Summary of Important Supreme Court Judgements on IBC

Resolution Team, Vinod Kothari and Company
(resolution@vinodkothari.com)
(https://ibbi.gov.in/en/orders/supreme-court)
[Updated till 17th January, 2024]

Subject	Details	*Key Ratio Decidendi*
Whether action can be initiated against promoters/directors of the Corporate Debtor during the moratorium of CD	*Ansal Crown Heights Flat Buyers Association (Regd.) vs. Ansal Crown Infrabuild Pvt. Ltd. & Ors.* Civil Appeal No(S). 4480 & 4481 of 2023: [Date: 17th January, 2024]	**Facts of the Case:** The appellant herein are homebuyers, who had filed a complaint against Ansal Crown Infrabuild Private Limited and its directors and promoters ('Developers') before the National Consumer Disputes Redressal Commission ('National Commission'), pursuant to which National commission directed as follows: (1) The Developer, to complete the project in all respects and handover the possession of the allotted flats/apartments to the members of the Association of the homebuyers within the time specified. (2) The homebuyers may claim refund of their deposited amount if they are not interested to wait further for taking possession of the Apartment, which the Developer shall refund along with interest, and in case of delay, with penal interest. In the meantime, CIRP proceedings u/s 9 of IBC started against the Developers.

Subject	Details	*Key Ratio Decidendi*
		However, the homebuyers sought to execute the direction(s) of the NCDRC against the company as well as against the individual directors. By its impugned orders, the NCDRC had held that the decree cannot be executed against the company due to the operation of the moratorium under Section 14 of the IBC and thereafter, the NCDRC had observed that in view of moratorium against the company, it would not be appropriate to proceed in the same execution application against the individual directors. Hence, the present appeal. **Issue before SC:** Whether action against the directors/ officers of a company undergoing CIRP can be continued even though the moratorium u/s 14 of IBC is in operation against the company? **Decision:** The Hon'ble Supreme Court dismissed the appeal and upheld the view that notwithstanding moratorium under IBC, the liability, if any, of the directors/officers will continue even though moratorium under section 14 of IBC is in operation against the company. **VK Co. Comments**: The decision in the present matter is very crucial in clarifying the legal position w.r.t. applicability of moratorium u/s 14 of IBC to the directors/officers of the defaulting company.

Subject	Details	*Key Ratio Decidendi*
Whether or not a dissenting financial creditor is entitled to get paid the minimum value of its Security interest as under Section 30(2)(b)(ii)	DBS Bank Limited Singapore v. Ruchi Soya Industries Limited and Another Civil Appeal No. 9133 of 2019 [Dated: 3rd January, 2024]	**Facts of the Case:** In this case, the Appellant – DBS Bank Limited Singapore had extended financial debt of Rs. 243 crores to Ruchi Soya Industries Limited (CD). The loan was secured by a sole and exclusive first charge over certain immovable assets of the CD. Subsequently, CIRP was initiated and the CoC approved pari passu distribution of the resolution plan proceeds. This was approved by 96.95% of the CoC. The Appellant voting against the plan became a dissenting financial creditor. The Appellant herein challenged the distribution mechanism of the resolution plan before NCLT, and post dismissal subsequently in NCLAT. During pendency of appeal, Section 30(2)(b)(ii) of the IBC was amended by the Amendment Act of 2019. The Appellant challenged the tenability of the distribution mechanism considering the new amendments. Meanwhile the Plan was approved by the NCLT. Both the orders were appealed before the NCLAT and subsequently dismissed. Hence, present appeal. **Issue**: 1. Whether the amendments made in the substantive portion of Section 30(2), in terms of Explanation 2 will be applicable when the first appeal was heard by the NCLAT? 2. Whether section 30(2)(b)(ii) of the Insolvency and Bankruptcy Code, 2016, as amended in 2019, entitles the dissenting financial creditor to be paid the minimum value of its security interest? **Decision**: 1. Hon'ble SC observed that no vested right inheres in any resolution

Subject	Details	*Key Ratio Decidendi*
		applicant who has plans approved under the Code. Further, an appellate proceeding is a continuation of the original proceeding. A change in law can always be applied to original or appellate proceedings. Thus, while the amendment in sec 30 (2) is constitutionally valid and has retrospective operation, it does not impair vested rights. 2. Referring to the judgements passed in number of its earlier decisions viz. *Committee of Creditors of Essar Steel India Limited*, *Swiss Ribbons Private Limited and Another v. Union of India and Others*, and *Vallal RCK v. Siva Industries and Holdings Limited and Others*, Hon'ble SC reinforced the principle that the commercial decisions made by the CoC should be respected, provided they are within the bounds of law. 3. The Hon'ble SC also emphasised the importance of fair treatment of secured creditors and held that a secured creditor cannot claim preference over another secured creditor at the stage of distribution on the ground of a dissent or assent, otherwise the distribution would be arbitrary and discriminative. The purpose of the amendment was only to ensure that a dissenting financial creditor does not get anything less than the liquidation value, but not for getting the maximum of the secured assets. 4. In the present case, the Hon'ble SC took a dissenting view to its earlier judgement passed in the matter of *India Resurgence ARC Private Limited v. M/s. Amit Metalinks Limited* on the interpretation of Section 30(2)(b)(ii), wherein the SC had held that: *'It needs hardly any emphasis that if the propositions suggested on behalf of the appellant were to be accepted, the result would be that rather than insolvency resolution and maximisation of the value of assets of the corporate debtor, the processes would lead to more liquidations, with every secured financial creditor opting to stand on dissent. Such a result*

