4

COMPANY LAW

*Arya. A. Kumar**

I INTRODUCTION

THE YEAR 2022 has been a relatively stable year pertinent to Company law matters. Companies (Corporate Social Responsibility Policy) Amendment Rules 2022[1] have introduced a new format for the yearly report on CSR efforts. The amended CSR Rules mandated companies *inter alia* to undertake CSR activities to register with central government by filing the CSR-1 form electronically. Also, according to the new amendment, as per section 135(6) of the Companies Act, a company having any amount in its 'Unspent Corporate Social Responsibility Account' shall mandatorily constitute a CSR Committee. The CSR Committee will monitor the unused funds, set aside unused funds in a designated account, and these funds must be used within three financial years. Where earlier, as per Rule 3(2), CSR provisions were no longer applicable when a company ceased to meet the threshold requirements for CSR obligation for three consecutive years but in this new amendment, Rule 3(2) has been omitted. The Companies (Amendment) Act made changes in the forms and filing procedures by including with increasing online processes and there has been significant traction on the part of SEBI.

II INSIDER TRADING

In this significant judgment[2], the Supreme Court sets aside insider trading orders against PCJ as SAT erred in inferring unpublished price sensitive information from only circumstantial evidence. SEBI alleged that appellants traded in shares of company 'PCJ' on basis of unpublished price sensitive information received by them on account of their alleged proximity to Managing Director (MD) of company and thereby, violated PIT regulations. However, there were no materials to prima facie show any transfer of information by MD to appellants. Apex court ruled that mere being a relative, could not be a ground for offence of insider trading and, thus, impugned order passed by SEBI imposing penalties and debarring them for security market for violation of PIT Regulations was to be set aside. The factual matrix of the said case was that, the SEBI had imposed a fine of Rupees 20 lakhs on

* Assistant Professor (SS), The Indian Law Institute, New Delhi.

1 Notification No. G.S.R-715(E) dated September 20, 2022.

2 *Balram Garg* v. *Securities and Exchange Board of India*, [2022] 137 taxmann.com 305 (SC).

appellants and restrained them from accessing the securities market and buying, selling or dealing in securities directly or indirectly for a year. The order was based on the finding of the SEBI that the family members concerned had traded on the basis of Unpublished Price Sensitive Information (hereinafter 'UPSI') received on account of their alleged closeness to the company and it's Managing Director.

The apex court held that Regulation 3(1) of SEBI (Prohibition of Insider Trading), 2015 does not create a deeming fiction in law in absence of material to show frequent communication between parties, there could not be a presumption of communication it is only through producing cogent materials (letters, emails, witnesses *etc*.) that the said communication of UPSI could be proved and not by deeming the communication to have happened owing to the alleged proximity between the parties.[3] It was also held that there is no correlation between the UPSI and the sale of shares undertaken by the appellants. It was observed that the charge of Insider Trading by communication of UPSI by an insider to other insiders or any other persons under Regulation 3 of SEBI (Prohibition of Insider Trading) Regulations, 2015 is required to be established by adequate material on record and cannot be established from only circumstantial evidence of share trading timing/ pattern. To raise the statutory presumption of communication of UPSI, there needs to be adequate material on record to show frequent communication between the parties. No presumption can be raised without proving foundational facts. The court noted the entire case of the respondents SEBI was premised on two important propositions, that firstly; there existed a close relationship between the appellants herein and secondly; that based on the circumstantial evidence that is trading pattern and timing of trading and therefore it could be reasonably concluded that the appellants were "insiders" in terms of Regulation 2(1)(g)(ii) of the PIT Regulations. However, the WTM and SAT wrongly rejected the claim of estrangement of the appellants, without appreciating the facts and evidence, as were produced before them.

The records and facts adequately establish that the there was a breakdown of ties between the parties, both at personal and professional level and that the said estrangement happened much prior to the sharing of two UPSI. Secondly, the SAT erred in holding the appellants to be "insiders" in terms of regulation 2(1)(g)(ii) of the PIT Regulations on the basis of their trading pattern and their timing of trading (circumstantial evidence). There is no correlation between the UPSI and the sale of shares undertaken by the appellants. Moreover, in the absence of any material available on record to show frequent communication between the parties, there could not have been a presumption of communication of UPSI by the appellant. The trading pattern of the appellants cannot be the circumstantial evidence to prove the communication of UPSI by the appellant to the other appellants. There is no material on record for the WTM and the SAT to arrive at the finding that both late P.C. Gupta and the appellant communicated the UPSI to the other appellants in C.A. No.7590 of 2021.

3 *Id* para 40.

III DISHONOUR OF CHEQUES

In this landmark case,[4] three-judge bench of apex court has held that when the complainant/payee for a complaint filed under Section 138 of Negotiable Instruments Act, 1881(N.I Act) is a company, an authorized employee can represent the company. Such averment need not be in any particular manner and *prima facie* material is sufficient for the magistrate to take cognizance and issue process. In the present case, the complaint was filed in the name of the company *i.e.,* "the payee", through its general manager. The authorization by the Managing Director in his favor disclosed that the MD of the appellant company had authorized the General Manager to institute criminal proceedings, including proceedings under the provisions of the N.I. Act and civil proceedings on behalf of the company against SMS Asia Private Limited, to represent the company and take all necessary actions in the matter in learned SDJM's court. The MD apart from himself being the key managerial personnel of the appellant company, has also been delegated the power by the Board of Directors, for the management and operation of the company and it has been specified among others, to exercise the power relating to important issues affecting the company's land and property. The MD was also empowered to delegate where necessary and to the extent required, any of the powers delegated to him, to his subordinate officers. In such circumstances, observing that company having authorized the General Manager who had personal knowledge being clearly averred, the court explained that, "What can be treated as an explicit averment, cannot be put in a straitjacket but will have to be gathered from the circumstance and the manner in which it has been averred and conveyed, based on the facts of each case. The manner in which a complaint is drafted may vary from case to case and would also depend on the skills of the person drafting the same which by itself cannot defeat a substantive right." However, what is necessary to be taken note of is as to whether the contents as available in the pleading would convey the meaning to the effect that the person who has filed the complaint, is stated to be authorized and claims to have knowledge of the same.

In addition, the supporting documents which were available on the record by themselves demonstrate the fact that an authorized person, being a witness to the transaction and having knowledge of the case had instituted the complaint on behalf of the "payee" company and therefore, the requirement of section 142 of NI Act was satisfied. Further, when a company is the payee of the cheque based on which a complaint is filed under Section 138 of NI Act, the complainant necessarily should be the company which would be represented by an employee who is authorized. *Prima facie*, in such a situation the indication in the complaint and the sworn statement (either orally or by affidavit) to the effect that the complainant (Company) is represented by an authorized person who has knowledge, would be sufficient. The Court made clear that the employment of the terms "specific assertion as to the knowledge of the power of attorney holder" and such assertion about knowledge should be "said explicitly" as stated in *A.C. Narayanan* v. *State of*

4 *TRL Krosaki Refractories Ltd.* v. *SMS Asia Private Limited,* 2022 SCC OnLine SC 217.

Maharashtra,[5] cannot be understood to mean that the assertion should be in any particular manner, much less only in the manner understood by the accused in the case. "All that is necessary is to demonstrate before the learned Magistrate that the complaint filed is in the name of the "payee" and if the person who is prosecuting the complaint is different from the payee, the authorization therefore and that the contents of the complaint are within his knowledge.

If at all, there is any serious dispute with regard to the person prosecuting the complaint not being authorized or if it is to be demonstrated that the person who filed the complaint has no knowledge of the transaction and, as such that person could not have instituted and prosecuted the complaint, it would be open for the accused to dispute the position and establish the same during the course of the trial. The court, hence, held that dismissal of a complaint at the threshold by the Magistrate on the question of authorization would not be justified. Also, entertaining a petition under section 482 to quash the order taking cognizance by the magistrate would be unjustified when the issue of proper authorization and knowledge can only be an issue for trial.

In a landmark case,[6] the Supreme Court held that 'Section 138 of NI Act would not attract if cheque does not represent a legally enforceable debt at the time of encashment.' In the case where the Supreme Court was called upon to decide whether the offence under Section 138 of the Negotiable Instruments Act 1881 would deem to be committed if the cheque that is dishonored does not represent the enforceable debt at the time of encashment, the bench held that for the commission of an offence under section 138, the cheque that is dishonored must represent a legally enforceable debt on the date of maturity or presentation. The court has further explained that if the drawer of the cheque pays a part or whole of the sum between the period when the cheque is drawn and when it is encased upon maturity, then the legally enforceable debt on the date of maturity would not be the sum represented on the cheque. When a part or whole of the sum represented on the cheque is paid by the drawer of the cheque, it must be endorsed on the cheque as prescribed in section 56 of the Act. The cheque endorsed with the payment made may be used to negotiate the balance, if any. If the cheque that is endorsed is dishonored when it is sought to be encashed upon maturity, then the offence under section 138 will stand attracted. Under Section 56 read with Section 15 of the Act, an endorsement may be made by recording the part-payment of the debt in the cheque or in a note appended to the cheque.

