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COMPANY LAW

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I INTRODUCTION

THE COMPANIES Act, 2013 is the major piece of legislation in India relating to formation, operation, and control of the companies and at the same time keeps balance between securities laws for investors and corporate finance for companies. The Companies Act, 2013 introduced several legal reforms like corporate social responsibility (CSR) in the field of corporate law to promote transparency and accountability in conducting business in a better way. The year under survey also witnessed several important judicial pronouncements pertaining to Company law.

II INSOLVENCY RESOLUTION PROCESS

The insolvency resolution process (IRP) is a one under the Insolvency and Bankruptcy Code, 2016, (hereinafter I and B Code) where the National Company Law Tribunal (NCLT) initiates a Corporate Insolvency Resolution Process (CIRP) when a company defaults on making payment to creditors. A financial creditor, operational creditor or corporate itself can file an application before NCLT for initiating IRP when default has occurred. In case of housing project, after amendment in the code, a homebuyer can also approach NCLT for initiating IRP if a developer fails to provide possession of the house or refund the money.

Under IRP, an interim resolution professional is appointed with the power to take charge of the company which has defaulted. The professional's task is to take necessary steps to revive the company. Appointed professional also has the power to raise fresh funds to continue operations.The IRP is granted 180 days to find a resolution, which can be extended by 90 days. If the IRP fails to find a resolution by then, the company is liquidated to pay the creditors.

ICICI Bank Ltd. v. *Essar Power Jharkhand Ltd.*,[1] was a case related to insolvency resolution. A petition was filed before NCLT by the financial creditor (ICICI Bank). All documents produced by the financial creditor validated their arguments. The petition was admitted before the court with the direction to postpone further payment except for the delivery of essential commodity. The NCLT has admitted ICICI Bank Ltd's insolvency petition against Essar Power Jharkhand Ltd., for defaulting on more

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1 [2018] 208 NCLT 0485.

than Rupees 3,033 crore. The court held, 'We are satisfied that a default has occurred... Thus, the application warrants admission'

The court also imposed a moratorium in terms of section 14[2] of the I and B Code, 2016 including a prohibition on any transfer or alienation of the company's assets.

In *Indian Bank Ltd.* v. *Varun Resources Ltd.,*[3] the High Court of Bombay has directed the sale of six ships operated by Varun resources. The case was filed by the financial creditor (Indian Bank) and it was held that the financial creditor is free to proceed against corporate debtor when he is unable to repay. The obligation is that the financial creditor is not allowed to invoke security before initiating insolvency proceeding under section 7 of the code.[4] Where a petition filed against corporate debtor under section 9 and 60(2) of I and B Code, 2016, the proceeding initiated against personal guarantor, it was held that it is maintainable before same authority.

The NCLAT in a landmark judgment held that the petition against corporate debtor does not bar initiation of proceedings against personal guarantor simultaneously. But it has to be kept in mind that it is maintainable after the finalization of insolvency proceedings against the principal borrower. As per the factual matrix of the case, the judgment on initiation of insolvency resolution process against personal guarantor while the order of moratorium on corporate debtor is pending in *State Bank of India* v. *D.S Rajendra Kumar.*[5] The matter arose out of an application filed by the State Bank of India ("SBI"), before NCLT, Chennai against personal guarantors of its corporate debtor under section 7 read with section 60(2) of I and B Code seeking resolution process against personal guarantors. The corporate debtor, for whose behalf the personal guarantees have been given, is already going through resolution process under Iand B Code before the NCLT. Likewise in *Aditi Engineering* v. *Tecpro Engineers Ltd*.,[6] the court admitted the petition while dealing with insolvency resolution where default was admitted by corporate debtor. The court held that the corporate debtor had duly acknowledged its liability regarding non- payment of unpaid debts to the operational creditor through demand notice.

In *Steel Konnect (India) P. Ltd.* v. *Hero Fin-Corp Ltd*.,[7] where an appeal was filed by the financial creditor (Hero Fin-Corp Ltd.) before the appellate tribunal which was accepted and an interim resolution professional appointed. It was alleged that no

2 S.14(1)(a) of the Code are very wide and appear to be a complete bar against the institution or continuation of suits or any legal proceedings against a corporate debtor on the declaration of moratorium by the adjudicating authority.

3 [2018] 208 NCLT 90.

4 See also, *Mahesh Kumar Sureka* v. *SBER Bank* [(2018) 208 NCLAT 21].

5 [2018] 208 NCLAT 384.

6 [2018] 208 NCLT 0650.

7 [2018] 208 NCLAT 678.

8. See also: *Vijay Kumar Jain* v. *DBS Bank Ltd* [2018] 208 NCLAT 193; *Anil Mahindroo* v. *Earth Iconic Structures P. Ltd*

7 [2018] NCLAT 193.

notice was sent to the corporate debtor. The corporate debtor was heard before passing the order and therefore no violation of natural justice.In *Quinn Logistics India Pvt. Ltd.*v. *Mack Soft Tech Pvt. Ltd,*[8] where financial creditor filed an application under section 12 for excluding of 166 days for counting total period of 270 days for completion of corporate insolvency resolution process (CIRP), but the same was rejected by adjudicating authority, the CIRP was remained stayed for 166 days due to the interim order passed the adjudicating authority, thus, the period of 166 days was excluded for the purpose of counting the total period of 270 days for completion of the CIRP. It was held by the adjudicating authority that if an application was filed by resolution professional or committee of creditors or any aggrieved person for justified reasons, then, it was always open to the adjudicating authority or appellate tribunal to exclude certain period for purpose of counting the total period of 270 days for completion the CIRP. CIRP remained stayed for 166 days due to the interim order passed the adjudicating authority. Hence, the period of 166 days was excluded for the purpose of counting the total period of 270 days for completion of the CIRP.

