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10 Important Insolvency Law Judgments of 2023

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10 Important Insolvency Law Judgments of 2023

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In recent years, several noteworthy judgments have been rendered by the Indian courts and tribunals in matters pertaining to the Insolvency and Bankruptcy Code, 2016 (IBC). This article covers ten such significant decisions rendered in the year 2023.

1. *RPS Infrastructure Ltd.* v. *Mukul Kumar*[1]

The mere fact that the resolution plan is yet to be approved by the adjudicating authority does not necessarily mean that the successful resolution applicant will be left to face unresolved claims, leading to a protracted and indefinite CIRP.

Brief facts

The appellant and KST Infrastructure Private Limited (corporate debtor) entered into an agreement for the development of land in Haryana. As disputes arose amongst the parties, the appellant invoked arbitration in May 2011. The arbitration culminated in an arbitral award rendered against the corporate debtor in August 2016. The corporate debtor contested the arbitral award through proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) at the District Court, Gurugram (Section 34 Court), which dismissed the challenge. Subsequently, the corporate debtor appealed the Section 34 Court's decision under Section 37 of the Arbitration Act.

Meanwhile, in March 2019, a corporate insolvency resolution process (CIRP) was initiated against the corporate debtor based on an order from the adjudicating authority. The interim resolution professional (IRP) invited claims from creditors on 30-3-2019. After receiving claims, the IRP formed the Committee of Creditors (CoC) on 6-11-2019, and invited expressions of interest from potential resolution applicants.

Subsequently, on 18-6-2020, the CoC replaced the interim resolution professional (IRP) with the resolution professional (Respondent 1). Furthermore, the CoC sanctioned the resolution plan put forth by KST Whispering Heights Residential Welfare Association on 11-7-2020.

In August 2020, the appellant addressed an e-mail to Respondent 1, drawing attention to the outstanding claim arising from the arbitral award against the corporate debtor. Respondent 1 dismissed the claim on 25-8-2020, citing that the claim submission deadline was 90 days from the initiation of the CIRP, and the appellant had exceeded this time-frame by 287 days. Additionally, the CoC had already approved a resolution plan.

Aggrieved by the rejection of the claim, the appellant filed an application under Section 60(5) of the IBC. The adjudicating authority accepted the appellant's plea, asserting that Respondent 1 could not have summarily dismissed the appellant's claims. Moreover, the adjudicating authority noted that the appellant's claim should have been reflected in the corporate debtor's financial records, a matter that Respondent 1 was obligated to investigate. The adjudicating authority also suggested that the appellant might not have been aware of the claim due to a possible oversight of the newspaper advertisement. Aggrieved by the adjudicating authority's decision, Respondent 1 filed an appeal under Section 61 of the IBC before the National Company Law Appellate Tribunal (NCLAT). Citing the precedent set in *Essar Steel (India) Ltd. (CoC)* v. *Satish Kumar Gupta*[2], Respondent 1

argued that a successful resolution applicant should not be confronted with unsettled claims once the resolution plan has been accepted.

To counter Respondent 1's arguments, the appellant referred to the Supreme Court's decision in *Brilliant Alloys (P) Ltd.* v. *S. Rajagopal*[3]. In the aforesaid case, the Supreme Court emphasised that a belated claim should not be dismissed outright, as the time-frames stipulated under the IBC are considered directory rather than mandatory. The appellant further contended that Respondent 1 had not fulfilled his statutory obligations.

The NCLAT overturned the adjudicating authority's decision in the impugned order, citing the following reasons:

(*i*) Respondent 1 had properly served notices/invitations for claims in accordance with the relevant rules and regulations.

(*ii*) The appellant failed to demonstrate that it filed its claim promptly upon learning of the initiation of the CIRP.

(*iii*) Respondent 1 had submitted an application under Section 19 of the IBC before the adjudicating authority, seeking a directive to compel the former management to provide all records. This action reflected diligent efforts by Respondent 1 to scrutinise the corporate debtor's records.

(*iv*) Entertaining new claims at a belated stage would jeopardise the resolution plan.

Aggrieved by the NCLAT's decision, the appellant approached the Supreme Court of India. When the present matter was heard, the appellate proceedings under Section 37 of the Arbitration Act were still ongoing.

Decision

The key issue before the Supreme Court in this case was whether a claim related to an arbitral award, which was under appeal in proceedings initiated under Section 37 of the Arbitration Act, could be included at a stage after the approval of the resolution plan.

The Supreme Court observed that the process followed by Respondent 1 was not flawed in general. The only thing to be checked was whether an effort should have been made to identify liabilities linked to the arbitral award from the corporate debtor's records.

Upon examining the case's facts, the Supreme Court found that Respondent 1

had taken all reasonable steps to obtain the corporate debtor's records by filing an application under Section 19 of the IBC. The Supreme Court emphasised that the IBC outlines time-bound procedures, allowing extensions only under specific circumstances. In this instance, the appellant, a commercial entity, displayed a lack of vigilance by filing a claim 287 days late, especially given that a public announcement serves as deemed knowledge of the initiation of insolvency proceedings and the invitation for claims against the corporate debtor.

The Supreme Court clarified that the fact that the adjudicating authority had not yet approved the resolution plan did not imply that the plan could undergo continuous revisions, turning the CIRP into an endless cycle. Consequently, the Supreme Court concluded that the NCLAT's decision was justified.

