COMPARATIVE TABLE OF CASES REPORTED IN THIS VOLUME

Asterisks indicate cases which have not been reported in other journals.

Page	Court	Other Journals
		PART 1 — 1-5-2020
1	NCLAT	* * *
4	NCLT	* * *
9	NCLT	* * *
20	NCLT	* * *
28	NCLAT	* * *
36	NCLT	* * *
43	NCLAT	* * *
48	Sikkim	* * *
54	NCLT	* * *
59	NCLAT	* * *
69	NCLT	[2019] 105 taxmann.com 305
76	NCLT	[2019] 106 taxmann.com 79
89	NCLAT	* * *
		PART 2 — 8-5-2020
101	NCLAT	* * *
110	NCLAT	* * *
116	NCLT	* * *
120	NCLAT	* * *
128	NCLAT	* * *
139	NCLAT	* * *
147	Delhi	* * *
		PART 3 — 15-5-2020
224	Delhi	[2019] 152 CLA 271
247	Delhi	* * *

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262	Delhi	*	*	*
280	NCLT	*	*	*
		PART 4 — 22-5-2020		
290	NCLT	*	*	*
295	SC	*	*	*
300	NCLT	*	*	*
313	NCLT	*	*	*
327	NCLT	*	*	*
335	NCLT	*	*	*

CONTENTS OF THIS PART

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JOURNAL : 1—24

SUBJECT INDEX TO CASES REPORTED IN THIS PART

SUPREME COURT

Oppression and mismanagement—Mismanagement—Fraud—Freezing of accounts of person liable for fraudulent conduct or business—Only of responsible for business of company being mismanaged and not business of another company or other persons—Freezing of accounts of officer of bank for omission to take precautions or preventive steps to prevent fraud perpetrated by person or company—Without jurisdiction—Companies Act, 2013, ss. 241(2), 337, 339—USHA ANANTHASUBRAMANIAN *v.* UNION OF INDIA ... 295

NATIONAL COMPANY LAW TRIBUNAL ORDERS

Insolvency resolution—Committee of creditors—Creditor—Fraudulent transactions—Direction for forensic audit—Insolvency and Bankruptcy Code, 2016, ss. 21, 60(5)—ASSET RECONSTRUCTION CO. (INDIA) LTD. *v.* GOPAL KRISHNA RAJU ... 327

——Committee of creditors—Related party—Committee of creditors must be completely independent and free from influence based on vested interest of promoters or their close relatives—Party related to promoters disqualified from participating, voting and representing in committee of creditors—Insolvency and Bankruptcy Code, 2016, ss. 5(24), 24A—ASSET RECONSTRUCTION CO. (INDIA) LTD. *v.* GOPAL KRISHNA RAJU ... 327

——Date of commencement—Supreme Court by order dated 9-8-2018 directing recommencement of resolution process afresh from stage of appointment of insolvency resolution professional by Adjudicating Authority's order dated 9-8-2017 and extended period of 180 days from date of its decision—Admission order passed by Authority or appointment of interim resolution professional not set aside by Supreme Court—Insolvency commencement date, i. e., cut-off date for calculating quantum of claim amounts for all types and classes of creditors was 9-8-2017 and not 9-8-2018—Insolvency and Bankruptcy Code, 2016, ss. 5(12), 7, 12, 16—IDBI BANK LTD. *v.* ANUJ JAIN ... 313

——Petition by financial creditor—Acknowledgment of debt—Sufficient evidence for debt due and default—Corporate debtor and guarantors acknowledging debts by offering repeated one-time settlement proposals after filing of petition—Petition to be admitted—

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CASES JUDICIALLY NOTICED IN THIS PART

Gaurav Hargovindbhai Dave *v.* Asset Reconstruction Co. (India) Ltd. [2019] 8 Comp Cas-OL 250 (SC) **distinguished** in Union Bank of India *v.* U. P. State Spinning Co. Ltd. [2020] 220 Comp Cas 335 (NCLT)

(Contd. on Cover page 3)

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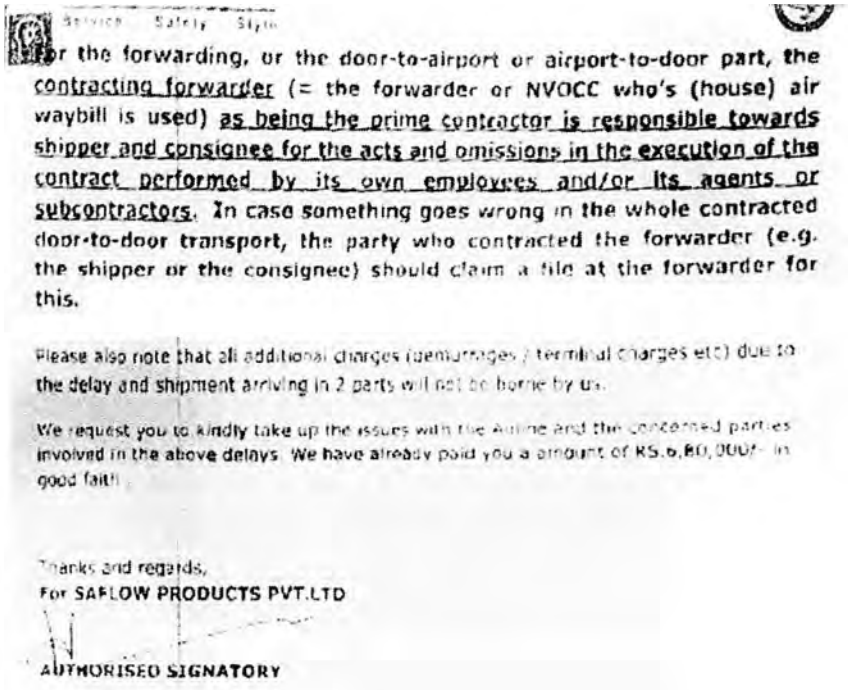

or the forwarding, or the door-to-airport or airport-to-door part, the contracting forwarder (= the forwarder or NVOCC who's (house) air waybill is used) as being the prime contractor is responsible towards shipper and consignee for the acts and omissions in the execution of the contract performed by its own employees and/or its agents or subcontractors. In case something goes wrong in the whole contracted door-to-door transport, the party who contracted the forwarder (e.g. the shipper or the consignee) should claim a file at the forwarder for this.

Please also note that all additional charges (demurrages / terminal charges etc) due to the delay and shipment arriving in 2 parts will not be borne by us.

We request you to kindly take up the issues with the Airline and the concerned parties involved in the above delays. We have already paid you a amount of RS.6,80,000/- in good faith.

Thanks and regards,
For SAFLOW PRODUCTS PVT.LTD

AUTHORISED SIGNATORY

(e) It is beneficial to refer the judgement of the hon'ble Supreme Court in the case of *Mobilox Innovations P. Ltd.* v. *Kirusa Software P. Ltd.* [2017] 205 Comp Cas 324 (SC) ; [2017] SCC Online SC 1154 wherein in paragraph No. 40, it was held as follows (page 373 of 205 Comp Cas) :

> "It is clear, therefore, that once the petitioner 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 petitioner or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the petitioner 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

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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."

14 When the ratio laid down in the judgement cited supra is applied to the facts of the present case on hand wherein the corporate debtor vide e-mail dated November 1, 2017 and November 13, 2017 clearly raised a dispute regarding delay in delivery of goods which is prior to the issuance of the demand notice dated August 5, 2018, thus tantamount to a pre-existing dispute between the parties and the petition deserves to be dismissed.

[2020] 220 Comp Cas 290 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — GUWAHATI BENCH]

ALLAHABAD BANK

v.

MEGHALAYA INFRATECH LTD.

K. R. JINAN *(Judicial Member)*

May 18, 2020.

HF ▸ Applicant

INSOLVENCY RESOLUTION—RESOLUTION PLAN—PLAN APPROVED BY COMMITTEE OF CREDITORS—PLAN FEASIBLE AND VIABLE—TO BE APPROVED—INSOLVENCY AND BANKRUPTCY CODE, 2016, SS. 30, 31—INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS, 2016, regln. 38.

On an application filed by the resolution professional for final approval of the resolution plan by the Adjudicating Authority, which was duly approved by the committee of creditors :

Held, *that the assets of the corporate debtor were going to rest in the safer hands of a person who was engaged in the very same kind of business as the corporate debtor. All the mandatory requirements had been complied with by the resolution applicant in accordance with form H submitted by the resolution professional which provided for the payment for the insolvency resolution process, payment of the debts of operational creditors, management of the affairs of the corporate debtor, and implementation and supervision of the resolution plan. It also provided the term of the plan and its implementation schedule. So it was a feasible and viable plan. This was a case in which the*

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committee of creditors had judiciously distributed the financial bids to the stakeholders according to their entitlements. There was nothing in the plan, so as to disapprove it. The committee of creditors had very well deliberated over the two plans and decided the viability, feasibility and financial matrix of each plan and approved one with 100 per cent. vote shares of the members. Accordingly the resolution plan was to be approved.

C. P. (IB) No. 13/GB/2019.

ORDER

K. R. JINAN ***(Judicial Member)***.—This is an unnumbered application in C. P. (IB) No. 13/GB/2019 came up for consideration on today at the instance of the resolution professional, which was filed by the resolution professional through e-mail, for final approval of the resolution plan by the Adjudicating Authority, which was duly approved by committee of creditors (in short, CoC) at the seventh CoC meeting held on March 6, 2020. 1

The applicant prayed for an urgent hearing because the 180 days CIRP period has already expired on February 24, 2020 and the extended period of 90 days will expire soon on May 24, 2020. The urgency set out in the application being found satisfactory this application was listed for hearing on today through video conference (VC), by giving advance notice from the Registry of Kolkata Bench to the resolution professional. 2

The Allahabad Bank has filed the C. P. (IB) No. 13/GB/2019 before the Guwahati Bench of National Company Law Tribunal under section 7 of the Insolvency and Bankruptcy Code, 2016 (in short I and B Code, 2016) for initiating corporate insolvency resolution process (in short, CIRP) as against the corporate debtor, Meghalaya Infratech Ltd. Vide order dated August 28, 2019 the application was admitted by appointing Mr. Amit Pareek as interim resolution professional. Thereafter, at the first CoC meeting held on September 25, 2019 interim resolution professional was appointed as resolution professional. 3

As an interim resolution professional, he has made public announcement in compliance with section 15 of the I and B Code, 2016 calling for claims from the creditors of the corporate debtor. Upon receipt of claims from creditors, committee of creditors (in short, CoC) was formed on September 17, 2019. Expression of interest (in short, EoI) was invited from the prospective resolution applicants and has received four (4) expression of interests from (a) Panna Pragati Infrastructure P. Ltd. and others ; (b) Mr. Ngaitlang Dhar ; (c) Mr. Abhishek Agarwal ; and (d) Mr. Ashish Jaisasaria and others respectively. EOI's received from 4 prospective resolution applicants were conformed to the eligibility criteria as laid down for evaluation 4

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of EOI's and provisional list of prospective resolution applicants was published for submissions of objections to the provisional list by December 25, 2019. However, no objection for inclusion or exclusion of any prospective resolution applicants was received and the final list of prospective resolution applicants was placed before the CoC for evolution. Thereafter, all the prospective resolution applicants as per regulation 36B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 were invited to submit their respective resolution plans by January 24, 2020. In response to that four (4) resolutions plans were received from the four (4) prospective resolution applicants.

5 At the fifth CoC meeting held on February 12, 2020 CoC has decided to follow swiss challenge method of bidding for resolution plan and after deliberation and negotiation with the resolution applicants present at the meeting Mr. Ngaitlang Dhar has been declared as H-1 and Mr. Abhishek Agarwal as H-2 by the CoC.

6 Finally at the seventh CoC meeting held on March 6, 2020 the CoC with a 100 per cent. voting share has approved the resolution plan of H-1 bidder.

7 It is stated that based on the affidavits received from the H-1 bidder by the resolution professional, the resolution applicant was found eligible under section 29A of the Code.

8 The learned resolution professional (RP) Mr. Amit Pareek, Mr. Prasanta Kumar Mallik, member of CoC, and Mr. Sushil Maithani representing Union Bank of India one another member of CoC were present. They were heard through video conferencing. Perused the scanned copies of documents and the resolution plan submitted through e-mail.

9 The learned resolution professional has submitted that the resolution plan contains all the mandatory requirements to be meted out as per regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and that an affidavit stating that the resolution applicant, H1 bidder is eligible under section 29A has been annexed with the resolution plan in compliance with section 30(1) and that the resolution plan submitted to the CoC for its approval conforms to all the conditions referred to in sub-section (2) of section 30.

10 The mandatory contents of the resolution plan as required to be meted out as per regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides, inter alia, for :

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"(1) A resolution plan shall identify specific sources of funds that will be used to pay the—

(a) insolvency resolution process costs and provide that the insolvency resolution process costs will be paid in priority to any other creditor ;

(b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of the resolution plan by the Adjudicating Authority ; and

(c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.

(2) A resolution plan shall provide :

(a) the term of the plan and its implementation schedule ;

(b) the management and control of the business of the corporate debtor during the term ; and

(c) adequate means for supervising its implementation."

11 The resolution professional states that he has verified the contents of the resolution plan and confirms that it complies with the requirements as envisaged under regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 as well as section 30 of the Code, for which a copy of Form H—compliance certificate issued by the resolution professional is annexed with the application and marked as "annexure F" (pages 375 to 385).

12 It is submitted by the learned resolution professional that by giving fairly good opportunities to both H1 and H2 bidders for arriving at the maximisation of value for the stressed assets of the corporate debtor, and the CoC has approved the resolution plan of H1 as the best plan among the two plans under consideration of the CoC and it is that plan which was approved by the CoC by a 100 per cent. voting share of the members of the CoC. It is understood that the resolution plan bid amount is Rs. 64.30 crores which is higher than the liquidation value of Rs. 61.62 crores. The financial creditors have had a hair cut of 51.44 per cent. So it appears to me that the CoC has taken a wise decision after considering the feasibility and viability of the plan and all other requirements to be meted out. No waiver or extinguishments in contravention of the provisions of the Code or in violation of existing laws seen not brought out. In the view of the matter, the resolution pan of H1 bidder is liable to be approved as per section 31(1) of the Code.

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13 A reference to the plan, it is understood that the assets of the corporate debtor are going to rest in a safer hand who is engaged in the very same kind of business as the corporate debtor. The resolution professional Mr. Amit Pareek deserves special appreciation for finding out a resolution applicant whose plan has been approved by the CoC by 100 per cent. vote share even in these difficult time of pandemic due to COVID-19. All the provisions of mandatory requirements are seen complied by the resolution applicant as per Form H submitted by the resolution professional. It provides provision for the payment of insolvency resolution process, payment of the debts of operational creditors, management of the affairs of the corporate debtor, and provides provision for implementation and supervision of the resolution plan. It also provides term of the plan and its implementation schedule. So it is a feasible and viable plan. This is a case in which the CoC has judiciously distributed the financial bids to the stakeholders according to their entitlements. There is nothing in the plan, so as to disapprove it. The CoC has very well deliberated with the two plans and decided the viability, feasibility and financial matrix of each plans and approved one with 100 per cent. vote shares of the members of the CoC. Accordingly, I hereby approve the resolution plan of Mr. Ngaitlang Dhar (H1 bidder) upon the following directions :

(i) The resolution plan of Mr. Ngaitlang Dhar, which was approved by the CoC with 100 per cent. voting share, is hereby approved under provisions of sub-section (1) of section 31 of the Insolvency and Bankruptcy Code, 2016, which shall be binding on the corporate debtor (Meghalaya Infratech Ltd.), its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

(ii) The revival plan of the company in accordance with the approved resolution plan shall come into force with immediate effect.

(iii) The moratorium order passed under section 14 of the Insolvency and Bankruptcy Code, 2016 shall cease to have effect.

(iv) The resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Insolvency and Bankruptcy Board of India to be recorded in its database.

(v) Unnumbered I. A. (IB) No. 2020 in C. P. (IB) No. 13/GB/2019 is disposed of accordingly.

(vi) Accordingly, C. P. (IB) No. 13/GB/2019 along with all the CAs filed and/or pending, if any, in this context is disposed of.

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The registry is directed to send e-mail copies of the order forthwith to all parties inclusive of the counsel. **14**

[2020] 220 Comp Cas 295 (SC)

[IN THE SUPREME COURT OF INDIA]

USHA ANANTHASUBRAMANIAN

v.

UNION OF INDIA

ROHINTON FALI NARIMAN, S. RAVINDRA BHAT and **V. RAMASUBRAMANIAN** JJ.

February 12, 2020.

HF ▸ Appellant

OPPRESSION AND MISMANAGEMENT—MISMANAGEMENT—FRAUD—FREEZING OF ACCOUNTS OF PERSON LIABLE FOR FRAUDULENT CONDUCT OR BUSINESS—ONLY OF RESPONSIBLE FOR BUSINESS OF COMPANY BEING MISMANAGED AND NOT BUSINESS OF ANOTHER COMPANY OR OTHER PERSONS—FREEZING OF ACCOUNTS OF OFFICER OF BANK FOR OMISSION TO TAKE PRECAUTIONS OR PREVENTIVE STEPS TO PREVENT FRAUD PERPETRATED BY PERSON OR COMPANY—WITHOUT JURISDICTION—COMPANIES ACT, 2013, ss. 241(2), 337, 339.

Under section 241(2) of the Companies Act, 2013, if the Central Government, is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may apply itself to the Tribunal for orders under Chapter XVI, which is headed "Prevention of oppression and mismanagement". Apart from the vast powers that are given to the Tribunal under section 242 of the Act, powers under sections 337 and 339 of the Act are also given in aid of this power, which will apply mutatis mutandis. Section 337 of the Act refers to penalty for frauds by an officer of the company in which mismanagement has taken place. Likewise, section 339 of the Act refers to any business of the company which has been carried on with intent to defraud creditors of that company. Obviously, the persons referred to in section 339(1) as persons who are other than the parties "to the carrying on of the business in the manner aforesaid" which again refers to the business of the company which is being mismanaged and not to the business of another company or other persons.

The National Company Law Tribunal in exercise of its jurisdiction under section 241 of the Act granted injunction against certain individuals from

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disposing of the movable and immovable properties or assets belonging to them. The assets were frozen, making it clear that post-freeze only a sum of Rs. 1,00,000 per month would be allowed to each of such persons for personal expenses, including the appellant who was the chief executive officer and managing director of the bank. The Central Bureau of Investigation charge sheeted the appellant for omission to take precautions or preventive steps to prevent the fraud perpetrated by NM and thereby committing misconduct and conspiracy with the other accused persons. On an appeal contending that under section 241, powers could be exercised under various provisions of the Act including sections 337 and 339 only in so far as the mismanagement of that very company was concerned, which was obviously not relatable to any other corporate body, including the bank, of which the appellant was an officer and that the order freezing the assets of the appellant was without jurisdiction :

Held accordingly, *that powers under sections 337 and 339 of the Act could not be utilized in order that a person who might be the head of some other organization be roped in, and his or her assets be attached. The orders passed by the National Company Law Appellate Tribunal and as well as the National Company Law Tribunal were to be set aside. [The court made it clear that the decision would not have any effect on the investigations conducted by the Central Bureau of Investigation or by the Serious Fraud Investigation Office.]*

Order of the National Company Law Appellate Tribunal reversed.

Civil Appeal No. 7604 of 2019.

Appeal from the judgment and order dated July 4, 2019 of the National Company Law Appellate Tribunal in Company Appeal (AT) No. 79 of 2019.

C. S. Vaidyanathan and *Ms. Meenakshi Arora*, Senior Advocates (*Parthiv K. Goswami*, *Anirudh Sharma*, *Rajiv Dalal*, *Abhaid Parikh* and *Vikrant Singh Negi*, Advocates, with them) for the appellant.

Sanjay Jain, Additional Solicitor General (*Kanu Agrawal*, *Zoheb Hussain*, *Padmesh Mishra*, *Arkaj Kumar* and *Arvind Kumar Sharma*, Advocates, with them) for the respondent.

JUDGMENT

The judgment of the court was delivered by

1 ROHINTON FALI NARIMAN J.—The present appeal is by Usha Ananthasubramanian-former MD and CEO of the Punjab National Bank. She was MD and CEO of the said bank from August 14, 2015 to May 5, 2017.

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A charge sheet has been filed by the CBI against several persons occupying positions in the Punjab National Bank as well as the directors of Gitanjali Gems Ltd. 2

Mr. C. S. Vaidyanathan, the learned senior advocate appearing on behalf of the appellant, points out that the charge sheet by the CBI itself makes it clear that at the highest even the criminal case against the appellant is only that she omitted to take precautions or preventive steps to prevent the fraud perpetrated by Nirav Modi and thereby committed misconduct and conspiracy with the other accused persons. After pointing out the aforesaid charge sheet, Mr. Vaidyanathan then pointed out orders that were passed by the National Company Law Tribunal in exercise of its jurisdiction under section 241 of the Companies Act by which certain named individuals were injuncted from disposing movable and immovable properties/assets which belong to them and whose assets were frozen, making it clear that post-freeze only a sum of Rs. 1,00,000 per month will be allowed to each of such persons for personal expenses. He further argued that in exercising powers under section 241, powers may be exercised under various provisions of the Companies Act including sections 337 and 339 only in so far as the mismanagement of that very company is concerned, which is obviously not relatable to any other corporate body, including the Punjab National Bank, of which the appellant is the CEO and MD. According to him, therefore, any order that freezes assets of the appellant in the exercise of jurisdiction under section 241 of the Companies Act would be without jurisdiction. He read to us the relevant sections of the Companies Act and pointed out that however widely they are construed they can only be qua the company in which acts of mismanagement are alleged and not qua any other person. 3

Mr. Sanjay Jain, the learned Additional Solicitor General appearing for the respondent, on the other hand, supported the orders passed by the National Company Law Tribunal and the National Company Law Appellate Tribunal in the appellant's case by reading to us, in particular, sections 337 and 339 of the Companies Act. According to him, where a person is liable for fraudulent conduct or business the jurisdiction under section 339 if very wide and would include freezing the assets of any person who was knowingly a party to the carrying on of the fraudulent conduct of business. 4

Having heard learned counsel for both sides, we may first set out section 241(2) and sections 337 and 339 of the Companies Act, which read as follows : 5

> "241. *Application to Tribunal for relief in cases of oppression, etc.*—
> . . . (2) The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public

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interest, it may itself apply to the Tribunal for an order under this Chapter :

Provided that the applications under this sub-section, in respect of such company or class of companies, as may be prescribed, shall be made before the Principal Bench of the Tribunal which shall be dealt with by such Bench.

337. *Penalty for frauds by officers.*—If any person, being at the time of the commission of the alleged offence an officer of a company which is subsequently ordered to be wound up by the Tribunal under this Act,—

(a) has, by false pretences or by means of any other fraud, induced any person to give credit to the company ;

(b) with intent to defraud creditors of the company or any other person, has made or caused to be made any gift or transfer of, or charge on, or has caused or connived at the levying of any execution against, the property of the company ; or

(c) with intent to defraud creditors of the company, has concealed or removed any part of the property of the company since the date of any unsatisfied judgment or order for payment of money obtained against the company or within two months before that date,

he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees.

339. *Liability for fraudulent conduct of business.*—(1) If in the course of the winding up of a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or any other persons or for any fraudulent purpose, the Tribunal, on the application of the official liquidator, or the company liquidator or any creditor or contributory of the company, may, if it thinks it proper so to do, declare that any person, who is or has been a director, manager, or officer of the company or any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Tribunal may direct :

Provided that on the hearing of an application under this sub-section, the official liquidator or the company liquidator, as the case may be, may himself give evidence or call witnesses.

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(2) Where the Tribunal makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration and, in particular,—

(a) make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf ;

(b) make such further order as may be necessary for the purpose of enforcing any charge imposed under this sub-section.

(3) Where any business of a company is carried on with such intent or for such purpose as is mentioned in sub-section (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be liable for action under section 447.

(4) This section shall apply, notwithstanding that the person concerned may be punishable under any other law for the time being in force in respect of the matters on the ground of which the declaration is to be made.

Explanation.—For the purposes of this section,—

(a) the expression 'assignee' includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration, not including consideration by way of marriage, given in good faith and without notice of any of the matters on the ground of which the declaration is made ;

(b) the expression 'officer' includes any person in accordance with whose directions or instructions the directors of the company have been accustomed to act."

6 Under section 241(2), the Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, may apply itself to the Tribunal for orders under this Chapter, which is headed "prevention of oppression and mismanagement". Apart from the vast powers that are given to the Tribunal under section 242, powers under sections 337 and 339 are also given in aid of this power, which will apply mutatis mutandis.

7 Section 337 refers to penalty for frauds by an officer of the company in which mismanagement has taken place. Likewise, section 339 refers to any

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business of the company which has been carried on with intent to defraud creditors of that company. Obviously, the persons referred to in section 339(1) as persons who are other than the parties "to the carrying on of the business in the manner aforesaid" which again refers to the business of the company which is being mismanaged and not to the business of another company or other persons.

8 This being the case, it is clear that powers under these sections cannot possibly be utilized in order that a person who may be the head of some other organization be roped in, and his or her assets be attached. This being the case, we set aside the impugned order passed by the National Company Law Appellate Tribunal and as well as the National Company Law Tribunal. The appeal is allowed in the aforesaid terms.

9 We may clarify that nothing stated in this judgment will have any effect in so far as the investigation conducted by the CBI or the investigation by the SFIO is concerned.

[2020] 220 Comp Cas 300 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — INDORE BENCH—AHMEDABAD]

BANK OF BARODA

(erstwhile Dena Bank)

v.

PITHAMPUR POLY PRODUCTS LTD.

