TRINITY CHAMBERS

Law Offices of Vasanth Rajasekaran

Top 10 Insolvency Law Judgments [April To September 2023]

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In recent times, several noteworthy judgments have been rendered by the Indian Courts and Tribunals in matters relating to the Insolvency and Bankruptcy Code, 2016 (**IBC**). Some decisions rendered from April to September 2023 that discuss the legal position concerning the interpretation and applicability of provisions of the IBC have been summarised below:

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

Supreme Court of India
Citation: 2023 SCC OnLine SC 1147

The mere fact that the adjudicating authority has not yet approved the resolution plan does not imply that the successful resolution applicant can be faced with undecided claims, and the resolution plan can go back and forth, making the CIRP an endless process.

Brief Facts

An agreement was entered between the appellant and KST Infrastructure Private Limited (Corporate Debtor) for the development of certain Haryana land. The appellant, aggrieved by the conduct of the Corporate Debtor, sought reference of disputes to arbitration in May 2011. The arbitral proceedings culminated into an award in August 2016 against the Corporate Debtor. The Corporate Debtor challenged the arbitral award in proceedings initiated under Section 34 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) before the District Court, Gurugram (**Section 34 Court**), which came to be dismissed. The Corporate Debtor then filed an appeal against the decision of the Section 34 Court under Section 37 of the Arbitration Act. The appellate proceedings under Section 37 of the Arbitration Act were still underway when the instant matter was heard.

In the meantime, a corporate insolvency resolution process (**CIRP**) was initiated against the Corporate Debtor in terms of an order rendered by the adjudicating authority in March 2019. The interim resolution professional (**IRP**) invited claims from the creditors on 30 March 2019. Upon the receipt of the claims, the IRP constituted the Committee of Creditors (**CoC**) on 6 November 2019 and invited expressions of interest from prospective resolution applicants.

Thereafter, the IRP was replaced by the resolution professional (**Respondent No. 1**) by the CoC on 18 June 2020. Further, the CoC approved the resolution plan

submitted by KST Whispering Heights Residential Welfare Association on 11 July 2020.

Sometime in August 2020, the appellant sent an email to Respondent No. 1 highlighting the pending claim arising from the arbitral award against the Corporate Debtor. Respondent No. 1 rejected the claim on 25 August 2020 on the ground that the timeline for submission of the claim was within 90 days from the initiation of the CIRP, and the appellant was 287 days late in this regard. Further, a resolution plan had already been passed by the CoC.

Aggrieved by the rejection of the claim, the appellant filed an application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (**IBC**). The adjudicating authority was pleased to accept the appellant's plea and opined that the Respondent No. 1 could not have summarily rejected the appellant's claims. Even otherwise, the adjudicating authority observed that the appellant's claim would have appeared in the Corporate Debtor's books of accounts, which Respondent No. 1 was dutybound to verify. Further, it was likely that the appellant missed the newspaper advertisement. Aggrieved by the decision of the adjudicating authority, Respondent No. 1 preferred an appeal under Section 61 of the IBC before the National Company Law Appellate Tribunal (**NCLAT**). Respondent No. 1 relied on the decision rendered in ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta***[1] in which the Supreme Court opined that a successful resolution applicant cannot be faced with undecided claims after the resolution plan has been accepted.

To counter the submissions of Respondent No. 1, the appellant relied on the decision of the Supreme Court in ***Brilliant Alloys Private Limited v. S. Rajagopal***[2] , which held that a belated claim should not be shut out as the time periods under the IBC are merely directory and not mandatory in nature. The appellant also argued that Respondent No. 1 failed to discharge his statutory duties. The NCLAT, by way of the impugned order, overturned the decision of the adjudicating authority for the following reasons:

(i) The Respondent No. 1 had effectuated proper service for inviting claims following the applicable rules and regulations;
(ii) The appellant failed to show that it filed its claim as soon as it came to know of the initiation of the CIRP;
(iii) Respondent No. 1 had filed an application under Section 19 of the IBC before the adjudicating authority seeking a direction to be issued to the erstwhile management to provide all records. This reflected sincere efforts having been made by Respondent No. 1 to look through the records of the Corporate Debtor; and
(iv) The resolution plan would be jeopardised if new claims were entertained.

Aggrieved by the NCLAT's decision, the appellant approached the Supreme Court of India.

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1 *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta*, (2020) 8 SCC 534.
2 *Brilliant Alloys Private Limited v. S. Rajagopal*, (2022) 2 SCC 544.

