IBC Case Laws

National Company Law Appellate Tribunal (NCLAT)

M/s Shah Paper Mills Limited Vs. M/s Shree Rama Newsprint & Paper Limited Company Appeal (AT) (Ins.) No. 1088 of 2022, Date of NCLAT's Judgement: December 21, 2022.

Facts of the Case

The appeal is filed under Section 61 of the IBC by *M/s Shah Paper Mills Limited* (Appellant) against the order dated July 20, 2022, passed by the AA. The AA through the impugned order has dismissed the Section 9 application filed against *M/s Shree Rama Newsprint & Paper Limited* (Respondent) for initiation of CIRP. The Appellant stated that the last invoice seeking payment of ₹70,76,730 was sent to the respondent on July 29, 2016, in reply of which the Respondent clearly admitted the liability to pay only ₹37,33,552. The Appellant further pointed out that on December 27, 2017, the Respondent was informed that the net receivable amount of ₹55,23,253/- was due from them. The Appellant also submitted that no disputes had been raised by the Respondent with regard to deficiency in supply of goods. The Appellant issued a demand notice on November 28, 2018, reply of which was submitted by the Respondent on December 11, 2018, i.e., beyond the timeline prescribed under the IBC. The Respondent submitted that there was change in the management of the company as per Share Purchase Agreement dated May 21, 2015, and all invoices pertaining to the period post-change of the management have been paid in full and that there were no outstanding dues. The Respondent contended that the present matter is not maintainable since the Appellant at no stage has crystalized the actual amount that had become due and that different outstanding amounts was claimed at different points of time. Further, it was contended that amount of ₹37,33,552 was the balance amount in respect of the invoices raised before July 25, 2015, being the date on which the first invoice was raised by the Appellant post change of management of the Respondent company. The question raised before the NCLAT is that whether the AA in the impugned order has correctly noted that as there was a serious dispute with regard to amount payable between the parties and the parties need to approach the proper forum in this regard.

NCLAT's Observations

The Appellate Tribunal referring to the *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited* stated the while admitting or rejecting an application, AA must follow the mandate of Section 9 and in particular the mandate of Section 9(5) of the IBC. The Tribunal further stated that the AA is not to enter into final adjudication with regard to existence of disputes between the parties regarding the operational debt but what has to be looked into is whether the defence raised by the Respondent is moonshine defence or not. There is no prior dispute regarding quality of goods or material supplied. The only dispute is the difference of views on the actual amount payable. The Tribunal held that the AA has glossed over the fact that the Respondent has not controverted the outstanding liability of ₹37,33,552. Furthermore, the statement by the Respondent that no amount is due and payable to the Appellant, was made with the caveat that only invoices, post change in management, have been paid in full. It was further held that the Respondent's reply to demand Notice, that they are not liable for the claims prior to change in management, is not a tenable argument as change in management is an internal matter in which the Appellant had no role to play. The Respondent has tried to take advantage of their own wrong of being lackadaisical in reconciling the accounts in spite of nearly 30 requests made by the Appellant to do so.

Order: The Impugned Order dated July 20, 2022, is set aside and the AA is directed to pass an order of admission of Section 9 Application.

Case Review: *Appeal dismissed.*

M.K.Resely and Ors. Vs. & Union Bank of India and Ors. IA No 990/2022 in Company Appeal No.337/2022, Date of Judgement: November 24, 2022.

Facts of the Case

M.K. Resely and Ors. (Petitioners), feeling aggrieved by AA's order dated January 21, 2022, to add the 'personal properties' of the petitioners in the liquidation estate of the CD filed the Writ Petition with the High Court on January 26, 2022. The Writ Petition was dismissed on April 22, 2022, following which the Petitioner filed the Writ Appeal on April 25, 2022(against the dismissal of Writ Petition) Later, The High Court *vide* its judgment dated June 22, 2022, dismissed the Writ Appeal and permitted the petitioner to prefer an appeal within two weeks from the date of judgement. Accordingly, the Petitioner preferred this very appeal before the Appellate Tribunal seeking to exclude the period from January 25, 2022 till June 22, 2022 in computing the "Period of Limitation'.