HARIHAR PRAKASH CHATURVEDI *(Judicial Member)* and **PRASANTA KUMAR MOHANTY *(Technical Member)***

January 3, 2020.

HF ▸ Petitioner

INSOLVENCY RESOLUTION—PETITION BY FINANCIAL CREDITOR—LIMITATION—DEFAULT OCCURRING ON 1-5-2000—HIGH COURT STAYING COERCIVE ACTION AGAINST CORPORATE DEBTOR—STAY VACATED ON 7-3-2018—PETITION FILED ON 21-8-2018 WITHIN LIMITATION—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 7.

INSOLVENCY RESOLUTION—PETITION BY FINANCIAL CREDITOR—ACKNOWLEDGMENT OF DEBT—SUFFICIENT EVIDENCE FOR DEBT DUE AND DEFAULT—CORPORATE DEBTOR AND GUARANTORS ACKNOWLEDGING DEBTS BY OFFERING REPEATED ONE-TIME SETTLEMENT PROPOSALS AFTER FILING

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OF PETITION—PETITION TO BE ADMITTED—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 7.

The financial creditor which had granted credit facilities to the corporate debtor filed a petition under section 7 of the Insolvency and Bankruptcy Code, 2016, upon its failure to repay its debt :

Held, *admitting the petition, that 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. The corporate debtor had been negotiating with the financial creditor and had offered corporate insolvency resolution process proposals on January 14, 2019, February 14, 2019 and February 18, 2019 after the petition was filed under section 7 by the financial creditor. It was clear from the records that the corporate debtor had availed of loan from the financial creditor. The debt due was above Rs. one lakh and the default had occurred on May 1, 2000. The petition had been filed within the limitation period as a clear cause of action arouse only after vacation of the stay by the High Court on March 7, 2018. Both the corporate debtor and the guarantors had acknowledging the debts by offering repeated one-time settlement proposals after the petition was filed before the Adjudicating Authority on August 21, 2018. The charges filed in the register of charges were not satisfied. A copy of the petition filed before the Tribunal had been sent to the corporate debtor and it was found to be complete for the purpose of initiation of the corporate insolvency resolution process against the corporate debtor. The petition was to be admitted.*

[The Adjudicating Authority also gave suggestions regarding the course of action to be adopted by the committee of creditors.]

B. K. EDUCATIONAL SERVICES P. LTD. *v.* PARAG GUPTA AND ASSOCIATES [2019] 212 Comp Cas 1 (SC) (para 16) *and* INNOVENTIVE INDUSTRIES LTD *v.* ICICI BANK [2017] 205 Comp Cas 57 (SC) (para 17) *referred to.*

C. P. (I. B.) No. 421/7/NCLT/AHM/2018.

Gaurav Maharshi and *Rohit Lalwani* for the applicant/financial creditor.

Akshat Agrawal for the respondent/corporate debtor.

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ORDER

The order of the Bench was delivered by

1 PRASANTA KUMAR MOHANTY ***(Technical Member)***.—The present I. B. petition is filed by the financial creditor-Bank of Baroda (erstwhile Dena Bank) under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as a "Code"), seeking initiation of the corporate insolvency resolution process ("CIRP" in short) against the corporate debtor company namely, Pithampur Poly Products Ltd., for the default committed by the corporate debtor in making repayment of the term loans/CC facility availed from the bank. The applicant (FC), Bank of Baroda (erstwhile Dena Bank) is a bank, incorporated under the provisions of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970. The application has been filed by the duly Authorised Officer, Shri Manoj Kumar, Assistant General Manager, Navlakha Chouraha, A. B. Road, Indore, Madhya Pradesh.

2 The respondent-corporate debtor (CD) company, namely Pithampur Poly Products Ltd., was incorporated on July 28, 1994 with CIN : L25202MP1994PLC008513.

3 The nominal share capital of the respondent (CD) company is Rs. 6,00,00,000 (rupees six crores only) and the paid-up capital of the company is Rs. 4,87,40,000 (rupees four crores eighty seven lakhs forty thousand only). The registered office of the corporate debtor-company is situated at : Plot No. 115, Sector-ITI, Industrial Area Pithampur, District-Dhar, Madhya Pradesh.

4 The main objects of the company, by which the respondent (CD) company is incorporated, are mentioned in the memorandum of association which are briefly mentioned as :

> "To carry on the business of manufacturers, producers, processors importers, exporters, buyers, sellers, and dealers in, flexible and other packaging material including plastic, paper, decorative, printing methods, such as flexographic, rotogravure lamination metallisation, surface coating, fabric, cloth, polythene polyester, polypropylene, PVC, material required for commercial industrial agricultural, construction purposes, HDPE/P. P. Bags, tarpaulin packing sheet, shopping bags and all types of covers required for packing cement, grain, fertilizers, chemicals, etc.
>
> To carry on the business of manufacturers, producers, importers, exporters, buyers, sellers, distributors, stockists, wholesale merchants, retailers, indenting agents in, flexible and other packaging material

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including plastic, paper, decorative, printing methods, such as flexographic, rotogravure, lamination, metallisation, surface coating, fabric, cloth, polythene, polyester, polypropylene, PVC, material required for commercial, industrial, agricultural, construction purposes, HDPE/P. P. Bags, tarpaulin packing sheet, shopping bags and all types of covers required for packing cement, grain, fertilizers, chemicals, etc."

5 It is stated that the corporate debtor has been engaged in the manufacturing of PP/SDP woven sacks, Jumbo Bags Box Bags, etc., since 1994. It has its factory at Industrial Plot No. 115 situated in sector-3 Industrial area Pithampur in District Dhar (MP), which is also the company's registered office.

The company was promoted by Shri S. N. Kabra, Shri Ashish Shekar and others and commercial production of the unit was scheduled to commence from April 1995 but due to delay in supply and installation of machinery the production could not start from December, 1995. At this stage in November, 1995 Shri R. K. Tekriwal took over the entire project and the unit could not turn the corner and loss was increased. To overcome the imbalances and to make the plant capable of producing fabric of a higher width, the company finalized a modernization-cum-expansion plant and bank has sanctioned the credit facilities.

6 It is submitted that the respondent-company applied for various term loan and cash credit facilities and the applicant-bank sanctioned term loans of Rs. 7,01,49,000 cash credit limit of Rs. 4,34,00,000 in various dated from November 27, 1994 to June 23, 1997.

Thus, total aggregate limit of Rs. 11,35,49,000 was sanctioned by the applicant-bank with certain terms and conditions including hypothecation of plant and machinery and mortgage of immovable properties including guarantees which was duly accepted/acknowledged by the corporate debtor and mortgagor/guarantors. Mortgage of the property has been created on July 14, 1995 (page No. 49 of the paper book).

7 The corporate debtor has defaulted payment and the date of default is May 1, 2000 as stated by the petitioner-bank (page Nos. 45-47 of paper book). CIBIL Report (page No. 98 to 119 of the paper book) has been filed by the bank which confirms that the account is in default.

8 The statements of accounts of the corporate debtor have been filed and the petitioner-bank has submitted a certificate to this effect under the Bankers' Books Evidence Act, 1891. (Page No. 127 of paper book). The petitioner-bank has claimed their total dues of Rs. 2,87,87,58,545.91 ps (rupees two hundred eighty seven crores eighty seven lakhs fifty eight

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thousand five hundred forty five and ninety one paisa only) as on August 8, 2018.

9 The petitioner-bank, in support of its contentions has annexed the details of financial debt, records and evidences of default including copies of all the sanction letters, the workings showing the amount claimed to be in default and its calculation in tabular form as on August 8, 2018 along with the Registrar of Companies search report.

10 The present application has been filed by the financial creditor under section 7 of the Insolvency and Bankruptcy Code, 2016 read with rule 4 of the Insolvency and Bankruptcy before this Adjudicating Authority to initiate the corporate insolvency resolution process.

11 The financial creditor, to substantiate their claim, has enclosed following documents :

(i) Copy of consent in Form 2 of interim resolution professional. (Page Nos. 40 to 44 of paper book)

(ii) Copy of dates of sanction and disbursement of each loan facilities mentioned in the tabular format. (Page No. 45 of paper book)

(iii) Copy of the workings of computation of amount and days of default in tabular form. (Page Nos. 46-47 of paper book)

(iv) Copy of Form 8 filed with registrar of companies dated July 20, 1995. (Page Nos. 48-49 of paper book)

(v) Copy of Form 8 filed with registrar of companies dated July 22, 1997. (Page Nos. 50-51 of paper book)

(vi) Copy of the order of the Debts Recovery Tribunal. (Page Nos. 52 to 63 of paper book)

(vii) Copy of the sanction letter dated November 27, 1994. (Page Nos. 64 to 97 of paper book)

(viii) CIBIL report dated June 18, 2018 wherein overdue amount from the corporate debtor towards the applicant-bank has been reported. (Page Nos. 98 to 119 of paper book)

(ix) Copy of the bank statements of the Pithampur Poly Products Ltd. from April 1, 2008 to July 25, 2018. (Page Nos. 120 to 126 of paper book)

(x) Copy of the certificate under section 24(a) and 24(b) of the Bankers' Books Evidence Act, 1891 dated June 18, 2018. (Page No. 127 of paper book)

12 In the present matter, this Tribunal, vide its order dated September 11, 2018 had directed the petitioner-bank to serve the notice of date of hearing to the corporate debtor and file the proof of service of notice before this

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Tribunal. Thereafter, the respondent, corporate debtor appeared before this Tribunal on October 29, 2018 and sought time to file objections within two weeks.

13 The learned lawyer of the applicant-bank (FC) clarified their positions and put forth their arguments relying on the documents submitted by them, which were executed by the corporate debtor and the mortgagors/ guarantors.

They have also referred the CIBIL report filed with their application which confirms the debt is in default. The Registrar of Companies report filed by them is referred to in support of the charge created in their favour by them.

14 The matter was taken up and heard both sides by this Bench on September 11, 2018, October 29, 2018, December 7, 2018, January 11, 2019, February 22, 2019, April 16, 2019, June 19, 2019, July 23, 2019, July 30, 2019, August 13, 2019, September 18, 2019, October 3, 2019, November 6, 2019 and November 21, 2019. The counsels of the petitioner and the respondent were present and put forth their submissions before the Bench.

15 On February 21, 2019 counsel of the corporate debtor submitted application to the Adjudicating Authority containing 6 pages for taking on record of further developments/documents. It is submitted as under :

15.1 The corporate debtor hereby submits that it has submitted an one-time settlement proposal to the present financial creditor vide its application dated January 14, 2019, regarding settlement of account and finally arriving at Rs. 3.725 crores details are as under :

	Rs.
Towards term loans 1, 2 and 3	50,00,000
Towards working capital	3,22,50,000
	3,72,50,000

Mr. Pawan Singhania has already deposited Rs. 50 lakhs out of the above Rs. 3.725 crores in "no lien account". It is submitted that on depositing of the above amount, the financial creditor will issue the full and final NOC and release charge satisfaction letter to be filed with the Registrar of Companies. Accordingly, the financial creditor will withdraw all cases filed by themselves in all courts, Tribunal or any other legal proceedings initiated against them. Same way the respondents will also withdraw all cases filed by themselves against bank in all courts, Tribunals or any other institutions.

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15.2 It is submitted that the said one-time settlement proposal is still pending and is under consideration before the present financial creditor, viz., Dena Bank. The negotiations between the parties are still going on and have to be given final shape by the banking authorities. A perusal of correspondence between corporate debtor and the financial creditor would go to show that the proposal is under consideration and is at last stage of completion.

15.3 The Fairdeal Marwar Garages Ltd. in its one-time settlement offer letter dated February 14, 2019 submits final non-negotiable offer of Rs. 1.75 crores for one-time settlement of the loan accounts with the conditions that :

(a) All the charges of the bank in the RoC records over the assets of the company shall stand vacated and the mortgage documents including the original chain documents of the properties mortgaged with the bank for the said loan accounts shall be returned back to them.

(b) The cases against the company and its promoters on various forums including the petition filed under the IBC with the National Company Law Tribunal Bench, Ahmedabad, shall be withdrawn with immediate effect.

(c) The bank shall issue a "No dues" certificated on payment of the amount as above within 2 days of making the payments.

(d) The bank shall release the primary as well as collateral security with immediate effect.

(e) The bank shall release the personal guarantees of all the guarantors immediately after receipt of the amount as above.

(f) The bank shall not have any claim against the promoters, company, properties of the company or any other assets of the company after the payment of the amounts as above.

(g) This offer is a joint offer along with Pithampur Poly Products Ltd. for Rs. 3.865 crores, thus making a total of Rs. 5.615 crores. Rs. 1.00 crore has been deposited by Mr. Pawan Singhania in "no lien account".

This offer is subject to accepting both company's one-time settlement by the bank.

(h) It is stated that they will withdraw all cases from all courts, Tribunals or in any other legal platforms and similarly bank will also withdraw all cases from all courts, Tribunals or in any other legal platforms.

It is stated that they have arranged funds from the investor who would not be available after February 25, 2019. Hence, they have requested the financial creditor to approve the one-time settlement and oblige.

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15.4 The corporate debtor further submits another letter on February 18, 2019 about their "one-time settlement" offer stating that this has reference to the one-time settlement proposals submitted by the Pithampur Poly Products Ltd. and Fairdeal Marwar Garages P. Ltd. They have requested the financial creditor to try and do the one-time settlement so that the matter can be closed once for all.

15.5 It is further submitted by the corporate debtor on February 21, 2019 before this the Adjudicating Authority that in view of above submission and pendency of one-time settlement proposal before the financial creditor, the present matter listed on February 22, 2019 may kindly be adjourned to a later date.

16 Further the corporate debtor has submitted its objections on December 4, 2019 stating that the alleged claim of the financial creditor is barred by limitation in view of the judgment of the hon'ble Supreme Court in case of *B. K. Educational Services P. Ltd.* v. *Parag Gupta and Associates* [2019] 212 Comp Cas 1 (SC), non-availability of existence of default for initiation of the corporate insolvency resolution process in respect of corp debtor. The applicant financial creditor is guilty of suppression fraud and misrepresentation. Mr. Manoj Kumar, Assistant General Manager, Dena Bank is not an authorised person to file the present application. The present application is liable to be dismissed for want of document/agreements to show borrowing by the respondent-corporate debtor. The copy of relevant account from the bank is not as per the Bankers' Books Evidence Act, 1891. The affidavit in support of the application not admissible for want of completeness and correctness. Certificate under rule 9(2) from the proposed insolvency professional cannot be relied upon. The mandatory instructions under Form 5 have been violated. The applicant-bank induced and lured the corporate debtor to take over their bad account with mala fide intentions to extract money without intention to support the business and subsequently back tracked. In view of the submissions made hereinabove the application filed by the applicant under section 7 of the IBC deserves to be and may kindly be dismissed.

17 The applicant submitted their written submission on December 5, 2019. It is stated that till the time the applicant could take any appropriate action for recovery of the dues, the corporate debtor had approached the hon'ble High Court of Madhya Pradesh at Indore Bench by filing a Writ Petition No. 5330 of 2013. An interim order was passed by the hon'ble High Court which barred the applicant for taking any action for recovery of dues which became due and payable.

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17.1 It is submitted that the applicant-bank was left with no recourse for recovery of its dues from the corporate debtor. Thereafter, the hon'ble High Court on March 7, 2018 vacated the stay and permitted the applicant to take appropriate steps for recovery of the outstanding amount in accordance with law.

17.2 It is submitted that at this juncture it is very crucial to note that the hon'ble apex court in the case of *Innoventive Industries Ltd* v. *ICICI Bank* [2017] 205 Comp Cas 57 (SC) ; [2018] 1 SCC 407, has very categorically discussed and held that (page 87 of 205 Comp Cas) : "The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins". Therefore, the moment the stay was vacated by the hon'ble High Court, the debt for which the corporate debtor had earlier defaulted, now again became due and payable. The same not being paid again, there lies a fresh cause of action.

17.3 It is submitted that since there arose a new cause of action after the stay was vacated by the hon'ble High Court, the applicant approached this hon'ble Bench on August 21, 2018 under section 7 of the IBC at earliest for initiation of the corporate insolvency resolution process against the corporate debtor.

17.4 It is submitted that the corporate debtor has also time and again offered one-time settlement proposal for settling down the debt which clearly shows the intent, acknowledgment and continuance of debt by the corporate debtor.

17.5 It is submitted that it is important to note that the corporate debtor had submitted one-time settlement vide letters dated January 5, 2019, January 14, 2019, February 11, 2019 and February 18, 2019. These one-time settlement offers were rejected vide letter dated February 20, 2019.

17.6 It is submitted that another one-time settlement offer was made on June 17, 2019 which was rejected vide letter dated August 2, 2019. A copy of the one-time settlement rejection letter was submitted to the hon'ble Bench during the course of the hearing.

17.7 Offering repeated one-time settlement to the applicant by the corporate debtor clearly shows that the debt has been acknowledged by the corporate debtor and there has been a continuous cause of action which gives rise to the claim of debt by the applicant against the corporate debtor.

17.8 It is submitted that it is imperative to note that there has been a continuous wrong on the part of the respondent when they refused to pay

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the admitted debt and instead kept on submitting one-time settlement offers. This continuing wrong and continuous cause of action allows the application to be not barred by limitation.

17.9 It is submitted that the application is within the period of limitation because the corporate debtor has itself acknowledged the current continuance of debt by submitting an one-time settlement to settle the dues with the applicant. If the corporate debtor is of the opinion that the debt is time barred, it would not have submitted an one-time settlement at all.

17.10 It is submitted that therefore, the debt being due and payable on which the corporate debtor defaulted it is imperative to believe that the application under section 7 is maintainable and not barred by limitation. It is humbly prayed that the said application be accepted and CIRP may be initiated against the corporate debtor.

It is a settled legal position that the pendency of the SARFAESI pro- **18**
ceeding or other dispute does not prevent a financial creditor to trigger the corporate insolvency resolution process because the nature of remedy being sought for under the provisions of the I and B Code is "Remedy in Rem" in respect of the CD.

The petitioner-bank has suggested the name of the insolvency profes- **19**
sional to be appointed, if this petition is allowed and the proposed insolvency resolution process has also given his affirmation/consent in writing, which is annexed with the present IB petition.

Observations

It is also found, that the petitioner-bank has submitted the documents **20**
duly executed by the corporate debtors and guarantors along with a certificate under the Bankers' Books Evidence Act, 1891, in support of their IB petition for initiation of corporate insolvency resolution process.

20.1 The term loans/CC facilities was sanctioned and released by the petitioner-bank and the same were availed by CD, Pithampur Poly Products P. Ltd. The charges have been filed by the CD with the Registrar of Companies, Gwalior in favour of the petitioner-bank on January 22, 1996 and modified on February 9, 1999. Charge certificate have been issued by the Registrar of Companies, Gwalior.

20.2 The CD has defaulted in making repayment of term loan/cash credit facilities to the petitioner-bank and the date of default is May 1, 2000. The statement of accounts and the CIBIL reports submitted by the applicant-bank confirm the default committed by the corporate debtor.

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20.3 The entire matter/company accounts are entangled in court case. The corporate debtor has filed writ petition in the hon'ble High Court of Madhya Pradesh, Jabalpur Bench in the year 2013 and the hon'ble High Court granted stay for not taking any coercive action. The hon'ble High Court vacated the interim order on March 7, 2018 and permitted the financial creditor to take appropriate steps for recovery. The financial creditor filed the petition on August 21, 2018, i. e., only after the vacation of interim order on March 7, 2018.

20.4 The corporate debtor was going on negotiating with the financial creditor and offering corporate insolvency resolution process proposals on January 14, 2019, February 14, 2019 and February 18, 2019 after the application is filed under section 7 by the financial creditor.

20.5 The corporate debtor further submitted application on February 21, 2019, enclosing all one-time settlement letters submitted by them to the financial creditor and requested this Adjudicating Authority not to proceed in this the petition filed by the financial creditor under section 7 of the IBC as their one-time settlement proposal is pending with the financial creditor.

20.6 It is observed that the path for finding a resolution plan was clear only after the hon'ble High Court vacated the stay on March 7, 2018. The corporate debtor has been acknowledging that the debt is due to the financial creditor which is 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.

20.7 The financial creditor had sanctioned loan of Rs. 11.36 crores but claimed total dues of Rs. 287.88 crores which includes undebited interest of Rs. 276.52 crores.

20.8 The present IB petition is filed by the duly authorised official of the applicant-bank in a prescribed format under section 7 of the Insolvency and Bankruptcy Code, 2016 annexing copies of loan documents confirming the existence of debt due and defaulted.

20.9 They have proposed a name of resolution professional to act as an interim resolution professional (IRP) for initiation of the CIRP.

ORDER

21 Considering the material papers filed by the petitioner-bank and the facts mentioned in paragraph Nos. 20, 20.1, 20.2, 20.3, 20.4, 20.5, 20.6, 20.7, 20.8 and 20.9 this Adjudicating Authority is satisfied that,

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(a) The corporate debtor availed the loan/credit facilities from the financial creditor ;

(b) Existence of debt is above Rs. one lakh ;

(c) Debt is due ;

(d) Default has occurred on May 1, 2000 ;

(e) The petition has been filed within the limitation period as entire matter entangled in the court cases and clear cause of action arouse only after vacation of the stay by the hon'ble High Court on March 7, 2018. Both the corporate debtor and the guarantors are acknowledging the debts by offering repeated one-time settlement proposals after the application is filed before the Adjudicating Authority on August 21, 2018. Charges filed in the Registrar of Companies has not been satisfied.

(f) Copy of the application filed before the Tribunal has been sent to the corporate debtor and the application filed by the petitioner-bank under section 7 of the IBC is found to be complete for the purpose of initiation of the corporate insolvency resolution process against the corporate debtor.

Hence, the present IB petition is admitted with the following directions/observations. The date of admission of this petition is January 3, 2020.

This Adjudicating Authority hereby appoints, as proposed, Mr. Jagdish **22**
Kumar, having Insolvency Professional Registration No. IBBI/IPA-001/IP-P00671/2017-18/11143, e-mail ID : *jkparulkar@yahoo.co.in*, Address : B-56, Wallfort City, Bhatagaon, Ring Road No. 1, Raipur, Chhattisgarh-492 001, India as an interim resolution professional. The interim resolution professional is further directed to make public announcement of moratorium in respect of corporate debtor soon after receipt of authentic copy of this order and to act further as per the order/directions issued by this Adjudicating Authority. The IRP is also to follow the provisions under sections 13 and 14 and other relevant provisions of the Insolvency and Bankruptcy Code, 2016.

As per the provisions of sections 13 and 14 of the I and B Code on the **23**
date of commencement of insolvency, this Adjudicating Authority declares moratorium with effect from today for prohibiting all of the following, namely :

I. (a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, Tribunal arbitration panel or other authority.

(b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein ;

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(c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of2002) ;

(d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor ;

II. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.

III. The provisions of sub-section (1) shall not apply to

(a) such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

IV. The order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process.

24 The IRP is hereby advised to adhere the timeline as stipulated for completion of the corporate insolvency resolution process ("CIRP" in short) and perform the duties as specified under sections 17, 18, 20 and 21 of the I and B Code. Further the personnels of the corporate debtor are advised to extend co-operation to interim resolution professional as required under section 19 of the I and B Code.

25 It is also observed that the petitioner-bank had sanctioned loan of Rs. 11.36 crores but claimed total dues of Rs. 287.88 crores which is inclusive of undebited interest of Rs. 276.52 crores. One of the prime objectives of the Insolvency and Bankruptcy Code, 2016 is to find out a viable insolvency resolution plan for the corporate debtor and in order to have a resolution plan viable, feasible and implementation successful, in the era of minimum cost of funds based lending rate ("MCLR" in short) and competitive market condition, committee of creditor(s) (CoC) may explore, while finalizing the resolution plan for the corporate debtor, the possibility of loading maximum interest at the applicant-bank's base rate (BR) +1 per cent. from the date of default to the date of implementation of MCLR and further from the date of implementation of MCLR till the date of approval of the resolution plan at the rate of petitioner bank's one year MCLR or one year MCLR +1 per cent. without any penal/overdue interest.

26 The registry is hereby directed to communicate the authenticate copy of this order to the financial creditor, corporate debtor-company, the IRP and also to the Registrar of Companies, Gwalior, Madhya Pradesh immediately through speed post/registered post.

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Thus the present IB petition filed under section 7 of the IBC stands admitted today with the above directions and observations. **27**

[2020] 220 Comp Cas 313 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — ALLAHABAD BENCH]

IDBI BANK LTD. AND OTHERS

v.

1. ANUJ JAIN AND OTHERS
2. JAYPEE INFRATECH LTD.

BIKKI RAVEENDRA BABU *(Judicial Member)* and
MS. SAROJ RAJWARE *(Technical Member)*

December 10, 2018.

HF ▸ Respondent

INSOLVENCY RESOLUTION—DATE OF COMMENCEMENT—SUPREME COURT BY ORDER DATED 9-8-2018 DIRECTING RECOMMENCEMENT OF RESOLUTION PROCESS AFRESH FROM STAGE OF APPOINTMENT OF INSOLVENCY RESOLUTION PROFESSIONAL BY ADJUDICATING AUTHORITY'S ORDER DATED 9-8-2017 AND EXTENDED PERIOD OF 180 DAYS FROM DATE OF ITS DECISION—ADMISSION ORDER PASSED BY AUTHORITY OR APPOINTMENT OF INTERIM RESOLUTION PROFESSIONAL NOT SET ASIDE BY SUPREME COURT—INSOLVENCY COMMENCEMENT DATE, I. E., CUT-OFF DATE FOR CALCULATING QUANTUM OF CLAIM AMOUNTS FOR ALL TYPES AND CLASSES OF CREDITORS WAS 9-8-2017 AND NOT 9-8-2018—INSOLVENCY AND BANKRUPTCY CODE, 2016, SS. 5(12), 7, 12, 16.

