MMJC

MMJCINSIGHTS

02 FEB 2023

Index

"Object of Issue" – Focus area for Preferential issue & QIP

I. Introduction:

Last month, on December 13, 2022, Bombay Stock Exchange ('BSE') and National Stock Exchange ('NSE') ("Stock Exchanges") have provided guidance on parameters for disclosure of object of issue in the explanatory statement of Shareholder's Meet notice in case of preferential issue and in the preliminary and final placement document in case of QIP, where issue size exceeds Rs. 100 crores.

II. Background:

Securities Exchange Board of India (hereinafter abbreviated as "SEBI") had at its Board meeting dated September 30, 2022 approved appointment of monitoring agency for monitoring of funds raised through Preferential Issue & Qualified Institutional Placement (hereinafter abbreviated as "QIP") in case issue size exceeded ₹ 100 crore. and for the said cause. Accordingly SEBI amended SEBI (Issue of Capital & Disclosure Requirement) Regulations, 2018 (hereinafter abbreviated as "SEBI ICDR") on November 21, 2022 and brought in provision for appointment of monitoring agency for monitoring of utilization of funds in case of preferential issue and QIP beyond ₹ 100 crore.

III. Need for the guidance from stock exchanges:

In our earlier edition of the MMJC Insights dated December 16, 2022, we had mentioned about the relevance of bifurcation of usage of funds as in the case of preferential issue and QIP which will need to be monitored by the monitoring agency. The same has been concurred by Stock Exchanges in this guidance note. The stock exchanges have highlighted that different issuers have used different ways for the disclosure of object of the issue in their related documents and in case of multiple objects, funds needed for each object is not be indicated clearly. Hence, in order to ensure uniformity and enhance clarity in the disclosure of objects of the issue, this guidance note is issued.This would assist monitoring agencies (Credit Rating Agencies) to appropriately monitor the funds and provide transparency to the shareholders by way of quarterly reports.

IV. Contents of the Guidance Note:

This note lists out disclosures that are required to be done by listed entities where their QIPs or Preferential Issue size exceeds Rs 100 crores.

The above guidance note will be applicable to all QIP and preferential issues which are approved by the Board of Directors of the issue on or after the date of issuance of this guidance note i.e. December 13, 2022

Stock exchange has stated that following points would be verified at the time of giving in-principle approval by Stock Exchanges under regulation 28(1) of SEBI (Listing Obligations and Disclosure Requirement) Regulations, 2015 before making allotment of securities:

- **Disclosure requirements with respect to Objects of Issue:** Each object of the issue, for which funds are proposed to be raised, shall be stated clearly and same shall not be open ended/ vague.
  This means that at the time of approval of resolution at the board meeting or before that at the time of inception of idea of preferential issue listed entities need to have a clear picture of where the funds are proposed to be utilised. This will have to be clearly mentioned in explanatory statement.

- **Disclosure of amount of funds to be utilised for each object:** The amount of funds proposed to be utilised against each of the object shall be stated clearly.
  As it is now mentioned that 'amount of funds' proposed to be utilised needs to be mentioned against each object. It is clearly mentioned that 'amount of funds' needs to be specified. So, mentioning of percentage of funds proposed to be utilised cannot be for

each object will not do. Listed entities will have to specify amount in absolute terms for each object.

- **Variation in amount specified for each object:** In case, it is difficult to quantify the exact amount of fund to be used, a broad range of amount may be provided but the broad range shall be a realistic estimation and range gap shall not exceed +/- 10% of the amount specified for that object of issue size. Further, while giving broad range, the reason for providing the same shall be specified.
  With respect to above referred point, if it is difficult to quantify exact amount then variation upto specified percentage is allowed by SEBI.

- **No spill over:** Total amount of issue size allocated for different objects of the issue shall together be used only for the object of the issue as specified in the placement document/ notice to shareholders and same cannot be added to General Corporate Purposes (GCP).
  These further highlights that there cannot be spill over within two separate categories.

- **Timeline for utilisation:** The tentative timeline for utilisation of issue proceeds for each of the object shall be clearly stated.
  Stock Exchanges wants listed entities to envisage a tentative timeline within which the funds would be utilised. Further, it is necessary to highlight that it is nowhere mentioned that funds have to be utilised within the same timeline. Also, the word timeline is prefixed with word 'tentative'. So, even if Stock Exchanges are asking listed entities to envisage timeline but prefixing word 'tentative' it is seen that Stock Exchanges are also mindful of the fact that exact timeline for utilisation of proceeds seems difficult.

