100 LANDMARK JUDGMENTS OF NCLAT

AN INSIGHT INTO IBC

ICSI INSTITUTE OF INSOLVENCY PROFESSIONALS
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ICSI House, 3rd Floor, 22, Institutional Area, Lodi Road, New Delhi - 110 003

Phones : 011-45341048/78
Website : www.icsiiip.com, E-mail : info@icsiiip.com

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Foreword

Codification of a new law is always a humongous exercise. It takes the legislature to not only diligently draft it and take-off from the statute book all previous legislation(s) concerning the subject, but, at the same time, it is also to be ensured that no unintended effect is caused to other legislations. IBC is one such codification which has not only introduced a complete sea-change in the debtor-creditor relationship, but has also led to some of the unthought-of recoveries made by Banks and Financial Institutions.

There can be no second thought that under the IBC framework, the role played by Insolvency Professionals (IPs) in realising the true spirit of law is very critical. In fact, under the entire machinery set-up under the Code, the role of an IP is the most crucial one. It occupies a pivotal position between the debtors and creditors on one hand and the adjudicating authority on the other hand. Efficiency of the CIRP process hinges on his timely actions and diligence in obtaining, assessing and processing of information.

I thank ICSI IIP for sending me a copy of the manuscript of its publication "*100 landmark judgments of NCLAT – An Insight into IBC*" for my thoughts and views on it. I believe that the efforts made by *ICSI IIP*, through its present publication, to bring forth in a very concise form, some of the most critical issues as have been settled by Hon'ble NCLAT, is highly appreciable. The manner in which the ratio(s) of Hon'ble NCLAT's judgments have been culled out is something that the readers shall definitely get benefited from. It is a fact that understanding of a subject like IBC (and its developments) takes a lot of efforts (and time) to be invested by the Professionals into the exercise of reading of voluminous landmark judgments. In such circumstances, having a handbook like the present one is nothing but an advantage for the professionals.

I wish the Insolvency Professionals *the very best* in all their endeavours!

CS Ranjeet Pandey
President, ICSI

About the Book

The publication is essentially about making the legal provisions in the *Insolvency & Bankruptcy Code, 2016* and the interpretations thereof easily discernible for the readers. The approach adopted thereof is through analysis of 100 crucial landmark judgments delivered by Hon'ble National Company Law Appellate Tribunal (NCLAT). While IBC as a legislation (read with the Rules and Regulations framed thereunder) is the chief source of law, the law acquires its final shape through the case-law itself. The doctrine of *Stare Decisis* further strengthens importance of case-law.

The landmark judgments, as delivered by Hon'ble NCLAT, have been identified and their ratios culled out. The issues dealt with in the publication have a very wide spectrum, and include subjects like "*scope of s. 230 of Companies Act during liquidation proceedings*", "*issues related to RP's fee*", "*scope of definitions of 'Financial Creditor', 'Financial Debt', 'Default', 'Moratorium',* "*ineligibility criteria u/s. 29A*", "*effects of approval of a resolution plan*", "*application of doctrine of subrogation in guarantee contracts*", "*scope of commercial wisdom of CoC*", "*rights of Resolution Applicant*", "*treatment of statutory dues as operational debt*", "*overriding effect of IBC over other legislations*", "*application of Limitation Act to IBC proceedings*", "*classification of Operational Creditors*", *"Rights of promoters in case of an MSME", "simultaneous proceedings against CD and Guarantor",* "*inevitable consequence of liquidation after completion of CIRP period*", "*reference of matters by AA to IBBI*", "*non-applicability of moratorium to criminal law proceedings*", "*Equitable treatment of Operational Creditors*", "*right of withdrawal of application under s. 12A*", "*OC's right of representation in CoC*", "*binding nature of Resolution Plan*", "*supply of essential services during CIRP*", "*rights of suspended Board of Directors of CD*", "*exclusion of Gratuity and Provident Fund from CD's assets*", "*feasibility and viability test of a Resolution Plan*", "*CIRP cost*", "*Disciplinary proceedings against RP*" *et al*.

I am quite positive that the readers shall find this book useful and a handmade guide for quick reference.

Date : 18 September, 2019

CS Alka Kapoor
Chief Executive Officer
ICSI Institute of Insolvency Professionals

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LIST OF ABBREVIATIONS AND REFERENCES

Abbreviation(s)	Reference(s)
AA	National Company Law Tribunal/Adjudicating Authority
CD(s)	Corporate Debtor(s)
CIRP	Corporate Insolvency Resolution Process
CIRP Regulations	IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
CoC	Committee of Creditors
Code	Insolvency and Bankruptcy Code, 2016
FC(s)	Financial Creditor(s)
I&B Code/IBC	Insolvency and Bankruptcy Code, 2016
NCLAT	National Company Law Appellate Tribunal
OC(s)	Operational Creditor(s)
RA	Resolution Applicant
RP	Resolution Professional
s.	Section
SARFAESI	The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002
ss.	Sections
u/s.	Under section

1

A Partner cannot, after dissolution of the firm (on account of death of one of its partners), constitute another firm in the same name and file for initiation of CIRP proceedings against one of the Corporate Debtors of the original firm (which stood dissolved).

Case title	Gay Printers v. Pawan Buildwell (P.) Ltd.
Date	16.01.2018
Order Number	Company Appeal (AT) (Insolvency) 17 and 18 of 2018

A s. 7, IBC application was filed in the name of the appellant, a Partnership Firm, which got rejected by AA, and further, the review petition filed against AA's order also got rejected subsequently. The ground for such rejection was that the applicant does not fall within the ambit of an 'FC'. In the facts of the case, the said application u/s. 7, IBC was filed in the same name as the erstwhile firm, which, on account of death of one of its partners, got dissolved. The Appellant could not produce any material of representation from deceased partner. The Appellant also failed to place any proof that the assets and liabilities of the erstwhile firm stood assigned to the Applicant.

Hence, new firm could not be said to be in continuation of and as successor to the earlier firm, and therefore, both firms are separate entities. Thus, it was held that the Appellant failed to establish its status as FC. AA dismissed the appeal on merits and also on the ground of Appellant's locus to file the claim.

2

An order of Moratorium will not apply to payment of current charges payable by the Corporate Debtor for supply of Essential Goods and/or Services.

Case title	Dakshin Gujarat VIJ Company Ltd. v. M/s. ABG Shipyard Ltd. & Anr.
Date	08.02.2018
Order Number	Company Appeal (AT) (Insolvency) No. 334 of 2017

An appeal was filed questioning applicability of an order of 'Moratorium' (passed u/s. 14, IBC) to payment of current charges payable by the CD for supply of essential goods or services.

While deciding the issue, NCLAT observed that, from the provisions of 'I&B Code' and Regulations thereof, no prohibition can be made out or a bar inferred in respect of payment of current charges of essential goods and/or services. Such payment is not covered by an order of 'Moratorium'. It was further held that Regulation 31 cannot override the substantive provisions of s. 14, IBC, and therefore, if any cost is incurred towards supply of the essential goods and/or services during the period of 'Moratorium', it may be accounted towards 'Insolvency Resolution Process Costs', law does not stipulate that the supplies of essential goods, including the electricity or water, to be supplied free of cost, till completion of the period of 'Moratorium'. Payment if made towards essential goods and/or services to ensure that the Company remains on-going, such amount can be accounted towards 'Insolvency Resolution Process Costs'. Further, the proposition that essential goods (such as electricity) are to be supplied free of cost and the CD is not liable to pay the amount till the completion of the period of 'Moratorium' was negated by the NCLAT. It was further held that if the CD has no fund even to pay for supply of essential goods and/or services, in such a case, the RP cannot keep the Company on-going just to put additional cost towards supply of electricity, water etc. In case the CD is non-functional due to paucity of funds, and has become sick, the question of keeping it on-going does not arise. The appeal was disposed of with the aforementioned observations.

3

Section 238, IBC does not operate to give IBC an overriding effect over winding up proceedings undergoing in respect of the CD.

Case title	Innoventive Industries Ltd. v. Kumar Motors Pvt. Ltd.
Date	09.02.2018
Order Number	Company Appeal (AT) (Insolvency) No. 181 of 2017

Innoventive Industries Limited (Appellant) filed an application u/s. 7, IBC for initiation of CIRP against *Kumar Motors Private Limited* (CD).

The AA, Mumbai Bench, rejected the application on the ground of pendency of a winding-up proceeding against the CD and left the question open for consideration whether the application was barred by limitation or u/s. 11(a), IBC or due to pendency of the arbitration proceedings.

NCLAT observed that, in this case, an order of winding up has already been passed by the Hon'ble High Court and the said proceedings are pending before the High Court. In view of such facts and circumstances, the winding up proceedings are saved by the IBC. Section 238, IBC will not have an overriding effect over such winding up proceedings. Therefore, initiation of CIRP proceedings against a CD in respect of whom a winding-up order has already been passed is not permitted under the law.

4

An order of Moratorium is applicable to proceedings pending before any court against the CD or Guarantor, but not applicable to filing of an application for triggering CIRP against a Corporate Guarantor or Personal Guarantor.

Case title	ICICI Bank Ltd. v. Vista Steel Pvt. Ltd.
Date	02.05.2018
Order Number	Company Appeal (AT) (Insolvency) No. 13 of 2018

ICICI Bank Ltd. (Appellant – FC) filed an application under s. 7, IBC for initiation of CIRP against *Vista Steel Pvt. Ltd*. (Guarantor – Corporate Debtor). The AA, Kolkata Bench, by impugned order dismissed the application on the ground that during the pendency of the proceeding against the Principal Borrower, no CIRP can be initiated against the Guarantor.

NCLAT held that an order of moratorium passed u/s. 14 would be applicable to the proceedings against the CD and the Guarantor, if pending before any court, but the same would not be applicable for filing application for triggering CIRP u/s. 7 or 9 of the Code against the guarantor or personal guarantor. NCLAT further held that, the resolution plan having been approved subsequently would not affect the rights of the FC, who filed the application u/s. 7 much prior to approval of the resolution plan. Hence, the decision of the AA was set aside and the case was remitted to the AA for admission of the application.

5

The Adjudicating Authority is required to give an opportunity to applicant to rectify the defect before rejecting an application on technical grounds.

Case title	Satyaprakash Aggarwal & Ors. v. Vistar Metal Industries Pvt. Ltd.
Date	21.05.2018
Order Number	Company Appeal (AT) (Insolvency) No 136 of 2018

An appeal was preferred by FCs against the order of AA rejecting joint applications filed u/s. 7 of the Code for initiation of CIRP on a technical ground that dates of default were not specifically mentioned, without allowing time to rectify it.

NCLAT set aside the order passed by AA, stating that, before rejecting the application, the AA was required to give an opportunity to the Appellants to rectify the defect. Further, it was also held that AA is not required to decide as to what is the actual amount of claim and other details, which is required to be determined by RP after initiation of CIRP.

6

The Resolution Professional is required to give notice of meeting of Committee of Creditors to Operational Creditors and to the suspended Board of Directors, who, besides attending the meetings of the CoC, may also express their views for coming to the conclusion.

Case title	ANG Industries Ltd. v. Shah Brothers Ispat Pvt. Ltd. &Ors.
Date	24.05.2018
Order Number	Company Appeal (AT) (Insolvency) No 109 of 2018

The RP challenged an order of AA wherein he was directed to include the OCs (having more than 10% of the aggregate of the debt) in the meeting of CoC.

NCLAT dismissed the appeal of the RP and gave reference of its order passed in the matter of *Rajputana Properties Pvt. Ltd*. v. *Ultra Tech Cement Ltd. & Ors*. in I.A. No. 594 of 2018 in Company Appeal (AT) (Insolvency) No. 188 of 2018 wherein a similar issue fell for consideration.

NCLAT pointed out that from s. 24(3) of the Code it is clear that the RP is not only required to give notice of the meeting to 'the members of CoC' but also to the members of (suspended) Board of Directors or partners of the corporate person as the case may be. It further held that the OCs or their representatives are also to be informed to attend the meeting of CoC, if the amount of the aggregate dues is not less than ten per cent of the debt. Section 24(4) of the IBC shows that the Directors, Partners, Representatives of OCs may attend the meeting of CoC but have no right to vote in such meetings. NCLAT also pointed out that the intent of legislature is very clear that those who attend the proceeding, such as (suspended) Board of Directors or its Partners, OCs or its representatives and RA(s) are not mere spectators, but they may convey their views to the CoC to enable it to come to a conclusion.

Note : Please also see the note at page 20 (infra) referring to judgment of Hon'ble Supreme Court dated 31-1-2019 on similar issue in the matter of *Vijay Kumar Jain* v. *Standard Chartered Bank & Ors*. in Civil Appeal No. 8430 of 2018.

7

An application for Corporate Insolvency Resolution Plan under Section 10 of the Code by the Corporate Debtor is not maintainable if any winding up proceeding has already been initiated against the Corporate Debtor by the Hon'ble High Court or Tribunal or a liquidation order has been passed.

Case title	Indiabulls Housing Finance Ltd. v. Shree Urban Infrastructure Ltd.
Date	30.05.2018
Order Number	Company Appeal (AT) (Insolvency) No 252 of 2018

An appeal was preferred by an FC whose application for initiation of CIRP was dismissed by the AA for the reasons that winding up proceeding against the 'CD' had already been initiated before Hon'ble High Court of Bombay.

NCLAT, while referring its other judgements passed on the said issue, held that if any winding up proceeding has been initiated against the CD by the Hon'ble High Court or Tribunal or a liquidation order has been passed, in such a case, the application under s. 10 is not maintainable. However, mere pendency of a petition for winding up, where no order of winding up or order of liquidation has been passed, cannot be ground to reject the application.

Consequently, NCLAT dismissed the appeal stating that High Court of Bombay has already ordered for winding up of the CD, which is the second stage of the proceeding. Therefore, initiation of 'CIRP' which is the first stage of resolution process in respect of the same CD does not arise.

8

All claims submitted are not required to have matured. Debt owed for payment in future, if not taken into consideration, does not extinguish automatically. Creditor may choose to submit claim on maturity, subject to survival of the CD.

Case title	Andhra Bank v. F.M. Hammerle Textile Ltd.
Date	13.07.2018
Order Number	Company Appeal (AT) (Insolvency) No 61 of 2018

An appeal was preferred by Andhra Bank claiming to be an FC, being guarantor of the CD. The claim was not matured at the time of initiation of CIRP. The AA rejected the claim in view of language of s. 3(6), IBC, as the Appellant has no right to claim any amount. The AA further observed that the right of remedy of Appellant can arise only in case of breach of contract.

NCLAT held that it is not necessary that the claims submitted by the Creditor should be a claim matured on the date of initiation of Resolution Process/ admission. Even in respect of a debt, which is due in future on its maturity, the FC or OC or a Secured Creditor or an Unsecured Creditor can file such claim. Therefore, any indemnity obligation in respect of a guarantee also comes within the meaning of 'Financial Debt' as per s. 5(8) of the Code as the debt has been disbursed against "consideration for time value of money".

NCLAT clarified that even if the resolution plan gets approved and the successful RA takes over the management of CD, the CD will continue to be the debtor of 'Andhra Bank' as their right will not cease since it cannot raise claim at this stage.

9

It is not desirable for Committee of Creditors to record reasons for replacing the Interim Resolution Professional/Resolution Professional.

Case title	State Bank of India v. Ram Dev International Ltd.
Date	16.07.2018
Order Number	Company Appeal (AT) (Insolvency) No. 302 of 2018

Through this appeal only, earlier functioning RP raised an issue that he was replaced by CoC without any reasons or adverse remarks. However, NCLAT was of the view that it is not desirable to record the reasons in view of the following :–

- Recording any adverse opinion for replacement of RP will not only harm him for the present, but will also affect him in future during appointment as an RP in another proceeding. In such a case, the CoC will have to refer the matter to IBBI for initiation of departmental proceeding, which is also not desirable in all the cases.
- If the CoC forms its opinion on the basis of performance of the RP and not because of allegation, it will also go against the RP in interest of the Resolution Process.

NCLAT, while setting aside impugned order passed by the AA, Principal Bench, New Delhi, replaced the RP to ensure early completion of the Resolution Process.