The Petitioner, citing the judgement of Supreme Court in *Kalparaj Dharamshi and ors Vs. Kotak Investment Advisors Limited and Ors*, and in *State Bank of India Vs. Visa Steel Ltd.* submitted that Provision of Section 14 of the Limitation Act 1963 will apply to the proceedings and the period from January 25, 2022, till June 22, 2022, is liable to be excluded. The petitioner contended that the said appeal is presented well within the specified period under Section 61 of the IBC.

The Union Bank of India and Ors (Respondent) submitted that the as per the order of the High Court, the last date for filing the appeal was July 05, 2022, whereas the appeal was filed on July 06, 2022. Further the Respondent submitted that the Appeal was lodged by the Petitioner without attaching the Certified Copy of the AA's Order which is violation of Rule 22(2) of NCLAT Rules 2016. The Respondent cited the case of *V. Nagaranjan Vs Sks Ispat and Power Limited*, wherein the High Court was of view that appellant having failed to apply for a certified copy, rendered the appeal filed before the NCLAT as clearly barred by limitation.

The question raised before the NCLAT is that whether the appeal filed by the Petitioner is barred by limitation or not

NCLAT's Observations

The Appellate Tribunal stated that Section 14 of the Limitation Act was enacted to exempt a particular period covered by a "Bonafide Litigious Activity' and 'Good faith' is required to be established to press Section 14 into service. The Tribunal pointed that the period of limitation for filing a suit/appeal is fixed by a Statute and it cannot be deemed to be excluded or extended as a matter of routine.

The Tribunal was of view that, even though the Petitioner have indulged in Bonafide Litigious Activity in Good faith and by applying the ingredients of Section 14 of the Limitation Act the period from January 25, 2022 till June 22, 2022 is liable to be excluded, it cannot be forgotten that the Hon'ble High Court had permitted the Petitioner to prefer the appeal within two weeks from the date of judgement on June 22, 2022.

Going by the tenor and spirit of the Judgement of the High Court, the last date for filing the appeal was July 05, 2022, and there is a delay of 'One day' in preferring the appeal.

Order: The filing of the Appeal is beyond the prescribed time limit granted by the Hon'ble High Court

Case Review: *Appeal Dismissed.*

Sunit Suri Vs. Ahsan Ahmed (RP) & CoC of SDU Travels Pvt. Ltd. Company Appeal (AT) (Insolvency) No. 774 & 781 of 2022, respectively, Date of Judgement: November 21, 2022.

Facts of the Case

Appeal has been filed by Mr. Sunit Suri, (Appellant) against the orders dated July 20, 2022 passed by the AA. The appellant, being the suspended director of CD- "SDU Travel Pvt Ltd.", filed application under section 22(3) of the IBC to replace the IRP stating that the IRP is not acting independently and is working under the influence of the other Suspended Directors. The appellant supporting his claim stated that the IIRP had allocated share in the CoC to the entities related to the CD.

AA dismissed the application of the appellant stating that it has no merit and moreover the application for replacement of IRP was not filed by the CoC, as required under the IBC.

The Appellant, relying on the judgment of the Tribunal on *Kanakabha Ray Vs. Narayan Chandra Saha & Ors* and on the case of *State Bank of India Vs. M/s Metenere Ltd*, filed appeal in the Appellate Tribunal and contended that the application filed by him is maintainable before the AA and accordingly the order shall be set aside.

The question raised before the Appellate Tribunal is that whether the application submitted before the AA shall be allowed even when the provision of IBC confers power to CoC to replace the IRP.

NCLAT's Observations

The Appellate Tribunal highlighted the submission of the appellant that except seeking the aid of Rule 11 of the National Company Law Appellate Tribunal Rules 2016, no other provision of IBC empowers the appellant to prefer an appeal in the given case.

The Tribunal held that, as per the Principle of Interpretation, the language employed in the relevant Section towards a Provision /Act /Statute should be read in a simple, plain, and harmonious manner without causing any volatile harm to the language used therein. Further, Section 22(3) of the IBC clearly confers power to the CoC to replace the IRP by preferring appeal before AA.