Subject	Details	*Key Ratio Decidendi*
		would be defeating the very purpose envisaged by the Code; and cannot be countenanced' and hence referred the matter to a larger bench and before the Chief Justice of India. **VK Co. Comments:** Taking a dissenting view from the established precedent, the SC observed that a secured creditor if unsatisfied with the proposed payout would be entitled to full liquidation value payable to him in terms of Section 53(1). The judgement, being contrary to the earlier landmark judgement, has been referred to the larger bench for appropriate orders.
Right of a creditor to claim set off of any amount that it owes to a corporate debtor against the debt owed by the corporate debtor to such creditor, post commencement of insolvency proceeding	*Bharti Airtel Limited and Another v. Vijaykumar V. Iyer and Others.* Civil Appeal Nos. 3088-3089 of 2020 [Dated: 3rd January, 2024]	**Facts of the Case:** 1. In the present case, Bharti Airtel Limited and Bharti Hexacom Limited (Airtel Entities/ the Appellants) executed eight Spectrum Trading Agreements with Aircel Limited and Dishnet Wireless Limited (Aircel Entities) in April 2016 for purchase of right to use the spectrum allotted to the latter in the 2300 MHz band against payment of Rs. 4,022.75 Crores to the Aircel Entities, which was contingent on approval of the Department of Telecommunications, GoI. 2. The Telecom Department demanded bank guarantees in relation to certain licence dues and spectrum usage dues from the Aircel Entities. Aggrieved by such demand, the Aircel Entities approached the Telecom Disputes Settlement and Appellate Tribunal (TDSAT). 3. TDSAT, vide Order dated 03-06-2016, directed the Aircel Entities to submit the bank guarantees. However, the Aircel Entities did not have the means to procure and submit bank guarantees, hence, they

Subject	Details	*Key Ratio Decidendi*
		approached the Airtel Entities for submission of such bank guarantees on behalf of the Aircel Entities to the Telecom Department 4. The Airtel Entities executed three Letters of Undertaking, whereby, they agreed to furnish the bank guarantees to the Telecom Department on behalf of the Aircel Entities, provided the latter deducted Rs. 586.37 Crores from the amount of consideration payable by the Airtel Entities under the Spectrum Trading Agreements. 5. Later, TDSAT directed the Telecom Department to return the Bank Guarantees to the Aircel Entities. However, the Bank Guarantees were not returned and the Telecom Department filed Civil Appeal No. 5816 of 2018 before the Supreme Court. The Aircel Entities also filed Cross-Appeals before the Apex Court. 6. The Supreme Court, vide Interim Order dated 28-11-2018, directed the Telecom Department to return the Bank Guarantees to the Aircel Entities, as per TDSAT Order dated 09-01-2018. But the Telecom Department did not return the Bank Guarantees. 7. In view of the aforesaid, the Airtel Entities approached the Banks seeking cancellation of Bank Guarantees. As the Banks were reluctant, the Airtel Entities approached the Apex Court, which, vide Order dated 08-01-2019, directed that the Bank Guarantees must be cancelled and the same cannot be used for any purpose. 8. Thereafter, the accounts between the Airtel Entities and Aircel Entities were settled, and as per the Airtel Entities, Rs. 145.20 Crores was the net amount payable by the Aircel Entities towards

Subject	Details	*Key Ratio Decidendi*
		operational charges, SMS charges and interconnect usage charges to the Airtel entities. 9. In the meantime, CIRP was initiated against Aircel entities u/s 10 of IBC, and the Airtel Entities submitted their claims before the Resolution Professional (RP), which were admitted to the extent of Rs. 112 Crores. 10. However, by Letter dated 12-01-2019, the RP sought from the Airtel Entities a sum of Rs. 112.87 Crores payable to the Aircel Entities under the Spectrum Trading Agreements, consequent to the discharge and cancellation of the Bank Guarantees furnished by the Airtel Entities, failing which the RP would take steps for recovery. 11. The Airtel Entities objected to the RP's demands on various grounds and also claimed set-off of the amount due to them by the Aircel Entities from the amount payable by them to the Aircel Entities. However, the Airtel Entities' claim for set-off was rejected by the RP. 12. Being aggrieved, the Airtel Entities approached the NCLT, which, vide Order dated 01-05-2019, allowed the prayers. 13. An appeal against the said NCLT Order was filed by RP before the NCLAT. 14. The NCLAT allowed the Appeal against the Airtel Entities and held that *"set-off is violative of the basic principles and protection accorded under any insolvency law. Set-off is antithetical to the objective of the IBC. Reference was made to the non-obstante provisions in the form of*

