RRG & ASSOCIATES
LAW OFFICES

RRG & ASSOCIATES (FIRM UPDATE)

A. ***1st FICL- CORPORATE LAWYERS SUMMIT; MRS. RANJANA ROY GAWAI, MODERATED A SESSION ON REGULATORY & COMPLIANCE ISSUES AND CORPORATE RESTRUCTURING & INSOLVENCY.***

We are elated to share that RRG & Associates was an integral part of 1st FICL – Corporate Lawyers Summit 2022. Our Founder and Managing Partner, Mrs. **Ranjana Roy Gawai** moderated a session on REGULATORY & COMPLIANCE ISSUES AND CORPORATE RESTRUCTURING & INSOLVENCY. The panelists included Mr. Siddharth Srivastava, Partner, Khaitan & Co, Mr. Rahul Narayan, Partner, Dua Associates, Ms. Renuka Iyer, Mr. Vishal Narula, Partner. The panelists had an effective discussion on issues like interplay between insolvency and SEBI laws, bottlenecks in the insolvency regime, group insolvency and reverse insolvency, pre pack insolvency and Dealing with Regulatory issues (Anti-Trust, Anti-Bribery) or non-compliances / frauds (accounting frauds, corporate frauds) discovered through Forensic Audits / DDs and their impact on the insolvency process.

B. **PHDCCI ORGANIZED A CONFERENCE ON WOMEN IN POWER AND DECISION MAKING ON JULY 23, 2022 AT PHD HOUSE, AUGUST KRANTI MARG, NEW DELHI, MRS. RANJANA ROY GAWAI**

SHARED HER INSIGHTS AND GRACED THE EVENT

To acknowledge, celebrate & uphold the growing prominence of Women in all spheres of the society, PHDCCI organized a Conference on Women in Power and Decision Making on July 23, 2022 at PHD House, August Kranti Marg, New Delhi.

Our Founder & Managing Partner Mrs. Ranjana Roy Gawai, shared her insights during the interactive session on Women in Industry in the conference. Women are significantly represented in all spheres of the society whether that is Judiciary, Legislature, Corporate and other sectors where they have excelled and contributed remarkably as change makers in all walks of life. Although, we have come a long way, there is still a lot to be done before we witness the desired and significant representation of Women in different facets of society. The conference was organized by the Law and Justice Committee of PHDCCI chaired by Ms. Priya Hingorani, Senior Advocate and Co-chairs, Ms. Mohini Lalit Bhat, Advocate and Mr. Kirit Javali, Advocate. The Conference was graced by Hon'ble Mr. Justice S. Ravindra Bhat, Judge, Supreme Court of India as the Guest of Honour and Hon'ble Mr. Justice Sanjeev Sachdeva, Judge, High Court of Delhi. Many other dignitaries along with a large number of delegates from Industry and Legal fraternity also joined for this Conference.

C. **CONFEDERATION OF INDIAN INDUSTRIES, NATIONAL COMMITTEE ON LEGAL SERVICES, NOMINATION OF OUR MANAGING PARTNER AS A MEMBER**

We are elated to share that a new feather has been added in the RRG & Associates' cap. Our Founder & Managing Partner, Mrs. Ranjana Roy Gawai has been nominated to be a part of CII National Committee on Legal Services constituted under the Chairmanship of Dr Lalit Bhasin. The committee comprises of revered members from the Legal Fraternity. Mrs. Ranjana Roy Gawai, through this role will endeavor to provide her inputs and contribute towards the growth of this committee. We foresee that this committee formulated by CII will deeply contribute towards growth, policy development and will set benchmarks in the legal arena.

D. **In the matter of JAGDISH CHANDRA ETC. VERSUS HINDUSTAN ZINC LIMITED & ORS., Petition(s) for Special Leave to Appeal (C) No(s). 18832-18837/2013 (Arising out of impugned final**

judgment and order dated 22-01-2013 in DBSA No. 439/2002, DBSA No. 1464/1999, DBSA No. 1466/1999, DBSA No. 35/2000, DBSA No. 374/2001 & DBSA No. 1463/1999 passed by the High Court Of Judicature For Rajasthan At Jodhpur), we represented the Respondents and were led by Mr. K.V. Vishwanathan, Sr. Adv. And our Managing Partner, Mrs. Ranjana Roy Gawai

In the instant case, the Hon'ble Apex court after hearing both the Parties at length was of the opinion that there exists no reason/justification to interfere with the order(s) impugned., i.e., final judgment and order dated 22-01-2013 in DBSA No. 439/2002, DBSA No. 1464/1999, DBSA No. 1466/1999, DBSA No. 35/2000, DBSA No. 374/2001 & DBSA No. 1463/1999 passed by the Hon'ble High Court of Judicature for Rajasthan at Jodhpur. The Hon'ble Apex Court heard the Parties and ordered in favor of the Respondents by dismissing the Special Leave Petitions.