- **Mode where funds are kept:** Till such time the issue proceeds are fully utilised, the issuer shall also disclose the mode in which such funds will be kept.
  So exact details of placement need not be given but mode in which they are kept shall be specified.

- **General Corporate Purpose:** The fund to be used for General Corporate Purposes (GCP), if any, shall not exceed 25% of the funds to be raised through the preferential issue or QIP, under the current issue.
  While raising funds under preferential issue or qualified institutional placement listed entities will have to be mindful that entire funds raised through preferential issue or qualified institutional placement cannot be utilised. 25% of same will have to be utilised for general corporate purpose

V. Conclusion:

The above parameters of disclosures at the time of raising of funds through QIP or preferential issue have been given by stock exchange by way of a separate circular and such parameters do not form part of SEBI (ICDR). Hence, this needs to be checked additionally over and above the compliance of SEBI (ICDR).

These Guidance notes are available on the below links of the stock exchanges:

NSE Circular: https://static.nseindia.com//s3fs-public/inline-files/NSE_Circular_13122022.pdf
BSE Circular: https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20221213-47

Are you equipped enough w.r.t Structured Digital Database ('SDD') !!!

I. Background: Regulation 3(5) and Regulation 3(6) of SEBI (Prohibition of Insider Trading) Regulations, 2015 ('PIT Regulations') provides for maintenance and format for maintaining SDD. Provision with respect to maintenance of SDD was brought into effect from April 1, 2019. Bombay Stock Exchange ('BSE') and National Stock Exchange ('NSE') ['Stock Exchange'] vide their email dt: August 04, 2022 had asked listed entities to certify maintenance of SDD. This compliance was required to be certified for quarter ended June 2022. This certificate was required to be given by August 09, 2022. SDD certificate as required under this email was to be given only for quarter ended June 2022. There was no clarity as to whether this certification of SDD will be required to be given for subsequent quarters too?

II. SDD Certificate for quarter ended on September 30, 2022: The Stock Exchanges had, vide their circulars dt: October 28, 2022 asked listed companies to submit a quarterly compliance certificate certified either by compliance officer or a practicing company secretary. This certificate was to be provided by November 18, 2022 for quarter ended September 2022 and it is required to be submitted by January 21, 2023 for quarter ending December 2022. Stock Exchanges have vide this circular dt: October 28, 2022 have also stated that companies which are in process of listing are also required to maintain the Structural Digital Database. Stock Exchanges have further stated that for subsequent quarters, i.e., post quarter ending December 2022, Stock Exchanges may come out with a separate circular.

III. Inspections by stock exchanges: As mentioned in these stock exchanges circulars dt: October 28, 2022, listed companies are requested to note that Exchanges may inspect the SDD system maintained by the company after providing one working day notice. So the question here that would arise is that if stock exchanges would be inspecting SDD, then whether they can be access to UPSI? And if they are getting access to UPSI by this inspection then whether their names shall be entered into SDD along with separate identifier number as soon as listed entities would receive a notice for inspection of SDD?

IV. Format of SDD certificate: A new format was notified by Stock Exchanges for certification of maintenance of SDD which is applicable for two quarters viz. September 2022 and December 2022. For subsequent quarters format may be notified latter. Further the present format of SDD certificate requires listed companies to certify that ***'all the UPSI disseminated in the previous quarter have been captured in the Database'*** Further Stock Exchanges have also asked listed entities to certify '***non-compliances observed in previous quarter and remedial actions taken along with timelines to resolve the same.'*** Hence, it has become very important to ensure that the SDD is duly updated with all the UPSI sharing trails as soon as it is shared with anyone and any non-compliance observed will have to be reported again and again till it is resolved, which would serve as an easy fact for SEBI to send show cause notice for non-compliance of PIT Regulations.

V. Maintenance of SDD by group companies: Stock Exchanges have further clarified that every company shall maintain an independent SDD to comply with pre-requisites as prescribed by PIT Regulations. Hence if there are two listed entities within the group, each one

of them must maintain separate SDDs. Similarly, if a particular listed entity is also an intermediary or fiduciary, it is recommended to maintain separate SDDs for both the functions, along with a separate code of conduct and separate list of designated persons for each function.