10

Resolution Professional, except for disciplinary proceeding or ineligibility under the Insolvency and Bankruptcy Code, cannot be held to be ineligible for appointment in a CIRP.

Case title	State Bank of India v. Ram Dev International Ltd.
Date	16.07.2018
Order Number	Company Appeal (AT) (Insolvency) No. 302 of 2018

An appeal was preferred by one of the members of CoC against the decision of AA wherein an RP was held ineligible on the ground that he was on the panel of erstwhile State Bank of Hyderabad, which subsequently got merged with the State Bank of India. In the instant proceedings, SBI was one of the members of the CoC and the said RP was confirmed as an RP by majority voting share of the CoC.

NCLAT, while setting aside the impugned order of AA, held that, except for pendency of a disciplinary proceeding or ineligibility in terms of provisions of the Code, there is no bar for appointment of a person as an RP. An RP, if empanelled as an Advocate/Company Secretary/Chartered Accountant with one or other FC, the said fact cannot be a ground to reject his appointment as an RP, if otherwise there is no disciplinary proceeding pending, or if it is shown that the person is an interested person being an employee or in the payrolls of any of the FC.

11

Gratuity Trust Fund cannot be treated as an asset of the Corporate Debtor.

Case title	Somesh Bagchi & Ors. v. Nicco Corporation Ltd., through Liquidator
Date	18.07.2018
Order Number	Company Appeal (AT) (Insolvency) No. 209 of 2018

An appeal was preferred by the retired employees of *Nicco Corporation Ltd,* which was undergoing Liquidation, for the grievance that the Liquidator is deviating the gratuity fund of the employees for payment of dues of Creditors in terms of s. 53 of the Code.

In the proceedings, the Liquidator clarified that the 'Gratuity Trust Fund' of employees has not been treated as asset of the CD, nor any amount has been disbursed from the said fund to any Creditor of the CD. The NCLAT appreciated the stand taken by the Liquidator. NCLAT, accordingly, dismissed the application observing that the issues pertaining to question of shortage in the fund, or as to who is to make good of such shortage amount, or as to who is to ensure that the amount is duly paid to ex-employees/workmen/ officers, etc. could not be decided by the AA or the Appellate Tribunal. They were allowed to move before appropriate authority or a court of competent jurisdiction, whoever may take care of their grievances.

12

The Board of Directors of a Corporate Debtor can file an application under Section 10, IBC for initiation of Corporate Insolvency Resolution Process in respect of itself, but with the approval of the shareholders.

Case title	Gaja Trustee Company Private Limited & Ors. v. Haldia Coke and Chemicals Private Limited
Date	19.07.2018
Order Number	Company Appeal (AT) (Insolvency) No. 137 of 2017

An order passed by AA, Division Bench, Chennai admitting an application for initiation of CIRP u/s. 10, IBC came under challenge in the instant appeal. The issues for decision before Hon'ble NCLAT were: (i) whether it is mandatory for the Board of Directors to place the proposal before the shareholders in the Extra Ordinary General Meeting (EoGM) before moving an application u/s. 10, IBC, and (ii) whether the decision of the Board of Directors to file an application u/s. 10, IBC without approval of the shareholders obtained in an EoGM is against the provisions of the Articles of Association of the Company and other provisions of law.

The NCLAT, after taking into account of ratio of judgments passed in the matters of *John Tinson & Co. Pvt. Ltd. & Ors.* v. *Surjeet Malhan (Mrs) and Anr.*, *Naresh Chandra Sanyal* v. *Calcutta Stock Exchange Association Ltd.* and *Life Insurance Corporation of India* v. *Escorts Ltd. and Ors.* as also the relevant clauses of Article of Association (AoA) of the CD whereunder the Board of Directors of CD was not empowered to file an application for its own liquidation or dissolution or for initiation of CIRP, finally concluded that the application u/s. 10 filed by the person authorized by the Board of Directors was not maintainable.

13

"Security Interest" does not include "Performance Bank Guarantee" given by Corporate Debtor and can be invoked by the Creditor during the moratorium period.

Case title	GAIL (India) Limited v. Rajeev Manaadiar & Ors.
Date	24.07.2018
Order Number	Company Appeal (AT) (Insolvency) No. 319 of 2018

The Appellant preferred an appeal against order passed by AA (Mumbai Bench), whereby the Appellant was prohibited from invoking the Performance Bank Guarantee against the CD on the ground that it cannot be invoked during the period of Moratorium. Appellant submitted that he intended to invoke part of the Performance Bank Guarantee and not the whole of it.

NCLAT held that as per the language employed in s. 3(31) of the Code, "security interest" does not include the Performance Bank Guarantee, thereby, the Performance Bank Guarantee given by the CD in favour of the Appellant is not covered by s. 14 of the Code, and thus the Appellant is entitled to invoke its Performance Bank Guarantee in full or in part.

14

Committee of Creditors being an expert body, the Adjudicating Authority cannot sit in appeal over the decisions of Committee of Creditors on matters such as eligibility criteria for Resolution Applicant etc.

Case title	Kannan Tiruvengandam v. M.K. Shah Exports Ltd. & Ors.
Date	26.07.2018
Order Number	Company Appeal (AT) (Insolvency) No 203 of 2018

M.K. Shah Exports Ltd. (RA) had filed an application for directions to the RP and the CoC to reasonably relax the eligibility criteria regarding requirement of minimum tangible net worth of Rs. 400 crore for Category-A prospective Resolution Applicants as mentioned in the advertisement.

The RP contested the prayer made by the RA contending that the criteria were already approved by the CoC. The AA vide the impugned order dated 26th April, 2018 referred to advertisement published and observed that the RP has left avenues for modification of the terms and conditions.

NCLAT held that the question of eligibility criteria regarding requirement of minimum tangible net worth for one or other category of RAs and other criteria are matters which can be dealt with by expert committee like CoC. Further, NCLAT held that the AA has no jurisdiction to sit in appeal over the decision of expert bodies relating to eligibility criteria till it is not shown that the same is perverse or against any of the provisions of the Code or existing law.

The appeal was thus allowed with direction to the RP and the CoC to complete the process immediately.

15

An order of moratorium will not cover or apply to a criminal proceeding initiated under Section 138 of Negotiable Instruments Act, 1881.

Case title	Shah Brothers Ispat Pvt. Ltd. v. P. Mohanraj & Ors.
Date	31.07.2018
Order Number	Company Appeal (AT) (Insolvency) No. 306 of 2018

The Appellants had filed two complaints u/s. 138 of the Negotiable Instrument Act, 1881 (NI Act) before the Metropolitan Magistrate; one complaint before the initiation of CIRP, and another complaint after the passing of order of moratorium.

In the instant appeal the order under challenge were passed by the AA directing the Appellants to withdraw the complaint case filed u/s. 138 of NI Act, 1881 treating it as a proceeding filed after order of moratorium with observation that such action amounts to deliberate attempt on the part of Appellant and sheer misuse of the process of law.

Thus, the question that arouse for consideration before NCLAT was whether the order of moratorium covers a criminal proceeding initiated u/s. 138 of Negotiable Instrument Act, 1881 which provides punishment of imprisonment and fine. NCLAT held that s. 138 is a penal provision which empowers the court of competent jurisdiction to pass order of imprisonment or fine, and thus cannot be held to be proceedings or any judgment passed thereon be called a decree of money claim. Thus concluding, NCLAT held that no criminal proceeding is covered u/s. 14, IBC.

16

Adjudicating Authority or Appellate Authority cannot decide whether an employee is an ex-employee or present employee of the CD.

Case title	Yogesh Kumar & Ors. v. Shantanu T. Ray, Resolution Professional of M/s. AML Steel and Power Ltd. &Ors.
Date	30.07.2018
Order Number	Company Appeal (AT) (Insolvency) No. 403 of 2018

The grounds of appeal preferred by the Appellants were that the RP was wrongly treating the appellants as ex-employees of CD. Looking into the facts of the case, NCLAT concluded that there is a dispute as to whether the Appellants are the present or ex-employees of the CD. The Appellate Tribunal further held that such an issue cannot be decided either by the AA or by the NCLAT. While directing the Appellants to approach the RP, NCLAT suggested the RP to take into consideration the pay roll and attendance sheet or whatever record is available in the office of the CD for ensuring that the CD continues as on-going concern.

17

At the admission stage, Adjudicating Authority is to be satisfied that a "default" has occurred, and the Corporate Debtor is entitled to point out that default has not occurred. No other person has right to be heard at admission stage.

Case title	Axis Bank Ltd. v. Lotus Three Developments Ltd. & Ors.
Date	31.07.2018
Order Number	Company Appeal (AT) (Insolvency) No. 246 of 2018

In this appeal an order passed by AA, Bengaluru Bench, wherein directions were passed for impleadment of the Respondents (who were the shareholder and personal guarantor of the CD) as party to the CIRP proceedings was sought to be challenged. The grounds of challenge was that the shareholders are not a necessary party as the CD is represented through its Board of Directors.

After taking into account the facts and circumstances of the case as well as the contentions raised by the parties, the NCLAT held that, while admitting or rejecting a CIRP application, the AA is only to satisfy itself that a default has occurred and that the CD is entitled to point out that such "default" has not occurred in the sense that debt is not due. The NCLAT further held that no other person has a right to be heard at the admission stage of an application filed u/s. 7 or u/s. 9 of the Code including the 'shareholders' or the 'personal guarantor' etc.

18

Appeals are not maintainable if they are filed by Corporate Debtor through (suspended) Board of Directors.

Case title	M/s Shilpi Cable Technologies Ltd. v. Macquarie Bank Ltd.
Date	08.08.2018
Order Number	Company Appeal(AT)(Insolvency) 101& 102 of 2017

An appeal was earlier preferred by the suspended Board of Directors of the CD against the two orders passed by the AA, Principal Bench, New Delhi, regarding initiation of CIRP proceedings against the CD and both orders were set aside. Against the said order, the Respondent Bank preferred an appeal before Hon'ble Supreme Court which remitted the appeals. The Appellant took the plea that as per agreement reached between the parties, they have agreed to be governed by English law and therefore, the Respondent was barred from initiating the proceeding under the Code. NCLAT observed that such plea cannot be accepted in view of substantive provisions of the Code as it is always open to the Respondent to file an application u/s. 9 of the Code, if there is debt and default. Merely because there is a provision of arbitration in the agreement, the same cannot be ground to hold that there is an existence of dispute.

The NCLAT further observed that both appeals were not maintainable having filed by the CD through suspended Board of Directors in view of judgment passed by the Hon'ble SC in *Innoventive Industries Ltd*. v. *ICICI & Anr*.

19

Resolution plans, fulfilling the criteria laid down under Sections 30(2) & 29A, IBC can be approved by CoC and the Adjudicating Authority cannot sit in appeal over the financial implications of such a Resolution Plan.

Case title	Rashidbhai Ismail Tharadra & 2 Ors. v. Raj Oil Mills Limited & Anr.
Date	08.08.2018
Order Number	Company Appeal (AT) (Insolvency) No. 297 of 2018

An appeal was preferred by *Rashidbhai Ismail Tharadra* (Appellant), Promoter of *Raj Oil Mills Limited* CD and Personal Guarantor in favour of the FC challenging the order passed by AA thereby approving the resolution plan which was earlier approved by the CoC. Appellant contended that the CD would have realized total amount from RA.

The appeal was dismissed on the grounds that there was no question hearing the Personal Guarantor in a CIRP and the Appellant being Promoter was also present in the meeting of the CoC, and that it is not a proceeding for recovery of money and the best of all Resolution plans submitted by different Resolution Applicants, which fulfills the conditions in terms of s. 30(2), and if does not attract ineligibility clause u/s. 29A of the Code, it is always open to the CoC to approve the same. The AA or the Appellate Tribunal cannot sit in appeal with respect to financial implications of the Resolution Plan.

20

Resolution Plans are confidential. Hence, cannot be handed over to (suspended) Board of Directors or Operational Creditors or the competitor Resolution Applicants.

Case title	Vijay Kumar Jain v. Standard Chartered Bank Ltd. & Ors.
Date	09.08.2018
Order Number	Company Appeal (AT) (Insolvency) No. 442 of 2018

An appeal was preferred by the Director of Ruchi Soya Industries Limited (CD) with the grievance that the CoC has not provided the (suspended) Board of Directors with copies of the resolution plans for their comments. Reliance was placed on Regulations 24 & 30 of CIRP Regulations. While dismissing the appeal, NCLAT held that though the (suspended) Board of Directors have been allowed to attend the meeting in which their resolution plans are considered, the Appellate Tribunal never allowed the resolution plan to be handed over to the (suspended) Board of Directors or to the OC or to other competitor RAs who will attend the meeting.

NCLAT further held that resolution plans are confidential and cannot be handed over to any other person including the competitor RAs. Board of Directors cannot decide the viability and feasibility of a Resolution Plan, and is not competent to restructure their debt in order to make the CD as a going concern. However, if the CoC is still negotiating the matter with the RAs, in such a case the representative of the Board of Directors may give its suggestions.

Note : An appeal (Refer Civil Appeal No.8430 of 2018 *Vijay Kumar Jain* v. *Standard Chartered Bank & Ors*.) was preferred against the above NCLAT's order before the Supreme Court wherein the Apex Court (order dated 31st January, 2019) came to a conclusion that a combined reading of IBC and the Regulations thereunder leads to the conclusion that members of the erstwhile Board of Directors, being vitally interested in Resolution Plans that may be discussed at meetings of the CoC, they must be given a copy of such plans as part of "documents" that have to be furnished along with the notice of such meetings. The argument that "committee" and "participant" are used differently was rejected. The petition was thus allowed.

21

Any person who has a right to claim payment, whether matured or otherwise, can file their claim.

Case title	Axis Bank Limited v. Edu Smart Services Private Limited
Date	14.08.2018
Order Number	Company Appeal (AT) (Insolvency) No. 304 of 2018

An appeal was preferred by *Axis Bank Limited* (Appellant) against an order passed by AA, Principal Bench, New Delhi, rejecting the claim of the Appellant on the grounds that the claim of the Appellant was contingent as on the date of commencement of CIRP in respect of the CD, and therefore, the same cannot be treated as a Financial Debt and moratorium imposed u/s. 14 in respect of the CD applies at the time of invocation of the Corporate Guarantee.

The Appellate Tribunal on perusal of the Master Restructuring Agreement found that Axis Bank is lender of the Corporate Guarantor (*Edu Smart Services Pvt. Ltd*.–CD) and in terms of the Corporate Guarantee, to give effect to the Guarantee, the Lenders may act and treat the Guarantor as the Principal Debtor to the Lenders.

CoC had taken a plea that the Appellant having not invoked its Corporate Guarantee given by the CD, no amount was due till insolvency commencement date, hence, it cannot form part of claim during the CIRP and that the same amount cannot be claimed simultaneously against the Principal Borrower and the Corporate Guarantor.

The Appellate Tribunal held that the claim of the parties should be as on the date of initiation of the CIRP. Any person who has right to claim payment, as defined u/s. 3(6), is supposed to file its claim, whether matured or unmatured. It does not mean that the persons whose debt has not matured cannot file claim. The maturity of a claim or default of debt is not the guiding factors to be noticed for collating or updating the claims.

It was further held that liability or obligation in respect of a claim which is due from any person includes both the ‘Financial Debt’ and ‘Operational Debt’. Thus, it was held that *Axis Bank Ltd.* is to be treated as the FC of the CD.

22

Counter Corporate Guarantor comes within the meaning of "Financial Creditor".

Case title	Export Import Bank of India v. Resolution Professional JEKPL Private Limited
Date	14.08.2018
Order Number	Company Appeal (AT) (Insolvency) No. 304 of 2017

An appeal was preferred by *EXIM Bank* (Appellant) against the order passed by AA, Allahabad Bench, for not treating the Appellant as FC. It was further submitted that 'Counter Corporate Guarantee' is not liable for any Financial Debt owed to *EXIM Bank*.

Exim Bank had disbursed a Dollar Loan to a Netherland based company, namely, *Jubilant Energy N.V.*, (*JENV*) for which Corporate Guarantee was executed by the *Jubilant Enpro Private Limited* (*JEPL*). Contractual obligation of *JEPL* (Corporate Guarantor) was further secured by the execution of 'Corporate Guarantor Guarantee' with 'Counter Corporate Guarantee' by *JEKPL* (CD).