Decision

The Supreme Court opined that the limited moot point in the instant matter was whether a claim pertaining to an arbitral award which was under appeal in proceedings instituted under Sectio 37 of the Arbitration Act was liable to be included at a belated stage post the approval of the resolution plan.

The Supreme Court observed that the process followed by Respondent No. 1 was not flawed in any manner except to the extent of whether an endeavour should have been made by Respondent No. 1 to locate the liabilities pertaining to the arbitral award from the records of the Corporate Debtor.

From the facts of the case, the Supreme Court observed that it was obvious that the Respondent No. 1 did whatever could have been done to procure the Corporate Debtor's records by moving an application under Section 19 of the IBC. Further, the Supreme Court held that IBC envisaged time-bound procedures, and only in certain circumstances, the timelines could be extended. However, in the instant case, the delay of 287 days in filing a claim made by the appellant - a commercial entity reflected a lack of vigilance on its part. This was especially since a public announcement would constitute a deemed knowledge on the appellant of the initiation of insolvency proceedings and invitation of claims against the Corporate Debtor.

The mere fact that the adjudicating authority had not yet approved the resolution plan did not imply that the resolution plan could go back and forth, making the CIRP an endless process. Thus, the Supreme Court came to the conclusion that the NCLAT's decision could not be faulted.

2. *Paschimanchal Vidyut Vitran Nigam Limited v. Raman Ispat Private Limited*

Supreme Court of India
Citation: 2023 SCC OnLine SC 842

The scheme and provisions of Insolvency and Bankruptcy Code, 2016 would override Electricity Act, 2003.

The decision in State Tax Officer v. Rainbow Papers Ltd. is limited to the facts of that particular case.

Brief Facts

The appellant Paschimanchal Vidyut Vitran Nigam Limited (**PVVNL**) had entered into an agreement with Ram Ispat Pvt. Ltd. (**Corporate Debtor**) on 11 February 2010 for supply of electricity. The agreement entered between PVVNL, and the Corporate Debtor allowed PVVL to create a charge on the assets of the Corporate Debtor in case of unpaid dues. PVVNL raised bills for the supply of electricity to Corporate Debtor from time to time. Since the dues of PVVNL remained unpaid,

PVVNL attached the Corporate Debtor's properties. The attachment was made under the orders of the Tehsildar, Muzaffarnagar whereby the Corporate Debtor was restrained from transferring properties by sale, donation or any other mode, and a charge was also created on the said properties.

The Corporate Debtor underwent CIRP under the IBC. However, the process was not successful and thus, the Corporate Debtor became subject to liquidation proceedings. The liquidator took the plea that the Corporate Debtor's assets would be classified in order of priority prescribed under Section 53 of the IBC and PVVNL would only be entitled to *pro rata* distribution of proceeds along with the other secured creditors from the sale of liquidation assets.

Accordingly, the liquidator requested the adjudicating authority to release the attached properties in favour of the liquidator. The NCLT was pleased to accept the plea of the liquidator. After multiple rounds of litigation, the matter finally reached the Supreme Court.

PVVNL submitted that Sections 173 and 174 of the Electricity Act, 2003 (**Electricity Act**) had an overriding effect on all other laws except the Consumer Protection Act, 1986; the Atomic Energy Act, 1962; and the Railway Act, 1989. Being a special law relating to generation, transmission, and distribution of electricity, PVVNL argued that the Electricity Act had primacy over the IBC. It was argued that the rights of electricity suppliers like PVVNL, therefore, were not subordinate and subject to the 'priority of claims' mechanism under the IBC. Therefore, PVVNL could opt to independently stay out of the liquidation process and recover its dues. In this regard, PVVNL relied on the decisions in *Board of Trustees, Port of Mumbai v. Indian Oil Corporation*[3], and *State Tax Officer v. Rainbow Papers Ltd.*[4]. In the alternative, PVVNL relied on the definition of secured creditors and argued that electricity dues were security interests created in favour of the electricity service providers.

The liquidator countered the PVVNL's arguments by referring to the case in *West Bengal State Electricity Distribution Company Limited v. Sri Vasavi Industries Limited*[5] to argue that electricity dues ought not to be given a special priority. The liquidator argued that in terms of Section 52(3) of IBC, before realization of security interest by secured creditors, the liquidator had to verify the existence of security interest from the records maintained by an information utility or by such other means as may be specified by the Insolvency and Bankruptcy Board of India (**IBBI**). Even otherwise, as per the liquidator, government dues were placed in the waterfall mechanism under Section 53(1)(e)(i) of the IBC.

