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COMPANY LAW

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I INTRODUCTION

THE CORPORATE law sector is the backbone of the economy of a Country since it contributes 53% of GDP. There has been immense growth in the company law sector as far as the legislative initiatives and judicial pronouncements are concerned in the year 2021. Keeping abreast with new developments in the field of company law, the Indian judiciary has decided majority of the cases at a fast pace in the year 2021. Indeed, the year started on a good note wherein High Court of Delhi held that advocates could file documents for incorporation of a company. In view of COVID-19 Pandemic, the apex court rightly upheld the constitutionality of RBI's decision to ban 'Merchanting Trade Transactions' pertaining to PPE kits.In one significant ruling, the apex court held that pledging of shares without undertaking to discharge liability would not make an entity financial creditor under IBC. An analysis of the judgments passed in the year are discussed below.

II RIGHTS OF BORROWERS

In this significant judgement,[1] the Supreme Court ruled that Borrowers cannot pray to court to grant a one-time settlement scheme as a matter of right.The borrower had obtained a credit facility from a bank categorized as "Non-Performing Asset (NPA)". The bank-initiated proceedings under the provisions of the SARFAESI Act, 2002. The borrower applied to the bank to consider her case under the One Time Settlement (OTS) Scheme. The bank rejected the application saying that she was not eligible for settlement under the OTS Scheme as her loan account had been declared as NPA. The loan could be recovered by auction of the mortgaged property.The borrower filed a writ petition before the high court to challenge the order passed by the bank rejecting her application for giving the benefit of the OTS scheme. The high court issued a writ of mandamus and directed the bank to positively consider her application for grant of benefit under the OTS Scheme.

On appeal, the Supreme Court held that no borrower could, as a matter of right, pray for a grant of benefit of the OTS Scheme. The apex court observed that it might happen that a person would borrow a considerable amount, for example, Rs. 100

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1 *Bijnor Urban Cooperative Bank Ltd*. v. *Meenal Agarwal*, [2021] 133 taxmann.com 167 (SC).

crores. After availing of the loan, he may deliberately not pay any amount towards instalments, though able to make the payment. He would wait for the OTS Scheme and then pray for a grant of benefit under the OTS Scheme, under which always a lesser amount will be paid than the amount due and payable under the loan account. This, despite all possible recovery of the entire loan amount, can be realized by selling the mortgaged/secured properties.The court further stated that if it were held that the borrower can still, as a matter of right, pray for benefit under the OTS Scheme, in that case, it would be giving a premium to a dishonest borrower, who, even though can make the payment and the fact that the bank can recover the entire loan amount even by selling the mortgaged/secured properties, either from the borrower and guarantor. Under the OTS Scheme, a debtor must pay a lesser amount than the actual amount due and payable under the loan account. Such cannot be the intention of the bank while offering OTS Scheme, and that cannot be the purpose of the Scheme, which may encourage such dishonesty.

If prayer is entertained on the part of the defaulting unit/person to compel or direct the financial corporation/bank to enter into a one-time settlement on the terms proposed by it/him, then every defaulting unit/person which/who is capable of paying its/his dues as per the terms of the agreement entered into by it/him would like to get a one-time settlement in its/his favor. The court raised the issue that who would not like to get his liability reduced and pay a lesser amount than the amount they are liable to pay under the loan account? The apex court ruled that no writ of mandamus can be issued by the high court in the exercise of powers under article 226 of the Constitution of India, directing a financial institution/bank to grant the benefit of OTS to a borrower positively.Given the above, the high court, in the present case, has materially erred and has exceeded in its jurisdiction in issuing a writ of *mandamus* in the exercise of its powers under article 226 of the Constitution of India by directing the appellant bank to positively consider/grant the benefit of OTS to the original writ petitioner. The apex court quashed and set aside the order passed by the high court, holding it to be unsustainable.

III INSOLVENCY

In this landmark ruling,[2] the Supreme Court upheld the provisions relating to insolvency of personal guarantors brought into force in 2019, allowing lenders to initiate insolvency proceedings against personal guarantors. The factual matrix of the case was that writ petitions were filed in the High Court of Delhi and other high courts challenging the 2019 notification and the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 as well as many similar Rules. Writ petitions challenged the constitutional validity of Part III of the IBC, which deals with insolvency resolution for individuals and partnership firms.Considering the importance of the issues raised in the writ petitions, which needed finality of judicial determination, the Apex Court transferred all writ petitions from the high court to

2 *Lalit Kumar Jain* v. *Union of India*, [2021] 127 taxmann.com 368 (SC).

itself. The apex court held that the impugned notification is not an instance of legislative exercise or amounts to impermissible and selective application of provisions of the Code. There is no compulsion in the Code that it should, at the same time, be made applicable to all individuals (including personal guarantors) or not at all. There is sufficient indication in the Code-by section 2(e), section 5(22), section 60, and section 179 indicating that personal guarantors, though forming part of the larger grouping of individuals, were to be, in view of their intrinsic connection with corporate debtors, dealt with differently, through the same adjudicatory process and by the same forum (though not insolvency provisions) as such corporate debtors.The landmark ruling has greater significance in speeding up the process for the recovery of dues. It would provide lenders with the much-needed arsenal to simultaneously invoke promoters' personal guarantees even while corporate insolvency resolution proceedings against the ailing companies are pending.

IV INSIDER TRADING

In this landmark ruling,[3] the Securities Appellate Tribunal (SAT) has set aside SEBI's insider trading charges against individuals who had forwarded WhatsApp messages allegedly containing unpublished price-sensitive information (UPSI). SEBI had initiated a crackdown during which search and seizure operations against 26 entities of a WhatsApp group were conducted, and about 190 devices and records, among others, were seized. As per SEBI, earnings data, and other financial information of nearly 12 companies were leaked through WhatsApp messages.Whether a "forwarded as received" WhatsApp message circulated on a group regarding quarterly financial results of a company, closely matching with the vital statistics, shortly after the in-house finalization of the financial results by the company and sometime before the publication/disclosure of the same by the concerned company, would amount to unpublished price-sensitive information under the provisions of SEBI (Prohibition of Insider Trading) Regulations, 2015?

The Adjudicating Officer (AO) answered the question in the affirmative and imposed a penalty of Rs. 15,00,000 on the appellants. The AO reasoned that as the message was a piece of information relating to financial results and as it closely matched with the financial results published subsequently, the message was an unpublished price-sensitive information.On appeal, the SAT observed that no information could be recovered by the respondent SEBI to find out the source of information from the financial team, legal team, or the audit team of the respective companies. The impugned order shows that the learned AO has expressed the inability in this regard.The definitions of 'Unpublished price sensitive information and 'insider' would show that generally, available information would not be unpublished price-sensitive information.Setting aside the reasoning of the AO, the SAT held that the information could be branded as unpublished price-sensitive information only when the person getting the information had knowledge that it was unpublished price-sensitive

3 *Shruti Vora* v. *Securities and Exchange Board of India*, [2021] 126 taxmann.com 38 (SAT – Mumbai).

information. Though knowledge is a person's state of mind, the same can be proved on the preponderance of probabilities on attendant circumstances. In the instant case, there are no attendant circumstances except the possibilities enumerated by the AO. The proximity of time, the similarity between the information were the only two factors that weighed with the Adjudicating Officer to brand the information as unpublished price sensitive information.SAT relied on an earlier judgment[4] of SAT-Mumbai in that case; the tribunal had rejected the arguments of SEBI that there is no need for linkage between the potential source of the unpublished price sensitive information and the person allegedly in possession of the alleged unpublished price-sensitive information.

