Insolvency and Bankruptcy Code 2016

Landmark Judgements by Supreme Court

Madhusudan Sharma

Over Riding Effect of IBC

Overriding Effect

- **Section 238** The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force **or any instrument having effect by virtue of any such law**.

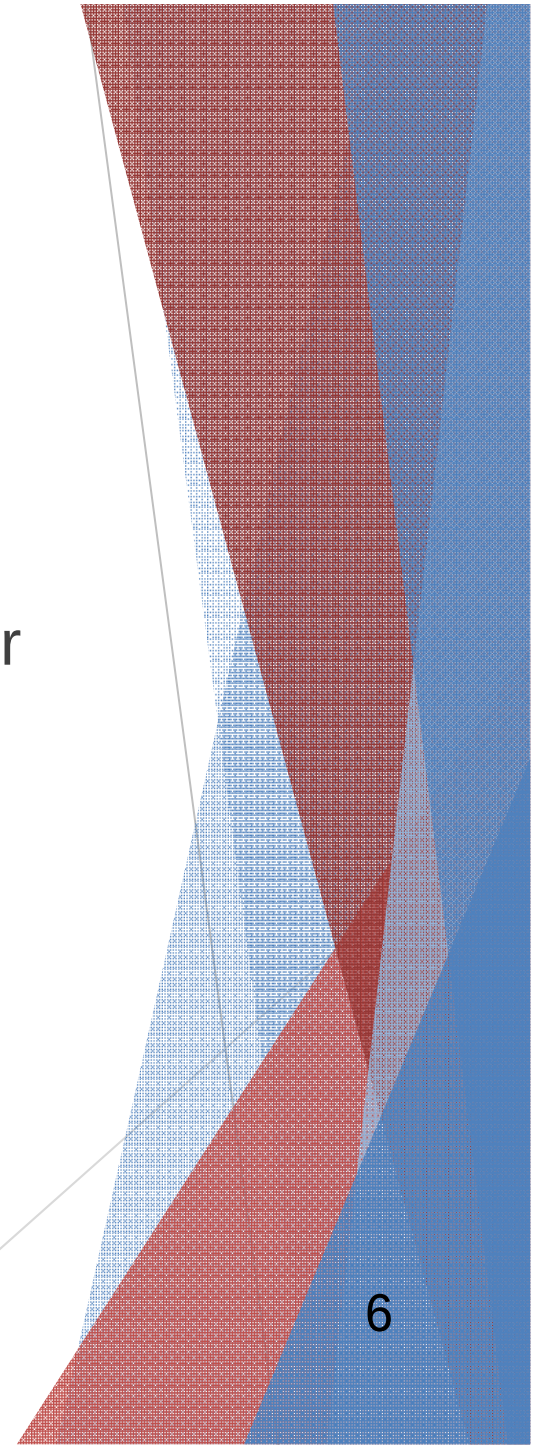
Repugnancy of Other Laws

- Innoventive Industries Ltd Vs ICICI Bank Ltd,
  - SC - 31st Aug 2017
  - NCLAT -15th May 2017
  - NCLT Mumbai 17th and 23rd January 2017
- Pr. Commissioner of Income Tax v. Monnet Ispat and Energy Ltd.

Innoventive Industries Ltd. Vs. ICICI Bank and Anr.

- A Code is complete and that marks the distinction between a Code and an ordinary enactment, by that canon, is self-contained and complete.
- It is settled law that a consolidating and amending act like the present Central enactment forms a code complete in itself and is exhaustive of the matters dealt with therein. (Similarly held earlier for CPC, Income Tax Act and Arbitration Act)

- …… **the non-obstante clause, in the widest terms possible, is contained in Section 238 of the Code, so that any right of the CD under any other law cannot come in the way of the Code.** For all these reasons, we are of the view that the Tribunal was correct in appreciating that there would be repugnancy between the provisions of the two enactments.
- The judgment of the Appellate Tribunal is not correct on this score because repugnancy does exist in fact.



- IBC is a Parliamentary law that is an exhaustive code on the subject matter of insolvency in relation to corporate entities, and is made under **Entry 9, List III** in the 7th Schedule which reads as under: “9. Bankruptcy and insolvency”
- *{MRU Act enacted under **Entry 23 of List III}***
- “It is clear that the **later non-obstante clause of the Parliamentary enactment will also prevail** over the limited non-obstante clause contained in Section 4 of the Maharashtra Act. For these reasons, we are of the view that the Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under the Code.”

Key issues in deciding Repugnancy

- Cannot obey one without disobeying the other
- Subject matter is relevant not the Entry in Schedule III of the Constitution

NCLAT Order

- ....it is apparent that the two enactments operate in entirely different fields. This is further made clear by the fact that the MRU Act is enacted under **Entry 23 of List III** while the Code has been enacted under **Entry 9 of the List III.**
- We hold that there is no repugnancy between I&B Code, 2016 and the MRU Act as they both operate in different fields. The Parliament has expressly stated that the provisions of the I&B Code, 2016 (which is a later enactment to the MRU Act) shall have effect notwithstanding the provisions of any other law for the time being in force...