Subject	Details	*Key Ratio Decidendi*
		Section 238 of the IBC. As moratorium under Section 14(4) applies till the date of completion of the Corporate Insolvency Resolution Process, which is till the resolution plan is approved or the liquidation order is passed, to permit set-off will be contrary to law. Further, the set-off being claimed is in respect of two separate and unrelated transactions." . Hence, the present appeal was preferred before SC by Airtel Entities. **Issues before SC:** Whether creditors have the right to claim set-off of any amount that it owes to a corporate debtor against the debt owed by the corporate debtor to such creditor, post commencement of insolvency proceedings? **Decision:** In the present case, SC dismissed the appeal and upheld the order passed by NCLAT and observed as follows: 1. Set-off in generic sense recognises the right of a debtor to adjust the smaller claim owed to him against the larger claim payable to his creditor. 2. The right to set-off may either be explicit in the words of the agreement or can be implied by existence of oral / indirect agreement to set-off, thereby, reflecting an understanding / arrangement between the parties to the said effect. 3. In law, Order VIII Rule 6 of the Code of Civil Procedure 1908 (CPC) provides that where a suit for recovery of money has been filed, the defendant can claim a set-off against the plaintiff's demand, for an ascertained sum of money that is legally recoverable by the defendant

Subject	Details	*Key Ratio Decidendi*
		from the plaintiff. Provided that the claim for set-off arises out of the same transaction. 4. The defendant may also claim an equitable set-off for an ascertained sum of money, wherein, such claim must have a connection between the plaintiff's claim for the debt and the defendant's claim to set-off. However, legal set-off, as distinguished from equitable set-off, is allowed by court only for an ascertained sum of money and is a statutory right. *5. "For set-off in law, the obligations existing between the two parties must be debts which are for liquidated sums or money demands which can be ascertained with certainty. Both the debts must be mutual cross-obligations, that is, cross-claims between the parties in the same right."* 6. Insolvency set-off applies when demands are between the same parties and there is a commonality of identity between the person who has made the claim and the person against whom the claim exists. Even when there are several distinct and independent transactions, mutuality can exist between the same parties functioning in the same right or capacity. 7. However, upon commencement of CIRP process, the identity of a corporate debtor changes and as a result, the set-off of the dues payable by the corporate debtor, prior to the commencement of CIRP cannot be made from the dues payable to the corporate debtor, post commencement of CIRP. Otherwise, in the event that cross demands are set-off, the assets available for distribution amongst various classes of creditors, would be depleted in favour of a single creditor

Subject	Details	*Key Ratio Decidendi*
		with a set-off entitlement. 8. This cannot be allowed as it would be contrary to the pari passu principle embedded in IBC such as in Section 53 of IBC (Distribution of assets) that creates a hierarchy of stakeholders with the stipulation that each class of creditors shall rank equally among each other and shall be given equal treatment as the creditors of such class. 9. Thus, the right to set-off, being an equitable right, can be denied if such grant of relief would defeat equity and justice. 10. However, in exceptional circumstances, if at all set-off is to be allowed after commencement of CIRP, *"the set-off should be genuine and clearly established on facts and in law, so as to make it inequitable and unfair that the debtor be asked to pay money, without adjustment sought that is fully justified and legal. The amount to be adjusted should be a quantifiable and unquestionable monetary claim, as the Corporate Insolvency Resolution Process is a time-bound summary procedure. It is not a civil suit where disputed questions of law and facts are adjudicated after recording evidence."* **VK Co. Comments**: While the Civil law recognises the principle of set-off, in IBC set-offs cannot be claimed as a right as it would prejudice the rights of the other creditors. The assets available for distribution amongst various classes of creditors, would be depleted in favour of a single creditor with a set-off entitlement, which would obviously be against the principles of natural justice and

Subject	Details	*Key Ratio Decidendi*
		Section 53 of IBC that creates a hierarchy of stakeholders.
Mortgaged property sold via auction under SARFAESI Act prior to initiation of CIRP cannot be treated to be liquidation estate of CD.	*Haldiram Incorporation Pvt. Ltd. v. Amrit Hatcheries Pvt. Ltd. and Others* Civil Appeal No. 1733 of 2022. [Date: 6th December, 2023]	**Facts of the Case:** 1. The appellant in the given case was a purchaser in an auction sale of certain properties of a defaulting borrower. 2. The properties were sold under SARFAESI Act, 2002 and a sale certificate was duly issued in favour of the appellant on 19.08.2023. 3. However, application u/s 9 of IBC was admitted by the NCLT against the defaulting borrower on 20.08.2023. 4. An erstwhile Director of the Corporate Debtor took out a notice of motion resisting the property sale. NCLT observing the sale was not concluded directed the liquidator to take possession. An appeal was filed by PNB against the said order before NCLAT, which was dismissed by NCLAT by a 2:1 majority decision. Hence, the present appeal was preferred before SC. **Issues before SC:** 1. Whether or not auction property belonged to the Liquidation estate? **Decision:** 1. The Hon'ble Supreme Court, citing *Esjapee Impex Private Limited vs. Assistant General Manager and Authorized Officer, Canara Bank*