The primary question at hand was whether PVVNL could pursue its security interest over the assets of the corporate debtor through the procedures outlined in electricity

3 *Board of Trustees, Port of Mumbai v. Indian Oil Corporation*, 1998 (2) SCR 774.
4 *State Tax Officer v. Rainbow Papers Ltd.*, 2022 (13) SCR 808.
5 *West Bengal State Electricity Distribution Company Limited v. Sri Vasavi Industries Limited*, 2022 SC OnLine Cal 1918.

laws or if they were required to follow the distinct procedures outlined in Section 52 of the IBC.

Decision

At the outset, the Supreme Court referred to the waterfall mechanism set out under Section 53 of the IBC. In the hierarchy, government debts and operational debts were found to be much lower in the order of priority than the dues owed by a corporate debtor to secured financial creditors.

The Supreme Court clarified that dues owed to corporations like the PVVNL (as opposed to the Central or State Government) should be classified as financial or operational debt depending on the nature of the transaction with the corporate debtor. The Supreme Court observed that PVVNL undoubtedly had government participation. However, that did not render it a government or a part of the 'State Government'. Its functions could be replicated by other entities, both private and public. The supply of electricity, the generation, transmission, and distribution of electricity had been liberalized in terms of the Electricity Act barring certain segments. Consequently, private entities were also entitled to hold licenses. For these reasons, it was held that in the present case, dues or amounts payable to PVVNL did not fall under the class of amounts owed to the Central or State Government.

The Supreme Court distinguished the ***Rainbow Papers***[6] from the present situation, noting that the corporate debtor in ***Rainbow Papers***[7] was undergoing insolvency resolution proceedings, whereas the corporate debtor in this case was undergoing liquidation. The Supreme Court also highlighted that ***Rainbow Papers***[8] did not consider the waterfall mechanism specified in Section 53 of the IBC and consequently treated the State Government as a "secured creditor." The Court emphasized that the legislative intent, on the contrary, was to treat dues owed to the Central Government or the State Government separately from the dues owed to secured creditors.

Furthermore, the Court pointed out that Section 52 of the IBC provided an option for a secured creditor to remain outside the 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. As a result, PVVNL's appeal was dismissed, and the liquidator was directed to decide on PVVNL's claims in terms of the prescribed law and procedures.

6 *State Tax Officer v. Rainbow Papers Ltd.*, 2022 (13) SCR 808.
7 *State Tax Officer v. Rainbow Papers Ltd.*, 2022 (13) SCR 808.
8 *State Tax Officer v. Rainbow Papers Ltd.*, 2022 (13) SCR 808.

3. *Eva Agro Feeds Private Limited v. Punjab National Bank*

Supreme Court of India
Citation: 2023 SCC OnLine SC 1138

While the highest bidder has no indefeasible right to demand acceptance of his bid, the liquidator if he does not want to accept the bid of the highest bidder has to apply his mind to the relevant factors. Such application of mind must be visible or manifest in the rejection order itself.

Brief Facts

In February 2021, liquidation proceedings were initiated against Amrit Feeds Limited, *i.e.*, the corporate debtor (**Corporate Debtor**), and the second respondent was appointed as the liquidator. Punjab National Bank (**PNB**), the first respondent and a financial creditor of the Corporate Debtor, challenged the adjudicating authority's decision that directed the liquidator to proceed with the highest bidder, Eva Agro Feeds Pvt. Ltd. (**Eva**), in the auction. The respondents (PNB and the liquidator) argued that being the highest bidder in itself did not constitute a successful completion of the auction, and the highest bidder did not acquire a legal right.

In the appellate proceedings, the National Company Law Appellate Tribunal (**NCLAT**) overturned the adjudicating authority's order and instructed the liquidator to initiate a new auction process. The NCLAT justified the cancellation of the auction, noting that Eva was the sole bidder, and its bid matched the reserve price. The NCLAT pointed out that the liquidator relied on Clause 3(k) of the e-auction process information document, which authorized the cancellation of the auction. Furthermore, the NCLAT emphasized that the terms of the auction sale notice granted the liquidator an absolute right to accept or reject any bid or to cancel the auction without providing a reason - a condition Eva had accepted during the auction. The NCLAT concluded that the liquidator possessed the authority to cancel the auction at any point before the sale was finalized, and the sale was considered successful only after the complete payment had been made.

Dissatisfied with the NCLAT's decision, Eva approached the Supreme Court against the NCLAT's ruling.

Decision

The Supreme Court observed that para 1(11) of Schedule I to the Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (**Regulations**) permitted the liquidator to conduct multiple rounds of auction to maximize the realization in the sale of assets and to promote the best interests of the creditors. However, a liquidator in terms of para 1(11A) of Schedule 1 of the Regulations was dutybound to intimate the reasons to the highest bidder for rejecting the highest bid in the auction process and was also required to mentioned it in the next progress report.

