



# INDIAN INSTITUTE OF INSOLVENCY PROFESSIONALS OF ICAI

(Company formed by ICAI under Section 8 of the Companies Act 2013)

## IBC Case Law Capsule

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**INSOLVENCY AND BANKRUPTCY BOARD OF INDIA Vs. & STATE BANK OF INDIA & ORS.**  
**W.P.(C) 10189/2018 & CM APPL. 39715/2018**  
**Date of High Court Judgement: November 28, 2022.**

### Facts of the Case: -

Writ Petition has been filed by Insolvency and Bankruptcy Board of India, hereinafter referred as (“Petitioner”) against the order dated 05.09.2018 passed by the AA in State Bank of India v. Su Kam Power Systems Ltd case. The AA held that Regulation 36A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ultra vires Section 240(1) of the IBC. The splitting of the CIRP into inviting expression of interest and then seeking resolution plans under Regulation 36A became the subject as it was contrary to the speedy disposal of the Resolution Process.

The Petitioner challenged the order on the ground that AA does not have jurisdiction to decide upon the validity and legality of the Regulations. Vide order dated 26.09.2018, the court directed that the AA’s order shall not come in the way of the matters where ‘Expression of Interest’ has already been issued. The Petitioner preferred an appeal against the said order and vide order date 05.10.2018 the operation of AA’s order was stayed. Thereafter, the appeal was disposed of on 04.05.2022 on the term that pending the disposal of the writ petition, interim order dated 05.10.2018 and Regulation 36A continues to operate.

On the final hearing, the Petitioner, citing the *M/s Mohan Gems & Jewels Pvt. Ltd. v. Vijay Verma & Anr* and *BSNL v. Telecom Regulatory Authority of India & Ors.* case, submitted that as per IBC the AA does not have any power to rule on the vires of any Regulations. The Petitioner’s power to issue Regulations are recognized in Section 240 of the IBC and lastly, Section 196(1)(u) of the IBC is a broad provision which stipulates that the petitioner can perform such other functions as may be prescribed.

The question raised before the High Court is that whether AA is vested with power to itself declare a Regulation as being ultra vires.



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## High Court's Observations: -

The High Court highlighted that on perusal of the powers of AA as per Section 60 of the IBC, the AA is vested with the power of deciding on questions of law but the questions of law or facts ought to be in respect of those proceedings which are pending before the AA and they ought to arise out of or in relation to the resolution or liquidation proceedings.

Referring to the judgement on the cases cited by the Petitioner, the High Court upheld that the need for judicial intervention or innovation from the AA & NCLAT should be kept at its bare minimum and should not disturb the foundational principles of the IBC. The jurisdiction to deal with the validity and legality of the Regulations framed under the IBC is not conferred upon the AA. The AA being a creature of the IBC, cannot assume to itself the power of declaring any provisions of the IBC or the Regulations as illegal or ultra vires.

The court held that Regulation 36A has been amended and passed in accordance with law, the AA did not have the power to declare the same as being ultra vires merely on the ground that the two-stage process provided in it i.e., of inviting an expression of interest first and then the financial bids, would be contrary to the speedier resolution of the Insolvency Resolution Process.

**Order: -** Order to the extent it holds Regulation 36A as ultra vires is accordingly set aside.

**Case Review: -** Writ petition is disposed of.