The Appellate Tribunal held that when the Section 22(3) (b) of the IBC explicitly spells for the appointment of the proposed RP then the invocation of Rule 11 of the National Company Law Appellate Tribunal Rules 2016 cannot be pressed into service, showering power only to CoC to replace the IRP. Referring to the judgements on which the appellant relied, the Tribunal stated that based on the available facts and materials on record. the same is inapplicable to the present case.

Order: Appeal lacks merit and should be dismissed.

Case Review: *Appeal Dismissed.*

Rahul Arunprasad Patel Vs. State Bank of India (774) Amit Dineshchandra Patel Vs. State Bank of India (781) Company Appeal (AT) (Insolvency) No. 774 & 781 of 2022, respectively, Date of Judgement: November 21, 2022.

Facts of the Case

Appeal has been filed by the Personal Guarantors (Appellant) against the orders dated July 19, 2021, and August 17, 2021, wherein the application under Section 95 of the IBC filed by State Bank of India (Respondent), was admitted by the AA and consequently RP was appointed.

Appellant challenging the Impugned Orders passed in these two Appeals submits that Application which has been filed in Form-C does not have signature of the RP in Part-IV of the said form. Hence, it proves that the application has been filed by the Respondent and not by the RP. The appellant further submits that although consent form under Form-A has also been filed but the same is contemplated only when the Application is not filed by the RP.

Further, Appellant submitted that as per Section 97(3), the RP is to be nominated by the Board whereas AA has appointed the RP on the basis of the application filed and therefore the Impugned Order is violative of Section 97(3) of the Code. The appellant relying on "*Perkins Eastman Architects DPC Vs. HSCC (India) Ltd.*" and "*Voestalpine Schienen GMBH Vs. DMRCL*" requested the removal of the appointed RP and stated that when an Application is filed by/through RP, it is difficult to presume that he would recommend the rejection of the Application as the RP becomes interested person in his own Application and become judge in his own case which is not permissible in law.

Respondent refuting the claims of the Appellant submitted that Appeal has been filed with delay and latches. The Respondent submitted that the appellant didn't raise any objection at the time when order was passed, and the said appeal is abuse of process and an attempt to delay the Resolution Process. The Respondent admitted that the defect of RP not signing the application is curable and the fact that the RP has submitted its consent form before the AA has cured the defect.

The question raised before the Appellate Tribunal is that whether the application submitted before the AA shall be treated to be filed by the creditor or by the RP on the fact that the same is not signed by the RP.

NCLAT's Observations

The Appellate Tribunal held that the difference to find out whether the Application filed by the RP or Creditor himself is the difference with regard to the filing of Part-IV. When Part-IV is not filled up in an Application, Application is clearly by Creditor himself but when Part-IV is filled up, Application is not by the Creditor himself but through RP. Part-IV of the Application being filled up, the conclusion is irresistible that Application was filed through RP. Part-IV not containing the signature of the RP and containing the written communication is a minor irregularity/defect which cannot have any adverse effect

since the written communication given by the RP was a part of the Application in Form C.

The Appellate Tribunal, referring to its judgment in "*Pologix Infrastructure Pvt Ltd Vs. ICICI Bank Ltd.*" held that if there is any defect in the name and address and position of the authorized representative the Application cannot be rejected, and the Applicant is to be granted time to remove the defection. In the present case only, defect pointed out by Appellant is that there is no signature of RP but it is clear that instead of signature there was a written consent of the RP, thus defect if any stood removed.

On the judgements referred by the appellant in the appeal, the Tribunal held that the mere fact that details of RP are provided by the Applicant himself, no bias can be read into the said procedure. An RP plays a pivotal role in Insolvency Resolution Process and is expected to perform his function and duties as per the IBC and the Rules. Hence, both the appeals lack merit and should be disposed of.

Order: Both the Appeals are dismissed. No costs.

Case Review: *Appeal Dismissed.*

CFM Asset Reconstruction Pvt. Ltd. Vs. SABIC Asia Pacific Pte. Ltd. & JBF Industries Ltd Company Appeal (AT) (Insolvency) No. 1231 and 1232 of 2022, Date of Judgement: November 14, 2022.

