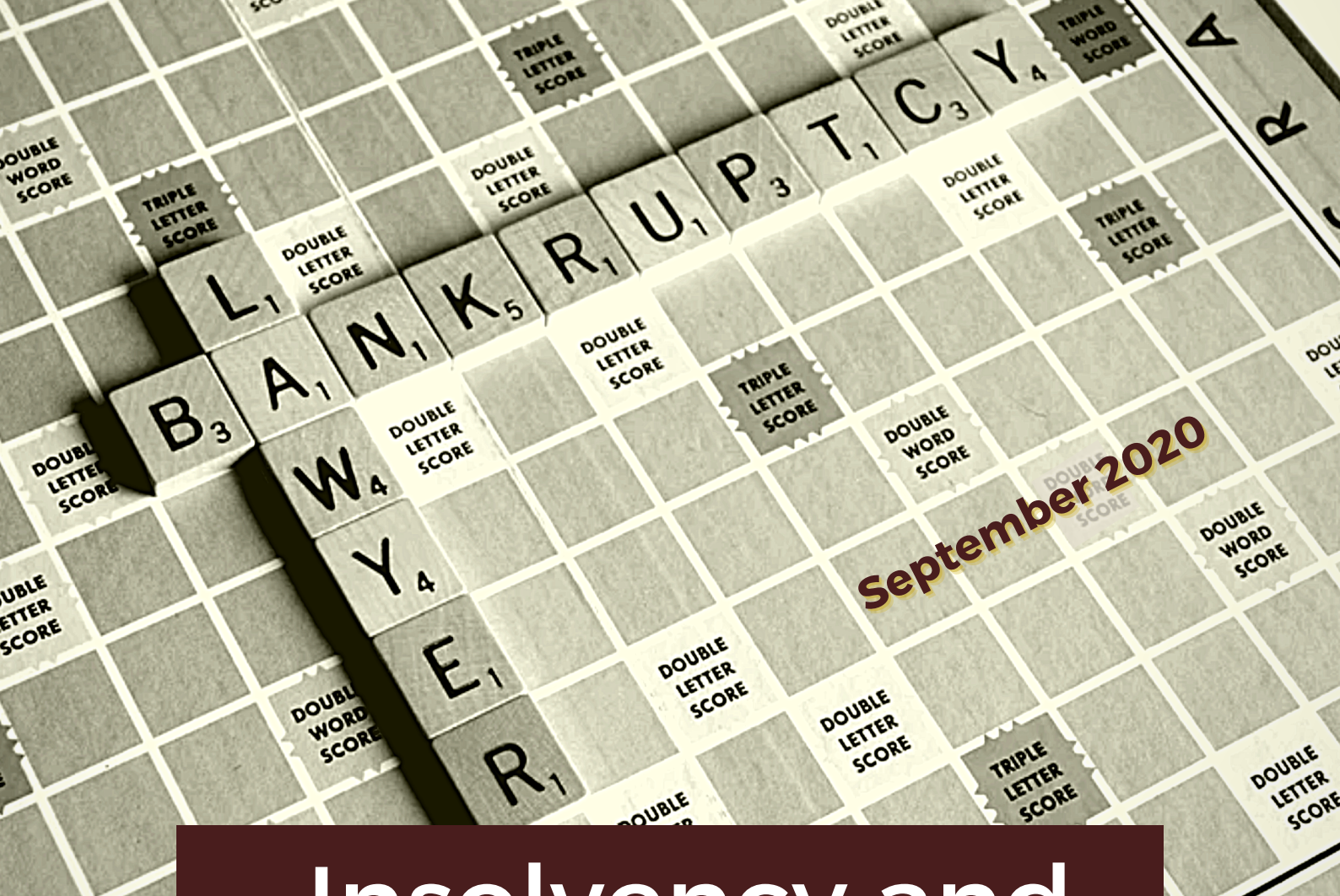




Insolvency and Bankruptcy Code

Quarterly Review of Significant Judgments

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The Insolvency and Bankruptcy Code ("IBC") has invited a lot of discussion during recent times, with numerous companies facing the wrath of the COVID-19 pandemic and resulting financial challenges. We have identified and summarized below some of the most significant judgments that we have come across in the second quarter of 2020 (April to June 2020), in matters involving provisions of the IBC.