Subject	Details	*Key Ratio Decidendi*
		*[(2021) 11 SCC 537],*held that since the Liquidator, the erstwhile directors/promoters of the CD and also the Bank did not dispute the factual position that the sale was concluded prior to declaration of moratorium, the present appeal shall stand allowed to the extent the properties in questions are concerned, and that the said properties cannot be treated to be liquidation assets of the Corporate Debtor for the purpose of further steps to be taken in the liquidation proceeding. **VK Co. Comments:** In the present case there was a requirement to interpret SARFAESI and IBC provisions jointly. The Hon'ble Bench rightfully however, found recourse through the legality of the sale document's registration. Considering that the sale transfer in itself was accepted by both parties, the Court effectively had to only remark on whether the assets of an entity already marked as sold prior to the CIRP would still be considered liquidation estate. The Hon'ble Court taking a logical approach preferred the order of sale and the legality of the sale over the later imposition of the Moratorium.
Section 95 to Section 100 of the IBC are constitutionally valid and do not vitiate the principles of natural justice under Article	*Dilip B Jirwajka v UOI and Ors* Writ Petition(Civil) No. 1281 of 2021 [Date: 9th November,	**Issues before the SC:** 1. Whether Section 95 to Section 100 of IBC are against the principles of natural justice and violate Article 14 of the Constitution? 2. Whether hearing should be conducted by the adjudicatory authority for the purpose of determining 'jurisdictional facts' at the stage when it

Subject	Details	*Key Ratio Decidendi*
14 of the Constitution	2023]	appoints a resolution professional under Section 97(5) of the IBC? **<u>Decision by the SC:</u>** The SC dismissed the write petition and held that the provisions of Section 95 to Section 100 of the IBC are not unconstitutional as they do not violate Article 14 and Article 21 of the Constitution, on the basis of following observations: 1. In exercise of the power conferred by Section 1(3), a notification was issued on 15 November 2019 by the Union Government in the Ministry of Corporate Affairs that brought in force section 95-100 of IBC alongwith other provisions. The said notification was challenged before the SC In *Lalit Kumar Jain v Union of India, wherein* a two-Judge Bench inter alia, held that the liability of a guarantor is not discharged merely on the discharge of the corporate debtor. 2. Subsequently, by amending Act 28 of 2018, Parliament introduced amendments in section 50 of IBC thereby extending the jurisdiction of adjudicating authority in deciding the matters involving bankruptcy of corporate guarantors or personal guarantors, as the case may be. 3. The resolution professional appointed under Section 97 serves a facilitative role of collating all the facts relevant to the examination of the application for the commencement of the insolvency resolution process which has been preferred under Section 94 or Section 95. The report to

Subject	Details	*Key Ratio Decidendi*
		be submitted to the adjudicatory authority is recommendatory in nature on whether to accept or reject the application. 4. There is no violation of natural justice under Section 95 to Section 100 of the IBC as the debtor is not deprived of an opportunity to participate in the process of the examination of the application by the resolution professional; 5. No judicial determination takes place until the adjudicating authority decides under Section 100 whether to accept or reject the application. The report of the resolution professional is only recommendatory in nature and hence does not bind the adjudicatory authority when it exercises its jurisdiction under Section 100 6. The adjudicatory authority must observe the principles of natural justice when it exercises jurisdiction under Section 100 for the purpose of determining whether to accept or reject the application; 7. The purpose of the interim-moratorium under Section 96 is to protect the debtor from further legal proceedings **VK Co. Comments:** In the present case, the SC highlights the underlying spirit of IBC in-depth in light of the constitutional validity of the provisions of IBC and with the

Subject	Details	*Key Ratio Decidendi*
		backdrop of the principle of natural justice. Further, pursuant to the present writ petitions being sub-judice, the AA was not in a position to admit the applications u/s 95 of IBC w.r.t. initiation of personal insolvency. However, now the position being clarified by the SC, application w.r.t. personal insolvency will be proceeded expeditiously and the personal guarantors will no longer take shelter of pendency of constitutional challenge before the Supreme Court to evade the process of law.
If MSME certificate is obtained prior to date of submission of Resolution Plan, ineligibility under Section 29A of IBC would not be incurred and benefit of Section 240A of IBC would be available to promoter of MSE Corporate Debtor	*Hari Babu Thota* Civil Appeal no. 4422/2023 [Date: 29th November, 2023]	**Facts** Shree Aashraya Infra-Con Limited (MSME) went into CIRP and the appellant was appointed as the Resolution professional who was also the promoter of company. The appellant submitted a resolution plan to the adjudicating authority on the ground that the appellant being a promoter could not have submitted the resolution plan. The company was not a MSME at the time of CIRP however achieved the MSME status prior submission of the resolution plan. **Issues before the SC:** 1. Whether the corporate debtor not having an MSME status at the time of commencement of CIRP proceedings would disqualify the Resolution applicant under Section 29A of the Code as benefit of Section 240A would not be available?