NCLT Order

Since the liability suspended under MRU Act being inconsistent with the default occurred to the debt payable to the creditor, this order will not be against the ratio decided by Hon'ble Apex Court in *Vishal* N *Kalsa v. Bank of India and Others (2016)* 3 *see* 762 *(Para* 113) therefore, this Bench having not noticed any merit in the argument of the CD Counsel, the Application filed by the CD is hereby dismissed. (Para 13).

- The CD filed another application saying notice has not been served to the debtor, but this plea pales into insignificance because this Bench already heard the CD and his application has already been dismissed, therefore this application also does not lie, hence the same is also hereby dismissed.

Other Issues decided by SC

- **Right to Represent CD during CIRP**
- Once an IP is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company.
- In the present case, the company is the sole appellant. This being the case, the present appeal is obviously **not maintainable**.

NCLAT Held

- "IRP' has not been vested with any specific power to sue any person on behalf of the 'CD'. However, in case of such difficulty, it is always open to the 'IRP' to bring to the notice of the AA for appropriate order.
- Once the application under Section 7 or 9 is admitted, the 'CIRP' starts in such case one of the aggrieved party being the 'CD' has a right to prefer an appeal, apart from any other aggrieved person like Director(s) of the company or members, who do not cease to be Director(s) or member(s), as they are not suspended but their function as 'Board of Director(s)' is suspend.

- The 'IRP' once given consent to function directly or indirectly, he cannot challenge his own appointment, except in case where he has not given consent. If the 'CD' is left in the hands of 'IRP' to raise his grievance by filing an appeal under Sec. 61, it will be futile, as no 'IRP' will challenge the initiation of 'Insolvency Resolution Process' which ultimately result into the challenge of his appointment.

- 'CD' in such case cannot be represented by the 'IRP', whose appointment is under challenge and for all purpose to be represented through the person who represented the 'CD' at the stage of admission before the Adjudicating Authority.

- The obligation of the CD under master restructuring agreement (MRA) was unconditional and did not depend upon infusing of funds by the creditors into the appellant company.

Pr. Commissioner of Income Tax v. Monnet Ispat and Energy Ltd.

- Given Section 238 of the Insolvency and Bankruptcy Code, 2016, it is obvious that the **Code will override** anything inconsistent contained in any other enactment, **including the Income-Tax Act.**
- We may also refer in this Connection to *Dena Bank* vs. *Bhikhabhai Prabhudas Parekh and Co. & Ors.* (2000) 5 SCC 694 and its progeny, making it clear **that income-tax dues, being in the nature of Crown debts, do not take precedence even over secured creditors,** who are private persons.

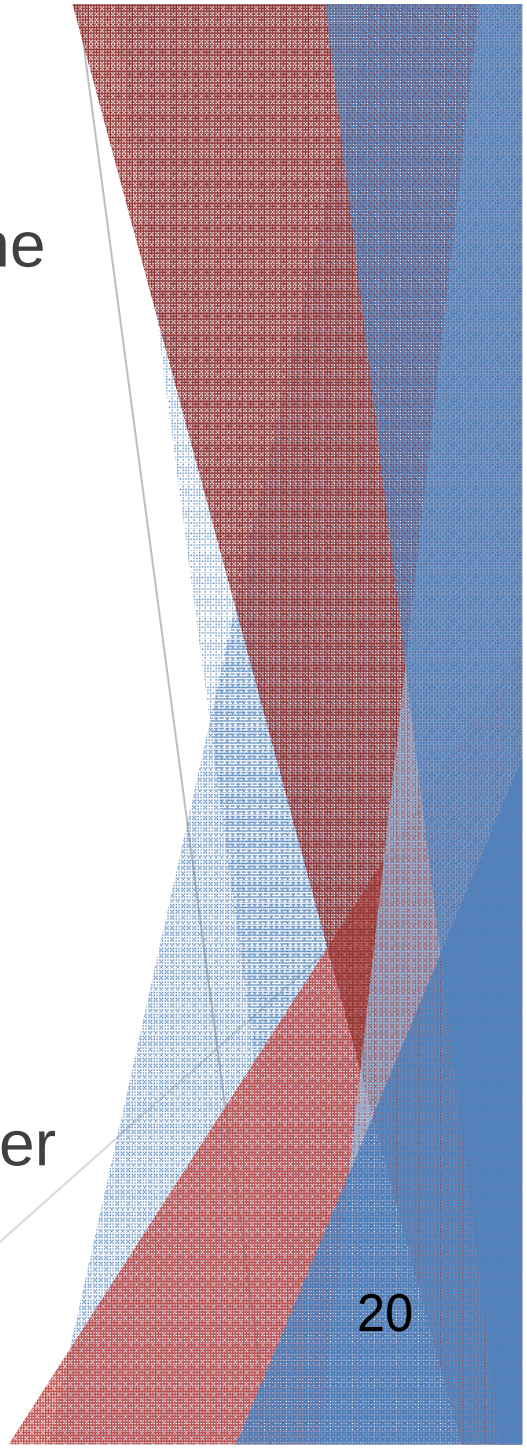
Swiss Ribbons Pvt Ltd & Anr. Vs Union of India & Ors.