In *Vijay Kumar Jain* v. *DBS Bank Ltd.,*[8] where an application was filed by the authorized person of the bank and it was alleged that he is not competent, tribunal ruled in favor of the bank and the application was held maintainable as per section 7 of I and B Code. The NCLT held that the directors have the right to attend the committee of creditors meetings as per section 24 of the Code. However, the directors could not receive information that is considered confidential by the resolution professional or the committee of creditors including the resolution plans. In *Anil Mahindroo* v. *Earth Iconic Infrastructure (P). Ltd.,*[9] initiation of corporate insolvency resolution process by the financial creditor petition filed against corporate debtor for not giving of possession of flat and payment of agreed and guaranteed commitment amount. Arbitration clause in the memorandum of understanding could not create any bar for initiation of insolvency process. Corporate debtor agreed to pay guaranteed commitment amount till actual possession of flat was delivered to buyer, but neither possession nor agreed guaranteed commitment amount was paid to buyer. Further, it was held that in an application under section 7, it was no matter that the debt was disputed so long as the debt was due and payable. There had been no payment of the guaranteed commitment amount which clearly gave rise to a default. Corporate debtor had committed default by not giving possession of the flat and payment of agreed and guaranteed the commitment amount after long period of time to the buyer. Hence, the petition was admitted under section 7 of I and B Code.

In *Nasik Diocesan Trust Association Pvt. Ltd*. v. *Uday Daniel Khare,*[10] there were conditions precedents attached to maintaining the petition. Application filed for waiving off the condition. Further, alleged that the petitioner is not a member,but the document expressly mentions that the petitioner was a member at some point of time.

8 [2018] NCLAT 656; Company Appeal (AT) (Insolvency) No. 74 of 2017.

9 [2018] 208 NCLAT 628.

10 [2018] 208 NCLAT 395.

It was held to be an exceptional circumstance and the tribunal exercised discretion and allowed waiver.In *Central Bank of India* v. *Ashok Magnetics*[11] where a petition was filed by the creditor concerning dispute of debt and the communication was made and copy of application with necessary documents provided to the corporate debtor. It is further to be noted that no discrepancies in amount claimed by the creditor in factual sheet as well as in the statement of account. Further objections raised by the debtor not maintained. It was found that the debtor made default in payment of the debt of outstanding amount. Tribunal admitted the default with moratorium. The NCLT directed the head offices of the members of the committee of creditors in the case to work out a "standard operating procedure" for its members to follow for determining the suitability and viability of resolution plans, in consultation with the banking division of the Union Ministry of Finance.

In *Ajay Agarwal* v. *Central Bank of India*[12] the counsel appearing on behalf of the appellant submitted that there is a mismatch of figures and dates of default relating to dues of State Bank of India. The Supreme Court further held that it is of no 9 Company Appeal matter that the debt is disputed so long as the debt is due *i.e.,* payable unless interdicted by some law or has not become due in the sense that it is payable at some future date and dismissed the petition.

In *Amandeep Singh Bhatia (Appellant/ Operational Creditor)* v. *Vitol S.A.*[13] it was held that the adjudicating authority can pass the order of seeking prior permission before leaving the country. Section 60(5)(c) read with section 67 of the I and B Code was challenged and the court held that the adjudicating authority is not empowered to direct the ex- directors not to leave the country without prior permission of adjudicating authority. Further any order passed under the law, cannot be held to be violative of article 21 of Constitution of India. Further, the adjudicating authority has not stayed the movement of the appellants, but has only observed that if they intend to leave the country, they should take the permission of the adjudicating authority. Therefore, the order cannot be held to be an order of permanent injunction on the appellants. In *Devendra Padamchand Jain* v. *State Bank of India*[14] it was held that the adjudicating authority has the right to appoint a new liquidator under the I and B Code, 2016. It was further held that the NCLAT held that the adjudicating authority has jurisdiction to remove the resolution professional if it is not satisfied with its functioning of the resolution professional, which amounts to non-compliance of sub-section (2) of section 30 of the I and B Code.

In *Standard Charted Bank* v. *Ruchi Soya Industries Ltd,*[15] the crediting bank was incorporated under English law and there was dispute regarding debt. This petition was accepted by the tribunal and held that authority given to power of attorney holder is valid as per section 7 of I and B Code. In *Punjab National Bank* v. *Concord*

11 [2018] 208 NCLAT 402.

12 CA (AT) (Insolvency) No. 502 of 2018.

13 [2018] 212 NCLT 109.

14 [2018] 208 NCLT 153.

15 (2018) NCLT 145.

Hospitality P. Ltd[16] application under section 12(2) of the I and B Code has been filed by the resolution professional for seeking extension of 90 days' period for completion of insolvency resolution process. In *Stannic Bank Ghana Ltd*. v. *Rajkumar Impex Pvt. Ltd.,*[17] where initiation of corporate insolvency resolution process by financial creditor was filed petition against guarantor for non-repayment of guarantee amount as per order of foreign court raised objection regarding filing of petition by foreign bank. It was held that the guarantor had never appeared before the foreign court, despite notice was served and it had never filed an application or an appeal to set aside the order of the foreign court before appropriate court. Further that, the bank had made out a *prima facie* case under the Code and also proved that there was a debt due payable by the subsidiary company and there was a decree made against the guarantor. Tribunal had no jurisdiction to enforce the foreign decree, but there was no bar in it taking cognizance of the foreign decree. Guarantor had committed defaults in repayment of the guarantee amount as per order of the foreign court. Hence, the petition was admitted.

Likewise in *C.G. Power and Industrial Solutions Ltd.* v. *A.C.C. Ltd.*[18] where appeal was pending under section 37 of Arbitration and Conciliation Act,1996 the pendency of such appeal would tantamount to pre-existence of dispute between the parties as envisaged under section 5(6) and 8 of I and B Code. It was held that since appeal under section 37 was pending before the high court and that the dispute was already in pre-existence between the parties even before section 8 notice was issued, therefore, the pendency of such appeal fell within the ambit of definition of "existence of dispute" as envisaged under section 5(6) and 8 of I and B Code, therefore, the petition was dismissed.[19]

In KLA Construction Technologies P. Ltd. v. *CKG Reality Pvt. Ltd.*,[20] the initiation of corporate insolvency resolution process by operational creditor was the issue. the operational creditor filed an application under section 9 against corporate debtor on the ground that the corporate debtor failed to pay mobilization advance prior to commencement of actual work, but the corporate debtor raised dispute that the mobilization advance was to be paid subject to completion of mobilization process by the operational creditor, there was a plausible dispute between the parties in regard to execution of contract, which could be agitated before civil court only, therefore, adjudicating authority rightly rejected the application and thus, appeal filed by the operational creditor against the order of the adjudicating authority was also to be dismissed. The operational creditor filed an appeal against the order and it was held that there was a plausible dispute between the parties in regard to execution of contract involving supply of material as well as rendering of works at the site. Since mere fact was that the operational creditor was entitled to mobilization advance prior to

16 [2018] 208 NCLT 25.