**Shakuntla Educational & Welfare
Society v. Punjab & Sind Bank**

**High Court of Delhi
W.P.(C)2959/2020
Decided On: 13.04.2020**

Brief Facts: This petition was filed seeking orders from the Delhi High Court ("**Court**") directing the respondent not to declare its pending loan accounts as Non-Performing Assets ("**NPA**"). The petitioner is a charitable society which was engaged in the field of education. To operate its educational institutions, the petitioner had availed several term loans from the respondent. The petitioner asserted that it had a clean record of repayment since a majority of the term loans were fully repaid. Even qua the unpaid term loans, the petitioner had been diligently making repayments until the COVID-19 pandemic.

The petitioner also submitted that the State Government of Uttar Pradesh had issued a specific directive prohibiting the petitioner from coercing students to pay the due fees, which was one of the reasons that led to the failure in repayment of term loan. The petitioner sought shelter under a Reserve Bank of India ("RBI") circular ("Circular") dated 27.03.2020 which provided a moratorium of three months in respect of all term loans as on 01.03.2020. Therefore, the petitioner vide the instant petition sought the grant of a moratorium of three months in terms of the Circular issued by the RBI.

Held: The Court agreed with the petitioner's submissions that the intention of the RBI while issuing the Circular was to maintain status quo with regard to the classification of accounts of the borrowers as they existed on 01.03.2020. The Court placed reliance upon its decision in **Anant Raj Limited v. Yes Bank Limited [1]** to hold that classification of petitioner's loan accounts as NPA would undoubtedly amount to causing grave and irreparable loss to the petitioner. The Court accordingly directed that till the next date, the respondent would stand restrained from declaring the petitioner's accounts as NPA. It was also held that in case the directive issued by the State Government of Uttar Pradesh prohibiting petitioner from demanding fees was withdrawn, the petitioner would be liable to pay the instalments forthwith.

**Ultra Tech Nathdwara Cement Ltd. v.
Union of India and Ors.**

**High Court of Rajasthan at Jodhpur
D.B. Civil Writ Petition No. 9480/2019
Decided On: 07.04.2020**

Brief Facts: A company namely Binani Cements Ltd. ("**Company**") had suffered huge losses leading to initiation of the Corporate Insolvency Resolution Process ("**CIRP**") by the National Company Law Tribunal ("**NCLT**"). The petitioner was one of the resolution applicants in the CIRP whose resolution plans were accepted by the Committee of Creditors ("**COC**"). The resolution plan accepted by the COC was challenged time and again, ultimately leading to the Hon'ble Supreme Court approving the same.

Despite the resolution plans having attained finality, the respondent, i.e., the Central Goods and Service Tax Department raised demands over Goods and Service Tax ("**G.S.T.**") for the period before the petitioner took over the Company. The petitioner, therefore, approached the High Court of Rajasthan ("**Court**") aggrieved by the demands raised by the respondent in the instant matter. The petitioner sought a restraint order against the respondent from raising any further claims concerning the period before the date on which the petitioner took over the Company in proceedings under Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Held: The Court noted that the issue in the present matter was whether the respondent could raise new demands against the petitioner when the resolution plan had attained finality. The Court laid stress upon the amended provision of Section 31 of the IBC, according to which the approved resolution plan was binding on the corporate debtor, its employees, members and all creditors including the Central Government and the State Government or any local authority to which debt was owed. The Court emphasised upon the minimal power of judicial review into the resolution plan duly approved by the COC to hold that once a resolution plan was accepted, it would bind every creditor, including the respondent.