2. *Paschimanchal Vidyut Vitran Nigam Ltd.* v. *Raman Ispat (P) Ltd.*[4]

The scheme and provisions of IBC override the Electricity Act, 2003.

The ruling in *STO* v. *Rainbow Papers Ltd.*[5] is specific to the circumstances of that particular case and does not establish a precedent.

Brief facts

The appellant, Paschimanchal Vidyut Vitran Nigam Limited (PVVNL), entered into an electricity supply agreement with Ram Ispat Pvt. Ltd. (corporate debtor) on 11-2-2010. According to the terms of the agreement, PVVNL was authorised to create a charge on the corporate debtor's assets in the event of unpaid dues. PVVNL issued periodic bills for the electricity supplied to the corporate debtor. Due to non-payment of dues, PVVNL proceeded to attach the properties of the corporate debtor. This attachment, authorised by the Tahsildar, Muzaffarnagar, restrained the corporate debtor from transferring properties through sale, donation, or any other means, and also created a charge on these properties.

Subsequently, the corporate debtor underwent CIRP under the IBC. However, the CIRP was unsuccessful, leading to the initiation of liquidation proceedings for the corporate debtor. The liquidator contended that the assets of the corporate debtor would be categorised based on the priority order outlined in Section 53 of the IBC. According to this arrangement, PVVNL would only be entitled to a proportional distribution of proceeds, alongside other secured creditors, from the sale of liquidation assets.

Consequently, the liquidator formally requested the adjudicating authority to

release the seized properties in favour of the liquidation process. The National Company Law Tribunal (NCLT) approved the liquidator's request. After undergoing multiple rounds of legal proceedings, the matter ultimately reached the Supreme Court.

PVVNL contended that Sections 173 and 174 of the Electricity Act, 2003 (Electricity Act) held a prevailing influence over all other laws, excluding the Consumer Protection Act, 1986; the Atomic Energy Act, 1962; and the Railways Act, 1989. Asserting its status as a specialised law governing the generation, transmission, and distribution of electricity, PVVNL argued that the Electricity Act took precedence over the IBC as well. Thus, the contention was that the rights of electricity suppliers, such as PVVNL, were not subservient to the "priority of claims" mechanism prescribed by the IBC. Consequently, PVVNL asserted its option to remain detached from the liquidation process and independently recover its outstanding dues. In support of this stance, PVVNL cited the rulings in *Port of Mumbai* v. *Indian Oil Corpn.*[6], and *STO* v. *Rainbow Papers Ltd.*[7] Alternatively, PVVNL relied on the definition of secured creditors, maintaining that electricity dues constituted security interests in favour of electricity service providers.

In response, the liquidator opposed PVVNL's arguments by referring to the case of *W.B. State Electricity Distribution Co. Ltd.* v. *Sri Vasavi Industries Ltd.* [8], asserting that electricity dues should not be accorded special priority. The liquidator contended that, in accordance with Section 52(3) of the IBC, prior to realising security interests by secured creditors, the liquidator was obligated to verify the existence of security interest using records maintained by an information utility or by means specified by the Insolvency and Bankruptcy Board of India (IBBI). Furthermore, according to the liquidator, government dues were placed within the waterfall mechanism as per Section 53(1)(*e*)(*i*) of the IBC.

The issue revolved around whether PVVNL could pursue its security interest in the corporate debtor's assets through the procedures outlined in electricity laws or if it was obliged to adhere to the distinct procedures specified in Section 52 of the IBC.

Decision

The Supreme Court examined the hierarchical distribution system outlined in Section 53 of the IBC. Within this framework, government debts and operational debts stood at a lower priority compared to the amounts owed by a corporate debtor to secured financial creditors.

The Supreme Court explained that dues owed to entities like PVVNL, as opposed to the Central or State Government, should be categorised as financial or operational debt based on the nature of the transaction with the corporate debtor. Despite the Government's involvement with PVVNL, the Supreme Court emphasised that this did not confer upon it the status of a government entity. The Supreme Court noted that PVVNL's functions could be replicated by other entities, both private and public, given the liberalisation of electricity supply, generation, transmission, and distribution under the Electricity Act, with certain exceptions. Consequently, the Supreme Court concluded that in the present case, the dues payable to PVVNL did not fall under the category of amounts owed to the Central or State Government.

The Supreme Court drew a distinction from the *Rainbow Papers*[9] case, highlighting that the corporate debtor in *Rainbow Papers*[10] was undergoing insolvency resolution proceedings. In contrast, the corporate debtor in the present case was undergoing liquidation. Additionally, *Rainbow Papers*[11] did not consider the waterfall mechanism specified in Section 53 of the IBC and incorrectly treated the State Government as a "secured creditor". The Supreme Court underscored that legislative intent was to treat dues owed to the Central Government or the State Government separately from those owed to secured creditors.

Moreover, the Supreme Court noted that Section 52 of the IBC provided an avenue for secured creditors to opt out of liquidation proceedings if they chose not to relinquish their security interest in favour of the liquidation estate. However, the IBC and related regulations outlined a procedure and timeline for secured creditors to exercise this option. Consequently, PVVNL's appeal was dismissed, and the liquidator was instructed to adjudicate PVVNL's claims in accordance with the prescribed laws and procedures.