V REGISTRATION OF COMPANIES

In this case,[5] the High Court of Delhi held that Advocates enrolled with Bar Council must be allowed to register as professionals on the MCA portal for Co. registration. A petition was filed before the High Court of Delhi challenging the non-providing of a field for Advocates to register companies and LLPs on the current Ministry of Corporate Affairs ('MCA') portal. The petitioner case was that the MCA portal permitted chartered accountants, company secretaries and cost and work accountants to register as practicing professionals and undertake incorporation of companies and LLPs for their clients and pursuant to an amendment in Companies Act, 2013 in 2014, even Advocates were permitted to file documents for incorporation of companies but said the amendment was not implemented in the tool kit, which was used by MCA. As a result, Advocates could not register companies/LLPs on behalf of their clients. Section 7 (1) (b) of the Companies Act, 2013 clearly shows that Advocates can file documents for incorporation of a company. This would be true even in the case of LLPs. Power. However, the MCS portal is stated to have no provision made for advocates who are members of Bar Councilthe Bar Councils are not provided as an option, in the list of councils. The high court, in this significant judgement stated that "If this is the position, the same would be discriminated to the advocates and would need to be rectified at the earliest". The High Court of Delhi held that advocates could file documents for incorporation of a company, and this would be true even in the case of LLPs, and, therefore, the amendment was to be carried out in the MCA tool kit permitting Advocates who are enrolled with Bar Council to register as professionals in MCA portal.

VI DEBTS RECOVERY APPELLATE TRIBUNAL

In this critical judicial ruling[6], the appellant-bank filed an appeal before the Supreme Court against the order of the high court wherein it had permitted the respondent guarantors to prosecute appeal before Debts Recovery Appellate Tribunal without pre-deposit of a portion of debt determined to be due, as provided under section 21 of Recovery of Debts and Bankruptcy Act, 1993. The apex court held that

4 *Samir Arora* v. *SEBI* [2005] 59 SCL 96.

5 *Shikha Sharma Bagga* v. *Union of India,* [2021] 124 taxmann.com 353 (Delhi).

6 *Kotak Mahindra Bank (P.) Ltd.* v. *Ambuj A. Kasliwal*, [2021] 124 taxmann.com 380 (SC).

when the additional amount was due and payable in the discharge of decree/recovery certificate issued by DRT in favor of appellant/bank, the high court did not have the power to waive pre-deposit in its entirety, nor could it exercise discretion which was against the mandatory requirement of statutory provision as contained in section 21 and, therefore, any waiver of pre-deposit to the entire extent would be against statutory provisions and not sustainable in law and order of the High Court was to be set aside.

VII CORPORATE DEBTOR

In *POSCO India Pune Processing Center (P.) Ltd.* v. *Dhaval Jitendra Kumar Mistry Resolution Professional of Poggenamp Nagatsheth Powertronics (P.) Ltd.,*[7] it was held that where a corporate debtor was not an MSME on the date of initiation of CIRP under section 9 of IBC, he could not be treated as MSME later on and could not take benefit of MSME in view of amendment in MSME classification norms vide notification dated June 1, 2020 with effect from July 1, 2020 by having its retrospective effect.About the applicability of retrospective effect of the amendment, the tribunal observed that:"It is a well-established principle of interpretation that no statute can be given retrospective effect unless statute so directs either expressly or by necessary implication. Nor can power be exercised retrospectively unless the statute expressly so provided.It is a fundamental rule of construction that no statute shall be so construed to have a retrospective operation unless such a construction appears very clearly in terms of the Action arises by necessary and distinct implication." The tribunal observed that it is a well-established principle that parties are governed by the law in force at the date when a suit or proceeding is initiated unless expressly laid down or by necessary implication inferred. Therefore, in the present case, when the application was filed and CIRP initiated, the corporate debtor was not falling in the criteria/classification of the MSME. Hence, the amendment benefit cannot be availed by the corporate debtor when it is under CIRP by giving retrospective effect."

Similarly in *Arun Kumar Jagatramka* v. *Jindal Steel and Power Ltd*., the GNCL, (corporate debtor) was undergoing CIRP and a resolution plan was submitted by a resolution applicant. However, the Committee of Creditors (CoC) found that the applicant being a promoter is disqualified under section 29A of IBC. Upon receiving no resolution plan within the CIRP timeframe, the resolution professional filed for liquidation in the NCLT which was allowed.Subsequently, an application was filed in the NCLT proposing a scheme of compromise and arrangement under section 230-232 of the Companies Act, 2013. The main contentions were; (i) whether in liquidation proceedings a scheme for compromise or arrangement under section 230-232 of the Companies Act, 2013 can be made and (ii) whether a promoter who is ineligible under section 29A IBC can be permitted to propose a compromise or arrangement under section 230-232 of the Companies Act, 2013.

The NCLT had allowed the application on the ground that there is no bar under the Companies Act, 2013, and issued a direction for convening a meeting of the shareholders and creditors.The NCLAT ruled that the stages of CIRP, *viz.,* a creditor

7 [2021] 124 taxmann.com 401 (NCLT – Ahd.).

in control, meetings of CoC, voting power of CoC, suspension of management, resolution plan, and even liquidation indicate the company must be running as a going concern or undergo liquidation to meet the liabilities. Proposal of a compromise or arrangement by a promoter is akin to giving a backdoor entry to the promoter to take over the management of the company. However, the NCLAT did affirm that a scheme for compromise or arrangement may be made for a company undergoing liquidation proceedings.The Supreme Court affirmed the judgement of NCLAT.The Supreme Court observed that during the liquidation process of the filing of a resolution agreement, selling the company's assets and selling the company as a going concern is not given a backdoor entrance into the company by the promoter or anyone in the company management and therefore unavailable at those phases.

In *Ashish Mohan Gupta* v. *Hind Motors India Ltd (In liquidation)*[8] the NCLT had passed an order to initiate liquidation against the corporate debtor. However, a director cum promoter cum shareholder of the corporate debtor filed an application for compromise and arrangement of the corporate debtor with two other companies which were undergoing liquidation and in which the individual held office as director.The issues raised in this case were; (i) whether an individual who is a promoter cum director cum shareholder of a company undergoing liquidation files an application for compromise and arrangement and (ii) whether the bar under section 29A IBC read with section 35 (1) (f) binds section 230-233 of the Companies Act, 2013 and acts as a bar in matters relating to compromise and arrangement?. The NCLT ruled that in the instant case, the applicant is disqualified under section 29A IBC and section 35(1)(f) of IBC and thus is disqualified from filing the application for compromise and arrangement under section 230-233 of the Companies Act, 2013. The NCLAT ruled that Section 29A of IBC prohibits a promoter from being a resolution applicant and section 35(1)(f) of IBC prohibits the liquidator to sell assets of the company undergoing liquidation to those disqualified under section 29A of IBC. The NCLAT further observed that in the case of *Arun Kumar Jagatprakash*v. *Jindal Steel and Power Ltd.,*[9] wherein the Supreme Court of India ruled that the bar under Section 29A IBC read with section 35(1)(f) of IBC is applicable to section 230-233 of the Companies Act, 2013 if not it would be akin to allowing that disqualified under section 29A read with section 35(1)(f) a backdoor entry to the corporate debtor thereby defeating one of the primary intentions of the Code.

Likewise, in *SICOM Ltd*. v.*Sundaes Bhat (NCLT Ahmedabad Bench)*[10] SICOM Ltd. (the applicant) had sanctioned a loan amounting to Rs. 90 crores to ABG Shipyards Ltd. (the corporate debtor). The corporate debtor created an exclusive first charge to the applicant on its assets.CIRP of the corporate debtor was initiated under section 7 of the IBC by a financial creditor. The applicant filed its claim to the interim resolution professional. Subsequently, the CIRP of the corporate debtor failed and the corporate debtor was undergoing liquidation. The applicant, despite receiving notice from the

8 Company Appeal (AT) (Insolvency) No. 875 of 2019.

9 2021 SCC Online SC 220.

10 NCLAT,Company Appeal (AT) (Insolvency) No. 470 of 2021.

liquidator, failed to file ROC Charge registration or CERSAI Search Reports in support of the security interest on the assets of the corporate debtor.Consequently, the applicant was classified as an 'unsecured creditor' by the liquidator. Aggrieved by this, the applicant filed the present application against the decision of the liquidator after a span of 551 days. The main contentions raised in this case were; (i) whether a creditor can file an application against the decision of the liquidator 551 days after the receipt of the decision of the liquidator and (ii) whether the liquidator can take into account only such charges which are duly registered and the certificate of registration is presented to the liquidator ?.Regarding the first contention, The NCLT Ahmedabad Bench ruled that under section 42 of the IBC, the creditor is under an obligation to file an appeal either confirming or challenging the decision of the liquidator in a span of 14 days after the receipt of the decision of the liquidator.Regarding the second contention, the NCLT Ahmedabad Bench ruled that a combined reading of Section 77(3) of the Companies Act, 2013 and Regulation 21 of Liquidation Regulation implies that for a charge to be valid against the holder and the liquidator, the charge must be registered and must be duly presented to the liquidator.