The Court then placed reliance upon the legislative intent behind the amendment in Section 31(1) of the IBC as explained by the Hon'ble Finance Minister in the upper house of the Parliament. It was observed that the Hon'ble the Finance Minister emphatically conveyed that the revival of the dying industry is of primacy and to secure this objective, the government would be ready to sacrifice, leaving its interest finally in the hands of the resolution professional and the COC as the case may be. Therefore, the demand notices of the respondent were held to be ex-facie illegal, arbitrary and not sustainable.

[1] W.P.(C) URGENT 5/2020.

**Allahabad Bank v. Poonam Resorts
Limited and Ors.**

National Company Law Appellate Tribunal, New Delhi
Company Appeal (AT) (Insolvency) Nos. 1303 and 1304 of 2019
Decided On: 22.05.2020

Brief Facts: The financial creditor preferred the appeals in this matter against the corporate debtors primarily assailing the orders passed by the National Company Law Tribunal ("NCLT"). The appellant filed applications under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC") against the respondents who were the corporate debtors, for initiation of Corporate Insolvency Resolution Process ("CIRP"). The corporate debtors raised certain objections stating that the CIRP was initiated fraudulently with a malicious intent to drag a solvent company into insolvency. The NCLT appointed a forensic auditor to examine allegations raised by the corporate debtor. The impugned orders were therefore passed at the instance of the corporate debtor who had moved applications under Section 75 of the IBC. The contention of the appellant, therefore, was that the NCLT failed to accept or reject the Section 7 application within the statutorily prescribed timeline and passed the impugned order instead.

The moot question before the National Company Law Appellate Tribunal ("NCLAT") was whether the NCLT was justified in ignoring the time frame prescribed under Section 7 of the IBC and embarking upon an enquiry to determine whether the applications filed under Section 7 contained false information when the matters were at the very threshold stage.

Held: The NCLAT relied upon the decision of the Hon'ble Supreme Court in *Innovative Industries Limited v. ICICI Bank and Anr.* [2] to hold that speedier resolution was crucial for the IBC and thus, all authorities under the enactment had to adhere to the prescribed timelines strictly. Therefore, the NCLAT held that the existence of a default was to be ascertained based on the evidence presented by the financial creditor within 14 days of the receipt of the application under Section 7 of the IBC. On the aspect of the appointment of the forensic auditor, the NCLAT reiterated that in case of a default by the corporate debtor, the NCLT had to merely see the records of the information produced by the financial creditor to satisfy itself that a default had occurred. Therefore, it was held that the NCLT could not direct a forensic audit and engage in a long-drawn pre-admission exercise.

**Exxaro Tiles Private Limited v. KPR
Realty India Private Limited**

National Company Law Tribunal, Bengaluru Bench
C.P. (IB) No. 88/BB/2020
Decided On: 21.05.2020

Brief Facts: The instant matter involves an application filed by the operational creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC") seeking to initiate the Corporate Insolvency Resolution Process ("CIRP") on the ground that the corporate debtor had committed a default. The petitioner submitted that the respondent being the corporate debtor, did not make payment of outstanding dues despite being sent a demand notice under Section 8 of the IBC. Hence, the present petition.



Held: The National Company Law Tribunal ("NCLT") held that on perusal of the petition, it appeared that the petitioner was attempting to misuse the provisions of the IBC and use the NCLT as a recovery forum, by filing a petition under Section 9 of the IBC.

The NCLT placed reliance upon the case of *Mobilox Innovations Private Limited v. Kirusa Software Private Limited* [3] and *K. Kishan v. Vijay Nirman Company Private Limited* [4] wherein it was held that the IBC was not intended to be a substitute to a recovery forum and could not be used to jeopardise the financial health of an otherwise solvent company by pushing it into insolvency. Hence, the instant petition was dismissed.

[2] (2018) 1 SCC 407.

[3] AIR 2017 SC 4532.

[4] (2018) 4 CompLJ 168 (SC).