Section 16 of the Insolvency and Bankruptcy Code, 2016, 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 the interim resolution professional even from the insolvency commencement date. 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, it can appoint the interim resolution professional within 14 days. In such cases alone would the proviso to section 12 of the Code come in the operation, i. e., where the interim resolution professional is not appointed in the admission order. If the interim resolution professional is appointed subsequently, i. e., within 14 days from the date of admission, the insolvency commencement date shall be the date on

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which the interim resolution professional is appointed by the Adjudicating Authority.

The insolvency resolution process in respect of the corporate debtor was initiated on August 9, 2017 following the order of the Adjudicating Authority admitting the petition filed by a financial creditor under section 7 of the Code. The home buyers in the project floated by the corporate debtor filed a petition before the Supreme court. The Supreme Court in Chitra Sharma *v.* Union of India [2018] 210 Comp Cas 609 (SC)*, inter alia, directed recommencement of the resolution process afresh from the stage of appointment of the insolvency resolution professional. Eight financial creditors who were the members of the committee of creditors filed an application under section 60(5) of the Code for a declaration that August 9, 2018 the date of the order of Supreme Court was the insolvency commencement date in the insolvency proceedings of the corporate debtor :*

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. The Supreme Court in its order had directed the period prescribed under section 12(3) of the Code to run from the date of its order, i. e., August 9, 2018. 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 creditor and the entire process had to be undertaken, exercising its powers under article 142 of the Constitution of India, extended the statutory period of 180 days from August 9, 2018. Therefore, it could not be said that the insolvency commencement date itself was August 9, 2018. 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 did not disturb the statutory definition of insolvency commencement date given in section 5(12) of the Code. The Supreme Court did not even interpret that the insolvency commencement date in this case was from August 9, 2018. It only dealt with the revival of the corporate insolvency resolution process and renewed the period of 180 days prescribed under section 12(3) of the Code. The fact that the bankers or financial institutions were not being paid interest from August 9, 2017 to August 9, 2018 equally applied to the home buyers, deposit holders and other classes*

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of creditors. The interim resolution professional was not at all prevented from taking claims. But the claim amounts should be calculated taking August 9, 2017 the insolvency commencement date as the cut-off date. Once the insolvency process commenced from August 9, 2017 the claim amounts had to be verified as on August 9, 2017 although the claims were received after August 9, 2017 or after August 9, 2018. Therefore, when the cut-off date was taken on August 9, 2017 it applied equally to all classes of creditors for the purpose of calculating the interest. Interest would be calculated only till the date of cut-off on the claims preferred by the various classes of creditors. The Authority in the order dated August 14, 2018 only clarified that the moratorium order shall be effective till 180 days from August 9, 2018 taking into consideration the order of the Supreme Court. That did not mean there was no moratorium order in force with effect from the date of admission, i. e., August 9, 2017. It was only an extension of the moratorium imposed on August 9, 2017. The insolvency commencement date, i. e., the cut-off date for calculating the quantum of claim amounts for all types and classes of creditors was August 9, 2017.

[The Adjudicating Authority observed that its order dated May 16, 2018 declaring certain transactions as avoidable transactions was pending adjudication before the National Company Law Appellate Tribunal and if the insolvency commencement date was taken as August 9, 2018 there was a possibility of certain transactions not falling under sections 43 and 45 of the Code.]

CHITRA SHARMA *v.* UNION OF INDIA [2018] 210 Comp Cas 609 (SC) (paras 1, 4) *referred to.*

I. A. No. 217 of 2018 in Company Petition No. (IB) 77/ALD/2017.

Bishwajit Dubey along with *Ms. Ruchi Chaudhary*, *Aditya Marwah* and *Rahul Agarwal*, for the IDBI Bank/applicants.

Anand Grover, Senior Advocate along with *Amit Mishra*, *Shivam Pandey*, *Samyak Gangwal* and *Yash Tandon*, for the home buyers/respondents.

Sanjay Bhatt along with *Ms. Janhvi Bhasin*, for the IRP/respondents.

ORDER

The order of the Bench was delivered by

BIKKI RAVEENDRA BABU ***(Judicial Member)***.—Eight financial creditors who are the members of CoC filed this application under section 60(5) of the Insolvency and Bankruptcy Code, 2016 to declare that August 9, 2018 1

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the date of order of the hon'ble Supreme Court of India in Writ Petition (Civil) No. 744 of 2017—*Chitra Sharma* v. *Union of India* [2018] 210 Comp Cas 609 (SC) as the insolvency commencement date in the proceedings of C. P. No. (IB)77/ALD/2017.

2 During the pendency of this application, respondents Nos. 2 to 10 (herein home buyers associations) filed C. A. No. 263 of 2018 to implead them as parties and the said application is allowed by this Authority on November 2, 2018.

3 IDBI Bank Ltd. (applicant No. 1 herein) filed C. P. No. (IB)77/ALD/2017 with a request to the trigger corporate insolvency resolution process (CIRP) in respect of Jaypee Infratech Ltd. (JIL). The said petition was admitted by this court on August 9, 2017 for the purpose of commencement of the CIRP in respect of JIL.

4 The home buyers filed Writ Petition (Civil) No. 744 of 2017 before the hon'ble Supreme Court of India in the case of *Chitra Sharma* v. *Union of India* [2018] 210 Comp Cas 609 (SC) under article 32 of the Constitution of India. The hon'ble Supreme Court of India in its final order dated August 9, 2018 in the case of *Chitra Sharma* v. *Union of India* [2018] 210 Comp Cas 609 (SC), directed, inter alia, recommencement of the CIRP of the JIL from the date of its order. The relevant paragraphs of the said order are reproduced hereinbelow (page 642) :

> "Having regard to the material change which has been brought about by the amendment of the IBC by the Ordinance and the fact that this court has been in seisin of the proceedings to ensure that the home buyers are protected, we are of the view that it is but appropriate and to do complete justice to secure the interests of all concerned that the CIRP should be revived and CoC reconstituted as per the amended provisions to include the home buyers. In the facts of the present case, recourse to the power under article 142 would be warranted to render complete justice. Parliament has undoubtedly provided a period of 180 days and an extended period of 90 days to complete the process. But in the present case a peculiar situation has arisen as a result of which the status of the home buyers which had not been recognised prior to June 6, 2018 has now been expressly recognised as a result of the amending Ordinance. Learned counsel for the IRP submitted that in the CoC which will be reconstituted under the amended IBC, the home buyers would have a substantial voting power so as to be able to effectively protect their interests. Moreover, this court should follow the discipline of the IBC which has been enacted by Parliament specifically to streamline the resolution of

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corporate insolvencies. Matters involving corporate insolvencies require expert determination. The Legislature has made specific provisions which are conceived in public interest and to facilitate good corporate governance. The court should not take upon itself the burden of supervising the intricacies of the resolution process. Accepting the suggestion of Mr. Nariman (and one of the two options proposed by Mr. Tripathi) of the court appointing a committee to supervise the resolution process outside the IBC will involve the court in an insuperable burden of evaluating intricate matters of financial expertise on which Parliament has legislated to create specific mechanisms. We are emphatically of the view that it would not be appropriate for the court to appoint a committee to oversee the CIRP and assume the task of supervising the work of the committee. We must particularly be careful not to supplant the mechanisms which have been laid down in the IBC by substituting them with a mechanism under judicial directions. Such a course of action would in our view not be consistent with the need to ensure complete justice under article 142, under the regime of law. Hence, the power under article 142 should be utilised at the present stage for the limited purpose of recommencing the resolution process afresh from the stage of appointment of IRP by the order dated August 9, 2017 and resultantly renew the period which has been prescribed for the completion of the resolution process. We have furnished above, the reasons for doing so. Chief amongst them is the fact that in the present case the period of 270 days expired before the Ordinance conferring a statutory status on home buyers as financial creditors came into existence. In the circumstances, it would be necessary to revive the period prescribed by the statute by another 180 days commencing from the date of this order. During this period, the IRP shall follow the provisions of the IBC afresh in all respects. A new CoC should be constituted in accordance with the amended provisions of the IBC to enforce the statutory status of the allottees as financial creditors. We also clarify that apart from the three bidders whose bids were found to be eligible by the IRP, it would be open to the IRP to invite fresh bids to facilitate a wider filed of choice before the CoC. In that process, the offers made by the interveners in this proceedings can also be considered by CoC anew. We are not inclined to evaluate the merits of the bids submitted by the bidders who were left in the fray, two of whom have intervened. All bids must follow the discipline of the IBC. We have, however, not accepted the submission to allow JIL or JAL and the

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erstwhile promoters to participate in the process. Their participation is expressly prohibited by section 29A and we decline to make any exception which would breach a salutary and express provision made in the IBC."

5 It is stated by the applicants that since the IRP is required to make a fresh public announcement and invite fresh proof of claims from all the creditors treating the date of the order of the hon'ble Supreme Court dated August 9, 2018 as the insolvency commencement date. It means according to the applicants, the cut off date for considering the quantum of claim is August 9, 2018 but not August 9, 2017 the date of the order of the Adjudicating Authority.

6 It is pointed out by the applicants that a proviso was added to the definition of "insolvency commencement date" which reads as follows :

"Provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or 10 the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority."

7 It is contended by learned counsel appearing for the applicants that the IBC do not envisage the insolvency commencement date occurring prior to the appointment of the IRP. It is argued that the hon'ble Supreme Court of India made it clear that the proceedings are to be recommenced from the "stage of appointment of the IRP", and therefore the insolvency commencement date that is the cut-off date for verifying the quantum of claims is August 9, 2018 but not August 9, 2017.

8 It is further stated that the representation made by the applicants before the RP on the above said lines has not been considered by the IRP. The following is the letter of the applicants :

"The order emphasizes that the IRP '*shall follow the provisions of the IBC afresh in all respects*'. It also envisages constitution of a new committee of creditors ('CoC'). As a consequence, all the provisions of the IBC shall apply afresh, including the provisions of regulation 8 read with Form C and regulation 13 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 as if the date of the order was the order of the Adjudicating Authority under section 7(5) of the IBC. Accordingly, the claims need to be invited from all the creditors for debt due to them as of the date and CoC has to be constituted accordingly." (emphasis[1] supplied)

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The RP gave reply dated August 30, 2018 considering the cut-off date as August 9, 2017. The reply of the respondent is as follows : **9**

> "The cut-off date for submission of claims as per section 15 of the IBC read with regulations is the date of commencement of insolvency resolution process. Therefore, the cut-off date for submission of claims in this case remains August 9, 2017. The hon'ble Supreme Court has not changed the commencement date and the cut-off date, which is prescribed by substantive provisions in the IBC, to August 9, 2018. A copy of the reply dated August 30, 2018 has been annexed and marked as annexure D."

Learned counsel appearing for the applicants contended that the RP failed to appreciate the order of the hon'ble Supreme Court of India in proper prospective. It is stated that the home buyers became financial creditors only by virtue of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 ("Ordinance"), (now the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018) and therefore the hon'ble Supreme Court of India directed revival and recommencement of the CIRP, wherein the creditors should be allowed to file fresh claims before the IRP. **10**

It is stated by the applicants that they have not been paid interest accruing on their claim for the period between August 9, 2017 and August 9, 2018. It is also stated that the voting share of the home buyers in the CoC may have undergone change during the period from August 9, 2017 to August 9, 2018 on account of delivery of certain homes to the home buyers and cancellation of homes by certain home buyers. It is stated that correct financial position of the financial creditors vis-a-vis JIL (corporate debtor) cannot be ascertained unless fresh claims are invited from all creditors taken the cut-off date as September 1, 2018 considering the change of circumstances during that period. **11**

It is further stated that this Authority vide its order dated August 14, 2018 recognised the fresh CIRP period commencing from August 9, 2018 and accordingly passed a moratorium order effective from August 9, 2018 as per the provision of the IBC. The order dated August 14, 2018 reads as follows : **12**

> "Learned counsel for the IRP has informed that the status about the current insolvency proceedings and as per the direction of the hon'ble Supreme Court in Writ Petition No. 744 of 2017 insolvency proceeding fresh 180 days has been provided for completion of CIRP with effect from August 9, 2018. It is to be clarified that a moratorium order shall be effective till 180th day from the date of August 9, 2018.

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Learned counsel for the IRP is directed to proceed for the completion of CIRP in the light of direction of hon'ble Supreme Court and keeping in consideration of the provisions of the Code."

13 It is stated that the IRP failed to appreciate that since the CIRP is required to start afresh from the date of the order, the IRP would be required to carry out all its duties from the inception, including inviting of fresh claims from creditors. According to the applicants, the date of commencement of the CIRP shall be the date of the order, the cut-off date for submission of claims should also stand revised to the date of order as per the provisions of the IBC.

14 It is stated by the applicants that unless this application is allowed, the applicants would not be able to file a fresh claim before the IRP. It is also stated that allowing this application does not in any manner cause any prejudice to the right of any of the parties. It is also stated that, if the application is not allowed, it would cause serious losses to the applicants, who are public sector banks holding public money.

15 The IRP filed reply stating that the reliefs prayed in the application are based on the applicants interpretation and clarification of the order dated August 9, 2018 passed by the hon'ble Supreme Court of India in Writ Petition (Civil) No. 744 of 2017 and therefore the applicants should approach the hon'ble Supreme Court of India for clarification of the order.

16 It is further stated by the IRP that the hon'ble Supreme Court of India in its order did not change the date of commencement of insolvency resolution process of the JIL from August 9, 2017 to August 9, 2018. It is further stated by the IRP that the hon'ble Supreme Court of India exercised powers under article 142 of the Constitution of India for recommencement of the resolution process afresh for limited purpose. It is stated that the hon'ble Supreme Court of India exercised powers under article 142 to interfere only in respect of under section 12 of the I and B Code, 2016. It is the plea of the IRP that the insolvency commencement date in respect of JIL has to be determined on the basis of the date of admission of insolvency application as per the statutory scheme of the Code as specifically prescribed in sections 7(6), 9(6) and 10(5) of the Code.

17 It is stated that the hon'ble Supreme Court of India has neither set aside the admission of the CIRP in respect of JIL nor changed the date of commencement of insolvency resolution process nor set aside the appointment of IRP.

18 On the other hand, the hon'ble Supreme Court of India has directed recommencement of the resolution process afresh from the stage of appointment of IRP by the order dated August 9, 2017.

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It is contended by the RP, the stage from which the process has to recommence, is the stage of appointment of IRP by the order dated August 9, 2017 but not August 9, 2018. According to the IRP, the cut-off date for submission of claims as per section 15 of the IBC read with the regulations is the date of commencement of the insolvency resolution process. Therefore, the cut-off date remains as August 9, 2017. **19**

The RP stated that this Authority in C. A. No. 26 of 2018 vide its order dated May 16, 2018 declared certain transactions are avoidable transactions that involved mortgage of 858 acres of land of JIL under sections 43, 45 and 66 of the Code. The said order was under challenge before the hon'ble National Company Law Appellate Tribunal. If the date of commencement of insolvency process is taken as August 9, 2018, those avoidable transactions will become infructuous and redundant. The avoidance of transactions falling under sections 43, 45 and 66 of the Code are linked with the date of insolvency commencement and provide for a maximum window of two years for getting the same avoided. **20**

In the event of change in the insolvency commencement date, a few transactions which stood avoided by this Authority earlier will fall out of the maximum period of two years from August 9, 2018 as new insolvency commencement date and thus will escape avoidance causing heavy financial loss to other financial creditors and stakeholders of JIL. The hon'ble Supreme Court of India in its order dated August 9, 2018 has held that the avoidance order passed by this authority as one of the grounds for disqualification of the promoters of the corporate debtor under section 29A of the Code. **21**

The home buyers associations, who are the interveners also filed the reply stating the insolvency commencement date can only be the date when the petition is admitted and the IRP is appointed. It is further stated that in corollary, the commencement date can only change, if the section 7 application filed by the lenders were to be declared infructuous and a new application under section 7 was to be filed against the corporate debtor, leading to a fresh appointment of the IRP. It is stated that nothing of that sorts, was done by the hon'ble Supreme Court in this case. **22**

It is stated that in the case on hand, the IRP was appointed on August 9, 2017 thus making it the insolvency commencement date for the purpose of present CIRP. It is contended that the plea of the financial creditors that there is a material change between August 9, 2017 and August 9, 2018 in the fiscal health of the corporate debtor, even if it is there, it has to be taken care by the IRP and it is the duty of the IRP to maintain the list of the creditors and keep the said list updated and revised under regulation 13 of the **23**

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Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The aim of the financial applicants in filing this application is to increase their claim against the corporate debtor.

24 The applicants in the rejoinder stated that this Authority has got jurisdiction to decide this issue. It is stated that the IRP erroneously interpreted the order and thereby misconstrued the intention of the hon'ble Supreme Court. In the rejoinder, the paragraph 42(i) and (ii) of the hon'ble Supreme Court order was referred to, which reads as follows (page 646 of 210 Comp Cas) :

> "We, accordingly, issue the following directions :
>
> (i) *In exercise of the power vested in this court under article 142 of the constitution, we direct that the initial period of 180 days for the conclusion of the CIRP in respect of JIL shall commence from the date of this order*. If it becomes necessary to apply for a further extension of 90 days, we permit the National Company Law Tribunal to pass appropriate orders in accordance with the provisions of the IBC.
>
> (ii) *We direct that a CoC shall be constituted afresh in accordance with the provisions of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, more particularly the amended definition of the expression financial creditors*." (emphasis[1] supplied)

25 It is stated by the applicants that the Chairperson (IRP) clarified that the advances received in last one year have been included in the voting share, however, no interest calculation is done for period after August 9, 2017. It is stated by the applicants that their claims have been calculated as on August 9, 2017 by the IRP, whereas the advances received from the home buyers up to August 9, 2018 are being considered for the purpose of calculating voting share.

26 The point emerges for determination is, whether the insolvency commencement date is August 9, 2017 or August 9, 2018 or in other words the cut-off date for deciding the quantum of claim amounts is August 9, 2017 or August 9, 2018.

27 Insolvency commencement date is defined under section 5, sub-section (12) which reads as follows :

> "5. (12) 'insolvency commencement date' means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under section 7, 9 or section 10, as the case may be :

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Provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority ;"

28 Section 16 of the Insolvency and Bankruptcy Code, 2016 deals with appointment and tenure of IRP, which reads as under :

"16. *Appointment and tenure of interim resolution professional.*— (1) The Adjudicating Authority shall appoint an interim resolution professional within fourteen days from the insolvency commencement date.

(2) Where the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, as the case may be, the resolution professional, as proposed respectively in the application under section 7 or section 10, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

(3) Where the application for corporate insolvency resolution process is made by an operational creditor and—

(a) no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the board for the recommendation of an insolvency professional who may act as an interim resolution professional ;

(b) a proposal for an interim resolution professional is made under sub-section (4) of section 9, the resolution professional as proposed, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

(4) The board shall, within ten days of the receipt of a reference from the Adjudicating Authority under sub-section (3), recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending.

(5) The term of the interim resolution professional shall continue till the date of appointment of the resolution professional under section 22."

29 The hon'ble Supreme Court of India by exercising power under article 142 passed an order for the limited purpose of recommencing the resolution process afresh from the stage of appointment of the IRP by the order dated August 9, 2017 and resultantly renewed the period which has been prescribed for the completion of resolution process.

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30 The hon'ble Supreme Court of India ordered to revive the CIRP and reconstitution of the CoC as per the amended provisions to include the home buyers. The hon'ble Supreme Court of India revived the period prescribed for the statute by another 180 days commencing from the date of the order, i. e., August 9, 2018.

31 Therefore, the hon'ble Supreme Court in Writ Petition (Civil) No. 744 of 2017 clearly held that, the resolution process start afresh from the stage of appointment of the IRP by the order dated August 9, 2017.

32 It is pertinent to mention here that this Authority by its order dated August 9, 2017 admitted C. P. No. (IB) 77/ALD/2017 filed by the IDBI Bank commencing the CIRP in respect of JIL (corporate debtor). In the said order itself this Adjudicating Authority appointed Mr. Anuj Jain as the IRP. Therefore, in view of the order of the hon'ble Supreme Court in Writ Petition (Civil) No. 744 of 2017 the recommencement of CIRP should be from the date of appointment of IRP, i. e., August 9, 2017. In this context, it is necessary to refer to the definition of insolvency commencement date under section 5, sub-section (12) of the Code. Section 5, sub-section (12) clearly says that the insolvency commencement date means the date of admission of application for initiating the CIRP by the Adjudicating Authority under section 7, 9 or 10 as the case may be. The proviso to section 12 applies only, whereas the Adjudicating Authority did not choose to appoint the IRP in the order admitting application under section 7, 9 or 10.

33 In section 7, 9 or 10 it is not enjoined upon the Adjudicating Authority to appoint the IRP simultaneously with the admission of the application or on the same date, on which the admission order was passed.

34 Section 16 of the I and B Code says that the Adjudicating Authority shall appoint the IRP within 14 days from the insolvency commencement date, that means 14 days time is given to the Adjudicating Authority to appoint IRP even from the insolvency commencement date. This is a time space given to the Adjudicating Authority to appoint the IRP 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 IRP in the order admitting the application, then, it can appoint the IRP within 14 days. In such cases only the proviso to section 12 of the Code would come in the operation, i. e., where the IRP is not appointed in the admission order. In case, if the IRP is appointed subsequently, i. e., within 14 days from the date of admission, then the insolvency commencement date shall be the date on which IRP is appointed by the Adjudicating Authority.

35 In the case on hand, the Adjudicating Authority in the admission order itself appointed the IRP, that was made on March 9, 2017. The hon'ble

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Supreme Court of India in paragraph 39 at page 40 of the judgment clearly said that the recommencement of the resolution process is from the stage of appointment of IRP by the order dated August 9, 2017. Therefore, a conjoint reading of section 5, sub-section (12) and section 16 and the order of hon'ble Supreme Court clearly goes to show that the insolvency commencement date in this case, is August 9, 2017.

36 The hon'ble Supreme Court in its order only recommenced the CIRP from the stage of appointment of IRP. The hon'ble Supreme Court of India by its order, directed the period prescribed under section 12(3) to run from the date of its order, i. e., August 9, 2018.

37 This Authority is of the considered view that reviving the period prescribed under the statute by another 180 days commencing from August 9, 2018 cannot be equated with insolvency commencement date.

38 The hon'ble Supreme Court considering the fact that the home buyers are treated as the financial creditors and they have to be included in the CoC and the entire process has to be undertaken, exercising its powers under article 142, extended the statutory period of 180 days from August 9, 2018. Therefore, taking that aspect of the order of the hon'ble Supreme Court into consideration, it cannot be said that the insolvency commencement date itself is August 9, 2018.

39 The hon'ble Supreme Court in its order did not set aside the admission order passed by this Authority on August 9, 2017. The hon'ble Supreme Court in its order did not set aside the appointment of IRP by this Adjudicating Authority in its order dated August 9, 2017. The hon'ble Supreme Court did not disturb the statutory definition of insolvency commencement date given in section 5, sub-section (12) of the Code. The hon'ble Supreme Court did not even interpret that the insolvency commencement date in this case is from August 9, 2018. The hon'ble Supreme Court only dealt with the revival of the CIRP and renew the period of 180 days prescribed under section 12(3) of the Code.

40 Coming to the factual aspects of the case, the contention of the bankers/financial institutions that they are not being paid interest from August 9, 2017 to August 9, 2018 equally applies to the home buyers, deposit holders and other classes of creditors also.

41 The IRP is not at all prevented from taking claims. But the claim amounts should be calculated taking August 9, 2017 it being the insolvency commencement date as the cut-off date. Once the insolvency process commences from August 9, 2017 the claim amounts have to be verified as on August 9, 2017. Although the claims were received after August 9, 2017 or after August 9, 2018.

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42 Therefore, when the cut-off date is taken on August 9, 2017 it applies equally to all classes of creditors for the purpose of calculating the interest. Interest would be calculated only till the date of cut-off on the claims preferred by the various classes of creditors.

43 This Authority in the order dated August 14, 2018 only clarified that the moratorium order shall be effective till 180th day from August 9, 2018 taking into consideration the order, of hon'ble Supreme Court in Writ Petition (Civil) No. 744 of 2017. That does not mean there is no moratorium order in force with effect from the date of admission, i. e., August 9, 2017. It is only extension of the moratorium imposed on August 9, 2017.

44 In this context, it is necessary to refer to the point urged by the IRP and the learned counsel appearing for home buyers, this Adjudicating Authority in its order dated May 16, 2018 made in C. A. No. 26 of 2018 declared certain transactions are avoidable transactions that involved mortgage of 858 acres of land of JIL under sections 43, 45 and 66 of the Code. The said order of this Authority is pending adjudication before the hon'ble National Company Law Appellate Tribunal. The insolvency commencement date has got a relevance in deciding whether the particular transactions is avoidable transactions or not under sections 43 and 45 of the I and B Code.

45 In the case on hand, if the insolvency commencement date is taken as August 9, 2018 there is a possibility of certain transactions not falling under sections 43 and 45 of the Code.

46 The IRP acting under regulations 13 and 14 of the CIRP Regulations, can estimate the amount of the claim from time to time based on the information available with him and revise the amount of the claims verified including the estimates of the claims made under sub-regulation (1) of regulation 14.

47 In view of the above discussion, this Authority is of the considered view that the insolvency commencement date, i.e., the cut-off date for calculating the quantum of claim amounts for all types and classes of creditors is August 9, 2017.

48 The application (I. A. No. 217 of 2018) is disposed of accordingly.

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[2020] 220 Comp Cas 327 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — CHENNAI BENCH]

ASSET RECONSTRUCTION CO. (INDIA) LTD.

v.