When such an endorsement is made, the instrument could still be used to negotiate the balance amount. If the endorsed cheque when presented for encashment of the balance amount is dishonored, then the drawee can take recourse to the provisions of section 138. Thus, when a part-payment of the debt is made after the cheque was drawn but before the cheque is encashed; such payment

5 (2014) 11 SCC 790.

6 *Dashrathbhai Trikambhai Patel* v. *Hitesh Mahendrabhai Patel*, 2022 SCC OnLine SC 1376.

must be endorsed on the cheque under section 56 of the Act. The cheque cannot be presented for encashment without recording the part payment. If the unendorsed cheque is dishonored on presentation, the offence under Section 138 would not be attracted since the cheque does not represent a legally enforceable debt at the time of encashment. The court was deciding the case where the respondent had made part-payments after the debt was incurred and before the cheque was encashed upon maturity. The sum of rupees twenty lakhs represented on the cheque was not the 'legally enforceable debt' on the date of maturity. Thus, it was held that the respondent cannot be deemed to have committed an offence under section 138 of the Act when the cheque was dishonored for insufficient funds.

Similarly, in *S.P. Mani and Mohan Dairy* v. *Snehalatha Elangovan,*[7] the issue involving the true import of Section 141 of the Negotiable Instruments Act, 1881. The bench laid down the guiding principles for dealing with Section 141 of the Negotiable Instruments Act, 1881 and had held that for fastening the criminal liability, there is no legal requirement for the complainant to show that the accused partner of the firm was aware about each and every transaction. The important issue which was decided by the apex court in this matter has wide ramifications for determining under what circumstances a person would be liable under Section 141(1) of the NI Act for being in charge of or responsible to the company at the time the offence was committed. The court held that, "if any Director or Partner wants the process to be quashed by filing a petition under Section 482 of the Criminal Procedure Code, 1973, on the ground that only a bald averment is made in the complaint and that he is really not concerned with the issuance of the cheque, he must in order to persuade the high court to quash the process, either furnish incontrovertible material or acceptable circumstances to substantiate his contention. He must make out a case that making him stand the trial would be an abuse of process of court." Background of the case at hand, a partnership firm named Sira Marketing Services used to purchase milk and milk products from the appellant/complainant on credit basis. A cheque for 10, 00,000, issued by the Partnership firm to clear its dues, came to be dishonored, leading to a complaint being filed under Section 138 of the NI Act. The respondent, one of the partners of the Partnership Firm, preferred an application under Section 482 of the Criminal Procedure Code, 1973 in the high court and prayed that the criminal proceedings instituted against her may be quashed, on the ground that much before the cheque came to be issued, the firm had been dissolved.

The accounts of the firm were settled on February 13, 2017 following the dissolution. The High Court of Madras quashed the proceedings against the respondent herein mainly on the ground that there was nothing to indicate as to how and in what manner the respondent at the relevant point of time was incharge and responsible for the conduct of the business of the firm. The high court took the view that the complaint can be prosecuted as against the respondent herein only if the allegations made in the complaint fulfils the requirements of Section 141

7 2022 SCC OnLine SC 1238.

of the NI Act. The high court took the view that merely by reciting the words used under Section 141 of the NI Act in the complaint, no vicarious liability can be fastened on the partner of the firm. Contrary to High Court of Madras ruling, the Supreme Court found clear and specific averments not only in the complaint but also in the statutory notice issued to the respondent that the cheque was issued with the consent of the respondent and within her knowledge. Hence, this was sufficient to put the respondent on trial for the alleged offence. It was held that the high court had practically no legal basis to say that the averments made in the complaint are not sufficient to fasten the vicarious liability upon the respondent by virtue of Section 141 of the NI Act. The court stressed that the respondent cannot get away by merely making a bald assertion that at the time of issuance of the cheque or at the time of the commission of the offence, she was in no manner concerned with the firm or she was not in-charge or responsible for day-to-day affairs of the firm. The court observed that a director or partner cannot get the complaint quashed merely on the ground that apart from the basic averment no particulars are given in the complaint about his/her role, because ordinarily the basic averment would be sufficient to send him/her to trial and it could be argued that his/her further role could be brought out in the trial.

For the purpose of Section 141 of the NI Act, a firm comes within the ambit of a company and therefore, vicarious liability can be fastened on the persons in charge of or responsible for conduct of the business of a firm. A person who signs the cheque or who has authority to sign the cheque on behalf of the company can *prima facie* be assumed to be in charge and responsible for the conduct of the company. The primary responsibility of the complainant is only to add specific averments in the complaint to make the accused vicariously liable. To place criminal liability, there is no legal requirement for the complainant to show that the accused partner of the firm was aware of each and every transaction. Every person who was in charge of and responsible for conduct of business at the time of commission of offence, may be 'proceeded against' but not 'punished' if such person succeeds in proving that the offence has occurred without his knowledge or that the person exercised due diligence to prevent commission of the offence. The onus to prove that the offence occurred without his knowledge or there was due diligence is upon such person and can only be discharged at the stage of evidence. If any director files a petition under Section 482 of the Cr PC on the ground that only a bald averment is made in the complaint and he/she is not concerned with issuance of the cheque, then such director must furnish some incontrovertible material or acceptable circumstances to substantiate such contention. The director must make out a case that making him stand trial would be an abuse of process of court. The courts have to exercise the power of quashing a complaint very sparingly and the complaint ought not to be quashed if the factual foundation for the offence has been laid in the complaint. In construing a complaint, a hyper- technical approach should not be adopted so as to quash the same. The courts should discharge the accused if the ingredients of offence are altogether lacking in the complaint. The object of issuing a notice before filing of the complaint is not just to give a chance

to the drawer of the cheque to rectify his omission but also to make his stand clear as far as liability under Section 138 of the NI Act is concerned.

Likewise in *Noor Mohammad* v. *Khurram Pasha*[8] where an offender under Section 138 of the N.I Act was denied the right to cross-examine a witness upon failure to deposit the interim compensation under Section 143A of N.I Act, the court held that any such order foreclosing the right would not be within the powers conferred upon the court and would, as a matter of fact, go well beyond the permissible exercise of power. The court, upon reading the provision in question, did the following point-wise breakdown of Section 143A of NI Act: The court can pass an order directing the accused to pay interim compensation under sub-section 1. Sub-section 2 then mandates that such interim compensation should not exceed 20 per cent of the amount of the cheque. The period within which the interim compensation must be paid is stipulated in sub-section 3. Sub-section 4 deals with situations where the drawer of the cheque is acquitted. It contemplates repayment of interim compensation along with interest as stipulated. Sub-section 5 states that the interim compensation payable under this Section can be recovered as if it were a fine. The expression interim compensation is one which is "payable under this Section" and would thus take within its sweep the interim compensation directed to be paid under sub-section 1 of said section 143A. It was, hence, observed that the remedy, the method, and modality of recovery of interim compensation is clearly delineated by the Legislature. "It is well known principle that if a statute prescribes a method or modality for exercise of power, by necessary implication, the other methods of performance are not acceptable." The court was, hence, of the opinion that the concerned provision nowhere contemplates that an accused who had failed to deposit interim compensation could be fastened with any other disability including denial of right to cross-examine the witnesses examined on behalf of the complainant.

The Partner may have civil liability and may also be liable under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. However, vicarious liability in the criminal law in terms of Section 141 of the NI Act cannot be fastened because of the civil liability. "Vicarious liability under sub-section (1) to Section 141 of the NI Act can be pinned when the person is in overall control of the day-to-day business of the company or firm. Vicarious liability under sub-section (2) to Section 141 of the NI Act can arise because of the director, manager, secretary, or other officer's personal conduct, functional or transactional role, notwithstanding that the person was not in overall control of the day-to-day business of the company when the offence was committed. Vicarious liability under sub-section (2) is attracted when the offence is committed with the consent, connivance, or is attributable to the neglect on the part of a director, manager, secretary, or other officer of the company."

8 2022 SCC OnLine SC 956.

The Supreme Court in *Dilip Hariramani* v. *Bank of Baroda,*[9] explained the law on vicarious liability under the Negotiable Instruments Act, 1881 by ruling that partner cannot be held to be vicariously liable when partnership firm is not tried as primary offender. Explaining the law on vicarious liability under the Negotiable Instruments Act, 1881, the apex court has held that while Section 141 of the NI Act extends vicarious criminal liability to officers associated with the company or firm when one of the twin requirements of Section 141 has been satisfied, which person(s) then, by deeming fiction, is made vicariously liable and punished, such vicarious liability arises only when the company or firm commits the offence as the primary offender. The court explained that the provisions of Section 141 NI Act impose vicarious liability by deeming fiction which presupposes and requires the commission of the offence by the company or firm. Therefore, unless the company or firm has committed the offence as a principal accused, the persons mentioned in sub-section (1) or (2) would not be liable and convicted as vicariously liable. Sub-section (2) to Section 141 of the NI Act does not state that the persons enumerated, which can include an officer of the company, can be prosecuted and punished merely because of their status or position as a director, manager, secretary, or any other officer, unless the offence in question was committed with their consent or connivance or is attributable to any neglect on their part. The onus under sub-section (2) to Section 141 of the NI Act is on the prosecution and not on the person being prosecuted. It was further observed that the Partnership Act, 1932 creates civil liability. Further, the guarantor's liability under the Contract Act, 1872 is a civil liability. In the case at hand, even the Bank of Baroda had admitted that the appellant had not issued any of the three cheques, which had been dishonored, in his personal capacity or otherwise as a partner. Hence, in the absence of any evidence led by the prosecution to show and establish that the appellant was in charge of and responsible for the conduct of the affairs of the firm, the conviction of the appellant had to be set aside. "The appellant cannot be convicted merely because he was a partner of the firm which had taken the loan or that he stood as a guarantor for such a loan."