Brief Facts: The appellant is the financial creditor who had sought the initiation of the Corporate Insolvency Resolution Process ("**CIRP**") by filing an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). The corporate debtor objected to the proposal that an ex-employee of the financial creditor would be the Interim Resolution Professional ("**IRP**"). Thereafter, an order was passed requiring the appellant to substitute the name of the IRP given that he was an ex-employee of the appellant who worked for almost four decades before retiring in 2016.

Aggrieved by the order, the appellant sought the directions for allowing the IRP to continue. The appellant defending its case argued that the IBC did not mention any provisions disqualifying an ex-employee of the financial creditor from being the IRP. It was also contended that the IRP was not required to act as an independent umpire between the financial creditor and the corporate debtor. The appellant emphasised on the role of the Resolution Professional ("**RP**") and an IRP contending that an IRP had no adjudicatory powers but only acted as a facilitator of the CIRP.

Hence, the moot question before the National Company Law Appellate Tribunal ("**NCLAT**") was whether an ex-employee of the financial creditor should not be permitted to act as an IRP in the instant matter.

Held: The NCLAT took note of the fact that the proposed IRP was an ex-employee of the financial creditor currently drawing a pension for his services. A reference was made to Regulation 3(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**Regulation**"). The Regulation clearly provided that an IRP would be eligible for appointment if he or his partners and directors of the insolvency professional entity were independent of the corporate debtor. While the NCLAT accepted that the proposed IRP was independent of the corporate debtor according to the Regulation, it was observed that the appellant's restriction of choice to an ex-employee was concern worthy. The NCLAT referred to **Ranjit Thakur v. Union of India and Ors. [5]** to hold that following the prescribed test for bias, it was clear that the appellant sought to gain from the loyalty of an ex-employee being appointed as the IRP. Therefore, the NCLAT found no legal flaw in the impugned order and upheld the same.

Brief Facts: The appellant preferred the instant appeal being aggrieved by the order passed by the National Company Law Tribunal ("**NCLT**") admitting a Section 7 application filed by the second respondent under the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). The facts of the case briefly stated revolve around the contention of the second respondent that the first respondent had defaulted in respect of a loan account. The second respondent declared the first respondent as a Non-Performing Asset ("**NPA**") on 31.03.2004. Thereafter, the second respondent filed an application under Section 7 of the IBC for initiation of the Corporate Insolvency Resolution Process ("**CIRP**") which was admitted.

The appellant contended that the Section 7 application filed under the IBC before the NCLT was filed in the year 2019, which was highly belated and barred by limitation given the fact that the loan account of the first respondent was declared an NPA in 2004. The appellant relied upon the decision in **B.K Educational Services Pvt. Ltd. v. Parag Gupta and Associates [6]** contending that the second respondent was obligated to file an application within a period of three years from the date of default. Since the default had occurred over three years before the date of filing of the application, the same was hit by Article 137 of the Limitation Act, 1963 ("**Limitation Act**").

The respondent refuting the contentions of the appellant asserted that there was a continuous cause of action and relied upon the Article 62 of the Limitation Act which had a limitation period of 12 years in respect of recovery of debt secured with immovable property.

Held: The National Company Law Appellate Tribunal ("**NCLAT**") took note of the submission of the second respondent regarding Article 62 of the Limitation Act. However, the NCLAT observed that the provisions of the IBC override other laws. Therefore, operating within the bounds of the IBC, the NCLAT held that the if more than three years had elapsed from the date of default, a creditor was not entitled to maintain an application under the IBC. The NCLAT held that the application under Section 7 of the IBC filed by the second respondent was time-barred because of the simple reason that the declaration of the NPA had occurred over three years before the date of filing the application. Hence, the application filed by the second respondent under Section 7 of the IBC was hit by Article 137 of the Limitation Act. The impugned order was accordingly set aside, and the first respondent was released from all the rigours of the CIRP.