According to *Exim Bank*, Principal Borrower having defaulted and the liability of Corporate Guarantee as 'Counter Corporate Guarantee' being joint and co-extensive with Principal Borrower, it falls within the meaning of FC in terms of s. 5(7) r/w s. 5(8)(h), IBC.

The appeal was allowed as on perusal of deeds of *JEPL* and *JEKPL*, as it was found that both are liable jointly and severally as Principal Debtor for the *EXIM Bank*. Thus, the 'Corporate Counter Guarantee' in question in respect of due performance and discharge of obligations and liabilities of *JEPL* to *EXIM Bank*, essentially comes within the ambit of its Additional Guarantee. So admittedly, *JEKPL* has given the 'Counter-Indemnity Obligation' by way of Guarantee (Counter Guarantee) and thereby it falls within clause (h) of s. 5(8) as such 'Counter-Indemnity Obligation' in respect of Counter Guarantee has been given by *JEKPL* as the *EXIM Bank* disbursed the debt against the consideration for time value of money in favour of the Principal Borrower (*JENV*).

23

There is no requirement to issue notice to the Operational Creditors if a Resolution Plan is already approved by the Committee of Creditors. Resolution Plan is binding on the Corporate Debtors, Financial Creditors, Operational Creditors and all other stakeholders, including guarantors.

Case title	Madhya Gujrat Vij Company Ltd. v. Kalptaru Alloys Pvt. Ltd. & Ors.
Date	24.09.2018
Order Number	Company Appeal (AT) (Insolvency) No. 211 of 2018

An appeal was preferred by *Madhya Gujarat Vij Company Ltd.* (Appellant), one of the OC of *Kalptaru Alloys Pvt. Ltd*. (CD) against the order passed by the AA, Ahmedabad Bench, approving the resolution plan submitted by *Shubhmangal Exim Private Limited*.

The Appellant contented that the order was passed without notice and hearing the Appellant. Further it was contented that since Appellant supplied electricity to the CD under the provisions of 'Gujarat Electricity Regulatory Commission (Electricity Supply Code and Related Matters) Regulations, 2015', no electrical connection can be restored in favour of the 'CD' till the total amount due to the Electricity Company is paid.

The appeal was dismissed stating that there is no requirement to issue notice to the OC(s) or any other 'creditors' for approving a 'Resolution Plan' under s. 31 of the Code having already been approved by the CoC by majority voting share. It was further held that since the Appellant is bound by the provisions of s. 31, IBC which states that the Resolution Plan is binding on the 'CDs', 'FCs', 'OC(s)' and all other 'stakeholders' including 'guarantors', therefore in view of s. 238, IBC, provisions of 'Gujarat Electricity Regulatory Commission (Electricity Supply Code and related matters) Regulations, 2015' cannot override the provisions of the Code, and as per the approved resolution plan, a sum of Rs. 80.80 lakhs having been paid by successful 'RA', the Appellant, in its term is required to restore the electricity connection of CD.

24

No action can be taken against the moveable and immoveable assets of the personal guarantor unless a separate application under Section 60(2), IBC is filed.

Case title	Ashutosh Singhania v. Liquidator, Vindhiya Vasini Industries Ltd. & Anr.
Date	25.09.2018
Order Number	Company Appeal (AT) (Insolvency) No. 439 of 2018

The instant appeal was preferred by *Ashutosh Singhania* (Appellant), legal heir of the personal guarantor in the matter, wherein the Appellant challenged the order passed by AA, Mumbai Bench, directing inclusion of the property of personal guarantor for liquidation.

The appeal was allowed holding that application of the Code to a personal guarantor of a CD can be decided under s. 60(2), IBC and no action can be taken against the moveable and immoveable assets of the personal guarantor in the absence of separate application under s. 60(2), IBC. Further, the impugned order directing to include the property of the personal guarantor for liquidation was held illegal, and thus set aside.

25

Adjudicating Authority cannot pass any observation against Resolution Professional (RP) without giving notice of hearing to him.

Case title	Vandana Garg, Resolution Professional (RP) of Jyoti Structures Ltd. v. State Bank of India
Date	26.10.2018
Order Number	Company Appeal (AT) (Insolvency) No. 507 of 2018

An appeal was preferred by *Ms. Vandana Garg* (Appellant/RP) against part of the order of AA, Mumbai Bench, wherein certain observations were made against the Appellant who allowed FCs to vote for the Resolution Plan subsequent to the conclusion of voting on the basis of bona fide belief and in absence of any deliberate inaction and intention.

The appeal was allowed setting aside the order of the tribunal stating that RP allowed their voting share to ensure that the CD does not go for liquidation and there was no occasion for the AA to pass any observation against the Appellant which will affect her career in future. It was further held that before making any observations against the RP, individual notice should be given to state as to why observations should not be made against him/her for alleged act of omission or commission.

26

Resolution Professional has the right to verify the claims to be admitted.

Case title	Dr. Ramakant Suryanath Pande v. C. S. Prakash K. Pandya, Resolution Professional
Date	26.10.2018
Order Number	Company Appeal (AT) (Insolvency) No. 525 of 2018

An appeal was preferred by *Ramakant Suryanath Pande* (Appellant) challenging the order of AA whereunder it upheld the decision of the RP not approving the claim of the appellant even though the amount given by Appellant to the CD was shown as a loan in the records of CD itself and for which interest had accrued and TDS was deducted. During the course of the hearing, RP had contended that the Resolution Plan was approved by CoC and submitted before the AA u/s. 31, IBC for orders. The matter was heard by the AA and order thereof reserved.

After considering the facts and circumstances of the case, the NCLAT disposed-off the appeal directing the RP to reconsider the issue as to whether the claim made by the Appellant is proper or not, and decide the question whether the Appellant is entitled for any amount. It was further held that if the Resolution Plan is sanctioned by the AA, it shall be subject to the decision as may be taken by the RP regarding claims to be considered.

27

Regulation 30A Of IBBI (IRPCP) Regulations cannot over-ride substantive provisions of Section 12A, IBC. Hence, an application for withdrawal under Section 12A, IBC can be filed only by the original applicant itself and not by the Resolution Professional.

Case title	Francis John Kattukaran v. The Federal Bank Ltd. & Anr.
Date	13.11.2018
Order Number	Company Appeal (AT) (Insolvency) No. 242 of 2018

In the facts of the case, the CoC, by a majority vote of 100%, had approved the proposal for withdrawal of the CIRP application, and the RP had subsequently moved an application u/s. 12A of the Code. The applicant had argued that under Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the RP can also move the application for withdrawal.

Deciding on the question of authority to file application u/s. 12A, IBC, Hon'ble NCLAT held that such an application for withdrawal can be filed only by the original applicant who had initially filed the application u/s. 7 or 9, 10, and not by the RP.

Taking into account the provisions of s. 12A, IBC and Regulation 30A of CIRP Regulations, Hon'ble NCLAT ruled that Regulation 30A cannot over-ride the substantive provisions of s. 12A, and thus, as provided under the Code, it is only the applicant who can move an application for withdrawal of the CIRP application before the AA, and not by the RP.

28

The liabilities of all creditors who are not part of Committee of Creditors must also be met in the resolution.

Case title	Binani Industries Limited v. Bank of Baroda & Anr.
Date	14.11.2018
Order Number	Company Appeal (AT) (Insolvency) No. 82 of 2018

The NCLAT, in this appeal matter, defined the role of CoC and the importance of OC(s) wherein they held that the liabilities of all creditors who are not a part of the CoC must also be met in the resolution. It was observed that the FCs can modify the terms of existing liabilities, while other creditors cannot take risk of postponing payment for better future prospects. That is, FCs can take haircut and can take their dues in future, while OCs need to be paid immediately.

NCLAT thus held that a creditor cannot maximise his own interest in view of the moratorium. If one type of credit is given preferential treatment, the other type of credit will disappear from market. This will be against the objective of promoting availability of credit. The Code aims to balance the interests of all stakeholders and does not aim to maximise value for FCs only.

Hence, the dues OCs must get at least similar treatment as compared to the dues of FCs, and even if the OCs are not a part of the CoC, their claims must still be accounted for in the resolution plan.

29

If the claim of Operational Creditors, on verification is found to be less than 10%, the Operational Creditors have no right to claim representation in the meeting of the Committee of Creditors.

Case title	Consolidated Engineering Company & Anr. v. Golden Jubilee Hotels Pvt. Ltd.
Date	12.12.2018
Order Number	Company Appeal (AT) (Insolvency) No. 501 of 2018

The AA in the impugned order had held that 10% of the total debt for the purpose of representation in the CoC is to be calculated on the basis of the claim as collated and noticed by the RP. NCLAT upheld the impugned order and stated that if the claim of OC(s), on verification, is found to be less than 10%, the OC(s) have no right to claim representation in the meeting of the CoC.

However, NCLAT allowed the representative of the OC(s) to observe the CoC proceedings but without any right to object or participate in the said proceedings, and if any contrary decision is taken, in such a case, the OC may move proper application before appropriate forum at proper stage.

30

An application under Section 10, IBC can be filed with the Adjudicating Authority (AA) when no winding up petition has been admitted or winding up order has been passed by the High Court.

Case title	Edelweiss Finvest Pvt Ltd v. Ramswarup Industries Ltd and Anr
Date	14.12.2018
Order number	Company Appeal (AT) (Insolvency) No. 170 of 2018

An appeal was preferred by *Edelweiss Finvest Pvt. Ltd*. (Appellant) challenging the legality of AA's order wherein an application filed by *Ramswarup Industries Ltd.* (CD) u/s. 10, IBC was admitted by the AA even though a winding up application filed u/ss. 433 and 434 of the Companies Act, 1956 was filed against the CD.

The appeal was dismissed and the impugned order upheld for the reason that the winding-up petition was neither admitted, nor any winding-up order passed in respect of the CD. In the said winding-up proceedings, the CD had admitted the principal claim and Hon'ble High Court of Kolkata had permitted the CD to pay off the claims. As the case of the Appellant was covered by the decision of NCLAT in *M/s Unigreen Global Private Limited*, it was held that the application u/s. 10, IBC filed by the CD was not barred by the provisions of s. 11 of the Code and was thus held to be maintainable.

31

A personal guarantor's right to subrogation against a Corporate Debtor can be taken away in a resolution plan under the Insolvency and Bankruptcy Code.

Case title	Lalit Mishra & Ors v. Sharon Bio Medicine Ltd. & Ors.
Date	19.12.2018
Order Number	Company Appeal (AT) (Insolvency) No. 164 of 2018

An order of approval of Resolution Plan was challenged on 2 grounds, namely, (a) No amount was provided to the promoters under the Resolution Plan and (b) Personal Guarantors were discriminated against in the Resolution Plan. NCLAT concluded that the restructuring of financial debt as a part of the Resolution Plan approved by the AA, Mumbai Bench, does not envisage complete discharge of the liability of personal guarantors of the CD. The liability of the Guarantors is co-extensive with the Borrower and the Code is not a recovery suit. Therefore, any right available to the surety under the Law of Contract will not be applicable in the case of an approved resolution plan.

NCLAT concluded that the shareholders and promoters are not the creditors and thereby the Resolution Plan cannot balance the maximization of the value of the assets of the CD at par with the FC(s) or OC(s) or Secured Creditors or Unsecured Creditors. If no amount is given to the promoters/ shareholders and the other equity shareholders who are not the promoters have been separately treated by providing certain amount in their favour, the Appellant cannot claim to have been discriminated.

32

AA cannot convert a CIRP into fast track CIRP; CoC ceases after 270 days, so it cannot remove RP after 270 days; with respect to Cost of CIRP or fee of RP AA cannot differ with the CoC, nor sit in appeal over CoC's decision, except in cases of any arithmetical error.

Case title	Sanjay Kumar Ruia v. Catholic Syrian Bank Ltd. & Anr.
Date	03.01.2019
Order Number	Company Appeal (AT) (Insolvency) No. 560/2018.

In the proceedings initiated u/s. 9, IBC in respect of *S.N. Plumbing (P.) Ltd.* (CD), upon lapse of 270 days of CIRP, the CoC had approached AA inter alia seeking change of RP. The AA, while disposing-off CoC's application, had, by exercising powers u/s. 55, IBC extended the CIRP period by 90 days treating the matter as Fast Track CIRP, and further, determined CIRP Fee and the Cost incurred to the RP at Rs. 23,69,064/- as against a sum of Rs. 1,45,92,064/- claimed by the RP.

Aggrieved by the said order passed by the AA, the RP had approached NCLAT with the present appeal. NCLAT deliberated on three issues, (i) whether AA has the power to convert CIRP triggered u/s. 7 or 9 or 10 as Fast Track CIRP u/s. 55, (ii) whether CoC has jurisdiction to replace RP after 270 days, and (iii) whether AA has authority to revise Resolution Cost including fee of RP. While setting aside the impugned order of AA, NCLAT held (i) the AA has no jurisdiction to proceed with CIRP beyond 270 days, (ii) the AA could not invoke Fast Track CIRP which is different from CIRP u/s. 7 or 9 or 10, nor was the CD covered within the definition of CD u/s 55(2), IBC; CoC having ceased to exist after 270 days, it could not replace the RP or even having replaced within 270 days, AA cannot entertain such decision after completion of 270 days. However, AA can look into the matter to decide whether the same RP should be allowed to continue as the liquidator, and (iii) once the 'Resolution Plan' is determined by the CoC, the AA cannot differ with the same nor can sit in appeal, except in cases where there is an arithmetical error. Since no order was passed u/s. 31, or u/s. 33, IBC, the AA had no jurisdiction to decide the resolution cost including the fee of the RP. AA was accordingly directed to pass an order u/s. 31 and if no Resolution Plan is approved, pass order u/s. 33 of the Code, more than 270 days having already expired.

33

An application under Section 7 can be filed simultaneously against the Corporate Debtor as well as Guarantor for the same set of debt and default, but it shall be admitted either against the CD or against the Guarantor.

Case title	Dr. Vishnu Kumar Agarwal v. M/s. Piramal Enterprise Ltd.
Date	08.01.2019
Order Number	Company Appeal (AT) (Insolvency) No. 346/2018.

The Appellant was a shareholder in two different corporate entities which had given their respective Corporate Guarantees in respect of loan availed by *All India Society for Advance Education and Research* (Principal Borrower or 'PB') from *Piramal Enterprises Ltd.* Default was committed by the PB in repayment to FC, and consequently, FC filed two separate applications u/s. 7 against the two Corporate Guarantors (CGs), both of which were admitted by the AA, Principal Bench, New Delhi, vide its orders dt. 24th May, 2018 and 31st May, 2018. The Appellant, accordingly, challenged maintainability of two CIRPs based on same set of claim, debt, default and record. Appellant also challenged maintainability of proceedings against CGs without first taking recourse against PB.

NCLAT, relying on the judgment of Hon'ble Supreme Court in the matter of *State Bank of India* v. *Indexport Registered and Ors*. answered both the issues and held as follows :–

The liability of the Surety being coextensive, it is not necessary to initiate CIRP against the Principal Borrower before initiating CIRP against the Corporate Guarantors.

There is no bar in the Code for filing simultaneously two applications u/s. 7 against the PB as well as the Corporate Guarantor(s) or against both the Guarantors. However, once, for same set of claim, application u/s. 7 filed by the FC is admitted against one of the CD/Principal Borrower or Corporate Guarantor(s), the second application filed by the same FC for same set of claim and default cannot be admitted against the other CD (the Corporate Guarantor(s) or the Principal Borrower).

34

A "Guarantee" becomes a "Debt" and "Corporate Guarantor" becomes a "Corporate Debtor" as soon as the Guarantee is invoked.

Case title	Ferro Alloys Corporation Ltd. v. Rural Electrification Corporation Ltd.
Date	08.01.2019
Order Number	Company Appeal (AT) (Insolvency) No. 92/2017.

Three appeals were filed against the common order dated 6th July, 2017. Being first application moved under the Code, NCLAT thought it necessary to deliver a detailed judgment so that all courts and tribunals could take notice of the paradigm shift in the law. It also observed that entrenched managements are no longer allowed to continue in management if they cannot pay their debts.