- Petitions to assail the constitutional validity of various provisions of the I & B Code, 2016
- SC Held that:
- The Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark.
- Even in liquidation, the liquidator can sell the business of the CD as a going concern.

- The **resolution process** is not adversarial to the CD but, in fact, protective of its interests.
- The **moratorium** imposed by section 14 is in the interest of the CD itself, thereby preserving the assets of the CD during the resolution process.

FC-OC Difference

- There is an intelligible differentia between the FCs and OCs which has a direct relation to the objects sought to be achieved by the Code.
- Classification between FCs and OCs is neither discriminatory, nor arbitrary, nor violative of Article 14.
- The NCLAT has, while looking into viability and feasibility of resolution plans approved by the CoC, always gone into whether OCs are given roughly the same treatment as FCs, and if they are not, such plans are either rejected or modified so that the OCs' rights are safeguarded.



Notice hearing, set-off or counter claims qua financial debts.

- The CD is served with a copy of the application filed with the AA and has the opportunity to file a reply and be heard by the said authority before an order is made admitting the said application.
- Code also prescribes penalties in order to protect the CD from being dragged into the corporate insolvency resolution process mala-fide.

CIRP Withdrawal u/s 12A

- After admission of creditor's petition under section 7 to 9 of the Code, the proceeding before the AA is a proceeding in rem.
- Regulation 30A(1) of the CIRP Regulations is not mandatory but is directory.
- Application for withdrawal may be allowed in exceptional cases even after issue of invitation for expression of interest under Regulation 36A.

- A party can directly approach NCLT for withdrawal or settlement at any stage if the CoC is not constituted which will be decided by the NCLT after hearing all the concerned parties.
- That withdrawal requires approval of CoC by 90% of voting power is in the domain of the legislative policy.
- The CoC does not have the last word on the subject; if CoC arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT can always set aside such decision under section 60 of the Code.

Information Utility

- The evidence of default with an Information Utility is only prima facie evidence of default, which is rebuttable by the CD.

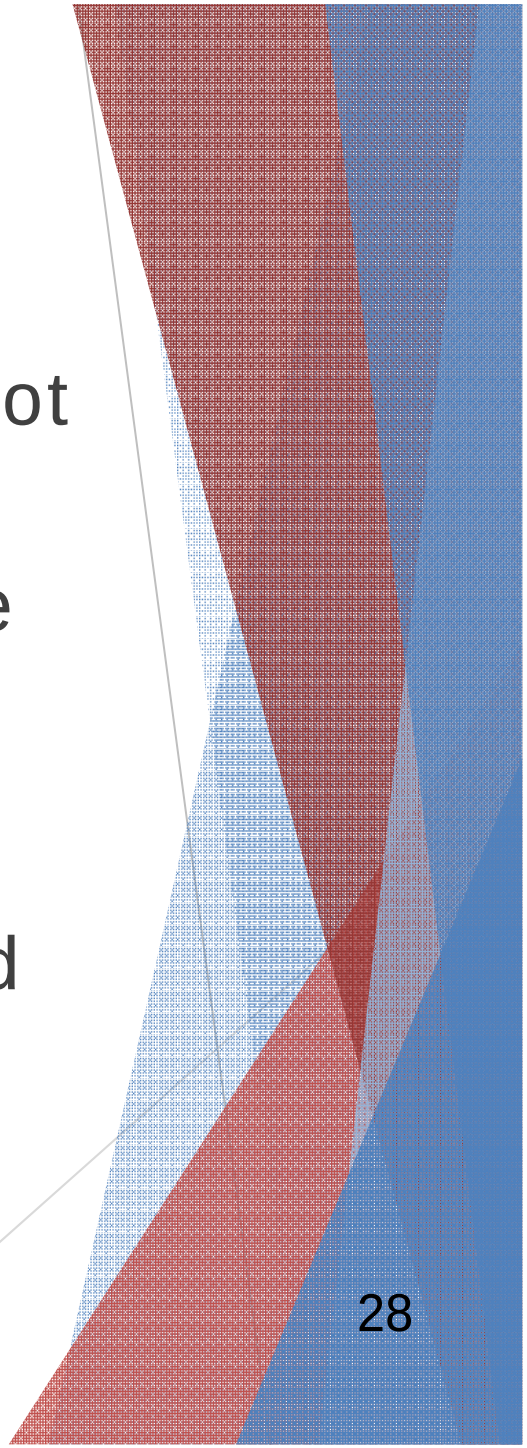
Resolution Professional

- RP has no adjudicatory powers. He has administrative powers as opposed to quasi-judicial powers.
- The RP is really a facilitator of the resolution process, whose administrative functions are overseen by the CoC and by the AA.

Constitutional Validity of Sec 29A

- A statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing.
- A resolution applicant has no vested right for consideration or approval of its resolution plan and, therefore, no vested right is taken away by Section 29A.
- There is no vested right in an erstwhile promoter of a CD to bid for the immovable and movable property of the CD in liquidation. Section 29A not only applies to resolution applicants but also to liquidation.