Ge Power India Ltd. v. NHPC Limited

Delhi High Court
CS (COMM) 140/2020 and I.A. 4016/2020
(under Order XXXIX Rule 1 and 2 CPC)
Decided On: 26.06.2020

Brief Facts: The plaintiff's predecessor, i.e., Alstom India Ltd. ("**Alstom**") entered into a contract with Lanco Infratech Limited ("**LIL**") for the supply of engineering drawings for a construction project. It is the case of the plaintiff that Alstom's engineering drawings were covered by copyrights which were eventually passed onto the plaintiff consequent to Alstom's acquisition by the plaintiff. The plaintiff also asserted that the engineering drawings were protected under a confidential information clause within the contract between Alstom and LIL. Meanwhile, insolvency proceedings were commenced against LIL wherein the defendant acquired the construction project that LIL was working on and disclosed to third parties, the copyrighted and highly confidential engineering drawings of the plaintiff. Aggrieved by this violation of the plaintiff's copyright, the plaintiff preferred the present suit.

Held: The Delhi High Court ("**Court**") held that in the absence of an assignment or a license in writing by the plaintiff, the defendant could not automatically have a right on the engineering drawings of the plaintiff which were not even the assets of LIL in terms of Section 36(4) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). The Court observed that the Sections 63 and 231 of the IBC created a bar on the jurisdiction of the civil court in respect of any matter in which the National Company Law Tribunal ("**NCLT**") or the National Company Law Appellate Tribunal ("**NCLAT**") had jurisdiction under the IBC. The Court placed specific reliance on Section 60(5) of the IBC to observe that the IBC vested jurisdiction in NCLT to entertain and dispose of any question of law and fact arising out of an insolvency resolution or liquidation proceedings. Hence, the present suit was dismissed.



**Pankaj Aggarwal v. Union of India
and Ors.**

Delhi High Court
W.P. (C) 3685/2020, CM APPLs. 13194, 13195 and 13196/2020
Decided On: 23.06.2020

Brief Facts: The present petition was filed challenging the impugned order passed by National Company Law Tribunal ("NCLT") under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC") wherein the NCLT appointed an Insolvency Resolution Professional ("IRP") and declared moratorium under Section 14 of the IBC. The petitioner contended that the NCLT had failed to appreciate that vide a notification, the jurisdiction of the NCLT was increased to Rs. 1 crore w.e.f. 24.03.2020. The petitioner asserted that the NCLT proceeded to exercise its jurisdiction on the basis that the defaulted amount exceeded Rs. 1 lakh, which was the erstwhile norm.

Held: The Delhi High Court ("**Court**") observed that the purpose of increasing the jurisdiction of the NCLT to Rs. 1 crore was to ensure that the Micro, Small and Medium Enterprises were not inflicted with sudden insolvency proceedings as they may have faced set-backs during the lockdown period. Therefore, the Court noted that the present petition deserved consideration. Prima facie, the Court held that there was an error by the NCLT since the notification dated 24th March 2020 was clearly applicable. The Court directed that subject to the petitioner depositing an amount of Rs. 10 lakhs with the Registrar General of the Court, the order of the NCLT would be stayed till the next date of hearing.

**Power2SME Pvt. Ltd. v. Allied Strips
Limited and Anr.**

National Company Law Appellate Tribunal, New Delhi
Company Appeal (AT) (Ins) No.680 of 2019
Decided On: 08.06.2020



Committee
of Creditors
of Essar Steel
India Limited
v.
Satish Kumar
Gupta & Ors.



Brief Facts: The appellant in the instant matter preferred an appeal against the impugned order of the National Company Law Tribunal ("NCLT") which accepted the resolution plan submitted by the second respondent in Corporate Insolvency Resolution Process ("CIRP") instituted by the financial creditor against the corporate debtor. In terms of the resolution plan, the financial creditors were proposed to be paid substantially more than the operational creditors. The appellant submitted that although it was an operational creditor, it was a secured operational creditor unlike the rest of the operational creditors. Therefore, the appellant contended that it deserved a similar treatment at par with the secured financial creditors. The appellant relied upon the judgment in the matter of **Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors. [7]** to submit that an equitable treatment was to be meted out to each creditor depending upon whether it was secured, unsecured, financial or operational creditor. Hence, the question before the National Company Law Appellate Tribunal ("NCLAT") was whether the appellant required separate treatment at par with secured financial creditors based on the claim that it was a secured operational creditor.