E. **In the matter of Dinesh Jhunjhunwala v. Citixsys Technologies Ltd. & Ors., CO.A(SB) 21/2016 & Co.Appl. No. 1343/2019, we represented the Respondents**

In this case our Firm represented Appellants, whereby we filed an appeal against an Order of the learned CLB which dismissed the Company Petition filed by the Appellant herein under Section 397/398 of the Act, on the ground that the Appellant, along with the other shareholders of the Respondent no. 1-Company from whom also he had taken consent to file the Company Petition on their behalf as well (hereinafter referred to as the "Consenters"), had failed to constitute 1/10th of the total number of members of the Respondent no. 1-Company as on the date of filing of the Company Petition. Liberty was granted to the Appellant to proceed on the same cause of action before the learned CLB after obtaining approval under Section 399(4) of the Act or before the Civil Court.

Issue:

Appellant submits that the learned CLB has erred in dismissing the Company Petition filed by the Appellant merely by perusing the register of the shareholders produced by the Respondent no. 1-Company/Respondents. No opportunity to rebut the contents of the register and/or to raise the plea that the transfer of shares to increase the number of members of company was fraudulent, was provided to the Appellant by the learned CLB.

Court Held:

Court placed reliance on various judgments, and held that while considering maintainability of the Petition, construction which furthers the purpose intended to be fulfilled by such petitions filed against oppression and mismanagement and would facilitate the solution of problems in the case of oppression, has to be adopted. the Respondents merely produced the Register of Members before the learned CLB. It did not even file any application before the learned CLB challenging the maintainability of the Company Petition. The learned CLB placed reliance on the register of members so produced, without giving any opportunity to the Appellant to challenge the entries made therein. In fact, even a copy thereof was not supplied to the Appellant. Once it is accepted that the Appellant can also challenge the transfer of shareholding as being oppressive and as being intended only to defeat the COA(SB) 21/2016 Page 14 of 15 right of the Appellant to maintain his petition under Section 397/398 of the Act, an opportunity should have been granted to the Appellant to peruse the register of members and, if so advised, challenge the same in accordance with law. The Company Petition, on the averments made in the Petition itself, could not have been thrown out at the threshold without granting such opportunity to the Appellant. As noted hereinabove, the learned CLB should have considered if the transfer of shares was made after the filing of the first Company Petition by the Appellant in January, 2015 and alteast prima facie showed any mala fide intent of the Respondent no.1-Company to record such transfer only to defeat the right of the Appellant to maintain the Company Petition under Section 397/398 of the Act.

OIL & GAS SECTOR

- **Supply of Liquified Natural Gas- Our Inputs**

With regard to Infrastructure and Transportation of Natural gas, perusal of the reports by Standing Committee on Petroleum & Natural Gas, were undertaken as per which it was deduced that the City Gas Distribution Network Authorization Regulations were framed by PNGRB in 2008, with a perspective to ensure proper and efficient supply of CNG and PNG by the authorized entity using CGD network. However, it was observed that in no manner, can the same CGD Network can be used for LNG.

Since the infrastructure has to be commonly used, it can be construed that only one kind of gas can be supplied into the pipeline network and since the existing infrastructure is implemented for the supply of CNG and PNG, it cannot be used by an entity willing to supply LNG.

The storage, supply, operational aspects, maintenance for LNG is extremely different with that of CNG. Moreover, Technical Standards and Specifications including Safety for LNG were not even into existence in 2008 when the Authorizations Regulations were made by the Board, the same has been notified only on 18.01.2018. It thus makes it evident that the Authorization Regulations were formed keeping into consideration the supply and market demand of CNG and PNG only.

The restrictions imposed by PNGRB upon both i.e., the customers of LNG and supplier of LNG, by way of public notice dated 23.07.2020 whereby the Board has observed that the customers of natural gas including LNG having requirement up to 50,000 SCMD shall be supplied through the CGD network, during marketing exclusivity period. This stand of PNGRB is arbitrary and unconstitutional to the scheme of the Act.