The Supreme Court denied the contention that para 1(11A) of Schedule 1 of the Regulations should only apply prospectively since it was introduced into the Regulations on 30 September 2021. The Supreme Court clarified that para 1(11A) of Schedule 1, inserted on 30 September 2021, merely formalized a fundamental principle, making it applicable even to transactions before that date. In this regard, the Supreme Court observed as below:

"*While it is true that para 1(11A) came to be inserted in Schedule 1 to the Regulations with effect from 30.09.2021, 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 concerned authority 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(11A) 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(11A) has done is to give statutory recognition to this well-established principle. It has made explicit what was implicit.*"

The Supreme Court also dismissed the argument put forth by the respondents that, as per Clause 3(k) of the e-auction process information document, the liquidator possessed the authority to cancel the auction without having to provide reasons, given that the bidder had accepted the auction notice's terms and conditions. The Supreme Court emphasized that, in the event of a conflict between the auction process document and the IBC or the Regulations, the provisions of the IBC or the Regulations would always take precedence.

Furthermore, the Supreme Court found no reasonable basis for the cancellation of the auction. The liquidator's justification for the cancellation was that the appellant was the sole bidder, and the auction price matched the reserve price. However, the Supreme Court pointed out that in the subsequent sale notice, the liquidator set the same reserve price for the property which was first fixed in the prior round of auction. The Supreme Court stated, "*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 observed that in terms of para 1(12) of Schedule-I of the Regulations, the highest bidder is required to provide the remaining sale consideration within 90 days of the demand date. Para 1(13) stipulates that the sale will be considered completed upon full payment. The Supreme Court disagreed with the NCLAT's observation that an auction sale was not concluded merely because a person was declared the highest bidder. In this regard, the Supreme Court observed, "*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." Consequently, the Supreme Court observed that the NCLAT was not justified in setting aside the order of the adjudicating authority and the appeal was allowed.

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

Supreme Court of India
Case Number: Civil Appeal No. 4620 of 2023

Upholds the decision in ***Union Bank of India v. Dinkar T. Venkatasubramanian***, 2023 SCC OnLine NCLAT 283.

NCLAT does not possess the formal powers of reviewing its decisions. However, NCLAT has the authority to recall its judgments by invoking inherent powers as stipulated in Rule 11 of the NCLAT Rules, 2016.

Brief Facts

A three-member bench of the National Company Law Appellate Tribunal (**NCLAT**) raised several important questions concerning the IBC. These questions included:

(i) Whether NCLAT, lacking the authority to formally review judgments, can consider applications for judgment recall based on valid reasons?
(ii) Whether the judgments of NCLAT in cases like ***Agarwal Coal Corpn. (P) Ltd. v. Sun Paper Mill Ltd.***, Company Appeal (AT) (Ins.) No. 412 of 2019, order dated 25 October 2021, and ***Rajendra Mulchand Varma v. K.L.J Resources Ltd.***, Company Appeal (AT) (Ins.) No. 359 of 2020, order dated 11 October 2022 imply that NCLAT does not possess the power to recall judgments?
(iii) Whether the judgments in ***Agarwal Coal Corporation (supra)*** and ***Rajendra Mulchand Varma (supra)*** correctly interpret the law in this context?

In June 2023, a five-member bench of NCLAT provided answers to these questions. The NCLAT clarified that it does not possess the power of formal review. Nevertheless, NCLAT opined that it did have the authority to recall its judgments by invoking inherent powers as stipulated in Rule 11 of the NCLAT Rules, 2016. However, this power to recall judgments does not extend to re-hearing cases to identify any apparent errors in the original judgment.

NCLAT also emphasized that the judgments in ***Agarwal Coal Corporation (supra)*** and ***Rajendra Mulchand Varma (supra)***, which suggested that the NCLAT lacked the power to recall judgments, did not accurately reflect the applicable legal principles.

Furthermore, NCLAT outlined the circumstances under which the power to recall judgments could be exercised, stating:

"*The above judgments of the Hon'ble Supreme Court clearly lays down that 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."

Subsequently, the Union Bank of India filed an appeal before the Supreme Court against the NCLAT's decision.

Decision

The Supreme Court upheld the decision rendered by the NCLAT and refused to interfere with the same. 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 Dr. Periasamy Palani Gounder*

Supreme Court of India
Citation: 2023 SCC OnLine SC 574

A revised resolution plan cannot be directly put for approval of the Adjudicating Authority without being first placed before the Committee of Creditors.