Held: The NCLAT relied upon the decision in **Essar Steel India Limited (supra)** to hold that the valuation of the asset was crucial in determining the extent to which the secured creditors were protected. The requirement of equitable dealing with the operational creditor's was not the same as saying that they must be paid the same amount of the debt proportionately. The NCLAT noted that the appellant admittedly got back its goods. Therefore, it was held that the appellant was wrong in seeking parity with the secured financial creditors who within the Committee of Creditors ("COC") approved a resolution plan taking huge haircut to keep the corporate debtor a going concern. Even otherwise, the NCLAT refused to interfere with the decision made in accord with the commercial wisdom of the COC.

**Babasaheb Sawalram v. Punjab
National Bank and Anr.**

National Company Law Appellate Tribunal, New Delhi
Company Appeal (AT) (Ins) 839 of 2019
Decided On: 02.06.2020

Brief Facts: In the instant matter, the first respondent filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC") against the corporate debtor ("Company") which was admitted by the National Company Law Tribunal ("NCLT"). Aggrieved by the decision of the NCLT, the appellant preferred the present appeal. The case of the first respondent before the NCLT was that the Company failed to repay several loan accounts amassing huge outstanding dues. The Company contended that the first respondent was vindictive and it had filed an original application before the Debts Recovery Tribunal ("DRT") which was then abated. The ground of limitation was also raised before the NCLT by the Company, which was rejected after reliance being placed on a simple mortgage deed. The NCLT, therefore, admitted the application of the first respondent filed under Section 7 of the IBC and further initiated Corporate Insolvency Resolution Process ("CIRP"). The appellant, in the instant appeal, argued that NCLT's reliance on the mortgage document was not well placed.

Held: The National Company Law Appellate Tribunal ("NCLAT") on the question of limitation held that the appellant had on several occasions admitted and acknowledged the dues and further sought time by making part payments. The correspondence acknowledging the dues was held to be covered under Section 18 of the Limitation Act, 1963. Therefore, the dues outstanding on the part of the Company were not hit by limitation. The NCLAT held that appellant had vaguely pleaded its case for vindictiveness and coercion on the part of the first respondent, and no evidence was presented to support contentions relating to the same. Hence, the appeal was dismissed.

**Abhishek Agarwal and Ors. v.
Manasadevi Bakers**

National Company Law Appellate Tribunal, New Delhi
Company Appeal (AT) (Ins) No.1012 of 2019
Decided On: 08.06.2020

Brief Facts: The appellants had originally filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC") before the National Company Law Tribunal ("NCLT") claiming to be financial creditors of the respondent. The appellant had disbursed an interest-free, unsecured loan to the corporate debtor owing to good relations amongst the parties. The scheme of the loan did not mention any time for repayment. The appellants also entered into a subordination agreement with a bank wherein they agreed that they would not claim their dues without the dues of the bank being paid up first.



There was also a dispute amongst the directors of the corporate debtor as to who was authorised to represent the corporate debtor. The present appeal before the National Company Law Appellate Tribunal ("NCLAT") was filed challenging the decision of the NCLT stating that the instant matter was not amenable to the NCLT for there was no default under the provisions of the IBC.

Held: The NCLAT upheld the findings of the NCLT in holding that there was no default under the IBC in the instant matter. It was held that the appellant had extended an interest-free loan to the corporate debtor without specifying the details of the timeline for repayment. In the absence of such information for the time of repayment, the loan was held not to have a consideration for the time value of money. Therefore, the NCLAT reiterated that there was no default under the provisions of the IBC.

The NCLAT also took note of the fact that even otherwise, the appellant had willingly signed a subordination agreement with a bank stating that the appellant would not claim any monies before the claims of the bank were settled. Lastly, inasmuch as the difference between the directors concerning as to who was authorised to represent the corporate debtor was concerned, the NCLAT held that the NCLT was not required to reconcile such contrary stands taken by rival groups within the corporate debtor. With these considerations, the NCLAT refused to interfere with the findings of the NCLT.