The interpretation given to Regulation 3 (2) of the Authorization Regulations vide public notice 23.07.2020 is not only contrary to the fundamental right of the traders but is also against the very object of the Act, which is to protect the interest of the consumers and ensure a competitive market.

Further, it is important to note that the Board has on 18.01.2018 notified the Regulations specifying Technical Standards and Specifications for LNG Facilities (LNG T4S Regulations) and subsequent to the same draft Regulations for Registration for Establishing & Operating LNG Terminals has also been notified.

The Technical definition of the term LNG has been defined under Regulations 2(x) of the T4S Regulations, which states as follows: *"Liquefied Natural Gas" (LNG) means a fluid in the liquid state composed predominantly of methane (CH4) and which may contain minor quantities of ethane, propane, nitrogen, or other components normally found in natural gas;*

The objective of the T4S Regulation is to ensure uniform application of design principles and to guide in selection and application of materials and components, equipment and systems and uniform

operation and maintenance of the LNG terminals or facilities and primarily focusing on safety aspects of the employees, public and facilities associated with LNG terminals. Upon perusal of LNG T4S Regulations it is evident that the Storage, Supply, Operational Aspects and Maintenance for LNG is extremely different with that of CNG and PNG, the establishment and infrastructure set up by the existing CGD network does not in any manner comply with the same.

Further the purpose of the Draft Regulations for Registration for Establishing & Operating LNG Terminals, is to allow the entities intending to Operate and Establish LNG Terminals to register themselves and operate. The Regulations does not in any manner restrain the sale of LNG in any GA where the CGD network is already operating nor does it restrict the sale or purchase to customers having demand less than 50,000 SCMD.

Therefore, the restriction given under Authorization Regulation 3(2)(a) and vide public notice dated 23.07.2020, cannot be said to be applied to LNG customers having a requirement of less than 50,000 SCMD.

RBI

1. *CIRCULARS AND NOTIFICATIONS*

A. Draft Master Direction on Outsourcing of IT Services

June 23, 2022: RBI *vide* its press release RBI/2022-23/xx DoS.CO.CSITEG/SEC.xx/ 31.01.015/2022-23 has released the Reserve Bank of India (Outsourcing of IT Services) Directions, 2022 ("**Draft Master Directions**"). The said Draft Master Directions is applicable to identified regulated entities, which includes non-banking financial companies in top, upper and middle layers ("**REs**"). The underlying principle of the Draft Master Directions is that the RE should ensure that outsourcing arrangements neither diminish its ability to fulfil its obligations to customers nor impede effective supervision by the supervising authority. REs desirous of outsourcing of Information Technology (IT) and IT enabled services shall not require prior approval from RBI. However, such arrangements shall be subject to on-site/ off-site monitoring and inspection/ scrutiny by the supervising authority. The Draft Master Directions shall apply to Material Outsourcing of IT Services arrangements entered by the Res.

B. **Provisioning for Standard assets by Non-Banking Financial Company – Upper Layer (NBFC-UL).**

The Reserve Bank of India ("**RBI**") *vide* its notification RBI/2022-23/61DOR.STR.REC.40/21.04.048/2022-23 issued guidelines on differential provisioning to be maintained by Non-Banking Financial Companies (NBFCs) classified as NBFC-UL towards different classes of standard assets as stipulated under its earlier circular **DOR.CRE.REC.No.60/03.10.001/2021-22** dated October 22,2021 on "*Scale Based Regulation (SBR): A Revised Regulatory Framework for NBFCs*".

C. **RBI issued Liberalization Measures under the External Commercial Borrowings Policy and has subsequently amended Master Direction - External Commercial Borrowings, Trade Credit and Structured Obligations**

RBI vide its Circular No. RBI/2022-23/98 A.P. (DIR Series) Circular No. 11 has issued certain liberalization measures under its External Commercial Borrowings (ECB) Policy, pursuant to Para 5 of the press release on "Liberalisation of Forex Flows" dated July 06, 2022.

RBI vide the said circular has decided to:

- increase the automatic route limit from USD 750 million or equivalent to USD 1.5 billion or equivalent.
- increase the all-in-cost ceiling for ECBs, by 100 bps. The enhanced all-in-cost ceiling shall be available only to eligible borrowers of investment grade rating from Indian Credit Rating Agencies (CRAs). Other eligible borrowers may raise ECB within the existing all-in-cost ceiling, as hitherto.