In *Rathish Babu Unnikrishnan* v. *State (NCT of Delhi)*[10] while rejecting an appeal to quash proceedings under Section 138 of the N.I. Act, 1881 at pre-trial stage, court held that when there is legal presumption, it would not be judicious for the quashing court to carry out a detailed enquiry on the facts alleged, without first permitting the trial court to evaluate the evidence of the parties. The Bench upheld the impugned judgment of High Court of Delhi wherein the high court had – while acting as a quashing court under Section 482 of CrPC – refused to quash proceedings at pre-trial stage. The Bench observed, "The quashing Court should not take upon itself, the burden of separating the wheat from the chaff where facts are contested." Factual backdrop evidently goes as, the complainant invested a substantial sum in the appellant's company, however as some dispute arose

9 2022 SCC OnLine SC 579.

10 2022 SCC OnLine SC 513.

between them, the parties decided that the invested money would be returned to the complainant and the shares allotted to the complainant will be proportionately transferred to the appellant. Pursuant to such compromise, the four cheques were issued by the appellant, which on being presented by the complainant, got dishonored due to insufficient fund. Consequently, proceedings under NI Act came in picture. The appellant argued that without satisfying the essential ingredients for the offence under Section 138 of the N.I. Act to the effect that the dishonored cheque received by the complainant was against "legally enforceable debt or liability", the criminal process could not have been issued. According to the appellant, the cheques in question were issued as "security" for buyback of shares and not in discharge of any "legally recoverable debt" and therefore they could not have been prematurely presented to the bank and should have been presented for encashment only after transfer of the complainant's shareholding in the appellant's company.

On the contrary, the complainant contended that when the cheques were issued and the signatures thereon were admitted, the presumption of a legally enforceable debt would arise in favour of the holder of the cheque. The complainant argued that the appellant should first pay and then as per the usual practice in the trade, the shares would be transferred to the appellant in due course within the time permitted by law. In *HMT Watches Ltd*. v. *M.A. Abida,*[11] and in *Rajiv Thapar* v. *Madan Lal Kapoor,*[12] it has been held that unless the court is fully satisfied that the material produced would irrefutably rule out the charges and such materials being of impeccable quality, the invocation of Section 482 CrPC, power to quash the criminal proceedings, would be unmerited. The Bench opined that when there is legal presumption, it would not be judicious for the quashing court to carry out a detailed enquiry on the facts alleged, without first permitting the trial court to evaluate the evidence of the parties. The quashing court should not take upon itself, the burden of separating the wheat from the chaff where facts are contested. The Bench observed, "The consequences of scuttling the criminal process at a pre-trial stage can be grave and irreparable." The Bench stated that at any rate, whenever facts are disputed the truth should be allowed to emerge by weighing the evidence. Otherwise, the accused may get an un-merited advantage in the criminal process. Hence, the Bench held that when the cheque and the signature were not disputed by the appellant, the balance of convenience was in favour of the complainant/prosecution and the accused will have due opportunity to adduce defense evidence during the trial, to rebut the presumption. In the light of above, the Bench reached to following findings: In shares transactions, there is a time lag between money going out from the buyer and shares reaching to the seller. The burden of proving that there is no existing debt or liability, is to be discharged in the trial. The legal presumption of the cheque having been issued in the discharge of liability must also receive due weightage. In a situation where the accused

11 (2015) 11 SCC 776.
12 (2013) 3 SCC 330.

moves court for quashing even before trial has commenced, the court's approach should be careful enough to not to prematurely extinguish the case by disregarding the legal presumption which supports the complaint. Consequently, the Bench held that when the proceedings are at a nascent stage, scuttling of the criminal process is not merited. Hence, the impugned judgment was upheld as the same was found to be rendered by applying the correct legal principles.

IV PUNISHMENT FOR FRAUD

In this technological world the corporate crimes are increasing day by day due to Internet transactions. Section 447 of the Companies Act, 2013 (hereinafter 'Act') provides for the punishment of fraud in company matters. The offence of fraud is punishable, on conviction, with imprisonment, a fine or both. In plain language, fraud is misleading conduct done by someone to get an undue advantage or infringe others' rights. But the term fraud has been diversely defined in various legislations pertaining to their respective nature. The Act, under the explanation to cection 447, defines fraud in relation to the affairs of a company or any corporate body. It includes any-

i. act, omission, concealment of facts or abuse of position committed by any person, or

ii. with connivance with other person with the intent to deceive or take undue advantage or

iii. to injure the interests of the company, its shareholders, creditors, or any other person, irrespective of any wrongful gain or loss.

Fraud is categorized as a wrongful act since it involves gaining benefits *via* false statements, deception etc. The act of fraud intervenes with the principle of business ethics. The importance of functioning ethically has increased and is contemplated to follow the same trajectory.

In *Serious Fraud Investigation Office* v. *Rahul Modi,*[13] the Central Government initiated an investigation into the affairs of Adarsh Group of Companies and LLPs under Section 212(1)(c) of the Act and subsections (2) and (3)(c)(i) of Section 43 of the Limited Liability Partnership Act, 2008. Respondents were arrested by the appointed Inspectors of the Director, SFIO during the investigation. Despite several legal proceedings, including their surrender and subsequent remands, the high court granted them bail on the basis that the trial court had not taken cognizance of the complaint before the expiry of the 60-day period, entitling them to statutory bail. The legal dispute primarily revolves around the interpretation of Section 167(2) of the Cr. PC and whether the accused are entitled to statutory bail due to the non-cognizance of the complaint before the expiry of the 60-day period from the date of the remand. The two vital issues arose in this case was whether the accused can claim statutory bail purely on the ground that cognizance has not been taken before the expiry of the statutory period, even if the charge-sheet has been filed within the stipulated time?, and whether the interpretation of conflicting

13 2022 SCC OnLine SC 153.

judicial opinions on the application of Section 167(2) of the Cr PC, specifically in relation to the filing of the charge-sheet, taking cognizance, and the accused's right to statutory bail?

The apex court held that the indefeasible right of an accused to seek statutory bail under section 167(2), Cr PC arises only if the chargesheet has not been filed before the expiry of the statutory period. The judgment highlighted that an accused's right to seek statutory bail under Section 167(2), Cr PC is only indefeasible if the charge-sheet has not been filed before the expiry of the statutory period, and that taking cognizance is not relevant to section 167. The court clarified that the custody of the accused after the filing of the chargesheet is not governed by Section 167(2) but by different provisions of the Cr PC. Therefore, the court allowed the Appeals and set aside the order passed by the high court. This particular case played a significant role in resolving the contradictory judicial views regarding the implementation of Section 167(2) of the CrPC, particularly with regards to the submission of the charge-sheet, the recognition of the offense, and the defendant's entitlement to statutory bail. It established that the defendant's right to claim statutory bail under Section 167(2), CrPC is only absolute if the chargesheet is not submitted before the expiration of the statutory time-frame, and that the recognition of the offense is not pertinent to Section 167.

V INSOLVENCY AND BANKRUPTCY CODE, 2016

In *Bank of Baroda* v. *Mbl Infrastructures Ltd*[14] the issue sought to provide judicial interpretation of Section 29A (h) of the Insolvency and Bankruptcy Code, 2016 (IBC), as amended by the Act, 2018, the Bench held that ineligibility has to be seen from the point of view of the resolution process. It can never be said that there can be ineligibility qua one creditor as against others. Rather, the ineligibility is to the participation in the resolution process of the corporate debtor. The court remarked, "what is required to earn a disqualification under the said provision is a mere existence of a personal guarantee that stands invoked by a single creditor, notwithstanding the application being filed by any other creditor seeking initiation of insolvency resolution process subject to further compliance of invocation of the said personal guarantee by any other creditor." Factual matrix of the case is as: an application was filed by RBL Bank under Section 7 of the Insolvency and Bankruptcy Code, 2016 to initiate corporate insolvency resolution process (CIRP) against respondent 1. Pursuant to which a resolution plan, after certain modifications was submitted by the respondent 3 on November 22, 2017. Meanwhile, by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, Section 29A was introduced to the Code.