Rural Electrification Corporation Ltd. had sanctioned a loan aggregating to Rs. 517.90 Crores and disbursed loan of Rs. 510.97 Crores to *FACOR Power Ltd.* (Principal Borrower). *Ferro Alloys Corporation Ltd.* had executed its Corporate Guarantee assuring repayment of the said loan to the FC. *FACOR* defaulted in repayment and its account was classified as an NPA, and subsequently, the entire loan was recalled by the FC. *FACOR* as well as Ferro Alloys had admitted their liability towards the FC in their respective audited balance sheet. Subsequently, FC invoked the Corporate Guarantee calling upon *Ferro Alloys* to make payment. The AA had vide its order admitted FC's application after satisfying itself on "debt" and "default" and the application being complete. The said order was challenged before NCLAT.

NCLAT, held that once an IP is appointed to manage the CD, the erstwhile Directors, who are no longer in management, obviously cannot maintain an appeal on behalf of the CD. In the present case, the CD was the sole Appellant. That being the case, the appeal was held to be not maintainable.

NCLAT dismissed the appeals holding that it is not necessary to initiate CIRP against the Principal Borrower before initiating CIRP against the Corporate Guarantors. Without initiating any CIRP against the Principal Borrower, it is always open to the FC to initiate CIRP u/s. 7 against the Corporate Guarantors, as the creditor is also the FC qua the Corporate Guarantor.

35

Even at the liquidation stage, liquidator can sell CD's business as a going concern.

Case title	S C Sekaran v. Amit Gupta & Ors.
Date	29.01.2019
Order Number	Company Appeal (AT) (Insolvency) No. 495 & 496/2018.

Two separate appeals were preferred by the respective Managements of two different CDs impugning common order passed by the AA wherein directions were passed for commencement of liquidation proceedings u/s. 33(1), IBC, in respect of the said CDs. Earlier, two separate appeals were also preferred by two RA(s) who were asked to submit better revised resolution plan. These were withdrawn and in the absence of resolution plan, NCLAT declined to interfere with the order impugned in the said appeals. In these appeals, CD's Management had pleaded that even under Liquidation, the Liquidator is required to keep the CDs as 'going concern', and if so required, also take steps u/s. 230, Companies Act, 2013 after consultation with the members or the creditors of CD for making arrangement with the third party, and thereafter take AA's approval. During the proceedings, the Liquidator stated that he shall ensure that both the companies remain as a going concern.

While allowing the appeal, the liquidator was directed to take steps in terms of s. 230, Companies, Act, 2013 and it was made clear that only on failure of revival, the liquidator shall first proceed with sale of assets wholly, and thereafter in part, and in accordance with law.

36

A Resolution Applicant has no vested right or fundamental right to have its Resolution Plan considered or approved.

Case title	Tata Steel Ltd. v. Liberty House Group Pte. Ltd. & Ors.
Date	04.02.2019
Order Number	Company Appeal (AT) (Insolvency) No. 198/2018.

Tata Steel Ltd., one of the Resolution Applicants for *Bhushan Power & Steel Ltd*. (CD) challenged the order passed by AA, Principal Bench, New Delhi, wherein directions were given to CoC to also consider the Resolution Plan submitted by *Liberty House Group Pte.* The main plea behind the appeal was that the AA cannot provide numerous opportunities to *Liberty House Group* at a belated stage.

The NCLAT, while dismissing the appeal, held that a RA has no vested right to have its resolution plan considered or approved. The case was accordingly remitted to the AA for passing appropriate order u/s. 31.

37

In case liquidation process takes more time, AA can extend the period to allow approval of arrangement of the Scheme.

Case title	Y Shivram Prasad v. S Dhanapal. & Ors.
Date	27.02.2019
Order Number	Company Appeal (AT) (Insolvency) No. 224/2018.

In the CIRP initiated against *Servalakshmi Papers Ltd*. in the absence of any approved Resolution Plan and 270 days having lapsed, the AA, Division Bench, Chennai, had passed order for liquidation of CD. The Appellant, being promoter/Director and Shareholder of CD challenged the impugned order stating that opportunity should have been given to the promoters to settle the matter. While disposing-off the Appeal, NCLAT held that the liquidator is required to take steps u/s. 230 of the Companies Act. If the members or the CD or the 'creditors' or a class of creditors like FC or OC approach the company through the liquidator for compromise or arrangement by making proposal of payment to all the creditor(s), the Liquidator on behalf of the company will move an application u/s. 230 of the Companies Act, 2013 before the AA.

38

Section 14, IBC overrides all other provisions to the contrary.

Case title	MSTC Ltd. v. Adhunik Metalliks Ltd. & Ors.
Date	15.03.2019
Order Number	Company Appeal (AT) (Insolvency) No. 519/2018.

In the CIRP initiated against *Adhunik Metalliks Ltd*. ('CD'), the AA, Kolkata Bench, by its impugned order had approved the Resolution Plan u/s. 31(1), IBC submitted by *Liberty House Group Pte. Ltd.*, which was earlier approved by the CoC with majority voting share. Vide the impugned order, a claim of *MSTC Ltd*. (an OC) to treat the additional expenses incurred by it as Resolution Cost was rejected and hence the present appeal was filed.

While upholding the impugned order, NCLAT held that s. 14 of the Code will override any other provision contrary to it, and that, any amount due to the OC prior to the date of admission of CIRP, the same cannot be appropriated during the moratorium period.

39

Once CoC votes in favour of a Resolution Plan, it cannot change its view subsequently.

Case title	Mr. Sharad Sanghi v. Ms. Vardana Garg &Ors.
Date	19.03.2019
Order Number	Company Appeal (AT) (Insolvency) No. 461/2018.

CIRP proceedings in respect of *Jyoti Structures Ltd*. were initiated, wherein the Appellant, *Sharad Sanghi* (amongst others) filed its resolution plan and subsequently, after negotiations, improved it. The Resolution Plan was initially approved by only 62.66% voting shares, but later on improved to 81.31% voting share in the CoC, however, the AA, Mumbai Bench, vide its impugned order rejected the plan and ordered for liquidation of CD inter alia on the grounds of viability and feasibility of the plan as also exceeding the timelines under the IBC.

The said order was challenged before NCLAT, and the NCLAT held that to make the 'Resolution Process' successful, though it is open to the 'CoC' to change its opinion by assenting in favour of one or other plan, the CoC once voted in favour of the 'Resolution Plan' cannot change its views. Thus, while allowing the appeal, NCLAT remitted the case to AA to approve the plan in terms of s. 31, IBC with a modification that the plan is to be implemented within a period of 12 years as offered by the successful RA.

40

Statutory dues like Income Tax, VAT etc come within the meaning of "Operational Debt".

Case title	Pr. Director General of Income Tax & Anr. v. Synergies Dooray Automotive Ltd. & Ors.
Date	20.03.2019
Order Number	Company Appeal (AT) (Insolvency) No. 205/2017.

The present appeal was preferred by *Pr. Director General of Income Tax* (*Adm & TPS*) against the order passed by AA, Hyderabad u/s. 31, IBC whereby the Resolution Plan wrt *Synergies Dooray Automotive Ltd*. (CD) was approved. The grounds of appeal were related *inter alia* to huge Income Tax benefits granted under the Resolution Plan. Thus, while observing that the 'Operational Debt' in normal course means a debt arising during the operation of the CD and that 'goods' and 'services', including employment, are required to keep the CD operational as a going concern, NCLAT held that all statutory dues including 'Income Tax', 'Value Added Tax' etc. come within the meaning of 'Operational Debt'.

41

For any lapse on the part of Resolution Professional coming to the notice of Adjudicating Authority, the matter should be referred to IBBI for taking any action in accordance with law, after seeking explanation from the Resolution Professional.

Case Title	Dhinal Shah v. Bharati Defence Infrastructure Ltd. & Anr
Date	29.03.2019
Order Number	Company Appeal (AT) (Insolvency) No. 175 of 2019

In this appeal matter an order passed by AA, Mumbai Bench, wherein they had made various adverse observations against the RP while passing the order of liquidation was sought to be challenged. While deciding the appeal, NCLAT observed that there was no notice that was issued to the RP to reply as to why adverse observations be not passed against him for any omission or commission. Without issuing any such notice and without impleading RP by name, AA was not competent to make any observation against RP. If there was any lapse on the part of the RP which was noticed by AA, then the same should be referred to IBBI for taking appropriate action as it is the competent authority to take action, in accordance with law, after seeking explanation from the RP. Accordingly, the part of the order insofar as it related to adverse observations against the RP was set aside.

42

Persons who are ineligible to file a Resolution Plan under Section 29A, IBC and those Resolution Applicants who did not move the AA before last date of submission of resolution plan, have no right to raise their grievance with regard to the expression of interest and that too after approval of the Resolution Plan by the Committee of Creditors.

Case title	JM Financial Asset Reconstruction Company Ltd. v. Well-Do Holdings and ExportsPvt. Ltd. & Ors.; Resolution Professional of Sevenhills Healthcare Pvt. Ltd. v. Well-Do Holdings and ExportsPvt. Ltd. & Ors.; B.R. Shetty & Anr. v. Sevenhills Healthcare Pvt. Ltd. & Ors.
Date	08.04.2019
Order Number	Company Appeal (AT) (Insolvency) No. 134 of 2019

A bunch of appeals were preferred respectively by the RP of *Sevenhills Healthcare Pvt. Ltd., JM Financial Asset Reconstruction Company Limited* (FC) and *Dr. B.R. Shetty* (RAs) against the order passed by the AA, Hyderabad Bench, wherein the AA, instead of passing an order u/s. 31 of the Code had remitted the matter with direction which amounted to initiation of resolution process de novo from the stage of calling of 'Expression of Interest'.

The Resolution plan of *BRS Ventures Investment Limited* was approved by the CoC and was submitted for approval before AA. Meanwhile, two shareholders of the CD and *Well-Do Holdings and Exports Private Limited* (one of the RA) filed interlocutory applications alleging that RP has fixed the requirement of *Earnest Money Deposit* (EMD) of Rs. 100 Crores which is exorbitant.

NCLAT found that the interlocutory applications preferred by shareholder and promoters were not maintainable. It was further held that the shareholder and promoters being ineligible to file the resolution plan u/s. 29A, have no right to raise their grievance with regard to the 'expression of interest' fixing the EMD of Rs. 100 Crore and that too after approval of the 'resolution plan' by the CoC.

43

Pledge of shares that does not amount to "disbursement of any amount against the consideration for time value of money" does not fall under the definition of "financial debt".

Case title	Phoenix ARC Pvt. Ltd. v. Ketulbhai Ramubhai Patel
Date	09.04.2019
Order Number	Company Appeal (AT) (Insolvency) No. 325 of 2019

In the instant appeal preferred by *Phoenix ARC Pvt. Ltd.* challenging the order passed by AA, Mumbai Bench, whereby the AA had held that the Appellant does not come within the meaning of 'FC' and there is no assignment in its favour.

The CD, *Doshian Water Solutions Pvt. Ltd*., executed a pledge agreement with *L&T Infrastructure Finance Company Limited* (*L&T*) whereby the 'CD' pledged shares in favour of *L&T* as a security *inter alia* for repayment of the Financial Facility provided by *L&T*. Thereafter, by Assignment Agreement, *L&T* assigned all rights, title and interest in the Financial Facility including any security interest therein, in favour of the Appellant – *Phoenix ARC Private Limited*. The shares were assigned and in case the shares or any part of them became subject matter of an attachment by a Court or otherwise tainted for any reason, the 'CD' was made liable to replace the same with other securities acceptable to the Assignor. The 'Pledge Agreement' ensures the benefit of the Assignor and its successor in title.

Considering the above facts, NCLAT held that the 'pledge of shares' in question do not amount to "disbursement of any amount against the consideration for time value of money" and it does not fall within the definition of a "financial debt". The appeal was thus dismissed.

44

Section 7 proceedings cannot be stalled on the CD's plea of collusion between CD's employee and FC's employee.

Case title	Neeraj Jain v. Yes Bank Ltd. & Anr.
Date	10.04.2019
Order Number	Company Appeal (AT) (Ins.) No. 323 of 2019

Present appeal was preferred by CD's shareholder challenging the order of AA, Principal Bench, New Delhi, initiating CIRP against CD pursuant to an application u/s. 7 of the Code and alleging conspiracy *inter se* employees of FC and CD. Appellant also informed regarding pending criminal proceedings initiated against aforesaid criminal conduct of parties' employees.

NCLAT, however, held that IBC proceedings are independent and have nothing to do with the pendency of some criminal proceedings. The Code being a complete Code will prevail over other Acts and no person can take advantage of the pendency of the case to stall CIRP proceeding initiated u/s. 7, IBC.

45

Any frivolous appeal based on fabricated and concocted grounds to frustrate CIRP is liable to be dismissed with costs.

Case title	Satyendra Singh v. Rama Subramanian &Anr.
Date	10.04.2019
Order Number	Company Appeal (AT) (Insolvency) No. 708 of 2018

The appeal was filed by *Mr. Satyendra Singh, Director of Sixth Dimension Project Solutions Ltd*. (CD) assailing the order passed by the AA, Mumbai Bench, whereby and whereunder the application of *Ms. Rama Subramanian*, OC u/s. 9, IBC seeking initiation of CIRP against the CD was admitted.

The OC, an ex-employee, had sent the demand notice for clearing of its dues that was not responded to by the CD, and no notice of dispute was served within the statutory period.

The CD contended existence of dispute with regard to Operational Debt but could not substantiate the same. NCLAT relied upon the Hon'ble Supreme Court judgements in *Innoventive Industries Ltd* v. *ICICI Bank* and *Mobilox Innovations (P.) Ltd*. v. *Kirusa Software (P.) Ltd.* and held the appeal as frivolous. The appeal was thus dismissed and a cost of Rs. 50,000 was imposed payable by the Appellant.

46

An "Agreement to Sell" suggesting that the Allottee of a property having disbursed advance amount towards consideration for time value of money comes within the meaning of 'Financial Creditor'.

Case title	Guneet Pal Singh Majitha Vs. Dharmendra Kumar
Date	11.04.2019
Order Number	Company Appeal (AT) (Insolvency) No. 752 of 2018

Guneet Pal Singh Majitha (Appellant) who was an allottee, filed a claim to be an FC. The RP refused to recognise him an FC which was affirmed by the AA, New Delhi Bench. An Agreement to Sell was reached between the CD and Allottee showing the Appellant as 'Purchaser' of office space owned by the CD. The appellant had paid the claimed amount as Advance Money.

NCLAT set aside the impugned order passed by the AA and directed the RP to treat the Appellant as FC since the amount was disbursed by him towards the consideration for time value of money. Thus, the Appellant was held to be covered within the meaning of FC.

47

In case any hindrance is created by the Promoter/Directors of CD in RP's functioning, and/or any non-compliance with AA's directions to appear, action can be initiated for Contempt of Court.

Case title	Gaurav Hargovindbhai Dave v. Hema Manoj Shah & Ors.
Date	22.04.2019
Order Number	Company Appeal (AT) (Ins.) No. 368 of 2019

These appeals were preferred by a Director and a son of the Director of CD, against the order of AA, Mumbai Bench, whereby the AA had noticed RP's submission, and observed that, despite the directions, the Appellants had not appeared in the Court and their action is in complete disregard of Court orders.

Whereas Appellants submitted that they wanted to co-operate with the RP and he has taken over the charge of the CD, the RP submitted that the Appellants all the time created hindrances and in fact tampered with the property and many of the materials have been taken away and electricity has been disconnected and they have not co-operated and handed over the charge. The Appellants moved before this Appellate Tribunal when this Appellate Tribunal dismissed the appeal with cost of Rs. 1,00,000/-, which has not been paid by the Appellants.

In consideration of the facts and circumstances of the case, the NCLAT dismissed the appeal and imposed a cost of Rs. 5,00,000/- in addition to the cost earlier imposed.

48

Default cannot be presumed to have been repaid in view of the invocation of pledge of shares and conversion of compulsorily convertible debentures for equity shares.