D. **RBI amends Foreign Exchange Management (Borrowing and Lending) Regulations, 2018**

RBI vide its gazette notification no. No. FEMA.3(R)(3)/2022-RB has amended the Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 ("Principal Regulations"). A new Para 8A was inserted by RBI inserted under Schedule I (Borrowings from outside India by a person resident in India) to the Principal Regulations, vide which the limit of borrowing for eligible borrowers from USD 750 million to USD 1,500 million was temporarily increased; and such dispensation will be available for ECBs raised till December 31, 2021.

COMPANY LAW UPDATES

A. MCA notifies Companies (Appointment and Qualification of Directors) Amendment Rules, 2022.

Ministry of Corporate Affairs ("**MCA**") vide its notification G.S.R.410 (E) dated June 1,2022 notified the Companies (Appointment and Qualification of Directors) Amendment Rules, 2022 to amend the Companies (Appointment and Qualification of Directors) Rules, 2014 ("**Appointment Rules**") wherein the below amendments are brought out:

New Proviso to Rule 8 of the Appointment Rules: Clause 5 of Section 152 (*Appointment of Directors*) of the Companies Act, 2013 ("**Companies Act**") provides that a person shall act as a director only after the person has given his consent to hold the office as a director and such consent has been filed with the Registrar of Companies ("**ROC**") within thirty days of his appointment. Rule 8 (*Consent to act as a director*) of the Appointment Rules provides that the written consent to act as a director has to be filed with the company in Form DIR-2 and the company after receiving such consent letter has to file the consent letter with the ROC in FormDIR-12 along with the fees as provided in the Companies (Registration Offices and Fees) Rules,2014. A new proviso has been inserted in Rule 8 of the Appointment Rules which provides that in case the person seeking appointment as a director is a national of a country which shares land border with India, necessary security clearance from the Ministry of Home Affairs, Government of India shall also be attached along with the consent.

New Proviso to Rule 10(1) of the Appointment Rules: Rule 9(1) of the Appointment Rules elaborates on the procedure to obtain Director Identification Number ("**DIN**") by filing an electronic application in Form DIR-3 to the Central Government along with such fees as provided under the Companies (Registration Offices and Fees) Rules, 2014. Further Rule 10(1) of the Appointment Rules specifies that on submission of Form DIR-3 and payment of requisite amount of fees through online mode, an application number shall be generated by the online portal. A new proviso has been inserted in Rule 10(1) of the Appointment Rules which provides that in case the person applying for DIN is a national of a country which shares land border with India, an application number shall be generated only after submitting

necessary security clearance from the Ministry of Home Affairs, Government of India alongwith the application for DIN.

Further, consequential changes in Forms DIR-2 (Consent to act as a director of the Company) andDIR-3 (Allotment of DIN) have been brought out accordingly.

The Companies (Appointment and Qualification of Directors) Amendment Rules, 2022 are effective from June 1, 2022.

B. MCA clarifies on spending of CSR funds for "Har Ghar Tiranga" campaign

The MCA vide its general circular no. 08/2022 dated July 26, 2022, stated that the following spendings under the Har Ghar Tiranga Campaign would qualify as spending on corporate social responsibility ("CSR") under the aegis of Azadi ka Amrit Mahotsav, such as:

(a) mass scale production and supply of the National Flag;

(b) outreach and amplification efforts; and

(c) other related activities;

The aforementioned activities are eligible CSR activities under item no. (ii) of Schedule VII of the Companies Act, 2013, which Are related to 'promotion of education relating to culture'. It was further clarified that the companies

may undertake the aforesaid CSR activities, subject to fulfillment of the Companies (CSR Policy) Rules, 2014 and related circulars/ clarifications issued by the MCA thereof, from time to time.

SECURITIES LAW UPDATES

A. Framework for regulating online bond trading platforms proposed by SEBI.

The Securities and Exchange Board of India ("SEBI") has sketched a framework to regulate the selling of listed debt securities on online bond platforms. The blueprint of the framework provides for the registration of the bond platforms as stockbrokers with the SEBI. The framework aims to bring these entities under the purview of the stock-broker regulations, which inter-alia would govern their code of conduct and other aspects including but not limited to their risk and operations management.