Subject	Details	*Key Ratio Decidendi*
		<u>Decision of the SC</u> The SC in its decision harmoniously interpreted the provisions of Section 29 A(c) and (h) of the code and Section 240A of the code of IBC. The SC while providing its judgement overruled the NCLAT judgement as provided under D*igamber Anand Rao Pingle v Shrikant Madanlal Zawar & Ors.*, which had held that the relaxation provided to the promoters under Section 240A to act as insolvency professionals shall only apply in the case if the corporate debtor at the time of initiation of CIRP proceedings is a MSME. Overruling this judgement, the Supreme Court held that CD's promoter can submit a resolution plan under IBC even if the CD obtains its MSME registration after being admitted into CIRP **VK Co. Comments:** MSMEs play a crucial role in the Indian economy. The legislative intent is not to push these companies into insolvency. According to the ICT report, the value of MSMEs often comes from their promoters. When these companies face insolvency, potential resolution participants may not be interested in reviving them, leading to liquidation, which goes against the legislative goal. To address this, Section 240A had been introduced allowing the promoters to act as resolution professionals, and giving promoters a chance to revive the company. The timing of MSME status is not critical, as long as it is granted before the submission of the resolution plan.

Subject	Details	*Key Ratio Decidendi*
SC held that in a Resolution Plan of a real estate company, home allotees who had approached for relief under state RERA are still to be considered as "financial creditors" in case insolvency proceedings are initiated against the Real estate company	*Vishal Chelani & Ors. Vs. Debashis Nanda* Civil Appeal No.3806 of 2023 [Date: 6th October, 2023]	**Facts:** In the present case, the appellants are Homebuyers, who had invested in a real estate project by a developer company, and being aggrieved by the delay in completion of the project, approached the Uttar Pradesh Real Estate Regulatory Authority (UPRERA) for appropriate orders. UPRERA passed an order in favour of the applicants directing the developer company to refund of the amounts deposited by the said homebuyers along with interest. Concurrently, insolvency proceedings under the Insolvency and Bankruptcy Code (IBC) were initiated against the developer. In the course of these proceedings, a resolution plan was presented, introducing a differentiation between home buyers who availed themselves of relief under RERA and those who did not. The former were classified as unsecured creditors and were offered terms less favorable than their counterparts. The appellants aggrieved approached the NCLT, NCLAT which passed unfavorable orders against them, due to which the appellants filed an appeal before the Supreme Court **Issue before the SC:** 2. Whether home buyers allottees in real estate projects, who have sought remedies under RERA, also fell within the broad description

Subject	Details	*Key Ratio Decidendi*
		of financial creditors under the IBC? **<u>Decision by the SC:</u>** The Supreme Court upheld the prayer of the appellants by relying on the amendment to Section 5(8)(f) of IBC, which explicitly included home buyers and allottees of real estate projects as "financial creditors." The Court held that any distinction made by the RP on the basis of remedy pursued by the home allottees under the state RERA would lead to hyper classification of the creditors (Home allottees), a concept not envisaged under the Act and hence if done so would lead to violation of Article 14 of the Constitution. In coming to this conclusion the Court referred to a previous case, *Natwar Agrawal (HUF) vs. Ms. Sakash Developers & Builders Pvt. Ltd.,* decided by the Mumbai Bench of the National Company Law Tribunal, where under the above mentioned ratio had been used to arrive at its judgement. **VK Co Comments:** One of the crucial observations made by the SC in this judgement is that it held, any orders passed in favour under the UPRERA towards the home allotted only solidify their claims as a financial creditor and does not defeat their rights as financial creditors under IBC.
Proceedings u/s 138 of the NI Act can run simultaneously with the proceedings	*Ajay Kumar Radheshyam Goenka vs. Tourism Finance Corporation of*	**Facts:** 1. The CD took a debt of Rs. 30 Cr. from the Respondent. The CD provided a post-dated cheque which was returned to the Respondent for the reason

Subject	Details	*Key Ratio Decidendi*
under IBC	*India Ltd.* Criminal Appeal No.172 Of 2023 [Date: 15th March, 2023]	that the account was closed. 2. The Respondent proceeded with criminal proceedings under the Negotiable Instruments Act. Meanwhile, CIRP was initiated against the CD in Ahmedabad. Later, the Respondent became a member of the CoC. **Issues before SC:** Whether proceedings u/s 138 of the Negotiable Instruments Act can take place simultaneously with CIRP or liquidation proceedings under IBC? **Decision:** The Supreme Court held that the scope of nature of proceedings under the two Acts, are distinct and would not intercede each other. The Hon'ble SC, relying upon previous rulings on the subject observed that the moratorium under Section 14 of the IBC does not apply to the proceedings initiated against signatories/directors under the NI Act. In the similar context, the SC held that the extinguishment of debt under Section 31 or Sections 38 to 41 of the IBC would not ipso facto apply to the extinguishment of the criminal proceedings. Thus, the proceedings against the Appellant i.e., the CD can be proceeded against under NI Act.
Developmental rights liable to include in the Information Memorandum by the Resolution Professional	*Victory Iron Works Ltd. vs. Jitendra Lohia & Anr.* Civil Appeal No.1743 Of 2021 [Date: 14th March, 2023]	**Facts:** 1. The CD is undergoing CIRP under Section 7 of the Code. The RP has included a property to the Information Memorandum which is owned by Energy Properties, part of which is licenced to Victory, and the CD has development rights over it. 2. The CD financed the purchase of the said property in lieu of 40% shares in Energy properties and development rights over the said land.