Brief Facts

In this case, the Tourism Finance Corporation of India Limited initiated insolvency proceedings under Section 7 of the IBC against Appu Hotels Limited (**Corporate Debtor**). The National Company Law Tribunal (**NCLT**) admitted the Corporate Debtor to CIRP on 5 May 2020. Mr. M.K. Rajagopalan (**Successful Resolution Applicant**) submitted a resolution plan for the Corporate Debtor. During the ninth meeting of the Committee of Creditors (**CoC**) held on 22 January 2021, the resolution plan presented by the Successful Resolution Applicant received conditional approval with 87.39% votes. However, the Successful Resolution Applicant was instructed to revise the plan in consultation with the creditors. As a result, the allocation for unsecured dissenting financial creditors was increased from INR 29 crore to INR 49.13 crore in the modified plan.

On 25 January 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 was challenged before the National Company Law Appellate Tribunal (**NCLAT**) on various grounds. On 17 February 2022, the NCLAT rejected the resolution plan approved by the NCLT, noting that it had been approved without being presented to the CoC for its final approval. The matter was sent back to the CoC, with directions for the resolution professional to restart the CIRP from the stage of publishing Form 'G' and inviting expressions of interest in accordance with the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**CIRP Regulations**). Furthermore, the Successful Resolution Applicant was declared ineligible under Section 88 of the Indian Trusts Act, 1882, and disqualified under Section 164(2)(b) of the Companies Act, 2013. Aggrieved thereby, the Successful Resolution Applicant subsequently filed an appeal before the Supreme Court against the NCLAT's decision.

Decision

The Supreme Court held that the irregularity of not presenting the revised plan to the CoC after the ninth meeting and instead directly submitting it to the NCLT for approval could not be dismissed as a mere technicality. The financial details of the resolution plan needed to be considered by the CoC before it could be deemed to have reached a well-considered decision. The Supreme Court emphasized that if a modified resolution plan, even with minor changes, had not received final approval from the CoC, then presenting such a modified plan to the adjudicating authority (NCLT) for approval constituted an incurable material irregularity. The Supreme Court also rejected the notion of post-facto approval of a revised resolution plan by the CoC. The Supreme Court concluded that the CoC's decision regarding the modified plan should not be a matter of assumption or guesswork. Thus, the conditional approval granted by the CoC in its ninth meeting could not be regarded as final approval. Therefore, the Supreme Court ruled that the modified resolution plan should have been presented to the CoC for final approval by the requisite majority before it could be submitted to the NCLT. The failure to follow this process constituted a material irregularity that could not be rectified.
The Supreme Court further emphasized the need for strict compliance with the requirements of the CIRP Regulations, particularly regarding the presentation of the final resolution plan to the CoC. The Supreme Court expressed concerns that approving the process as adopted in this case would leave the Code and CIRP regulations open-ended and susceptible to arbitrariness.

Accordingly, the Supreme Court held that the NCLT could not have approved the resolution plan for two reasons: first, the Successful Resolution Applicant's failure to present the revised plan to the CoC before seeking NCLT approval, and second, the Successful Resolution Applicant 's ineligibility under Section 88 of the Indian Trusts Act. Therefore, the Supreme Court set aside the NCLAT's order on the remaining issues.

6. *M. Suresh Kumar Reddy v. Canara Bank*

Supreme Court of India
Citation: 2023 8 SCC 387

The Adjudicating Authority has no option but to admit a petition filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 if the existence of a financial debt and its default on part of the Corporate Debtor is proven.

Brief Facts

Kranthi Edifice Pvt. Ltd. (**Corporate Debtor**) had obtained credit facilities from Canara Bank (**Financial Creditor**) but failed to repay the debt. The Financial Creditor initiated insolvency proceedings by filing a petition under Section 7 of the IBC before the National Company Law Tribunal (**NCLT**) to trigger the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

On 27 June 2022, the NCLT admitted the petition and commenced CIRP against the Corporate Debtor. M. Suresh Kumar Reddy (**Appellant/ Suspended Director**), a suspended director of the Corporate Debtor, appealed against the NCLT's decision to admit the insolvency petition before the National Company Law Appellate Tribunal (**NCLAT**) which came to be dismissed.

Subsequently, the Suspended Director approached the Supreme Court against the decision of NCLAT, arguing that as per the decision rendered in ***Vidarbha Industries Power Limited v. Axis Bank Limited***[9] the NCLT had the discretion to decline the admission of a Section 7 petition under the IBC even if there was proof of a debt and default.