3. *Eva Agro Feeds (P) Ltd.* v. *Punjab National Bank*[12]

Although the highest bidder does not possess an absolute right to insist on the acceptance of their bid. The liquidator, in the event of deciding against accepting the highest bid, is required to consider pertinent factors carefully. This deliberation must be evident and apparent in the rejection order itself.

Brief facts

In February 2021, Amrit Feeds Limited, the corporate debtor (corporate debtor), was put through liquidation proceedings, with the second respondent acting as the liquidator. Punjab National Bank (PNB), a financial creditor of the corporate

debtor, contested the adjudicating authority's directive to proceed with the highest bidder Eva Agro Feeds Pvt. Ltd. (Eva), in the auction. Both respondents (PNB and the liquidator) contended that being the highest bidder did not automatically confer a legal right and did not signify the successful completion of the auction.

In the subsequent appellate proceedings, the NCLAT reversed the adjudicating authority's order and directed the liquidator to initiate a new auction process. The NCLAT justified the auction cancellation, citing Eva as the sole bidder whose bid matched the reserve price. Notably, the NCLAT highlighted the liquidator's reliance on Clause 3(*k*) of the e-auction process information document, which authorised auction cancellation. Additionally, the NCLAT underscored that the auction-sale notice terms granted the liquidator an absolute right to accept or reject any bid or to cancel the auction without providing a reason — a term Eva had accepted during the auction. The NCLAT concluded that the liquidator had the authority to cancel the auction before the sale was finalised, and the sale was deemed successful only upon complete payment.

Aggrieved by the NCLAT's ruling, Eva filed an appeal before the Supreme Court challenging the NCLAT's decision.

Decision

The Supreme Court observed that Para 1(11) of Schedule I to the Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Regulations) allowed the liquidator to conduct multiple rounds of auction to maximise asset realisation and safeguard the best interests of creditors. However, as per Para 1(11-A) of Schedule 1 of the Regulations, the liquidator was obligated to communicate the reasons for rejecting the highest bid in the auction process to the highest bidder and include this information in the subsequent progress report.

Rejecting the argument that Para 1(11-A) of Schedule 1 of the Regulations should only have prospective application, considering its introduction on 30-9-2021, the Supreme Court clarified that this provision merely formalised a fundamental principle. Consequently, the Supreme Court held that it was applicable to transactions even before the specified date.

In this regard, the Supreme Court observed as below: *65*. … While it is true that Para 1(11-A) came to be inserted in Schedule 1 to the Regulations with effect from 30-9-2021, it does not imply that an auction-sale or the highest bid prior to the aforesaid date could be cancelled by the liquidator exercising unfettered

discretion and without furnishing any reason. It is trite law that furnishing of reasons is an important aspect rather a check on the arbitrary exercise of power. Furnishing of reasons presupposes application of mind to the relevant factors and consideration by the authority concerned before passing an order. Absence of reasons may be a good reason to draw inference that the decision-making process was arbitrary. Therefore, what Para 1(11-A) has done is to give statutory recognition to the requirement for furnishing reasons, if the Liquidator wishes to reject the bid of the highest bidder. Furnishing of reasons, which is an integral facet of the principles of natural justice, is embedded in a provision or action, whereby the highest bid is rejected by the liquidator. Thus, what Para 1(11-A) has done is to give statutory recognition to this well-established principle. It has made explicit what was implicit.[13]

The Supreme Court rejected the respondents' contention asserting that, in accordance with Clause 3(*k*) of the information document governing the e-auction process, the liquidator had the discretion to annul the auction without the obligation to furnish reasons, particularly because the bidder had already acknowledged and accepted the terms and conditions outlined in the auction notice. The Supreme Court underscored that in cases where there was a divergence between the auction process document and either the IBC or the Regulations, the stipulations of the IBC or the Regulations would invariably hold greater significance and take precedence.

Moreover, the Supreme Court identified no justifiable grounds for annulling the auction. The liquidator's rationale for the cancellation rested on the fact that the appellant stood as the exclusive bidder, and the auction price matched the reserve price. Nevertheless, the Supreme Court highlighted a discrepancy by noting that even in the subsequent sale notice, the liquidator maintained an identical reserve price for the property, consistent with the initial auction round. The Supreme Court observed, "if this is the position, we fail to find any rationale or justification in rejecting the bid of the appellant and going for another round of auction at the same reserve price."

The Supreme Court noted that, as per Para 1(12) of Schedule I in the Regulations, the winning bidder must submit the outstanding sale amount within 90 days from the date of the demand. Additionally, Para 1(13) specifies that the sale is deemed finalised upon complete payment. In this regard, the Supreme Court observed, *75*. … if we read the provisions of Schedule I, more particularly Paras 1(11) to (13) thereof, in a conjoint manner a view may reasonably be taken that ordinarily the

highest bid may be accepted by the liquidator unless there are statutory infirmities in the bidding or the bidding is collusive in nature or there is an element of fraud in the bidding process.[14] As a result, the appeal was allowed.

4. *Union Bank of India* v. *Financial Creditors of M/s Amtek Auto Limited*

Upholds the decision in *Union Bank of India* v. *Dinkar T. Venkatasubramanian*[15].