17 [2018] 208 NCLAT 25.

18 Arbitration and Conciliation Act, 1996, s.11, 34 and 37 Insolvency and Bankruptcy Code, 2016, ss. 5(6), 8 and 9.

19 [2018] 208 NCLAT 220.

20 [2018] 208 NCLAT 439.

commencement of actual work in wake of the corporate debtors| plea that no machinery or equipment was moved to the construction site, raised a debatable issue which could be agitated before civil court only. Hence, the adjudicating authority rightly rejected the application filed by the operational creditor.

In *J.R. Agro Industries P. Ltd.* v. *Swadisht Oils P. Ltd.*[21] the resolution professional has certified that the resolution plan submitted by Rajasthan Liquors Ltd. satisfies the requirements laid down in section 30 (2)/31(1) and regulations 38 and 39 of the CIRP. The counsel appearing on behalf of the resolution professional has contended that section 31(1) provides that adjudicating authority shall approve the plan if it meets the requirements laid down in section 30(2). In the present case, the plan submitted by Rajasthan Liquors Limitedmeets all the requirements of section 30(2) of I and B Code and regulations 38 and 39 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations. Thus, resolution plan should be approved.

Roma Enterprises v. *Martin S.K.Golla, Resolution Professional*[22] NCLAT held that where the claim of an operational creditor involves a disputed question of fact as it cannot be decided by the resolution professional or the adjudicating authority, such operational creditor can raise such issue and claim at an appropriate stage *i.e.,* after moratorium is over.

III OPERATIONAL CREDITORS

In *Chetan Sharma* v. *Jai Lakshmi Solvents P. Ltd.*[23] It is well settled law that unilateral 'transfer' of liability does not constitute a 'dispute' within the meaning of section 5(6) of the 'I and B Code'. The 'dispute' under section 5(6) of the 'I and B Code' has to be between the 'corporate debtor' and the 'operational creditors' and an inter-se dispute between two groups of shareholders of the 'corporate debtor' does not constitute a 'dispute' in reference to 'operational creditors' and on perusal of the documents, appellate tribunal find that there is no pre-existing dispute between the 'corporate debtor' and the 'operational creditors'.

In *Bhadresh Trading Corporation Ltd.* v. *Jaimurugan Textiles Ltd.*[24] the initiation of corporate insolvency resolution process by operational creditor was the issue. The factual matrix of the case was that the application filed against non-payment of supplied cotton bales furnishing of invoices, demand notice, financial transaction and bank statements proving of default by overwhelming evidences. When operational creditor had produced invoices, demand notice, financial transaction and bank statements, which proved that corporate debtor had committed default in payment of supplied cotton bales, then, petition under section 9 filed by the operational creditor for initiation of corporate insolvency resolution process against the corporate debtor was admitted. The operational creditor supplied cotton bales to corporate debtor. Corporate debtor had only made part payment of the supplied goods. Therefore, the operational creditor

21 Appeal (at) (Ins.) No.232 of 2018.

22 [2018] 208 NCLAT 469.

23 [2018] 208 NCLAT492.

24 CP. No. 104 (IB)/CB of 2018.

issued demand notice under section 8,[25] but no payment was made by the corporate debtor. Operational creditor filed petition under section 9[26] for initiation of corporate insolvency resolution process against the corporate debtor. It was held that the operational creditor had produced invoices, demand notice, financial transaction and bank statements, all overwhelming evidences proved that the corporate debtor had committed default in payment of the supplied goods. Operational creditor had also placed proof of sending notices, its deliveries and affidavit and bank statement under section 9(3) (b) and (c).

IV OPPERESSION AND MISMANAGEMENT

The word oppression in common parlance refers to a situation or an act or instance of oppressing or subjecting to cruel or unjust impositions or restraints. According to Lord Keith," Oppression means, lack of morality and fair dealings in the affairs of the company which may be prejudicial to some members of the company.The term mismanagement refers to the process or practice of managing ineptly, incompetently, or dishonestly. However it is to be noted that the terms are not defined under the Companies Act and is left to the discretion of the court to decide on the facts of the case whether there is oppression or mismanagement of minority or not.The section which covers oppression and mismanagement is 241 of Companies Act, 2013 and chapter XVI which corresponds to a clubbed section of 397 and 398 of the former Companies Act, 1956.

In *Ace Oilfield Supply Inc.* v. *Oil Tools International Services P. Ltd.,*[27] the court dealt with oppression and mismanagement of a private company. Shares were allotted to an outsider without having special resolution passed. Thus, making majority shareholders as minority the court set aside the said allotment.In *Kalyan Choudhary* v. *Bengal Chemist and Druggists Association,*[28]the case pertains to the matter of oppression and mismanagement. Annual general meeting was held by the company without issuing notice under memorandum of association and procedure mentioned under articles of association. It was directed that a fresh annual general meeting to be held and to form executive committee following due process of law.

In *Shyam Mangluia* v. *Ravi Shankar Srivastava*[29] in the case of oppression and mismanagement an appeal was filed against subsequent order of maintaining status quo ante as existed prior to holding of extraordinary general meeting Interim order of staying extraordinary meeting to remove directors from post of directorship not followed by company. It was held that there was material showing that the directors had sent mails to the company, wherein they requested to postpone the meeting as the orders were yet not in their hands and the matter was *sub-judice*. Tribunal had exercised discretion judicially when an ad interim order was sought from it to protect the interest

25 Insolvency and Bankruptcy Code, 2016.

26 [2018] 208 NCLT 0568.