VIII INSOLVENCY AND BANKRUPTCY CODE (IBC), 2016

In the instant case,[11] the petitioners who were mostly allottees under the real estate projects challenged the constitutional validity of Sections 3,4 and 10 of the Insolvency and Bankruptcy Code (Amendment) Act, 2020 that amends section 7(1) of the Insolvency and Bankruptcy Code, 2016 and incorporates three provisos to the said section, adds a new explanation (Explanation II) in Section 11 and inserts a new section *i.e.,* 32 A respectively.The petitioners contended that the impugned amendments defeat the very objective of the code since the legislative intent behind the enactment of the code was to enhance the ease of carrying out business in India. They believed the amendments are restrictive in nature, causing hindrance to the allottees in recovery of their claims. On the contrary, the respondents confuted that the amendments are perfectly valid as they are incorporated to prevent multiplicity of proceedings and reduce the burden of pending cases before the already overburdened adjudicating authorities. The petitioners also argued referring the landmark case[12] that the legislature was now estopped by promissory estoppel from enacting the impugned amendment act which imposed additional conditions for triggering corporate insolvency resolution process under the code. To this, the Hon'ble Supreme Court responded that: "A supreme legislature cannot be cribbed, cabined, or confined by the doctrine of promissory estoppel or estoppel. It acts as a sovereign body." The main argument of the petitioners is that the amendments are arbitrary, unreasonable and are in contravention of article 14, 19(1)(g), 21 and 300A of the Constitution.The Supreme Court upheld the constitutional validity of the impugned amendments rejecting all the averments put forth by the petitioners, albeit with directions issued under Article 32 of the Constitution of India and expressed an observation that: "There is nothing like a perfect law and as with all human institutions, there are bound to be imperfections. What is significant

11 *Manish Kumar*v. *Union of India*, (2021) Ibclaw.in 16 SC..

is however for the court ruling on constitutionality, the law must present a clear departure from constitutional limits.”

In this judgment,[13] the Supreme Court has laid down limitations on the applicability of the Insolvency and Bankruptcy Code (IBC) concerning properties belonging to a third party or the assets which do not belong to the corporate debtor facing insolvency proceedings.The issue concerning the property of a third party came up before the Supreme Court in the Municipal Corporation of Greater Mumbai (MCGM) versus Abhilash Lal case, and the apex court ruled in favor of the MCGM, setting aside the contention of the National Company Law Appellate Tribunal (NCLAT).The MCGM gave plots of land to Seven Hills Healthcare (P) Limited in Mumbai for developing a 1,500-bed hospital with certain conditions. Seven Hills borrowed funds from banks and financial institutions for building the hospital. However, it could not complete the project in time and defaulted on repayment of loans. Axis Bank initiated insolvency proceedings against Seven Hills. The NCLT appointed an insolvency resolution professional. Later, the Committee of Creditors (CoC) approved a revised resolution plan under which Shetty New Medical Centre (SNMC) agreed to invest Rs 1,000 crore. The amount was to be borrowed from banks and financial institutions by spade hypothecation and mortgage of the movable and immovable properties under the possession of Seven Hills. Having agreed initially, the MCGM during proceedings opposed the resolution plan, arguing that being a public body as well as a planning authority, it had to comply with the provisions of the Mumbai Municipal Corporation Act, 1888 (MMC Act), which meant that all action and approval had to be taken by the Improvement Committee of the Corporation.The NCLT overruled the objections of the MCGM and approved the resolution plan. The MCGM approached the NCLAT but failed to obtain any relief. Aggrieved by the NCLT and NCLAT, the MCGM moved the Supreme Court.

One of the crucial issues that came up during the hearing was regarding section 238 of the Code, which said: “the provisions of this Code shall have an effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.” The Supreme Court ruled that section 238 cannot be read as overriding the MCGM’s right and its public duty to control and regulate proper, overriding the MMC Act provisions Act. “This court is of the opinion that Section 238 could be of importance when the properties and assets are of a debtor and not when a third party like the MCGM is involved,” the judgment said while allowing the appeal.The ruling will have implications wherever the properties belonging to a third party comes into the picture during the corporate insolvency resolution process.

12 *Pioneer Urban Land and Infrastructure Ltd. and Anr*v. *Union of India*,[2019] Ibclaw.in 13 SC.

13 *MunicipalCorporation of Greater Mumbai (MCGM)* v.*Abhilash Lal*, [2019] 111 taxmann.com 405 (SC).

Likewise, in,[14] the apex court held that the period of limitation for filing an appeal against an order of NCLT as per section 61 of the IBC, 2016 would start from the date of pronouncement of the order in the open court not the date of the uploading of order. The factual matrix of the case was that the appellant had filed an appeal before the NCLAT without attaching the certified copy of the NCLT order, citing reasons they had applied for the same but hadn't been issued. NCLAT dismissed the appeal for being time-barred. Challenging the NCLAT order, the appellant approached the Supreme Court. The appellant argued that the clock on limitation would run from the date a free copy is provided. However, the sourt refuted the argument highlighting that an appeal if considered necessary and reasonable by an aggrieved party, is expected to be filed immediately without awaiting a free copy that may be received at an indefinite stage.The two important issues raised in this case were(a) When will the clock for calculating the limitation period run for proceedings under the IBC?(b) Whether annexation of a certified copy mandatory for an appeal to the NCLAT against an order passed under the IBC?

The Supreme Court observed that the answers to the questions must be based on a harmonious interpretation of the applicable legal regime. The IBC is a Code and has an overriding effect.The court further said that Sections 61(1) and 61(2) of the IBC consciously omit the requirement of limitation being computed from when the "order is made available to the aggrieved party", in contradistinction to section 421(3) of the Companies Act.It further ruled "It is not open to a person aggrieved by an order under the IBC to await the receipt of a free certified copy under Section 420(3) of the Companies Act 2013 read with Rule 50 of the NCLT and prevent limitation from running. Accepting such construction will upset the timely framework of the IBC," Regarding the question of attachment of a certified copy of the order and appeal, the court held that Rule 22(2) of the NCLAT rules renders it mandatory. The court made it clear that the litigant must file its appeal within thirty days, which can be extended up to a period of 15 days, and no more, upon showing sufficient cause. A sleight of interpretation of procedural rules cannot be used to defeat the substantive objective of legislation that impacts the economic health of a nation, ruled Supreme Court. The court concluded that the appellant should have exercised diligence to obtain a certified copy of the order to file an appeal. Since the appeal was barred by limitation, NCLAT was correct in dismissing his appeal.

In *Rajendra Narottamdas Sheth* v. *Chandra Prakash Jain*[15] the Supreme Court held that the burden of proving the occurrence of default and that the application filed under section 7 of the IBC is within the period of limitation is entirely on the financial creditor. In this case, the financial creditor filed an application under section 7 of the IBC to initiate the corporate insolvency resolution process. The adjudicating authority admitted the application and rejected the corporate debtor's contention that the application was not maintainable as a power of attorney holder filed it and that it

14 *V. Nagarajan* v. *SKS Ispat and Power Ltd*, [2021] 131 Taxmann.com 258 (SC).

15 [2021] 131 taxmann.com 2 (SC).

was barred by limitation. On appeal, the appellant corporate debtor reiterated that the application under section 7 of the Code was barred by limitation before the NCLAT. Dismissing the appeal, the NCLAT observed that the corporate debtor could not demonstrate any error in the order of the adjudicating authority. The NCLAT examined a power of attorney given and found no merit in the argument of the corporate debtor that the application under Section 7 of the Code was not maintainable as a power of attorney holder filed it.