Case title	MAIF Investments India Pte. Ltd. v. Ind-Barath Energy (Utkal) Limited
Date	23.04.2019
Order Number	Company Appeal (AT) (Insolvency) No. 597 of 2018

The Appellant, *MAIF Investments India Pte. Ltd.*, filed an application u/s. 7 of the Code. AA, Hyderabad Bench, dismissed the application on the ground that default is deemed to have been repaid in view of the invocation of pledge of shares and conversion of Compulsorily Convertible Debentures into equity shares. The *Bank of Baroda*, another 'FC', also filed an application u/s. 7 of the Code and AA admitted the same.

The question for consideration in the appeal was 'whether the Appellant shall be considered as FC'.

After taking into account the facts and circumstances of the case, the NCLAT set aside AA's order and held that invocation of the pledge of shares pursuant to the Subscription Agreement, no presumption can be drawn that the disbursement of the amount so made was towards the OC default and stands paid.

49

Once an application filed under Section 7, IBC against the Principal Borrower is admitted, another application against the Corporate Guarantor for the same debt cannot be maintained.

Case title	IFCI Ltd. v. Golf Technologies (P) Ltd.
Date	23.04.2019
Order Number	Company Appeal (AT) (Ins.) No. 497 of 2018

IFCI limited filed two applications u/s. 7 of the Code, one against the Principal Borrower (*Cedar Infonet (P.) Ltd*.) and the other against the Guarantor (*Golf Technologies (P.) Ltd*.) for the same debt. The AA, New Delhi Bench, rejected the application filed against Principal Borrower stating that Appellant did not file alongwith the application the details of Respondent's accounts showing value of the invoked shares and the remaining balance, if any, after giving credit in respect of the value of invoked shares. The Application filed against Guarantor was rejected on the ground that the application against Principal Borrower has already been rejected.

NCLAT observed that from the record, a debt of more than Rs. 1 lakh was still outstanding. Consequently, the AA wrongly rejected both applications against Principal Borrower and Guarantor and remitted the matter to AA for admission, if record is complete and after notice to the parties. It also clarified that firstly, application against Principal Borrower will be taken up and that the case against CD should not have been taken up as the Appellant can claim only before RP and same debt cannot be claimed in two different Resolution Processes.

50

If the resolution cost incurred by Interim Resolution Professional has been ratified and fee has been determined by the Committee of Creditors, such amount should be paid.

Case title	State Bank of India v. Brijender Singh Deswal & Ors.
Date	23.04.2019
Order Number	Company Appeal (AT) (Insolvency) No. 214-215 of 2019

In the facts of the case, *State Bank of India* (Appellant) was a member of the CoC with 70.17% voting right which had preferred the instance appeal challenging order of AA, New Delhi whereby the AA had directed that after appointment of the RP, the initial costs have to be defrayed by the CoC which would be recoverable as the CIRP costs.

NCLAT observed that it has already been made clear that the initial cost is to be defrayed by the CoC which will be recoverable as CIRP costs. Therefore, NCLAT directed that if the resolution cost incurred by IRP has been ratified and fee has been determined by the CoC, then such amount has to be released by CoC.

51

The fee of RP depends on various factors. Therefore, it can be determined by Committee of Creditors and not by Adjudicating Authority or Appellate Authority.

Case title	Manish Sukhani v. MTK Tooling & Engineering Private Limited and others
Date	23.04.2019
Order Number	Company Appeal (AT) (Insolvency) No. 132 of 2019

An appeal was preferred by the Interim RP (Appellant) against the order passed by the AA, Mumbai Bench relating to fees and expenses incurred by him.

RP submitted that the CD has paid lesser amount which according to the Appellant was approved in the first meeting of the CoC.

The appeal was dismissed on the grounds that the Appellate Tribunal cannot decide as to what should be the fee for RP which depends on various factors including asset and liability of the CD, amount of default and actual time taken and performance of the RP, which can be decided by the CoC and not by the AA or by the NCLAT.

52

Resolution Professional has to include cost in respect of goods supplied during the period of Corporate Insolvency Resolution Process as cost towards Resolution Process Cost.

Case title	MV Projects v. Divya Jyoti Sponge Iron Private Limited and Others
Date	24.04.2019
Order Number	Company Appeal (AT) (Insolvency) No. 481 of 2018

This appeal was preferred by *MV Projects* wherein an order passed by the AA, Kolkata Bench, approving the Resolution Plan and rejecting the application filed by OC as not maintainable was sought to be challenged.

NCLAT held that if the Appellant had supplied the goods during the period of CIRP, the RP has to include such cost towards Resolution Process Cost.

NCLAT observed that in this case, RP had not included the cost of goods supplied during the period of CIRP in the Resolution Process Cost and therefore, modified the Resolution Plan to make it in order and in accordance with the law.

NCLAT thus held that the Appellant shall file an application before the CD (through the Successful Resolution Applicant) enclosing copies of evidence/ invoices etc. in support of supply of goods during the period of CIRP and that the CD along with the Interim RP will verify the same and will pay the total admitted dues without any cut within 30 days, failing which, the Resolution Plan may be held to be in violation of s. 30(2)(a) of the Insolvency and Bankruptcy Code.

NCLAT also held that, the CD (through the Successful Resolution Applicant), if refuses the claim or part thereof, will communicate the grounds thereof to the Appellant. NCLAT further held that if the refusal is not in accordance with law, it will be open to the Appellant to file an Interlocutory Application in this appeal matter to re-open the issue to decide whether the Resolution Plan is in violation of s. 30(2)(a) of the Insolvency and Bankruptcy Code or not.

The appeal was accordingly allowed.

53

Except for the Corporate Debtor, no other party has a right to intervene at the stage of admission of a petition under Section 7 or 9, IBC. An aggrieved party may prefer an appeal if the order of admission affects the person.

Case Title	Damont Developers Pvt. Ltd. v. Bank of Baroda & Anr.
Date	24.04.2019
Order Number	Company Appeal (AT) (Insolvency) No. 436-437 of 2019

The Appeal was filed challenging initiation of CIRP against the CD. The grievance of the Appellant was that the AA, Principal Bench, New Delhi, by impugned order dated 4th February, 2019 had rejected the impleadment application filed by the Appellant, and by a subsequent order dated 18th March, 2019, admitted the application filed u/s. 7, IBC.

NCLAT relied on Hon'ble Supreme Court judgment in *Innoventive Industries Ltd*. v. *ICIC Bank and Ors*. wherein it held that the AA is required to go through the records to find if there is a debt and default and while doing so it was open for the CD to show that there is no debt payable and no default, at the stage of admission of the petition. Except the CD, no other party has a right to intervene at the stage of admission of a petition u/s. 7 or 9. However, an aggrieved party may prefer an appeal if the order of admission affects the person. Accordingly, the appeal was held to be not maintainable.

54

The Resolution Plan which is more suitable, feasible and viable amongst all the Resolution Plans should be the Successful Resolution Plan.

Case title	Prakash Chand Jain v. Punjab National Bank and Others
Date	24.04.2019
Order Number	Company Appeal (AT) (Insolvency) No. 180 of 2018

An appeal was preferred by *Prakash Chand Jain* (Shareholder and Promoter of CD) challenging an order passed by AA, Kolkata Bench, approving the Resolution Plan submitted by *CP Ispat Private Limited* (Successful Resolution Applicant).

NCLAT observed that the Appellant also submitted a Resolution Plan which was rejected by the CoC having filed after the cut-off date. NCLAT found that Resolution Plan submitted by the Successful Resolution Applicant was more suitable, feasible and viable than the Resolution Plan submitted by Appellant. Hence, it was held that there is no ground to interfere with the impugned order.

55

Even during Liquidation Process, steps for revival and continuance of the Corporate Debtor by compromise or arrangement need to be taken in terms of Section 230 of the Companies Act, 2013; death by liquidation being the last option.

Case title	Ram Niwas Basia & Others v. Vijender Sharma, R.P. of Global Houseware Limited
Date	24.04.2019
Order Number	Company Appeal (AT) (Insolvency) No. 806 of 2018

An appeal was preferred by one of the RA(s) (Appellant) against the impugned order passed by the AA, New Delhi Bench, directing for liquidation of the CD on the grounds that the Resolution Plan submitted by the RA was rejected by CoC on 16th April, 2018 with 83.45% voting share.

The Resolution Plan was not considered by the CoC on the ground that the RA (Appellant) is a related party.

NCLAT directed that during liquidation process, the Liquidator is required to take steps for revival and continuance of CD by protecting it from its management and from a death by liquidation. Thus, the steps required to be taken are compromise or arrangement with the creditors, or class of creditors or members or class of members in terms of s. 230 of the Companies Act, 2013. On failure, steps should be taken to sell the business of the CD as a going concern in its totality along with the employees. The last stage will be death of the CD by liquidation, which should be avoided.

56

Operational Creditor, who has assigned or legally transferred any Operational Debt to a Financial Creditor, the assignee or transferee shall be considered as an Operational Creditor to the extent of such assignment or legal transfer.

Case title	Cooperative Rabobank U.A. Singapore Branch Vs. Mr. Shailendra Ajmera
Date	29.04.2019
Order Number	Company Appeal (AT) (Insolvency) No. 261 of 2018

An appeal was preferred by *Cooperative Rabobank U.A. Singapore Branch* who filed its claim before RP of *Ruchi Soya Industries Ltd.* for goods supplied by a party in between, which was rejected by the RP. Vide the impugned order, the AA, Mumbai Bench, held that the Appellant is not an FC, but an OC.

In cases wherein an OC has assigned or legally transferred any Operational Debt to an FC, the assignee or transferee thereof shall be considered as an OC to the extent of such assignment or legal transfer, and not an FC.

NCLAT held that in this case, Bills of Exchange relates to supply of goods and whatever finance given by the Appellant is to *Avanti Industries Pte Ltd., Singapore* and not to the CD. Therefore, the Appellant is not a FC and can claim only as an OC.

57

Liquidator is bound by the terms of an agreement providing for redemption of redeemable preference shares into the loan upon default and has no right to argue on behalf of the Borrower (Corporate Debtor).

Case title	Nicco Corporation Limited v. Technology Development Board
Date	30.04.2019
Order Number	Company Appeal (AT) (Insolvency) No. 360 of 2018

A debt restructuring agreement was executed in 2004 between **Technology Development Board** (lender) and CD. Subsequently, by a Supplementary Agreement in 2011, the loan was converted into redeemable preference shares (RPS) subject to the condition that in case of default, the agreement shall be treated as cancelled, and that the RPS shall be redeemed and converted to loan and the CD will be required to repay entire amount without any remission. The Lender made its first claim only before the liquidator, who partly rejected it. The appeal of lender was allowed by AA against which, the liquidator preferred this appeal.

NCLAT relied on the judgment passed by High Court of Andhra Pradesh passed in the matter of *SJK Steel Plant Limited* v. *Meegada Sudhakar Reddy & Ors.* wherein it was held that s. 80 of the Companies Act, 1956 deals with power of the Company which issued redeemable preference shares. When preference shares are issued, it is not always necessary that they shall have to be redeemed.

NCLAT held that the Borrower (CD) has agreed that in case of default of repayment of loan etc., the agreement will be treated as cancelled and the Borrower will pay the entire amount in terms of the loan agreement without any remission. It was thus held that it is not open to the Liquidator to argue on behalf of the Borrower that the Borrower is not liable or required to pay the entire amount in terms of the Loan Agreement.

58

Reluctance to implement resolution plan by the successful Resolution Applicant is a ground for Appellate Authority to direct Adjudicating Authority to pass appropriate orders and to MCA for taking appropriate steps against the said appellant, even through USA where the company is situated.

Case title	Ingen Capital Group LLC. v. Ramkumar S. V. & Another
Date	30.04.2019
Order Number	Company Appeal (AT) (Insolvency) No. 795 of 2018

The brief facts of the case are that *Ingen Capital Group LLC* was the successful Resolution Applicant which was approved by the CoC as well as AA.

The RA was given multiple opportunities to deposit the upfront amount but they failed to deposit the same.

Taking a view on the conduct of the said RA, NCLAT observed that the RA did not seem to be in a mood to implement the approved plan, given the multiple opportunities to do so.

The Central Government was directed through the Ministry of Corporate Affairs to take appropriate steps against *Ingen Capital Group LLC* and its Managing Director and other Directors who tried to take advantage of the resolution process but later on failed to implement its proposal without any basis.

Since the RA had no office in India, the Central Government (through Ministry of Corporate Affairs) was directed to take up the matter with the appropriate authorities in USA, where the Appellant Company is situated. The appeal was accordingly dismissed with directions to the RA to pay a cost of Rs.10,00,000/- (Rupees Ten Lakhs Only) in favour of the CoC within thirty days of passing this order.

59

Any payment to Operational Creditors by Corporate Debtor after order of moratorium & before joining of Resolution Professional is in violation of provisions of Section 14, IBC.

Case title	Ranjit Kapoor and Others v. Hemant Sharma and Others Yajur International Private Limited v. Hemant Sharma, Resolution Professional of White Metals Limited
Date	01.05.2019
Order Number	Company Appeal (AT) (Insolvency) No. 99 of 2019

The instant appeals were preferred by the Promoter of CD and *Yajur International Private Limited*, OC in the matter, wherein an order was passed by AA, Principal Bench, New Delhi, whereby transfer of a sum of Rs.1,50,75,000/- by the Promoter in favour of OC was held to be in violation of provisions of moratorium u/s. 14, IBC.

NCLAT held that if the CD makes payment to the OC during the moratorium period, it is in violation of provisions of moratorium u/s. 14, IBC.

60

Section 14, IBC cannot give protection from criminal proceeding or any penal action involving imprisonment to an individual which may include the ex-director / shareholder of Corporate Debtor, relate to different field having no overriding effect of one Act over the other including Insolvency and Bankruptcy Code.

Case Title	Varrsana Ispat Limited Through the Resolution Professional Mr. Anil Goel v. Deputy Director, Directorate of Enforcement
Date	02.05.2019
Order Number	Company Appeal (AT) (Insolvency) No. 493 of 2018

This is an appeal against the order of AA, Kolkata Bench, turning down the application filed by RP for release of provisional attachment of assets by Directorate of Enforcement took place prior to order of declaration of Moratorium, being not maintainable. Whereas RP contended that s. 14 of the Code would override Prevention of Money Laundering Act, 2002, the contention of Respondent was that in view of the provisions of Prevention of Money Laundering Act, 2002 including s. 2(1)(u) and ss. 3 & 4, action can be taken under Prevention of Money Laundering Act, 2002 even during the period of Moratorium.

NCLAT held that the offence of money laundering is punishable with rigorous imprisonment, which has nothing to do with the CD. It is applicable to the individual, which may include the ex-directors and shareholders of the CD. As PMLA relates to different fields of penal action of proceeds of crime, it invokes simultaneously with the Code, having no overriding effect of one Act over the other including the Code.

61

Notwithstanding an order passed under Section 31, IBC, it is open for a person to file a suit or an application against the CD after completion of Moratorium Period, in accordance with Section 60(6), IBC.

Case title	Prasad Gempex v. Star Agro Marine Exports Ltd. & Anr.
Date	02.05.2019
Order Number	Company Appeal (AT) (Insolvency) No. 469/2019.

CIRP proceedings were initiated in respect of *Star Agro Marine Exports (P) Ltd.* (CD), wherein Appellant's claim was partially approved by the RP. Challenging RP's decision, Appellant had first approached the AA and then NCLAT. In the appeal, NCLAT had directed the AA to pass appropriate order u/s. 31, IBC as regards resolution plan approved by the CoC. Appellant was further directed to file its claim u/s. 60(6), IBC before appropriate Forum. The Resolution Plan was subsequently approved by AA, Chennai Bench, with following directions :–

> *from the plan approval date, all inquiries, investigation and proceedings, whether civil or criminal, suits, claims, disputes, proceedings in connection with the CD, pending or threatened, present or future in relation to any period prior to the plan approval date, or arising on account of implementation of the resolution plan shall stand withdrawn and dismissed*.

These directions were challenged by the Appellant before NCLAT in the present appeal. NCLAT, while partly allowing the appeal, set aside the aforementioned directions passed by AA in the impugned order being contrary to its decision.