VI. Whether sharing of UPSI internally shall also be captured in SDD: Stock Exchanges have also clarified that irrespective of whether an UPSI is shared internally or externally, necessary recording should be made in SDD. This has also been clarified by SEBI in its FAQ on Prohibition of Insider Trading released on April 29, 2021.

VII. Further following certifications have been omitted from the new format of SDD certificate applicable for quarters ending September and December 2022: Whether the recipient was upfront informed that the information which they will be receiving shortly is UPSI and the entry has been captured in the Database prior to forwarding the UPSI data. If not details of events that have not been captured and the reason for the same? Whether name of persons who have shared the information has been captured along with PAN or any other identifier? Whether name of persons with whom information is shared has been captured along with PAN or any other identifier?

VIII. Ambiguity: Earlier format of SDD certificate did not seek certification with respect maintenance of SDD for a period of eight years. Now SDD certificate ask listed companies to certify whether this SDD has the capability be maintained for eight years. But it needs to be highlighted here that eight years have to be counted from what date? It should ideally be considered as eight years from last entry made. Stock Exchanges may consider clarifying on this. Also, as per Regulation 3(6) if any investigation has been initiated then SDD needs to be preserved till the completion of such proceedings. So, Stock Exchanges may consider suitably revising the wordings of certification. Further certification with respect to maintenance of SDD submitted for quarter ended June 2022 sought certification with respect to whether the SDD maintained has feature of time stamping or not? Revised format of certification does not seek any such clarification.

IX. Ambiguity with regard to applicability of requirement to submit SDD certificate by REITs and InvITs: Stock Exchanges have further provided clarification with respect to maintenance of SDD by entities who have listed their REITs or InvITs. Stock Exchanges have released FAQ on maintenance of SDD dt: October 28, 2022. FAQ no. 1 has stated that every entity, which has issued 'Securities' are required to be maintain SDD. Stock Exchanges have further stated that listed entities who have listed or propose to list 'Securities' is required to maintain SDD. 'Securities' here shall fulfill the definition of term 'Securities' under the Securities Contract Regulation Act, 1956 ['SCRA'] as amended from time to time [Reg. 2(1)(i) of SEBI (Prohibition of Insider Trading (Regulations, 2015)]. As per definition of Securities as per Section 2(h)(i) of SCRA all marketable securities are covered under the definition of 'Securities'. Units or debt securities issued by REITs or InvITs are subscribed and/or traded on stock exchange by public at large. So it can be sold or purchased easily. As highlighted by Hon'able Bombay High Court in Dahiben Umedbhai Patel v. Norman James Hamilton and Others [(1983) 85 BOMLR 275, 1985 57 CompCas 700 Bom, *"Any security which is capable of being freely transferable is marketable"*. So, Section 2(h)(i) read with FAQ no.1 of BSE circular dt: October 28, 2022 it is clear that REITs and InvITs who have listed their units or debt securities would be covered under the definition of Securities as per Section 2 (h) (i) of SCRA. So now REITs or InvITs who have listed their units also have to certify whether SDD is maintained by them.

X. Ambiguity with regard to previous quarter: Further, Stock Exchanges have asked to companies to certify that, "all the UPSI disseminated in the previous quarter have been captured in the Database" 'Previous quarter' would mean which preceding quarter ended June 2022? If it is preceding quarter ended June 2022 then SDD certification with respect to entries made is already certified, then why again it shall be certified? This aspect can also be clarified by stock exchanges by prescribing appropriate wordings.

XI. Enforcement for non-maintenance of SDD: Further Stock Exchanges have stated that if company has not complied with the requirements of Reg 3(5) and 3(6) of SEBI (PIT) Regulations, 2015 which required SDD to be maintained by the company, then Exchange shall under the "Get Quote" page of the Exchange Website of the Listed Entity, wherever listed, would display that the company is non-compliant with SDD, from the next trading day till the Exchanges have satisfactorily verified that the company has completely complied. BSE vide its circular dt: January 25, 2023 has stated that in addition to stating that the company is non-compliant' at the "Get Quote" Page, name of the Compliance Officer of the company will also be displayed. Now here it needs to be understood that Stock Exchanges would initiate this action either when they receive SDD quarterly certification stating SDD is not maintained or after they have independently verified maintenance of digital database after inspection.