Facts of the Case

CFM Asset Reconstruction Pvt. Ltd. (Appellant) filed appeal after being aggrieved by the orders dated September 06, 2022, passed by the AA that prohibited the appellant to intervene in the insolvency proceedings under Section 9 initiated by SABIC Asia Pacific Pte. Ltd. (Operational Creditor) against the JBF Industries Ltd. (Corporate Debtor).

All the Financial Creditors of the Corporate Debtor assigned their rights and interest to the Appellant. There being default on part of the Corporate Debtor, the Appellant initiated proceedings under SARFAESI Act, 2002. After knowing about the initiation of insolvency proceedings under Section 9 initiated by an Operational Creditor, the Appellant prayed before the AA to intervene in the Petition as claim of the Operational Creditor is in excess of ₹100 Crores whereas the amount outstanding to the Appellant is in excess of ₹3,600 Crores and any order of admission will impact the Appellant.

The Operational Creditor relying on *Beacon Trusteeship Ltd. Vs. Earthcon Infracon Pvt. Ltd.* and *L&T Infrastructure Finance Company Ltd. Vs. Gwalior Bypass Project Ltd.* case (7) submitted that the Appellant cannot be allowed to intervene in the present proceeding as even if Appellant holds debt of 99.1% of the Corporate Debtor, the Appellant should file its claim before the RP and NCLT cannot exercise its residuary inherent powers in the case. Permitting intervention by the Financial Creditor in Section 9 application will be contrary to the IBC which does not contemplate intervention by Financial Creditor prior to admission of application.

The Appellant apprehended that the Operational Creditor has not disclosed about the insurance taken with respect to the goods supplied and the fact that the insurance claim has been fully received by the Operational Creditor is also not disclosed. The Operational Creditor submitted that even if the amount of insurance claim has been received by the Operational Creditor, application under Section 9 can be proceeded with.

The question raised before the Appellate Tribunal is that whether Financial Creditor is entitled to intervene in proceedings initiated by Operational Creditor under Section 9 or not?

NCLAT's Observations

The Appellate Tribunal held the present case is different from the referred L&T Infrastructure Finance Company Ltd case on two facts, Firstly Intervention Application was filed by the L&T after order was reserved on the application filed under Section 7 and Secondly, L&T had challenged both order rejecting his Intervention Application and order admitting the Section 7 application but in present case, application under Section 9 is yet to be heard and admitted. Further, referring to the judgment of the Supreme Court in *Beacon Trusteeship Ltd. Vs. Earthcon Infracon Pvt. Ltd. & Anr*, case wherein a Financial Creditor was permitted to intervene in Section 9 Application, the Tribunal held that ordinarily a Financial Creditor cannot be allowed to intervene in the Section 9 proceedings, however, if there are reasons and allegations which require consideration by the AA intervention can be allowed.

The Tribunal further referring to a document titled as "Form of Acceptance Claim Discharge & Subrogation Form", which indicates that the Operational Creditor has received the insurance claim from the Insurance Company, was of view that when the Operational Creditor has received the claim amount and has fully discharged the Insurance Company of the liability the said document is relevant material to be examined by the AA as to whether on the basis of the claim raised by the Operational Creditor, insolvency proceeding be initiated against the Corporate Debtor or not.

The Appellate Tribunal held that on account of exceptional facts and circumstances, Appellant be permitted to intervene in the proceedings initiated under Section 9 by the Operational Creditor. Hence, order on September 06, 2022, passed by AA prohibiting the appellant to intervene in the insolvency proceedings is hereby set aside.

Order: The appellant is permitted to intervene in the application filed by the Operational Creditor under Section 9.

Case Review: *Appeal Allowed.*

Chipsan Aviation Private Limited Vs. Punj Llyod Aviation Limited Pvt. Ltd Company Appeal (AT) (Insolvency) No.261 of 2022, Date of Judgement: November 10, 2022.