On further appeal, the apex court held that burden to prove the occurrence of the default and that the application is filed within the period of limitation is entirely on the financial creditor. The court held that the plea of section 18 of the Limitation Act not having been raised by the financial creditor in the application filed under section 7 could not rescue the appellants in the facts of this case. Accordingly, the court clarified that the onus on the financial creditor, at the time of filing an application, to demonstrate default with respect to a debt, which is not time-barred, is not sought to be diluted herein. Dismissing the plea, the court observed that, "In the present case, if the documents constituting acknowledgement of the debt beyond April 2016 had not been brought on record by the corporate debtor, the application would have been fit for dismissal on the ground of lack of any plea by the financial creditor before the Adjudicating Authority with respect to an extension of the limitation period and application of Section 18 of the Limitation Act." The court further observed that while the decision to admit an application under section 7 is typically made because of material furnished by the financial creditor, the adjudicating authority is not barred from examining the material that is placed on record by the corporate debtor to determine that such application is not beyond the period of limitation.

In the instant case,[16] two of the financial creditors filed an application under section 60 (5) (c) of the Insolvency and Bankruptcy Code, 2016 before the NCLT for removal of two entities, AAA Landmark Private Limited and Spade Financial Services Private Limited, from the Committee of Creditors (Coc) constituted for corporate insolvency resolution process (CIRP) initiated against AKME Projects Limited, a Corporate Debtor on the ground that they are "related parties".The NCLT believed the two entities did not qualify as "financial creditors" under Section 5 (7) of the code since the transactions between them were collusive in nature and consequently they were not eligible to participate in the meeting of CoC. Therefore, it did not venture to consider the question regarding whether they are related parties or not. On the contrary, the NCLAT held that two entities were "admittedly" financial creditors of the corporate debtor but being "related parties" to the corporate debtor, they were disqualified to be a part of the CoC. Aggrieved by the ruling of the NCLAT, both the parties appealed to the Supreme Court. The contention of Phoenix before the Apex Court was that though the NCLAT rightly ruled that the two entities were related parties and hence could not

16 *Phoenix Arc Private Limited* v. *Spade Financial Services Limited,* (2021) Ibclaw.in 03 SC.

be included in the CoC, the observation that Spade and AAA were financial creditors were erroneous in nature.

Before going into the decision of the Supreme Court, it is of utmost importance to understand that the sole purpose of exclusion of related parties from the CoC is to obviate differences of opinions and to ensure that the CoC is not sabotaged by any "related parties" of the corporate debtor.The Supreme Court altered the decision of NCLAT and held that Spade and AAA are not financial creditors since collusive transactions are anathema to the objectives of IBC. Also, the apex court affirmed that the two entities are related parties within the meaning of the section 5 (24) of the code and hence, they are excluded from the meeting of the Coc. In the light of the objectives of the code, another interesting observation made by the Supreme Court is that: "while the default rule under the first proviso to Section 21(2) is that only those financial creditors that are related parties in praesenti would be debarred from the CoC, those related party financial creditors that cease to be related parties in order to circumvent the exclusion under the first proviso to Section 21(2), should also be considered as being covered by the exclusion thereunder."

In another case[17] the apex court held that petitioners-home buyers would not be prevented by the moratorium under section 14 from initiating proceedings against the promoters of the corporate debtor in relation to honoring the settlements reached before the court. The petitioners/home buyers and developer/corporate debtor entered into a homebuyer agreement which envisaged that delivery of possession in almost all cases was to be in 2014.The corporate debtor abandoned the project. As a result, the petitioners instituted proceedings before NCDRC sought a refund of their monies, and NCDRC allowed their claim.In the meantime, proceedings were initiated against the respondent/developer under section 9 by an operational creditor, and the same was admitted. CoC approved the resolution plan submitted by the consortium of home buyers, and the Adjudicating Authority was yet to decide on the application for approval of the resolution plan.

Petitioners submitted that during instant proceedings, settlements were arrived at, and hence promoters of corporate debtor/ developer should be held liable personally to honor the settlements. Petitioners urged that instant court should direct the personal properties of promoters to be attached in view of provisions contained in the resolution plan. The apex court held that if the petitioners have any objections to the Resolution Plan, they must submit them before the adjudicating authority. The NCLT was directed to ensure that the application for approval is disposed of expeditiously and preferably within six weeks from the date of receipt of a certified copy of the instant order. The court further clarified that the petitioners would not be prevented by the moratorium under section 14 from initiating proceedings against the promoters of the corporate debtor in relation to honoring the settlements reached before an instant court. However,

17 *Anjali Rathi* v. *Today Homes and Infrastructure (P.) Ltd*, [2021] 130 taxmann.com 253 (SC),

instant court cannot issue a direction as sought by petitioners relying on a resolution plan which is still pending approval before an adjudicating authority.

In this landmark ruling,[18] the apex court held that the 2019 amendment to section 31 of the Insolvency and Bankruptcy Code, 2016 is clarificatory and declaratory, and therefore when NCLT approves resolution plan, claims, which are not part of the resolution plan, shall stand extinguished and proceedings related to it shall stand terminated. Section 31 states that if the adjudicating authority is satisfied that the CoC under section 30 has approved the resolution plan, it shall by an order approving the resolution plan, which shall be binding on corporate debtors, their employees, members, creditors, guarantors, and other stakeholders involved in the plan. In section 31(1), after the words 'creditors', the 2019 amendment added the words "including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed".

The high court in an impugned order held that since the NCLT approved the resolution plan of the petitioner company *vide* its order dated April 17, 2018, which is much before the 2019 amendment, the said amendment in Section 31(1) of the IB Code, 2016 shall not apply to the resolution plan of the petitioner Company.The question that arose before the apex court were whether any creditor, including the central government, state government, or any local authority, is bound by the resolution plan once an adjudicating authority approves it under subsection (1) of section 31 of the Insolvency and Bankruptcy Code, 2016? Whether the amendment to section 31 by section 7 of Act 26 of 2019 is clarificatory /declaratory or substantive? Whether after approval of resolution plan by the adjudicating authority a creditor including the Central Government, state government or any local authority is entitled to initiate any proceedings for recovery of any of the dues from the corporate debtor, which are not a part of the resolution plan approved by the adjudicating authority?

The court ruled that "once the Adjudicating Authority duly approves a resolution plan under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors, and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of the resolution plan, shall stand extinguished, and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan; 2019 amendment to Section 31 of the IBC is clarificatory and declaratory and therefore will be effective from the date on which IBC has come into effect; consequently, all the dues, including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period before the

18 *Ghanashyam Mishra & Sons (P.) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd*, [2021] 126 taxmann.com 132 (SC).

date on which the Adjudicating Authority grants its approval under section 31 could be continued".

In this significant ruling,[19] the Supreme Court held that a person who is ineligible to submit a resolution plan under section 29A of the IBC would not be permitted to propose a scheme of compromise and arrangement under section 230 of the Companies Act, 2013.The apex court also upheld the constitutional validity of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, which prescribes that a person who is not eligible under the IBC to submit a resolution plan for corporate insolvency resolution of the corporate debtor shall not be a party in any manner to such compromise or arrangement. An appeal against an order passed by the National Company Law Tribunal in an application under sections 230 to 232 of the Act of 2013 in which it was held that a person who is ineligible under section 29A of the Insolvency Bankruptcy Code, 2016 to submit a resolution plan and is also barred from proposing a scheme of compromise and arrangement under section 230 of the Companies Act, 2013.The decision of the NCLAT was challenged in the appeal before the apex court. According to the appellant, in the absence of a disqualification, the NCLAT could not have read the ineligibility under section 29A of the IBC into section 230 of the Act of 2013. This would, in the submission, amount to a judicial reframing of legislation by the NCLAT, which is impermissible.