- A person, who is unable to service its own debt beyond the grace period, is unfit to be eligible to become a resolution applicant. This policy cannot be found fault with.
- Neither can the period of one year be found fault with, as this is a policy matter decided by the RBI and which emerges from its Master Circular, as during this period, an NPA is classified as a substandard asset.



Relatives

- Persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. All categories of persons mentioned in section 5 (24A) of the Code must be connected with the resolution applicant within the meaning of section 29A (j). **The categories of persons who are collectively mentioned as 'relative' in explanation to section 5 (24A) need to have a connection with the business activity of the resolution applicant.**

MSME

- Rationale for excluding MSMEs from eligibility criteria laid down in Section 29A (c) and 29A (h) of the Code is qua such industries, other resolution applicants may not be forthcoming which would not lead to resolution but liquidation.

Shivam Water Treaters Pvt. Ltd. Vs. Union of India & Ors.

- **[SLP (C) No. 1740/2018] SC, 25.01.2018, Article 32 of Constitution of India**
- Constitutional Validity of the I & B Code, 2016 Challenged
- We are only inclined to ***request the High Court to address the relief limited to any action taken by the respondents or any order passed by the NCLT***.
- Barring this, the High Court should not address any other relief sought in the prayer clause. The High Court is requested not to enter into the debate pertaining to the validity of the Insolvency and Bankruptcy Code, 2016 or the constitutional validity of the National Company Law Tribunal."

K. Sashidhar vs Indian Overseas Bank & Ors.

- SC, 05.02.2019
  CD Kamineni Steel & Power India (P) Ltd. and Innoventive Industries Ltd.
- CD filed an application u/s 10 for initiation of CIRP against it and the NCLT allowed the same. Resolution plan was approved by only 66.67% voting share of the CoC against 75% required.
- RP filed an affidavit before the NCLT, submitting the outcome of the CoC meeting.
- NCLT approved the said resolution plan.
- NCLAT set aside the order and ordered for liquidation

SC Held that:

- If CoC approves the resolution plan by requisite percentage of voting share, it is imperative for the RP to submit the same to the AA.
- On receipt of such proposal, the AA is required to satisfy itself that the plan approved by CoC meets the requirements specified in section 30 (2). No more no less.
- If the resolution plan is expressly rejected by not less than 25% of voting shares of the FCs, the RP is under no obligation to submit the plan under section 30(6) to AA.

- “the percent of voting share of FC” approving vis-à-vis dissenting is required to be reckoned. It is not on the basis of members present and voting as such. At any rate, the approving votes must fulfill the threshold percent of voting share of the FCs. It is not possible to countenance any other construction or interpretation.
- .

- The Code grants paramount status to the commercial wisdom of the CoC, without any judicial intervention, for ensuring completion of the processes within time limit. The legislature, consciously, has not provided any ground to challenge the “commercial wisdom” of the individual FCs or their collective decision before AA. That is not justiceable.

- The discretion of the AA is circumscribed by section 31 to scrutiny of resolution plan “as approved” by the requisite percent of voting share of FCs. The ground for rejection is limited to the matters specified under section 30(2).
- The jurisdiction bestowed upon the Appellate Authority is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in section 61(3), which is limited to matters “other than” enquiry into the automony or commercial wisdom of dissenting FCs.

- Thus, the prescribed authorities (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the Code and not act as a court of equity or exercise plenary powers.

Resolution Professional

- The CoC is called upon to consider the resolution plan under section 30(4) after it is vetted and verified by RP as being compliant with all the statutory requirements specified under section 30(2).
- The Resolution Professional is not required to express his opinion on matters within the domain of the financial creditors, to approve or reject the resolution plan, under section 30(4).

- There is no indication in the amendment Act that the legislature intended to undo and/or govern the decisions already taken by the CoC of the concerned CDs prior to 6th June, 2018.
- The amendment Act will have prospective application and apply only to the decision of CoC taken on or after that date concerning the approval of plan.
- The amendment to regulation 39(3) of the CIRP Regulations can not have retrospective effect so as to impact the decision of the CoC of taken before amendment of the said regulation

- **Regu 39 (3)** The committee shall evaluate the resolution plans received under sub-regulation (1) strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit:
- Provided that the committee shall record its deliberations on the feasibility and viability of the resolution plans.

Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd.

- **Issue - Demand Notice by Advocate on behalf of operational Creditor**
- The non-obstante clause contained in Section 238 of the Code **will not override the Advocates Act** as there is no inconsistency between Section 9, read with the Adjudicating Authority Rules and Forms referred to hereinabove, and the Advocates Act.

- Section 30 of the Advocates Act deals with the fundamental right under Article 19(1)(g) of the Constitution to practice one's profession.
- Therefore, a conjoint reading of Section 30 of the Advocates Act and Sections 8 and 9 of the Code together with the AAA Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order.

Issue – Evidence of Debt

- **Sec 9 (*3*)** The operational creditor shall, along with the application furnish—
- (*c*) a copy of the **certificate from the financial institutions maintaining accounts** of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and
- (*d*) such other information as may be specified.