62

Right to file application under Section 7, IBC accrues on or after 1st December, 2016. Hence, the limitation period commences from that date.

Case title	Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Limited and Others
Date	02.05.2019
Order Number	Company Appeal (AT) (Insolvency) No. 655 of 2018

The Appellant was a Shareholder of *Shivam Water Treaters Pvt Ltd,* (CD) in the matter wherein an order was passed by AA, Mumbai Bench, admitting the application of ARCIL for initiation of CIRP against CD.

NCLAT relied on the order passed in the matter of *Pushpa Shah & Ors.* v. *IL&FS Financial Services & Ors.* wherein it had held that since Insolvency and Bankruptcy Code, 2016 had come into force on 1st December, 2016, the right to file application u/s. 7 of IBC accrues on or after 1st December, 2016. Based on facts of the case, the claim of ARCIL was held to be not barred by law of limitation.

63

Resolution Professional can only collate claims. He has no jurisdiction to decide the claim of one or other party.

Case title	Roma Enterprises v. Martin S.K. Golla (Resolution Professional)
Date	06.05.2019
Order Number	Company Appeal (AT) (Insolvency) No. 232 of 2018

An appeal was preferred by the person claiming to be FC (Appellant) against the application filed by RP to take over the hypothecated goods which has not been accepted by AA, Mumbai Bench.

NCLAT relied on the order of Hon'ble Supreme Court passed in the matter of *Swiss Ribbons Private Limited and Others* v. *Union of India and Others* wherein it held that RP has no jurisdiction to decide the claim of one or other party. The Appellate Tribunal had also held earlier that the RP can only collate the claims. Apart from the fact that earlier the same issue was raised and the Appellate Tribunal had not entertained the appeal and had observed that the Appellant could raise such issue and claim at an appropriate stage i.e. after moratorium is over, Appellate Tribunal dismissed the appeal.

64

Section 9, IBC requires strict proof of debt and default, in absence whereof an application cannot be entertained.

Case title	Ramco Systems Ltd. v. Spicejet Ltd. through RP
Date	08.05.2019
Order Number	Company Appeal (AT) (Ins.) No. 31 of 2018

Appellant preferred an application u/s. 9, IBC claiming default of payment of Operational Dues payable by CD to OC. AA, New Delhi Bench, dismissed the application inter alia on the grounds of inconsistency in overall payments and non-compliance of s. 9(3)(C), IBC.

NCLAT, while dismissing the appeal, held that, in absence of specific evidence relating to invoices actually forwarded by the Appellant and there being a doubt, the AA rightly refused to entertain application u/s. 9 which requires strict proof of debt and default.

65

The resolution plan should not relate to the closure of the Corporate Debtor as it is against the scope and intent of the Code which is in violation of Section 30(2)(e), IBC.

Case Title	Industrial Services v. Burn Standard Company Ltd. And Another
Date	13.05.2019
Order Number	Company Appeal (AT) (Insolvency) No. 141 of 2018

The appeal was filed to challenge the approval of a Resolution Plan submitted by the RA. The appellant contended that CD had filed s. 10 application with malicious intent. The plan submitted provided for closure of the CD and retrenchment of all the workmen instead of its revival. NCLAT observed that the resolution plan submitted was against the object of the Code and the application u/s. 10 was filed with intent of closure of CD against the object of the Code, since the application u/s. 10 was for closure of CD, for a purpose other than resolution of the insolvency or liquidation and held that the resolution plan which relates to the closure of the CD being against the scope and intent of the Code is in violation of s. 30(2)(e), IBC. The NCLAT set aside part of the approved resolution plan in so far as it related to closure of CD and also directed the CD to ensure that the company remains a going concern and the employees are not retrenched.

66

Section 18, IBC prevails over Section 13(4) of SARFAESI Act, 2002.

Case title	Encore Asset Reconstruction Company Pvt. Ltd. v. Charu Sandeep Desai & Ors.
Date	14.05.2019
Order Number	Company Appeal (AT) (Ins.) No. 719 of 2018

The present appeal was preferred by *Encore Asset Reconstruction Company Pvt. Ltd.* (Encore), which had taken over CD's loan account from Dena Bank which was CD's secured creditor and had initiated SARFAESI action in respect of such secured asset and taken possession of the same. In the IBC proceedings initiated by SBI against CD, the RP had made an application with AA, Mumbai Bench, seeking directions to Encore to handover possession of CD's land mortgaged with it which was allowed by the AA. The present appeal was against the said order by AA contending that the secured asset is no longer property of CD and is rather Encore's asset since action under SARFAESI has already been taken by it. Rejecting such contention, NCLAT held that since the ownership rights/title still vests with the CD and even if it is in possession of Dena Bank or Encore, it is bound to hand over the same to RP.

67

Central Government comes within the meaning of "Operational Creditor" for the purpose of Income Tax.

Case title	Seth Thakurdas Khinvraj Rathi v. Cal Refineries Limited & Others
Date	14.05.2019
Order Number	Company Appeal (AT) (Insolvency) No. 473 of 2018

An appeal was preferred by the OC (Appellant) in the matter wherein an order was passed by AA, New Delhi Bench, dismissing the application filed by Income Tax Department seeking representation in the CoC.

NCLAT relied on the order passed in the matter of *Pr. Director General of Income Tax (Admn. & TPS)* v. *Synergies Dooray Automotive Limited and Others* and held that Income Tax Department of the Central Government and the Sales Tax Department of the State Government and local authority, who are entitled to dues arising out of the existing law are OC(s) within the meaning of s. 5(20) of the IBC.

In the absence of merit, the appeal was dismissed.

68

In case of suspicious circumstances, AA must examine if an application filed under Section 10, IBC has an element of fraudulent or malicious intent behind it.

Case title	Ravi Kant Gupta v. Alpfy (P) Ltd. through RP
Date	14.05.2019
Order Number	Company Appeal (AT) (Ins.) No. 782-783 of 2018

The present appeal was preferred by Promoters of CD and Corporate Applicant against orders dated 16th October, 2018 and 12th November, 2018 passed by AA, New Delhi (Bench III) whereby in absence of an FC, the AA observed that the fee and defray costs of RP shall be borne by the CD. The said order was clarified by the subsequent order dated 12th November, 2018 wherein it was also observed that the CD is a legal entity and without the sanction of the Board could not have initiated the process and for necessary compliance the corporate veil is required to be lifted and see the legal persons behind the debtor company which has filed the application based on which the Tribunal has initiated the insolvency resolution process.

The NCLAT held that there is nothing on record to suggest that any decision was taken by the Annual General Meeting of the CD to file an application u/s. 10 of the Code. There have been 'default' against the purchasers of the Plans, who otherwise do not come within the meaning of FCs or OCs. The RP also claims that financial irregularities have also been committed by the CD. Considering the record, the NCLAT held that the AA should also have seen whether the application u/s. 10 of the Code was filed fraudulently or with malicious intention and should request the Central Government for reference to the SFIO u/ss. 212 and 213 of the Companies Act, 2013 and other provisions of the IBC, including Part II Chapter VII wherein 'Offences and Penalties' have been prescribed. The appeal was disposed of with the aforesaid observations.

69

Period of limitation in regard to mortgaged property is 12 years.

Case title	Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.
Date	14.05.2019
Order Number	Company Appeal (AT) (Insolvency) No. 549 of 2018

Appellant being the suspended director of *Veer Gurjar Aluminium Industries Pvt. Ltd.* (CD) had preferred an appeal before NCLAT on the question of limitation and had contended that the 'default' having been committed on 8th July, 2011 and the petition filed u/s. 7 of the Code in March, 2018, the same is not maintainable being barred by law of limitation.

NCLAT dismissed the appeal and held that the claim is not barred by limitation as the period of limitation is 12 years with regard to mortgaged property.

70

Financial Creditor can claim its voting shares based only on the amount actually disbursed in favour of Corporate Debtor.

Case title	Capri Global Capital Ltd. v. Value Infracon India Pvt. Ltd.
Date	14.05.2019
Order Number	Company Appeal (AT) (Insolvency) No. 29 of 2019

Appellant *Capri Global Capital Limited* (FC) by way of the instant appeal had challenged the order dated 17th December, 2018 passed by the AA, Principal Bench, New Delhi. Appellant had preferred this appeal based on the grievance that the RP had reallocated voting share to the Appellant in the CoC by considering only the amount disbursed to the CD as against the total loan amount which was due and payable by the CD and its two sister concerns in terms of the Agreement between the parties.

NCLAT found no merit in the appeal as it observed that the amount was separately disbursed in their respective bank accounts. Therefore, it was held that the Appellant cannot claim all the payments from the CD and observed that the AA had rightly held that the FC can claim its voting shares based only on the amount actually disbursed in favour of CD and dismissed the appeal.

71

A Financial Creditor can claim to be a 'Financial Creditor', only if the Corporate Debtor has been disbursed the amount for consideration for time value of money.

Case title	Indiabulls Housing Finance Ltd. v. Rudra Buildwell Projects Private Ltd.
Date	14.05.2019
Order Number	Company Appeal (AT) No.172 OF 2019

Indiabulls Housing Finance Ltd., Appellant (FC) preferred the instant appeal challenging the order passed by the AA, Special Bench, New Delhi, rejecting the application filed u/s. 7 of the Code for initiation of CIRP against CD.

In the present case, the loan agreement was executed between Appellant and the Borrower on 6th April, 2015 and the aggregate loan amount sanctioned vide said loan agreement dated 06.04.2015 was for Rs.73,23,391. Under the agreement it was clear that Mr. Davendra Singh was the Borrower and the Appellant, *Indiabulls Housing Finance Ltd.* was the FC.

In addition a tripartite agreement dated 06.04.2015 was also executed between the Appellant, Respondent (CD) and the Borrower according to which the Borrower informed the Appellant about the scheme of arrangement between the Borrower and the builder in terms whereof the builder assumed the liability on account of interest payable by the Borrower to the IHFL during the period to be referred to as the "Liability Period" in terms of 24 months i.e. till 30-04-2017

NCLAT observed that in terms of Clause 5(8) of the Code, if disbursement is made for consideration for time value of money, a person can claim to be an FC with regard to the amount paid.

NCLAT held that since the Appellant has disbursed the amount for consideration for time value of money in favour of Borrower, Mr. Davender Singh and not the CD, therefore, Appellant cannot be held to be an FC to the Corporate Debtor.

72

The primary objective of the Insolvency and Bankruptcy Code is not to sell the Corporate Debtor.

Case title	Superna Dhawan & Anr. v. Bharti Defence and Infrastructure Ltd. & Ors.
Date	14.05.2019
Order Number	Company Appeal (AT) (Insolvency) No. 195 of 2019

The RP of *Bharti Defence and Infrastructure Ltd.* (CD) filed an application u/s. 31, IBC for approval of the Resolution Plan submitted by *Edelweiss Asset Reconstruction Company Ltd.* duly approved by the CoC by a voting share of 94.3%. The AA, Mumbai Bench, vide its order dated 14th January, 2019 rejected the plan and ordered for liquidation u/s. 33 read with Regulation 32(b) & 32(e) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

The Appellant, Shareholder challenged the order passed by the AA on the ground that liquidation order has been passed with "material irregularity" due to fraud committed by the RP. It was contended by the Appellant that the RP delegated his duties and responsibilities and outsourced the same, which is prohibited under Regulation 7(b) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, RP was not independent prior to initiation of the CIRP as his partnership firm was providing services to the 'Resolution Applicant' in relation to the CD.

While disposing-off the appeal, NCLAT held that, the AA rightly observed that the RP should be planned for 'Resolution' of the CD as a going concern and not for addition of value with intent to sell the CD. The purpose to take up the company with intent to sell the CD is against the basic object of the Code.

73

NCLAT upheld rejection of application for commencement of CIRP under Section 9, IBC filed with 'fraudulent and malicious' intent.

Case title	Praveen Kumar Mundra v. CIL Securities Ltd.
Date	17.05.2019
Order Number	Company Appeal (AT) No.89 of 2019

This appeal has been preferred by *Praveen Kumar Mundra*, (Operational Creditor) of *CIL Securities Limited* (CD) against the order passed by AA rejecting his application for initiation of CIRP against CD.

NCLAT observed that :

(i) Respondent had taken a plea before the AA that it is agreeable to pay the amount subject to the registration of the Operational Creditor under the GST Act, 2017.

(ii) It further found that before the admission of the application, the Respondent was ready with the draft for Rs.3,36,978.48. However, the Appellant is not inclined to accept the same.

The Appellate Tribunal was of the view that the OC initiated the CIRP with fraudulent and malicious intent and for purposes other than the resolution of insolvency or liquidation, and therefore, it was clearly covered u/s. 65 (fraudulent or malicious initiation of proceedings) of the Code.

The appeal was thus dismissed.

74

If the Resolution Professional is no more functioning and another person is appointed as Liquidator, there is no question of bias with the present Liquidator.

Case title	Concept Management Consulting Ltd. v. Anand Chandra Swain & Anr.
Date	22.05.2019
Order Number	Company Appeal (AT) (Insolvency) No.392-393 of 2019

An appeal was preferred by the Appellant challenging the orders passed by the AA, Kolkata Bench, regarding the appointment and change of the liquidator, also the Appellant stated that there was a claim filed before the IRP which was not admitted. Allegations were made against erstwhile IRP on the ground that he had not followed the procedure which resulted in the liquidation of the company.

The NCLAT, however, held that since IRP/RP is no more functioning and the Appellant did not file any application u/s. 60(5), IBC during CIRP against decision of the IRP that he had not admitted the claim, at the stage of liquidation, these contentions cannot be raised. The NCLAT further observed that the RP is no more functioning and another person is appointed as a liquidator. Therefore, there is no question of bias with the present liquidator. The appeal was disposed-off citing the above reasons.

75

Liquidator to ensure that during liquidation process, Corporate Debtor remain as a going concern for scheme of arrangement or sale of CD as a going concern.

Case title	Hindustan Paper Corporation Officers & Supervisor Association & Ors. v. Hindustan Paper Corporation Ltd. & Ors.
Date	29.05.2019
Order Number	Company Appeal (AT) No.585 of 2019

This Appeal was filed by *Hindustan Paper Corporation Officers & Supervisor Association & Ors.* and *Cachar Paper Project Workers' Union* challenging liquidation order passed by the AA, New Delhi Bench, on the grounds that initiation of CIRP was illegal. Since CIRP was initiated before one-year, thus the NCLAT was not inclined and directed liquidator to perform his duty for the benefit of the CD by making it going concern.

The CD was an undertaking of the Government of India. Therefore, Union of India was also involved in the matter. The Union of India submitted that though a proposal for distributing salaries of the employees had been made under the Consolidated Fund for budget in budgetary allocation was not sanctioned in the Cabinet pursuant to that due to initiation of CIRP, the Cabinet could not sanction the salaries to the employees from the consolidate fund. The provision for budget in budgetary allocation was not sanctioned in the Cabinet pursuant to admission of CIRP.

The RP submitted that no expression of interest was received and 270 days have also expired. Therefore, the RP filed an application u/s. 33, IBC for the order of liquidation which was also approved by the CoC.

In view of this, the NCLAT held that since more than 270 days have already lapsed and in absence of any viable and feasible Resolution Plan, the AA has only option to pass liquidation order. NCLAT directed liquidator to approach the Union of India through the concerned Department for realization of the funds to ensure that the CD remains a going concern so that scheme of arrangements can be reached or it can be sold as a going concern along with employees / workmen to third parties.

76

The debt of government being 'Operational Debt', question of asking waiver does not arise and should not be less than the amount to be paid to Operational Creditors in the event of a liquidation of a Corporate Debtor under Section 53, IBC.

Case title	RMS Employees Welfare Trust v. Anil Goel
Date	30.05.2019
Order Number	Company Appeal (AT) (Insolvency) No. 699 of 2018

In an application for approval of resolution plan, the AA, Chandigarh Bench, noted that the plan did not provide for payment toward any government dues and the waiver of government dues may be considered by the respective Government department. In an appeal against this order, NCLAT held that the debt of the Central Government or State Government arising out of existing law is an Operational Debt, and hence, question for waiver of such dues does not arise.