GOPAL KRISHNA RAJU AND ANOTHER

CH. MOHD. SHARIEF TARIQ *(Judicial Member)*

March 27, 2019.

HF ▸ Applicant

INSOLVENCY RESOLUTION—COMMITTEE OF CREDITORS—RELATED PARTY—COMMITTEE OF CREDITORS MUST BE COMPLETELY INDEPENDENT AND FREE FROM INFLUENCE BASED ON VESTED INTEREST OF PROMOTERS OR THEIR CLOSE RELATIVES—PARTY RELATED TO PROMOTERS DISQUALIFIED FROM PARTICIPATING, VOTING AND REPRESENTING IN COMMITTEE OF CREDITORS—INSOLVENCY AND BANKRUPTCY CODE, 2016, SS. 5(24), 24A.

INSOLVENCY RESOLUTION—COMMITTEE OF CREDITORS—CREDITOR—FRAUDULENT TRANSACTIONS—DIRECTION FOR FORENSIC AUDIT—INSOLVENCY AND BANKRUPTCY CODE, 2016, SS. 21, 60(5).

The purport and object of section 5(24) and (24A) read with the proviso to sub-section (2) of section 21 of the Insolvency and Bankruptcy Code, 2016, is that a party which has a vested interest or relation with the corporate debtor should not become the part of the committee of creditors because the decisions of the committee of creditors must remain independent, as the committee of creditors is the pivot of the insolvency and resolution process. The decision of the committee of creditors has far-reaching consequences on the corporate debtor for its survival or liquidation and realization of the debt of the creditors. Therefore, the institution of the committee of creditors needs to be completely independent and free from any kind of influence based on vested interests 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) and (24A) of the Code cannot said to be exhaustive but are inclusive.

On an application filed by one of the financial creditors, under section 60(5) read with section 21 of the Insolvency and Bankruptcy Code, 2016, and rule 11 of the National Company Law Tribunal Rules, 2016, to declare that the second respondent was a related party under the Code and therefore to restrain it from in any manner exercising any right of representation in the committee of creditors and to order a proper forensic audit and direct the resolution professional to examine fraudulent transactions and to take action

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under the specific provisions of the Code further in terms of the examination of the transactions and forensic report :

Held, *(i) that the long-term borrowings did not include the amount of Rs. 2,49,28,86,436 as claimed by IA under loan agreement dated April 1, 2012. The loan agreement dated April 1, 2012 showed that monies advanced from time to time were agreed to be repaid by the corporate debtor on demand as unsecured loan till March 31, 2016 which was a non-current liability falling within the ambit of the long-term borrowings. Therefore, the contention of the second respondent was not substantiated with the relevant documents of the corporate debtor. It was also on record that IA, on April 1, 2015, had written a letter to the corporate debtor that out of the amounts transferred by her on various dates aggregating to Rs. 324.16 crores lying in her credit, a sum of Rs. 200 crores was requested to be debited in her account credited to the account of the second respondent, in the books of account of the corporate debtor. The letter did not constitute a valid document in the eyes of the law as it was neither an assignment deed nor an agreement as claimed by the second respondent. A loan agreement had been signed between the second respondent and the corporate debtor on April 1, 2015 which provided that the lender had provided loans to the borrower and the aggregate amount of loan as on April 1, 2015 was Rs. 200 crores. Another agreement dated September 4, 2017 had been signed between the second respondent and the corporate debtor wherein it had been recorded that the borrower had borrowed a sum of Rs. 200 crores from the second respondent by loan agreement dated April 1, 2015. These agreements were not substantiated in the books of account of the corporate debtor. Therefore, a forensic audit required to be conducted by the resolution professional in order to examine the fraudulent transactions with regard to the claims of the creditors of the corporate debtor including the second respondent. The claim of the second respondent should remain subject to the outcome of the forensic audit directed to be conducted. Consequently, the resolution professional was directed to delete the name of respondent No. 2 from the committee of creditors with immediate effect and get the forensic audit.*

(ii) That the managing director of the corporate debtor was the father of P and the grandfather of A, who were the shareholders and directors of the second respondent as on date. Therefore, the interest of the second respondent through its shareholders-cum-directors had direct concern with the corporate debtor. This relationship of the managing director of the corporate debtor and the shareholders-cum-directors of the second respondent would have direct effect on the decisions of the committee of creditors, as the second respondent

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was holding a majority voting right in the committee of creditors which certainly would lack bona fides and good faith, which would adverse effects on the rights of the minority financial creditors. The second respondent was a party related to the corporate debtor, and had no right of representation, participation or voting in the meeting of the committee of creditors of the corporate debtor.

M. A. No. 17 of 2019 in C. P. No. 603/IB/2017.

E. Omprakash, Senior Counsel *V. M. Karthik* for *M/s. Ramalingam and Associates*, for the applicant.

Rishi Srinivas Ranghasayee for *Anant Merathia*, for respondent No. 1, Resolution Professional.

Vineet (S.) for the second respondent.

ORDER

Ch. Mohd. Sharief Tariq ***(Judicial Member)***.—At the outset it is noted that respondent No. 2 was set ex parte on February 26, 2019 the same stands set aside. 1

Under adjudication is Miscellaneous Application No. MA/17/2019 filed by one of the financial creditors, viz., M/s. Asset Reconstruction Co. (India) Ltd., under section 60(5) read with section 21 of the Insolvency and Bankruptcy Code, 2016, and rule 11 of the National Company Law Tribunal Rules, 2016. 2

The main prayers sought by the applicant are as follows : 3

> "(i) Set aside the decision taken by the first respondent that the second respondent is not a related party and consequentially declare that the second respondent herein, as falling within the definition of 'related party' under the Code and therefore restrain them from in any manner exercising any right of representation/participation or voting in the members of CoC.
>
> (ii) Order a proper forensic audit and direct the first respondent to examine fraudulent, avoidance transactions and to take action under the specific provisions of the Code further in terms of the examination of the transactions and forensic report.
>
> (iii) Restraining the first respondent from proceedings with the further CIRP on the basis of defective CoC composition and voting, pending the decision on the issue of related party."

In relation to the above matter, the applicant had at an earlier point of time filed an application under section 7 of the I and B Code, 2016. The application was numbered as C. P. No. 603 of 2017 which was admitted on 4

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June 6, 2018 for initiating the CIR process against the corporate debtor, viz., M/s. Anandram Developers P. Ltd. The public announcement was made for filing the claims by the creditors with the IRP. Thereafter, the CoC was constituted.

5 The applicant has contended that the second respondent, viz., M/s. Anandcine Services P. Ltd., who is a member of the CoC, was earlier treated as "related party" and disqualified from participating, voting and representing in the CoC. Thereafter, the first respondent/resolution professional has blindly by relying upon the "transaction verification audit report", without conducting the "Forensic Audit", has taken a decision that the second respondent is not "related party". The applicant has submitted that it has to recover a total sum of Rs. 120,03,00,000 from the corporate debtor which had been determined by the orders of the Debts Recovery Tribunal, Chennai (DRT) and recovery certificate has been issued. But, the first respondent/resolution professional has not admitted the entire claim only to ensure that the applicant does not get the voting percentage, by relying on the amount said to be reflected in the books of corporate debtor and failed to recognize the recovery certificate issued by the DRT after adjudication of the debt. The applicant claims that it, along with the other financial creditors, is only legally entitled to be represented in the CoC with the entire voting rights. It has been alleged by the applicant that the claims by other creditors are dubious in nature clearly establishing the fact of collusive conduct in so far as the promoters/shareholders/directors claimed to have lent money to the corporate debtor and had transferred/assigned the alleged debt to the third parties, who have vested interests in the corporate debtor and its affairs. Based on these allegations, the applicant has submitted that the nature of transactions clearly require a "Forensic Audit" to be conducted and the transactions to be seen as fraudulent and avoidance transaction.

6 The applicant has submitted that one Mrs. Indira Anand, who was a shareholder of the corporate debtor till the year 2016-17 alleged to have funded to the corporate debtor prior to 2012 on various dates totalling to the tune of Rs. 200 crores. The loan amount is said to have been transferred to the second respondent, viz., M/s. Anandcine Services P. Ltd., which was a partnership firm and later converted into a private limited company on August 11, 2017 in which Mrs. A. Padma Manohar (daughter of Mr. K. Bapaiah + Mrs. Bharathi (K.)) and Mr. A. Anand Prasad (grandson of Mr. K. Bapaiah + Mrs. Bharathi (K.)) are the directors. It has further been submitted that one Mr. Mukund Vijayan, a shareholder of M/s. Anandcine

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Services P. Ltd., is also the shareholder of the corporate debtor holding 9.09 per cent. shareholding in the corporate debtor.

7 It is submitted that 55 per cent. of the shareholders of second respondent are relatives or shareholders having more than of the 81 per cent. shareholding of the corporate debtor. The corporate debtor acknowledged the said debt by executing a confirmation of account in favour of the second respondent. Based on these facts, the applicant alleges that there are common shareholders, directors, promoters, etc., as between the corporate debtor, claimants and other related companies, clearly falling under the definition of "related party". It has been contended that the second respondent cannot have any right of representation, participation or voting in a meeting of CoC. It has further been contended by the applicant that the very claims are bogus, time barred, validated by self serving document of the corporate debtor apparently to reduce the voting right of the applicant and defeat the purpose of the CoC. It is has further been alleged that the confirmation of balance executed by the corporate debtor on the request of the second respondent on June 14, 2017 is invalid, legally not tenable and the claim based on the same cannot be sustainable in law and on facts.

8 The applicant again reiterated that the "transactions verification audited report" has not gone into and also not decided as to how Mrs. Indira Anand, who was a shareholder of the corporate debtor alleged to have funded to the corporate debtor on various dates totalling to the tune of Rs. 200 crores and the said alleged loan is claimed to have been transferred based on an alleged letter dated on March 31, 2017. Therefore, the decision of the first respondent/resolution professional is perverse, erroneous, contrary to the statutory mandates and liable to be set aside.

9 The applicant submits that a very mean and absurd view is propagated in the transaction audit report subject to disclaimer that the relevant documents for the period have not been perused as it is reported that the old documents are lost. The applicant further submits that the transaction audit report qualifies that there was time constraint and all the documents as requested were not made available. Therefore, the question of fact and law is required to be adjudicated by this Authority.

10 The first respondent/resolution professional has filed counter stating therein that the IRP has suspended the voting right of the second respondent as it appeared to be falling under the category "related party". However, the second respondent had written a letter dated August 3, 2018 annexing a legal opinion dated July 5, 2018 in order to substantiate that they are not "related party" to the corporate debtor. The resolution

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professional has claimed that he had taken an independent view to that extent and had declared that the second respondent is not a "related party". The first respondent/resolution professional further submits that there does not arise any necessity for conducting a "Forensic Audit" as there seems to be no fraudulent transactions as alleged by the applicant herein. It has been denied by the first respondent/resolution professional that he has blindly followed the transactions audit report to come to a decision on the "related party" issue. He has also denied the allegations of the applicant that the second respondent has camouflaged as financial creditors based on the documents that were created for the purpose of such claim and the claim made by the second respondent is based on the assignment deeds are very much sustainable and legally tenable in the eye of law.

11 It has also been denied that the transactions audit report has not sufficiently covered the loan of Mrs. Indira Anand and the said report is not severely affected because of the non-availability of the documents. The first respondent/resolution professional submits that it is a sheer attempt of the applicant to portray the first respondent and his office in bad light before this Authority.

12 The second respondent has filed reply wherein the allegations levelled by the applicant have been denied and submitted that Mr. Mukund Vijayan is not a shareholder in the second respondent-company, and there are only two shareholders, viz., Mrs. Padma Manohar and Mr. Anand Prasad, who are not holding any shares in the corporate debtor. It has further been submitted that the balance-sheets of the corporate debtor clearly record the debt due, and as such there can be no doubt of the genuineness of the transactions. It has specifically been denied that there are any "related parties" either under section 5(24), (24A) or section 21 of the I and B Code, 2016. Therefore, the second respondent is not a "related party". However, it has been alleged that the applicant is attempted to commit a fraud on this Authority and unjustly enrich itself by claiming a much higher amount than its dues.

13 It has further been submitted that the DRT has taken up a review of its earlier order and examining whether the debt claimed by the applicant is correct and it is possible that the DRT may find that the applicant is not entitled to the amount it has claimed against the corporate debtor. Based on these submissions, the second respondent has prayed to dismiss the application.

14 In the light of the pleadings of both the parties and the documents placed on record, the issues that arise for consideration are as follows :

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(i) As to whether "Forensic Audit" needs to be conducted in relation to the transactions took place between the creditors including respondent No. 2 and the corporate debtor, to ascertain the genuineness or otherwise ; and

(ii) As to whether respondent No. 2 is falling within the ambit of the "related party" as defined under section 5(24), (24A) of the I and B Code, 2016 ?

First issue

Paragraph 11 of the reply filed by the second respondent reveals that the **15** balance-sheets of the corporate debtor clearly record the debt due and as such there can be no doubt of the genuineness of the transactions. The cash flow statements for the years 2013 and 2014 placed at pages 288 and 289 of the typed set filed with the counter by respondent No. 2 indicate under heading "non-current liability", "long-term borrowings" and "unsecured loan from directors" is Rs. 388,514,392 and Rs. 385,514,392 respectively. In other words, long-term borrowings does not include the amount of Rs. 2,49,28,86,436 as claimed by Mrs. Indira Anand vide loan agreement dated April 1, 2012 the loan agreement dated April 1, 2012 shows that monies advanced from time to time was agreed to be repaid by the corporate debtor on demand as unsecured loan till March 31, 2016 which obviously is a "non-current liability" falling within the ambit of "long-term borrowings". Therefore, the contention of the second respondent is not substantiated with the relevant documents of the corporate debtor. It is also on record that Mrs. Indira Anand, on April 1, 2015 has written a letter to the corporate debtor that out of the transfer of amount by her on various dates aggregating to Rs. 324.16 crores lying in her credit is requested to be debited in her account for a sum of Rs. 200 crores and be credited to the account of M/s. Anandcine Services, in the books of account of the corporate debtor. The letter does not constitute a valid document in the eye of law as the same is neither an assignment deed nor agreement as claimed by the second respondent. It has further been noted by this Authority that a loan agreement has been signed between the second respondent, i. e., M/s. Anandcine Services P. Ltd., and the corporate debtor on April 1, 2015 which provides that the lender has provided loans to the borrower and the aggregate amount of loan as on April 1, 2015 is Rs. 200 crores, then another agreement dated September 4, 2017 has been signed between the second respondent and the corporate debtor wherein it has been recorded that the borrower had borrowed a sum of Rs. 200 crores from M/s. Anandcine Services P. Ltd., lender, vide loan agreement dated April 1, 2015. The agreements noted above are not substantiated with books of account of the

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corporate debtor. Therefore, there requires a "Forensic Audit" to be conducted by the first respondent/resolution professional in order to examine the fraudulent, and avoidance transactions with regard to the claims of the creditors of the corporate debtor including the second respondent. Accordingly, issue No. 1 is decided in favour of the applicant and against the respondents.

Second issue

16 In relation to the second issue, the factual detail deduced from the pleadings and the documents placed on record goes to show that the managing director of the corporate debtor, viz., Mr. K. Bapaiah is the father of Mrs. A. Padma Manohar and grandfather of Mr. A. Anand Prasad, who are the shareholders and directors of the second respondent as on date. Therefore, the interest of the second respondent through its shareholders-cum-directors has direct concern with the corporate debtor, whose managing director is Mr. K. Bapaiah. This relationship of the managing director of the corporate debtor and the shareholders-cum-directors of the second respondent will have direct effect on the decisions of the CoC, as the second respondent is holding majority of voting right in the CoC, which certainly will be lacking bona fide and good faith, which will have adverse effects on the rights of the minority financial creditors.

17 The purport and object of section 5(24), (24A) read with proviso to subsection (2) of section 21 of the I and B Code, 2016 is that a party which has vested interest/relation with the corporate debtor should not become the part of the CoC for the reasons that the decisions of the CoC must remain independent, as CoC is the pivot of the insolvency and resolution process. The decision of the CoC 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 CoC needs to be completely independent and free from any kind of influence based on vested interest either of the promoters or their closed relatives who may have stakes being creditors with respect to the corporate debtor. The provisions of section 5(24), (24A) of the I and B Code, 2016 appear to be incorporated to fulfil the said purport and object. The provisions of section 5(24), (24A) of the I and B Code, 2016 cannot said to be exhaustive but are inclusive. Therefore, we have to construe the terms "related party" used in the said provisions with respect to purposive and contextual interpretation so that intended object could be achieved. In view of it, the second respondent is held to be "related party" to the corporate debtor, which shall have no right of representation, participation or voting in the meeting of the committee of creditors of the corporate debtor.

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In view of the discussion made above, the second issue is also decided in favour of the applicant and against the second respondent. It is made clear that the claim of the second respondent shall remain subject to the outcome of the "Forensic Audit" directed to be conducted. Consequently, respondent No. 1/resolution professional is directed to delete the name of respondent No. 2 from the list of the CoC with immediate effect and get the "Forensic Audit" conducted for the purpose mentioned in the preceding paragraphs. Accordingly, the application stands disposed of. **18**

There is no order as to costs. The order is pronounced in the open court. **19**

[2020] 220 Comp Cas 335 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — ALLAHABAD BENCH]

UNION BANK OF INDIA

v.

U. P. STATE SPINNING CO. LTD.

A. R. K. SINHA *(Judicial Member)*

October 22, 2019.

HF ▸ Petitioner

INSOLVENCY RESOLUTION—PETITION BY FINANCIAL CREDITOR—LIMITATION—PETITION FILED WITHIN THREE YEARS OF ACKNOWLEDGMENT OF DEBT—FRESH LIMITATION STARTING FROM DATE OF ACKNOWLEDGMENT—PETITION WITHIN LIMITATION—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 7—LIMITATION ACT, 1963, S. 18.

INSOLVENCY RESOLUTION—PETITION BY FINANCIAL CREDITOR—DEBT AND DEFAULT PROVEN—PETITION ADMITTED—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 7.

The financial creditor-bank filed a petition under section 7 of the Insolvency and Bankruptcy Code, 2016, for initiation of the corporate insolvency resolution process against the corporate debtor on the latter's failure to repay its dues. The corporate debtor objected on the ground of limitation contending that the account of the corporate debtor was declared a non-performing asset on March 7, 2013 and the financial creditor had filed the petition much after 3 years, i. e., on September 17, 2018 :

Held, *admitting the petition, (i) that even if it was to be assumed that 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, though not pleaded in*

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the petition by a letter dated July 30, 2018 the corporate debtor had admitted the debt and undertaken to repay the legal dues of the financial creditor within two or three months. 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, acknowledged the debt of the financial creditor. Therefore, in view of section 18 of the Limitation Act, 1963, 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. Deposit of two cheques amounting to Rs. 50 lakhs dated March 8, 2019 also amounted to acknowledgment of the debt. The financial creditor had not claimed that the default was from March 7, 2013 the date when the corporate debtor's assets was declared as a non-performing asset but it had claimed default from July 30, 2018 the date when corporate debtor had sent the letter and acknowledged the debt. There was no force in the contention that the petition was barred by the limitation.

GAURAV HARGOVINDBHAI DAVE *v.* ASSET RECONSTRUCTION CO. (INDIA) LTD. [2019] 8 Comp Cas-OL 250 (SC) *distinguished*.

(ii) That the financial creditor had successfully proved that there was a financial debt and there was default in the payment of the debt by the corporate debtor, which had been corroborated by the documents filed by the financial creditor. The petition was complete. There was default in non-payment of the debt owed by the corporate debtor and the creditor had annexed sufficient evidence to show that there was default on behalf of the corporate debtor.

Cases referred to :

Ajay Agarwal *v.* Central Bank of India [2018] 208 Comp Cas 402 (NCLAT) (para 18)

Gaurav Hargovindbhai Dave *v.* Asset Reconstruction Co. (India) Ltd. [2019] 8 Comp Cas-OL 250 (SC) (paras 6, 9, 11, 14)

Innoventive Industries Ltd. *v.* ICICI Bank [2017] 205 Comp Cas 57 (SC) (para 17)

Karan Goel *v.* Pashupati Jewellers [2020] 9 Comp Cas-OL 304 (NCLAT) (para 19)

Company Petition No. (IB)335/ALD/2018.

Sandeep Arora, for the applicant/financial creditor.

Kartikeya Saran with *Ujjawal Satsangi* for the respondent/corporate debtor.

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COMPANY CASES

VOLUME 220 — 2020

(STATUTES)

SEBI Circulars

Ref. SEBI/HO/CFD/DIL2/CIR/P/2020/78,
dated 6th May, 2020.

To

All Registered Merchant Bankers

All Recognized Stock Exchanges

All Registered Registrars to an Issue

All Self Certified Syndicate Banks

All listed entities

All entities who propose to list specified securities

Dear Sir/Madam,

Subject: **Relaxations relating to procedural matters—Issues and listing**

1. In view of the impact of the COVID-19 pandemic and the lockdown measures undertaken by the Central and State Governments, based on representations, the SEBI has decided to grant the following one time relaxations from strict enforcement of certain regulations of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018[1] (hereafter "ICDR Regulations"), pertaining to rights issue opening up to July 31, 2020 :

(i) Service of the abridged letter of offer, application form and other issue material to shareholders may be undertaken by electronic transmission as already provided under regulation 77(2) of the ICDR Regulations. Failure to adhere to modes of dispatch through registered post or speed post or courier services due to prevailing COVID-19 related conditions will not be treated as non-compliance during the said period. However, the issuers shall publish the letter of offer, abridged letter of offer and

1. See [2019] 213 Comp Cas (St.) 2.

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application forms on the websites of the company, registrar, stock exchanges and the lead manager(s) to the rights issue. Further, the issuer company along with lead manager(s) shall undertake all adequate steps to reach out its shareholders through other means such as ordinary post or SMS or audio-visual advertisement on television or digital advertisement, etc.

(ii) The issue related advertisement as mandated by regulation 84(1), shall contain additional details as regards the manner in which the shareholders who have not been served notice electronically may apply. The issuer may have the flexibility to publish the dispatch advertisement in additional newspapers, over and above those required in regulation 84. The advertisement should also be made available on the website of the Issuer, Registrar, Lead Managers, and Stock Exchanges. The issuer shall make use of advertisements in television channels, radio, internet, etc., to disseminate information relating to the application process. Such advertisements can be in the form of crawlers/tickers as well.

(iii) In terms of SEBI circular dated January 22, 2020, the SEBI introduced dematerialized rights entitlements (REs). Further, physical shareholders are required to provide their demat account details to issuer/ Registrar to the issue for credit of REs. In view of COVID-19 pandemic and the lockdown measures undertaken by the Central and State Governments, in case the physical shareholders who have not been able to open a demat account or are unable to communicate their demat details, in terms of clause 1.3.4 of SEBI circular dated January 22, 2020, to the issuer/ Registrar for credit of REs within specified time, such physical shareholders may be allowed to submit their application subject to following conditions :

(a) Issuer along with lead manager(s) and other recognized intermediary shall institute a mechanism to allow physical shareholders to apply in the rights issue. Issuer along with lead manager(s) shall ensure to take adequate steps to communicate such a mechanism to physical shareholders before the opening of the issue.

(b) Such shareholder shall not be eligible to renounce their rights entitlements.

(c) Such physical shareholders shall receive shares, in respect of their application, only in demat mode. The lead managers may also be guided by paragraph 10 of Form A, Schedule V of the ICDR Regulations.

(iv) In terms of regulation 76 of the ICDR Regulations, an application for a rights issue shall be made only through ASBA facility. In view of the difficulties faced due to COVID-19 pandemic and the lockdown measures, and in order to ensure that all eligible shareholders are able to apply to

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rights issue during such times, the issuer shall along with lead manager(s) to the issue, the Registrar, and other recognized intermediaries (as deemed fit by issuer and lead manager(s)) institute an optional mechanism (non-cash mode only) to accept the applications of the shareholders subject to ensuring that no third party payments shall be allowed in respect of any application.

(v) In respect of mechanisms at point (iii) and (iv) above, the issuer along with Lead Manager(s) shall ensure the following :

(a) The mechanism(s) shall only be an additional option and not a replacement of the existing process. As far as possible, attempts will be made to adhere to the existing prescribed framework.

(b) The mechanism(s) shall be transparent, robust and have adequate checks and balances. It should aim at facilitating subscription in an efficient manner without imposing any additional costs on investors. The issuer along with lead manager(s), and Registrar shall satisfy themselves about the transparency, fairness and integrity of such mechanism.

(c) An FAQ, online dedicated investor helpdesk, and helpline shall be created by the issuer company along with lead manager(s) to guide investors in gaining familiarity with the application process and resolve difficulties faced by investors on priority basis.

(d) The issuer along with lead manager(s), Registrar, and other recognized intermediaries (as incorporated in the mechanism) shall be responsible for all investor complaints.

2. In respect of all offer documents filed until July 31, 2020, it has been decided to grant the following relaxations :

(i) Authentication/certification/undertaking(s) in respect of offer documents, may be done using digital signature certifications.

(ii) The issuer along with lead manager(s) shall provide procedure for inspection of material documents electronically.

3. This Circular shall come into force with immediate effect.

4. This Circular is issued in exercise of the powers conferred by section 11(1) of the Securities and Exchange Board of India Act, 1992.

5. A copy of this Circular is available on SEBI website at *www.sebi.gov.in* under the categories "Legal Framework/Circulars".

Yours faithfully,
Jeevan Sonparote,
Chief General Manager.