Decision

The Supreme Court referred to its previous judgments in ***Innoventive Industries Limited v. ICICI Bank***, (2018) 1 SCC 407, and ***E.S. Krishnamurthy v. Bharath HiTecch Builders Pvt. Ltd.***, (2022) 3 SCC 161, to clarify the legal principles governing Section 7 petitions under the IBC. In ***Innoventive Industries (supra)***, the Supreme Court had held that the NCLT must admit a Section 7 petition once it is satisfied that a default in payment of a financial debt has occurred.

Similarly, in ***E.S. Krishnamurthy (supra)***, the Supreme Court emphasized that the NCLT's role is limited to verifying whether a default has occurred, and if so, the petition must be admitted under Section 7.

The Supreme Court also considered the judgment in ***Vidarbha Industries (supra)*** and noted that it introduced an element of discretion for the NCLT in admitting a Section 7 petition, provided there were valid reasons not to admit it. However, in a

9 *Vidarbha Industries Power Limited v. Axis Bank Limited*, 2022 8 SCC 352.

subsequent review of the decision, it was held that the dicta in ***Vidarbha Industries (supra)*** was limited to the facts of that case. Hence, the Supreme Court clarified that once a default had occurred, the NCLT hardly had any discretion left to reject the admission of a Section 7 petition. The sole ground for rejecting such a petition would be if the debt had not yet become due and payable. Therefore, the appeal was dismissed, affirming the principles established in ***Innoventive Industries (supra)*** and ***E.S. Krishnamurthy (supra)***.

7. *Sanket Kumar Agarwal v. APG Logistics Private Limited*

Supreme Court of India
Citation: 2023 SCC OnLine SC 976

The date of pronouncement of the order and time taken to provide certified copy by the Adjudicating Authority would stand excluded from limitation period for filing an appeal before the National Company Law Appellate Tribunal under Section 61(2) of the Insolvency and Bankruptcy Code, 2016.

Brief Facts

Mr. Sanket Kumar Agarwal (**Appellant**) filed an application under Section 7 of the IBC with the National Company Law Tribunal (**NCLT**) seeking to initiate the Corporate Insolvency Resolution Process (**CIRP**) against APG Logistics Private Limited. On 26 August 2022, the NCLT dismissed the application.

Subsequently, on 2 September 2022, the Appellant applied for a certified copy of the NCLT order, which the NCLT's registry received on 5 September 2022. On 15 September 15, 2022, the certified copy of the NCLT's order was provided to the Appellant. Following this, on 10 October 2022, the Appellant e-filed an appeal with the National Company Law Appellate Tribunal (**NCLAT**) against the NCLT order. An application for condonation of a five-day delay was filed along with the appeal, and the physical copy of the appeal was filed on 31 October 2022.

On 9 January 2023, the NCLAT dismissed the appeal as time barred. It was noted that the appeal was filed through the e-portal on 10 October 2022, which was the 46th day following the NCLT order. However, Section 61 of the IBC specifies a 30-day deadline for filing an appeal against an NCLT order, and the NCLAT can only condone a delay of up to 15 days if sufficient cause is shown. Section 61 of the IBC does not require the appellant to wait for the receipt of a certified copy of the order before filing an appeal. Therefore, the appeal was deemed time-barred as it was initiated on the 46th day after the NCLT order, exceeding the permissible 45-day limit under Section 61 of the IBC.

Aggrieved by the decision of the NCLAT, the Appellant then appealed against the NCLAT's decision before the Supreme Court.

Decision

The Supreme Court found that the NCLAT had made an error by not excluding the date of the pronouncement of the NCLT order when calculating the limitation period. The Supreme Court noted that Rule 3 of the NCLAT Rules, 2016 mandates the exclusion of the date of the pronouncement of the order, in line with Section 12(1) of the Limitation Act, 1963. By excluding the date of the NCLT order pronouncement (26 August 2022), the appeal filed on 10 October 2022, was actually within the 45-day limit set by Section 61 of the IBC. Therefore, the NCLAT had wrongly dismissed the appeal on the basis that it was filed on the 46th day.

In this regard, the Supreme Court observed that the NCLAT had issued a standard operating protocol (SOP) on 3 January 2021, encouraging litigants to use the electronic filing facility through the NCLAT e-filing portal. On 24 December 2022, a clarification was issued by the NCLAT, stating that the limitation would be computed from the date of e-filing of the appeal, and the mandatory physical copy must be filed within seven days of e-filing. The order clarified that the requirement of e-filing would continue, along with the mandatory physical filing of appeals in accordance with Rule 22 of the NCLAT Rules, 2016.