Setting aside part of the order, NCLAT concluded that the amount to be paid to the Central or State Government should not be less than the amount to be paid to OC(s) in the event of liquidation of the CD u/s. 53, IBC.

77

Gratuity and Provident Funds are not the Assets of the Corporate Debtor.

Case title	Sunil Kumar Jain & Ors. v. Sundaresh Bhatt & Ors.
Date	31.05.2019
Order Number	Company Appeal (AT) (Insolvency) No. 605 of 2019

An appeal was preferred by the Appellant-workmen against part of the order of the AA, Ahmedabad Bench, wherein no relief was granted to the Appellants with regard to their claim relating to salary for the period involving CIRP and the prior period.

The NCLAT in its order held that they are not inclined to interfere with the impugned order of AA, but allowed the Appellant to file individual claims with the Liquidator and subject to the acceptance/rejection of the claims by him, the Appellants can move to the AA. Regarding the Gratuity and PF, NCLAT held that those cannot be treated as the asset of the CD and should be disbursed among the employees/ workmen who are entitled for the same. The Appeal was dismissed with the aforesaid observations.

78

The Appeal for removal of Resolution Professional/Liquidator dismissed as the Contempt proceeding against appellant for not co-operating with RP was already initiated in NCLT.

Case title	Mahesh Kumar Panwar v. Mega Soft Infrastructure Pvt. Ltd. (In Liquidation) & Anr.
Date	10.06.2019
Order Number	Company Appeal (AT) No.617 of 2019

Director of *Mega Soft Infrastructure Pvt. Ltd.* (Appellant) filed an application for removal of the RP/ Liquidator which was rejected by the AA, New Delhi Bench. NCLAT observed that Appellant has not co-operated with the RP/ Liquidator and the AA has already initiated the contempt proceedings u/s. 425 of the Companies Act and intends to order for penal action u/s. 70 and 72 of the Code. The Appellant was given liberty to raise all the issues before the AA in person and to file reply, and whereafter, the AA shall decide whether the Appellant and the other Directors are liable for punishment in terms of s. 425 of the Companies Act or their case is to be referred to the Special Court for action u/s. 70 r/w s. 72, IBC. The Appeal was dismissed with the aforesaid observations.

79

Resolution Applicant should provide the same treatment in its Resolution Plan to all Operational Creditors which are similarly situated.

Case Title	Jagmeet Singh Sabharwal & Ors. v. Rubber Products Ltd. & Ors.
Date	11.06.2019
Order Number	Company Appeal (AT)(Ins) No. 405 of 2019

Appeal was preferred by the successful Resolution Applicant who had a grievance against part of the modified order on the ground that the claim with regard to the additional Government Dues of Rs. 14 Crore were added by the AA, Mumbai Bench, the claim which was not before the RP nor shown in the Information-Memorandum.

It was submitted that whatever claim was made towards the statutory dues, i.e., dues arising out of existing law, were taken into consideration and the RA made suitable provision for such dues. The NCLAT, based on its judgment in the matter of *Pr. Director General of Income Tax & Anr.* v. *Synergies Dooray Automotive Ltd. & Ors*. wherein it had held that the debt payable to Central Government, State Government or Local Authority is an Operational Debt, took the view that the RA is required to provide the same treatment to all the OCs who are equally situated. Upon going through the revised Redistribution Chart submitted by the RA, the Appellate Tribunal held that the classification between employees, OCs who have supplied goods or rendered services and OCs like Government dues was rational and correct in view of classification of OCs into three categories u/s. 5(2), i.e. :– (i) Those who supplied goods or rendered services to CD, (ii) Employees of OCs, (iii) debt payable under existing law to Central Government or State Government or local authority for the fact that the Central Government or State Government do not invest any money nor render any services but derive advantage of operations of the Company by claiming of the debt on the basis of the existing law (statutory debt).

NCLAT, however, modified a part of the impugned order by substituting the manner of distribution with revised distribution.

80

The NCLT, acting on a CIRP process, cannot be converted into an Adjudication Forum to settle claims which are already in dispute in the Court.

Case title	Sri Krishna Constructions v. Vasudevan, R.P. of Tiffins Barytes Asbestos & Paints Ltd.
Date	12.06.2019
Order Number	Company Appeal (AT) (Insolvency) No. 619 of 2019

An application u/s. 7 of the Code was filed by FC – *Udhyaman Investments Private Limited* against *Tiffins Barytes Asbestos and Paints Limited*, which was admitted on 12th March, 2018.

The Appellant, claiming to be an OC, filed a claim of more than Rs.17 Crores with the IRP. The IRP while collating did not accept the claim of the Appellant as not being supported by documents. The Appellant took up the matter with the AA, Chennai Bench.

The AA observed that the Appellant had earlier moved to Hon'ble High Court of Madras for winding up against the CD on ground of CD's inability to pay debt. Hon'ble High Court found that the claim of the Appellant was not substantiated, mere statement of account was not sufficient to prove business transaction and that the defence raised by the CD was bona fide. Thus, the High Court relegated the Appellant to Civil Court and the matter is still pending before the Additional Senior Civil Judge and CJM.

The NCLAT, while dismissing the appeal, observed that *under section 18 of the I&B Code, 2016 the IRP is required to receive and collate all the claims submitted by the Creditors. This is not a process of sitting and deciding disputed claims. For collating, the IRP has to receive the claim and examine the same. While examining, the IRP did not find that the claim was made out with support of appropriate documents. As such, the IRP may not have considered the claim and the AA has looked into it and did not find anything wrong with the act of collating done by IRP. CIRP process cannot be converted into adjudication Forum to settle claims already in disputes in Court*.

81

An application under Section 9 of the Code occupies a different field than Section 16G(1) of the Tea Act, 1953

Case title	J. Agrochem v. Duncans Industries Limited
Date	20.06.2019
Order Number	Company Appeal (AT) (Insolvency) No. 710 of 2019

The Appellant filed an application u/s. 9 of the Code against *Duncans Industries Limited* (CD).

The AA, Kolkata Bench, vide order dated 5th October, 2018 rejected the application on the ground that the provisions of the Code are not applicable unless the OC seeks consent of the Central Government to start the CIRP of the CD in view of s. 16G(1)(c) of the Tea Act, 1953.

NCLAT held that s. 16G(1)(c) of the Tea Act 1953 relates to winding up and on the other hand application filed u/s. 9 of the Code is not a proceeding for winding up but for initiation of CIRP to ensure revival and continuation of the 'CD' by protecting the CD from its own management and from corporate debt by liquidation.

NCLAT, observing that s. 9 of the Code occupies a different field than s. 16G(1) of the Tea Act, 1953 held that for filing an application u/s. 9 against a Tea Company under the management of the different board, no permission of Central Government is required in terms of s. 16G(1) of the Tea Act, 1953.

82

Section 14 of the Code is not applicable to the criminal proceedings or any penal action taken pursuant to the criminal proceeding or any act having essence of crime.

Case title	Rotomac Global Pvt. Ltd v. Deputy Director, Directorate of Enforcement
Date	02.07.2019
Order Number	Company Appeal (AT) (Insolvency) No. 140 of 2019

AA, Allahabad Bench, ordered for liquidation of the CD in absence of any viable and feasible resolution plan.

In the investigation under the provisions of PMLA it was found that accused persons had misappropriated/ diverted bank funds, committed criminal breach of trust and laundered the money so diverted.

Based on the materials and evidences on record, the Directorate of Enforcement passed a Provisional Attachment Order (PAO) thereby, attaching the properties provisionally lying in the name of the CD and its Directors with further direction that the same shall not be transferred, disposed, parted with or otherwise dealt with in any manner, whatsoever, until or unless specifically allowed to do so by the Directorate.

The Liquidator filed an application seeking direction on Directorate of Enforcement to release the assets of the CD. Vide order dated 10th January, 2019 the AA rejected the application.

NCLAT relied on its decision dated 2nd May, 2019 in *Varrsana Ispat Limited* v. *Deputy Director, Directorate of Enforcement* – Company Appeal (AT) (Insolvency) No. 493 of 2018 wherein it was held that s. 14 of the Code is not applicable to the criminal proceeding or any penal action taken pursuant to the criminal proceeding or any act having essence of crime or crime proceeds.

In view of the same, NCLAT held that PMLA relates to different fields of penal action of proceeds of crime; it can be invoked simultaneously with the Code, having no overriding effect of one Act over the other. Finding no merits, it dismissed the appeal.

83

Absence of RP during CIRP is a ground for exclusion of time for the purpose of counting time limit for completion of insolvency resolution process.

Case title	Vandana Garg v. Reliance Capital Ltd & Anr.
Date	02.07.2019
Order Number	Company Appeal (AT) (Insolvency) No. 603 of 2019

Appellant, the RP of *GVR Infra Projects Limited* on the instructions of the CoC moved an application before the AA, for exclusion of 35 days of delay in appointing RP in place of the IRP and the period during which different applications were pending. Prayer was rejected by the AA, Division Bench, Chennai, vide order dated 30th April, 2019 giving rise to the present appeal.

NCLAT relied on its decision in *Quinn Logistics India Pvt. Ltd.* dated 2nd May, 2019, wherein NCLAT held that *if an application is filed by the Resolution Professional or the Committee of Creditors or any aggrieved person for justified reasons, it is always open to the Adjudicating Authority/Appellate Tribunal to exclude certain period for the purpose of counting the total period of 270 days, if the facts and circumstances justify exclusion, in unforeseen circumstances*.

NCLAT accordingly held that since the CIRP could not proceed in the absence of RP for 35 days, the exclusion of period of 35 days was allowed and also the period of 18 days during which the application remained pending before the AA was excluded.

84

On receipt of rejected resolution plan, NCLT is not expected to do anything more but is obligated to initiate liquidation process.

Case title	Milind Dixit & Anr v. Elecon Engineering Company Ltd & Ors
Date	03.07.2019
Order Number	Company Appeal (AT) (Insolvency) No. 500 of 2019

An application u/s. 9 of the Code was filed by *Elecon Engineering Company Ltd*. (OC) and the AA, Mumbai Bench, initiated CIRP by passing order of admission dated 4th December, 2017. Since the CIRP could not be completed within the statutory period of 180 days, the AA extended time by 90 days in terms of order dated 19th December, 2018.

NCLAT observed that the CoC constituted by the RP held as many as ten meetings during CIRP and after deliberations the resolution plan submitted by *Jyotiba Developers* was rejected with 100 percent vote share as in the opinion of CoC its value was less than the average liquidation value as assessed by the valuers. The CoC recommended that the CD be liquidated as a going concern.

The AA vide its order dated 27th March, 2019 ordered for liquidation of the CD based on approval of CoC. Appellants preferred an appeal against the order on a variety of grounds including alleged irregularity in appointment of RP, collusion between the RP and the CoC, bias and fraud.

NCLAT relying on the decision dated 5th February, 2019 of the Hon'ble Apex Court in Civil Appeal No. 10673 of 2018 titled *K. Shashidhar* v. *Indian Overseas Bank and Ors.* which provides *upon receipt of a "rejected" resolution plan the AA is not expected to do anything more; but is obligated to initiate liquidation process u/s. 33(1) of the Code*, decided not to interfere with the impugned order of liquidation.

85

IBC does not permit the Committee of Creditors to form a Sub-Committee or a Core Committee or to even delegate its power to a Sub-Committee or Core Committee for negotiating with the Resolution Applicant(s).

Case title	Standard Chartered Bank v. Satish Kumar Gupta, R.P. of Essar Steel Ltd. & Ors.
Date	04.07.2019
Order Number	Company Appeal (AT) (Ins.) No. 242 of 2019

In the present appeal, NCLAT was informed by one of the Appellants, *Standard Chartered Bank* (SCB), that despite its opposition, CoC constituted a Core Committee/Sub-Committee to negotiate with the RA [*ArcelorMittal India (P.) Ltd*.]. Regarding the arrangement as inconsistent with the Code, SCB argued that negotiation with an RA on a Resolution Plan is a substantive function of the CoC, and due to constitution of such a sub-committee, SCB has been denied its right to participate in the decision making process.

NCLAT on the issue as to whether the CoC can delegate its power to a 'Sub Committee' or 'Core Committee' for negotiation with the RA for revision of plan, and after hearing the parties and taking into account the law on the subject held that a Sub-Committee or 'Core Committee' is unknown and against the provisions of the Code. NCLAT further held that there is no provision under the Code which permits constitution of a 'Core Committee' or 'Sub-Committee' nor the Code or Regulations empower the CoC to delegate the duties of the CoC to such 'Core Committee'/ 'Sub Committee'.

NCLAT also considered the question of whether the 'Sub Committee' or the CoC are empowered to distribute the amount amongst the FCs and the OCs and other Creditors and held that the CoC does not enjoy any authority to delegate to itself the role of the RA including the manner of distribution of amount amongst the stakeholders, which is exclusively within the domain of the RA, and thereafter, before the AA, if found discriminatory.

86

Once a debt payable by CD stands cleared on account of approval of plan by payment in favour of lenders, the effect of Deed of Guarantee comes to an end as the debt stands paid.

Case title	Prashant Ruia v. State Bank of India & Ors.
Date	04.07.2019
Order Number	Company Appeal (AT) (Ins.) No. 257 of 2019

In the present appeal the ground of challenge made thereof were that the Appellant being a Guarantor with respect to CD's loans, its right of subrogation u/s. 140 and its right to be indemnified u/s. 145 (Indian Contract Act, 1872) stands extinguished on account of approval of the Resolution Plan submitted by *ArcelorMittal India (P) Ltd.*

While dismissing such contentions as devoid of merit, NCLAT held that the effect of 'Deed of Guarantee' comes to an end as the debt stands paid. The guarantee having become ineffective in view of payment of debt by way of resolution to the original lenders (FCs), the question of right of subrogation of the Appellant's right u/s. 140 of the Contract Act and the right to be indemnified under s. 145 of the Contract Act does not arise.

87

Operational Creditors can be classified into different classes and Resolution Applicant is required to determine the manner of distribution to be made amongst them in a non-discriminatory manner.

Case title	Standard Chartered Bank v. Satish Kumar Gupta, RP of Essar Steel Ltd. & Ors.
Date	04.07.2019
Order Number	Company Appeal (AT) (Ins.) No. 242 of 2019

A bunch of appeals were filed challenging an order of the AA, whereby, the resolution plan filed by *ArcelorMittal India (P) Ltd.* (RA), in respect of *Essar Steel India Ltd.* (CD), was approved with certain modifications. In the appeal filed, NCLAT was called upon to decide *inter alia* on the manner and percentage of claim amount payable to different set of creditors. It observed that in the matter of *Darshak Enterprise Private Limited* v. *Chhaparia Industries Pvt. Ltd*., it had held that in a particular case, what should be the percentage of claim amount payable to one or other FC or the OC or Secured Creditor or Unsecured Creditor can be looked into by the CoC based on facts and circumstances of each case. However, that decision was held to be not applicable in the present case wherein it has held that the RA is required to decide the manner in which the distribution is to be made amongst all the stakeholders including the FCs, Operational Creditors and other Creditors. It is only when such distribution is found to be discriminatory, in such case, to remove such discrimination and to find out what should be the percentage of the claim amount payable to one or other FCs or OCs, that the CoC may negotiate and may ask the RA to prepare revised chart re-distributing the amount in favour of Creditors in a manner which is non-discriminatory by providing same treatment to all the stakeholders.

88

AA cannot interfere with CoC's decision on percentage of claim amount payable to different creditors unless there is some discrimination practiced.

Case title	Darshak Enterprise (P) Ltd. v. Chhaparai Industries (P.) Ltd.
Date	04.07.2019
Order Number	Company Appeal (AT) (Ins.) No. 327 of 2017

Appeals were preferred by two OC(s) against the order passed by the AA, Mumbai Bench, approving the Resolution Plan wherein Appellants were given 5% of their principal outstanding. NCLAT held that, in absence of any discrimination or perverse decision, it is not open to AA or the NCLAT to modify the resolution plan.

89

In case of an MSME, it is not necessary for Promoters to compete with other RAs to regain control of CD.