- **Sec 3 (14)** "**financial institution**" means—
- (a) a scheduled bank;
- (b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934;
- (c) public financial institution as defined in clause (72) of section 2 of the Companies Act, 2013; and
- (d) such other institution as the Central Government may by notification specify as a financial institution;

NCLAT Held

- We thereby, hold that 'Macquarie Bank', Australia not being a 'financial institution' within the meaning of sub-section (14) of Section 3 of the 'I & B Code', any certificate given by the said bank cannot be relied upon, to decide default of debt

NCLAT Held

- There is another reason to hold that the application under Section 9 is not maintainable. We find from the record that the so called application under Section 8 is not in accordance with law and is defective. The notice under sub-section (1) of Section 8 of 'I & B Code was not issued by the 'Operational Creditor' but by a Lawyer of Singapore.

Supreme Court Held

- The Code cannot be construed in a discriminatory fashion so as to include only those OCs who are residents outside India who happen to bank with financial institutions which may be included under Section 3(14) of the Code.
- Proof of the existence of a debt and a default in relation to such debt can be proved by other documentary evidence, as is specifically contemplated by Section 9(3)(d) of the Code.

- “therefore, the Code requires that the creditor can only trigger the IRP on clear evidence of default.” Nowhere does the report state that such “clear evidence” can only be in the shape of the certificate, referred to in Section 9(3)(c), as a condition precedent to triggering the Code.
- it is well settled that procedure is the handmaid of justice and a procedural provision cannot be stretched and considered as mandatory, when it causes serious general inconvenience.

Sec. 9 (*3*)(c) Modified w.e.f. 06.06.2018

- **Sec 9 (*3*)** The operational creditor shall, along with the application furnish—
- (c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available

Mobilox Innovations Private Limited Vs Kirusa Software Private Limited

IBC Provisions

- Sec 5 (*6*) "**dispute" includes** a suit or arbitration proceedings relating to—
  - (*a*) the existence of the amount of debt;
  - (*b*) the quality of goods or service; or
  - (*c*) the breach of a representation or warranty;
- Sec 8 (*2*) The CD shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (*1*) bring to the notice of the operational creditor—

- (*a*) existence of a dispute, if any, **and** record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute; (or - 06.06.18)

- **Sec 9 (5)** The AA shall, within 14 days of the receipt of the application, by an order–(*ii*) reject the application and communicate such decision to the OC and the CD, if—
  - **(*d*) notice of dispute has been received by the OC or there is a record of dispute in the information utility;**

- NCLT rejected application on the ground that the default payment was disputed
- NCLAT allowed the appeal on the ground that condition of demand notice under Section 8(2) has not been fulfilled by the CD and the defence claiming dispute was not only vague, got up and motivated to evade the liability.
- SC set aside the order of NCLAT

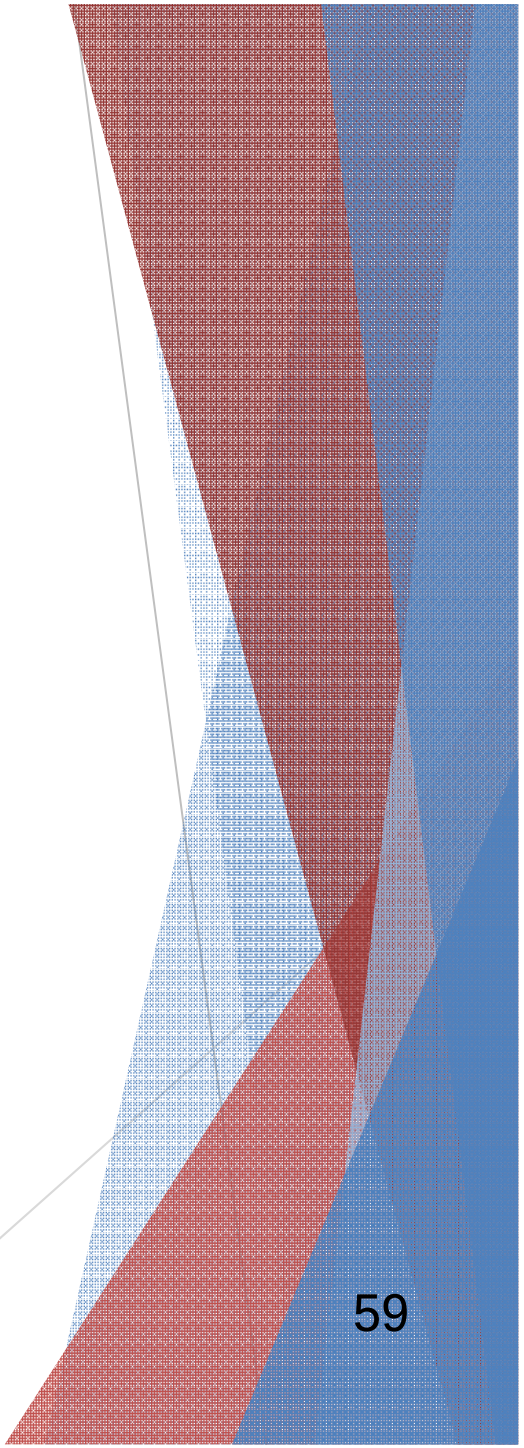
Supreme Court Held

- The AA, when examining an application u/s 9 of the Act will have to determine:
  - Whether there is an “operational debt” as defined *exceeding* Rs.1 lakh? (Sec 4)
  - Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and

- Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If *any one* of the aforesaid conditions is lacking, the application would have to be rejected.