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Companies (Winding up) Rules, 2020

Notification No. G. S. R. 46(E), dated 24th January, 2020[1]

In exercise of the powers conferred by sub-sections (1) and (2) of section 468 and sub-sections (1) and (2) of section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules, namely :—

PART I

General

1. Short title, commencement and application.—(1) These rules may be called the **Companies (Winding up) Rules, 2020.**

(2) They shall come into force on 1st day of April, 2020.

(3) These rules shall apply to winding up under the Companies Act, 2013 (18 of 2013).

2. Definitions.—In these rules, unless the context or subject matter otherwise requires,—

(a) "Act" means the Companies Act, 2013 (18 of 2013) ;

(b) "Form" means a Form annexed to these rules ;

(c) "Registrar" means the Registrar of the National Company Law Tribunal or National Company Law Appellate Tribunal and includes such other officer of the Tribunal or Bench thereof to whom the powers and functions of the Registrar are assigned ;

(d) "Registry" means the Registry of the Tribunal or any of its Benches or of the Appellate Tribunal, as the case may be, which keeps records of the applications and documents relating thereto ;

(e) "Section" means section of the Act ;

(f) words and expressions used and not defined in these rules but defined in the Act shall have the meanings respectively assigned to them in the Act.

PART II

Winding up by Tribunal

3. Petition for winding up.—(1) For the purposes of sub-section (1) of section 272, a petition for winding up of a company shall be presented in Form WIN 1 or Form WIN 2, as the case may be, with such variations as the circumstances may require, and shall be presented in triplicate.

(2) Every petition shall be verified by an affidavit made by the petitioner or by the petitioners, where there are more than one petitioners, and

1. Gaz. of India, Extry. No. 43, dt. 24-1-2020, Pt. II, sec. 3(i), p. 129.

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in case the petition is presented by a body corporate, by the Director, Secretary or any other authorised person thereof, and such affidavit shall be in Form WIN 3.

4. Statement of affairs.—The statement of affairs, as required to be filed under sub-section (4) of section 272 or sub-section (1) of section 274, shall be in Form WIN 4 and shall contain information up to the date which shall not be more than thirty days prior to the date of filling the petition or filling the objection as applicable and the statement of affairs shall be made in duplicate, duly verified by an affidavit, and affidavit of concurrence of the statement of affairs shall be in Form WIN 5.

5. Admission of petition and directions as to advertisement.—Upon filing of the petition, it shall be posted before the Tribunal for admission of the petition and fixing a date for the hearing thereof and for appropriate directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served, and where the petition has been filed by a person other than the company, the Tribunal may, if it thinks fit, direct notice to be given to the company and give an opportunity of being heard, before giving directions as to the advertisement of the petition, if any, and the petitioner shall bear all costs of the advertisement.

6. Copy of petition to be furnished.—Every contributory of the company shall be entitled to be furnished by the petitioner or by his authorised representative with a copy of the petition within twenty four hours of his requiring the same on payment of five rupees per page.

7. Advertisement of petition.—Subject to any directions of the Tribunal, notice of the petition shall be advertised not less than fourteen days before the date fixed for hearing in any daily newspaper in English and vernacular language widely circulated in the State or Union territory in which the registered office of the company is situated, and the advertisement shall be in Form WIN 6.

8. Application for leave to withdraw petition.—(1) A petition for winding up shall not be withdrawn after presentation without the leave of the Tribunal subject to compliance with any order of the Tribunal, including as to costs.

(2) An application for leave to withdraw a petition for winding up which has been advertised in accordance with the provisions of rule 7 shall not be heard at any time before the date fixed in the advertisement for the hearing of the petition.

9. Substitution for original petitioner.—(a) Where a petitioner—

(i) is not entitled to present a petition ; or

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(ii) fails to advertise his petition within the time prescribed by these rules or by order of Tribunal ; or

(iii) consents to withdraw the petition, or to allow it to be dismissed, or fails to appear in support of his petition when it is called on in Tribunal on the day originally fixed for the hearing thereof, or any day to which the hearing has been adjourned ; or

(iv) if appearing, does not apply for an order in terms of the prayer of his petition ; or

(b) where in the opinion of the Tribunal there is other sufficient cause for an order being made under this rule, the Tribunal may, upon such terms as it may think just, substitute as petitioner any other person who, in the opinion of the Tribunal, would have a right to present a petition, and who is desirous of prosecuting the petition.

10. Procedure on substitution.—Where the Tribunal makes an order substituting a contributory as petitioner in a winding up petition, it shall adjourn the hearing of the petition to a date to be fixed by the Bench and direct such amendments of the petition as may be necessary and such contributory shall, within seven days from the making of the order, amend the petition accordingly, and file two legible and clean copies thereof together with an affidavit in duplicate setting out the grounds, on which he supports the petition and the amended petition shall be treated as the petition for the winding up of the company and shall be deemed to have been presented on the date on which the original petition was presented.

11. Affidavit-in-objection.—Any affidavit in objection to the petition under sub-section (1) of section 272 shall be filed within thirty days from the date of order, and a copy of the affidavit shall be served on the petitioner or his authorised representative forthwith and copies of the affidavit shall also be given to any contributory appearing in support of the petition who may require the same on payment of five rupees per page within three working days.

12. Affidavit in reply.—An affidavit in reply to the affidavit in objection to the petition shall be filed not less than seven days before the day fixed for the hearing of the petition, and a copy of the affidavit in reply shall be served on the day of the filing thereof on the person by whom the affidavit in objection was filed or his authorised representative.

Liquidator

13. Applicability.—Unless specified otherwise, the rules hereinafter shall apply to all types of liquidators.

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14. Appointment of provisional liquidator or company liquidator.— (1) After the admission of a petition for the winding up of a company by the Tribunal, and upon proof by affidavit of sufficient ground for the appointment of a provisional liquidator, the Tribunal, if it thinks fit, and upon such terms and conditions as in the opinion of the Tribunal shall be just and necessary, may appoint a provisional liquidator of the company, pending final orders on the winding up petition, in pursuance of clause (c) of sub-section (1) of section 273, and where the company is not the applicant, notice of the application for appointment of provisional liquidator shall be given to the company in Form WIN 7 and the company shall be given a reasonable opportunity to make its representation unless the Tribunal, for reasons to be recorded in writing, dispenses with such notice.

(2) The order appointing the provisional liquidator shall set out the restrictions and limitations, if any, on his powers imposed by the Tribunal in accordance with sub-section (3) of section 275 and the order shall be in Form WIN 8, with such variations as may be necessary.

(3) An order for the appointment of a provisional liquidator as passed in accordance with clause (c) of sub-section (1) of section 273 shall also state that it will be the duty of every person, who is in possession of any property, books or papers, cash or any other assets of the company, including the benefits derived therefrom, to surrender forthwith such property, books or papers, cash or other assets and the benefits so derived, as the case may be, to the provisional liquidator.

(4) Where an order for the appointment of provisional liquidator or company liquidator, as the case may be, has been made, the Registrar shall, as provided in sub-section (1) of section 277 within a period not exceeding seven days from the date of passing of the order, send intimation to the company liquidator or provisional liquidator in Form WIN 9 by registered post or by speed post or by courier service or by electronic means and a copy of the order for the appointment of provisional liquidator or company liquidator, as the case may be, shall also be sent to the Registrar of Companies together with a copy of the petition and the affidavit, if any, filed in support thereof.

(5) The provisional liquidator or the company liquidator, as the case may be appointed by the Tribunal shall file a declaration in Form WIN 10 disclosing conflict of interest or lack of independence in respect of his appointment, if any, with the Tribunal within seven days from the date of appointment.

(6) The provisional liquidator or the company liquidator, as the case may be shall be appointed by the Tribunal from amongst the insolvency

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professionals registered under the Insolvency and Bankruptcy Code, 2016 (31 of 2016) unless the official liquidator is appointed.

15. Rules applicable to provisional liquidator.—The rules relating to company liquidators shall apply to provisional liquidators, so far as applicable, subject to such directions as the Tribunal may give in each case.

16. Costs, etc., of provisional liquidator.—Subject to any order of the Tribunal, all the costs, charges and expenses incurred by the provisional liquidator shall be paid out of the assets of the company and if the company does not have sufficient assets or any assets to pay the costs, charges and expenses, the Tribunal may make appropriate orders in this regard.

Winding up order

17. Order to be sent to liquidator and form of order.—(1) For the purposes of sub-section (1) of section 277, the order for winding up shall be in Form WIN 11 with such variations as may be necessary and the order for winding up shall be sent by the Registrar after it is signed and sealed within a period not exceeding seven days from the date of receipt of the order by the Registrar, to the company liquidator and the Registrar of Companies in Form WIN 12 and Form WIN 13, and the copy of the order sent to company liquidator shall be accompanied by a copy of the petition and the affidavit, if any, filed in support thereof if not already sent at the time of appointment of the provisional liquidator.

(2) The company liquidator shall cause a sealed copy of the order to be served upon the company in accordance with the provisions of section 20, at its registered office or if there is no registered office, at its principal or last known principal place of business, or upon such other person or persons or in such manner as the Tribunal may direct.

(3) A copy of the order made by the Tribunal shall also be filed by the liquidator within thirty days of the receipt with the Registrar of Companies in form INC-28 of the Companies (Incorporation) Rules, 2014.

18. Contents of winding up order.—An order for winding up a company shall, inter alia, contain that it will be the duty of such of the persons as are liable to submit the books of account of the company completed and audited up to the date of the order, to attend on the company liquidator at required time and place and give him all the information, and it will be the duty of every person who is in possession of any property, books or papers, cash or any other assets of the company, including the benefits derived therefrom, to surrender forthwith such property, books or papers, cash or other assets and the benefits so derived, as the case may be, to the company liquidator.

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19. Directions on making winding up order.—At the time of making the winding up order, or at any time thereafter, the Tribunal shall give directions to the petitioner as to the advertisement of the order and the persons, if any, on whom the order shall be served and the persons, if any, to whom notice shall be given of the further proceedings, in the liquidation, and such further directions as may be necessary.

20. Advertisement of order.—Save as otherwise ordered by the Tribunal, the order for the winding up of a company by the Tribunal shall, within fourteen days of the date of the order, be advertised by the petitioner in a newspaper in the English language and a newspaper in vernacular language widely circulating in the State or the Union territory where the registered office of the company is situated and shall be served by the petitioner upon such person, if any, and in such manner as the Tribunal may direct, and the advertisement shall be in Form WIN 14.

21. Declaration by company liquidator.—The declaration by the company liquidator regarding disclosing conflict of interest or lack of independence, if any, in respect of his appointment as company liquidator as referred to in sub-section (6) of section 275 shall be filed in Form WIN 10 with the Tribunal.

22. Company liquidator to take charge of assets and books and papers of company.—(1) On a winding up order being made, the company liquidator shall, forthwith take into his custody or under his control all the properties and effects, actionable claims and the books and papers of the company, and it shall be the duty of all persons having custody of any of the properties, books and papers, cash or any other assets of the company, to deliver possession thereof to the company liquidator.

(2) Where the company, its promoters, its key managerial personnel or any other person required to co-operate with the liquidator does not so co-operate, the liquidator may make an application to the Tribunal for an appropriate order.

(3) The Tribunal, on receiving an application under sub-rule (2), shall by an order, direct such promoters, key managerial personnel or other person (including contractual counter party, supplier, service provider or auditor)—

(a) to provide the information requested by the liquidator ; and

(b) to comply with the instructions of the liquidator and to co-operate with him in collection of information and taking custody of the assets, properties and books of account.

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23. Form of proceedings after winding up order is made.—After a winding up order is made or a provisional liquidator is appointed, every subsequent proceeding in the winding up shall bear the original number of the winding up petition besides its own distinctive number, but against the name of the company in the cause-title, the words "in liquidation" or "in provisional liquidation" as the case may be, shall appear in brackets.

Application for stay of suits, etc., on winding up order

24. Application for leave to commence or continue suit or proceeding.—An application under sub-section (1) of section 279 for leave of the Tribunal to commence or continue any suit or other legal proceeding by or against the company shall be made in Form WIN 15 upon notice to the company liquidator and the parties to the suit or proceeding sought to be commenced or continued.

Reports by company liquidator under section 281

25. Report by company liquidator.—(1) The report to be submitted by the company liquidator under sub-section (1) of section 281 shall be in Form WIN 16 with such variations as may be necessary and the company liquidator may make further report or reports, if he thinks fit, according to the provisions of sub-section (4) of the said section.

(2) It shall be the duty of the promoters, directors, officers, employees and every person who has made or concurred in making of the statement of affairs, if and when required, to attend on the company liquidator and answer all such questions as may be put to him, give all such further information as may be required from him, and provide such assistance as may be required by the company liquidator.

(3) The Tribunal shall, within seven days from the receipt of such report, fix a date for the consideration thereof by the Tribunal and notify the date on the notice board of the Tribunal and to the company liquidator.

26. Inspection of statement of affairs and report.—Every creditor or contributory, by himself, or by his agent, shall be entitled to inspect the statement of affairs submitted under sub-section (4) of section 272 or sub-section (1) of section 274 and the report of the company liquidator submitted under sub-rule (1) of rule 25, on payment of a fee of one thousand rupees and to obtain copies thereof or extracts therefrom on payment of a fee of five rupees per page.

27. Consideration of report by Tribunal.—The consideration of the report made by the company liquidator pursuant to section 281, shall be placed before the Tribunal, and the company liquidator shall personally or by authorised representative attend the consideration of the said report

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and give the Tribunal any further information or explanation with reference to the matters contained therein which the Tribunal may require and on consideration of the aforesaid report, the Tribunal may pass such orders and give such directions as it may thinks fit.

Settlement of list of contributories

28. Provisional list of contributories.—(1) Unless the Tribunal dispenses with the settlement of a list of contributories, the company liquidator shall prepare and file in the Tribunal not later than twenty-one days after the date of the winding up order a provisional list of contributories of the company with their names and addresses, the number of shares or the extent of interest to be attributed to each contributory, the amount called up and the amount paid up in respect of such shares or interest, and distinguishing in such list the several classes of contributories.

(2) The list shall consist of every person who was a member of the company at the commencement of the winding up or his representative, and shall be divided into two parts, the first part consisting of those who are contributories in their own right, and the second part, of those who are contributories as being representatives of, or liable for the debts of others, as required under sub-section (1) of section 281, and the list shall be in Form WIN 17.

29. Notice to be given of date of settlement.—(1) Upon the filing of the provisional list of contributories mentioned in rule 28, the company liquidator shall obtain a date from the Tribunal for settlement of the list of contributories and shall give notice of the date appointed to every person included in such list, stating in such notice in what character and for what number of shares or extent of interest such person is included in the list, the amount called up and the amount paid up in respect of such shares or interest, and informing such person by such notice that if he intends to object to his being settled as a contributory in such character and for such number of shares or interest as mentioned in the list, he should file in Tribunal his affidavit in support of his contention and serve a copy of the same on the company liquidator not less than two days before the date fixed for the settlement, and appear before Tribunal on the date appointed for the settlement in person or by authorised representative and such notice shall be in Form WIN 18, and shall be sent in the mode set out in section 20 so that it reaches the contributories not less than fourteen days before the date fixed for the settlement.

(2) The person who posted the notice shall swear by an affidavit in Form WIN 19 relating to the dispatch thereof, and file the same in the Tri-

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bunal not later than two days before the date fixed for the settlement of the list.

30. Settlement of list.—On the date appointed for the settlement of the list referred to in rule 29, the Tribunal shall hear any person who objects to being settled as a contributory or as a contributory in such character or for such number of shares or extent of interest as is mentioned in the said list, and after such hearing, shall finally settle the list in accordance with sub-section (1) of section 285 and the aforesaid list when settled shall be certified by the Tribunal under its seal and shall be in Form WIN 20.

31. Notice of settlement to contributories.—(1) Upon the receipt of the settled list of contributories, as certified by the Tribunal in terms of rule 30, the company liquidator shall within a period of 7 days issue notice to every person placed on the said list of contributories, stating in what character and for what number of shares or interest he has been placed on the said list, what amount has been called up and what amount paid-up in respect of such shares or interest and in the notice he shall inform such person that any application for the removal of his name from the aforesaid list or for a variation of the said list, must be made to the Tribunal within fifteen days from the date of service on the contributory of such notice, and such notice shall be in Form WIN 21 and shall be sent to each person settled on the said list by pre-paid registered post or speed post at the address mentioned in the said list.

(2) An affidavit of service relating to the dispatch of the notice to the contributories under this rule shall be sworn by the person who dispatched the said notice and shall be filed in Tribunal within seven days of the said dispatch of notice and such affidavit shall be in Form WIN 22.

32. Supplemental list of contributories.—The Tribunal may add to the list of contributories by a supplemental list or lists and any such addition shall be made in the same manner in all respects as the settlement of the original list.

33. Variation of list.—Save as provided in rule 31, the list of contributories shall not be varied, and no person settled on the list as a contributory shall be removed from the list, or his liability in any way varied, except by order of the Tribunal and in accordance with such order.

34. Application for rectification of list.—If after the settlement of the list of contributories, the company liquidator has reason to believe that a contributory who had been included in the provisional list has been improperly or by mistake excluded or omitted from the list of contributories as finally settled or that the character in which or the number of shares or extent of interest for which he has been included in the list as finally settled

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or any other particular contained therein, requires rectification in any respect, he may, upon notice to the contributory concerned, apply to the Tribunal for such rectification of the list as may be necessary, and the Tribunal may on such application, rectify or vary the list as it may thinks fit.

35. List of contributories consisting of past members.—It shall not be necessary to settle a list of contributories consisting of the past members of a company, unless so ordered by the Tribunal and where an order is made for settling a list of contributories consisting of the past members of a company, the provisions of these rules shall apply to the settlement of such list in the same manner as they apply to the settlement of the list of contributories consisting of the present members.

Advisory Committee

36. Meeting of creditors and contributories.—The meeting of the creditors and contributories in accordance with the provisions of sub-section (3) of section 287 to determine the persons who may be the members of the advisory committee, shall be convened, held and conducted in the manner hereinafter provided in these rules for the holding and conducting of meeting of creditors and contributories.

37. Company liquidator to report result of meeting.—(1) As soon as possible but not later than seven days after the holding of the meeting of the creditors and contributories, the company liquidator shall report the result thereof to the Tribunal and such report shall be in Form WIN 23.

(2) Where the creditors and contributories have agreed upon the constitution and composition of the advisory committee and the persons who are to be members thereof, an advisory committee shall, subject to the provisions of sub-section (2) of section 287, be constituted in accordance with such decision, and the company liquidator shall set out in his report the names of the members of the committee so constituted.

(3) After being directed by the Tribunal to constitute an advisory committee where the creditors and contributories have not agreed upon the composition of the advisory committee and the persons who are to be members thereof, the company liquidator shall, at the time of making his report as aforesaid, apply to the Tribunal for directions as to what shall be its composition, and who shall be the members thereof, and the Tribunal shall thereupon fix a date for the consideration of the report of the company liquidator and the notice of the date so fixed shall be advertised by the company liquidator in such manner as the Tribunal shall direct not less than seven days before the date so fixed, and the advertisement shall be in Form WIN 24.

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(4) On the date fixed for hearing of the said application for directions, the Tribunal may, after hearing the company liquidator and any creditor or contributory who may appear, decide as to who would be the members of the said advisory committee or pass such orders or give such directions in the matter, as the Tribunal may thinks fit.

38. Filling-up of vacancy in advisory committee.—(1) On a vacancy occurring in the advisory committee, the company liquidator shall forthwith summon a meeting of creditors or of contributories, as the case may require, to recommend for filling the vacancy and the meeting may, by resolution, recommend for reappointing the same, or propose for appointing another creditor or contributory, as the case may to fill the vacancy :

Provided that if the company liquidator, having regard to the position in the winding up, is of the opinion that it is unnecessary for the vacancy to be filled, he may apply to the Tribunal and the Tribunal may make an order that the vacancy shall not be filled, or shall not be filled except in such circumstances as may be specified in the order.

(2) The continuing members of the advisory committee, if not less than two, may act notwithstanding any vacancy in the said committee.

(3) Where the creditors or contributories, as the case may be, fail to fill the vacancy for whatever reason, the company liquidator shall forthwith report such failure to the Tribunal and Tribunal may, by order, fill such vacancy.

39. Company liquidator and members of advisory committee dealing with company's assets.—Neither the company liquidator nor any member of the advisory committee shall, while acting as such liquidator or member of such committee in any winding up, either directly or indirectly, by himself or through his employer, partner, clerk, agent, servant, or relative, become purchaser of any part of the company's assets, except by leave of the Tribunal and any such purchase made contrary to the provisions of this rule may be set aside by the Tribunal on the application of the said liquidator or of a creditor or contributory, as the case may be, and the Tribunal may make such order as to costs as it may thinks fit.

40. Advisory committee not to make profit.—No member of the advisory committee shall, except under the order of the Tribunal, directly or indirectly, by himself or through his employer, partner, clerk, agent, servant or relative, be entitled to derive any profit from any transaction arising out of the winding up or to receive out of the assets any payment for services rendered by him in connection with the administration of the assets, or for any goods supplied by him to the company liquidator for or on account of the company and where any profit or payment has been made

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contrary to the provisions of this rule, such payment shall be disallowed or the profit shall be recovered, as the case may be, on the audit of the such liquidator's accounts or otherwise.

41. Cost of obtaining order of Tribunal.—In any case in which an order of the Tribunal is obtained under rule 39 or rule 40, the costs of obtaining such order shall be borne by the person in whose interest such order is obtained and shall not be payable out of the companies' assets.

42. Order sanctioning payment to advisory committee.—Where the order of the Tribunal to a payment to a member of the advisory committee for services rendered by him in connection with the administration of the company's assets is obtained, the order of the Tribunal shall specify the nature of the services, and such order shall only be given where the service performed is of a special nature, and except by the express order of the Tribunal, no remuneration shall be paid to a member of the advisory committee for services rendered by him in the discharge of the duties attached to his office as a member of such committee.

43. Meetings of advisory committee.—(1) The advisory committee shall meet at such times as it may from time-to-time appoint and the company liquidator or one-third of the total number of members of the said committee may also call a meeting of that committee as and when they think necessary.

(2) The quorum for a meeting of the advisory committee shall be one-third of the total number of the members, or two, whichever is higher.

(3) The advisory committee may act by a majority of its members present at a meeting, but shall not act unless a quorum is present.

(4) A member of the advisory committee may resign by notice in writing signed by him and delivered to the company liquidator.

(5) If a member of the advisory committee is adjudged as an insolvent, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the said committee without the leave of those members who, together with himself, represent the creditors or contributories, as the case may be, his office shall become vacant.

(6) A member of the advisory committee may be removed, subject to the directions of the Tribunal, at a meeting of creditors if he represents creditors, or at a meeting of contributories if he represents contributories, by an ordinary resolution of which seven days' notice has been given, stating the object of the meeting.

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Meetings of creditors and contributories

44. Application of rules to meetings.—Subject to any directions given by the Tribunal, rules as hereinafter set out shall apply to meetings of creditors and contributories as may be convened in pursuance of sub-section (3) of section 287 and sub-section (3) of section 292.

45. Notice of meeting.—(1) The company liquidator shall summon meetings of creditors and contributories by giving not less than fourteen days' notice by sending individually to every creditor of the company a notice of the meeting of creditors, and to every contributory of the company a notice of the meeting of contributories, by sending notice by registered post or speed post or by electronic means so as to reach such person in not less than fourteen days before the date fixed for the meeting :

Provided that where the number of creditors or contributories, as the case may be, exceeds five hundred, the company liquidator shall also give a fourteen days' notice of the time and place appointed for the meeting by advertisement in one daily newspaper in the English language and one daily newspaper in the principal regional language circulating in the State or Union territory concerned.

(2) The notice to each creditor shall be sent to the address given in his proof as referred to in rule 101 or, if he has not so proved, to the address given in the statement of affairs, or, to the address given in the books of the company, or to such other address as may be known to the person summoning the meeting, and the notice to each contributory shall be sent to the address mentioned in the books of the company as the address of such contributory or to such other address as may be known to the person summoning the meeting.

(3) The notices shall be in Forms WIN 25 to 29 as may be applicable.

46. Place and time of meeting.—Every meeting shall be held at such place and time as the company liquidator considers convenient for the majority of the creditors or contributories or both and different times or places or both may, if thought fit, be appointed for the meeting of the creditors or contributories or both.

47. Notice of first or other meeting to officers of company.—(1) The company liquidator shall also give, to each of the officers of the company, who in his opinion ought to attend the first or any other meeting of creditors or contributories, fourteen days' notice in Form WIN 30 of the time and place appointed for such meeting and the notice may either be delivered by hand or sent by registered post or speed post or by electronic means as may be convenient, and it shall be the duty of every officer who

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receives notice of such meeting to attend if so required by the company liquidator, and if any such officer fails to attend, the liquidator may report such failure to the Tribunal and the Tribunal may issue such directions to such person as it thinks fit.

(2) The company liquidator, if he thinks fit, may instead of requiring any of the officers of the company to attend the meeting as aforesaid, require such officer to answer any interrogatories or to furnish in writing any information that he may require for purposes of such meeting, and if such officer fails to answer the interrogatories or furnish such information, the liquidator shall report such failure to the Tribunal and the Tribunal may issue such directions to such officer as it may thinks fit.

48. Proof of notice.—An affidavit by any person who sent the notice, that such notice has been duly sent, shall be sufficient evidence of the notice having been sent to the person to whom the same was addressed and the affidavit shall be filed in the Tribunal in Form WIN 31.

49. Costs of meeting.—The cost of convening and conducting the meeting of the creditors or contributories shall be met out of the assets of the company.

50. Chairman of meeting.—The company liquidator or some person nominated by him shall be the Chairman of the meeting and the nomination shall be in Form WIN 32.