27 [2018] 208 NCLAT 347; See also: *Pinakin Kharwar* v. *Nagina Processors P. Ltd* [2018] 208 NCLT 699.

28 [2018] 208 NCLAT 689.

29 [2018] NCLT 706.

of the company till the petition was decided. Subsequent order had not in any manner modified the order dated February 23, 2018. It was made clear to the parties that the order would be followed, even if the extraordinary general meeting had been held. Hence, there was no need to interfere in the discretion exercised by the tribunal.

In *Pinakin Kharwar* v. *Rudraksh Synthetics P. Ltd.*[30] the petition filed by minority shareholder against transfer of majority shareholders shares and assets of companies to third party rejected by tribunal transfer of shareholding and assets without issuing notice and convening of board meeting and annual general meeting. Majority shareholders failed to disclose any documents regarding convening of meetings and where majority shareholders failed to disclose any documents, which proved that they had transferred their shareholding and assets of the companies to third party with proper convening of board and annual general meetings and notices of the meetings were also given to minority shareholder, therefore, such actions of transfer of shares and assets of the companies to third party came within oppressive act, thus, direction was given to both minority as well as majority shareholders to quote higher price to purchase the shares of other group quoting lower price. Minority shareholder and majority shareholders held shareholding in NPL and RSL. Minority shareholder filed petitions under section 241 and 242 on the ground that the majority shareholders transferred their shareholding and assets of both the companies to third party without convening board meeting and annual general meeting and no notices of the meetings were given to him. Tribunal rejected the petition on the ground that action of transfer of the assets of both the companies was a business decision and the same could not be taken as act of oppression, unless it was shown that prejudice or loss had been caused to the minority shareholder. Tribunal also directed the majority shareholdersto purchase the shares of the minority shareholder. Minority shareholder filed an appeal against the order on the ground that the majority shareholders could not transfer their shares to third party without being offered to existing member. It was held that majority shareholders had not disclosed any documents, which proved that they had transferred their shareholding and the assets of the companies to the third party with proper convening of the meetings and notices of the meetings were also given to the minority shareholder. Further that, the majority shareholders had failed to show consideration amount for transfer of the assets to third parties. Majority shareholders had also not shown any material, which proved that before transfer of their shareholding, they had sent notice to the minority shareholder and on decline, and the shares were transferred to the third parties. Actions of the majority shareholders were not in consonance of the Companies Act and article of association.

In *Belfin Spa* v.*Cima Shyam Springs P. Ltd.*[31] in an appeal against reduction of shareholding due to illegal allotment of shares tribunal upheld extraordinary general meeting (EGM) in respect of allotment of shares on basis of quorum. No notice of meeting given to shareholder and where shareholder's shareholding was reduced due to illegal increase of authorized share capital and allotment of shares, such decisions

30 [2018] 208 NCLAT 232.

31 Companies Appeal (AT) No. 207 of 2018 (decided on April 25, 2018).

were taken in several meetings of the company, but no notice or short notice was given to the shareholder, therefore, the decisions taken in the meetings in respect of increase of authorized share capital and allotment of shares was set aside and the shareholders' shareholding was originally restored. Shareholder held 51.36% shareholding in the company. Shareholder filed petition under section 397 and 398[32] against the company and its directors on the ground that several board meetings and general body meetings were called by the directors of the company, wherein due to illegal increase of authorized share capital and allotments of additional shares and conversion of convertible debentures into shares, its shareholding was reduced to 39.87%. Further that, no notice or very short notice of the meetings was issued it, which made it impossible for it to attend the meetings. Tribunal passed order of set aside the decision of conversion of convertible debentures into shares on the ground that shares were allotted to another person only to exclusion of the shareholder, which amounted to act of oppression and also directed to the parties to purchase either one shareholding. Further that, the tribunal upheld extraordinary general meeting in respect of allotment of shares on basis of quorum. Shareholder filed an appeal against part of the impugned order on the ground that the tribunal failed to appreciate that there was no adequate notice to it. Therefore, the shareholder sought that partof the impugned order, which was not in its favour should be upset and increase of share capital and issue of all shares in the meetings should be set aside. The company averred that it had sent notice and e-mail of the meetings to the shareholder. It was held that the company had failed to prove that the notice was duly sent and served to the shareholder to attend EGM, but the shareholder did not attend the meeting. Further that, record clearly revealed that the shareholder was kept in dark while directors of the company had taken decision of issue of equity shares and shares were allotted to outsiders before offering the same to the shareholder. The EGM suffered from insufficient notice to the shareholder, who was majority shareholder. The tribunal failed to appreciate that it was not a question of sufficient quorum for the EGM, but the question was whether there was adequate notice to the shareholder to attend the EGM. Decisions taken in the meetings in respect of increase of authorized share capital and allotment of shares were not binding on the shareholder, as there was no notice or short notice of the shareholder. Directors of the company were found guilty of oppression and mismanagement. Hence, the decisions taken in the meetings in respect of increase of authorized share capital and allotment of shares was set aside and the shareholders' shareholding was restored to 51.36%.

In the similar vein in *Ajith Kunimal Venugopal* v. *Oil Tools International Services P. Ltd.*[33] it was held that since appellant directors increased authorized share capital of company and allotted shares to themselves as well as to third party by sending calendar of events to shareholders at EGM, such meeting was held invalid as calendar of events could not be treated as sufficient notice and non-attending of meeting as per calendar of events could not be held against R3 for the purpose of vacating the office under

32 [2018] 208 NCLAT 592.