- ……, the word “and” occurring in Section 8(2)(a) must be read as “or” keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as “or”.
- …..a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an arbitral tribunal or a court.
- It is settled law that the expression “and” may be read as “or” in order to further the object of the statute and/or to avoid an anomalous situation.
- 3 years time is allowed under Law of Limitation for filing suit or application.



Sec.8 (*2*)(a) Amended w.e.f. 06.06.2018

- Sec 8 (2) The CD shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor -
- Sec 8 (2) (a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

Sunrise 14 A/S Denmark v. Ravi Mahajan

- **SC 03.08.2018 CD Muskan Power Infrastructure Limited, Sec. 61 and 7 of IBC**
- Issues - Filing of application by advocate
- Non-filing of certificate from Indian financial institutions evidencing default
- A Foreign company filed an application U/s 7 for initiation of CIRP against CD
- NCLT admitted the same.
- NCLAT set aside the order on the ground that
- Foreign company failed to file the statutory form as required under section 7(3)(a). Further,
- Application was filed by an advocate and not by the party in person

SC Held:

- Relied on the decision in **Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd**.
- in the case of OCs, the petition filed by a foreign company need not observe such requirements of a statute which were impossible of compliance, namely, of getting a certificate from Indian financial institutions evidencing default in repayment of a debt.
- Further, the said judgment would apply in the case of financial creditors as well.
- Petition filed by an advocate on behalf of company would be maintainable
- The decision of NCLT to initiate CIRP against the CD was restored.

Applicability of the Law of Limitation

NCLAT in Neelkanth Township and Construction Pvt. Ltd. V/s. Urban Infrastructure Trustees Ltd.,

- There is nothing on the record that Limitation Act, is applicable to I& B Code.
- The I& B Code, 2016 is not an Act for recovery of money claim, it relates to initiation of Corporate Insolvency Resolution Process. If there is a debt which includes interest and there is default of debt and **having continuous course of action**, the argument that the claim of money by Respondent is barred by Limitation cannot be accepted.

IBC Amended w.e.f. 06.06.2018

- Sec 238A was added
- The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be

SC- B. K. Educational Services Pvt. Ltd Vs. Parag Gupta and Associates

- Insolvency Law Committee Report of March, 2018 makes it clear that the object of the Code from the very beginning was not to allow dead or stale claims to be resuscitated.
- Right to sue accrues when a default occurs.

- If the default has occurred over 3 years prior to the date of filing of the application, it would be barred under Article 137 of the Limitation Act, (save and except in cases, section 5 may be applied to condone the delay in filing such application).
- Section 238A, being clarificatory of the law and being procedural in nature is retrospective.
- Periods of limitation are procedural and procedural law is retrospective.
- Sec 433 of CA 2013 applies to Tribunal even when it decides applications under sections 7 and 9 of IBC.

- **Section 60 (6)** Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.

Limitation Act 1963

- **Article 137 -** Any other application for which no period of limitation is provided elsewhere in this Division.
- Period of limitation - Three years
- When the right to apply accrues
- **Co. Act Sec 433** The provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be.

Alchemist ARC vs Hotel Gaudavan P Ltd

- **Complaint against IRP/ RP**
- Police Complaint and FIR by CD against IRP
- IRP was put behind the bar by Police
- **NCLT Delhi held**: Police complaint can be filed only by IBBI or Central Govt. u/s Sec. 236 (2)
- **Jaipur HC** dismissed writ petition Challenging IBC
- **SC quashed the FIR**, and held that:
- **the steps that have to be taken under the Insolvency Code will continue unimpeded by any order of any other Court.**

Vijay Kumar Jain Vs Standard Chartered Bank & Ors

- **SC, 31.01.2019**
- Member of the erstwhile Board of Directors (BoDs) filed the application on the ground that after the first CoC meeting, he was denied participation in the subsequent meetings by RP
- Both NCLT and NCLAT recognized his right to attend and participate in the CoC meetings but denied to access certain confidential information and documents, particularly, the resolution plans.

SC held:

- Though the erstwhile BoDs were not members of the CoC, yet, they had a right to participate in each and every meeting held by the CoC,
- They also had a right to discuss along with members of the CoC all resolution plans that were presented at such meetings under section 25(2)(i) of the Code.
- They being vitally interested in resolution plans, must be given a copy of such plans as part of 'documents' that had to be furnished along with the notice of such meetings.
- RP could take an undertaking from members of the erstwhile BoDs to maintain confidentiality.

Swastik Coal Corporation Pvt. Ltd. Vs. Union of India

- Supreme Court allowed supply of a copy of the Resolution Plan(s) to the Corporate Debtors/Stakeholders.