In terms of the proposed SEBI scheme solely listed debt securities will be provided with the option to buy or sale the online bond

platforms. With respect to the listed debt securities which are offered for sale on online bond platforms after being issued on a private placement, are proposed to be locked in for a period of at least 6 (Six) months from the date of allotment of such debt securities by the issuer.

In order to minimise the risk of settlement, it has been further proposed in the scheme that transactions entered upon through online bond platforms must be then passed through the trading platform of the debt segment of exchanges. In the alternative, in order to clear and settle a transaction on a Delivery Versus Payment (DVP-1) basis, an option to route the transactions through the Request for Quote has also been suggested by the Board.

B. Government declares "zero coupon zero principal instruments" as securities

Securities and Exchange Board of India("SEBI") in September 2021 had approved the creation of Social Stock Exchange ("SSE"), which is a funding platform regulated by SEBI for listing Not-for-Profit Organisations ("NPOs"). SEBI also cleared a scheme for raising funds by such NPOs on the SSE. The scheme contemplated that a security may be introduced in the form of a zero coupon zero principal bond. A zero coupon zero principal bond is contemplated to have zero coupon and no principal payment at maturity, thereby differentiating it from the conventional bonds. A conventional bond provides for a fixed interest/repayment on the funds raised through the various contractual arrangements, however a zero coupon zero principal bond is not designed to offer such returns but promises a social return to the funder.

In furtherance to setting up of SSE by SEBI, the Ministry of Finance has now, vide its Gazette notification dated 15.07.2022, declared "zero coupon zero principal instruments" to be securities under the Securities Contracts (Regulation) Act, 1956 ("SCRA"). Zero coupon zero principal instruments mean instruments issued by NPO which shall be registered with the SSE segment of recognised stock exchanges.

Pursuant to this notification by the Ministry of Finance, zero coupon zero principal instruments shall now be governed by the rules and regulations made by the Securities and Exchange Board of India.

C. Applicability of the provisions in Circular on Development of Passive Funds deferred by SEBI

SEBI in order to regulate and manage the passive funds i.e., Exchange Traded Funds ("ETFs") vide its circular dated May 23, 2022 ("Circular"), had issued a framework coming into effect from July 01, 2022. The Scheme lays down the standard in relation to the direct transactions in ETFs through Asset Management Companies ("AMCs") and in order to enhance the liquidity in Units of ETFs, provides the investors with an opportunity to enter into direct transactions with AMCs for transactions above INR 25 Crores.

Subsequent to the perusal of the response received from all the stakeholders, SEBI has decided to bring the above provisions governing direct transactions in ETFs through AMCs into force on and from November 01, 2022.

D. **SEBI issues a consolidated circular for listing obligations and disclosure requirements for non-convertible securities, securitized debt instruments and commercial papers**

SEBI has vide its notification dated 22.03.2022 amended the SEBI Listing Regulations, making the requirement to separate the role of chairperson and Managing Director or CEO of a Company, non-mandatory. In terms of the same, the mandatory requirement for top 500 listed entities to ensure that a Chairperson or Board of Directors is a non-executive director and not related to the Managing Director or the CEO w.e.f. 01.04.2022 has been made discretionary.

E. **Listing obligations and disclosure requirements for non-convertible securities, securitized debt instruments, and commercial papers issued by SEBI**

With the aim to increase operational efficiency and ease out the obligations for listing and compliance, SEBI has recently issued a consolidated operational circular that revolves around non-convertible securities, securitized debt instruments, and commercial papers. The operational circular not only puts together all the relevant existing circulars and their consequential changes but also provides for the format for submission of statements thereby indicating the utilization of issue proceeds for non-convertible securities to stock exchanges

LATEST JUDGMENTS

A. **In the Matter of Star India Private Limited v. Advance Multisystem Broadband Communications Limited (I.A. No. 841/KB/2020) combined with**

Shri Kuldeep Verma, Resolution Professional of Advance Multisystem Broadband Communications Limited v. IndusInd Media and Communications Limited and Others (I.A. No. 1288/KB/2020) NCLT: Material facts are to be pleaded in preferential, fraudulent or avoidable transactions

The National Company Law Tribunal, Kolkata ("**NCLT**"), vide its order dated 30.05.2022, in the aforementioned matter held that a transaction cannot be alleged to be preferential, fraudulent or avoidable by the resolution professional, unless an **enquiry has been conducted** by the relevant experts and **specific material facts have been stated as to why such transaction would be covered under Sections 45/46/47** (Avoidance of undervalued transactions and application by creditor in cases of undervalued transactions) and Section 66 (Fraudulent trading or wrongful trading) of the Insolvency and Bankruptcy Code, 2016 ("**Code**").