33 [2018] 208 NCLAT 366.

section 283(1) (g), therefore, vacation of office by R3 in terms of section 283(1) (g) was invalid. Again in *Gangadharmadupu* v. *Katta Corp. P. Ltd.*[34] it was held that sale deed was executed by the majority shareholder's brother with designation as the managing director of the company, even though he was not a managing director of the company at that point of time and the sale deed was executed in favour of the majority shareholder's mother-in-law,wherein the company had not received any consideration, which was contrary to law. The sale deed clearly showed that the affairs of the company were being conducted in a manner prejudicial and oppressive to the shareholder and also against the interests of the company in general. Therefore, the tribunal rightly declared the sale deed as illegal and the same was also set aside. Further that, no sufficient material had been produced by the shareholder regarding other averments of breach of trust, cheating, fraud and money laundering, which was made in the petition. Hence, the tribunal rightly rejected other reliefs sought by the shareholder.

In *MJM Industries P. Ltd* v. *Registrar of Companies*,[35] the company was required to file its annual returns and financial statements, but the company had not filed statutory returns since incorporation. Registrar of Companies (RoC) had produced duly attested documents, which proved that the notices were issued to the company and its two out of three directors by speed post in compliance of section 248. Further that, public notice was published in newspaper for information of general public and concerned companies including the company intimating them reasons for striking of their name from the register of companies. The company failed to respond to opportunity, which was in the public domain, therefore, the RoC in absence of any explanation received from the company rightly strike off the name of the company from the register of companies. Hence, the appeal was rejected.In case *Faisal Abdul Gaffar Kapadia* v. *Registrar of Companies*,[36] power of registrar to remove name of company from register of companies was filed petition for restoration of name of company. It was held that if the RoC had reasonable cause to believe that the company was not carrying on business or in operation, then, notice(s) under section 560(1), (2) and (3) were sent to the company and if the RoC did not receive any reply within time, then, name of the company would be struck off. RoC had struck off the name of the company without complying with provisions of section 560(1), (2) and (3). Therefore, the objection of the interveneor was not sustainable. Further that, the RoC had not raised any objection regarding restoring the name of the company. Hence, the name of company was restored in the register of companies, subject to filing of the outstanding statutory returns and deposit of fees.

V REDUCTION OF SHARE CAPITAL

Capital reduction is the process of decreasing a company's shareholder equity through share cancellations and share repurchases, also known as share buybacks. The reduction of capital is done by companies for numerous reasons, including increasing shareholder value and producing a more efficient capital structure. After a

34 [2018] 208 NCLAT.

35 [2018] 208 NCLT 298.

36 [2018] 208 NCLAT 284.

capital reduction, the number of shares in the company will decrease by the reduction amount. While the company's market capitalization will not change as a result of such a move, the float, or number of shares outstanding and available to trade, will be reduced.The act of capital reduction may also be enacted in response to a decline in a company's operating profits or a revenue loss that cannot be recovered from a company's expected future earnings. In some capital reductions, shareholders will receive a cash payment for shares canceled, but in most other situations, there is minimal impact on shareholders.

In *Mahendra G. Wadhwani* v. *Reed Relays & Electronics India Ltd.*,[37] the Regional Director (RD) raised various objections that the non-promoters shareholding was being paid as per discounted cash flow method (DCF) at Rs. 107 per equity as share price, but the same was less than fair market value (to be determined as per the exit circular and the delisting regulations). Further that, in the DCF method, valuer had not taken cash and bank balance, non-current investment and liabilities of the company. While net assets value (NAV) method the value of share was Rs. 351 per share. Further that, promoters of the company used the company funds to purchase the shares of non-promoters without giving any option to such shareholders to accept or reject the offer so made, which was against grain of the SEBI regulations. All issues raised by the RD were not considered by the tribunal while pronouncement of judgment, as the same was not filed within statutory period. Thus, in the interest of parties, the order of the tribunal was set aside and the matter was remanded back to the tribunal to rehear the matter after considering issues of the RD and after giving opportunity to all the parties.

VI SCHEME OF AMALGAMATION

An amalgamation is a combination of two or more companies into a new entity. Amalgamation is distinct from a merger because neither company involved survives as a legal entity. Instead, a completely new entity is formed to house the combined assets and liabilities of both companies.The term amalgamation has generally fallen out of popular use in countries like the United States, being replaced with the terms merger or consolidation. But it is still commonly used in countries like India. Amalgamation helps increase cash resources, eliminate competition, and save companies on taxes.The terms of amalgamation are finalized by the board of directors of each company. The plan is prepared and submitted for approval. For instance, the high court and Securities and Exchange Board of India (SEBI) will approve the shareholders of the new company when a plan is submitted.The new company officially becomes an entity and issues shares to shareholders of the transferor company. The transferor company is liquidated, and all assets and liabilities are taken over by the transferee company.

In *Ritemad Pharma Retail P. Ltd.* v. *Official Liquidator,*[38] an appeal filed against non-sanction of scheme of amalgamation due to issuance of shares at premium. No

37 [2018] 208 NCLT 321.

38 [2018] 208 Bombay High Court 331.

bar on issuance of shares at premium scheme followed by procedure and complied with all requirements where tribunal rejected sanction of scheme of amalgamation on the ground that there were not specific provisions providing for issuance of shares at premium in any scheme of amalgamation, but there was no bar to issue of shares at a premium whether for cash or otherwise, fair value of assets of transferor, which was acquired by transferee was more than face value of shares issued for the same, therefore, the transferee had no other alternative, but to allot the shares at a premium, both the transferor and transferee company had followed the procedure for the purpose of the scheme and had complied with all requirements, therefore, the tribunal was directed to sanction the scheme. Transferor and transferee company filed a joint petition for sanction of scheme of amalgamation between them and their respective shareholders. The scheme of amalgamation provided that the transferee company should, without any further act or deed, issue and allot equity shares at premium to member of the transferor. Tribunal rejected the sanction of the scheme on the ground that the transferor and transferee company were private limited companies and the scheme was not in compliance with section 232. Transferor and transferee companyfiled an appeal against the order on the ground that there was no legal embargo or prohibition for issue of shares at a premium for discharge of purchase consideration in pursuance of the scheme of amalgamation either by a private company or a public company under provisions of Companies Act, 2013.