Facts of the Case

Chipsan Aviation Private Limited (Appellant) filed appeal after being aggrieved by the order dated January 06, 2022, passed by the AA that rejected the Section 9 application holding that advance payment made by Operational Creditor to the Corporate Debtor does not fall within the four corners of the Operational Debt. The Appellant on March 28, 2016 advanced an amount of ₹60 lakhs to the Punj Llyod Aviation Ltd. (Respondent) for aviation related services, which were neither provided nor the advance paid was refunded. After payment, there has been several emails correspondence between the Appellant and the Respondent. Further, the amount of 60 lakhs was continuously shown as advance received from the customers during 2015-16, 2016-17 and 2017-18 in the financial statement of the Respondent. On September 19, 2019, the Appellant issued a demand notice under Section 8 which was delivered on Respondent on September 21, 2019. The Appellant filed a Section 9 application demanding an amount of ₹97,40,055/- (₹60 lakhs as principal amount and rest interest).

Respondent while refuting the claims of the Appellant pleaded that there was no privity of contract between him and the Appellant and there is no operational debt in existence under Section 5(21) of IBC. It was further pleaded that Application under Section 9 is barred by limitation as the advance payment was made on March 28, 2016, and the Application has been filed after expiry of the three years. The Appellant contended that advance payment was made for the purposes of providing aviation services and the Draft Agreement was forwarded to the Respondent but was never signed by him. The advance amount was towards obtaining goods and services; hence it falls within the Operational Debt. Relying upon *Construction Consortium Ltd. Vs. Hitro Energy Solutions Pvt. Ltd*. case, the appellant submitted that the order of the AA is knocked out and the Application under Section 9 was liable to be admitted.

The question raised before the Appellate Tribunal is that whether the advance payment made by Operational Creditor to the Corporate Debtor fall within the four corners of the Operational Debt or not?

NCLAT's Observations

The Appellate Tribunal while adjudicating the appeal held that although there is no contract between the Appellant and the Respondent for providing an aviation service, the payment of ₹60 lakhs to the Respondent, which is reflected by Bank transaction cannot be denied. The definition of Operational Debt as contained in Section 5(21) defines Operational Debt as a claim in respect of the provision of goods and services. Repeated correspondence between Appellant and Respondent indicates that the communication was in regard to goods and services. Thus, the correspondence as encapsulated shows that an amount of ₹60 lakhs was advanced for providing goods and services. However, neither goods and services could be provided, nor any Agreement could be entered between the Appellant and the Respondent. Referring the view of Hon'ble Supreme Court in Construction Consortium Limited case the Appellate Tribunal held that the advance payment of ₹60 lakhs was clearly an Operational Debt and the AA committed error in rejecting Section 9 Application.

The Appellate Tribunal further stated that although submission regarding objecting Section 9 Application on the ground of limitation have been noticed by the AA but has not been dealt with. Hence, order dated January 06, 2022 rejecting Section 9 Application on the ground that advance payment paid is not an Operational Debt is hereby set aside.

Order: The Section 9 Application before the AA to be heard and decided afresh after hearing both the parties.

Case Review: *Appeal Allowed.*

SLB Welfare Association Vs. M/s PSA IMPEX Pvt Ltd, M/s Rudra Buildwell Constructions Pvt. LtdCompany Appeal (AT) (Insolvency) No.642 of 2022, Date of Judgement: November 4, 2022.

Facts of the Case

SLB Welfare Association (Appellant) filed appeal against the orders dated April 18, 2022, and July 25, 2022, passed by the AA. *M/s PSA IMPEX Pvt Ltd*, the "CD", launched a House Building Project in the year 2012 to be completed within 36 months. Being delayed, the homebuyers approached the RERA, and the latter conducted an inspection of the Project site on February 18, 2019, and found that only 10% of the work has been started and from March 2016 work was abandoned. CD, on August 04, 2019, sent a mail to the buyers that the Project has been handover to *M/s. Rudra Buildwell Constructions Pvt. Ltd.* The RERA passed an order on September 30, 2019, cancelling the registration of the Project. A letter dated June 26, 2020, was issued by the Secretary of RERA to the CD for handing over the site to the Appellant.