B. M/s Orissa Concrete and Allied Industries Ltd. Vs. Union of India, 2022 SCC OnLine Del 955

In this case, the Hon'ble High Court of Delhi decided the issue as to **whether a fresh claim arising out of the same dispute can be entertained in a separate arbitration.** The petitioner had sought appointment of a sole arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("Act") to arbitrate the disputes between the parties regarding the manufactured sleepers, delivery of which was not taken by the respondent despite various communications. The Court held that the claim of the petitioner in the earlier arbitral award concerned the illegal termination of the contract, liquidated damages and recovery of the payment towards the dispatched sleepers. In the earlier arbitration proceedings, the petitioner had not claimed payment and damages towards the sleepers lying with the Petitioner at its premises. By referring to the contract between the Parties, the Court further held that there was no stipulation in the contract that once some disputes are referred to arbitration, further disputes arising out of the same contract cannot be decided by an arbitrator. **Taking this view, the Hon'ble Court allowed the petition for appointment of an Arbitrator under Section 11(6) of the Act to adjudicate the fresh disputes arising between the parties.**

C. In the matter of *M/s Agarwal Veneers v Fundtonic Service Pvt. Ltd.*, CIRP Against Solvent, MSME Company Providing Employment Not Justified: NCLAT Delhi

The National Company Law Appellate Tribunal ("NCLAT"), Principal Bench, comprising of Justice Anant Bijay Singh (Judicial Member) and Ms. Shreesha Merla (Technical Member), while adjudicating an appeal filed in ***M/s Agarwal Veneers v Fundtonic Service Pvt. Ltd.***, has upheld the dismissal of a Section 9 petition on the grounds of the Corporate Debtor being a solvent company, operating as a 'going concern' and is also a MSME enterprise providing employment and generating revenue.

BACKGROUND:

A petition under Sec. 9 of the Insolvency and Bankruptcy Code, 2016 was filed by M/s Agarwal Veeners ("Appellant") before NCLT Ahmedabad Bench seeking initiation of Corporate Insolvency Resolution Process ('CIRP') against Fundtonic Service Pvt. Ltd. ('Respondent'). The Adjudicating Authority vide an order dated 29.09.2020 rejected the said petition while observing as stated.

DECISION of NCLAT

The Bench observed that a Demand Notice under Section 8 could be issued by an advocate. However, the Adjudicating Authority is empowered **to reject an incomplete petition under Section 9 if a copy of the invoices, the bank statements and the financial accounts are not furnished alongwith it.** The Preamble of IBC describes its spirit and objective to be 'Reorganisation' and 'Insolvency Resolution', specifically omitting the word 'Recovery'. **If IBC is purely used for the purpose of Debt Recovery, particularly when the amounts due are small, and the Company is a solvent entity and is a going concern, the question of 'Reorganising' or 'Resolution of the Company' does not arise.**

D. In the matter of Saraf Chits Private Limited & Anr. v. KAD Housing Private Limited (IB)-255 (ND)/2021

In the present matter, M/s Saraf Chits Private Limited and M/s. VKSS International Private Limited (Financial Creditors) filed an application under the Section 7 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a prayer to initiate CIRP against KAD Housing Private Limited (Corporate Debtor). As per Part IV of the appliance which denoted detailed particulars of the entire financial debt by the Corporate Debtor and its default thereon, the un-paid amount was shown as INR 1,76,04,484. The date of

default was in July 2019, however, during the course of proceedings the company Debtor had paid the principal amount of INR 1.5 Crore and only an amount of INR 64 lakh was left to be paid towards the interest component. This was highlighted by the Counsel for the Applicants during the course of hearing on 08.12.2021. In furtherance of the identical, on 19.04.2022 the Applicants contended the maintainability of this application by relying on the fact that the principal amount was discharged only during the pendency of the proceedings and not before the default date. Additionally, it had been submitted that as the statutory definition of the term 'financial debt' under Section 5(8) of the Code included interest also. Therefore, even though it's only the interest amount that is remains unsettled, this application is maintainable within the eyes of law and CIRP shall be initiated.

Issues: The primary issue under consideration before the Tribunal was, "Whether the CIRP can be initiated / triggered solely on the basis of the un-paid amount of interest when the entire principal amount of debt has been discharged by the Corporate Debtor?