It was held section 232(3) (j) is applicable to all companies and does not make a distinction whether the company is a private or public company or whether it is a listed company or non-listed company. Further that, there was no bar to issue of shares at a premium whether for cash or otherwise. It was the prerogative of the transferee to issue shares at a premium or otherwise depending upon the facts and circumstances of the situation. Transferee issued the shares at premium to the transferor's shareholder for acquiring assets of the transferor, as fair value of the assets acquired by the transferee was more than face value of the shares issued for the same. Therefore, the transferee had no other alternative, but to allot the shares at a premium and difference being carried to a securities premium account.Both the transferor and transferee company had followed the procedure for the purpose of the scheme and had complied with all requirements. Therefore, the tribunal did not have any jurisdiction to reject the sanction of scheme merely upon unfounded belief that there were not specific provisions providing for issuance of shares at premium inany scheme of amalgamation. Hence, the tribunal was directed to sanction the scheme.

VII SCHEME OF ARRANGEMENT

Scheme of arrangement is a compromise or arrangement between the company and its creditors or between the company and its members. It includes the reorganization of company's share capital by consolidation of shares of different classes or by division of shares into shares of different classes, or by both of those methods. It is taken as a form of financial and corporate restructuring including sale of assets or the business itself or amalgamation with another company. Moreover, 'Arrangement' means something analogous in some sense to a compromise. It also includes amalgamation which is blending of the two or more existing undertakings into one single undertaking,

the shareholders of each blending companies becoming substantially the shareholders in the company which is to carry on the blended undertakings. It however has no precise legal meaning. But, arrangement as construed by courts, covers a broad array of transactions which are conducted according to a scheme, which is approved by a statutory majority be it the company and its members or the company and its creditors.

In *Associated Aluminiums Industries P. Ltd.* v. *Registrar of Companies,*[39] there was a scheme of arrangement or compromise. A windmill business was transferred to the transferee and the scheme was made to effect by the transferee after filing a form (Form 21) respectively. An amendment sought by the transferor to retain windmill business since certain tax benefits are not available to transferee. It was held not permissible.

VIII ARBITRATION

Arbitration is a mechanism for resolving disputes between investors and brokers, or between brokers. It is overseen by the Financial Industry Regulatory Authority (FINRA), and the decisions are final and binding. Arbitration is distinct from mediation, in which parties negotiate to reach a voluntary settlement, and decisions are not binding unless all parties agree to them. Arbitration is not the same as filing an investor complaint, in which an investor alleges wrongdoing on the part of a broker, but has no specific dispute with that broker, for which the investor seeks damages.

In *Cheran Properties Ltd.* v. *Kasturi and Sons Ltd.,*[40] the two issues before the Supreme Court in this case were as follows:

a) Whether the appellant was bound by the award, though it was neither a party to the arbitration agreement, nor a party in the arbitral proceedings;

b) Whether proceedings for enforcement of the award would be maintainable before the NCLT.

With respect to the first issue, the Supreme Court relied on the decision of *Chloro Controls Pvt. Ltd.* v. *Severn Trent Water Purification Inc.1* and the English "group of companies doctrine", whereunder, depending on the nature of the transaction, an arbitration agreement which is entered into by a company within a group of companies may bind non-signatory affiliates, if the circumstances are such as to demonstrate the mutual intention of parties to bind both signatories and non-signatories. The Supreme Court stated that the law has evolved to recognise that modern business transactions are increasingly carried out through multiple agreements, and there may be intrinsically related transactions within a corporate group. In holding a non-signatory bound by an arbitration agreement, factors such as relationship of a third party to the signatory party, commonality of the subject matter, and the composite nature of the transaction must be taken into account.

The Supreme Court also relied on section 35 of the Arbitration and Conciliation Act, 1996, which states that an arbitral award "shall befinal and binding on the parties

39 [2018] 208 SC 496.
40 [2018] 208 Guj 101.

and the persons claiming under them respectively". The Supreme Court found that the letter had contained aclear reference to the agreement, and it was in pursuance of that agreement that the group companies had agreed to purchase theshares of SPIL. KCP had been acting in the capacity of the authorized signatory of the appellant and therefore, the appellant had clear knowledge and intention that it would be bound by the terms of the agreement. Further, the agreement itself provided that KCP could transfer shares to its nominees only on the express condition that the nominee would abide by the terms of the agreement. Therefore, the Supreme Court found that the elements of section 35 of the Act were sufficiently met, and that the appellant was claiming under KCP. In the circumstances, the appellant would be bound by the award, notwithstanding the fact that it was not a party to the arbitration agreement or proceedings.

Insofar as the maintainability of proceedings before the NCLT was concerned, the Supreme Court opined that the terms of the award required transmission of the shares back to KSL, which could only be effectuated by rectification of the register of SPIL. The court rejected the appellant's submission that, in light of section 42 of the Act, the respondent could only enforce the award in High Court of Madras, which had previously heard and decided applications under section 9 and 34 of the Act. The Supreme Court relied on its judgment in *Sundaram Finance Limited* v. *Abdul Samad2*[41], wherein it was held that section 42 has no application to execution proceedings since the arbitral proceedings stand terminated once the award is passed, and that proceedings for execution of an arbitral award can be initiated in the most apposite court usually having jurisdiction over the assets. Transposing this principle to the case at hand, the only recourse available to KSL for giving effect to the award was an application to the NCLT under section 111 of the Companies Act, 1956 for the rectification of the register. Thus, the proceedings before the NCLT were held to be maintainable.

This judgment has now widened the scope of Sundaram Finance and has made it clear that an award-holder is not just restricted to the ordinary civil courts for enforcement of the award and can approach even the NCLT for effective enforcement in appropriate cases. However, the Supreme Courts's finding that a third-party, which is not a party to the arbitration agreement nor to the arbitral proceedings, could be bound by the award, may have serious ramifications. Although the Supreme Court relied on the fact that the agreement clearly specified that any subsequent buyer would be bound by the terms of the agreement, it is pertinent to note that there was no agreement between KCP and the appellant which refers to the arbitration clause in the Agreement, as required under section 7 of the Act. The decision is yet another example of the pro-award stance being taken by courts in India, and the possible intent behind this ruling may have been to ensure that the award is not vitiated at the enforcement stage.