Section 29-A was passed in the public interest and to support efficient corporate governance. Additionally, it was mentioned that Parliament had closed a gap in the Act that permitted former management of CIRP to enter through a backdoor. The standard underlying Section 29-A continues to permeate section 35(1)(f) when it applies to both resolution applicants and liquidation, according to

14 2022 SCC OnLine SC 48.

the ruling in *Swiss Ribbons (P) Ltd*. v. *Union of India.*[15] The court ruled that both movable and immovable property should be sold to anyone, including those who are not qualified to be resolution applicants, rejecting the argument that section 35(1)(f) is *ultra vires.* The bar qua eligibility of a person who executes a guarantee in favor of a creditor with respect to credit facilities availed by a corporate debtor will come into play. The clause calls for a guarantee in favor of "a creditor" to ensure that all creditors belonging to the same class are treated equally and have equal rights.

The apex court also addressed this position in *Swiss Ribbons.*[16] If the Committee of Creditors (CoC) has not yet been formed, a party may contact NCLT directly. After hearing from all parties and taking into account all pertinent information, the tribunal will decide whether to approve or reject a request for withdrawal or settlement. If there is a bar at the time of submission, applicant's submission of a resolution plan cannot be maintained. The amended provision, however, will control the eligibility issue if the submission is maintainable and a person loses eligibility. The resolution applicant's only responsibility is to facilitate the process; if an applicant is found to be ineligible, the same procedure must be followed, contrary to the earlier provision. There is no justification for merely filing or submitting a resolution plan. The third respondent signed personal guarantees that three of the financial creditors had already used before the application was filed. This highlights the strictness of Section 29A (h) of the Code, which must include all other financial creditors. In this case, one of these creditors filed an application invoking section 7, which was used by respondent no. 3 even when submitting a resolution plan. The adjudicating authority and appellate tribunal erred when they rejected the appellant's arguments on the grounds that since earlier appeals had been withdrawn without liberty, the eligibility issue could not be brought up again. The issue of law is unresolved, so the appellate tribunal's reasoning cannot be upheld in law. The court agreed with the adjudicating authority and appellate tribunal on the issue of limitation. The adjudicating authority correctly excused and disregarded the 106-day delay by using Section 12(3) of the Code. The adjudicating authority concluded that there is a distinction between extension and exclusion, as exclusion would be relevant if appealed to a higher forum. The amended provision will control the eligibility issue if the submission is maintainable and a person loses eligibility. There is no justification for filing or submitting a resolution plan. Respondent no. 3's resolution plan is unmaintainable due to his ineligibility, but the necessary portion of voting shares has been obtained and Section 30(4) of the Code has been changed to 66%. The court emphasized that the primary goal of the Code is to get the corporate debtor back on track and that the resolution plan protects the rights of the dissenting creditors and allows them to recoup their credit limits. Therefore, the court does not wish to interfere with the resolution plan.

15 (2019) 4 SCC 17.

16 *Ibid.*

The law which was prevailing on the date of the application has to be seen, therefore, the disqualification gets attracted on the date of filing of the application and on the same analogy not only Section 29A(h) but also Section 30(4) has to be interpreted. The approval of the resolution plan was made after the mandatory period of 270 days, *i.e.,* after the expiry of the CIRP period. Hence, the instant case was filed for seeking judicial interpretation of Section 29A (h) of the IBC, as amended by the Act, 2018. Interpretation of Section 29A (h) of the Code The idea of the IBC being to facilitate a process of rehabilitation and revival of the corporate debtor with the active participation of the creditors, the Bench opined that there are two principal actors in the entire process, *viz.*, (i) the committee of creditors and, (ii) the corporate debtor. Therefore, there can never be any other interest than that of the CoC and the corporate debtor. Observing that the objective behind Section 29A of the Code is to avoid unwarranted and unscrupulous elements to get into the resolution process while preventing their personal interests to step in, and to prevent certain categories of persons who may not be in a position to lend credence to the resolution process by virtue of their disqualification. The court relied on *Ebix Singapore Pvt. Ltd.* v. *COC of Educomp Solutions Ltd*.[17] to hold that the CoC even with the requisite majority, while approving the resolution plan must consider the feasibility and viability of the plan and the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53 of the IBC. And that the CoC cannot approve a resolution plan barred under Section 29A of the IBC. Rejecting the contention of the respondents that section 29A(h) had to be literally interpreted to the extent that a personal guarantor is barred from submitting a resolution plan only when the creditor invoking the jurisdiction of the adjudicating authority has invoked a personal guarantee executed in favour of said creditor by the resolution applicant and no personal guarantee stood invoked by RBL Bank at the time of application to the adjudicating authority under Section 7 of the Code, the Bench emphasized that ineligibility has to be seen from the point of view of the resolution process. It can never be said that there can be ineligibility qua one creditor as against others. Rather, the ineligibility is to the participation in the resolution process of the corporate debtor.

The apex court in *Indian Overseas Bank* v. *RCM Infrastructure ltd*.[18] has held that the proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) cannot continue once the CIRP has been initiated and the moratorium has been ordered as per the Section 14(1)(c) of the IBC). The Indian Overseas Bank had extended certain credit facilities to the Corporate Debtor. When the Corporate Debtor failed to repay the dues and the loan account became irregular, it came to be classified as “Non Performing Asset” (NPA). The Bank issued a Demand Notice under Section 13(2) of the SARFAESI Act, calling upon the Corporate Debtor and its guarantors

17 2021 SCC OnLine 707.

18 2022 SCC OnLine SC 634.

to repay the outstanding amount due. Upon failure to do so, the Bank, under Section 13(4) of the SARFAESI Act, took symbolic possession of two secured assets of the Corporate Debtor and Corporate Guarantor, mortgaged exclusively with it. E-auctions were also held to recover the public money availed by the Corporate Debtor. Later, NCLT, passed an order under Section 10 of the IBC, after which the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor commenced. A moratorium under Section 14 of the IBC was notified and an Interim Resolution Professional (IRP) was also appointed. It is important to note, that 75% of the sale consideration from E-Auctions was received before initiation of the CIRP. The remaining 25% was recovered subsequently. Hence, it was argued that merely because a part of the sale consideration was received subsequently, it could not affect the sale. It was also argued before the court that the CIRP was initiated only to stall the SARFAESI proceedings. It was submitted before the court that Section 14(1)(c) of the IBC interdicts any action to foreclose, recover or enforce any security interest including any action under SARFAESI. However, it does not undo actions which have already stood completed. The court, however, noticed that, in the case at hand, the balance amount was accepted by the Bank on March 8, 2019. The sale stood completed only on March 8, 2019. Admittedly, this date falls much after January 3, 2019, *i.e.,* on which date CIRP commenced and moratorium was ordered. Hence, the court refused to accept the argument of the Bank that the sale was complete upon receipt of the part payment. The court explained that under Section 14(1)(c) of the IBC, which has overriding effect over any other law, any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the SARFAESI Act is prohibited. Considering that IBC is a special Code, its provisions have 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. It is thus clear that after the CIRP is initiated, there is moratorium for any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the SARFAESI Act. It is clear that once the CIRP is commenced, there is complete prohibition for any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property. The words "including any action under the SARFAESI Act" are significant. The legislative intent is clear that after the CIRP is initiated, all actions including any action under the SARFAESI Act to foreclose, recover, or enforce any security interest are prohibited.

In *Tech Sharp Engineers Pvt Ltd.* v. *Sanghvi Movers ltd.,*[19] dealing with the issue of limitation in cases under the IBC, the court held that the pendency of the proceedings in a parallel forum is not sufficient cause for the delay in filing an application under Section 9 of the IBC if by the time the application was filed, the claim had become barred by limitation. In this case a winding up petition was filed

19 2022 SCC OnLine SC 1249.

before the High Court of Madras as the appellant had outstanding dues against the services provided by the respondent. Respondent filed petition under Section 9 of the IBC for initiation of the CIRP in the NCLT. By an order dated January 02, 2019, the Adjudicating Authority (NCLT) rejected the application as barred by limitation. The Respondent appealed to the NCLAT under Section 61 of the IBC. By the impugned judgment and order, the NCLAT set aside the order dated January 2, 2019 passed by the Adjudicating Authority (NCLT) rejecting the application of the Respondent under Section 9 of the IBC and remitted the case to the Adjudicating Authority for admission after notice to the parties. The NCLAT held in the present case, it is not in dispute that right to apply under section 9 accrued to the appellant on December 1, 2016, when 'I and B Code' came into force. Therefore, we find that the application under Section 9 filed by the Appellant is within the period of three years from the date of right to apply accrued." The Supreme Court *vide* its order dated September 19, 2022 held that the pendency of the proceedings in a parallel forum, is not a sufficient cause for the delay in filing an application under the Insolvency and Bankruptcy Code, 2016 (the Code).