Court Held:

While deliberating upon the difficulty involved in the present matter, the Tribunal noted that a clear reading of all **the relevant definitions will unravel that interest is not included within the term "debt" per se**. Rather, the "interest" are often claimed as "financial debt" only if such debt exists. Similarly, the NCLAT within the matter of S. S. Polymers v. Kanodia Technoplast Ltd., Company Appeal (AT) (Insolvency) No. 1227 of 2019, observed that when the total debt was paid by the Corporate Debtor before the admission of an application under Section 9 of the Code; the appliance filed solely to realise interest would be pursued as being filed with malicious intent. Additionally, it might be barred according to the principles of the Code also as within the nature of Section 65 of the Code. Therefore, considering the statutory definitions envisaged under the Code, the **Tribunal was of the view that a nonpayment of only the interest can't be the reason to trigger the resolution process under the Code**. Such an intention isn't within the purview of the preamble of the Code. **The Tribunal while dismissing the petition by the applicants ruled that CIRP against a company Debtor cannot be initiated/triggered solely**

on the basis of the un-paid amount of interest where the entire principal amount has already been discharged by the company Debtor.

E. **In the matter of Sudip Dutta v State Bank of India [CA (AT) (Insolvency) No. 807 of 2021]**

"LIABILITY OF PERSONAL GURANTOR SURVIVES EVEN WHEN HE BECOMES A FOREIGN CITIZEN: NCLAT DELHI"

The National Company Law Appellate Tribunal ("NCLAT"), New Delhi, comprising of Justice Ashok Bhushan (Chairperson), Justice M. Satyanarayan Murthy (Judicial Member) and Shri Barun Mitra (Technical Member), has held that the **liability of Person Guarantor does not cease of exist upon becoming a foreign national**. It was further held that the provision of Section 234 and Section 235 of IBC would not apply if the assets of the Personal Guarantor are situated within India. It was observed that Section 60(1) of IBC categorically provides that the insolvency resolution process is to be initiated before the Adjudicating Authority within whose territorial registered office of the corporate person is located. The residence of Personal Guarantor is not taken into consideration when proceedings against the Personal Guarantor are initiated.

The statutory scheme of the code does not contain any indication that the Personal Guarantor of a Corporate Debtor can escape from its liability under the Personal Guarantee Deed merely on the ground that he is now started residing in another country and acquired citizenship of another country and is no more an Indian citizen."

F. **Prashant Agarwal v. Vikas Parasrampuria**

"THRESHOLD LIMIT UNDER INSOLVENCY AND BANKRUPTCY CODE WILL ALSO INCLUDE INTEREST: NCLAT"

The National Company Law Appellate Tribunal, Principal Bench, New Delhi comprising of Justice Ashok Bhushan, Justice M Satyanarayana Murthy and Mr. Naresh Salecha held that minimum threshold mentioned under Section 4 of the Insolvency & Bankruptcy Code, 2016 (IBC/Code) can include both the principal amount and the interest.

BRIEF FACTS:

The Operational Creditor supplied various yarns to the Corporate Debtor namely Bombay Rayons Fashions Ltd. (Bombay Rayons) and raised nine invoices from March, 2017 to January, 2020 for an amount of INR 2.02 Crores. Bombay Rayons paid some invoices and five invoices were remained unpaid to the Operational Creditor by the Bombay Rayons.

Thereafter, the Operational Creditor filed an application under Section 9 of the Code against Bombay Rayons which was admitted by the NCLT, Mumbai and Corporate Insolvency Resolution Process (CIRP) of Bombay Rayons was initiated by NCLT.

HELD:

The NCLAT noted that originally Section 4 of the Code prescribes a threshold limit of INR One Lakhs however vide notification No. S.O 1205 (E) dated 24.03.2020 issued by the Ministry of Corporate Affairs, the threshold limit under Section 4 of IBC had been increased to INR One Crore. The Bench further observed that the invoices raised by the Operational creditor clearly mentioned that the interest will be charged @18% after the due date of the Bill.

Thereafter, Appellate Tribunal referred to the definition of Debt as defined under Section 3(11) of the Code and definition of Claim as defined under Section 3(6) of the Code and concluded that since the interest on delayed payment was clearly stipulated in invoices and therefore, the operational creditor will entitle for right to payment which will clearly part of debt under Section 3(11) of the IBC.