Arcelormittal India Pvt. Ltd. Vs Satish Kumar Gupta & Ors

- **SC, 04.10.2018**
- Arcelor Mittal India Ltd., Resolution applicant's connected persons were promoters of other entities, whose accounts were classified as NPA as per guidelines of RBI.
- Such connected persons transferred their shareholdings just before submission of resolution plan
- RP held that the resolution applicant's connected persons were promoters of Uttam Galwa Steel Ltd. and KSS Petreon Pvt. Ltd., whose accounts were classified as NPA, therefore, the resolution applicant was ineligible for submission of resolution plan.

- It was upheld by NCLT
- However, NCLAT granted opportunity to the resolution applicant for submission of the resolution plan by making payment of all overdue amounts with interest and charges of UGSL and KSS.
- RP filed appeal before Supreme Court on the ground that the connected persons had transferred their shareholding just before submission of the resolution plan. Therefore, question of paying off debts of UGSL and KSS would not arise.

SC Held:

- From perusal of section 29A(c), it was clear that person should be eligible to submit a "resolution plan" if such person made payment of all overdue amounts with interest thereon and charges relating to NPA accounts before submission of "resolution plan".
- It did not stipulate any other mode to become eligible and thereby did not prescribe any other mode to become ineligible, including by selling the shares thereby exiting as a member of the company whose account had been classified as NPA accounts in accordance with the guidelines of the RBI.

- Reasonable proximate facts prior to the submission of the resolution plan by the resolution applicant would show that the resolution applicant's connected persons sold their shares in order to get out of the ineligibility and consequence mentioned in section 29A(c).
- Therefore, section 29A was attracted and the resolution applicant was ineligible under section 29A(c), even if shares were sold by the resolution applicant's connected persons before submission of the resolution plan.

- In order to do complete justice under Article 142 of the Constitution of India, and also for the reason that the law on section 29A has been laid down for the first time by this judgment, both RAs were given an opportunity to pay off the NPAs of their related CDs within a period of two weeks from the date of receipt of the judgment, in accordance with the proviso to section 29A(c).

Issues Settled

- Section 29A is de facto as opposed to de jure position of persons mentioned therein. This is a 'typical see through provision' so that one can see persons who are actually in 'control', whether jointly or in concert with other persons. A purposeful and contextual interpretation of section 29A is imperative to find out the real individuals or entities who are acting jointly or in concert with for submission of a resolution plan.
- The ineligibility under section 29A attaches when the resolution plan is submitted by a resolution applicant (RA).

- Section 33 provides that if no resolution plan is received before the end of the period or the resolution plan is rejected, the CD is required to be liquidated. Therefore, the period under section 12 is mandatory. It is of utmost importance for all authorities concerned to follow the model timeline given in regulation 40A of the CIRP Regulations as closely as possible

- *Actus curiae neminem gravabit* - the act of the court shall prejudice no one - is a maxim firmly rooted in our jurisprudence. But the time taken by a Tribunal should not set at naught the time limits within which the CIRP must take place. Where a resolution plan is upheld by the Appellate Authority, either by way of allowing or dismissing an appeal before it, the period of time taken in litigation ought to be excluded. This is not to say that the NCLT and NCLAT will be tardy in decision making.

- The non-obstante clause in section 60(5) is to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a CD covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings.
- It is settled law that a statute is designed to be workable, and the interpretation thereof should be designed to make it so workable.

- Given the timeline and given the fact that RA has no vested right that his resolution plan be considered, it is clear that no challenge can be preferred to the AA at threshold.
- A writ petition under Article 226 filed before a High Court would also be turned down on the ground that no right, much less a fundamental right, is affected at this stage.
- Aggrieved RA can approach the NCLT for relief only after a resolution plan has been considered by the CoC via voting and not prior to that.

- The only reasonable construction of the Code is the balance to be maintained between timely completion of the CIRP, and the CD otherwise being put into liquidation.
- The CD consists of several employees and workmen whose daily bread is dependent on the outcome of the CIRP. If there is RA who can continue to run the CD as a going concern, every effort must be made to try and see that this is made possible.

Swaraj Infrastructure (P.) Ltd. v. Kotak Mahindra Bank Ltd.

- **SC, 29.01.2019**
  Sec.18, 19 and 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and Section 433 & 434 of Companies Act, 1956
- Issue - Whether secured creditor could file winding up petition even after obtaining decree from DRT and a recovery certificate based thereon
- Bank approached DRT to recover the debt.

- DRT issued a Decree.
- Recovery certificates were issued by Recovery Officer under Sec 19(19) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDB&FI Act).
- In the meanwhile, bank filed a winding up petition pursuant to notice under sections 433 and 434 of the Companies Act, 1956
- Petition was allowed by the High Court.

Objections Raised:

- RDDB&FI Act being a special Act, after obtaining a decree and a recovery certificate, the bank cannot file a winding up petition.
- A secured creditor could file a winding up petition only on giving up its security, which had not been done.

SC held:

- When winding up petition was filed by the bank, an execution or a recovery certificate had not been issued.
- Winding up proceeding is not 'for recovery of debts' due to banks,
- Thus bar contained in Sec 18, read with Sec. 34 of RDDB&FI Act would not apply to winding up proceedings under Companies Act, 1956.
- A secured creditor's petition for winding up was maintainable without any requirement of it having to give up or relinquish its security under section 439 of the Companies Act, 1956.