BSE circular Dt: January 25, 2023 :
https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20230125-33

NSE circulars can be accessed at below mentioned link:
https://www.nseindia.com/companies-listing/circular-for-listed-companies-equity-market

BSE Circular dt: November 4, 2022:
https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20221104-37

BSE circular October 28, 2022:
https://www.bseindia.com/markets/MarketInfo/DispNewNoticesCirculars.aspx?page=20221028-16

What if the Act does not specify timeline to comply...

The essence of time

Obscurity in Companies Act w.r.t timeline

Under the companies Act, 2013 (the Act), applicability of almost all significant compliances is triggered on the basis of company's financial position, i.e. either on the basis of its net-worth, or paid up capital or turnover or net profit or borrowings.

One of such instances which we are going to deliberate in this article is appointment of woman director, the compliance requirement in case of appointment of Woman director[1] get triggers based on paid-up capital of Rs. 100 Crore or more or turnover of Rs. 300 Cr. or more as per latest audited financial statement. Although rules[2] specify time limit for filling casual vacancy happened due to reasons like resignations, it does not specify any time limit while appointing woman director for first time. This creates ambiguity as to what should be the reasonable period within which woman director should be appointed once it is triggered.

This question gains higher importance because, non-compliance of section 149 of the Act is an adjudicatable offence and per day penalty is of Rs. 500 over and above fixed penalty of Rs. 50,000. As there is no guidance provided w.r.t within how much period appointment of woman director should happen once triggered, adjudicating officer may take different view w.r.t starting point of default.

Till date total five adjudication orders were pronounced on this subject matter, one is adjudicated by ROC, Pune and rest 4 orders are adjudicated by ROC, Delhi & Haryana. There is difference of opinion amongst both the ROCs.w.r.t. starting point from which default period to be calculated.

ROC Pune has taken a stricter view that appointment of woman director will get triggered immediately and therefore period of default was counted from start of financial year i.e., from 1st April onwards till the date of show cause notice, as the company was converted to Private Company and therefore no longer required to appoint woman director. The trigger point in this case of the company exceeded the turnover of Rs. 300 crore which can be gauged on the basis of audited financial statements at the end of year.

Whereas ROC Delhi & Haryana had taken a lenient view and default period was counted from next day of receipt of auditor's report till the date of show cause notice, although the trigger point was company has exceeded paid-up capital which is easily traceable at any point of time. In this case the matter was adjudicated although default was not made good.

If we refer provisions of the Act there are various compliances like appointment of independent directors, constitution of audit/NRC committee, applicability of CSR and formation of CSR committee etc. which gets triggered based on prescribed threshold but where no timeline is prescribed to comply with the same. It creates an ambiguity and as we have seen in above cases there is a disparity in views of ROCs also, so it is appreciated if Ministry of Corporate Affairs (MCA) may come up with any clarification w.r.t this subject which will bring parity in

thoughts of regulators as well as stakeholders which will avoid regulatory actions linked to it like adjudication.

Till the time MCA come up with any such clarification w.r.t this subject and considering the shift of MCA from more amendments to more adjudication orders, there will many more pronouncements on this subject in near future and therefore it is necessary to understand the regulators perspective and act accordingly where law is silent or ambiguous and adhere to it to avoid any penal action against company or its officer in default.

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[1] Section 149 read with rule 3 of Ch. XI

[2] rule 3 of Companies (Appointment Qualification of Director) Rules, 2014

Independent Directors can cut Corporate frauds & Risks with trust & inspect tools

Drawing a parallel with the popular saying `God cannot be everywhere, so he created mothers', similarly, the regulator created Independent Directors (IDs) since they could not be on board of all companies.

With exceptional responsibility placed by the regulator on IDs, the onus now lies on them to use their wisdom in balancing between trust and inspection as a tool to curtail corporate frauds and risks.

Needless to say, the expanding focus on ethics and governance within India has increased ID's responsibility to be an efficacious obstruction to fraud, mismanagement, and lapses in corporate functions.

As a watchdog for all stakeholders, IDs have a non-biased approach to strategize, performance, risk management, and standards of conduct. This was witnessed in case of PFS where the company reconstituted the Audit Committee despite regulator's order to not change Board's structure due to ongoing forensic audit. Citing the same, ID complained to SEBI raising governance concerns.

Simply put, it is the test of ID's wisdom as to in which situations, they rely on trust and in which situations, they dig deep to inspect and how they balance between responses of Trusting and Inspecting.

The trust imbibed on the IDs also needs to be reciprocated and demonstrated by the respective company via systematic disclosures and robust processes. While the trust on the company exists, caution should be exercised by the IDs if the need arises as even blind trust is not encouraged.