Brief Facts: The appellant in the instant matter appealed against an order passed by the National Company Law Tribunal ("NCLT") admitting a Section 9 application filed under the Insolvency and Bankruptcy Code, 2016 ("IBC"). The appellant, a shareholder of the corporate debtor, asserts that the first respondent was a supplier of aluminium for a real estate project. Disputes emerged amongst the first respondent and the corporate debtor after which the first respondent projected an application under Section 9 of the IBC claiming certain outstanding sums. The appellant contended that the Section 9 application was filed by the first respondent irrespective of the fact that there was a pre-existing dispute regarding the quality of the goods supplied and further a demand notice was never delivered to the appellant. The appellant also contended that the NCLT was not justified in initiating a Corporate Insolvency Resolution Process ("CIRP") against a running concern.

In the meantime, an application was filed by the home buyers as financial creditors of the corporate debtor for impleading themselves into the matter. The financial creditors placed reliance upon the decision in **Flat Buyers Association Winter Hills v. Umang Realtech Pvt. Ltd. [8]** to contend that their interest would be impaired if any order was passed without considering their case. Therefore, the National Company Law Appellate Tribunal ("NCLAT") was required to decide the merits of the appeal and the status of the homebuyers as the financial creditors.

Held: The NCLAT on the appeal against the impugned order held that the corporate debtor had committed a default as per the definition under Section 3(12) of the IBC. In spite of the notice, the corporate debtor failed to effect the payments due to the first respondent. The NCLAT held that the view arrived at by the NCLT that the corporate debtor had committed default was free from any legal infirmities. Resultantly, the appeal was dismissed.

On the question of the status of the homebuyers, the NCLAT held that a CIRP initiated against a real estate company by the allottees (financial creditors), banks or operational creditors of one project, will be confined to that particular project only. A CIRP shall not have any effect on another project of the same real estate company.

Further, the NCLAT explained the principle of 'Reverse CIRP' wherein it held that a secured creditor such as financial institutions or banks, could not be provided with the asset (flat/apartment) by preference over the allottees (unsecured financial creditors) for whom the project had been approved. The homebuyer's claims were to be satisfied at first by providing the flat/apartment. Therefore, the NCLAT opined that it was just and proper for the homebuyers to take recourse before the resolution professional or the competent forum to seek necessary reliefs for redressal of their grievances.

Brief Facts: The appellant preferred the instant appeal against the impugned judgment of the National Company Law Tribunal ("NCLT") wherein the appellant sought intervention and direction for reconsideration of the resolution plan. The appellant asserts that the NCLT mechanically accepted the resolution plan without the application of mind. Therefore, the NCLT failed to exercise its power under Section 31 of the Insolvency and Bankruptcy Code, 2016 ("IBC") which required the adjudicating authority to apply its mind before approving or rejecting a resolution plan.

The appellant further pleaded for reconsideration of the resolution plan given certain alleged irregularities committed by the Resolution Professional ("RP") and the Committee of Creditors ("COC"). Lastly, the appellant stated that the NCLT had failed to give any reasons for rejecting the Section 7 application of the appellant filed under the IBC. Hence, the present appeal before the National Company Law Appellate Tribunal ("NCLAT").

Held: The NCLAT at first explained the settled position that the resolution applicant has no vested right that his resolution plan must be considered. The commercial wisdom of the COC is paramount, and it has the absolute prerogative to decide the viability and feasibility of the resolution plans. The NCLAT noted that once the resolution plan was passed as viable, then the same cannot be interfered with. The NCLAT stated further in its judgement that the COC had appropriately evaluated the resolution plans submitted by the applicants. Therefore, the NCLAT held that there was no material irregularity in the Corporate Insolvency Resolution Process before the RP, and the impugned order was passed on the proper application of mind.