Subject	Details	*Key Ratio Decidendi*
		3. Energy Properties and Victory have independently contested the inclusion of the said land to Information Memorandum by the RP. **Issues before SC:** 1. Whether developmental rights over a property can be included in the Information Memorandum prepared by the Resolution Professional? 2. Whether AA under the Code is empowered to adjudicate the dispute between the ostensible owner and licensee? **Decision:** With regard to issue no. 1, the Supreme Court held that the developmental rights over the said property in favour of the CD is "property" as defined in Section 3(27) of the Code. Thus, the inclusion of the same in the Information Memorandum by the RP is valid. With regard to issue no. 2, the Court observed that the explanation in Section 18, which restricts the definition of assets, is not applicable to Section 25 of the Code, which places a duty on the RP to take immediate custody and control of all the assets of the CD, and held that held the NCLT and NCLAT rightly balanced the interests of both parties by protecting the interest of Victory to the extent of land occupied, while also safeguarding the possession of the CD. **VK Co. Comments:** It's a significant judgement as in this judgement Hon'ble SC reiterates the powers of the NCLT or NCLAT to issue directions regarding rights of possession held by a tenant/lessee/licensee over a property in which the CD has an interest in the course of CIRP.

Subject	Details	*Key Ratio Decidendi*
The NCLT is not empowered to exercise its rectificatory jurisdiction under Section 59 of the Companies Act, 2013, to undo the mischiefs which are in the adjudicatory jurisdiction of SEBI	*IFB Agro Industries Ltd. Vs. SICGIL India Ltd. and Ors.* Civil Application No.2030 of 2019 [Date: 4th January, 2023]	**Facts:** 1. The Respondents acquired more than 5% of the Appellant Company's total paid-up share capital. 2. The Respondents failed to comply with Regulation 7 (1) of SEBI (SAST) Regulations which mandates disclosure of shareholding or voting rights by the acquirer when he acquires more than 5% or more of the total paid-up share capital of a company. 3. The Appellants filed a petition under Section 111A of Companies Act, 1956 with the Company Law Board praying to delete the name of the Respondents as the owner of shares which are over and above the 5% threshold. 4. The NCLT authorized the appellant to buy back the share that the Respondents hold in excess of 5% of the shareholding in the Company. The Tribunal also held that it has the power to pass the present order under Section 111A of the 1956 Act which will not preclude SEBI from deciding any violation of its regulation. **Issues before SC:** 1. What is the scope and ambit of the rectification of the register of members that can be achieved through Section 111A of the 1956 Act, which has been modified by Section 59 of the 2013 Act? 2. Which is the appropriate forum for adjudication and determination of violations and consequent actions under the SEBI (SAST) Regulations 1997 and the SEBI (PIT) Regulations 1992? **Decision:** On the first issue, the Supreme Court, relying on *Ammonia Supplies Corporation*

Subject	Details	*Key Ratio Decidendi*
		(P) Ltd. v. Modern Plastic Containers Pvt. Ltd. & Ors., held that the rectificatory jurisdiction under Section 59 of the 2013 Act is summary in nature and not intended to be exercised where there are contested facts and disputed questions. On the second issue, the court clarified that the NCLT doesn't enjoy a parallel jurisdiction with SEBI for adjudication and determination of violations under the SEBI Act.
Application under Section 9 can be dismissed on the ground of a 'pre-existing dispute' between the CD and OC	*Sabarmati Gas Limited Vs. Shah Alloys Limited.* Civil Appeal No. 1669 of 2020 [Date: 4th January, 2023]	**Facts:** 1. The Respondent entered into a Gas Sales Agreement (GSA) with the Appellant. The Respondent defaulted the payments which were to be paid in accordance as per GSA. 2. The Respondent was declared as 'sick company' and moratorium was imposed under Section 22 of SICA, thus the Appellant was unable to proceed against the Respondent to recover its dues without the permission of the BIFR. 3. Subsequent to the enactment of IBC in 2016, the Appellant filed an application under Section 9 of the Code. The same was dismissed due to a 'pre-existing' dispute between the Appellant and the Respondent. **Issues before SC:** Whether the dispute raised by the Respondent with regard to the default of the recoverable amount should be considered as 'pre-existing dispute' which would render dismissal of application under Section 9 of the Code? **Decision:** The Hon'ble Supreme Court, considering the arbitration proceedings between