Similarly, under Section 18 of the Limitation Act, an acknowledgment of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing of a fresh period of limitation, from the date on which the acknowledgment is signed. However, the acknowledgment must be made before the period of limitation expires. Proceedings in good faith in a forum which lacks jurisdiction or is unable to entertain for like nature may save limitation. The Supreme Court observed that for the purpose of limitation, the relevant date is the date on which the right to sue accrues which is the date when a default occurs. The condition precedent for condonation of the delay in filing an application or appeal is the existence of sufficient cause. Whether the explanation furnished for the delay would constitute "sufficient cause" or not would be dependent upon facts of each case. However, there cannot be any straitjacket formula for accepting or rejecting the explanation furnished by the Appellant/applicant for the delay in taking steps. When an appeal is filed against an order rejecting an application on the ground of limitation, the onus is on the appellant to make out sufficient cause for the delay in filing the application. The date of enforcement of the IBC and/or the date on which an application could have first been filed under the IBC are not relevant in computation of limitation. "It would be absurd to hold that the CIRP could be initiated by filing an application under Section 7 or Section 9 of the IBC, within three years from the date on which an application under those provisions of the IBC could have first been made before the NCLT even though the right to sue may have accrued decades ago."

In a review petition filed by Axis Bank against Supreme Court's judgment in *Vidarbha Industries Power Ltd*. v. *Axis Bank Ltd,*[20] the apex court has dismissed the review petition and reaffirms that the National Company Law Tribunal under

20 (2022) 8 SCC 352.

section 7(5)[21] of the Insolvency and Bankruptcy Code, 2016 has discretionary power to admit/reject an application. In this case, it was held that NCLT cannot arbitrarily and in a straitjacket manner admit applications filed under Section 7 of the Code, as the legislative intent of Section 7(5)(a) of the Code confers discretionary power on the NCLT to admit/reject an application of a financial creditor, as the Legislature in its wisdom has chosen to use the expression 'may' in the said section. The court ruled that Section 7(5)(a) of the IBC confers a discretionary power on the NCLT to admit an application of insolvency after the financial creditor has proved the existence of default. This judgment marks a significant departure from previous judgments of the Supreme Court where it has held that the NCLT needs to restrict its analysis to: (1) the existence of debt and (2) default in payment of debt. The Supreme Court in *Vidarbha* applied the literal interpretation test and held that the use of the word "may" confers upon the NCLT the discretion to admit the application after it is satisfied of the existence of debt. Further, it held that Section 9(5) of the IBC by using the word "shall" in the context of an application made by an operational creditor, highlights a deliberate legislative intent to differentiate between applications made by financial creditors and operational creditors. The Supreme Court in *Vidarbha* held that the objective of the IBC is not to "penalize solvent companies, temporarily defaulting in repayment of its financial debts, by initiation of CIRP." While this is not disputed, it is also true that the IBC was designed to expedite insolvency disputes in a transparent and predictable manner.

In the review petition, reliance was placed on the Supreme Court's judgment in *E S Krishnamurthy* v. *Bharath Hi-tech Builders Pvt. Ltd.*[22] in which the Supreme Court held in the context of Section 7(5) of the IBC that "the Adjudicating Authority is empowered only to verify whether a default has occurred or if a default has not occurred. Based upon its decision, the adjudicating authority must then either admit or reject an application respectively. These are the only two courses of action which are open to the adjudicating authority in accordance with section 7(5). The Supreme Court however rejected the review petition on the basis that the question whether the power under section 7(5) was mandatory or directory was not in issue in the judgments cited before the court.

The main ground for review raised by Axis Bank was that the court has erred in considering the true import and views of its earlier judgments such as *E.S. Krishnamurthy* v. *Bharath Hi-Tecch Builders (P) Ltd.,*[23] wherein it was categorically held that the adjudicating authority must only see whether there is a debt, default, and whether the application filed under Section 7 is complete in all aspects or not. The court observed that the question of whether Section 7(5) was

21 IBC, 2016 s. 7(5)(a) reads: "Where the Adjudicating Authority is satisfied that a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it **may,** by order, admit such application".

22 (2022) 3 SCC 161.

23 (2022) 3 SCC 161.

mandatory or discretionary was not in issue in any of the judgments cited by the applicant and the issue in Krishnamurthy's case (supra) was, whether the adjudicating authority could foist a settlement on unwilling parties, and that issue was answered in the negative. Thus, there were no grounds for review of the judgment and order.[24]

VI CORPORATE DEBTOR

In *Vidarbha Industries Power Ltd* v. *Axis Bank Ltd*[25] the court rejected the view of NCLT and NCLAT that once it is found that a debt existed, and a corporate debtor is in default in payment of the debt there would be no option to the Adjudicating Authority (NCLT) but to admit the petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC). Referring to the judgment in *Swiss Ribbons* v. *Union of Indian*[26], the NCLT held that the imperativeness of timely resolution of a corporate debtor, who was in the red, indicated that no other extraneous matter should come in the way of expeditiously deciding a petition under Section 7 or under Section 9 of the IBC. NCLAT affirmed the NCLT's finding while observing that NCLT was only required to see whether there had been a debt and the corporate debtor had defaulted in making repayment of the debt, and that these two aspects, if satisfied, would trigger the CIRP. The court observed there can be no doubt that a corporate debtor who is in the red should be resolved expeditiously, following the timelines in the IBC. No extraneous matter should come in the way. The court, hence, set aside the NCLAT and NCLT orders and directed NCLT to re-consider the application of the Appellant for stay of further proceedings on merits in accordance with law.

In *State Tax Officer* v. *Rainbow Papers Ltd*[27] the apex court has reversed the NCLAT order wherein it was held that the government cannot claim first charge over the property of the corporate debtor, as Section 48 of the Gujarat Value Added Tax, 2003 (GVAT Act), which provides for first charge on the property of a dealer in respect of any amount payable by the dealer on account of tax, interest, penalty *etc.,* under the said GVAT Act, cannot prevail over Section 53 of the IBC. Holding that NCLAT clearly erred in its observation that Section 53 of the IBC over-rides Section 48 of the GVAT Act, the court observed that, Section 48 of the GVAT Act is not contrary to or inconsistent with Section 53 or any other provisions of the IBC. Under Section 53(1)(b)(ii), the debts owed to a secured creditor, which would include the State under the GVAT Act, are to rank equally with other specified debts including debts on account of workman's dues for a period of 24 months preceding the liquidation commencement date. Going into the scheme of both the Statutes, the court said that Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such security interest could be created by operation of law. The definition of secured creditor in

24 *Axis Bank Limited* v. *Vidarbha Industries Power Limited*, 2022 SCC OnLine SC 1339.

25 *Supra* note 20.

26 *Supra* note 15.

27 2022 SCC OnLine SC 1162.

the IBC does not exclude any government or governmental authority. Likewise, the State is a secured creditor under the GVAT Act. On the validity of a resolution plan which does not meet the requirements of Section 30(2) of the IBC, the court held that the same would be invalid and not binding on the Central Government, any state government, any statutory or other authority, any financial creditor, or other creditor to whom a debt in respect of dues arising under any law for the time being in force is owed. Such a resolution plan would not bind the State when there are outstanding statutory dues of a corporate debtor.

The NCLAT, in *Rajeev Kumar Jain* v. *Uno Minda Limited*[28] which dealing with the issue of ascertaining the nature of debt, held that the term *disbursal of funds* in the definition of financial debt under Section 5(8) of the IBC does not indicate that the disbursal is required to be made to the corporate debtor only. Any disbursal made *on behalf of* the corporate debtor or *at the instructions of* the corporate debtor may also tantamount to disbursal made to the corporate debtor if the beneficiary of such disbursal is the corporate debtor, the NCLAT said. In furtherance of the aforesaid observation, the NCLAT held that financial assistance provided to the corporate debtor by supplying funds for purchase of raw material by the corporate debtor would amount to supplying funds for the working capital needs of the corporate debtor and, as such, would qualify as financial debt. It further observed that just because the financial assistance was given for the purchase of raw material, such financial assistance cannot be treated as operational debt and has to be treated as financial debt. Similarly, in *Kolkata Municipal Corporation* v. *Bengal Shelter Housing Development Limited*[29] the NCLAT held that where the corporate debtor had obtained possession and development right *vis-à-vis* a land parcel in breach of the transfer restriction contained in original title deed, such development right could not be treated as an asset of corporate debtor under Section 18 of the Code, nor could the moratorium be applied as a defense to deny regaining of possession of such land from the corporate debtor. In *Ashok Kumar Sarawagi* v. *Enforcement Directorate*[30] Supreme Court held that in light of an order of provisional attachment of the immovable and movable properties owned by the corporate debtor under the PMLA the Resolution Professional can conduct the process of CIRP in accordance with IBC on “as is where basis is” and “whatever there is basis”. However, it was specifically stated by the Supreme Court that even if a Resolution Plan is approved, the order of approval shall not be passed by the NCLT without the express permission of the Supreme Court. Earlier it has been held on various occasions by the NCLAT and the High Court of Delhi that the moratorium under Section 14 of the IBC does not apply to the proceeds under the PMLA.