The NCLAT lacks the powers and authority to review its decisions. However, NCLAT can recall its judgments or orders by invoking the inherent powers set out in Rule 11 of the NCLAT Rules, 2016.

Brief facts

A three-member Bench of the NCLAT raised significant questions regarding the IBC, including:

(*i*) Whether NCLAT, lacking the formal authority to review judgments, can entertain applications for the recall of decisions based on valid reasons?

(*ii*) Whether the judgments in cases like *Agarwal Coal Corpn. (P) Ltd.* v. *Sun Paper Mill Ltd.*[16], and *Rajendra Mulchand Varma* v. *K.L.J Resources Ltd.*[17], imply that NCLAT does not possess the power to recall judgments?

(*iii*) Whether the judgments in *Agarwal Coal Corpn.*[18] and *Rajendra Mulchand Varma*[19] accurately interpret the law in this context?

In June 2023, a five-member Bench of NCLAT provided its answers to these issues. The NCLAT clarified that it lacks the formal power of review. However, the NCLAT asserted that it does possess the authority to recall its judgments by invoking inherent powers as outlined in Rule 11 of the NCLAT Rules, 2016. Yet, this authority to recall judgments does not extend to rehearing cases to identify apparent errors in the original judgment.

NCLAT also stressed that the judgments in *Agarwal Coal Corpn.*[20] and *Rajendra Mulchand Varma*[21], suggesting that NCLAT lacked the power to recall judgments, did not accurately represent the relevant legal principles.

Moreover, NCLAT delineated the conditions in which the authority to recall judgments could be utilised. The NCLAT observed: *21*. … there is a distinction between review and recall. The power to review is not conferred upon this Tribunal but power to recall its judgment is inherent in this Tribunal since inherent power of the Tribunal are preserved, powers which are inherent in the

Tribunal as has been declared by Rule 11 of the NCLAT Rules, 2016. Power of recall is not power of the Tribunal to rehear the case to find out any apparent error in the judgment which is the scope of a review of a judgment. Power of recall of a judgment can be exercised by this Tribunal when any procedural error is committed in delivering the earlier judgment; for example; necessary party has not been served or necessary party was not before the Tribunal when judgment was delivered adverse to a party. There may be other grounds for recall of a judgment. Well-known ground on which a judgment can always be recalled by a court is ground of fraud played on the court in obtaining judgment from the court. We, for the purpose of answering the questions referred to us, need not further elaborate the circumstances where power of recall can be exercised.[22]

Following the decision of the NCLAT, the Union Bank of India filed an appeal with the Supreme Court challenging the decision of the NCLAT.

Decision

The Supreme Court affirmed the decision issued by the NCLAT and declined to intervene in the matter. The Supreme Court observed: "we are in agreement with the view taken by the five-Judges Bench of the NCLAT and thus find no reason to interfere with the impugned judgment. Insofar as the endeavour of learned counsel for the appellant to urge on the facts of the case is concerned, that would be a matter to be considered, dependent on the fate when the matter is placed before the appropriate Bench, to be decided on merits. The civil appeal is dismissed."

5. *M.K. Rajagopalan* v. *Periasamy Palani Gounder*[23]

A modified resolution plan must undergo reconsideration by the Committee of Creditors before being presented for approval by the adjudicating authority.

Brief facts

In the instant matter, the Tourism Finance Corporation of India Limited initiated insolvency proceedings against Appu Hotels Limited (corporate debtor) under Section 7 of the IBC. The NCLT admitted the corporate debtor to the CIRP on 5-5-2020. Mr M.K. Rajagopalan (successful resolution applicant) submitted a resolution plan for the corporate debtor. During the ninth CoC meeting on 22-1-2021, the resolution plan by the successful resolution applicant received conditional approval with 87.39% votes. However, the CoC directed the successful resolution applicant to revise the plan in consultation with the creditors. Consequently, the allocation for unsecured dissenting financial creditors in the

amended plan increased from INR 29 crores to INR 49.13 crores.

On 25-1-2021, the successful resolution applicant submitted the revised resolution plan to the resolution professional, bypassing the CoC. Subsequently, the modified plan was directly presented to the NCLT for approval, and the NCLT granted its approval. The approval of the resolution plan faced challenges before the NCLAT on various grounds. On 17-2-2022, the NCLAT rejected the resolution plan approved by the NCLT, noting that it had been approved without being presented to the CoC for final approval. The matter was remitted to the CoC, with directions for the resolution professional to recommence the CIRP from the stage of publishing Form "G" and inviting expressions of interest as per the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations). Additionally, the successful resolution applicant was declared ineligible under Section 88 of the Trusts Act, 1882, and disqualified under Section 164(2)(*b*) of the Companies Act, 2013. Aggrieved by the NCLAT's decision, the successful resolution applicant approached the Supreme Court.

Decision

The Supreme Court determined that the irregularity of bypassing the CoC and directly submitting the revised plan to the NCLT for approval could not be dismissed as a mere technicality. The financial details of the resolution plan needed CoC's consideration before being deemed a well-considered decision. The Supreme Court stressed that presenting a modified resolution plan, even with minor changes, to the NCLT without obtaining final approval from the CoC constituted a significant and incurable material irregularity. The Supreme Court also rejected the post facto approval of a revised resolution plan by the CoC. It concluded that the CoC's conditional approval in the ninth meeting was not final. Therefore, the modified plan should have undergone final approval by the CoC before being submitted to the NCLT. The failure to adhere to this process constituted an irreparable material irregularity.