The apex court held that a person who is ineligible under section 29A of the Insolvency Bankruptcy Code to submit a resolution plan could not propose a scheme of compromise and arrangement under Section 230 of the Companies Act, 2013. The Court also rejected the contention that attaching the ineligibilities under section 29A and section 35(1)(f) of the IBC to a scheme of compromise and arrangement under section 230 of the Act of 2013 would be violative of article 14 of the Constitution as the appellant would be "deemed ineligible" to submit a proposal under section 230 of the Act of 2013.The court observed that the stages of submitting a resolution plan, selling assets of a company in liquidation, and selling the company as a going concern during liquidation all indicate that the promoter or those in the management of the company must not be allowed a back-door entry in the company and are hence, ineligible to participate during these stages. Proposing a scheme of compromise or arrangement under section 230 of the Act of 2013 while the company is undergoing liquidation under the provisions of the IBC lies in a similar continuum. Thus, the prohibitions that apply in the former situations must naturally also attach to the latter to ensure that like situations are treated equally.

The Supreme Court in an important ruling[20] held that entities having commercial arrangements of collusive nature with the corporate debtor could not be considered financial creditors under the Insolvency and Bankruptcy Code (IBC) provisions.In this case, the operational creditor initiated the corporate insolvency resolution process (CIRP) against AKME Projects Limited under section 9 of the IBC.As part of the

19 *Arun Kumar Jagatramka* v. *Jindal Steel and Power Ltd*, [2021] 125 taxmann.com 244 (SC).

20 *Phoenix Arc (P.) Ltd*. v. *Spade Financial Services Ltd*, [2021] 124 taxmann.com 24 (SC).

process, the Interim Resolution Professional invited claims. In response to the notice, Spade Financial Services Limited and its subsidiary AAA Landmark Private Limited filed claims as creditors.Spade filed the claim based on an alleged Memorandum of Understanding executed with the corporate debtor, which stated that Inter Corporate Deposits (ICDs) of Rs. 26.55 crore have been granted to the corporate debtor by Spade, bearing interest of 24 per cent repayable in terms of the mutual agreement between the parties. AAA filed its claim before the IRP for a sum of Rs. 93.90 crore.Later, the CoC was constituted on May 22, 2018. On May 25, 2018, the IRP rejected the claim of Spade, *inter alia*, on the ground that the claim was not in the nature of a financial debt in terms of section 5(8) of IBC since consideration was absent for the time value of money, *i.e.,* the period of repayment of the claimed ICDs was not stipulated.The IRP also rejected the claim of AAA on the ground that its claim as a financial creditor in Form C was filed after the expiry of the period for filing such a claim.Having gone through the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT), the dispute reached the Supreme Court. Based on the appeals, the Supreme Court framed three issues for consideration which are as follows; (i) Whether Spade and AAA are financial creditors of the Corporate Debtor, (ii) Whether Spade and AAA are related parties of the corporate debtor; and (iii) Whether Spade and AAA must be excluded from the CoC.

In the present case, the court said, there was a finding that AAA and Spade were related parties within the meaning of section 5(24) at the time when the alleged financial debt based on which they assert a claim to be a part of the CoC was created. "Further, we have also concluded that the transactions between Spade and AAA on the one hand, and the Corporate Debtor on the other hand, which gave rise to their alleged financial debts were deceitful in nature. Therefore, it is evident that there existed a deeply entangled relationship between Spade, AAA, and Corporate Debtor, when the alleged financial debt arose," the court said, adding, the pervasive influence of the promoter/director of the corporate debtor over the concerned entities was evident, and allowing them in the CoC would affect the other independent financial creditors. "Due to the collusive nature of their transactions alleged to be a financial debt under section 5(8), Spade and AAAcannot be labelled as financial creditors under section 5(7)," it added.

IX SHARES

In a critical judgment,[21] the Supreme Court held that pledge of shares would not make an entity financial creditor of the corporate debtor for the purpose of the Insolvency and Bankruptcy Code (IBC). In this case, the L and T Infrastructure Finance Company Limited advanced a financial facility to Doshion Limited, which was repayable in 72 structured monthly instalments. A pledge agreement was executed under which 40,160 shares of Gondwana Engineers Limited (GEL) were pledged as a security by Doshion Limited.Later, by an agreement, L andT Infrastructure assigned all rights, title and interest in the financial facility, including any security and interest

21 *Supra* note.16.

therein, in favour of Phoenix ARC, the appellant in the present case. On failure of Doshion Limited to repay the loans, the appellant initiated action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Meanwhile, the Bank of Baroda initiated a corporate insolvency resolution process against Doshion Limited (corporate debtor) under Section 7 of the IBC. Subsequently, an Interim Resolution Professional (respondent in the present case) was appointed.

Pursuant to the commencement of the corporate insolvency resolution pro regarding the corporate debtor, the appellant filed its claim for an amount of Rs. 83.49 crore with the respondent.The respondent rejected the appellant's claim, stating that as per the pledge agreement, the corporate debtor's liability was restricted to the pledge of the shares only.The appellant approached the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) without success. The appellate tribunal held that pledge of shares does not amount to "disbursement of any amount against the consideration for the time value of money" and hence do not fall within sub-clause (f) of sub-section (8) of Section 5 of the IBC.The appellant moved the Supreme Court for relief.

The Supreme Court held that a person having only security interest over the assets of the corporate debtor, even if falling within the description of 'secured creditor' by virtue of collateral security extended by the corporate debtor, would not be covered under the definition of financial creditor contained in sub-section (7) and (8) of section 5 of the IBC."The appellant at best will be secured debtor qua above security but shall not be a financial creditor within the meaning of Section 5 sub-sections (7) and (8)," the Supreme Court said, upholding the decision of the NCLT that appellant was not a financial creditor of the corporate debtor.

X MERCHANTING TRADE TRANSACTIONS

In this significant ruling,[22] the Supreme Court upheld the measures adopted by the Reserve Bank of India to implement the ban imposed by the Union Government on the export of Personal Protective Equipment (PPE) Kits in view of the COVID-19 pandemic. The petitioner was the managing director of a firm that manufactured and traded pharmaceuticals and healthcare products like PPE kits. He secured a contract to serve as an intermediary for the sale of PPE products by a supplier in China to a buyer in the United States. However, the Revised Guidelines on Merchanting Trade Transactions (MTT), issued by the RBI in January 2020, banned the export of PPE products.The petitioner wrote a letter to his bank seeking documents such as a letter of credit to execute the Merchanting Trade Transactions (MTT) contract to execute the transaction. However, he was denied the same. The petitioner argued that the prohibiting export of PPE products violates his right to equality and is arbitrary. However, the appellant received no response.

22 *Akshay N Patel* v. *Reserve Bank of India*, [2021] 133 taxmann.com 53 (SC).

The appellant then filed a writ petition under article 226 before the High Court of Madhya Pradesh. The high court upheld clause 2(iii) of the Revised Guidelines on Merchanting Trade Transactions issued by the RBI.

On appeal, disagreeing with the argument raised by the petitioner, the apex court reasoned that the prohibition was based on a legitimate goal. The court said that: “democratic interests that secure the well-being of the masses cannot be judicially aborted to preserve the unfettered freedom to conduct the business of the few”.

The court rejected the argument of a businessperson that the restrictions amounted to a violation of his fundamental right to freedom to trade and business guaranteed under article 19(1)(g) of the Constitution of India.”When an Indian entity facilitates the trade of PPE products to another nation, it takes away from India’s possible stock in the global market. There is a rational nexus in the prohibition of MTTs in respect of PPE products and the public health of Indian citizens,” court held. The apex court held that the ban imposed on Merchanting Trade Transactions in respect of all commodities whose exports were banned by the prevailing FTP, under clause 2(iii) of 2020 Revised Guidelines on Merchanting Trade Transactions issued by RBI under sections 10(4) and 11(1) of FEMA, 1999, was proportional and not unconstitutional under article 19(1)(g) of the Constitution of India in so far as it pertained to PPE Kits.