The apex court in this progressive judgment[31] ruled that the CIRP proceedings can be initiated against two corporate debtors but same amount cannot be realized

28 Comp. App. (AT) (Ins.) No. 947 of 2022.

29 Company Appeal (AT) (Insolvency) No.81 of 2023 and I.A. No. 335 of 2023.

30 SLP(CIVIL) No(s). 30092/2022.

31 *Maitreya Doshi* v. *Anand Rathi Global Finance Limited*, 2022 SCC OnLine SC 1276.

from both. It was held that if there are two borrowers or if two corporate bodies fall within the ambit of corporate debtors, there is no reason why proceedings under Section 7 of the IBC cannot be initiated against both the corporate debtors. The court, however, clarified that the same amount cannot be realized from both the corporate debtors. "If the dues are realized in part from one Corporate Debtor, the balance may be realized from the other Corporate Debtor being the co-borrower. However, once the claim of the Financial Creditor is discharged, there can be no question of recovery of the claim twice over." In the case at hand, a non-banking financial company, *i.e.,* "Financial Creditor" disbursed loan to the tune of 6 Crores to one Premier Limited, under three separate loan-cum-pledge agreements. According to the Appellant, Doshi Holdings pledged shares held by it in premier, in favour of the financial creditor, by way of security for the loan. It was argued before the court that the Loan-cum-Pledge Agreements contemplated two distinct transactions under one document, that is, grant of loan to Premier, and creation of pledge by Doshi Holdings of securities held by the Doshi Holdings in Premier. When Premier failed to make repayments in terms of the loan-cum-pledge agreements, the financial creditor, called upon Premier and Doshi Holdings, also described as the borrower under the loan-cum-pledge agreements, to pay the entire outstanding loan amount of 8,35,25,398. It was argued before the court that no amount under the loan-cum-pledge agreements was disbursed by the financial creditor to Doshi Holdings.

The financial creditor granted loans to Premier. The loans were disbursed to Premier. Doshi Holdings did not utilize any part of the money disbursed by the financial creditor under the loan-cum-pledge agreement. Hence, there was no obligation on the part of Doshi Holdings to make any repayment to the financial creditor and that there was no financial debt owed by Doshi Holdings to the financial creditor under Section 5(8) of the IBC. Insofar as Doshi Holdings is concerned, the loan-cum-pledge agreements only created a pledge of the shares of Doshi Holdings in Premier in favour of the financial creditor. Hence, the petition under Section 7 of the IBC against the corporate debtor was not maintainable. The financial creditor, on the other hand, argued that Doshi Holdings was party to the loan-cum-pledge agreements in its dual capacity as co-borrower and pledgor which had pledged its shares in Premier in favour of the financial creditor. The appellant had signed documents on behalf of Doshi Holdings in its capacity as co-borrower. The appellant was director of both, Premier and Doshi Holdings and that both Premier and Doshi Holdings have been described as borrowers in the loan-cum-pledge agreements. Taking note of the facts of the case, the Supreme Court held that the finding of the appellate authority that Doshi Holdings is a borrower, is based on its interpretation of the loan-cum-pledge agreements and supporting documents. The interpretation given by the appellate authority is definitely a possible interpretation. Hence, interpretation is a plausible interpretation which cannot be interfered with.

VII COMMITTEE OF CREDITORS (COC)

The binding nature of a plan upon the Committee of Creditors (CoC) pending its approval by the adjudicating authority and permissibility of the plan being withdrawn or reconsidered by the CoC was considered by the NCLAT in the two significant cases.[32] In both the cases, the NCLAT observed that the law is well-settled that the resolution plan approved by the CoC is binding on the CoC and except in exceptional circumstances, such a decision cannot be reviewed or reconsidered. Examples of such exceptional circumstances which would allow the reconsideration of approval of a plan by the COC was noted in *Jubilee Metal*[33] where the NCLAT had observed that the restriction on reviewing such a decision would not apply where the resolution applicant itself has breached the terms and conditions of the plan in a manner resulting in the very basis and substratum of the resolution applicant (which had led the CoC to approve the plan) being knocked out on account of a change in the control of the resolution applicant. Accordingly, the NCLAT allowed the application filed by the CoC for the withdrawal of an approved resolution plan upon the successful resolution applicant (SRA) changing shareholding pattern in a manner that the ultimate beneficial owner had changed. Likewise in *Nivaya Resource*[34] the NCLAT observed that examples of such circumstances, *inter alia,* include where the SRA acquires any ineligibility subsequent to the approval of the resolution plan or there is breach of any condition of the resolution plan which make the successful resolution applicant not entitled to implement the resolution plan. In the instant case, however, the NCLAT held that (i) downgrading of credit rating of the successful resolution applicant; and (ii) freezing order against the parent company of the successful resolution applicant would not be grounds for reconsideration of the resolution plan. In *Masatya Technologies Private Ltd.* v. *Amit Agarwal,*[35] the NCLAT held that the Adjudicating Authority was permitted to reject the plan approved by the CoC and issue direction for a fresh publication of Form-G, when certain additional valuable assets of corporate debtor were identified subsequently and was not made part of information memorandum, and where the inclusion of such assets could have increased valuation of the corporate debtor.

In *IDBI Bank* v. *Sumit Binani*[36] the NCLAT held that the resolution professional is empowered to reject the CoC's proposal for the renewal of bank guarantees provided by the corporate debtor prior to the initiation of the CIRP when such renewal would not lead to any advantage or any valuable gains. In *Harish Raghavji Patel* v. *Clearwater Capital Partners*[37] the NCLAT held that

32 *Jubilee Metal Pvt. Ltd.* v. *Surendra Raj Gang RP of Metenere Ltd. and Anr.* (Company Appeal (AT) (Insolvency) No. 1550 of 2023); and *Nivaya Resources Private Limited* v. *Asset Reconstruction Company (India) Limited* (Company Appeal (AT) (Insolvency) No. 1184 of 2022 & I.A. No. 3573 of 2022).

33 *Supra* note 14.

34 *Supra* note.15.

35 Company Appeal (AT) (Insolvency) No.1688 of 2023.

36 Company Appeal (AT) (CH) (INS.) No. 385 / 2022.

37 Company Appeal (AT) (Insolvency) No.446 of 2022.

when a default is committed during the section 10A period, and where such default continued even post the section 10A period, a section 7 application is fully maintainable in relation to any default occurred subsequent to the section 10A period as long as the relevant threshold is met. The NCLAT further observed that presence of a debenture trustee does not bar the debenture holder from initiating a section 7 proceeding in their individual capacity. In *Mukesh Kumar Jain* v. *Navin Kumar Upadhyay,*[38] the NCLAT held that a stay on the admission of a CIRP would not require the resolution professional (RP) to hand-over the charge of the corporate debtor to the erstwhile management as such a step would be disastrous and adversely affect the creditors of the corporate debtor. It further went on to observe that while the RP cannot take any further steps in the CIRP of the corporate debtor and has to stay his hand from proceeding any further in the CIRP, the RP would still be bound to take decisions in his wisdom as to how the corporate debtor should be allowed to continue as a going concern. In *Mehul Parekh* v. *Unmark Remedies*[39] the NCLAT held that a resolution plan cannot be faulted for differentiating between a related party and other similar category creditors, nor can it be faulted for allocating a nominal amount towards the employees, where the liquidation value payable to such employees was ***nil*** in terms of Section 53 of the Code.

The NCLAT further observed that as Section 28 of the Code does not mandate the approval of CIRP costs by the CoC, the adjudicating authority's decision to task CoC with the redetermination of CIRP costs was not valid. Finally, the NCLAT held that determination of CIRP costs and payment of CIRP costs to those who found entitled to receive the payments is an independent process from any recovery from promoters/ key managerial personnel, and hence such determination and payment cannot be made subject to avoidance proceedings. The NCLAT, in *Jaipur Trade Expocentre Private Limited* v. *Metro Jet Airways Training Private Limited*[40] has observed that the decision of the CoC to liquidate cannot be arbitrary but has to be accompanied with reasons. Further, the NCLAT held that there is no bar on a single operational creditor constituting a CoC. In *Consortium of Murari Lal Jalan and Florian Fritsch* v. *Ace Aviation VII Ltd.,*[41] the NCLAT held that Section 60(5) of the Code empowers the adjudicating authority to have jurisdiction over any proceedings "arising out of" the resolution process, including implementing the sale process, if contemplated under the resolution plan approved by it.

In *Vallal RCK* v. *Siva Industries and Holdings Limited,*[42] a CIRP had been initiated against the Corporate Debtor *i.e.,* Siva Industries and Holdings Limited. The validity of Section 12A was upheld as was also done in *Swiss Ribbons* v. *Union of India.*[43] Further, it had to be decided whether a subsequent settlement

38 Company Appeal (AT) (Insolvency) No. 930-931 of 2022.

39 Company Appeal (AT) (Insolvency) No. 839 of 2022.

40 Company Appeal (AT) (Ins.) No. 1224 of 2022.

41 Company Appeal (AT) (Insolvency) No. 1517 of 2022.

42 (Civil Appeal No. 1811-1812 of 2022).