Furthermore, the Supreme Court underscored the necessity for strict compliance with the requirements of the CIRP Regulations, particularly in presenting the final resolution plan to the CoC. The Supreme Court expressed concern that approving the process employed in this case would leave the scheme under the IBC and CIRP regulations susceptible to arbitrariness.

Consequently, the Supreme Court ruled that the NCLT could not have approved

the resolution plan for two reasons: firstly, the successful resolution applicant's failure to present the revised plan to the CoC before seeking NCLT approval, and secondly, the successful resolution applicant's ineligibility under Section 88 of the Trusts Act. Therefore, the Supreme Court set aside the NCLAT's order.

6. *M. Suresh Kumar Reddy* v. *Canara Bank*[24]

The adjudicating authority must admit a petition under Section 7 of the IBC when the existence of financial debt and its default by the corporate debtor is established.

Brief facts

Kranthi Edifice Pvt. Ltd., the corporate debtor (corporate debtor), availed credit facilities from Canara Bank, the financial creditor (financial creditor), but defaulted on the repayment. Consequently, the financial creditor initiated insolvency proceedings by filing a petition under Section 7 of the IBC to the NCLT, seeking to trigger the CIRP against the corporate debtor.

On 27-6-2022, the NCLT admitted the petition, commencing the CIRP against the corporate debtor. M. Suresh Kumar Reddy, a suspended Director of the corporate debtor and the appellant (appellant/suspended Director), challenged the NCLT's decision in the NCLAT, but the appeal was dismissed.

Following the NCLAT's ruling, the suspended Director took the matter to the Supreme Court. He argued that, in accordance with the precedent set in *Vidarbha Industries Power Ltd.* v. *Axis Bank Ltd.*[25], the NCLT had the discretion to reject the admission of a Section 7 petition under the IBC, even in the presence of evidence of debt and default.

Decision

The Supreme Court, upon considering the legal framework governing Section 7 petitions under the IBC, referred to its previous rulings in *Innoventive Industries Ltd.* v. *ICICI Bank*[26] and *E.S. Krishnamurthy* v. *Bharath Hi-Tecch Builders (P) Ltd.*[27] In *Innoventive Industries*[28] the Supreme Court asserted that the NCLT should admit a Section 7 petition once it confirms the occurrence of a default in the payment of a financial debt. Likewise, in *E.S. Krishnamurthy*[29], the Supreme Court underscored the NCLT's limited role, emphasising that its task is solely to ascertain whether a default has occurred. If so, the petition must be admitted under Section 7.

Examining the *Vidarbha Industries*[30], the Supreme Court acknowledged that it introduced an element of discretion for the NCLT in admitting a Section 7 petition,

subject to valid reasons for non-admission. However, upon evaluation, the Supreme Court clarified that the Vidarbha Industries dicta was confined to the specifics of that case. Consequently, the Supreme Court clarified that once a default occurs, the NCLT has minimal discretion to reject the admission of a Section 7 petition. The only valid ground for dismissal would be if the debt had not yet matured and become payable. Consequently, the appeal was dismissed, upholding the principles established in *Innoventive Industries*[31] and *E.S. Krishnamurthy*[32].

7. *Sanket Kumar Agarwal* v. *APG Logistics (P) Ltd.*[33]

The time-frame between the pronouncement of the order and the issuance of the certified copy by the adjudicating authority is excluded from the limitation period for filing an appeal with the NCLAT under Section 61(2) of the IBC.

Brief facts

Mr Sanket Kumar Agarwal, the appellant, filed a petition under Section 7 of the IBC against APG Logistics Private Limited. On 26-8-2022, the NCLT dismissed this application.

Subsequently, on 2-9-2022, the appellant filed an application for certified copy of the NCLT's order, which the NCLT's registry received on 5-9-2022. The certified copy was furnished to the appellant on 15-9-2022. Later, on 10-10-2022, the appellant electronically filed an appeal with the NCLAT against the NCLT order. Alongside the appeal, an application for the condonation of a five-day delay was submitted, and the physical copy of the appeal was filed on 31-10-2022.

On 9-1-2023, the NCLAT dismissed the appeal, citing it to be time-barred. The basis for this decision was the observation that the appeal was filed through the e-portal on 10-10-2022 — the 46th day subsequent to the NCLT order. Despite Section 61 of the IBC setting a 30-day time-frame for filing an appeal against an NCLT order, with the NCLAT having the authority to condone a delay of up to 15 days under sufficient cause, the appeal was deemed time-barred. It was emphasised that Section 61 of the IBC does not require waiting for the certified copy of the order before filing an appeal. Consequently, the appeal was considered to have exceeded the permissible 45-day limit under Section 61 of the IBC.

Aggrieved with the NCLAT's decision, the appellant approached the Supreme Court.

Decision

The Supreme Court pointed out an error in the NCLAT's judgment, underscoring its oversight in computing the limitation period. The Supreme Court observed that Rule 3 of the NCLAT Rules, 2016 calls for the exclusion of the date of the pronouncement, in line with Section 12(1) of the Limitation Act, 1963 (Limitation Act). By excluding the date of the NCLT order pronouncement (26-8-2022), the appeal filed on 10-102022, was actually within the 45-day limit set by Section 61 of the IBC. Therefore, the Supreme Court opined that the NCLAT had wrongly dismissed the appeal on the basis that it was filed on the 46th day.