XI DIRECTORS OF COMPANY

In this case,[23] the High Court of Delhi helddirector cannot be attached merely on the ground of allegation against company and therefore the provisional attachment could be ordered against property belonging to taxable person and provisional attachment order of directors’ bank accounts on fake Input Tax Credit (ITC) allegations on their companyis not valid. The petitioner acted as a director on the Board of Directors of a company between 2006 and 2008. The department initiated an investigation against that company, alleging that the company was availing ITC against fake/ineligible invoices. The petitioner was also a shareholder in the company and owned approximately 14.33% equity shares. The department, therefore, initiated proceedings under section 83 against the petitioner and provisionally attached her bank accounts. She filed a writ petition against the same. The high court observed that there is nothing on record to show material available with the department, linking the petitioner to purported fake invoices. In other words, in the absence of such material, the impugned action concerning provisional attachment of the petitioner’s bank accounts, which is otherwise a “draconian” step, was unsustainable. In the zeal to protect the interest of the revenue, the department cannot attach any property, including bank accounts of persons other than the taxable person. Therefore, it was held that provisional attachment orders were liable to be quashed.

23 *Roshni Sana Jaiswal* v. *Commissioner of Central Taxes GST Delhi (East)*, [2021] 128 taxmann.com 357 (Delhi).

In another significant ruling[24] the High Court of Karnataka held that section 272 (1)(e) of Companies Act is not ultra vires Constitution of India. In the instant case, the High Court dismissed a petition which sought to quash proceedings initiated against Devas Multimedia Private limited by ISRO arm Antrix Corp. before NCLT.The petitioner, Devas Employees' Mauritius Pvt. Ltd., a company incorporated under the laws of the Republic of Mauritius, had presented a writ petition with prayers to declare section 272(1)(e) of Companies Act, 2013 as *ultra vires* Constitution of India;to declare that the second proviso to section 272(3) of the Act must be read to apply to the petitions presented by persons falling under section 272(1)(e) of the Act; andto issue a writ of certiorari quashing sanction order and consequently to quash all proceedings before NCLT.The high court held that section 272 (1)(e) is not an ultra vires Constitution of India. As registrar and 'a person authorized by Central Government' fall into different categories, it does not warrant reading down Section 272(3).The Court observed that according to arbitration proceedings between company 'A' and company 'D' (of which petitioner was a shareholder), an award was passed in favor of company 'A'. The Central Government Authorized Chairman and Managing Director of 'A 'to present a petition to wind up 'D'; there was no infirmity in the order passed by Central Government.

In *Indus Biotech Private Limited* v. *Kotak India Ventutre Fund* [25] the Kotak India Venture (Offshore) Fund, in congruence with the terms of shareholders' agreements and share subscription agreements had subscribed to the equity shares and Optionally Convertible Redeemable Preference Shares ("OCRPS") in Indus Biotech Private Limited. Kotak preferred to convert their OCRPS into equity shares in accordance with the regulations 5(2) of SEBI (ICDR) Regulations, 2018 since Indus had proffered to make a Qualified Initial Public Offering ("QIPO"). Subsequently, Kotak had filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 seeking initiation of corporate insolvency resolution process against Indus Biotech since it had failed to redeem the OCRPS. In the same matter, Indus Biotech had filed an interim application under section 8 of the Arbitration and Conciliation Act, 1996 to refer the dispute to arbitration along with an application seeking dismissal of section 7 of the IBC proceedings.The NCLT allowed the Indus' application filed under section 8 of the Arbitration and Conciliation Act and as a corollary dismissed Kotak's application filed under section 7 of the IBC. The NCLT in the light of the factual matrix of the case noted that the main issue was with the valuation of shares and conversion formula that was to be applied by the parties for conversion of the OCRPS since Kotak claimed that it would be entitled to 30% of the total paid up share capital of Indus Biotech, while according to Indus Biotech, it should be only 10%. Therefore, NCLT believed invocation of arbitration was justified as disputes in the present case were all arbitrable. Furthermore, given that the corporate debtor was a "solvent, debt-free and profitable company" the NCLT observed initiating CIRP against Indus Biotech would be inappropriate.

24 *Devas Employees Mauritius (P.) Ltd*. v. *Union of India*, [2021] 127 taxmann.com 108 (Kar.).
25 (2021) Ibclaw.in 52 SC.

The Supreme Court had to deal with two petitions- a special leave petition by Kotak against the NCLT order and arbitration petition under section 11 by the Indus Biotech for appointment of arbitrator on behalf of Kotak. The apex court upheld the order passed by the NCLT and correspondingly appointed an Arbitral Tribunal. The Supreme Court while delivering the judgement rightly pointed out, since there had been no determination with respect to the conversion formula of the OCRPS, it would be incorrect to conclude if "default" had occurred within the meaning of the section 3 (12) of the code. Another important observation made by the apex court was that mere filing of section 7 IBC application would not make the proceedings in rem and consequently it would be very much within the scope of arbitrability. The proceedings become "in rem having the erga omnes effect" only upon admission and that marks the initiation of CIRP. However, the Supreme Court emphasized that even if there were an application under section 8 of the Arbitration Act pending before the adjudicating authority, the authority ought to have first decided the section 7 application of IBC and adjudged on the matter related to the occurrence of "default" because it has a non-obstante clause having an overriding effect on all other laws. This would bolster the objectives of the code since arbitration could not be used as a sham to delay the IBC proceedings and defeat the timelines prescribed under the code.

In *Ghanashyam Mishra and Sons Pvt Limited* v. *Edelweiss Asset Reconstruction Company Limited*[26] the State Bank of India, the financial creditor filed an application under Section 7 of the Insolvency and bankruptcy Code, 2016 to initiate corporate insolvency resolution process against the Orissa Manganese & Minerals Limited, the corporate debtor. Upon admission of the application by the NCLT, a Resolution Professional was appointed who initiated the resolution process. Subsequently, three resolution plans were received from Edelweiss Asset Reconstruction Company Limited ("EARC"), Orissa Mining Private Limited ("OMPL") and Ghanashyam Mishra and Sons Private Limited ("GMSPL"), respectively.The NCLT approved the plan of GMSPL rejecting all other applications, which was also approved by the Committee of Creditors by a voting share of about 89.23%. Thereupon, EARC filed an appeal against the rejection of its claims before the NCLAT. The appellate authority emphasized that although the plan of GMSPL had better potential, there could be a chance of agitation before the alternative forums by the parties whose claims were not included in the resolution plan. Consequently, an appeal was filed by GMSPL before the Supreme Court against the impugned order of NCLAT.

The Supreme Court merged four matters together as they involved common questions of law. The Apex Court determined two major issues- whether an approved resolution plan would bind all the creditors including the Central Government, state government or any local authority and whether any creditor would be entitled to initiate proceedings against the corporate debtor in respect of claims which are not covered in the resolution plan after the same gets approved. The Supreme Court also pointed out an important question of law that whether the amendment to section 31 would

26 (2021) Ibclaw.in 54 SC.

have retrospective effect or not.The Supreme Court while addressing the above-mentioned issues observed that Section 31 unequivocally states that once a resolution plan is approved, it would be binding on all the creditors (including the Central Government, state government or any local authority), corporate debtors, its employees and other stakeholders. Furthermore, it was observed by the Supreme Court that all the claims that were not included in the resolution plan shall stand extinguished and all the creditors would be barred from recovering any of the dues from the corporate debtor accruing before the transfer of the management of the corporate debtor to the successful resolution applicant. The apex court also observed that the amendment to section 31 is "clarificatory and declaratory" in nature and thus it would have a retrospective effect.In the light of the observations, the Supreme Court held that the NCLAT's observation that EARC could take recourse to alternative remedies as are available to it in law is prohibited in law. This decision of the Supreme Court will prevent multifarious litigations and provide an opportunity to the corporate debtor to start with a clean slate with no burden of past liabilities.

In the instant case,[27] the petitioners challenged the validity of the notification issued by the Ministry of Corporate Affairs on November 15, 2019, which brought into effect Part III of the Insolvency and Bankruptcy Code, which dealt with personal guarantors of corporate debtors. The petitioners, in the capacity of promoters, directors, or in some other roles had provided personal guarantees to banks and financial institutions, because of which they were facing insolvency proceedings that are at various stages. The provisions of Part III established a comprehensive mechanism for creditors that enabled them to initiate insolvency proceedings against personal guarantors of the corporate debtors. The legislative intent was to make directors, managing directors, promoters, or the chairperson liable for the loans availed by their firm on their personal guarantee.