Case title	Saravana Global Holdings Ltd. & Anr. v. Bafna Pharmaceuticals Ltd. & Anr.
Date	04.07.2019
Order Number	Company Appeal (AT) (Ins.) No. 203 of 2019

The present appeal was preferred by *Saravana Global Holdings Ltd.* impugning AA's order whereby the CoC's decision approving the Resolution Plan submitted by CD's Promoters was upheld. The Appellant contended that, though they were interested in submitting a resolution plan for the CD, they were not given any opportunity to file the same before the CoC.

NCLAT held that the Parliament has amended the provisions of the Code with specific intention to encourage the promoters of MSME to payback the amount with the satisfaction of CoC to regain control of CD. Therefore, in exceptional circumstances, if the CD is MSME, it is not necessary for the Promoters to compete with other Resolution Applicants to regain the control of the CD. In view of the fact that the RA was the Promoter of the *Bafna Pharmaceuticals Limited*, MSME, NCLT held that it was open to the CoC to defer the process of issuance of Information Memorandum, if the Promoter of MSME offers a viable and feasible plan maximising the assets of the CD and balancing all the stakeholders. For such purpose, it is not required to follow all the procedure as the case for accepting the proposal u/s. 12A of the Code.

90

Proceedings before NCLT, either under Section 7 or 9 or 10 of the Code, are neither in the nature of a litigation, nor a money suit, or a money claim.

Case title	M/s Smartron Indian (P) Ltd. v. ZTE Corporation
Date	18.07.2019
Order Number	Company Appeal (AT) (Insolvency) No. 733 of 2019

Under the impugned order, which was sought to be challenged in the instant appeal, the AA, Hyderabad Bench had declined permission to the CD/ appellant to file a sur-rejoinder/additional counter and additional documents in the proceedings initiated against it by the OC/Respondent, and had directed parties to argue on merit.

The NCLAT, after taking into account Hon'ble Apex Court's judgment passed in the matter of *Innoventive Industries Ltd*. v. *ICICI Bank & Ors.* (judgment dt. 31st August, 2017), wherein the subtle distinction between different sets of procedure/scheme to be followed in respect of a s. 7 application and that of a s. 9 application was clearly laid down, held as follows:

> "5. *One opportunity which was required to be given to the 'Corporate Debtor' has since been given and it has filed its reply affidavit. Now, it is on the basis of the record available and the stand so taken by the 'Corporate Debtor', the Adjudicating Authority is required to decide the matter…*"

The appeal was accordingly dismissed.

91

It is not open to an appellant to challenge an order admitting its own application.

Case title	Mr. Suresh Narayan Singh v. Tayo Rolls Ltd.
Date	18.07.2019
Order Number	Company Appeal (AT) (Insolvency) No. 561 of 2019

In the instant appeal, curiously, the appellant, who represented 284 workers of the CD (*Tayo Rolls Ltd*.), had sought to challenge an order dt. 5th April, 2019 passed by the AA, Kolkata Bench whereunder the appellant's application filed u/s 9, IBC was admitted. The impugned orders were passed by the AA in terms of NCLAT's directions passed in its judgment dt. 26th September, 2018 (in Appeal (CA (AT) (Ins.) No. 112 of 2018) wherein the Appellant had challenged AA's order dt. 3rd January, 2019 rejecting Appellant's application (filed u/s 9, IBC) on the ground that application u/s 9 has to be filed by the OC individually and not jointly.

While dismissing the appeal, the NCLAT, expressed its view on the matter in the following terms:

> *13. The Appellant-Mr. Suresh Narayan Singh having filed application under Section 9 and being successful, on the basis of direction of this Appellate Tribunal his application under Section 9 was admitted. Now, it is not open to the Appellant to challenge the order of admission of application filed by him*.

92

A mere dispute raised by a CD subsequent to service of Demand Notice u/s. 8(1) by the OC does not fulfil the requirements of the term "existence of dispute" employed u/s. 8(2)(a), IBC.

Case title	M/s. Next Education India Pvt. Ltd. v. K12 Techno Services Pvt. Ltd.
Date	01.08.2019
Order Number	Company Appeal (AT) (Insolvency) No. 98 of 2019

The instant appeal was filed challenging legal validity of an order passed by the AA, Bengaluru Bench whereby the AA had rejected an application filed by the Appellant u/s. 9, IBC on the ground of 'existence of dispute'. The appellant challenged the conclusion arrived at under the impugned order and brought on record Form 5 of 'debt' and 'default', as also the Demand Notice issued by it to the CD u/s. 8(1) of the Code. The appellant's contention was that its application (u/s. 9, IBC) was rejected merely on the ground that the respondent in its reply to the Demand Notice had raised several disputes regarding existence of debt payable by the CD to the OC. During the course of the hearing, the CD was inquired on any correspondence evidencing existence of such a dispute prior to issuance of the Demand Notice u/s. 8(1), IBC, and the CD utterly failed to bring any such correspondence on record. Taking cognizance of such facts, the NCLAT clarified the legal position on the subject in the following words:

> *It is a settled law that if any dispute is raised prior to the issuance of the invoices or Demand Notice u/s. 8(1) of the I&B Code with regard to quality of service or goods or pendency of the suit or arbitration, in such case one may take the plea that there is an 'existence of dispute' but if any dispute is raised after issuance of Demand Notice u/s. 8(1) that cannot be termed to be a 'pre-existing dispute'.*

Thus, concluding, the NCLAT, while setting aside the impugned order, remitted the matter back to the AA with directions to admit the application u/s. 9, IBC, after notice to the CD, and further allowed the CD to settle the claim before its admission, if it so chooses.

93

Application under Sections 7 and 9, IBC will be maintainable against the 'Corporate Debtor', even if the name of a 'Corporate Debtor' had been struck-off from the register of companies within twenty years.

Case title	Mr. Hemang Phophalia v. Penguin Umbrella Works Private Limited Through Mr. Vijay Pitamber Lulla
Date	05.08.2019
Order Number	Company Appeal (AT) (Insolvency) No. 765 of 2019

An appeal was preferred by *Hemang Phophalia*, Ex-Director and Shareholder of the *Penguine Umbrella Works Private Limited* (CD) against the order dated 12th June, 2019 passed by AA, Mumbai Bench, initiating the CIRP against *Penguine Umbrella Works Private Limited* u/s. 7, IBC.

Appellant submitted that name of the CD was struck-off from the Register of the Companies u/s. 248 of the Companies Act, 2013; therefore, the application u/s. 7 against non-existent Company (Corporate Debtor) is not maintainable.

NCLAT observed that the name of the Company having been struck-off, the Corporate Person cannot file an application u/s. 59 for Voluntary Liquidation. In such a case and in view of the provisions of s. 250(3) read with s. 248(7) and (8). NCLT held that the application u/ss. 7 and 9 will be maintainable against the 'Corporate Debtor', even if the name of a 'Corporate Debtor' has been struck-off.

Therefore, while holding that the application u/ss. 7 and 9 will be maintainable against the CD, even if the name of a CD has been struck-off, it further held that the Adjudicating Authority who is also the Tribunal is empowered to restore the name of the Company and all other persons in their respective position for the purpose of initiation of CIRP u/ss. 7 and 9 of the I&B Code based on the application, if filed by the 'Creditor' ('FC' or 'OC') or workman within twenty years from the date the name of the Company is struck off under sub-section (5) of s. 248, IBC.

The appeal was accordingly dismissed.

94

If, under a Contract of Supply inter se the parties, existence of a dispute as regards quality of goods supplied is established, no application filed u/s. 9, IBC, seeking initiating of CIRP against the CD is maintainable.

Case title	R.S. Cottonmark (I) (P) Ltd. v. Rajvir Industries Ltd.
Date	05.08.2019
Order Number	Company Appeal (AT) (Insolvency) No. 653 of 2018

In this appeal matter, the NCLAT was called upon by an OC (Appellant) to decide legality of an order passed by the AA, Hyderabad Bench, wherein, based on its findings as regards facts of the case, the AA had rejected OC's petitions on the ground of "existence of dispute".

The relevant and pertinent facts of the case are that pursuant to a contract inter se the parties, the appellant had made certain supplies of goods to the respondent (CD). The respondent, however, after conducting a quality test on the goods supplied had found them not up to the mark, as per CD's requirements. Furthermore, an intimation in this regard was sent to the OC, as also to the Market Intermediary (as per the practice in place). Upon taking cognizance of the facts of the case, NCLAT concluded as follows:

> *11. We are of the considered view that there is an existence of dispute as on the date of issue of Demand Notice by the Appellants to the Respondent. Apart from the above, the Respondents also raised the issue with regard to quality of the bales supplied by the Appellants to the Respondent....*
>
> *12. From the perusal of the dates of the said letters, it is apparent that the letters have been issued much prior to issuance of Demand Notice.... by the Appellants to the Respondent.*

Thus, finding no legal infirmity in the impugned order, NCLAT dismissed the appeal reiterating that IBC is not meant to be a legal instrument for recovery of money, and left it open to the appellant to pursue any alternative remedy available to it in law with regard to its claims against the Respondent/CD.

95

NCLT is required to provide reasonable opportunity of hearing to the parties concerned/alleged offenders before referring the matter to the IBBI or the Central Government.

Case title	Committee of Creditors of Amtek Auto Ltd. through Corporation Bank v. Dinkar T. Venkatasubramanian & Ors
Date	16.08.2019
Order Number	Company Appeal (AT) (Insolvency) No. 219 of 2019

On the issue as to whether the AA, Chandigarh Bench, has any jurisdiction to pass any order referring the matter to the Central Government or the IBBI for action u/s. 74(3) or under any of the provisions 'for punishment' as prescribed under Chapter VII of Part II of the Code, NCLAT observed that Code is silent on this aspect.

Setting aside the order of the AA dated 13th February, 2019 relating to grant of liberty to CoC or RP to file a complaint before the IBBI, NCLAT opined that before referring the matter to the IBBI or the Central Government, the AA is required to provide reasonable opportunity of being heard to the parties concerned/alleged offenders of provisions of Chapter VII of Part II and if satisfied, may request the Central Government to investigate the matter and then to decide the question of referring matter to special court u/s. 236, IBC for alleged offence u/s. 74(3) of the Code.

96

After completion of statutory period of 270 days, the Adjudicating Authority only has the option to pass liquidation order for the Corporate Debtor.

Case title	Sanjeev Shriya v. LML Ltd. & Ors.
Date	20.08.2018
Order Number	Company Appeal (AT) (Insolvency) No. 154 of 2018

The appeal was preferred by one of the shareholders of the CD against liquidation order passed by the AA, Allahabad Bench, on the ground that the Resolution Process was not conducted in a legal manner. The AA also noticed that the RP was not conducting the proceeding properly and was not careful in following timelines prescribed under the Code.

NCLAT held that such submissions at a belated stage cannot be entertained because Appellant or the members of the Board of Directors never raised any objection about the proceeding before AA earlier. After completion of statutory period of 270 days, the AA, having no option, ordered for liquidation of CD. In view of the fact that the Resolution Plans were not approved as they were not in accordance with s. 30(2), it was held that grant of extension of period shall not serve any useful purpose.

97

If the assets of a Corporate Debtor are the result of "proceeds of crime", it would always be open to the Enforcement Directorate to seize the assets in accordance with the Prevention of Money Laundering Act, 2002.

Case title	Shweta Vishwanath Shirke & Ors. v. The Committee of Creditors & Anr.
Date	28.08.2019
Order Number	Company Appeal (AT) (Insolvency) No. 601 of 2019

A bunch of appeals were filed against a liquidation order passed against the Corporate Debtor.

The CoC approved a settlement with the promoters of the CD with 90% approval and sought withdrawal of the s. 7 application. AA passed the liquidation order as the settlement was opposed on the ground that the assets of the CD are based on the proceeds of the crime and therefore, it cannot be given to any person.

NCLAT held that the Enforcement Directorate has the power to seize the assets of the CD in accordance with the Prevention of Money Laundering Act, 2002, however, it will not come in the way of the individual such as 'Promoter' or 'Shareholder' or 'Director', if he pays not from the proceeds of crime but in his individual capacity the amount from his account and not from the account/ assets of the CD and satisfies all the stakeholders, including the FC(s) and the OC(s). There was nothing on the record to suggest that the individual property of the Promoter / Shareholder / Director who proposed to pay the amount has been subjected to restraint by the 'Enforcement Directorate'. Therefore, even if the asset of the 'CD' is held to be proceeds of crime, the AA cannot reject the prayer for withdrawal of application u/s. 7, if the Promoter / Director or Shareholder in the individual capacity satisfies the creditors.

NCLAT set aside the order of liquidation and further directed that setting aside the order of initiation of CIRP will not amount to interference with any of the orders passed by the ED with regard to the assets of the CD and the proceedings under PMLA will continue against the CD etc. in accordance with law. Side by side, the remarks made by AA against the RP were also expunged.

98

Section 29A, IBC is not applicable for entertaining/considering an application under Section 12A, IBC.

Case title	Andhra Bank v. Sterling Biotech Ltd. (Through the Liquidator) & Ors.
Date	28.08.2019
Order Number	Company Appeal (AT) (Insolvency) No. 612 of 2019

The Appellant (*Andhra Bank*) submitted that s. 29A is not applicable to an application filed u/s. 12A for withdrawal of application u/s. 7 filed by *Andhra Bank*, if the CoC accepts the same with more than 90% of the voting share.

NCLAT relied on s. 12A and the decision of the Hon'ble Supreme Court in *Swiss Ribbons Pvt. Ltd. & Anr.*, to hold that the Promoters/Shareholders are entitled to settle the matter in terms of s. 12A and in such cases, it is always open to an applicant to withdraw the application u/s 9 of the I&B Code on the basis of which the CIRP was initiated.

NCLAT allowed the appellant to withdraw the appeal concluding that s. 29A is not applicable for entertaining/considering an application u/s. 12A.

99

NCLAT directed that the orders passed by NCLT or NCLAT will not come in the way of SEBI or any competent authority taking steps against erstwhile promoters, directors or officers or others, if any or all of them had violated any of the provisions under the SEBI Act or Rules framed thereunder or any other law.

Case title	Securities and Exchange Board of India v. Assam Company India Ltd. & Anr.
Date	29.08.2019
Order Number	Company Appeal (AT) (Insolvency) No. 629 of 2018

The appeal was filed before the Hon'ble NCLAT challenging order dated 20th September, 2018 passed by the AA, Guwahati Bench, wherein the AA had approved the Resolution Plan submitted by RA, *BRS Ventures Investment Ltd.*

The Appellant challenged the order of approval of resolution plan which was 100% voting share of the CoC. The Resolution Plan involved delisting of shares of the CD to which SEBI (the appellant) objected stating that the CD was a shell company which was undergoing an investigation by Forensic Auditor on an interim order of WTM of SEBI.

Further the CD challenged the investigation before the Hon'ble High Court, Guwahati which set aside the investigation by order dated 7th March, 2019. The appellant moved the Division Bench against the said order; however no order of stay was passed.

NCLAT held that the appeal is not maintainable on merit, in absence of any violation of the provisions of the Code or any existing law or material irregularity in exercising the powers by the RP. NCLAT also stated that the order passed by the NCLT or NCLAT will not come in the way of the SEBI or any competent authority taking steps against erstwhile promoters, directors or officers or others, if any or all of them had violated any of the provisions under the SEBI Act or rules framed thereunder or any other law.

100

Adjudicating Authority has no jurisdiction to reject an application filed under Section 9, IBC only on the ground that the Corporate Debtor is an MSME.

Case title	M/s. Bannari Amman Spinning Mills Ltd. v. My Choice Knit & Apparels Pvt. Ltd.
Date	03.09.2019
Order Number	Company Appeal (AT) (Insolvency) No. 513 of 2019

An appeal was filed against AA's order whereby a s. 9 application was dismissed.

The Appellant had filed an application u/s 9, IBC for initiation of CIRP against the Respondent (CD). The AA had dismissed the application on the ground that the CD is a Micro, Small and Medium Enterprise (MSME), and the Code provides some safeguards to run its business and also a mechanism is provided in the Code itself to settle their dispute arising out of the business transactions made by the MSME with the other business establishments.

The impugned order was set aside and the case was remitted to AA with direction to AA to admit application after notice to CD to enable it to settle the claim.