Jaipur Metals & Electricals Employees Organisation Vs. Jaipur Metals & Electricals Ltd.

- **SC, 12.12.2018**
  Sec. 7 and 238 of the Code, Section 434 of the Companies Act, 2013 and rules 5 and 6 of the Companies (Transfer of Pending Proceedings) Rules, 2016
- CD was referred to the Board for Industrial and Financial Reconstruction (BIFR) under the Sick Industrial Companies (Special Provisions) Act, 1985.
- BIFR forwarded it to the High Court with the prima facie opinion that the company ought to be wound up
- High Court registered the case as company petition.

- Meanwhile the FC acquired substantially all the financial debts of the CD and filed application u/s 7 of the Code for initiation of CIRP.
- NCLT admitted the application
- High Court refused to transfer the winding up proceedings pending before it to the NCLT and set aside the admission order of NCLT on the ground that the order was passed without jurisdiction.

SC allowed the appeal and Held

- NCLT was absolutely correct in applying Section 238 to an independent proceeding instituted by a secured financial creditor.
- By virtue of substituted section 434(1)(c), all proceedings under the Companies Act, 2013 related to winding up of companies, pending immediately before the date notified by the Central Government would be transferred to the NCLT
- In case of inconsistency between substituted section 434 and the provisions of the Code, the latter would prevail.

- Thus, the winding up petition pending before the High Court could not be proceeded with further in view of section 238.
- NCLT would continue the proceedings from the stage at which they were left. Hence, appeal was allowed.

Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd.

- **SC, 25.01.2019 CD Tecpro Systems Ltd. Sec. 7 and 9 of IBC, Sec** 271 and 434 of the Companies Act, 2013

- An OC filed a winding up petition against the CD before the High Court under section 433(e) of the Companies Act, 1956. Notice was issued on the petition prior to the commencement of IBC.
- After notification of IBC a FC filed application u/s 7 for initiation of CIRP.
- NCLT admitted the application
- NCLAT dismissed the appeal stating that there was no winding up order against CD.

SC held

- The CIRP is an independent proceeding which must be decided in accordance with the provisions of the Code.
- Liberty was granted to OC to apply under the proviso to Section 434 of the Companies Act to transfer the winding up proceeding pending before the High Court of Delhi to the NCLT, which could then be treated as a proceeding under Section 9 of the Code.

K. Kishan Vs. Vijay Nirman Company Pvt. Ltd

- **SC, 14.08.2018**
  Sec. 9 (5)(ii)(d) of the Code, Section 34 of Arbitration and Conciliation Act, 1996
- Application for initiation of CIRP by OC during pendency of challenge to an arbitral award

- Dispute between M/s Vijay Nirman Company Pvt. Ltd (“Respondent”) and M/s Ksheerabad Constructions Pvt. Ltd. (“KCPL”)
- 21.01.2017 - Arbitral award in favour of the Respondent for INR 1,71,98,302. Cross claims of the Applicant were rejected.
- 06.02.2017 Respondent issued a demand notice u/s 8 on on KCPL.
- Within 10 days KCPL disputed the demand notice

- 20.04.2017 KCPL challenged the Award under Section 34 of the Arbitration Act.
- 14.07.2017 application for CIRP filed u/s 9
- 29.08.2017 NCLT admitted the Application, and observed that pendency of a Section 34 challenge was irrelevant as there had been no stay of the Award, and moreover the claim amount stood admitted during the arbitral proceedings.
- NCLAT affirmed the ruling of the NCLT and held that order of the Arbitral Tribunal, would be treated as “a record of an operational debt”.

- Supreme Court relied on Section 9 (5) (ii) (d) of the Code and held that an application under Sec 8 must be rejected when a notice of dispute had been received by the operational creditor.
- Sec 9 (5) The AA shall, within 14 days of the receipt of the application under sub-section (2), by an order–
- (i) admit the application and communicate such decision to the operational creditor and the corporate debtor if, -
- (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

Grounds for the decision:

- demand notice was disputed.
- counter-claim exceeding the claim awarded was rejected by the Arbitral Tribunal for lack of evidence or on merits
- challenge under Section 34 of the Arbitration Act was pending
- a ‘pre-existing dispute’ continues even after the Award, till the final adjudicatory process under Section 34 and Section 37 of the Act is complete.
- Rejected the submission that the debt set out in the demand notice had been admitted by the Appellant during the arbitral proceedings on the ground that the mere possibility of the cross claims getting admitted, was sufficient to consider it as a disputed debt.

- Placed reliance on Mobilox order and held that OC cannot use the Code either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures.
- SC also observed that where a challenge petition under Section 34 of the is clearly and unequivocally barred by limitation, CIRP may be put into operation;
- But CIRP cannot be initiated during the pendency of an application for exclusion of time under Section 14 of the Limitation Act, 1963.
- There is no inconsistency between the adjudication and enforcement process under the Arbitration Act and Section 8 & 9 of the Code and therefore Section 238 of the Code would have no application in the present case.

जय हिन्द Jai Hind

धन्यवाद Thanks

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