The impugned notification was challenged before various high courts. Therefore, to settle the protracted saga with respect to personal guarantors, the Supreme Court exercised its power under article 139A and presided on the matter.The bone of the contention was that the impugned notification was ultra vires of the powers delegated to the Central Government under section 1(3) of the code and asserted that the executive did not have the power to bring into effect the provisions of the code selectively and in a phased manner only to the extent that they administer personal guarantors of the corporate debtors and therefore the notification was ultra vires of the. Another issue that was before the Supreme Court was whether the approval of a resolution plan of a corporate debtor discharges all the liabilities of the personal guarantor to the corporate debtor.The Supreme Court upheld the legal validity of the impugned notification and held it is *intra vires* of the powers of the Central Government. The court while determining the scope of delegated legislation, observed that the Central Government was well within its powers and the notification was not an occasion of excessive legislative exercise. It also opined that the intention of the legislature was never to enforce the provisions of the code all at once. The Supreme Court also held that the

27 *Lalit Kumar Jain*v. *Union of India*(2021) Ibclaw.in 61 SC.

approval of a resolution plan would not ipso facto discharge or release the liabilities of the personal guarantors to the corporate debtors.

In the present case[28] it was held that writ filed by a home buyer without seeking to represent the entire class of home buyers wouldn't be maintainable. Petitioner buyer filed a writ petition under Article 32 of the Constitution of India seeking cancellation of all agreements with the respondent Development Authority and refund of money to purchasers, or in alternative to ensure that construction was carried out and that premises were handed over within a reasonable time. The petitioner also sought a forensic audit, an investigation by CBI and other authorities such as Serious Fraud Investigation Office and Enforcement Directorate. However, it was found that a singular home buyer had filed a writ petition under article 32 without seeking to represent the entire class of home buyers. The court observed that all buyers might not seek a cancellation and refund of consideration. Apart from this aspect, the petitioner sought other reliefs in aid of preliminary relief, including the constitution of a committee presided over by a former judge of this court to handle developer projects. The court further observed that entertaining a petition of this nature would involve the court virtually carrying out day-to-day supervision of a building project. There were specific statutory provisions holding field and adequate provisions made in statute to deal with filing a complaint and for investigation according to law."Therefore, in view of the statutory framework, both in terms of civil and criminal law and procedure and fact that there was no reason to assume that the petitioner represented a class, petition under Article 32 could not have been entertained."

Likewise in *Anuj Mittal* v. *Union of India*,[29] directors of a company were disqualified from 1st November 1, 2017 to October 31, 2022 due to non-compliance under section 164(2)(a) of the Companies Act, 2013*, i.e.,* non-filing of financial statements or annual returns for any continuous period of three financial years. As a result, their DINs and DSCs were de-activated.Because of disqualification, the petitioners were facing problems in other active companies. They were appointed as directors as they claim to be directors in other active companies and now wish to start business afresh.The Court considered the legal position relating to activation of DIN/ DSC numbers of directors of defaulting companies in *Anjali Bhargava* v. *UOI*[30] and took reference from the MCA's CFSS scheme and stated that the directors of struck off companies who seek to be appointed as directors of other/new companies, ought to be provided with an opportunity to avail of CFSS. The scheme seeks to provide a fresh start for directors of defaulting companies who seek appointments in other companies or wish to start new businesses. The court observed that since the disqualification of petitioners was before May 7, 2018, petitioners would be directors who had been disqualified before May 7, 2018, qua other companies in addition to defaulting company and proviso section 167(1)(a) would not apply. Directors would continue to be directors in companies other than defaulting company and, therefore,

28 *Upendra Choudhury* v. *Blanshard Development Authority*, [2021] 127 taxmann.com 24 (SC).

29 [2021] 125 taxmann.com 10 (Delhi).

30 W.P. (C) No. 11264 of 2020, dated Jan.6, 2021.

DINs and DSCs of petitioners would be re-activated within 10 days. If the Petitioners wish to seek restoration of the struck off company, they are permitted to seek their remedies in accordance with law before the NCLT.

Similarly in another case,[31] the petitioners were directors of a company 'P', which availed loan/credit facilities from the respondent bank. The petitioners guaranteed the loan repayment and offered their immovable property as security.The bank loan was categorized as a Non-Performing Asset due to defaults in repayment. A notice under section 13(2) was issued, followed by a possession notice under section 13(4) the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Aggrieved by the same, the petitioners approached Debts Recovery Tribunal (DRT) under section 17. However, the DRT declined to grant any interim relief against the physical possession of the aforesaid properties. The petitioners filed an appeal but could not deposit Rs. 7 crores being 25 per cent of the amount demanded in the notice under section 13(2). Eventually, the appeal was dismissed as withdrawn.In addition to the foregoing, the writ petition came for admission. The petitioners admitted liability and offered, by way of a statement under oath, to deposit Rs. 7 crores, *i.e.,* 25 per cent of the notice amount in three instalments. The bank gave its consent, and after that, the High Court ordered that the possession of the petitioners' properties would not be disturbed subject to the petitioners depositing Rs. 7 crores. However, the cheque deposited for instalment was dishonored. Therefore, the bank filed a petition under sections 10 and 12 of the Contempt of Courts Act, 1971, for punishing the petitioners for willful and deliberate breach of their undertaking.

Though the petitioners resisted the contempt petition on the ground that breach of an undertaking, made with a view to secure a conditional order of stay may not be tantamount to contempt, especially when the consequences for breach of such undertaking was spelt out in the order of the court itself, the judge was not convinced. Therefore, high court held the petitioners guilty of contempt and sentenced them to simple imprisonment for three months with a fine of Rs. 2000 each.As a result, the petitioners raised a defence that they had issued post-dated cheques in the hope of receiving amounts due to them from their debtors and that their debtors failed to make payment. The petitioners also named three debtors from whom they were expected to receive money. Doubting the genuineness of the claim made by the petitioners, the Judge before whom the contempt petition came up passed an order directing an investigation by the Serious Fraud Investigation Office (SFIO). To the misfortune of the petitioners, SFIO submitted a report that the alleged debtors of the petitioners are only shell entities of PPPL, of which the petitioners were directors.The High Court concluded that the petitioners had played a fraud upon the Court and thus, held the petitioners guilty of contempt of the court. After that, an appeal was filed to the apex court. After investigation, the apex court noted that the series of acts committed by the petitioners (i) in issuing post-dated cheques, which were dated beyond the date within which they had agreed to make payment; (ii) in allowing those cheques to be dishonored; (iii) in not appearing before the court on the first date of hearing with an

31 *Suman Chadha* v. *Central Bank of India*, [2021] 131 taxmann.com 161 (SC).

excuse that was found to be false; (iv) in coming up with an explanation about their debtors committing default; and (v) in getting exposed through the report of the SFIO, convinced the high court to believe that the undertaking given by the petitioners was not based upon good faith but intended to hoodwink the court. Therefore, there is no fault with the order of the High Court holding the petitioners guilty of contempt.Because the immovable properties which the petitioners attempted to save, by approaching the DRT and the High Court, have already been sold. All the attempts made by the petitioners from 2015 onwards to save the mortgaged properties have been in vain.Therefore, the SLP was disposed of upholding the finding of the High Court that the petitioners were guilty of contempt of court but reducing the period of sentence from three months to the period of imprisonment already suffered/undergone by the petitioners.

XII LIMITED LIABILITY PARTNERSHIP

In a significant ruling,[32] the High Court of Kerala held that a could form a partnership with an individual or other persons. A partnership deed was executed between an individual and an LLP. When the said deed was submitted for registration, the Registrar of Firms refused registration of the partnership firm on the reasoning that an LLP cannot be a partner in the firm.The Petitioner claimed that a partnership and an LLP are not prohibited under the Partnership Act and that LLP is a legal entity, as defined under the LLP Act, and it is separate from its partners. It has perpetual succession and has a common seal. The petitioner argued that on its registration, it can sue and being sued under section 14. It can also acquire, develop, or dispose of movable or immovable properties. Therefore, the petitioner claims that the LLP is liable to be treated as a person, and there cannot be any objection to registering a partnership with an LLP.The respondent filed a statement reiterating his stand in the impugned order. According to the respondent, section 25, 26, and 49 of the Indian Partnership Act, 1932 makes the partners jointly and severally liable with all other partners. At the same time, under section 28 of the LLP Act, 2008, the provisions regarding the liability of the partnership firm are restricted only to the extent provided in the agreement. Such a provision runs contrary to section 25 and 49 of the Indian Partnership Act. It is also pointed out that foreign investment is permissible in LLP, whereas it is not permissible under the Partnership Act.