M/s. Rudra Buildwell Constructions Pvt. Ltd. claiming to be an Operational Creditor filed an Application under Section 9 which was later withdrawn on the submission that Application is hit by Section 10A of the Code. Within a week from the withdrawal, a notice under Section 8 of the Code was issued by the Operational Creditor dated December 06, 2021, to the CD demanding payment of ₹ 5,39,60,674/- including interest. The date of default mentioned in the Application was March 31, 2020. The AA being prima facie of the view that the Application is hit by Section 10A, permitted the Operational Creditor to file an additional affidavit. The AA vide order dated April 18, 2022, admitted Section 9 Application, and appointed an IRP. Pursuant to the application filed by IRP, AA vide its order dated July 25, 2022, directed the Appellant to handover possession of the project in question to the IRP within two weeks.

Aggrieved by the order, the Appellant filed appeal in NCLAT submitting that insolvency proceedings were fraudulently initiated by the Operational Creditor in collusion with the CD. The invoices filed in support of Section 9 Application were only proforma invoices and does not have any invoices number and GST number and are self-prepared documents. The Appellant contended that rights of the Project vests in the Appellant by virtue of order passed by RERA and by virtue of Section 14(1) Explanation, there is no conflict with the order passed by the RERA and those of proceedings under IBC.

The Respondent submitted that proforma invoices are issued at the time of work being carried out and thereafter while raising final invoices, GST payments are made. The provisions of IBC shall override the provisions of RERA and order passed by RERA cannot come in the way of initiation of CIRP.

The question raised before the NCLAT is that whether the order of AA directing the Appellant to handover the Project to IRP is justified or not.

NCLAT's Observations

The Appellate Tribunal after considering the submission of both the parties held that the facts of the case make it amply clear that object of filing Section 9 Application by the Operational Creditor was not for resolution of insolvency of CD but was an attempt to stop the implementation of RERA order. The invoices are not claimed to have been issued within one month from the date of supply of goods, material or services and also does not mention the GST number or amount of tax, which proves the contention of the Appellant that they have been prepared for the purposes of the case.

Further, the ledgers of Corporate Debtor maintained by *M/s. Rudra Buildwell Constructions Pvt. Ltd.* indicate that ledgers are not prepared in an ordinary course of business. It is further relevant to notice that RERA has made inspection of the site in February 2019 and at that time of inspection, no work was found to be going on and the work has stopped for last two years. The Project was handed over to the Appellant on June 29, 2019 and the Operational

Creditor has claimed the amount from August 2019 to May 2021.

The Appellate Tribunal held that the entire case of the Operational Creditor to supply materials, goods and services appears to be false and concocted only for the purpose of filing Section 9 Application and thus penalty is liable to be imposed on the Operational Creditor under Section 65 of the Code. The initiation of CIRP itself being vitiated in law, all subsequent orders passed in the proceedings have to be automatically set aside.

Order: The orders are set aside, and the company petition is dismissed as having been filed malifide for purposes other than resolution of insolvency of the CD. A penalty of ₹ 25,00,000/- (Rupees twenty-five lakhs) is imposed on *M/s. Rudra Buildwell Constructions Pvt. Ltd.* through its owner Shri. Raj Kumar.

Case Review: *Appeals Allowed.*

Punjab National Bank Vs. Mr. Ashish Chhauwchharia, RP JetAirways & Ors. Company Appeal (AT) (Insolvency) No. 584 of 2021, Date of Judgement: October 21, 2022.

Facts of the Case

The Appellant - Punjab National Bank (PNB) had extended various loans credit to Jet Airways (India) Limited (Corporate Debtor) in 2016-17. After the Company committed default in repayment of the loan, the Promoter of the Corporate Debtor executed a Share Pledge Agreement in favour of the Appellant to secure their outstanding dues and 2,95,46,679 equity Shares were Pledged in favour of the Appellant. Meanwhile, the Corporate Debtor was admitted to Corporate Insolvency Resolution Process (CIRP) on an application filed by another creditor – State Bank of India (SBI). During CIRP, the Appellant filed a claim of ₹956.21 crore, which was admitted by the Resolution Professional.

On September 19, 2020, the RP issued an email to the Appellant stating that its claim would be reduced by the Fair Market Value of the Pledged Shares. Accordingly, the claim of PNB was reduced by approx. ₹202 crores. The Appellant also raised this issue during the e-voting on Resolution Plan through its representative in the CoC who 'requested the RP to minutise its dissent as PNB's claim of approx. ₹202 crores was rejected and they would suffer twice if such distribution methodology was allowed'. However, the Appellant voted in favour of the Resolution Plan. The Adjudicating Authority (AA) also rejected Interlocutory Application (IA) and approved the Plan. Subsequently, PNB preferred this appeal before the NCLAT.