The Supreme Court also took note of the NCLAT's Standard Operating Protocol (SOP) issued on 3-1-2021, encouraging litigants to utilise the electronic filing facility through the NCLAT e-filing portal. A subsequent clarification issued by the NCLAT on 24-12-2022 emphasised that the limitation period would be reckoned from the date of e-filing, with mandatory physical filing required within seven days.

In addition, Rule 22(2) of the NCLAT Rules, 2016 mandated the submission of a certified copy of the impugned order with the appeal. The appellant diligently requested this certified copy from the NCLT on 2-9-2022, within the 30-day limitation period specified in Section 61(2) of the IBC, showcasing due diligence.

Placing reliance on Section 12(2) of the Limitation Act, the Supreme Court opined that the time taken to procure a certified copy of the underlying impugned order should be excluded when calculating the limitation period. In the present case, since the certified copy was only received by the appellant on 15-9-2022, the time from 5-9-2022 until 15-9-2022 should have been excluded while calculating the limitation under Section 61(2) of the IBC. Accordingly, the Supreme Court allowed the appeal and directed the NCLAT to reconsider the matter on merits.

8. *Dilip B. Jiwrajka* v. *Union of India*[34]

Supreme Court upholds the constitutional validity of Sections 95 to 100 contained in the IBC.

Brief facts

On 9-11-2023, a 3-Judge Bench of the Supreme Court dealt with more than 350 writ petitions and affirmed the constitutional validity of Sections 95 to 100 contained in Part III within the IBC which pertain to insolvency resolution process for individuals and partnership firms. Chapter III in Part III of the IBC allows the

commencement of an insolvency resolution process by either a debtor (under Section 94) or a creditor (under Section 95). Upon filing an application under Section 94 or Section 95 of the IBC, an interim moratorium takes effect from the application date. Subsequently, a resolution professional (RP) is appointed under Section 97 of the IBC. The RP is responsible for evaluating the application and submitting a report to the adjudicating authority, recommending either the acceptance or rejection of the application. Throughout this process, the RP may request the debtor to provide information or explanations regarding the debt. Following this, under Section 100 of the IBC, the adjudicating authority issues an order either admitting or rejecting the application.

The aforementioned provisions became a focal point in the writ petitions, wherein it was alleged, among other things, that the procedure involving the automatic imposition of interim moratorium and the appointment of an RP solely based on an application filed under Sections 94 and 95 of the IBC, without affording the debtor an opportunity for a personal hearing, violates the principles of natural justice and is manifestly arbitrary. It was strongly argued that such actions contravene with Article 14 of the Constitution of India. Therefore, the petitioners sought the incorporation of principles of natural justice at the initial stage before the imposition of interim moratorium and the appointment of an RP.

The petitioners further asserted that the framework should encompass the determination of jurisdictional questions, such as whether the debt is subsisting and/or payable, before an RP is appointed to perform the tasks outlined in Section 99 of the IBC. To illustrate this point, the petitioners drew a comparison between the scheme outlined in Part III of the IBC and the process adopted under Part II of the IBC (for corporate debtors). In the latter, the imposition of moratorium under Section 14 and the appointment of an interim RP occurs after judicial adjudication under Section 7 or Section 9 of the IBC. Consequently, the petitioners argued that this unequal treatment between Parts II and III of the IBC is glaringly arbitrary and infringes upon Article 14 of the Constitution.

Moreover, the petitioners contended that the powers vested in the RP to “seek such further information or explanation in connection with the application as may be required from the debtor or the creditor or any other person” are unrestricted and unbounded. Granting such broad authority to compel information even from third parties is considered an excessively wide and unregulated power, which should not be conferred upon the RP without affording debtors a prior opportunity for a personal hearing.

Additionally, the petitioners raised concerns about the practical implications of the automatic moratorium under Section 96 of the IBC. It was strongly argued that such a moratorium raises issues concerning the reputation and creditworthiness of a debtor. Beyond that, it attaches a stigma that adversely affects the fundamental rights of the debtor to engage in trade or business, as guaranteed under Article 19(1)(*g*) of the Constitution. Furthermore, numerous lending documents may include clauses triggering defaults upon the receipt of an insolvency notice, leading to the invocation of collateral or independent debts by lending agencies. Consequently, this also gives rise to significant legal and financial consequences for the individual involved.

Decision

The Supreme Court, upon thoroughly examining the provisions under Sections 95 to 100 of the IBC, held them to be constitutionally sound and devoid of any arbitrariness, thereby not infringing Article 14 of the Constitution. The Supreme Court, in reaching this determination, highlighted that, at the juncture of Section 97 of the IBC, the authority granted to the adjudicating authority is confined to the appointment of the RP. The role of the RP at this stage is restricted to gathering details about the debt and preparing a report under Section 99 of the IBC based on the acquired information. Consequently, the Supreme Court underscored that the adjudicating authority's adjudicatory function only comes into play in Section 100 of the IBC.