For the issue whether LLP can be treated as a person, who can be permitted to form a partnership with an individual? the High Court of Kerala held that "a partnership can be entered into between two persons. Such persons can be an incorporated body of individuals. LLP is a body corporate. It can be said to be a person, as defined in Section 3(42) of the General Clauses Act, 1897 if there is no repugnancy in the subject or context. To examine the same, it is necessary to look at some more provisions in both the Acts *viz.,* Partnership Act and LLP Act." The High Court of Kerala further held that the liability of partners of LLP and liability of the LLP as a partner under the Partnership Act would be different. The liability of partners in an LLP cannot be

32 *Raj Shipping Agencies* v. *Barge Madhwa*, [2021] 116 taxmann.com 707 (Bombay).

relevant when the LLP becomes a partner, as the provisions in the Partnership Act would bind it. The liability of the LLP would be as in the case of a company that joins a firm after entering a partnership. The court also observed that section 4 of the Partnership Act permits the constitution of a firm or partnership between one or more persons. In this case, the partnership deed was executed between an individual and an LLP, a body corporate having a legal entity and coming within the definition of "person". The individual liability of the partners of LLP would not be relevant when the LLP itself would have liability independent of the liability of the partners. Therefore, the difference in the provisions under the Partnership Act relating to the firm's liability or the individual partners would not stand in the way of the constitution of a partnership with an LLP. The court held that LLP could not be disqualified from entering a partnership with an individual or other persons.

In *Northern Operating Systems Private Limited* v. *Union of India,*[33] Indian Supreme Court in the context of service tax laws examined the secondment and employment agreements and applied the principle of 'substance over form' to conclude that employee secondments by the overseas group company will be 'manpower supply service' liable to service tax. Given the significance of the Supreme Court's observations, it can have far reaching implications on the existing secondment arrangements from an income tax and transfer pricing perspective also.

XII CORPORATE INSOLVENCY RESOLUTION PROCESS (CIRP)

The insolvency resolution process (IRP) is a one under the Insolvency and Bankruptcy Code, 2016, 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 orcorporate 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.

In *Ramaswamy Palaniappan* v. *Radha Krishnadharmarajan*[34] the NCLT excluded the 179 days pursuant to Regulation 40 C of CIRP Regulations, which excluded the period of lockdown for the purposes of calculating the timeline for CIRP.The factual matrix of the case was that the Committee of Creditors (CoC) had voted in favour of excluding 179 days, *i.e,* the period from May 5, 2020 to October 31, 2020. The central government inserted Regulation 40C in the CIRP Regulations, 2016 which excluded the period of lockdown for the purposes of calculating the

33 Civil Appeal No. 2289-2293 of 2021.

34 Company Appeal (AT) (CH) (Ins.) No. 19 of 2021.

timeline for CIRP. The two major contentions were; (i) Whether a mechanical extension of 179 days from the CIRP period without complete exclusion of the timelines and the activities undertaken during the lockdown period render a considerable benefit to all the stakeholders and, (ii) whether the extension of CIRP of 179 days was against the basic object of IBC which is providing benefit to all stakeholders.The NCLAT observed the decision of the NCLT. The NCLAT further observed that regulation 40C was inserted in compliance with the powers derived u/s. 12 of the IBC and was done in the interest of Public Health during these unprecedented times. The NCLAT cited the judgement of *Kalpraj Dharamshi* v. *Kotak Investment Advisors Limited*,[35] in which the Supreme Court observed that the commercial wisdom of the CoC is not to be interfered with unless the scheme does not provide equitable relief to all the stakeholders. Corporate Insolvency Resolution Process (CIRP) was initiated against Appu Hotels Ltd (Corporate Debtor) on 5th May 2020, but the entire CIRP process could not be completed due to the lockdowns imposed by the central government and various State Governments within the statutory period of 180 days.

In the similar vein in *Ministry of Corporate Affairs* v. *Amit Chandrakant Shah (Resolution Professional)*[36]the NCLTheld that in the exercise of its powers u/s. 213(b)(i) of the Companies Act, 2013which allows the NCLT to direct the central government to investigate in case of fraud committed by the management of the Company to defraud the creditors.The NCLT further ordered the resolution professional to file the requisite documents in support of the application filed u/s. 66 and even directed the central government to refer the matter to the Serious Fraud Investigation Office (SFIO). (2021). As per the facts of the case, the resolution professional had filed an application to the NCLT under section 66 IBC for fraudulent and wrongful trading with the intent to defraud the company against the management of the company undergoing Corporate Insolvency Resolution Process (CIRP). The man contention raised in the case was that whether section 213 allows the NCLT can direct the central government to refer a matter to the Serious Fraud Investigation Office (SFIO)? For which the NCLATciting its decision in the case of *Ganapati Ramesh* v. *Ramanathan Bhuvaneswari*[37] ruled that under section 213 of the Companies Act, 2013 the NCLT may give notice to the promoters and directors of the company and only if a *prima facie* case is made out to the matter to the central government. If the inspectors of the central government are satisfied that there is a case of wrongful trading or fraud with the intent to defraud creditors and the same requires investigation by the SFIO, the matter shall be directed to the SFIO. Hence, it is not within the powers of the NCLT under section 213 to direct the central government to refer the matter to the SFIO for investigation.

XIII 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,

35 2021 SCC Online SC 204.

36 (2021) ibclaw.in 219 NCLAT.

37 Company Appeal Insolvency No. 574 of 2019.

and distribute any remaining assets to partners or shareholders. The term is used primarily in Great Britain, where it is synonymous with liquidation.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. A company can be legally forced to wind up by court order. In such cases, the company is ordered to appoint a liquidator to manage the sale of assets and distribution of the proceeds to creditors.The court order is often triggered by a suit brought by the company's creditors. They are often the first to realize that a company is insolvent because their bills have remained unpaid. In other cases, the winding-up is the conclusion of a bankruptcy proceeding.In any case, a company may not have sufficient assets to satisfy all its debtors entirely, and the creditors will face an economic loss.A company's shareholders or partners may trigger a voluntary winding up, usually by the passage of a resolution. If the company is insolvent, the shareholders may trigger a winding-up to avoid bankruptcy and, in some cases, personal liability for the company's debts. Even if it is solvent, the shareholders may feel their objectives have been met and it is time to cease operations and distribute company assets.

In *Rajee Tasha Stampings P. Ltd.* v. *POCSO- India Pune Processing Centre P. Ltd.*[38] Payment was made to the petitioner by the insurance company when the defendant was unable to pay.It was held that the Company was held liable because the company stands outside the contract between petitioner and its insurer. Order to wind up the company and an official liquidator appointed.[39]

XI CONCLUSION

In the year under survey, the analysis of the plethora of cases it is found that though the courts addressed multiple issues like merger, and acquisition, international trade issues, corporate governance most of the judgements were pertaining to the interpretations of IBC Code, 2016. The proper management of corporate governance necessary for the better working of a company.The courts through these judicial interpretations provided solutions and clarity and insight on such issues.Adjudicating authorities like the NCLT and NCLAT played a key role in resolving disputes under the Companies Act, 2013 and IBC Code 2016 and 2020. The decisions clear the mist regarding the exclusion of lockdown period during CIRP, limitation of NCLT in referring a matter to the SFIO, disqualification of a promoter in proposing a compromise or arrangement in a company undergoing liquidation and presenting a duly registered charge to the liquidator to realize the security of the corporate debtor.

38 [2021] 208 BOMBAY 67.

39 (Section- 433, 434,439) Companies Act, 1956.