The two questions before the NCLAT were (a) whether reduction of the claim of financial creditor by resolution professional was valid? and (b) whether a member of the CoC that has voted in favour of the Resolution Plan can question the Resolution Plan for his claims?

NCLAT's Observations

The Court observed that there was no dispute between the parties regarding facts and sequence of the events. The RP in its reply affidavit filed in this Appeal has categorically stated that reduction of the claim of the Appellant was on the basis of the judgment of NCLAT in the cases of *India Power Corporation Ltd. Vs. Meenakshi Energy Ltd.* and PTC India Financial Services Ltd. However, the NCLAT observed that the Supreme Court has set aside NCLAT's decision in the matter of PTC India Financial Services Ltd and upheld that 'registration of the pawn, that is the dematerialised shares, in favour of PIFSL as the 'beneficial owner' does not have the effect of sale of shares by the pawnee. The pledge has not been discharged or satisfied either in full or in part. PIFSL is not required to account for any sale proceeds which are to be applied to the debt on the actual sale'. Therefore, NCLAT concluded that in view of the law laid down by Supreme Court in PTC India Financial Services Ltd., the reason for reduction of the claim of the Appellant by RP is knocked out.

Regarding second question, the Court observed that the Appellant never acquiesced to the reduction of their claim and agitated it before the CoC and AA. Besides, apart from reduction of claim, no other part of Resolution Plan has been objected by the Appellant. The Appellant is not praying for setting aside the impugned order on any other ground and their prayer in essence is only to accept the entire admitted claim and direct for distribution of assets under the Plan accordingly. Accordingly, the Court concluded that the 'Appellant is entitled to the relief as prayed and it is not necessary to issue any direction for modifying the Resolution Plan'.

Order: - Reduction of the claim of Financial Creditor by

Resolution Professional is set aside. The liability of payment of additional amount to the Appellant shall be borne by Resolution Applicant from amount reserved under the Resolution Plan.

Case Review: *Appeal Disposed of.*

National Agriculture Cooperative Marketing Federation Limited (NAFED) Vs Synergy Petro Products Private Limited, Company Appeal (AT) (Insolvency) No. 862 of 2021, Date of Judgement: October 11, 2022.

Facts of the Case

This appeal under Section 61(1) of IBC was filed by NAFED (Appellant), who is a Creditor of Corporate Debtor (Synergy Petro Products Private Limited), against the order passed by the Adjudicating Authority (New Delhi). The appellant had filed an Application u/s 7 of IBC 2016, before the AA as a Financial Creditor and claimed its License Fee (in terms of Arbitral Award) and to get back the possession of their premises from the Respondents.

The Appellant is a multi-state Co-operative Society formed and registered under the provisions of the Multi State Cooperative Societies Act, 2002 and has given building to the Respondent for the use of in its business. The Respondents is unable to the pay the rent in terms of the Agreement despite reminders as well as Legal Notices, in furtherance of same the Appellant move for Arbitration. As per Arbitral Award the Respondent is liable to pay to the Appellant a license fee along with the Interest on it. In pursuance of order of Ld. District Collector, Alwar, the Appellant got back the possession of the said premise on July 15, 2015. Despite the award being passed on July 10, 2019, and the same becoming enforceable on expiry of a period of 90 days thereafter, the Corporate Debtor failed to make the payment in terms of the award and fails to vacate the premises. Therefore, Appellant filed an Application in terms of Section 7 of the IBC. However, the Adjudicating Authority dismissed the said Application filed by the Appellant under Section 7 of the IBC.

NCLAT's Observations

The court observed that the transactions which transpired between the parties does not partake the character of a 'financial debt' and the Appellant does not qualify to be a Financial Creditor in relation to the Corporate Debtor.

Order: - The court affirmed the order passed by the Adjudicating Authority wherein the rental lease agreement can be 'operational debt' but not 'financial debt'.