43 *Supra* note 15.

agreement after an application of liquidation was made could be entered into. In the present case, there was a one-time settlement agreement passed by the CoC members. The Supreme Court gave reasoning that nothing in the Code disallows a settlement post admission of CIRP and the NCLT cannot sit over the commercial wisdom of the CoC, when it has decided to enter into such a settlement agreement.

VIII DIRECTORS OF COMPANY

In *Nirendra Nath Kar* v. *Gopal Navin Bhai Dave*,[44] the apex court held that an appeal for restoration of company's name can't be maintained by a person whose status as its director is disputed. In the instant case, an application for restoration of company was made by one who was neither company nor a member nor a creditor, he could not be said to be a person aggrieved to question order of Registrar of Companies (RoC) striking off name of company from Register of Companies and, thus, he had no *locus standi* to file application for restoration of name of company. The appeal was filed against the order passed by the High Court of Calcutta, setting aside the order of the RoC striking off the name of the company under Section 560(5) of the Companies Act, 1956. The RoC alleged that the company was not functioning properly and not carrying out any business, and the last annual return was filed for the year 2002-2003. Aggrieved by order of RoC, a complaint was filed by the appellant, who was one of the company's directors, in the year 2010 before the high court. The high court allowed the application on the ground that the procedure as prescribed under section 560 was not followed before striking off the name of the company and passed an order to restore the name of the company. Thereafter, an appeal was made to the Supreme Court against the order passed by the high court. The Supreme Court held that an appeal for restoration of the name of the company struck off by RoC as defunct cannot be maintained by a person whose status as director of the defunct company was disputed and not evident from documents filed with RoC, when the company's name was taken out of the records of RoC. The Supreme Court further held that the filings of the individual as a director after the company's name is struck off cannot give the individual the right to file/maintain an appeal for restoration of the name of the company until the dispute as to his status was decided in his favour by the civil court. Accordingly, the appeal was to be dismissed.

Likewise in another case[45] the Supreme Court ruled that director of a company can't be prosecuted vicariously for cheque bounce if company is not charged as accused. The prosecution against director for cheque bounce of company is to be quashed if company is not arraigned as accused and director of company cannot be prosecuted vicariously for cheque bounce by company if company is not arraigned as accused and where the allegations in the complaint did not, in express words, or with reference to the allegations contained therein make out a case that at the time of commission of the offence, the director named in the complaint as

44 [2022] 142 taxmann.com 563 (SC).

45 *Pawan Kumar Goel* v. *State of U.P.*, [2022] 145 taxmann.com 57 (SC).

accused was in charge of company and hence, liable to be held responsible for the conduct of its business.

In the instant case, the two main issues arose before the apex court were: (i) Whether a director of a company would be liable for prosecution under Section 138 of the N.I Act without the company being arraigned as an accused? (ii) Whether a complaint under Section 138 of the Negotiable Instrument Act would be liable to be proceeded against the director of the company without there being any averments in the complaint that the director arrayed as an accused was in charge of and responsible for the conduct and business of the company? Vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if, at the material time, he was in charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of a company, it does not necessarily mean that he fulfils both the above requirements to make him liable. Conversely, without being a director, a person can be in charge of and responsible to the company for the conduct of its business. Where the allegations in the complaint did not, in express words or with reference to the allegations contained therein, make out a case that at the time of the commission of the offence, the individual named in the complaint as accused was in charge of and was responsible to the company for the conduct of its business, it was to be held that requirement of section 141 was not met and the complaint against the accused was to be quashed.

Similarly in the instant case,[46] the petitioners were aggrieved by cessation of office as directors of Hahnemann International Pvt. Ltd. The disqualification happened by operation of section 164 (2) for not filing balance sheets and annual returns for a continuous period of three years from the year 2014-15. The ROC also deactivated the Director Identification Number (DIN) of the petitioner-directors. The petitioners advanced a three-fold argument challenging such disqualification, primarily being, that they were not permitted to avail the benefit of the "Company's Fresh Start Scheme of 2020" despite applying by letter dated November 11, 2020. The court held that a DIN can't be automatically deactivated on grounds of automatic vacation of office of director under section 164 (2). A DIN of a disqualified director cannot be automatically deactivated on account of disqualification from his directorships in companies.

IX SEBI

In *Securities and Exchange Board of India* v. *National Stock Exchange Members Association*[47] it was held that a stockbroker has to obtain a registration certificate from SEBI for each Stock Exchange where it seeks to operates and pay prescribed fee**.** A stockbroker operates from several stock exchanges in country, has to obtain a certificate of registration from SEBI for each of stock exchange where he operates and also has to pay ad valorem fee prescribed in terms of Part III annexed to Regulation 10 of the Securities and Exchange Board of India

46 *Satya Narayan Banik* v. *Union of India,* 135 taxmann.com 352 (Calcutta).

47 [2022] 143 taxmann.com 192 (SC).

(Stockbrokers and Sub-Brokers) Regulations, 1992 in reference to each certificate of registration. The respondent no. 1 was an association of the trading members of the NSE and its members deal in sale and purchase of shares and securities in India and each stockbroker has been registered under the Act, 1992 and pay fee for registration in accordance with the SEBI (Stock Brokers and Sub-Brokers) Regulations, 1992. The SEBI issued a Circular dated March 28, 2002 clarifying that every stock broker who has a certificate of registration has to pay the fees prescribed in Schedule III for each and every certificate of registration that he holds. The association of trading members filed writ petition challenging the Circular dated March 28, 2002 to the extent that paragraph (vi) of Part A provides the fees payable by a composite corporate member and requires that the stockbroker who held more than one registration with SEBI, structured fee would be required to be paid for each registration.

It was contended that even if a stock broker has more than one registration from SEBI, he was required to pay fees only with respect to the initial registration with SEBI irrespective of the number of cards held by the broker from the stock exchange and accordingly, it was prayed that the clarification made by SEBI under its Circular, dated March 28, 2002 was in contravention to the scheme of the Act, 1992 and deserved to be set aside. The single judge of the high court arrived at the conclusion that multiple registrations are envisaged under the scheme of regulations, and upheld the impugned circular, holding that it only determines the mode and manner of the calculation and dismissed the petition. On a Letters Patent Appeal being preferred by respondent no. 1, the division bench of the high court viewed that the scheme only manifests one certificate of registration from SEBI even if a stockbroker operates from several stock exchanges in the country and was primarily influenced by the expression 'a certificate' as referred to in section 12(1) of the Act, 1992 and allowed the appeal by setting aside the finding returned by the single judge and declared paragraph (vi) of Part A of the Circular, to be inconsistent with section 12(1) of the Act, 1992. On appeal to the Supreme Court, it was held that stockbroker who operates from several stock exchanges in country has to obtain a certificate of registration from SEBI for each of stock exchange where he operates. The court held that stock broker also has to pay *ad valorem* fee prescribed in terms of Part III annexed to regulation 10 of regulations, 1992 in reference to each certificate of registration from SEBI in terms of computation prescribed under circular. It was further held that fee is to be paid as a guiding principle by stockbroker, which is in conformity with scheme of Regulations.

In the judgment, *Ravi Parthasarathy* v. *Deputy Superintendent of Police Economic Offence Wing*[48] the court held that Issuance of non-convertible debentures (NCDs) to a selected group *via* private placement couldn't be termed as deposits u/s 2(2) of TNPID Act.[49] Company ITNL had floated non-convertible debentures through private placement basis only to select group of persons and

48 [2022] 133 taxmann.com 325 (Mad).

49 Tamil Nadu Protection of Interest of Depositors Act, 1997.

no advertisement was made soliciting deposits from public to invest in ITNL, issuance of debentures by ITNL could not be termed as 'deposits' as defined under section 2(2) of TNPID Act nor company floating private placement scheme could be termed to be a 'financial establishment' as defined under section 2(3) of TNPID Act. In the instant case being a purchaser of NCDs of company ITNL and having not received interest as undertaken by ITNL while issuing said debentures lodged a complaint before R1- Economic Offence Wing (EOW) under Tamil Nadu Protection of Investment of Depositors (in Financial Establishments) against company ITNL and its directors including petitioners. Aggrieved by the said registration of the case against the petitioners, a criminal petition was filed on the ground that the invocation of the provisions of TNPID Act would not stand attracted to the debentures floated by ITNL as the said debentures were not 'deposit' and ITNL was not a 'financial establishment' as defined under section 2(2) and 2(3) of the TNPID Act. It was the case of the petitioners that ITNL, which was a group company under the umbrella of IL and FS was involved in the infrastructural activities and not into finance and banking activities. ITNL had floated NCDs, to a select few, on which interest was to be paid. The petitioners were, till January 21, 2019 were paying interest on the said debentures, but in view of the moratorium issued by NCLAT, ITNL was not able to pay the interest, which defaults led to the registration of the complaint by the interveners under the TNPID Act.