In the past, there have been several instances where the regulators have gone harsh and rigorous on IDs for not exercising diligence and they have been held responsible. Penalties have been levied upon them. This can be witnessed in case of BDMCL where IDs were penalized for alleged failure to carry out adequate due diligence and exercise independent judgement as members of audit committee. They were expected to apprehend, flag governing issues, inspect, suspect and be vocal subtly unlike being submissive. However, the caveat is BDMCL has filed an appeal with SAT; but irrespective of SAT's stand, IDs are facing the heat of reputation loss.

Risk Mitigation Strategies – Safeguarding Mechanism

Several countries have introduced the concept of Business Judgement Rule ("BJR"). It emphasizes on protecting those directors who make judgments in good faith and for a genuine purpose, have acted on an informed basis without material personal interest and who have a rational belief that the decision is in the best interest of the company. The same if demonstratable justifies the BJR rule. IDs can use this rule as a defence mechanism only if diligence is exhibited. Similar provisions exist in section 463 of Companies Act, 2013. This was seen in case of Edserv Softsystems Limited where IDs exhibited diligence by seeking more details with respect to GDR proceeds utilization. When the same was not received, the IDs resigned.

To obtain reasonable assurance, IDs can:

- Evaluate quality, quantity, and timeliness of information internally and externally for taking the right decision.
- Examine and challenge high value or "extraordinary" transactions that are or will become part of financial statements.
- Evaluate if the implemented corporate governance framework is strong and adequately equipped to supervise all aspects of organisation's risk profile.
- Take note of all whistle-blower complaints diligently and ensure that instances of suspected or known fraud is appropriately investigated and acceptable action is taken against perpetrators.
- Undertake periodic detailed assessment of the entity's management system, including review of board's capabilities and expertise, considering the industry or regulatory fraternity in which the entity operates.

Although there are multiple priorities for those charged with corporate governance, to my mind, there is an utmost need for IDs to reflect upon the level of their organisations' preparedness to meet the challenges of fraud and misconduct in the current environment and accordingly should empower themselves to preserve organisation value and fulfil their fiduciary responsibility.

Thus, IDs should know in which circumstances, they should rely on words and in which situations, they should look at actions and establish the stability between responses of Trusting and Inspecting.

Whether the Adjudicating Authority can remove the Liquidator?

In the matter of CA V. Venkata Sivakumar (Appellant) v/s IDBI Bank Limited (Respondent No.1/Financial Creditor), Insolvency Bankruptcy Board of India (IBBI) (Respondent No.2), Indian Institute of Insolvency Professionals of ICAI (IP-ICAI) (Respondent No.3) at National Company Law Appellate Tribunal dated 20 December 2022.

Facts of the Case

- Mr. V. Venkata Sivakumar, the appellant is an Insolvency Professional (IP) who was the Liquidator of the Jeypore Sugar Company Ltd., (Corporate Debtor/CD) and was subsequently replaced by National Company Law Tribunal (NCLT) on the application of the **IDBI Bank–** Respondent no. 1 vide order dated 1 July 2022. IDBI Bank Limited (1st Respondent and a Secured Financial Creditor of the CD) had a stake of 43.57% of the Liquidation Process.
- Insolvency Bankruptcy Board of India (IBBI), the regulator, under Insolvency and Bankruptcy Code, 2016 (IBC/Code). Indian Institute of Insolvency Professionals of ICAI (IP-ICAI) is a professional body authorised to issue Authorisation for Assignment (AFA).
- The CD was incorporated in 1936 and was engaged in manufacturing of sugar and allied products. On failure to make repayments of various loans taken from the financial creditors including from IDBI bank, an application u/s 7 of the IBC was admitted by NCLT on 25 February 2019.
- The appellant was appointed as Interim Resolution Professional and was subsequently confirmed as a Resolution Professional (RP). After the expiry of 330 days of the Corporate Insolvency Resolution Process (CIRP), NCLT ordered for liquidation of the CD on 29 May 2020 and appointed the appellant as Liquidator.
- During annual performance review of all IPs empanelled with the bank, declarations were called for verification and review to decide on continuation of the services of IPs and as part of this exercise an email was sent to the appellant on 21 July,2020 to submit the details and documents.
- A self- declaration was received from the appellant through e-mail on the same day confirming that all the information/ undertakings/ affirmations/ documents submitted by the appellant at the time of empanelment continued to be valid, effective and in force and further IP-ICAI confirmed that the appellant would be bound by the terms and conditions contained in the original letter of empanelment dated 6 October 2018 issued by the IDBI bank.
- Regulation 7A of IBBI [Insolvency Regulation 2017 (IBBI- IR 2017)] mandates the IPs to have the AFA in order to take assignments and without which they cannot be engaged in any capacity under the provision of IBC. The IDBI bank claimed that an e-mail was sent on 6 August,2020 requesting the appellant to furnish a copy of AFA issued by the IP-ICAI and on the same date the appellant informed that he was not interested in getting empanelled with the IDBI bank due to several assignment with the appellant. The IDBI bank again replied on same day ie., 6 August, 2020 to the appellant to furnish the copy of AFA since he had been continuing on the panel of the bank. However, the IDBI bank did not get any response from the appellant.
- The IDBI bank had approached the IP-ICAI and after checking the status came to know that the appellant did not have valid AFA.
- The IDBI bank then moved an application to the NCLT for appellant's removal and the NCLT vide order dated 1 July 2020 replaced the appellant by new liquidator