51. Resolution at creditors' meeting.—At a meeting of creditors, a resolution shall be deemed to be passed, when a majority in value of the creditors present personally or by proxy and voting on the resolution have voted in favour of the resolution and in a winding up by the Tribunal, the value of a creditor, shall, for the purposes of a first meeting of the creditors meeting held under section 287, be deemed to be the value as shown in the books of the company, or the amount mentioned in his proof as referred to rule 101, whichever is less and for the purposes of any other meeting, the value for which the creditor has proved his debt or claim.

52. Resolution of contributories' meeting.—At a meeting of the contributories, a resolution shall be deemed to be passed when a majority in value of the contributories present personally or by proxy and voting on the resolution have voted in favour of the resolution and the value of the contributories shall be determined according to the number of votes to which each contributory is entitled as a member of the company under the provisions of the Act, or the articles of the company, as the case may be.

53. Copies of resolution to be filed.—The company liquidator shall file in the Tribunal a copy certified by him of every resolution passed at a

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meeting of the creditors or contributories and the registry shall keep in each case a file of such resolution.

54. Non-receipt of notice by creditor or contributory.—Where a meeting of creditors or contributories is summoned by notice, the proceedings and resolution at the meeting shall, unless the Tribunal otherwise orders, be valid notwithstanding that some creditors or contributories may not have received the notice sent to them.

55. Adjournments.—The chairman of the meeting may, with the consent of the creditors or contributories present in the meeting, as the case may be, adjourn it from time-to-time, but the adjourned meeting shall be held at the same place as the original meeting unless in the resolution for adjournment another place is specified or unless the Tribunal otherwise orders.

56. Quorum.—A meeting may not act for any purpose except for adjournment thereof unless there are present or represented there at in the case of a creditors' meeting at least three creditors entitled to vote or in the case of a meeting of contributories at least three contributories or all the creditors entitled to vote or all the contributories if the number of creditors entitled to vote or the number of contributories, as the case may be does not exceed three.

57. Procedure in absence of quorum.—If, within half an hour from the time appointed for the meeting, a quorum of creditors or contributories, as the case may be, is not present or represented, the meeting shall be adjourned to the same day in the following week at the same time and place and if at such adjourned meeting, the quorum is not present, at least two creditors or contributories present in person shall form the quorum and may transact the business for which the meeting was convened :

Provided that if at the adjourned meeting also two creditors or contributories, as the case may be, are not present, the chairman of the meeting shall submit his report to the Tribunal for such directions as the Tribunal may deem fit.

58. When creditor can vote.—In the case of a meeting of creditors held under section 287 or of any adjournment thereof, a person shall not be entitled to vote as a creditor unless he has duly lodged with the company liquidator not later than the time mentioned for that purpose in the notice convening the meeting, a proof of the debt which he claims to be due to him from the company and in the case of other meeting of creditors, a person shall not be entitled to vote as a creditor unless he has lodged with the company liquidator a proof of the debt which he claims to be due to him

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from the company and such proof has been admitted wholly or in part before the date on which the meeting is held :

Provided that this rule and rules 59 to 62 shall not apply to a meeting of creditors held prior to the meeting of creditors under section 287 :

Provided further that this rules shall not apply to any creditors or class of creditors who by virtue of these rules or any directions given thereunder are not required to prove their debts.

59. Case in which creditors may not vote.—A creditor shall not vote in respect of any unliquidated or contingent debt or any debt, value of which is not ascertained, nor shall a creditor vote in respect of any debt secured by a current bill of exchange or promissory note held by him unless he is willing to treat liability to him thereon of every person who is liable thereon antecedently to the company, and against whom no order of adjudication has been made, as a security in his hands, and to estimate the value thereof, and for the purposes of voting, but not for purposes of dividend, to deduct it from his proof mentioned above.

60. When secured creditor can vote.—For the purposes of voting at a meeting, in a winding up by the Tribunal, a secured creditor shall, unless he surrenders his security, state in his aforesaid proof, the particulars of his security, the date when it was given and the value at which it is assessed by a registered valuer, and shall be entitled to vote only in respect of the balance due to him, if any, after deducting the value of his security.

61. Effect of voting by a secured creditor.—If a secured creditor votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the Tribunal, on an application by such creditor, is satisfied that the omission to value the security was due to inadvertence.

62. Procedure when secured creditor votes without surrendering security.—The liquidator may within fifteen days from the date of the meeting at which a secured creditor voted on the basis of his valuation of the security, require him to give up the security for the benefit of the creditors generally on payment of the value so estimated by him, and may, if necessary, apply to the Tribunal for an order to compel such creditor to give up the security :

Provided that the Tribunal may, for good cause shown, permit the said creditor to correct his valuation before being required to give up the security, upon such terms as to costs as the Tribunal may consider just.

63. Admission or rejection of proof for purposes of voting.—The chairman of the meeting shall have power to admit or reject a proof for the purposes of voting, but his decision shall be subject to appeal to the

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Tribunal, and if he is in doubt whether a proof shall be admitted or rejected, he shall mark it as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

64. Minutes of proceedings.—(1) The chairman of the meeting shall cause minutes of the proceedings at the meeting to be drawn up and fairly entered in the minute book within 30 days and the minutes shall be signed by him or by the chairman of the next meeting.

(2) A list of creditors and contributories present at every meeting shall be made and kept in Form WIN 33.

65. Report to Tribunal.—The company liquidator shall, within seven days of the conclusion of the meeting, report the result thereof to the Tribunal in Form No. WIN 34.

Proxies in relation to meetings of creditors and contributories

66. Voting by proxies.—A creditor or contributory may vote either in person or by proxy, and where a person is authorised in the manner provided by section 113 to represent a body corporate at any meeting of creditors or contributories, such person shall produce to the company liquidator or and chairman of the meeting, as the case may be, a copy of the resolution so authorising him and such copy must be certified to be a true copy by a director, manager, secretary or other officer of the company duly authorised in that behalf, who shall certify that he is so authorised.

67. Form of proxies.—A creditor or contributory may give a general proxy or a special proxy to any person, and a general proxy shall be in Form WIN 35 and a special proxy in Form WIN 36.

68. Proxies to company liquidator or chairman of meeting.—A creditor or contributory in a winding up by the Tribunal may appoint the company liquidator or if there is no such liquidator, the chairman of the meeting, to act as his general or special proxy.

69. Use of proxies by deputy.—Where a company liquidator who holds any proxies cannot attend the meeting for which they are given, he may in writing depute some person under his official control to use the proxies on his behalf and in such manner as he may direct.

70. Forms to be sent with notice.—Forms of proxies shall be sent to the creditors and contributories with the notice summoning the meeting and no name shall be inserted or printed in the form before it is sent.

71. Proxies to be lodged.—A proxy shall be lodged not later than 48 hours before the meeting at which it is to be used, with the company liquidator in a winding up by the Tribunal.

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72. Holder of proxy not to vote on matter in which he is financially interested.—No person acting either under a general or special proxy, shall vote in favour of any resolution which would directly or indirectly place himself, his partner or employer in a position to receive any remuneration out of the assets of the company otherwise than as a creditor ratably with the other creditors of the company.

73. Minor not to be appointed proxy.—No person shall be appointed as a general or special proxy who is a minor.

74. Filling in proxy where creditor or contributory is blind or incapable.—The proxy of a creditor or a contributory who is blind or incapable of writing may be accepted if such creditor or contributory has attached his signature or mark thereto in the presence of a witness who shall add to his signature his description and address :

Provided that all insertions in the proxy shall be in the handwriting of the witness and such witness shall have certified at the foot of the proxy that all such insertions have been made by him at the request and in the presence of the creditor or contributory before he attached his signature or mark.

75. Proxy of person not acquainted with English.—The proxy of a creditor or contributory who does not know English may be accepted if it is executed in the manner provided in rule 74 and the witness certifies that it was explained to the creditor or contributory in the language known to him, and gives the creditor's or contributory's name in English below the signature.

76. Submission of periodical reports to the Tribunal.—The company liquidator shall make quarterly reports, referred to in sub-section (1) of section 288, to the Tribunal in Form WIN 37 with respect to the progress of winding up of the company.

77. Employment of additional or special staff by official liquidator.—Where the official liquidator is of the opinion that the employment of any special or additional staff is necessary in any liquidation, he shall apply to the Tribunal for sanction, and the Tribunal may sanction such staff as it thinks fit on such salaries and allowances as the Tribunal may deem appropriate.

78. Declaration by professional.—The professional, referred to in section 291, appointed by the company liquidator with the sanction of the Tribunal shall file a declaration in Form WIN 38 disclosing any conflict of interest or lack of independence in respect of his appointment with the Tribunal forthwith.

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Registers and books of account to be maintained by company liquidator

79. Record book to be maintained by company liquidator.—The company liquidator shall maintain a record book for each company in which shall be entered minutes of all the proceedings and resolutions passed at any meeting of the creditors or contributories or of the advisory committee, the substance of all orders passed by the Tribunal in the liquidation proceedings, and all such matters other than matters of account as may be necessary, to furnish a correct view of the administration of the company's affairs.

80. Registers and books to be maintained by company liquidator.—(1) The company liquidator shall maintain the following books of account, so far as may be applicable, in respect of the company under winding up :

(a) Register of liquidations in Form WIN 38A ;

(b) Central cash book in Form WIN 38B ;

(c) Company's cash book in Form WIN 38C ;

(d) General ledger in Form WIN 38D ;

(e) Cashier's cash book in Form WIN 38E ;

(f) Bank ledger in Form WIN 38F ;

(g) Register of assets in Form WIN 38G ;

(h) Securities and investment register in Form WIN 38H ;

(i) Register of book debts and outstanding's in Form WIN 38-I ;

(j) Tenants ledger in Form WIN 38J ;

(k) Suits register in Form WIN 38K ;

(l) Decree register in Form WIN 38L ;

(m) Sales register in Form WIN 38M ;

(n) Register of claims and dividends in Form WIN 38N ;

(o) Contributories ledger in Form WIN 38-O ;

(p) Dividends paid register in Form WIN 38P ;

(q) Suspense register in Form WIN 38Q ;

(r) Documents register in Form WIN 38R ;

(s) Books register in Form WIN 38S ;

(t) Register of unclaimed dividends and undistributed assets, deposited into the companies liquidation account in the bank, in Form WIN 38T,

and in maintaining the registers and books mentioned above, the company liquidator shall follow the instructions contained in the respective forms provided for the said books and registers.

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(2) The company liquidator shall, in addition to the registers and books referred to in sub-rule (1), maintain such other books as may be necessary for the proper and efficient working of his office such as petty cash register, correspondence register, despatch register, daily register of money orders and cheques received for accounting of transactions entered into by him in relation to the company.

(3) Where the accounts of the company are incomplete, the company liquidator shall, with all convenient speed, as soon as the order for winding up is made, have them completed and brought up-to-date.

(4)(a) Where the company liquidator is authorised to carry on the business of the company he shall keep separate books of account in respect of such business and such books shall, as far as possible, be in conformity with the books already kept by the company in the course of its business, and the company liquidator shall incorporate in the winding up cash book and in the company's cash book, the total weekly amounts of the receipts and payments on such trading account.

(b) The trading account shall, from time-to-time not less than once in every month, be verified by affidavit, and the company liquidator shall thereupon submit such account to the advisory committee (if any) or such member thereof as may be appointed by the said committee for that purpose, who shall examine and certify the same.

(5) The company liquidator shall keep proper vouchers for all payments made or expenses incurred by him, and the vouchers shall be serially numbered.

Banking account of company liquidator

81. All money to be paid into special bank account in a scheduled bank.—(1) The company liquidator shall deposit into a special bank account in his official name opened in any scheduled bank or any other bank as may be permitted by the Tribunal (hereinafter referred to as the bank), all moneys including cheques and demand drafts received by him as the company liquidator of the company, and the realisations of each day shall be deposited in the bank without deduction, not later than the next working day of the bank and the company liquidator may maintain a petty cash of five thousand rupees or such higher amount as may be permitted by the Tribunal to meet day-to-day expenses, and all payments out of the aforesaid account by the company liquidator above two thousand rupees shall be made by cheque drawn against the said account.

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(2) The company liquidator shall make quarterly reports to the Tribunal regarding the funds, including filing the bank statements of the special bank account.

82. Bills, cheques, etc., to be deposited with bank.—All bills, cheques, hundies, notes and other securities payable to the company or to the company liquidator thereof shall, as soon as they come into the hands of the company liquidator, be deposited by him with the bank for the purpose of being presented for acceptance and payment or for payment only, as the case may be and the proceeds when realised shall be credited by the bank to the special bank account.

83. Payments into bank.—Where the Tribunal makes an order directing any person to pay any money due to the company into the special bank account maintained by the company liquidator, the person so directed shall, at the time of making the payment, produce to the bank a certified copy of the order or a payment in challan endorsed by the company liquidator under his signature and the person making the payment shall give notice thereof to the company liquidator and produce before him the bank receipt relating thereto.

84. Company liquidator's dividend account.—The company liquidator shall also open a separate dividend account for the company under liquidation with the sanction of the Tribunal, in any scheduled bank, under the name "the Dividend Account of . . . . . (name of the company) in liquidation" into which account he shall, upon a declaration of dividend being made in the winding up of the company, deposit by transfer from special bank account, the total amount of the dividend payable upon such declaration and there shall be a separate such account in respect of each declaration of dividend and all payments of dividend shall be made from the said company liquidator's dividend account and any unpaid balance in the said account shall be transferred to the company liquidation dividend and undistributed assets account referred to in sub-section (1) of section 352, and all payments of dividends shall be made by cheques or through electronic clearing system drawn against the said account.

85. Where the company has no available assets.—(1) Where a company against which a winding up order has been made has no available assets, the company liquidator may, with the leave of the Tribunal, incur any necessary expenses in connection with the winding up, out of any permanent advance or other fund provided by the Central Government, and the expenses so incurred shall be recouped out of the assets of the company in priority to the debts of the company :

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Provided that where any money has been advanced to the company liquidator by the petitioner or other creditor or contributory for meeting any preliminary expenses in connection with the winding up, the company liquidator may incur any necessary expenses out of such amount, and the money so advanced shall be paid out of the assets of the company in priority to the debts of the company :

Provided further that if the official liquidator maintains any Common Pool Fund or Establishment Fund under order of the court prior to the date of the commencement of these rules, he shall continue to use such fund for the purpose for which the fund was originally created.

(2) The official liquidator shall reimburse the amount availed out of the said Common Pool Fund or Establishment Fund for the purpose of meeting the expenditure of the company in liquidation which does not have sufficient funds to its credit from the amounts of the company in liquidation on priority basis as and when any amount comes to its credit.

Investment of surplus funds

86. Investment of surplus funds.—(1) All such money for the time being standing to the credit of the company liquidator at the bank as is not immediately required for the purposes of winding up, shall be invested in Government securities or in interest bearing deposits in any scheduled bank in the name of the company in liquidation or provisional liquidation represented by company liquidator of the company to which the funds belong and such funds so invested shall be monitored regularly by the company liquidator and the returns also containing the details of fixed deposit receipts shall be submitted to the Tribunal.

(2) Where the fixed deposit has matured, it shall not be automatically renewed but the company liquidator shall carry out the due diligence to assess whether a higher rate of interest is available in any other scheduled bank and the said liquidator shall report the conclusion of such due diligence to the Tribunal, and in the event a higher rate of interest is available in any other scheduled bank, the said liquidator shall apply for the leave of the Tribunal to invest the surplus funds in such other scheduled bank offering higher rate of interest.

87. Company liquidator to examine accounts for purposes of investment.—The company liquidator shall, at the end of every month, examine account of liquidation to ascertain what moneys are available for investment, and shall make an entry at the end of every month in the record book relating to the company of his having examined the account for the purpose and of the decision taken by him regarding the investment, and in

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case he decides not to invest any surplus funds, the reasons for such decision.

88. Investments to be made by bank.—All investments shall be made by the bank upon the written request of the company liquidator but the securities shall be retained in the bank in the name and on behalf of the company liquidator, and shall not be sold except by the bank and under the written instructions of the company liquidator, and when the securities are sold, the proceeds shall be credited by the bank to the account of the company liquidator.

89. Dividend and interest to be credited.—All dividends and interest accruing from any securities or investments shall from time-to-time be received by the bank and placed to the credit of the account of the company liquidator and intimation thereof shall be given to the company liquidator, who shall thereupon credit such dividend or interest in his account to the company to which the security or the investment relating thereto belongs.

90. Refunds of taxes.—The company liquidator shall claim such refunds of income-tax or other taxes as may be due.

Filing and audit of company liquidator's account

91. Half-yearly accounts to be filed.—For the purposes of sub-section (2) of section 294, unless otherwise ordered by the Tribunal, the company liquidator shall file his accounts to Tribunal twice a year and such accounts shall be made up to 31st of March and 30th of September every year, the account for the period ending 31st March being filed not later than the 30th of June following, and account for the period ending 30th September, not later than the 31st of December following :

Provided that the final accounts of the company liquidator shall be filed as soon as the affairs of the company have been fully wound up, irrespective of the period specified above :

Provided further that the Tribunal may permit the company liquidator to straight away forward completed accounts of the company in liquidation in respect of relevant period to the auditor for the purpose of audit in Form WIN 42 requesting that the accounts may be audited, and the certificate of audit shall be submitted to the Tribunal not later than one month from the date of receipt of the copy of the accounts as required under sub-section (3) of section 294 :

Provided also that the accounts need not be got audited where the transaction during the period is for ten thousand rupees or less.

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92. Form of account.—The account shall be a statement of receipts and payments in Form WIN 39 and shall be prepared in accordance with the instructions contained in the said form and three copies thereof shall be filed, and the account shall be verified by an affidavit of the company liquidator in Form WIN 40 and the final account shall be in Form WIN 41.

93. Nil account.—Where the company liquidator has not, during the period of account, received or paid any sum of money on account of the assets of the company, he shall file an affidavit of no receipts or payments on the date on which he shall have to file his accounts for the period.

94. Registry to send copy of account to auditor.—As soon as the accounts are filed, the registry shall forward to the auditor one copy thereof for purposes of audit with a requisition in Form WIN 42 requesting that the accounts may be audited and a certificate of audit be submitted to the Tribunal not later than one month from the date of receipt of the copy of the account as required under sub-section (3) of section 294 :

Provided that the accounts need not be got audited where the total transaction during the period is for ten thousand rupees or less.

95. Audit of company liquidator's accounts.—The accounts shall be preferably audited by one or more chartered accountants appointed by the Tribunal from out of the panel to be maintained by the Tribunal, the audit shall be a complete check of the accounts of the company liquidator and the company liquidator shall produce before the auditor all his books and vouchers for the purposes of the audit, and shall give the auditor all such explanations, information and assistance as may be required of him in respect of the accounts.

96. Audit certificate to be filed.—After the audit of the accounts of the company liquidator filed in Tribunal, the auditor shall forward to the registry a certificate of audit relating to the account with his observations and comments, if any, on the account, together with a copy thereof and shall forward another copy to the company liquidator, and the company liquidator shall file copy of the audit certificate together with a copy of audited accounts with the Registrar of Companies and the registry shall file the original audit certificate with the records of the Tribunal.

97. Audit fees.—The audit fees shall be fixed by the Tribunal from time-to-time having regard to the nature and complexity of the case.

98. Inspection of account and certificate of audit.—Any creditor or contributory shall be entitled to inspect the accounts and the auditor's certificate in the office of the Tribunal on payment of fees of one hundred

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rupees and to obtain a copy thereof on payment of the charges at the rate of five rupees per page.

99. Account and auditor's report to be placed before Tribunal.—Upon the audit of the account, the registry shall place the statement of account and the auditor's certificate before the Tribunal for its consideration and orders.

PART III

Winding up by Tribunal (other than summary winding up) debts and claims against company

100. Notice for proving debts.—(1) Subject to the provisions of the Act and directions of the Tribunal, the company liquidator in a winding up by the Tribunal shall, within a period of thirty days from the date of order of winding up, fix a certain day, and give a notice of fourteen days thereof—

(i) by advertisement in Form No. WIN 43 in one issue of a daily newspaper in the English language and one issue of a daily newspaper in the regional language widely circulating in the State or Union territory where the registered office is situated concerned to the creditors of the company to prove their debts or claims and to establish any title they may have to priority under section 326 or 327, or to be excluded from the benefit of any distribution made before such debts or claims are proved, or, as the case may be, from objecting to such distribution ;

(ii) by such mode of communication as is permitted under section 20 to every person mentioned in the statement of affairs, as a creditor, who has not proved his debt and to every person mentioned in the statement of affairs as a preferential creditor, whose claim to be a preferential creditor has not been established or is not admitted, or where there is no statement of affairs, to the creditors as ascertained from the books of the company and, to each person who, to the knowledge of the company liquidator, claims to be a creditor or preferential creditor of the company and whose claim has not been admitted, to the last known address or place of residence of such person.

(2) All the rules hereinafter set out as to the admission or rejection of proofs shall apply with necessary variations to any claim to priority as a preferential creditor.

101. Proof of debt.—(1) In a winding up by the Tribunal, every creditor shall, subject as hereinafter provided, prove his debt, unless the Tribunal in any particular case directs that any creditors or class of creditors shall be admitted without proof.

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(2) Formal proof of the debts mentioned in clause (d) of sub-section (1) of section 327 shall not be required, unless the company liquidator in any special case otherwise directs.

102. Mode of proof and verification thereof.—A debt may be proved by delivering or sending to the company liquidator by such mode as set out in section 20, an affidavit verifying the debt made by the creditor or by some person authorised by him and if the affidavit is made by a person authorised by the creditor, it shall state the authority and means of knowledge of the deponent and a creditor need not attend upon the examination unless required so to do by the company liquidator.

103. Contents of proof.—An affidavit proving a debt shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantiated and the affidavit shall state whether the creditor is a secured creditor, or a preferential creditor, and if so, shall set out the particulars of the security or of the preferential claims, and the affidavit shall be in Form WIN 44.

104. Workmen's dues.—In any case where there are numerous claims for wages or any accrued remuneration by workmen and others employed by the company, it shall be sufficient if one proof in Form WIN 45 for all such claims is made either by a foreman or some other person on behalf of all such creditors and such proof shall be annexed thereto as forming part thereof, setting forth the names of the workmen and others and the amounts severally due to them in the schedule in the said form, and any proof made in compliance with this rule shall have the same effect as if separate proofs had been made by each of the said workmen and others.

105. Production of bills of exchange and promissory notes.—Where a creditor seeks to prove in respect of a bill of exchange, promissory note or other negotiable instrument or security of a like nature on which the company is liable, such bill of exchange, note, instrument or security shall be produced before the company liquidator and be marked by him before the proof is admitted.

106. Value of debts.—The value of all debts and claims against the company shall, as far as is possible, be estimated according to the value thereof at the date of the appointment of the provisional liquidator or the order of the winding up of the company, whichever is earlier :

Provided that where before the presentation of the petition for winding up, a resolution has been passed by the company for winding up, the date for estimation of debts and claims shall be the date of the passing of such resolution.

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107. Discount.—A creditor proving his debt shall deduct therefrom all trade discounts, if any.

108. Interest.—On any debt or certain sum payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the winding up order, or the resolution, as the case may be, the creditor may prove for interest at a rate not exceeding six per cent. per annum or as decided by the Tribunal up to that date from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made, giving notice that interest will be claimed from the date of demand until the time of payment.

109. Periodical payments.—When any rent or other payment falls due at the time referred to in rule 108, and the order or resolution to wind up is made at any time other than one of those times mentioned in rule 108, the persons shall be entitled to the rent or payments for a proportionate part thereof up to the date of winding up order or resolution accrued due from day-to-day :

Provided that where the company liquidator remains in occupation of the premises demised to a company which is being wound up, nothing in this rule shall prejudice or affect the right of the landlord of such premises to claim payment by the company, or the liquidator, of rent during the period of the company's or liquidator's occupation.

110. Proof of debt payable at future time.—A creditor may prove for a debt not payable at the date of the winding up order, as if it were payable presently, and may receive dividends equally with the other creditors, deducting only there at a rebate of interest at the rate of six per cent. per annum computed from the date of declaration of the dividend to the time when the debt would have become payable according to the terms on which it was contracted.

111. Examination of proof.—The company liquidator shall, as soon as possible but not later than thirty days or within such time as may be allowed by the Tribunal on an application by the liquidator, examine every proof of debt lodged with him and the grounds of the debt and he may call for the production of the documentary proof if any referred to in the affidavit of proof or require further evidence in support of the debt, and if he requires further evidence, or requires that the creditor should attend the investigation in person, he shall fix a day and time at which the creditor is required to attend or to produce further evidence and send a notice to such

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creditor in Form WIN 46 by pre-paid registered post or speed post so as to reach him not later than seven days before the date fixed.

112. Company liquidator's right to call any person in connection with investigation.—The company liquidator may call upon any person whom he may deem capable of giving information respecting the debts to be proved in liquidation and may require such person to produce any documents in his custody or power relating to such debts and shall tender with the call such sum as appears to the company liquidator sufficient to defray the travelling and other expenses of the person called for attendance and where the person so called fails without lawful excuse to attend or produce any documents in compliance with the call or avoids or evades service, the company liquidator may report the same to the Tribunal and apply for appropriate orders, and the Tribunal may pass any order as it may thinks fit.

113. Affidavit.—For the purpose of his duties, in relation to the admission of proof of debts, where applicable, the company liquidator may take affidavits and the company liquidator may at his discretion dispense with this requirement and he may also permit the taking of an affidavit or undertaking in lieu of an oath.