The high court noted that neither there was any advertisement soliciting deposits from the public to invest in ITNL nor collection of any money from the public. The debentures were issued on a private placement basis only to a selected group of persons. Such being the case, issuance of debentures would by no stretch of imagination be termed to be 'deposits' within the meaning of section 2(2) nor company floating private placement scheme could be termed to be a 'financial establishment' as defined under section 2(3) and therefore, provisions of TNPID Act could not be made applicable in the instant case and consequential registration of case for the investigation by EOW against ITNL and petitioners was beyond its legal domain. It was also noted that investigation of the issue had already been entrusted with SFIO under section 212, thus, the jurisdiction of EOW under TNPID Act to conduct the parallel investigation was barred. Therefore, the crime registered with EOW against petitioners and ITNL deserved to be quashed.

X CORPORATE INSOLVENCY RESOLUTION PROCESS (CIRP)

The Corporate insolvency resolution process (CIRP) 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 or corporate itself can file an application before NCLT for initiating CIRP when default has occurred. In case of housing project, after amendment in the code, a homebuyer can also approach NCLT for initiating CIRP if a developer fails to provide possession of the house or refund the money. Under CIRP, an interim resolution professional (IRP) is appointed with the power to take charge of the

company which has defaulted. The said IRP must issue notice about imposition of moratorium against the concerned company within 3 days and constitute CoC within a specified period. After that CoC shall choose/appoint Resolution Professional (RP) subject to due approved from NCLT. The RP is tasked to take necessary measures 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 CoC fails to find a resolution within specified period, Adjudicating Authority *vis-a-vis* NCLT may order liquidation of company to pay the debts of the creditors.

Recently court has delivered judgments touching upon matter with respect to personal guarantors. The Supreme Court in *Mahendra Kumar Jajodia* v. *State Bank of India*[50] and several other matters like *Gurmeet Singh Sodhi* v. *Union of India*[51] has issued an interim stay on personal guarantor insolvencies. Further, the constitutional challenge to these provisions of personal insolvency provisions under the Code is on the basis that the provisions violate principles of natural justice as they do not give opportunity to the personal guarantor to be heard before the appointment of insolvency petition and the appointment of Resolution Professional.

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. 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.

50 C.A. No. 1871-1872 of 2022.

51 Writ Petition(s) (Civil) No(s).307/2022.

52 [2022] 134 taxmann.com 168 (SC).

In *Devas Multimedia (P.) Ltd*. ***v.*** A*ntrix Corporation Ltd.,*[52]*,* the Supreme Court upholds NCLAT order on winding up of DEVAS (Digitally Enhanced Video and Audio Services) on the grounds of fraud. The factual matrix of the case is that Antrix Corporation Ltd. was incorporated in September 28, 1992 under companies Act 1956. It is commercial arm of the Indian Space Research Organisation (ISRO) which is wholly owned by government of India and coming under the administrative control of the department of space. On December 17, 2004 Devas Multimedia Pvt Ltd. was incorporated as private company under the companies act 1956. Immediately thereafter Antrix entered into an agreement with the said company. As per the said agreement Devas was developing a platform capable of delivering multimedia and information service *via* satellite and territorial system to mobile receivers, tailored to the needs of various market segment and that devas had therefore requested Antrix, space segment capacity for the purpose of offering various services *inter alia* S-DMB service, new multimedia and information service across India that will be delivered *via* satellite and terrestrial system *via* fixed portable mobile receivers including mobile phones, mobile video/audio receivers for vehicles *etc.* The agreement dated January 28, 2005 was terminated by Antrix by a communication dated February 25, 2011, on account of *force majeure* clause. It stated that government of India had taken a policy decision not to provide orbital slots in S-Band for commercial activities. The termination led to initiating a commercial arbitration in India and Mauritius and German investors-initiated arbitration under BITs separately. Eventually, Antrix made a request to the Ministry of Corporate Affairs on January 14, 2021 seeking authorisation to initiate proceedings under section 271(c) of the companies Act 2013 act for winding up Devas. Pursuant to said authorization Antrix filed a petition before NCLT and NCLT approved winding up. Aggrieved by this order an appeal was filed. One of the grounds of appeal was the company has breached the mandatory requirement of advertisement before ordering winding up.

The Supreme Court observed that requirement of advertisement of petition for winding up does not flow out of statute but flows from rules. It clarified that as per sub-rule (5) and (6) of the NCLT Rules 2016, where direction of the tribunal as regards advertisement has not been complied with, the tribunal has an option of, i) either to dismiss the petition, or ii) to give such further direction as it may think fit. It observed that in the instant case the company was undergoing liquidation not on account of inability to pay debts or just and equitable grounds, but a case of fraud and all stakeholders were fully aware of the proceedings. Hence, the argument that failure by tribunal to order publication of an advertisement rendered entire proceedings unlawful, be declared unsustainable.

In this case, Devas, a joint venture of United States Corporation and ISRO's commercial arm 'Antrix' was engaged in fraudulent activities and it estopped Antrix from seeking its winding-up on ground that application for winding-up was barred by limitation, in view of fact that fraud was unearthed by investigating agencies only in 2016 and subsequently in 2018 and 2019 and these were sources of information for Antrix to get knowledge on aspects of fraud and by time discovery

was made, attempts to reap fruits of fraud had reached pinnacle and these attempts continue even till date and thus, winding up application was within period of limitation and therefore, impugned order passed by NCLT as well as NCLAT admitting application for winding-up was justified. Antrix, incorporated under the Companies Act, 1956, is the commercial arm of the ISRO. Antrix entered into the MOU with one of the advisors for business advisory purposes and otherwise. Advisors made a presentation proposing an Indian Joint venture, "DEVAS", to provide multimedia services to mobile users using the leased S-band satellite spectrum. Antrix entered into an agreement with Devas Multimedia Private Ltd. for the lease of space segment capacity of ISRO/Antrix S-Band spacecraft. Antrix, later on, terminated the agreement on the ground of *force majeure* that Government of India had taken a policy decision not to provide orbital slots in S-Band for commercial activities.

Meanwhile, CBI also filed an FIR on Devas under Section 420 read with Section 120B of IPC and Section 13(2) of the Prevention of Corruption Act, 1988. On January 18, 2021, Antrix filed the winding-up petition under Section 271(c) of the Companies Act, 2013 before NCLT, Bengaluru Bench. NCLT admitted the petition of Antrix and passed the order of winding up, saying that it was formed for "fraudulent and unlawful purposes".

Later on, Devas and its shareholder Devas Employees Mauritius Pvt Ltd. challenged the order to wind up before the Chennai bench of the NCLAT, which also dismissed the petition. Later on, the matter went to the Supreme Court to set aside the NCLT/NCLAT order to wind up Devas. Devas contended on various grounds, including the following:

(i) Definition of 'fraud' for section 271(1)(c) purpose;

(ii) Auditors reported no frauds in CARO Report;

(iii) A statement by NCLAT in its order that "the allegations are prima facie made out" a company cannot be ordered to be wound up based on prima facie findings;

(iv) Petition under Section 271(c) should have been preceded, at least by a report from the Serious Fraud Investigation Office, which has now gained statutory status under Section 211 of the Companies Act, 2013;

(v) Company cannot be wound up for fraud until criminal complaint filed for the offences punishable under Section 420 read with Section 120B IPC have been taken to a logical end. The Supreme Court quashed the above grounds on the following basis.

The Supreme Court called the deal between Antrix and Devas to build the satellites as "fraud". The court observed "if the seeds of the commercial relationship between Antrix and Devas were a product of fraud perpetuated by Devas, every part of the plant that grew out of those seeds, such as the agreement, the disputes, arbitral awards are all affected with the poison of fraud". Fraud in section 271(1)(c) has a wider meaning than that assigned to it in Contract Act or Section 447 of the Companies Act, 2013. What is covered by Section 271(c) of the Companies Act,

2013 is a fraud that goes beyond what lies in the realm of contract or in the realm of the penal provisions of the Companies Act, 2013.

As far as the question of "No Fraud" reporting by the auditor is concerned, the auditor's report can neither be taken as gospel truth nor act as estoppels against the company. The statement in the auditor's report is as per the information given to them or as per the information culled out to the best of their ability. The Supreme Court after analyzing the judgments passed by NCLT and NCLAT observed that merely because NCLAT used an erroneous expression, those findings cannot become prima facie. The detailed findings recorded by the Tribunal show that they are final and not prima facie. The outcome of one need not depend upon the outcome of the other, as the consequences are civil under the Companies Act, 2013 and penal in the criminal proceedings. The Supreme Court dismissed the appeal filed against the order of NCLT/NCLAT orders and upheld the decision of winding up of the company.

XII CONCLUSION

In the year under survey, while analyzing 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 judgments were pertaining to the interpretations of IBC Code, 2016 and corporate debtor. The report of the Company Law Committee recommends various changes to the Companies Act, 2013. The proposed changes include recognizing new concepts, fastening the corporate processes, improving compliance requirements, and removing ambiguities from existing provisions. The Company Law Survey for year 2022 also proposes changes to the Limited Liability Act, 2008 to enable producer organizations to incorporate under the Limited Liability Partnership Act, 2008. All these changes are aimed at facilitating and promoting greater ease of doing business in India and effective implementation of the Companies Act, 2013 and the Limited Liability Partnership Act, 2008.