The Supreme Court also noted that under Rule 22(2) of the NCLAT Rules, 2016, it is mandatory to file a certified copy of the impugned order along with the appeal. As such, the Appellant had requested a certified copy of the order from NCLT on 2 September 2022. The NCLT received this request within the 30-day limitation period specified in Section 61(2) of the IBC. Therefore, the Appellant had exercised due diligence in obtaining the certified copy.

The Court relied on Section 12(2) of the Limitation Act, 1963 (**Limitation Act**), which states that the time required to obtain a copy of the order against which an appeal is to be filed should be excluded when calculating the limitation period. Additionally, the explanation to Section 12 of the Limitation Act clarified that the time taken by the court to prepare an order, before an application for obtaining a certified copy is made, should not be included.

Since the certified copy was received by the Appellant on 15 September 2022, the time taken by the court between 5 September 2022 and 15 September 2022 to provide the certified copy should have been excluded when calculating the limitation under Section 61(2) of the IBC. As a result, the Supreme Court allowed the appeal thereby setting aside the NCLAT's order, and directed the NCLAT to reconsider the matter on its merits.

8. *Vineet Saraf v. Rural Electrification Corporation Ltd.*

High Court of Delhi
Citation: 2023 SCC OnLine Del 4291

It would not be arbitrary for a creditor to send a demand notice to the personal guarantor under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019.

Brief Facts

In 2009, FACOR Power Ltd. (**FPL**), the principal borrower, obtained a loan from Rural Electrification Corporation Ltd. (**Respondent**). Mr. Vineet Saraf, the petitioner and personal guarantor, guaranteed the loan. The loan was also secured by Ferro Alloys Corporation Ltd. (**FACOR**) as a corporate guarantor.

The principal borrower defaulted on the loan, leading to the initiation of CIRP against FACOR under the IBC in 2017. In 2019, Sterlite Power Transmission Limited (**SPTL**) submitted a resolution plan for FACOR, which was approved by the Committee of Creditors (**CoC**) and the adjudicating authority.

On 9 December 2022, the Respondent issued a demand notice under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 (**Rules**) invoking the personal guarantee of Mr. Vineet Saraf (i.e., the petitioner). The petitioner filed a writ petition before the High Court of Delhi (**High Court**), seeking a writ of prohibition to prevent the Respondent from approaching the adjudicating authority and to quash the demand notice. The petitioner argued that the Respondent had irrevocably assigned the entire debts to FACOR, excluding the personal guarantees, under the terms of the resolution plan and an assignment agreement. Therefore, the Respondent could no longer invoke the guarantee furnished by the petitioner, and the demand notice merely suggested the intention to approach the adjudicating authority over a 'non-existent' debt.

The Respondent argued that the discharge or release of the principal debtor does not absolve the surety/guarantor of their liability. The Respondent sought to recover the remaining debt after the FACOR CIRP's conclusion. The personal guarantees were explicitly excluded from the resolution plan and the assignment agreement, so their terms could not be altered.

Decision

The High Court ruled against quashing a demand notice issued to a personal guarantor under Rule 7(1) of the Rules. The High Court's decision was based on the principle that the issuance of a demand notice to a personal guarantor is not arbitrary, as it is a necessary step to comply with Section 95 of the IBC which mandates that creditors must establish the existence of a debt owed by the personal

guarantor to the creditor before approaching the adjudicating authority. Therefore, the Court dismissed the writ petition and declined to issue a writ of prohibition to prevent the Respondent from approaching the adjudicating authority.

9. *Sandeep Anand v Gopal Lal Baser*

National Company Law Appellate Tribunal, Principal Bench
Case Number: Company Appeal (AT) (Ins) No. 767 of 2023

For the purpose of calculating limitation period, public holidays can only be excluded from the initial 30-day period specified under Section 61(2) of the Insolvency and Bankruptcy Code, 2016.

In a case involving Sandeep Anand v Gopal Lal Baser, the National Company Law Appellate Tribunal (NCLAT) in New Delhi, consisting of Justice Ashok Bhushan (Chairperson) and Shri Barun Mitra (Technical Member), has rendered a decision regarding the calculation of limitation periods for filing appeals. The NCLAT ruled that the benefit of excluding public holidays or holidays from the limitation period applies only to the initial 30-day period specified in Section 61(2) of the Insolvency and Bankruptcy Code (IBC). This benefit does not extend to the additional 15-day period provided by the Proviso to Section 61(2) of the IBC.