Mr. S. Hari Karthik under provision of Section 33 & 34 of IBC r/w section 16 of General Clauses Act, 1897 r/w Section 276 of the 'Companies Act, 2013'.

- Aggrieved by the above order, the appellant has preferred the present appeal before National Company Law Appellate Tribunal (NCLAT)

Arguments by the Appellant:

- After introduction of regulation 7A of IBBI- IR 2017, the appellant applied for AFA on 31 December 2019 for the first time which was rejected and was informed on 16 July 2020 by the IP-ICAI on telephone
- The appellant again had applied for AFA for second time on 1 August 2020 which was again rejected on 25 August 2020 citing violation of Regulation 7A and disciplinary proceedings were initiated by IBBI and IP-ICAI. The appellant gave further details of show cause notice, disciplinary proceedings and the fact that the IP-ICAI imposed a fine of Rs.10,000/- on 1 December 2020 which was paid under protest
- Further, stated that aggrieved from wrong action by the respondents, Writ Petition was filed under Article 226 of the Indian Constitution at Madras High Court. It was stated that Hon'ble Madras High Court was pleased to grant an interim injunction and in spite of clear order of Hon'ble Madras High Court, the IDBI bank persisted with petition before the NCLT without making IBBI and IP-ICAI as necessary parties
- That in the meanwhile, a fresh AFA on 30 December 2020 was received. The appellant further mentioned that it was bought to the notice of NCLT of these new developments and interim stay by the Hon'ble Madras High Court vide order dated 26 February 2021. In spite of this, NCLT pronounced judgment removing him from the Liquidator of the CD contrary to oral orders made in the open court which was clearly a case of judicial misconduct
- Further argued that the whole intention was to get best value of the assets of the CD and attempted to pay 100% of the claims of stakeholders and this fact was appreciated in 1st, 7th & 9th meeting of Stakeholder Consultation Committee
- Despite the best efforts of the appellant, due to complications in the process, the appellant had to file SR/217/2020 seeking extension of CIRP period which was dismissed by the NCLT and pronounced for liquidation by appointing the appellant as the Liquidator
- The appellant further submitted that the IDBI bank started complete non-cooperation and filed several petitions for the removal of the appellant. Also highlighted the fact that IDBI bank with mala-fide intentions sought to remove the appellant as Liquidator despite knowing the appellant had got proper AFA and interim stay from the Hon'ble Madras High Court
- Further also highlighted the fact that IDBI bank was against because of refusal to accept 'Resolution Plan' submitted by 'Benamies' and 'Ex-Promoters' since they were hit by Section 29(A) of the IBC
- Also stated that the IDBI bank moved the application to the NCLT for removal primarily on five grounds i.e.
    - Violation of Regulation of 7A of IBBI Insolvency Regulation 2017
    - Removal of the appellant as the Liquidator under Section 16 of 'General Clauses Act, 1897' r/w Section 276 of the 'Companies Act, 2013'
    - Personal attack on appellant's' character for continuing as a liquidator
    - Wrongful sharing of valuation report by the appellant.
    - Depicting the appellant as delinquent person.