114. Costs of proof.—Unless otherwise ordered by the Tribunal, a creditor shall bear the costs of proving his debt.

115. Acceptance or rejection of proof to be communicated.—As soon as possible, but not later than fourteen days, from the date of conclusion of the examination referred to in rule 111, the company liquidator shall, in writing admit or reject the proof in whole or in part, every decision of the liquidator accepting or rejecting a proof, either wholly or in part, shall be communicated to the creditor concerned by means permitted under section 20 when the proof is accepted or rejected, provided that it shall not be necessary to give notice of the admission of a claim to a creditor who has appeared before the liquidator and the acceptance of whose claim has been communicated to him or his agent in writing at the time of acceptance and where the liquidator rejects a proof, wholly or in part, he shall state the grounds of the rejection to the creditor in Form WIN 47, and notice of admission of proof shall be in Form WIN 48.

116. Appeal by creditor.—(1) If a creditor is dissatisfied with the decision of the company liquidator in respect of his proof, the creditor may, not later than twenty-one days from the date of service of the notice upon him of the decision of the liquidator, appeal to the Tribunal against the decision.

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(2) The appeal shall be made in Form WIN 49, supported by an affidavit which shall set out the grounds of such appeal, and notice of the appeal shall be given to the company liquidator and on such appeal, the Tribunal shall have all the powers of an appellate court under the Code of Civil Procedure, 1908 (5 of 1908).

117. Procedure where creditor appeals.—(1) The company liquidator shall, upon receiving notice of the appeal against a decision rejecting a proof wholly or in part, file with the registry such proof with the order containing the grounds of rejection.

(2) It shall be open to any creditor or contributory to apply to the Tribunal for leave to intervene in the appeal, and the Tribunal may, if it thinks fit, grant the leave subject to such terms and conditions as may be just, and where such leave has been granted, notice of the hearing of the appeal shall be given to such creditor or contributory.

118. Company liquidator not to be personally liable for costs.—The company liquidator shall in no case be personally liable for costs in relation to an appeal from his decision rejecting any proof wholly or in part.

119. Proofs and list of creditors to be filed in Tribunal.—The company liquidator shall, within thirty days from the date fixed for the submission of proofs under rule 100 or such further time as the Tribunal may allow, file in the Tribunal a list of the creditors, in Form WIN 50, who submitted to him proofs of their claims in pursuance of the advertisement and the notice referred to in rule 100, mentioning the amounts of debt for which they claimed to be creditors, distinguishing in such list the proofs admitted wholly, the proofs admitted or rejected in part, and the proofs wholly rejected, and the proofs, with the memorandum of admission or rejection of the same in whole or in part, as the case may be, endorsed thereon, shall be filed in Tribunal along with the certificate.

120. List of creditors not to be varied.—The list of creditors filed in Tribunal shall be the list of the creditors of the company, and shall not be added to or varied except under the order of the Tribunal and in accordance with such orders and where an order is made adding to or varying the list of creditors, the company liquidator shall amend the list in accordance with such order.

121. Notice of filing list and inspection of same.—Upon the filing of the list of creditors as settled by the company liquidator, the registry shall notify the filing thereof on the Tribunal's notice board and on the website of the Tribunal, and the list of creditors as settled and the proofs relating thereto shall be open to the inspection of every creditor or contributory on payment of fee of one thousand rupees.

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122. Expunging of proof.—(1) If after the admission of a proof, the company liquidator has reason to believe that the proof has been improperly admitted or admitted by a mistake, he may immediately apply to the Tribunal upon notice to the creditor who made the proof, to expunge the proof or reduce its amount, as the case may be.

(2) Any creditor or contributory may, within ten days of the admission of the proof, also apply to the Tribunal to expunge the proof or reduce the amount thereof, if the company liquidator declines to move in the matter, and on such application, the Tribunal may pass such order as it may think just.

123. Procedure on failure to prove debt within time fixed.—If any creditor fails to file proof of his debt with the company liquidator within the time specified in the advertisement referred to in rule 100, such creditor may apply to the Tribunal for relief within fifteen days from the time specified in such advertisement, and the Tribunal may, thereupon, adjudicate upon the debt or direct the liquidator to do so.

124. Right of creditor who has not proved debt before declaration of dividend.—Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the company liquidator available for distribution of dividend, any dividend or dividends which such creditor may have failed to receive before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

125. Payment of subsequent interest.—In the event of there being a surplus after payment in full of all the claims admitted to proof, creditors whose proofs have been admitted shall be paid interest from the date of the winding up order or of the resolution, as the case may be, up to the date of the declaration of the final dividend, at a rate not exceeding six per cent. per annum or such other rate as may be decided by the Tribunal, on the admitted amount of the claim, after adjusting against the said amount the dividends declared as on the date of the declaration of each dividend.

Attendance and appearance of creditors and contributories

126. Attendance at proceedings.—(1) Save as otherwise provided by these rules or by an order of the Tribunal, every person for the time being on the list of contributories of the company and every creditor whose debt has been admitted by the company liquidator wholly or in part shall be at liberty at his own expense to attend the proceedings before the Tribunal or

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before the company liquidator and shall be entitled upon payment of the costs occasioned thereby to have notice of all such proceedings as he shall, by request in writing addressed to the company liquidator, desire to have notice of ; but if the Tribunal shall be of opinion that the attendance of any such person has occasioned any additional costs which ought not to be borne by the funds of the company, it may direct such costs or a gross sum in lieu thereof to be paid by such person and such person shall not be entitled to attend any further proceedings until he had paid the same.

(2) No contributory or creditor shall be entitled to attend any proceedings before the Tribunal, unless and until he or an authorised representative on his behalf has filed an appearance with the registry and the registry shall keep an "Appearance Book" in which all such appearances shall be entered.

127. Representation of creditors and contributories before Tribunal.—The Tribunal may, if it thinks fit, appoint from time-to-time any one or more of the creditors or contributories to represent before the Tribunal at the expense of the company, all or any class of creditors or contributories upon any question or in relation to any proceedings before the Tribunal, and may remove any person so appointed, if more than one person is appointed under this rule to represent one class, and the persons so appointed, shall employ the same authorised representative to represent them, and where they fail to agree as to the authorised representative to be employed, the Tribunal may nominate an authorised representative for them.

Collection and distribution of assets in winding up by Tribunal

128. Powers of company liquidator.—The duties imposed by sub-section (1) of section 290 with regard to the collection of the assets of the company and the application of the assets in discharge of the company's liabilities shall be discharged by the company liquidator subject to the control of the Tribunal.

129. Company liquidator to be in position of receiver.—For the discharge by the company liquidator of the duties imposed by sub-section (1) of section 290, the company liquidator shall, for the purpose of acquiring and retaining possession of the property of the company, be in the same position as if he were a receiver of the property appointed by the Tribunal, and the Tribunal may on his application enforce such acquisition or retention accordingly.

130. Company's property to be surrendered to company liquidator on requisition.—Any contributory for the time being on the list of

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contributories, trustee, receiver, banker, agent, officer or other employee of a company which is being wound up under order of the Tribunal, shall on notice from the company liquidator and within such time as he shall by notice require, pay, deliver, convey, surrender or transfer to or into the hands of the company liquidator any money, property or books and papers in his custody or under his control to which the company is or appears to be entitled and where the person so required fails to comply with the notice, the company liquidator may apply to the Tribunal for appropriate orders and the notice shall be in Form WIN 51.

Calls in winding up by Tribunal

131. Calls by company liquidator.—Subject to the provisions of sub-sections (2) of section 465, the Tribunal may by order grant leave to the company liquidator to make calls referred to in section 296.

132. Company liquidator to realise uncalled capital.—Notwithstanding any charge or encumbrance on the uncalled capital of the company, the company liquidator shall be entitled to call and realise the uncalled capital of the company and to collect the arrears, if any, due on calls made prior to the winding up, but shall hold all moneys so realised subject to the rights, if any, of the holder of any such charge or encumbrance.

133. Application for leave to make call.—(1) The company liquidator shall not make any call without obtaining the leave of the Tribunal for the purpose.

(2) Within seven days of the settlement of the list of contributories, the company liquidator may apply to the Tribunal for leave to make a call on the contributories and the application shall state the proposed amount of such call and shall be in Form WIN 52 which shall be supported by the affidavit of the company liquidator which shall be in Form WIN 53.

134. Notice of application.—(1) Notice of an application for leave to make a call shall be served on every contributory proposed to be included in such call, by post under certificate of posting so as to reach such contributory, in the ordinary course of post not less than seven clear days before the date appointed for the hearing thereof, or if the Tribunal so directs, notice of the application may be given by advertisement in Form WIN 54, in newspapers as the Tribunal may direct, not less than seven clear days before the date appointed for the hearing, without a separate notice to each contributory.

(2) The affidavit of service relating to the dispatch of notice to each contributory, or to the advertisement, as the case may be, shall be filed in the Tribunal three days before the date fixed for the hearing.

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135. Order granting leave to make call and document making call.—The order granting leave to make a call shall be in Form WIN 55, and shall contain directions as to the time within which such calls shall be paid and when an order has been made granting leave to make a call, the company liquidator shall file in Tribunal, document making the call in Form WIN 56 with such variations as circumstances may require.

136. Service of notice of call.—Immediately after filing the document making the call as referred to in rule 135, the company liquidator shall serve by registered post or speed post or in electronic mode, a copy of the order granting leave to make the call upon each of the contributories included in such call together with a notice in Form WIN 57 specifying the amount or balance due from such contributory in respect of such call and the order granting leave to make a call need not be advertised unless the Tribunal otherwise orders for any special reason.

137. Order for payment of call.—The company liquidator may apply to the Tribunal for an order against any contributory or contributories for payment of moneys due on the calls made by him and the application shall be made in Form WIN 58 supported by an affidavit in Form WIN 59 and notice of the application together with a copy of the affidavit shall be served on the contributory by registered post or speed post not less than seven days before the date fixed for the hearing of the application, and the order for payment shall be in Form WIN 60.

138. Other moneys due by contributories.—When any money is due to the company from a contributory or from the estate of the person whom he represents, other than moneys due on calls made subsequent to the winding up but including moneys due on calls made prior to the winding up the company liquidator may make an application to the Tribunal supported by an affidavit for an order against such contributory for the payment of such moneys and the notice of the application shall be given to such contributory by registered post or speed post not less than seven days prior to the date fixed for the hearing of the application.

Examination under sections 299 and 300

139. Application for examination under section 299.—(1) An application for the examination of a person under section 299 may be made ex parte, provided that where the application is made by any person other than the company liquidator, notice of the application shall be given to the company liquidator.

(2) The application referred to in sub-rule (1) shall be in Form WIN 61 and where the application is by the company liquidator, it shall be

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accompanied by a statement signed by him setting forth the facts on which the application is based, and where the application is made by a person other than the company liquidator, the application shall be supported by an affidavit of the applicant setting forth the matters in respect of which the examination is sought and the grounds, relied on in support of the application.

140. Directions at hearing of application.—Upon the hearing of the application referred to in rule 139, the Tribunal may, if satisfied that there are grounds for making the order, make an order directing the issue of summons against the person named in the order for his examination or for the production of documents or both, and unless the Tribunal otherwise directs, the examination of such person shall be held in Chambers and the order shall be in Form WIN 62.

141. Service of summons.—The summons issued in pursuance of the order of the Tribunal shall be in Form WIN 63 and shall be served, in the mode as referred to in section 20, on the person to be examined not less than seven days before the date fixed for the examination, and when the summons are served in person, there shall be paid or tendered to the person summoned along with the summons a reasonable sum for his expenses to be fixed by the Tribunal or Registry with due regard to the scale of fees in force in the Tribunal and when the summons are served by registered post, such sum shall be sent to such person by postal money order.

142. Conduct of examination.—(1) The company liquidator shall have the conduct of an examination under section 299, provided that the Tribunal may, if for any reasons it thinks fit so to do, entrust the conduct of the examination to any contributory or creditors and where the conduct of the examination is entrusted to any person other than the company liquidator, the company liquidator shall nevertheless be entitled to be present at the examination in person or by authorised representative, and may take notes of the examination for his own use and put such questions to the person examined as the Tribunal may allow.

(2) Save as provided in sub-rule (1), no person shall be entitled to take part in an examination under section 299 except the company liquidator and his authorised representative, but any person examined shall be entitled to have the assistance of his authorised representative, who may re-examine the witness :

Provided that the Tribunal may permit, if it thinks fit, any creditor or contributory to attend the examination subject to such conditions as it may impose.

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(3) Notes of the examination may be permitted to be taken by the witness or any person on his behalf on his giving an undertaking to the Tribunal that such notes shall be used only for the purpose of the re-examination of the witness and on the conclusion of the examination, the notes shall, unless otherwise directed by the Tribunal, be handed over to the Tribunal for destruction.

143. Notes of deposition.—(1) The notes of the deposition of a person examined under section 299 shall be signed by such person and shall be lodged in the office of the registry, but the notes shall not be open to the inspection of any creditor, contributory or other person, except the company liquidator, nor shall a copy thereof or extract therefrom be supplied to any person other than the company liquidator, save upon orders of the Tribunal.

(2) The Tribunal may from time-to-time give such general or special directions as it shall think expedient as to the custody and inspection of such notes and the furnishing of copies thereof or extracts therefrom.

144. Order for examination under section 300.—(1) Where an order is made for the examination of any person or persons under section 300, the examination shall be held before the Tribunal :

Provided that the Tribunal may direct that the whole or any part of the examination of any such person or persons be held before any person or authority as may be mentioned in the order and where the date of the examination has not been fixed by the order, the company liquidator shall take an appointment from the Tribunal, or the person or authority before whom the examination is to be held as to the date of the examination, and the order directing examination shall be in Form WIN 64.

(2) The Tribunal may, if it thinks fit, either in the order for examination or by any subsequent order, give directions as to the specific matters on which such person is to be examined.

145. Notice of examination.—Not less than seven clear days before the date fixed for the examination, the company liquidator shall give notice thereof to the creditors and contributories of the company by advertisement in Form WIN 65 in such newspapers as the Tribunal shall direct, and shall within the same period, serve, either personally or by registered post or by speed post, on the person or persons to be examined, a notice in Form WIN 66 of the date and hour fixed for the examination and the officer before whom it is to be held, together with a copy of the order directing the examination and where the examination is adjourned, it shall not be necessary to advertise the adjournment or serve notice thereof unless otherwise ordered by the Tribunal.

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146. Adjournment of examination for orders of Tribunal.—Where on an examination held before the person or authority appointed by the Tribunal, such person or authority is of the opinion that the examination is being unduly or unnecessarily protracted or, for any other sufficient cause, he is of the opinion that the examination should be held before the Tribunal, such person or authority may adjourn the examination of any person, or any part of the examination, to be held before the Tribunal and submit his report to the Tribunal, and the Tribunal may thereupon hold the examination itself or pass such orders as it may thinks fit.

147. Procedure for contumacy.—(1) If a person examined before the person or authority appointed by the Tribunal refuses to answer to the satisfaction of such the person or authority any question which he may put or allow to be put, such the person or authority shall forthwith report such refusal to the Tribunal and upon such report being made, the person in default shall be in the same position and be dealt with in the same manner as if he had made default in answering before the Tribunal.

(2) The report shall be in writing and shall set forth the question or questions put and the answer or answers given, if any, by the person examined, and the person or authority shall notify the person examined of the date when he should attend before the Tribunal, and the report shall be in Form WIN 67 and upon receiving the report, the Tribunal may take such action thereon as it may thinks fit.

148. Notes of examination.—The notes of every examination shall, after being signed as required by sub-section (7) of section 300, form part of the records of winding up and the company liquidator, the person examined or contributory of the company, shall be entitled to obtain a copy thereof from the Tribunal on payment of five rupees per page.

149. Application under sub-section (5) of section 300.—An application under sub-section (5) of section 300 by any person ordered to be examined to be exculpated from any charges made or suggested against him, shall be made upon notice to the company liquidator and to such other persons as the Tribunal may direct.

150. Warrant of arrest of contributory.—(1) If the Tribunal is satisfied as referred to in section 301 and that notice of the date and hour fixed for the examination was duly served on such contributory, the Tribunal may, issue without any further notice, a warrant in Form WIN 68 for the arrest of the said contributory.

(2) Every warrant of arrest of the contributory issued under this rule shall remain in force until it is cancelled by the Tribunal which issued it or

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by the Appellate Tribunal to which appeals ordinarily lie from the decisions of such Tribunal, or until it is executed.

151. Prison to which contributory arrested on warrant is to be taken.—Where the Tribunal issues a warrant for the arrest of the contributory as referred to in section 301, the prison in which such contributory shall be detained, shall, unless the Tribunal otherwise orders, be specified in the order of the Tribunal in the exercise of its powers under the Act, and the warrant for keeping the said contributory in prison shall be in Form WIN 69 and the order of releasing him on bail shall be in Form WIN 70.

152. Execution of warrant of arrest outside jurisdiction of Tribunal.—(1) Where a warrant has been issued by the Tribunal under these rules for the arrest of a contributory who is or is believed to be outside the jurisdiction of the Tribunal, the Tribunal issuing the warrant may send the warrant of arrest for execution to the District Court or, to the Court of Small Causes at Bombay, Calcutta or Madras (if the warrant has to be executed in any of these places) within the ordinary jurisdiction of which such contributory shall then be or be believed to be, with a requisition in Form WIN 71 annexed thereto under the seal of the Tribunal requesting execution of the warrant by the Court to which it is sent and the last mentioned Court shall seal the warrant with its seal and shall cause the arrest to be made by its own officers or by a Court subordinate to it and the concerned police officers shall aid and assist within their respective jurisdiction in the execution of such warrant.

(2) The court making the arrest shall send the contributory arrested in proper custody to the Tribunal by which the warrant of arrest was originally issued, unless he furnishes the required security to the satisfaction of the court for his appearance before the Tribunal, in which case the court shall release him on such security and inform the Tribunal by which the warrant of arrest was originally issued.

Application against delinquent directors, promoters and officers of the company

153. Application under section 339 or section 340.—An application under sub-section (1) of section 339 or under sub-section (1) of section 340, shall be made by a summons returnable in the first instance in chambers and the summons shall state the nature of the declaration or order for which the application is made, and the grounds of the application, and shall be served on every person against whom an order is sought not less than seven days before the day named in the summons for the hearing of the application, and it shall not be necessary to file any affidavit or report

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before the return of the summons and the summons shall be in Form WIN 72 or Form WIN 73 with such variations as may be necessary.

154. Directions at preliminary hearing of summons.—On the return of the summons, the Tribunal may give such directions as it shall thinks fit as to whether points of claim and defence are to be delivered, as to the taking of evidence wholly or in part by affidavit or orally, as to the cross-examination, on the hearing, before the Tribunal or of any deponents to affidavits in support of or in opposition to the application, as to any report, the Tribunal may require the liquidator to make, and generally as to the procedure on the summons and for the hearing thereof, and points of claim to be delivered shall be in Form WIN 74 or Form WIN 75 with such variations as may be necessary.

155. Liberty to apply for further directions.—Where the Tribunal has directed that points of claim and defense shall be delivered, it shall be open to either party who wishes to apply for any further direction as to any interlocutory matter, to apply, by restoration of the summons, before the summons has been set down for trial, for such direction, upon giving two clear days' notice in writing to the other party stating the grounds of the application and a copy of the notice shall be filed with the registry, two clear days' before the day fixed for the hearing of the application.

Disclaimer

156. Application for disclaimer.—(1) An application for leave to disclaim any part of the property of a company pursuant to sub-section (1) of section 333 shall be made by an application supported by an affidavit setting out the full facts relating to the property, the parties interested, the nature of their interests, and stating whether the company is solvent and whether any notice has been served on the liquidator by any person referred to in sub-section (4) of the said section requiring him to elect whether or not he will disclaim.

(2) The notice and application referred to in sub-rule (1) shall be in Forms WIN 76 to 82 with such variations as may be necessary.

157. Preliminary hearing of application.—The application referred to in rule 156 shall be posted before the Tribunal ex parte in the first instance for directions as to the persons on whom notice of the application should be served, and the Tribunal shall thereupon fix a date for the hearing of the application and give such directions as may be necessary as to the persons on whom notice of the application should be served.

158. Claimant to furnish statement of his interest.—Where a person claims to be interested in any part of the property of the company which

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the company liquidator wishes to disclaim, such person shall, if so required by the liquidator, furnish a statement of the interest claimed by him.

159. Service of notice.—Notice of the date fixed for the hearing of the application referred to in rule 156 shall be in Form WIN 83 and shall be served not less than seven days before the date fixed for the hearing, together with a copy of the application and of the affidavit filed in support thereof, and the notice shall require that any affidavit-in-opposition to the application shall be filed in Tribunal and a copy thereof served on the company liquidator not later than two days before the date fixed for the hearing.

160. Order granting leave to disclaim.—On the hearing of the application referred to in rule 156, the Tribunal may after hearing the company liquidator and such parties as may appear in response to the notices issued, and such other persons appearing and interested as the Tribunal may thinks fit to hear, grant leave to the liquidator and to disclaim on such terms and conditions if any, as to the Tribunal may deem just and the order granting leave to disclaim shall be in Form WIN 84.

161. Disclaimer to be filed in Tribunal.—Every disclaimer shall be filed in Tribunal by the company liquidator and shall not be operative until it is so filed and where the disclaimer is in respect of a leasehold interest, it shall be filed in Tribunal forthwith ; the notice of the filing of the disclaimer shall be given to the persons interested in the property ; the disclaimer shall contain particulars of the interest disclaimed and a statement of the persons to whom notice of the disclaimer has been given ; a disclaimer shall be in Form WIN 85, and a notice of disclaimer in Form WIN 86, and where a disclaimer has been filed in Tribunal, the company liquidator shall file a copy thereof with the Registrar of Companies.

162. Vesting of disclaimed property.—(1) Where the disclaimed property is a leasehold interest and an application is made under sub-section (6) of section 333 for an order vesting the property in any person and it appears that there is an under lessee or mortgagee or holder of a charge by way of demise in respect of such property, claiming under the company, the Tribunal may direct that notice shall be given to such under lessee, mortgagee or holder of charge, that if he does not elect to accept and apply for a vesting order upon the terms required by the abovementioned sub-section and such other terms as the Tribunal may think just, within a time to be fixed by the Tribunal and stated in the notice, he will be excluded from all interest in and security upon the property and the Tribunal may adjourn the application for such notice to be given and for such under-lessee, mortgagee or holder of charge, to be added as a party to and served

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with a copy of the application, and to make, if he deem fit, such election and application as is mentioned in the notice, and if at the expiration of the time so fixed by the Tribunal, such under-lessee, mortgagee or holder of charge, fails to make such election and application, the Tribunal, may make an order vesting the property in the applicant or other person who, in the opinion of the Tribunal, may be entitled thereto, and excluding such under-lessee, mortgagee or holder of charge, from all interest in or security upon the property.

(2) An order requiring parties interested in a disclaimed lease to apply for a vesting order or to be excluded from all interest in the lease shall be in Form WIN 87, and an order vesting lease and excluding persons who have not elected to apply, shall be in Form WIN 88.

Compromise or abandonment of claims

163. No claim to be compromised or abandoned without sanction of Tribunal.—In a winding up by the Tribunal, no claim by the company against any person shall be compromised or abandoned by the company liquidator without the sanction of the Tribunal upon notice to such person as the Tribunal may direct.

164. Application for sanction of compromise.—Every application for sanction of a compromise or arrangement referred to in clauses (ii) and (iii) of sub-section (1) of section 343 shall be accompanied by a copy of the proposed compromise or arrangement and shall be supported by an affidavit of the company liquidator, along with final report of the advisory committee, stating that for the reasons set out in the affidavit he is satisfied that the proposed compromise or arrangement is beneficial to the company.

Sale by company liquidator

165. Sale to be subject to sanction and to confirmation by Tribunal.—Unless the Tribunal otherwise orders, no property or asset belonging to company which is being wound up by the Tribunal shall be sold by the company liquidator without the previous sanction of the Tribunal, and every sale shall be subject to confirmation by the Tribunal.

166. Procedure at sale.—Every sale shall be held by the company liquidator, or, if the Tribunal shall so direct, by an agent or an auctioneer approved by the Tribunal, and subject to such terms and conditions, if any, as may be approved by the Tribunal and all sales shall be made by public auction or by inviting sealed tenders or by electronic bidding or in such manners as the Tribunal may direct.

167. Expenses of sale.—Where property forming part of a company's assets is sold by the company liquidator through an auctioneer or other

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agent, the gross proceeds of the sale shall, unless, the Tribunal otherwise orders, be paid over to the liquidator by such auctioneer or agent and the charges and expenses connected with the sale shall afterwards be paid to such auctioneer or agent in accordance with the scales, if any, fixed by the Tribunal.

Dividends and returns of capital in winding up by Tribunal

168. Declaration of dividend or return of capital.—No dividend to creditors or return of capital to contributories shall be declared by the company liquidator without the sanction of the Tribunal.

169. Notice of declaration.—The company liquidator shall give notice of the declaration of dividend not less than fifteen days prior to the date fixed for the payment thereof and unless otherwise directed by the Tribunal, such notice shall be given by advertisement in such newspapers as the Tribunal shall direct and by sending by registered or speed post and electronic mode if any, a notice to every person whose name appears in the list of creditors as on such date and the advertisement shall be in Form WIN 89 and the notice to creditor in Form WIN 90.

170. Form of authority to pay dividend.—A person to whom dividend is payable may lodge with the company liquidator an authority in writing to pay such dividend to another person named therein and such authority shall be in Form WIN 91.

171. Transmission of dividends, etc., by post.—Dividends and returns of capital may, at the request and risk and cost of the person to whom they are payable, be transmitted to him by money order, or to his bank account through electronic means as may be appropriate.

