise their option to liquidate an asset independently.

Liquidation estate : A fire broke out in the property of the corporate debtor which under exclusive charge of the financial creditor-bank during pre-moratorium period. The financial creditor had exercised its option to stay outside the liquidation proceedings. Dispute arose in respect of the insurance proceeds received during the moratorium. It was held that since the property was under the exclusive charge of the bank, all encumbrances thereon and all incomes and claims, including the insurance claim, therefrom related to the bank (*Anuj Bajpai* v. *State Bank of India (No. 2)* [2019] 8 Comp Cas-OL 415 (NCLT)).

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