Subject	Details	*Key Ratio Decidendi*
		the Appellant and the Respondent, held that the dismissal of application under Section 9 of the Code on the ground of 'pre-existing dispute' prior to issuing a demand notice under Section 8 of the Code, is legal. The court allowed the parties to settle their dispute through the pending arbitration process. **VK Co. Comments:** Non-existence of any pre-existing dispute is an essential requirement to begin CIRP against the Corporate Debtor. The same is required as the insolvency proceedings is the last resort taken against the debtor, so the creditor can recover the dues. However, insolvency proceedings are increasingly used as a debt recovery mechanism which is against the objectives of the Code. By rejecting the Appellant's argument to allow the application of CIRP despite the existence of a pre-existing dispute, the Supreme Court has made a positive move forward with this ruling.
The Standard to determine a case of a pre-existing dispute under IBC cannot be equated with the principle of preponderance of probability which guides a civil court at the stage of finally decreeing a suit.	*Rajratan Babulal Agarwal v Solartex India Pvt. Ltd.* Civil Appeal No. 2199 of 2021 [Date: 13th October, 2022]	**Facts** 1. Respondent No. 1/Operational Creditor (**OC**) entered into an agreement with Corporate Debtor for the supply of 500 metric tonnes coal to it and its sister concern, that was intended to be utilized in boilers producing starch and related products. 2. The Corporate Debtor, unsatisfied with the quality of the coal, and the losses that might occur due to it, instructed the OC to stop supplying coal to the Corporate Debtor. 3. On February 3, 2018, the OC sent a demand notice to the Corporate Debtor, as per Section 8 of IBC, outlining a claim for Rs 21,57,700.38. In response, the Corporate Debtor sought damages from the OC to the tune of Rs. 4.44 crores due to the coal being supplied not of the stipulated quality. 4. Subsequently, the OC submitted an application under Section 9 of the IBC to

Subject	Details	*Key Ratio Decidendi*
		start the CIRP against the Corporate Debtor. The NCLT approved the application of initiating CIRP against the Corporate Debtor on grounds that there was no prior dispute. The NCLAT upheld the decision of the NCLT. **Issues before SC:** Whether there was a pre-existing dispute between the Operational Creditor and the Corporate Debtor **Decision:** The Court placing reliance on the Mobilox judgment, observed that IBC does not enable the Operational Creditor to put the Corporate Debtor into insolvency resolution process prematurely over small amounts of default. It is for this reason that it is enough that a dispute exists between the parties. The Bench further observed that it cannot be oblivious to the limited nature of examination of the case of the Corporate Debtor projecting a preexisting dispute **VK Co Comments:** The Court is correct in its stance that the Adjudicatory Authority does not have to delve into the likelihood of success of claim to reject the application under Section 9. It reiterates and expands on the premise already established in the SC judgment of *Mobilox Innovations Private Limited v. Kirusa Softwares.*
The designated authority under Section 14 of the SARFAESI Act is not empowered to adjudicate disputes between borrower, secured creditor, or	*Balkrishna Rama Tarle Thr LRS & Anr. Vs. Phoenix ARC Pvt Ltd. & Ors.* Special Leave Petition No. 16013 of 2022 [Date: 26th September,	**Facts:** 1. The secured creditor provided a loan of Rs. 6 Crores to the borrower which he failed to repay. Subsequently, the borrower was classified as Non-Performing Asset (NPA). 2. The secured creditor sought assistance of the District Magistrate, designated authority u/s 14 of the SARFAESI Act, 2022 ('Designated Authority') for

Subject	Details	*Key Ratio Decidendi*
any third party	2022]	taking physical possession of the secured assets post the loan was classified as NPA. 3. A dispute was raised by the borrower against the secured creditor taking possession of the secured assets. The designated authority intervened and passed an order which was set aside by the High Court on the ground that the order was beyond the scope and ambit of the powers to be exercised under Section 14 of the SARFAESI Act. **Issue:** Whether the designated authority u/s 14 of the SARFAESI Act, 2002 has the power authority to adjudicate any dispute with regard to the secured asset under Section 14 of the SARFAESI Act, 2002? **Decision:** The Hon'ble Supreme Court, relying on its decision in *M/s R.D. Jain and Co. Vs. Capital First Ltd. & Ors.*, upheld the decision of the Hon'ble Bombay High Court and observed that powers conferred on the designated authority under Section 14 of the SARFAESI Act, 2002, does not involve adjudication of disputes between borrower, secured creditor, or any third party. Once the requirements laid down are fulfilled, the designated authority is duty bound to assist the secured creditor to attain the possession of secured assets. **VK Co. Comments:** Under Section 14 of the SARFAESI Act, the Designated Authority has the prerogative to assist the secured creditor in taking the possession of the secured asset. It doesn't empower the Designated Authority to adjudicate disputes relating to the secured assets. The court has rightly limited the powers conferred to the Designated Authority as it overstepped into the mandate of the Debt Recovery Tribunal (DRTs) under the Act.