Therefore, the bench concluded that the total amount for maintainability of a debt as per Section 4 of the Code will include both the principal debt as per Section 4 of the Code will include both the principal debt amount as well as the interest on the delayed payment as it was clearly stipulated in the invoice itself.

G. In Vidarbha Industries Power Limited v. Axis Bank Limited the Apex Court held That Section 7(5)(a) Of IBC Is Discretionary and not Mandatory

In Vidarbha Industries Power Limited v. Axis Bank Limited the Apex Court, inter alia, held that Section 7(5)(a) of the Insolvency and Bankruptcy Code ("Code"/"IBC") **confers discretionary power on the Adjudicating Authority to admit an application of a financial**

creditor under Section 7 of the Code for initiation of CIRP. The Apex Court the Adjudicating Authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete or technically unviable.

It was observed that the legislature has, in its wisdom, chosen to use the expression 'may' in Section 7 (5)(a) of the IBC, which is contrary to the use of the word 'shall' in an otherwise almost identical provision of Section 9(5)(i) of the IBC. It was, thus, apparent that the legislature intended Section 9(5((i) of the IBC to be mandatory and Section 7(5)(a) of the IBC to be discretionary.

Court Findings (relevant paras) –

The Adjudicating Authority (NCLT) and the Appellate Tribunal (NCLAT) proceeded on the premises that an application must necessarily be entertained under Section 7(5)(a) of the IBC, if a debt existed and the Corporate Debtor was in default of payment of debt. In other words, the Adjudicating Authority (NCLT) found Section 7(5) (a) of the IBC to be mandatory. The Adjudicating Authority (NCLT) was of the view that Section 7(5)(a) did not admit any other interpretation, with which the Appellate Tribunal (NCLAT) agreed. (Para 56)

The Appellate Tribunal (NCLAT) affirmed the finding of the Adjudicating Authority (NCLT) that the Adjudicating Authority was only required to see whether there had been a debt, and the Corporate Debtor had defaulted in making the repayments. These two aspects, when satisfied, would trigger Corporate Insolvency. Since the Adjudicating Authority (NCLT) did not consider the merits of the contention of the Respondent Corporate Debtor**, the only question in this appeal is, whether Section 7(5)(a) is a mandatory or a discretionary provision. In other words, is the expression 'may' to be construed as 'shall', having regard to the facts and circumstances of the case.** (Para 57)

As pointed out by Appellant in its wisdom, chosen to use the expression "may" in Section 7(5)(a) of the IBC. When an Adjudicating Authority (NCLT) is satisfied that a default has occurred and the application of a Financial Creditor is complete and there are no disciplinary proceedings against proposed resolution professional, it may by order admit the application. Legislative intent is construed in accordance with the language used in the statute. (Para 62)

As Appellant has argued and the court made held that the legislative intent Section 7(5)(a) of the IBC should be a

mandatory provision Legislature would have used the word 'shall' and not the word 'may'. There is no ambiguity in Section 7(5)(a) of the IBC. Purposive interpretation can only be resorted to when the plain words of a statute are ambiguous or if construed literally, the provision would nullify the object of the statute or otherwise lead to an absurd result. In this case, there is no cogent reason to depart from the rule of literal construction. (Para 69)

The Adjudicating Authority (NCLT) failed to appreciate that the question of time bound initiation and completion of CIRP could only arise if the companies were bankrupt or insolvent and not otherwise.

In this case, the Adjudicating Authority (NCLT) has simply brushed aside the case of the Appellant that an amount of Rs.1,730 Crores was realizable by the Appellant in terms of the order passed by APTEL in favour of the Appellant, with the cursory observation that disputes if any between the Appellant and the recipient of electricity or between the Appellant and the Electricity Regulatory Commission were inconsequential. (Para 89)

We are clearly of the view that the Adjudicating Authority (NCLT) as also the Appellate Tribunal (NCLAT) fell in error in holding that once it was found that a debt existed and a Corporate Debtor was in default in payment of the debt there would be no option to the Adjudicating Authority (NCLT) but to admit the petition under Section 7 of the IBC. (Para 90)

For the reasons discussed above, the appeal is allowed. The impugned order dated 29th January 2021 passed by the Adjudicating Authority (NCLT) and the impugned order dated 2nd March 2021 passed by the Appellate Authority (NCLAT) dismissing the appeal of the Appellant are set aside. The NCLT shall re-consider the application of the Appellant for stay of further proceedings on merits in accordance with law. (Para 91)

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