Case Review: *Appeal dismissed.*

High Court

Insolvency And Bankruptcy Board of India Vs. & State Bank of India & Ors. W.P.(C) 10189/2018 & CM APPL. 39715/2018, Date of Judgement: November 28, 2022.

Facts of the Case

Writ Petition has been filed by Insolvency and Bankruptcy Board of India, (Petitioner) against the order dated September 05, 2018, passed by the AA in *State Bank of India Vs. Su Kam Power Systems Ltd.* case. The AA held that Regulation 36A of the IBBI (CIRP) 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 September 26, 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 October 05, 2018, the operation of AA's order was stayed. Thereafter, the appeal was disposed of on May 04, 2022, on the term that pending the disposal of the writ petition, interim order dated October 05, 2018 and Regulation 36A continues to operate.

On the final hearing, the Petitioner, citing the *M/s Mohan Gems & Jewels Pvt. Ltd. Vs. Vijay Verma & Anr* and *BSNL Vs. 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.

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.

National Company Law Tribunal (NCLT)

Kotak Mahindra Bank Limited Vs. Jotindra Steel and Tubes. CP (IB) No.12/Chd/HRY/2021 Date of Judgement: October 21, 2022.

Facts of the Case

Kotak Mahindra Bank Limited (Applicant) filed petition under Section 7 of the IBC for initiating CIRP against *M/s Jotindra Steel and Tubes Limited* (Respondent). The applicant had advanced credit facilities to *M/s Mauria Udyog Limited* (associate company of the respondent, hereinafter referred as "Borrower") for an amount of ₹17,50,00,000. The respondent stood as Corporate Guarantor for the said loan and furnished an unconditional corporate guarantee to the applicant expressly stating and undertaking that it would make do payment on behalf of the borrower. Cause of continuous payment defaults made by the borrower in, the applicant classified the borrower as NPA. Thereafter, the applicant invoked the guarantee furnished by the respondent to pay the financial debt on behalf of the borrower to the tune of ₹14,48,48,132.15.

The Respondent contended that it never stood as Corporate Guarantor and no contract of guarantee was ever executed. Further it was stated that the letter of comfort in issue is a document signed by an individual, is undated and is not supported by an authentication of the Board of Directors and no resolution was ever passed by the Board of Directors in support of the said letter, or to provide any guarantee. The respondent stated that the letter of comfort was not stamped and as per Section 35 of the Indian Stamp Act it cannot be tendered as evidence. Further, the respondent quoted Section 185 of the Companies Act 2013 which strictly bars the company from granting loan/guarantee to any other person in whom director of the company are interested.

The question raised before the AA is that whether letter of comfort allegedly issued by the respondent/ amounts to contract of guarantee or not.

NCLT's Observations

The AA held that bare reading of the Section 126 of the Contract Act reveals that in a contract of guarantee, there are three different entities i.e., (i) 'surety', (ii) 'principal debtor' and (iii) 'creditor'. And the said letter of comfort cannot be termed as letter of contract of guarantee because it is neither signed by the creditor nor by the borrower. More so, there is no evidence placed on record to show that the said letter of comfort was signed in pursuance of any resolution passed by the Board of Directors of the respondent. Thus, the said letter of comfort is not in conformity with the provisions of Section 179 and Section 185 of the Companies Act, 2013.

The AA citing Laxmi Pat Surana case was of the view that there is no dispute that petition under Section 7 is maintainable against the corporate guarantors, but findings given in Lucent Technologies are not binding on the facts and circumstances of the case in hand because no

inference can be drawn from the said letter that there was intention to create the liability of guarantee in favour of the petitioner by the respondent.

Further, AA cited that Coordinate Bench of the Tribunal, recently in its order dated August 05, 2022, passed in the matter of IB-197/ND/2022*; M/s Shapoorji Pallonji and Company Private Limited versus M/s ASF Insignia SEZ Pvt. Ltd.*, held that letter of comfort cannot be treated as letter of guarantee.

Order: The respondent cannot be termed as a corporate guarantor based on alleged letter of comfort. Therefore, the present petition is not maintainable against the respondent/corporate debtor and the same is dismissed on the ground of maintainability.

Case Review: *Appeals Dismissed.*