Brief Facts

Section 61(2) of the IBC establishes a 30-day time frame for filing an appeal against an order issued by the adjudicating authority, i.e., the National Company Law Tribunal (**NCLT**). The proviso to Section 61(2) of the IBC allows the National Company Law Appellate Tribunal (**NCLAT**) to consider appeals filed beyond the 30-day limit but within a maximum extension of 15 days, provided there is a valid reason for the delay. In this case, Mr. Sandeep Anand (**Appellant**) filed an appeal with the NCLAT after 45 days had passed from the date of the impugned order passed by the NCLT. This exceeded both the statutorily prescribed 30-day limitation period and the discretionary extension of 15 days.

Simultaneously, the Appellant submitted an application requesting for the condonation of the delay in filing the appeal. The argument made was that the 45th day, which was the last day for filing the appeal, happened to be a 'Public Holiday,' and the NCLT was closed for the subsequent two days. Therefore, considering the intervening holidays, the appeal should be deemed as filed within the 45-day limit.

Decision

The NCLAT noted that the proviso to Section 61(2) grants the NCLAT the authority to condone delays for a maximum of 15 days. However, the benefit of excluding public holidays or holidays can only be applied when calculating the 30-day limitation under Section 61(2) of the IBC and not otherwise. Consequently, the NCLAT declined to condone the delay since the appeal was filed beyond the 45-day period. The relevant observations of the NCLAT in this regard are as below:

"*We are of the view that the benefit as claimed in paragraph 5 is not available which benefit can be availed only with respect to the period of limitation provided with regard to period of 30 days.*"

As a result, both the application for condonation of delay and the appeal were dismissed.

10. *IDBI Trusteeship Services Ltd. v. Nirmal Lifestyle Ltd.*

National Company Law Appellate Tribunal, Principal Bench
Citation: 2023 SCC OnLine NCLAT 225

An insolvency petition may be revived upon the breach of settlement terms despite the Adjudicating Authority not having granted such liberty if the settlement terms provided for such revival of insolvency proceedings.

Brief Facts

IDBI Trusteeship Services Limited (**Financial Creditor**) initiated proceedings under Section 7 of the IBC to trigger the CIRP against Nirmal Lifestyle Limited (**Corporate Debtor**). While the petition was pending, the Financial Creditor and the Corporate Debtor entered into a consent agreement, which stipulated that in the event of default, the settlement would be void, and the petition could be reinstated against the Corporate Debtor.

However, despite the consent agreement, the petition was admitted on 5 August 2021 and CIRP was initiated against the Corporate Debtor. An appeal was subsequently filed with the NCLAT, which allowed the suspended director of the Corporate Debtor to seek withdrawal of the petition under Section 12A of the IBC before the adjudicating authority. During the pendency of this application, the formation of the Committee of Creditors (**CoC**) was put on hold.

The Interim Resolution Professional (**IRP**) filed a Section 12A application before the adjudicating authority for withdrawal of the insolvency petition, which was allowed on 9 February 2022. However, the adjudicating authority's order did not provide the Financial Creditor with the liberty to revive the petition in the event of a default by the Corporate Debtor.

Subsequently, after the petition was withdrawn, the Corporate Debtor failed to honour the terms of the consent agreement. Consequently, the Financial Creditor filed an application to revive its petition filed under Section 7 of the IBC. On 21 December 2022, the adjudicating authority rejected the application, noting that there was no specific provision in the IBC for reopening a petition once it had been withdrawn. Aggrieved by the decision of the adjudicating authority, the Financial Creditor approached the NCLAT.

Decision

The NCLAT based its decision on a previous judgment in ***SRLK Enterprises LLP v. JALAN Transolutions (India) Ltd.***, C.A. (AT) Ins. No. 294 of 2021, where a distinction was drawn between a simple withdrawal of a petition with a statement that the parties had settled and a withdrawal where the settlement was placed on record. The NCLAT held that revival applications would not be entertained when parties simply made a statement of settlement.

In the facts of the present case, the NCLAT observed that the consent terms were placed on record before the adjudicating authority as part of the withdrawal application filed under Section 12A of the IBC. Consequently, when the consent agreement itself contained a clause for revival, it was immaterial whether the adjudicating authority had explicitly granted any liberty for revival. The petition would have to be reinstated in case of a default under the consent terms.

The NCLAT concluded that the adjudicating authority had erred in rejecting the revival application since the consent agreement itself contemplated a clause for reviving the petition in the event of a default. The NCLAT emphasized that the absence of specific liberty mentioned in the order was inconsequential, given the clear terms of the settlement, which formed the basis for the withdrawal of the insolvency petition. As a result, the petition under Section 7 of the IBC was revived before the adjudicating authority.

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