172. Form of order directing return of capital.—Every order by which the company liquidator is authorised to make a return to contributories of the company, shall, unless the Tribunal otherwise directs, contain or have appended thereto a schedule or list (which the company liquidator shall prepare) setting out in a tabular form the full names and addresses of the persons to whom the return is to be paid, and the amount of money payable to each person, and particulars of the transfers of shares (if any) which have been made or the variations in the list of contributories which have arisen since the date of the settlement of the list and such other information as may be necessary to enable the return to be made and the schedule or list shall be in Form WIN 92 with such variations as circumstances shall require and the company liquidator shall send a notice of return to each contributory by registered or speed post and electronic mode if any in Form WIN 93.

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173. Payment of dividend or return of capital due to deceased creditor or contributory.—Where a claim made in respect of a dividend due to a deceased creditor or a return of capital due to a deceased contributory is one lakh rupees or less, the company liquidator may, upon satisfying himself as to the claimant's right and title to receive the dividend or the return, as the case may be, apply to the Tribunal for sanctioning the payment of such dividend or return to the claimant without the production of a succession certificate or like authority, however, in respect of the claim mentioned above, pertaining to a deceased creditor or contributory where the claim amount is one lakh rupees or less, in lieu of succession certificate, the claimant shall produce Family Member Certificate issued by competent authority in the State Government or Union territory, as the case may be, and where the Tribunal sanctions the payment, the company liquidator shall make the payment upon obtaining a personal indemnity as well as an affidavit duly stamped from the payee.

Termination of winding up

174. Company liquidator to apply for dissolution.—After the affairs of the company have been fully wound up and final accounts thereof are audited, the company liquidator shall apply to the Tribunal within ten days along with audited final accounts and auditors certificate thereon for orders as to the dissolution of the company.

175. Dissolution of company.—Upon the hearing of the application, the Tribunal may, after hearing the company liquidator and any other person to whom notice may have been ordered by the Tribunal, upon perusing the account as audited, make such orders as it may thinks fit as to the dissolution of the company, the application, subject to the provisions of the Act, of the balance in the hands of the company liquidator or the payment thereof into the company liquidation dividend and undistributed assets account, and the disposal of the books and papers of the company and of the liquidator.

176. Liquidator to pay the balance into company liquidation dividend and undistributed assets account.—Upon an order for dissolution being made, the company liquidator shall forthwith pay into the company liquidation dividend and undistributed assets account any unclaimed dividends payable to creditors or undistributed assets refundable to contributories in his hands on the date of the order of dissolution, and such other balance in his hands as he has been directed by the Tribunal to deposit into the company liquidation dividend and undistributed assets account and every order of dissolution shall direct that the company liquidator shall forward a certified copy of the order to the Registrar of Companies not later

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than seven days from the date of the order, and along with the copy of the order shall be filed with the Registrar of Companies, a statement signed by the company liquidator that the directions of the Tribunal regarding the application of the balance as per his final account have been duly complied with.

177. Conclusion of winding up.—The winding up of a company shall, for purposes of section 302, be deemed to be concluded at the date on which the order dissolving the company has been reported by the company liquidator to the Registrar of Companies unless any fund or assets of the company remaining unclaimed or undistributed in the hands or under the control of the company liquidator, have been distributed, or paid into the company liquidation dividend and undistributed assets account as provided in section 352.

178. Application to declare dissolution void.—An application under section 356 shall be made upon notice to the Central Government and the Registrar of Companies and where the Tribunal declares the dissolution to have been void, the order shall direct that the applicant shall file a certified copy of the order with the Registrar of Companies not later than twenty-one days from the date of the order.

Payment of unclaimed dividends or undistributed assets into the company liquidation dividend and undistributed assets account in a winding up

179. Statement to accompany payment.—(1) The statement to be furnished, under sub-section (3) of section 352 to the Registrar of Companies, by the liquidator when making any payment of unclaimed dividends or undistributed assets into the company liquidation dividend and undistributed assets account in a scheduled bank under sub-sections (1) and (2) of the said section, shall be in Form WIN 94.

(2) The liquidator shall, whenever called upon by the Registrar of Companies so to do, certify whether a person claiming payment from the company liquidation dividend and undistributed assets account under sub-section (7) of section 352 is or is not entitled to the whole or any part of the amount claimed.

180. Unclaimed dividends or undistributed assets under investment.—For purposes of payment of unclaimed dividends and undistributed assets into the company liquidation dividend and undistributed assets account, money invested or deposited at interest by the liquidator shall be deemed to be money in his hand, and when such money forms part of the unclaimed dividends or undistributed assets of the company, the liquidator shall realise the investment or withdraw the deposit and shall pay the

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proceeds into the company liquidation dividend and undistributed assets account.

181. Application by person for payment of money paid into the company liquidation dividend and undistributed assets account.—An application under sub-section (6) of section 352 by any person claiming to be entitled to any money paid into the company liquidation dividend and undistributed assets account for payment of such money shall state whether the applicant had made an application to the Central Government for the payment, and, if so, the result of the application.

182. Cost and expenses payable out of the assets in a winding up by Tribunal.—(1) The assets of a company in a winding up by the Tribunal remaining after payment of the fees and expenses properly incurred in preserving, realising or getting in the assets shall, subject to any order of the Tribunal and to the rights of secured creditors if any, be liable to the following payments which shall be made in the following order of priority, namely :—

First—the taxed costs of the petition including the taxed costs of any person appearing on the petition, whose costs are allowed by the Tribunal ;

Next—the costs and expenses of any person who makes, or concurs in making, the company's statement of affairs ;

Next—the necessary disbursements of the company liquidator other than expenses properly incurred in preserving, realising or getting in the properties of the company ;

Next—the cost of any person properly employed by the company liquidators ;

Next—the cost, charges and expenses incurred by the liquidator ;

Next—the actual out of pocket expenses necessarily incurred by the members of the advisory committee, and sanctioned by the Tribunal.

(2) Save as otherwise ordered by the Tribunal, no payments in respect of bills of authorised representatives, shall be allowed out of the assets of the company without proof that the same have been considered and allowed by the taxing officer of the Tribunal and the taxing officer shall before passing the bills or charges of an authorised representative, satisfy himself that the appointment of an authorised representative to assist the liquidator in the performance of his duties has been duly sanctioned.

(3) Nothing contained in this rule shall apply to or affect costs which, in the course of legal proceedings by or against the company which is being wound up by the Tribunal, are ordered by the Tribunal in which such

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proceedings are pending, to be paid by the company or the liquidator, or the rights of the person to whom such costs are payable.

PART IV

Costs, etc.

183. Costs in the discretion of Tribunal.—Costs shall be in the discretion of the Tribunal and no costs of, or incidental to, a proceeding shall be allowed between party and party, unless the same are expressly awarded by an order of the Tribunal.

184. Bill of costs by authorised representative, etc., employed by company liquidator.—Every authorised representative, accountant, auctioneer or other person employed by the company liquidator in a winding up by the Tribunal, shall, on request by the company liquidator (to be made in sufficient time before the declaration of a dividend) deliver his bill of costs or charges to the company liquidator, and if he fails to do so within four weeks of the receipt of the request or such extended time as the Tribunal may allow, the company liquidator shall declare and distribute the dividend without regard to such person's claim and the claim shall be forfeited :

Provided that the Tribunal may, at any time before the declaration of the final dividend, for good cause shown, restore the claim and order the bill to be received without prejudice to the distribution of dividends declared prior to the making of the order, and the request by the company liquidator shall be in Form WIN 95 and shall be served personally or by registered post or speed post.

185. Fees in misfeasance proceeding.—In a proceeding against the persons referred to in section 339 or 340, the fees to authorised representatives shall be allowed as decided by the Tribunal having regard to the nature and complexity of the case.

186. Fees when proceeding is compromised.—Where a proceeding is compromised prior to its being set down for hearing, the fees to be allowed to authorised representatives of the parties shall be as decided by the Tribunal having regard to the nature and complexity of the case.

187. Costs of parties having common interest.—(1) Where two or more petitions or applications raise a common issue and are heard together and decided by a common judgment, unless the Tribunal otherwise orders, only one set of costs shall be allowed to all the parties together in the said petitions or applications who have a common interest.

(2) Where different parties in the same proceeding have a common interest, only one set of fees shall be allowed to all of them together,

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COMPANY CASES

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CASE LAW ANALYSIS—VOLUME 219

DR. K. R. CHANDRATRE[1]

National Company Law Tribunal's power to pass interim orders

Under section 242(4) of the Companies Act, 2013, the National Company Law Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable.

This provision is analogous to section 403 of the Companies Act, 1956 which provided that :

> "403. *Interim order by* [2]*[Tribunal]*.—Pending the making by it of a final order under section 397 or 398, as the case may be, the [3][Tribunal] may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs, upon such terms and conditions as appear to it to be just and equitable[4]."

The Company Law Board may, it was held, while making of a final order under section 397 or 398 is pending, make any interim order which it thinks fit for regulating the conduct of the company's affairs, upon such terms and conditions as appear to it to be just and equitable. But such order shall be passed only on the application of any party to the

1. Practising Company Secretary, Past President, the Institute of Company Secretaries of India.
2. Substituted for "Company Law Board" by the Companies (Second Amendment) Act, 2002.
3. Ibid.
4. Fees prescribed is Rs. 5,000 with effect from April 1, 2000. On notification of the commencement of the amendment, power will be transferred to the National Company Law Tribunal.

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proceeding[1]. It is clear that the Company Law Board has during the pendency of a petition under sections 397 and 398 wide and ample powers to make any interim order which it thinks fit for regulating the conduct of the company's affairs on such terms and conditions as appears to the Company Law Board as just and equitable. Section 403 does not fetter the rights of any aggrieved party to make an application in the course of the pendency of a petition under sections 397 and 398, whenever necessitated by a change in the circumstances for appropriate interim order(s) in order to regulate the conduct of the company's affairs. At any time during the pendency of a petition, any interim order passed may suitably be modified, in the event of any change in the circumstances, requiring such modification or if the Company Law Board is satisfied of the circumstances requiring modification on the lines of the principles enunciated on Order 39, rule 4 of the Civil Procedure Code, which can be applied to the proceedings before the Company Law Board (*BPL Communications Ltd.* v. *T. P. G. Nambiar* [2006] 132 Comp Cas 13 (CLB)).

In *Mukesh Mehta* v. *Silver Land Developers P. Ltd.* [2020] 219 Comp Cas 1 (NCLAT), the National Company Law Appellate Tribunal has held that under section 242(4) of the Companies Act, 2013, the Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable.

Where the Tribunal directed the parties to maintain status quo for a period of 14 days, in the meanwhile, giving the respondent liberty to proceed to exercise his rights as secured creditor after the next date of hearing and that if the sale taken up by respondent No. 5 was found to be in collusion with the directors of the company against whom the allegations of oppression and mismanagement were levelled, the sale would become the subject-matter of final decision and was bound to be set aside in case it was found that it was done in collusion with the company. On appeal, the National Company Law Appellate Tribunal held that while passing the order, it was not necessary for the Tribunal to give a finding whether or not under the agreement of mortgage, respondent No. 5 could sell the mortgaged property. Such finding could be given only after examining the allegations and counter allegations of oppression and mismanagement levelled against respondents Nos. 2 to 4. The order was not in any manner detrimental to the company or to the appellants' interest. The Tribunal had vast power to pass interim orders for regulating the conduct of the

1. Section 403.

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company's affairs. The order was just and equitable. Therefore, there was no ground to interfere with the order.

Conversion of a public company into a private company

Section 14 of the Companies Act, 2013 facilitates conversion of a public company into a private company. This requires approval of members of the company by special resolution. The words "including alterations having the effect of conversion" in section 14(1) refer to the insertion in the articles of the company the conditions which are required to be included in the articles of every private company pursuant to section 2(68) of the Act. When these conditions are inserted by altering the articles by a special resolution, such alteration has the effect of converting the company into a private company.

According to the second proviso to section 14(1), as substituted by the Companies (Amendment) Act, 2019, with retrospective effect from November 2, 2018 any alteration having the effect of conversion of a public company into a private company shall not be valid unless it is approved by an order of the Central Government[1] on an application[2] made in such form and manner as may be prescribed.

In *Medeor Hospitals Ltd.* v. *Registrar of Companies, Delhi* [2020] 219 Comp Cas 7 (NCLAT), the Tribunal had rejected the application of the appellant, a public limited company, for conversion to a private limited company, holding that the petition was delayed having been filed after three months from the date of passing of the special resolution, that in the notice for extraordinary general meeting no reasons had been assigned for giving shorter notice and that board resolution of the holding company had not been filed. The Tribunal noted that on October 17, 2016 the statutory auditor had resigned and on the same date a new auditor was appointed and the new auditor had signed the balance-sheet on the same date, and took the view that this raised a doubt how in one day new auditor could conduct the audit. The Tribunal further held that the two independent directors had resigned after the passing of the resolution for conversion, and this fact was not mentioned in the petition. It found that the claims of two objectors were pending before the arbitral tribunal and held that during such pendency it would not be appropriate to permit conversion of the company from public to private limited.

1. Powers delegated to Regional Directors with effect from December 18, 2018 vide Notification No. S. O. 6225(E), dated December 18, 2018—See [2019] 214 Comp Cas (St.) 1.
2. Refer rule 41, Form No. INC-25A, Form No. RD-1 and Form GNL-5, the Companies (Incorporation) Rules, 2014.

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However, on appeal, allowing the appeal, the National Company Law Appellate Tribunal held that the company had passed the resolution on August 14, 2017. The first petition was filed on October 30, 2017 which was premature. Therefore, it was withdrawn on December 6, 2017 and second petition was filed on December 19, 2017, i. e., after three months from the date of passing of special resolution. Thus, the petition was well within limitation. That there was no illegality or irregularity in passing the resolution dated August 14, 2017 with the written consent of the shareholders for shorter notice. Since, the company had fulfilled the conditions for conversion and the shortcomings pointed out by the Tribunal were inconsequential. Therefore, the order of the Tribunal was to be set aside and the special resolution dated August 14, 2017 for conversion of the company from a public company to a private company was to be approved.

Rectification of name of a company

Under section 16 of the Companies Act, 2013

A company must change its name if it is directed by the Central Government (Powers delegated to Regional Directors) to do so in the following situations :

(a) in the opinion of the Central Government (Powers delegated to the Regional Directors), the name is identical with or too nearly resembles the name of any company previously registered, whether under this Act or any previous company law. The company must change its name within three months from the issue of such direction, with the approval of the members by an ordinary resolution ;

(b) a registered proprietor of a trade mark applies to the Central Government within three years of incorporation or registration or change of name of the company, stating that the name of that other company is identical with or too nearly resembles a registered trade mark of the applicant, whether under this Act or any previous company law, and the Central Government (Powers delegated to the Regional Directors) is of the same opinion. The company must change its name within 6 months from the issue of such direction, with the approval of the members by an ordinary resolution.

This provision corresponds to section 22 of the Companies Act, 1956. In *Congruent Info-tech P. Ltd.* v. *Regional Director* [2020] 219 Comp Cas 303 (Mad), the Madras High Court held that, the Regional Director, Ministry of Company Affairs, while exercising his jurisdiction under section 22 of the Companies Act, 1956, is expected to confine himself within the scope of

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section 22 of the Act. He shall satisfy himself that the name in which the subsequent company was registered through inadvertence or otherwise is undesirable. Merely because the name of the company subsequently registered is identical with that of the existing company, he cannot direct the subsequent company to change its name. The identity of the name between the two companies cannot be the sole criterion to effect the change of name of a company.

The Regional Director should not go into factors which were not relevant for exercising his jurisdiction under section 22 of the Act. He had passed the order mainly on the ground that the first name of the petitioner-company as well as the second respondent-company were identical and the third respondent registered the name without considering the promotions of the existing company inadvertently when the second respondent-company was already engaged in the very same field since 1986 and acquired a brand value for the name and the petitioner had failed to establish that it had exclusive right to use the key word as part of its name. Such a finding was totally unwarranted and also beyond the scope of section 22 of the Act. He had taken into consideration irrelevant facts and failed to consider the relevant factors which were germane for consideration while exercising his jurisdiction under section 22 of the Act. The order was to be set aside and was to be remitted to the Regional Director for reconsideration and pass orders afresh by considering relevant facts.

Investigation by Serious Fraud Investigation Office—Copy of arrest order containing grounds of arrest must be served to the accused

Under section 212 of the Companies Act 2013, where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company by the Serious Fraud Investigation Office—

(a) on receipt of a report of the Registrar or inspector under section 208 ;

(b) on intimation of a special resolution passed by a company that its affairs are required to be investigated ;

(c) in the public interest ; or

(d) on request from any Department of the Central Government or a State Government,

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the Central Government may, by order, assign the investigation into the affairs of the said company to the Serious Fraud Investigation Office and its Director, may designate such number of inspectors, as he may consider necessary for the purpose of such investigation.

Under sub-section (8) of section 212, if the Director, Additional Director or Assistant Director of Serious Frauds Investigation Office authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of any offence punishable under sections referred to in sub-section (6), he may arrest[1] such person and shall, as soon as may be, inform him of the grounds for such arrest.

Thus, informing the person to be arrested is mandatory. In *Neeraj Singal* v. *Union of India* [2020] 219 Comp Cas 322 (Delhi), the Delhi High Court has held that the grounds of arrest, even according to the Serious Fraud Investigation Office, were only "explained" to the petitioner. Nowhere was it noted that he was attempted to be served with the grounds of arrest and he refused to receive the grounds. It was only said that he refused to sign the arrest memo in acknowledgment of his having been "explained" the grounds of arrest. Although section 212(8) stated that he should be "informed" of the grounds of arrest, rule 4 of the Serious Fraud Investigation Office Rules, 2017, read with the arrest form appended thereto mandated serving upon the petitioner the copy of the arrest order containing the grounds of arrest in column 15. Even till the filing of the petition or even thereafter the arrest order was not served on the petitioner. The proposal placed before the Director of the Serious Fraud Investigation Office was for the arrest of the petitioner and one other person in exercise of the powers under section 212(8) of the Act.

Oppression and mismanagement—Increase in capital by issuance of shares to a few shareholders without proof of offer to other shareholders and failure to comply with procedures amounts to oppressive conduct

It is common to vest the power of issue of share capital in the Board by an express provision in the articles of association. Under the Companies Act, for issue of shares on rights basis by private company, there is no requirement that the board of directors should obtain approval of the

1. Refer the Companies (Arrests in connection with Investigation by Serious Fraud Investigation Office) Rules, 2017.

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company at a general meeting to issue shares in the company. It is only in the case of a rights issue in a private company in a non-pro rata manner or issue of shares on a non-rights basis that the Board requires the company's sanction by a special resolution at a general meeting. Thus, as a general rule, the Board is authorised to issue shares of the company.

The courts have dealt in several cases, with the nature and scope of the Board's power to issue shares and laid down certain principles in this regard, the most important of which is that the power to issue shares is a fiduciary power that the Board must exercise in a bona fide manner, for a proper purpose and in the interest of the company and without any ulterior motive.

The director's power to issue shares is a fiduciary one, not to be exercised for an improper purpose, and it is generally speaking improper for the directors to use their fiduciary powers over the shares in the company purely for the purpose of destroying an existing majority or creating a new majority, which did not previously exist[1].

If the real motive for the issue of shares is to alter the balance of voting power in the company, it would be an improper exercise of this power. An abuse of this power is an infringement of a member's contractual rights under the articles[2].

As to the nature and scope of the directors' power of issue of shares, on a review of the case law on the subject, the Supreme Court[3] has laid down the following principles :

(a) The directors of a company are in a fiduciary position vis-a-vis the company and must exercise their power to issue further shares for the benefit of the company.

(b) If the power is exercised by the directors not for the benefit of the company but simply and solely for their personal aggrandizement to the detriment of the company, the court will interfere and prevent the directors from doing so.

(c) The fact that by the issue of shares the directors succeed, also or incidentally, in maintaining their control over the company or in newly acquiring it, does not amount to an abuse of their fiduciary power.

1. *Howard Smith Ltd.* v. *Ampol Petroleum Ltd.* [1974] AC 821 (PC).
2. *A Company, In re* [1987] BCLC 82 (Ch D).
3. *Needle Industries (India) Ltd.* v. *Needle Industries Newey (India) Holding Ltd.* [1981] 51 Comp Cas 743 (SC).

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(d) What is considered objectionable is the use of such powers merely for an extraneous purpose like the maintenance or acquisition of control over the affairs of the company, and where the directors seek, by entering into an agreement to issue new shares, to prevent a majority shareholders from exercising control of the company, they will not be held to have failed in their fiduciary duty to the company if they act in good faith in what they believe, on reasonable grounds, to be in the interests of the company.

(e) An inquiry as to whether additional capital was presently required is often most relevant to the ultimate question upon which the validity or the invalidity of the issue depends ; but that ultimate question must always be whether in truth the issue was made honestly in the interests of the company.

(f) It would be too narrow an approach to say that the only valid purpose for which shares may be issued is to raise capital for the company.

(g) To define in advance the exact limits, beyond which directors must not pass, is, impossible, since the variety of situations facing the directors of different types of companies in different situations cannot be anticipated.

(h) If the true effect of the whole evidence is, that the directors truly and reasonably believed at the time that what they did was for the interests of the company, they are not chargeable with dolus malus[1] or breach of trust merely because in promoting the interests of the company they were also promoting their own.

(i) The mere circumstance that the directors derive benefit as shareholders by reason of the exercise of their fiduciary power to issue shares, will not vitiate the exercise of that power. If the shares are issued in the larger interests of the company, the decision to issue the shares cannot be struck down on the ground that it incidentally benefited the directors in their capacity as shareholders.

In *Dale and Carrington Invt. P. Ltd.* v. *P. K. Prathapan* [2004] 122 Comp Cas 161 (SC), the Supreme Court summarised the principles of the directors' fiduciary duty concerning issue of shares thus :

1. Fraud or deceit, especially involving or evidencing evil intent, intentional damage.

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"A company is a juristic person and it acts through its directors who are collectively referred to as the board of directors. An individual director has no power to act on behalf of a company of which he is a director unless by some resolution of the board of directors of the company specific power is given to him/her. Whatever decisions are taken regarding running the affairs of the company, they are taken by the board of directors. The directors of companies have been variously described as agents, trustees or representatives, but one thing is certain that the directors act on behalf of a company in a fiduciary capacity and their acts and deeds have to be exercised for the benefit of the company. They are agents of the company to the extent they have been authorized to perform certain acts on behalf of the company. In a limited sense they are also trustees for the shareholders of the company. To the extent the powers of the directors are delineated in the memorandum and articles of association of the company, the directors are bound to act accordingly. As agents of the company they must act within the scope of their authority and must disclose that they are acting on behalf of the company. The fiduciary capacity within which the directors have to act enjoins upon them a duty to act on behalf of a company with utmost good faith, utmost care and skill and due diligence and in the interest of the company they represent. They have a duty to make full and honest disclosure to the shareholders regarding all important matters relating to the company. It follows that in the matter of issue of additional shares, the directors owe a fiduciary duty to issue shares for a proper purpose. This duty is owed by them to the shareholders of the company. Therefore, even though section 81 of the Companies Act, 1956 (corresponding to section 62 of Companies Act, 2013) which contains certain requirements in the matter of issue of further share capital by a company does not apply to private limited companies, the directors in a private limited company are expected to make a disclosure to the shareholders of such a company when further shares are being issued. This requirement flows from their duty to act in good faith and make full disclosure to the shareholders regarding affairs of a company. The acts of directors in a private limited company are required to be tested on a much finer scale in order to rule out any misuse of power for personal gains or ulterior motives. Non-applicability of section 81 of the Companies Act in case of private limited companies casts a heavier burden on its directors. Private limited companies are normally closely held, i. e.,

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the share capital is held within members of a family or within a close knit group of friends. This brings in considerations akin to those applied in cases of partnership where the partners owe a duty to act with utmost good faith towards each other. Non-applicability of section 81 of the Act to private companies does not mean that the directors have absolute freedom in the matter of management of affairs of the company."

In *K. Balagangadharan* v. *Gurukripa Ayurvedic Heritage P. Ltd.* [2020] 219 Comp Cas 489 (NCLT), on a petition filed under sections 397 and 398 of the Companies Act, 1956, inter alia, to declare the allotment of 2,000 shares made by the board of directors of the company in favour of respondents Nos. 2 and 7 was illegal and invalid, to declare the unauthorised increase of capital and the removal of the petitioners as directors of the company illegal, the National Company Law Tribunal held that the company issued notice for increase of share capital by altering both the articles of association and the memorandum of association of the company by clubbing them together in a single resolution and had been notified under special business. When an agenda item notified under special business the resolution also had to be passed as a special resolution, even though it was not required under the Act. Further, alteration of the articles of association and the memorandum of association could not be clubbed together in one resolution, as the resolution to be passed in each case was different under the Act. The increase of authorised share capital of the company was not done according to the Act, and was illegal. The company had also not mentioned the purpose for which the increase in share capital was done except mentioning that the company needed funds, which was vague. No proof was shown that it was offered to other shareholders. Respondents Nos. 2 and 7 had apportioned between them the entire increased share capital which clearly led to the conclusion that the entire act of increase in share capital of the company and apportionment done between respondents Nos. 2 and 7 clearly raised doubts whether it was done with bona fide intention. In the absence of proof of offer to other shareholders, this was an act of oppression by respondents Nos. 2 and 7 to deprive other shareholders of their legitimate right to subscribe to increased share capital. The increase of authorised share capital of the company at the annual general meeting dated September 26, 2009 from Rs. 1,00,000 to Rs. 3,00,000 was illegal, null and invalid and was to be set aside.

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The allotment of 2,000 shares made by the board of directors of the company in favour of respondents Nos. 2 and 7 was illegal and was to be set aside. The company was directed to rectify the register of members deleting the additional shares issued and restoring the shareholding pattern that existed prior to September 26, 2009.

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

Poornima (N.)[1]

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

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

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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-

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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*

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[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)

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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

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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)).

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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.

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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

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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

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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*

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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

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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

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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.

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