In *Essar Steel India Ltd.* v. *Reserve Bank of India,*[42] Essar Group is an Indian conglomerate into manufacturing, services and retails sectors. The group has

41 2018 SCC OnLine SC 121.

42 2017 SCC OnLine Guj. 995. In *ICICI Home Finance Co. Ltd* v. *Binod Kumar* [2018] 208, Delhi 205 direction by the Reserve Bank of India to take action under 2016 code is not arbitrary.

operational presence across 29 countries having 45,000 employees across the world. The group's core interest lies in steel and energy sector, Essar Steel being the flagship company of this group.Reserve Bank of India (RBI) vide their press note dated June13, 2017 had directed banks to initiate insolvency proceedings before NCLT under section 9 of the I and B Code against 12 companies including Essar Steel India Ltd. (Essar) and accordingly proceedings were initiated by consortium of banks led by State Bank of India (SBI) which is leading the consortium. Essar challenged the aforementioned press note by filing a writ petition† before High Court of Gujarat Bench at Ahmedabad, citing failure of the consortium of banks to accept the package of debt restructuring, proposed and approved by the board of directors of Essar. Essar further challenged authority of RBI to issue directions to NCLT, as interpretation of last line of paragraph 5 implied that NCLT is a subordinate authority to RBI, which is constitutionally wrong. The Reserve Bank, based on the recommendations of the IAC, will accordingly be issuing directions to banks to file for insolvency proceedings under the IBC in respect of the identified accounts. Such cases will be accorded priority by the NCLT. RBI apologised to the court for such poor drafting and they have issued a corrigendum dated July 3, 2017 correcting this mistake by deleting last line of paragraph 5.The court refused to grant any relief to Essar with respect to their prayers to quash the said proceedings filed under section 9 of the I and B Code and said that NCLT may be directed to set aside all the proceedings. The court also observed that NCLT, respondent 4 cannot be directed to restrain from proceedings against Essar, as such writ of prohibition may be issued only in the rarest of rare cases or when inferior court exceeds its jurisdiction, or proceeds under a law which is itself ultra vires or unconstitutional. Since IBC is not unconstitutional, this prayer was also rejected by the court.

This high court decision is a major relief for financial institutions who got wary of the prospects of recovery from twelve biggest loan defaulters of India. This decision also establishes statutory right of banks to initiate proceedings against loan defaulters before appropriate forum with or without guidelines from RBI.[43]

In *Valuefab Solutions P. Ltd.* v. *Registrar of Companies,*[44] the respondent had reasonable cause to believe that the petitioner company is not carrying on any business or operation and a notice in Form STK-1, was sent to the company with a copy of the same to,directors of the company to the address available in the MCA 21 portal. Subject to the satisfaction of this tribunal and in the event of this tribunal willing to revive the company, then the respondent humbly prays that this tribunal may kindly, It is further stated that the petitioner company had commenced its product development activity immediately after incorporation until June 2013, but could not generate any revenue and was not conducting business thereafter.The board decided to wind up the company since there was no potential for business. It also found that the appellant/ petitioner had no assets other than nominal cash balance in the current liabilities and there was no justification for restoring the name of the company.It appears the process for striking of the company of the name of the company was duly followed by the

43 [2018] 208 NCLAT 621.

44 [2108] 208 NCLAT 42.

ROC as is clear from the counter affidavit filed by ROC which has been extensively referred to by NCLT and which portion of the judgment we have reproduced.

IX PETITION FOR RELIEF

In *K.Vaidya Lingam* v. *S.K. Ganesan,*[45] an application filed to refer the matter to arbitration based on memorandum of understanding. But it was found that parties and cause of action in memorandum is different. Application was rejected due to failure to produce memorandum of understanding and also there was no memorandum of understanding was in force at the time as it was cancelled by the parties.[46]

In *O.K. Varghese* v. *OFS Industries P. Ltd.*[47] in capital but respondent argued as to having no knowledge duly approved and signed returns as documents indicated. Where documents showed that respondent had at all times been aware of and had approved the increase in capital and further shares, and, balance-sheet and annual account had been signed by respondent, respondent alleged oppression and mismanagement on the part of appellants and CLB ordered that appellants had failed to refute the allegations of diversion of business and funds, order was totally unreasoned and was ex facie perverse, hence, the CLB's order was set aside. Appeal was filed against the order of CLB in the petition filed by respondent (i) his signature had been falsely taken on various company law forms and that these had subsequently been misused to show A1 as major shareholder of the respondent-company. (ii) He had not signed the balance-sheet of company. (iii) R2 had annexed a copy of balance-sheet which was signed only by A1 and auditor. (iv) Only when he received the extraordinary general meeting notice, R2 discovered that there had been an illegal increase and subsequent allotment of shares in favour of A1 resulting in R2 being reduced to a minority. A1 stated that new contracts necessitated additional bank facilities and banks had insisted on an increase in the company's paid-up capital. A1 submitted that additional shares were duly issued and allotted, after necessary resolutions had been passed. He further, stated that R2 had signed and initialed on all the pages of annual return including the annexures showing the shareholding and same was filed with the income tax department also. Board held that appellants had failed to refute the allegations or specific allegations of diversion of business and funds had not been refuted by appellants. It was held that documents indicated that R2 had at all times been aware of and had approved the increase in capital and further shares. Balance-sheet and annual account had all been approved and signed by R2 as the managing director and had also been filed with the income-tax authorities. Therefore, board's finding was totally unreasoned, disclosed an error apparent and was *ex facie* perverse. The allegations of misappropriation and diversion of funds by R2 were generally bald and unsubstantiated allegations. Thus, appeal was allowed.

45 [2018] 208 NCLT 654.

46 Arbitration and Conciliation Act, 1996, s.8 and Companies Act, ss.1956 397,398,402,403.

47 [2018] 208 Comp Cas 1 (Bom).