Additionally, the Supreme Court emphasised that introducing an opportunity to raise jurisdictional questions, including those related to the existence of the debt, prior to Section 100, would disrupt the envisaged timelines under the IBC. Furthermore, the Supreme Court noted that incorporating a personal hearing at an earlier stage would render Sections 99 and 100 of the IBC redundant.

In this context, the Supreme Court stressed the facilitative nature of the RP's role preceding Section 100 of the IBC. It noted that the RP's role involves compiling information provided in the application and, if necessary, seeking further information related to the application. The legislature envisions interaction between the debtor and the RP in preparing the report under Section 99(2) of the IBC. Since Section 99(2) explicitly indicates a non-ex parte process and considers the debtor's explanations even in the recommendatory report, the Supreme Court concluded that the right to representation is provided even at this stage.

The Supreme Court also observed that rejecting the petitioners' submissions is

warranted because Section 99 of the IBC does not entail adverse consequences. The Supreme Court clarified that information sought from parties, especially third parties, must be connected to the application filed under Section 94 or Section 95 of the IBC. As per Parliament's intention, it must be an inquiry concerning the application and not a broad inquiry. The Supreme Court also clarified that judicial adjudication under Section 100 of the IBC must fully adhere to the duty to provide a personal hearing and adhere to principles of natural justice.

In summary, the Supreme Court concurred with the respondents' argument that the IBC's timelines are crucial, and distinct schematic structures are envisioned for corporate entities under Part II and individuals and partnership firms under Part III of the IBC. The Supreme Court clarified that the interim moratorium under Section 96 of the IBC applies only to the "debt" and is for the debtor's benefit. Hence, the Supreme Court specifically noted that the legislature carefully calibrated the RP's role and the moratorium's nature under Parts II and III of the IBC, considering the intelligible differentiation between corporate entities and individual guarantors.

9. *Haldiram Incorporation (P) Ltd.* v. *Amrit Hatcheries (P) Ltd.*[35]

The properties validly sold in an auction-sale under the SARFAESI Act before declaration of moratorium under the IBC cannot be treated as liquidation assets of the corporate debtor under the scheme of IBC.

Brief facts

The appellant was the purchaser of an auction-sale of certain properties of the defaulting borrower. A sale certificate was issued on 19-8-2019 under the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) in relation to the immovable properties in respect of which the auction-sale was held. The auction sale took place in respect of properties mortgaged by the borrower/corporate debtor (first respondent represented by the liquidator appointed under the provisions of the IBC) for availing credit facilities. The latter had defaulted in repayment of the same. The appellant submitted that payment was completed by it on 16-8-2019. Thereafter, an operational creditor filed a petition under Section 9 of the IBC before the NCLT and consequently on 20-8-2019, a moratorium was declared and CIRP was initiated.

An erstwhile director of the corporate debtor had taken out a notice of motion

resisting the sale of the properties carried out in the auction-sale. The NCLT, by an order passed on 25-2-2020 found issue of sale certificate and handing over of the property to be illegal and hence held that the subject property shall continue to be assets of the corporate debtor.

The NCLT had proceeded on the basis that sale was not concluded and while commencing the resolution process, directed the liquidator to take possession of the subject properties. An appeal came to filed against the aforesaid order of the adjudicating authority, which was dismissed on 14-2-2022, by a 2:1 majority decision, with a technical member of the NCLAT taking a dissenting view.

Though both the erstwhile director and the liquidator had filed counter-affidavits contesting the auction-sale under the SARFAESI Act. At the time of hearing before the Supreme Court, the counsel representing them conceded to the legitimacy of the transaction resulting from sale of the subject property through auction, and both of them agreed that the auction-sale stood concluded before the declaration of moratorium.

Decision

At the outset, the Supreme Court referred to the decision in *Esjaypee Impex (P) Ltd.* v. *Canara Bank*[36] to hold that the mandate of law in terms of the Registration Act, 1908 only required the authorised officer of the bank under SARFAESI Act to handover the duly validated sale certificate to the auction-purchaser with a copy forwarded to the registering authorities. This view was also followed by the Supreme Court in *Inspector General of Registration* v. *G. Madhurambal*[37].

In the instant matter, since the liquidator and the erstwhile director both did not dispute the factual position that the sale stood concluded before the declaration of the moratorium, the Supreme Court held that no case was made out for invalidating the auction-purchase. Accordingly, the Supreme Court held that the properties purchased by the appellant in the auction could be carved out of the scope of the liquidation proceedings and may not be treated as liquidation assets under the scheme of the IBC. The impugned order was set aside in these terms.

10. *Sanjay Pandurang Kalate* v. *Vistra ITCL (India) Ltd.*[38]

The limitation period for filing an appeal would commence only when the order being challenged gets uploaded on the NCLT's website if the contents of the same are not made available/pronounced to the parties otherwise.

Brief facts

Vistra ITCL (India) Limited (respondent) initiated insolvency proceedings against Evirant Developers Pvt. Ltd. (corporate debtor) by filing a petition under Section 7 of the IBC. The appellant —— a former director of the corporate debtor, filed an interlocutory application before the NCLT claiming that the second respondent had submitted a response to the insolvency petition on behalf of the corporate debtor without proper authorisation from the Board of Directors or notification being issued to the appellant.