Arguments by the Respondents:

- It was argued that impugned order has been passed after factoring into account all the facts and relevant laws on the subject and while approving the replacement of the liquidator, all applicable regulations and procedures were fully met with.
- IDBI bank was a secured financial creditor having stake of 43.57% in the liquidation process moved an IA/815/2020 against the appellant on several grounds including non-

holding of valid AFA on the date of his appointment as liquidator.

- IBBI`s website also stated the non- fulfilment of the mandatory requirement of a vaild AFA. This very fact was noticed during performance review of Insolvency Professionals.
- Since the appellant had already been appointed as liquidator, again the details were asked for submission. On receipt of information from the appellant, the IDBI bank had written letter to the IP-ICAI on 10 August 2020 seeking information on status of the AFA of the appellant and IP-ICAI replied that as per their record, the current status of the AFA of the appellant was NIL and so an application was made to NCLT for the appellants removal.
- The allegation by the appellant were baseless, malicious, wrongful and motivated statements castigating the Technical (Member) of the NCLT. The appellant's removal was on several grounds including non-possession of the AFA, illegal sharing of valuation report of the CD with prospective 'Resolution Applicants' etc
- The authority who appointed the liquidator has adequate powers to remove also.
- Interim Stay order of the Hon'ble Madras High Court has no relevance in the present case and the relief were sought against the order passed by IP-ICAI (disciplinary committee).
- Arguments raised by the Appellant were only to derail the process of liquidation.
- The appellant had a habit of forum shopping as well as labelling malicious allegations against concerned authorities as an intimating strategy and therefore urged NCLT to take a serious view.
- There was no retrospective applicability of the AFA and therefore, all action taken by the appellant prior to 30 December 2020 were null & void and bad in law.
- All the lenders of the CD with 100% majority had sought for the removal of the appellant.
- As per the minutes of the Joint Lenders Meeting all lenders appreciated long awaited order of NCLT for removing the appellant from liquidator and authorised IDBI bank to defend for appeal by the appellant on their behalf and agreed to share legal expenses including advocate and senior counsel's fee as per lenders share in liquidation claim. This clearly showed the deep sentiments of the lenders who had absolutely no trust in the appellant.

NCLAT held that:

- On reading the regulation 7A of IBBI- IR 2017, it was clear that no IP should accept or undertake any assignment after 31 December 2019 unless he held a valid AFA on the date of acceptance or commencement of such assignment.
- The appellant was appointed as the Liquidator by the order of NCLT on 29 May 2020. After carefully examining the dates of the letter by the IP-ICAI and the impugned order of NCLT, it was clear that the appellant did not have the valid AFA on date of acceptance of the Liquidator.
- Further, all the assignments as an interim resolution professional, resolution professional, liquidator etc. were to be treated as independent assignments and one assignment cannot automatically give extension to next assignment. Thus, it is natural that the appellant needs to comply to the requirements of the particular appointment. In this case, the criteria need to be met at the different stages and at the time of liquidation, the appellant was duty bound to comply with the regulations.
- The IBC does not explicitly state the grounds for removing the Liquidator. In the absence of specific provisions, NCLAT has to resort to Section 33 & 34 of the IBC and Section 276 of the Companies Act, 2013, which provides for the removal and replacement of liquidators on various grounds.
- NCLAT also noted that the recent judgement passed by Principal Bench, NCLAT in *Subrata Maity Vs. Mr. Amit C. Poddar & Ors established that*, no liquidator, has any personal rights, to continue in liquidation and the NCLT, can order for replacement of the liquidator, after recording sufficient reasons, as per law.
- Further, since the NCLT, was vested with the power, to appoint a liquidator, under Section 33 and 34 of the IBC. It was by the virtue of the Section 16 of the General Clauses Act,

1897, that an Adjudicating Authority, has the power, to remove the liquidator.

- Combined reading of the provisions along with Section 33 and Section 34 of the IBC, made it clear that NCLT, which has the powers, to appoint the liquidator, will also have the powers, to remove the liquidator for reasons, the NCLT, may find fit, just, valid and proper.
- The Appeal, being devoid of merits and was dismissed.

*[Authorisation for assignment. 7A.
An insolvency professional shall not accept or undertake an assignment after 31st December, 2019 unless he holds a valid authorisation for assignment on the date of such acceptance or commencement of such assignment, as the case may be:
Provided that provisions of this regulation shall not apply to an assignment which an insolvency professional is undertaking as on-
(a) 31st December, 2019; or
(b) the date of expiry of his authorisation for assignment.]

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