X MISCELLANEOUS

In Board for Industrial and Financial Reconstruction v. *Managing,*[48] reference was made to the board for industrial and financial reconstruction.Company was not viable for reconstruction. Therefore, recommendation was made to wind up the company.[49]

Nitin Modi v. *Rakesh Shivhre*[50] an appeal from orders of tribunal before appellate tribunal for review of judgment regarding upholding of direction of tribunal directions given by tribunal to applicants to return back sale consideration of shares on failure of consent term. No power to review its own order, where applicants filed an application before appellate tribunal for review of judgment on the ground that the appellate tribunal failed to consider the fact that they had transferred their shares to director as per consent term of Annexure B, therefore, tribunal had no power to direct them to return back sale consideration of shares on failure of consent term Annexure A and B, but the applicants had never filed an appeal against the order of the tribunal and the appellate tribunal had no power to review its own order, thus, the application was dismissed.Two sets of consent terms were filed before tribunal, first wherein shareholders sold their shares to directors as per Annexure A and second wherein applicants, who were also shareholders of the company sold their shares to the directors as per Annexure B. However, disputes arose between the parties regarding implementation of terms contained in Annexure A and B. Therefore, the tribunal directed the parties to settle the disputes by entering into a fresh settlement or it would appoint an independent committee of management, which was also upheld by appellate tribunal. Applicants filed an interlocutory application for review of judgment on the ground that the appellate tribunal failed to consider the fact they had transferred their shares to the directors on receiving of consideration. Further that, the tribunal had no power to direct them to return back the money on failure of the consent termAnnexure A and B, because both the annexure were independent and stood alone and there was no term for return of money.

It was held that the directors had neither paid the sale consideration to the shareholders within time nor asked for any extension of time by filing an application either before expiry of time or after expiry of time. Therefore, there was violation of the consent terms of Annexure A. Further, that, the applicants had also raised the disputes that the sale consideration was not paid in time, but from material available on record, it was found that the directors had paid the entire sale consideration before expiry of period as per the consent terms of Annexure B. Therefore, there was no violation of the consent terms of Annexure B. Both Annexure A and B and defaults of parties would create strange situations making execution of the consent terms unworkable and unpractical. Therefore, the tribunal exercised its inherent powers to do justice between the parties and passed impugned directions. There was neither any

48 [2018] 208 Comp Cas 79 (Guj) (decided on Dec 1, 2017).

49 Sick Industrial Companies (Special Provisions) Act, 1985 and Companies Act, 1956, s.20.

50 [2018] 208 NCLAT 642.

error apparent on the face of the record nor there do any materials to rectify or any mistake apparent from the record calling for amendment in the judgment, which had been passed.Applicants had never filed an appeal against the order of the tribunal. Further that, the appellate tribunal had no power to review its own order. Hence, the application for review of the judgment was dismissed.

XI WINDING UP

Winding up is the process of dissolving a company. While winding up, a company ceases to do business as usual. Its sole purpose is to sell off stock, pay off creditors, and distribute any remaining assets to partners or shareholders.Winding up a business is a legal process regulated by corporate laws as well as a company's articles of association or partnership agreement. Winding up can be compulsory or voluntary and can apply to publicly and privately held companies.

In *Rojee Tasha Stampings P. Ltd.* v. *POCSO- India Pune Processing Centre P. Ltd.*[51] payment was made to the petitioner by the insurance company when the defendant was unable to pay.The company was held liable because the company stands outside the contract between petitioner and its insurer and the order to wind up the company and an official liquidator appointed.[52] *In Jai Hind Finance (India) Ltd.* v. *Kotak Mahindra Bank Ltd.*[53] for the non-repayment of dues DRT directed to repay wherein the bank filed winding up petitions. It was held that the secured creditors need not wait till the final outcome of the proceedings in case financier decides to proceed to enforce and realise the secured assets. The reading of provisions of sectionsection434 and 439 of the Companies Act is itself clear to indicate that to recover loan advanced, even a secured creditor would be entitled to prefer a company petition for winding up. Also, so far nothing was paid to the bank against the loan advanced to appellants. Likewise the High Court of Gujarat in *Aum Capital Market (P.) Ltd.* v. *Jyoti Ltd.,*[54] held that where petitioners are strangers to the arbitration proceedings, the findings recorded in the arbitration proceedings pending between the respondents *inter se* could not be made binding to the petitioners.Where there is no arbitration agreement existing between the concerned petitioners and the concerned respondents for resolving the disputes in respect of shares in question, the petitioners being not the party to the arbitration proceedings before the respondent, the NCLT could not have passed the impugned order holding that the decision on the reliefs claimed shall depend on the findings of the arbitral tribunal regarding the certain restrictions contemplated on the transfer of shares in the shareholder agreement and its binding nature, and the decision on certain other reliefs shall be postponed till the decision of the arbitral tribunal.

The position taken by the High Court of Andhra Pradesh has now been confirmed by the Supreme Court of India in *Mackintosh Burn Limited* v. *Sarkar and Chowdhury Enterprises Private Limited.*[55] In this case the Supreme Court held that the registration

51 [2018] 208 Bom 67.

52 Companies Act, 1956, ss. 433, 434, 439.

53 [2018] 208 Bom. 408.

54 [2018] 143 CLA 359 (Guj.)

55 (2018) 5 SCC 575.

of a share transfer may not only be refused on the ground of it resulting in a violation of any law but also for any other sufficient cause. The *Mackintosh* case involved an unlisted public company, which had refused to register a transfer of shares to its competitor. Here the Supreme Court noted, "…The Company Law Board, it appears, was of the view that the refusal to register the transfer of shares can be permitted only if the transfer is otherwise illegal or impermissible under any law. Going by the expression "without sufficient cause" used in section 58(4), it is difficult to appreciate that view. Refusal can be on the ground of violation of law or any other sufficient case. Conflict of interest in a given situation can also be a cause…"

XII CONCLUSION

In the year under survey, The Supreme Court of India, high courts, NCLAT and NCLT benches across the country delivered significant judicial pronouncements on Insolvency and Bankruptcy Code, 2016. The issues under the Code are better understood by these judicial pronouncements and also created awareness about the implementation of the Code.