On 17-5-2023, the NCLT heard the arguments from both sides but did not render a decision or substantive order. Subsequently, the NCLT's registry uploaded the detailed order on 30-5-2023, even though the same was dated 17-5-2023. In the order, the NCLT dismissed the appellant's application. Aggrieved by the NCLT's decision, the appellant, in order to file an appeal, requested for a certified copy of the order on 30-5-2023. The certified copy came to be received by the appellant on 1-6-2023. The 30-day period to file an appeal concluded on 29-6-2023. The appellant electronically filed an appeal with the NCLAT on 10-7-2023, along with a delay condonation application.

The appellant argued that the limitation period should commence from 30-5-2023, the date the appellant became aware of the NCLT order's contents. However, on 14-9- 2023, the NCLAT dismissed the appeal, citing it as time-barred, asserting that the limitation period starts from 17-5-2023.

The NCLAT relied on the Supreme Court's decision in *V. Nagarajan* v. *SKS Ispat & Power Ltd.*[39], which established that the limitation period begins from the date of pronouncement and not from the order's upload or the receipt of a certified copy. Nonetheless, it was observed that the time taken to obtain a certified copy can be excluded from the limitation period, provided the appellant applies within the stipulated time under Section 61(2) of the IBC. Aggrieved by the NCLAT's decision, the appellant filed an appeal before the Supreme Court.

Decision

The Supreme Court noted that the commencement of the limitation period is contingent upon the date of pronouncement of the judgment/order. Accordingly, the matter revolved around determining when an order is officially considered to have been pronounced.

In this regard, a reference was made to Rule 89(1) of the NCLT Rules, which delineates that the NCLT registry, in publishing its cause list, distinguishes between cases earmarked for the pronouncement of orders and those of a

different nature. In accordance with the NCLT Rules, the pronouncement of an order is deemed necessary and cannot be done away with. The Supreme Court observed that: *19*. … the NCLT Rules, 2016 make a clear distinction between the "hearing" of an appeal and the "pronouncement" of the order. Rule 150(1) provides that after hearing the parties, the order may be pronounced either at once or soon thereafter, as may be practicable, but not later than thirty days from the final hearing. Further, Rule 151 indicates that a member of the Bench may pronounce the order for and on behalf of the Bench. When the order is pronounced, the Court Master shall make a note in the order sheet to that effect. The language of the above Rules indicates that the pronouncement of the order is necessary and cannot be dispensed with.[40]

Based on the cause list of 17-5-2023, the Supreme Court observed that the case was slated for admission and not for the pronouncement. It was also undisputed by the parties that no substantive order was issued by the NCLT on 17-5-2023.

In view of the above, the Supreme Court concluded that the limitation period would not commence from 17-5-2023, the date of the conclusion of hearings. Given that no order was issued before 30-5-2023, there was no occasion for the appellant to submit an application for a certified copy on 17-5-2023. The Supreme Court emphasised that the time for filing an appeal would commence only when the order appealed from, was uploaded, as before that date, no order was officially pronounced.

While acknowledging that the appeal was filed beyond the 30-day time-frame, the Supreme Court held that it still fell within the condonable period of 15 days. Consequently, the Supreme restored the appeal before the NCLAT for a reassessment of whether the appellant had demonstrated sufficient cause for condoning the delay beyond the initial 30 days.

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1. 2023 SCC OnLine SC 1147.

2. (2020) 8 SCC 531.

3. (2022) 2 SCC 544.

4. (2023) 10 SCC 60.

5. (2023) 9 SCC 545.

6. (1998) 4 SCC 302.

7. (2023) 9 SCC 545.

8. 2022 SCC OnLine Cal 1918.

9. (2023) 9 SCC 545.

10. (2023) 9 SCC 545.

11. (2023) 9 SCC 545.

12. (2023) 10 SCC 189.

13. *Eva Agro* case, (2023) 10 SCC 189.

14. *Eva Agro* case, (2023) 10 SCC 189.

15. 2023 SCC OnLine NCLAT 283.

16. Company Appeal (AT) (Ins.) No. 412 of 2019 dated 25-10-2021.

17. Company Appeal (AT) (Ins.) No. 359 of 2020 dated 11-10-2022

18. Company Appeal (AT) (Ins.) No. 412 of 2019 dated 25-10-2021.

19. Company Appeal (AT) (Ins.) No. 359 of 2020 dated 11-10-2022

20. Company Appeal (AT) (Ins.) No. 412 of 2019 dated 25-10-2021.

21. Company Appeal (AT) (Ins.) No. 359 of 2020 dated 11-10-2022.

22. *Dinkar* case, 2023 SCC OnLine NCLAT 283.

23. 2023 SCC OnLine SC 574.

24. (2023) 8 SCC 387.

25. (2022) 8 SCC 352.

26. (2018) 1 SCC 407.

27. (2022) 3 SCC 161.

28. (2018) 1 SCC 407.

29. (2022) 3 SCC 161.

30. (2022) 8 SCC 352.

31. (2018) 1 SCC 407.

32. (2022) 3 SCC 161.

33. 2023 SCC OnLine SC 976.

34. 2023 SCC OnLine SC 1530.

35. Civil Appeal No. 1733 of 2022. (not found)

36. (2021) 11 SCC 537.

37. 2022 SCC OnLine SC 2079.

38. 2023 SCC OnLine SC 1663.

39. (2022) 2 SCC 244.

40. *Sanjay Pandurang* case, 2023 SCC OnLine SC 1663.