Subject	Details	*Key Ratio Decidendi*
CIRP proceedings can be initiated against both the co-borrowers at the same time but the same amount of debt cannot be realised twice	*Maitreya Doshi v Anand Rathi Global Finance Pvt. Ltd.* Civil Appeal No. 6613 of 2021 [Date: 22nd September, 2022]	**Facts:** 1. For a loan extended by Anand Rathi Global Finance Limited ("Financial Creditor") to Premier Limited ("Borrower"), Doshi Holdings Private Limited ("Pledgor") pledged certain shares held by it in the Borrower in favor of the FC by way of a loan-cum-pledge agreement to secure loans for the Borrower. 2. The Pledgor was identified as a co-borrower in the loan-cum-pledge agreement. The FC had disbursed certain loans to the principal Borrower, for which **Pledger** pledged certain shares held by it in the Borrower in favor of the FC by way of a loan-cum-pledge agreement to secure loans for the Borrower. 3. The Borrower defaulted in meeting its payment obligations. Hence, an application for initiating CIRP proceedings u/s 7 was filed by the Financial Creditor against both the Borrower & the Pledgor by way of two separate applications. 4. Both the sec 7 applications were admitted by the NCLT and CIRP was initiated against both the Borrower and the Pledgor. By way of two separate orders, the NCLT admitted both the applications filed by the FC against the Borrower and Pledgor, and the order of the NCLT was same was later affirmed by the NCLAT as well. Aggrieved by this, an appeal was filed before the Supreme Court to seek relief. **Issues**: 1. Whether an application u/s 7 of IBC is maintainable against both the pledgor and the principal borrower at the same time given the fact that the pledgor is identified as a co-borrower based on the interpretation of the agreement pursuant to which loan was disbursed and pledge was created?

Subject	Details	*Key Ratio Decidendi*
		Decision: In the present case since the Pledgor was identified as a "co-borrower", relying on its judgement in the matter of *Lalit Kumar Jain & Ors v. Union of India*, Supreme Court held that initiation of proceedings against one borrower under the provisions of the IBC does not discharge the co-borrower**s.** However, if a certain amount is already realised from one of the borrowers then the liability of the other borrower is only towards the balance amount as there can never be a question of realising the debt amount twice. **1.** Based on the interpretation of the "loan-cum-pledge" agreement, it was deduced that the Pledger in the present case is interpreted as a co-borrower. Hence, relying on the judgment of the Supreme Court in *Lalit Kumar Jain & Ors v. Union of India*, it was held that it is a settled law that initiation of proceedings against one borrower under the provisions of the IBC does not discharge the co-borrower**s.** However, the Supreme Court did clarify the fact that if certain amounts are realized from one of the borrowers, the other borrower(s) can only be held liable to pay the balance amount and there can be no question of recovery of the claim amount, twice over. **VK Co. Comments**: In the present case, the Pledger was also identified as a co-borrower based on the interpretation of the "Loan-cum-pledge" agreement pursuant to which the loan was disbursed and the pledge was created. Therefore,. Given the said interpretation, providing the leeway to file CIRP application against both the Parties ledger and the Borrower is quite justified because if the loan was taken for the benefit of both the Borrower and the Pledger, then why should only one bear the "rage" of the CIRP proceedings. However, in any case, the total recovery cannot exceed the total debt amount.

Subject	Details	*Key Ratio Decidendi*
Security interest created by the Statute is kept at par with the dues owed to secured creditors	*State Tax Officer (1) v. Rainbow Papers* Civil Appeal No. 1661 of 2020 [Date: 6th September, 2022]	**Facts:** 1. Before the CIRP application was filed against the CD, recovery proceedings were initiated by the Gujarat State Tax Officer and the property of the CD was attached pursuant to the same. 2. Upon initiation of CIRP, resolution plans were invited wherein the statutory demands were not treated at par with the secured creditors. 3. Aggrieved by this, the Appellant (State Tax Officer) approached the NCLT arguing that the resolution plan could not have overlooked the statutory dues. The appellant prayed for payment of dues towards VAT/CST on the ground that the Sales Tax Officer was a secured creditor pursuant to sec 48 of GVAT Act. 4. The NCLT rejected the plea of the appellant, and the decision was further affirmed by the NCLAT. **Issues**: 1. Whether Section 48 of the GVAT Act which provides for first charge on the property in respect of any amount payable on account of tax, interest, penalty etc. overrides sec 53 of IBC? 2. Whether the attachment of assets by a statutory authority can be considered as 'security interest' under the IBC? **Decision**: 1. The Hon'ble Supreme Court held that by virtue of security interest created by the Government under GVAT, the State is a secured creditor under IBC and hence, the debt owed to State should be put at the same pedestal as that of the first priority creditors. Authorities holding any charge over a property of the CD be treated as 'secured creditor' under the IBC. It further held that

Subject	Details	*Key Ratio Decidendi*
		if a company fails to clear its statutory dues to the Government and there is no plan which contemplates dissipation of those debts in a phased manner, the company would necessarily have to be liquidated and its assets sold and distributed according to the waterfall mechanism under section 53. 2. Further, the Court held that the Section 48 of the GVAT Act is not contrary to or inconsistent with section 53 or any other provisions of the IBC. **VK Co. Comments**: The Court's observation on this case diverts from the well-established waterfall mechanism jurisprudence around the subject matter of the conflict between the IBC and tax statutes and the question of priorities between these. Even before the enactment of IBC, the statutory dues in the nature of crown debts were ranked lower than private secured debt. Government authorities holding a charge over a property cannot be classified as 'secured creditor' under IBC. Thus, SC's stance in the present judgement sounds different to its approach in the past. Ascribing the status of a secured creditor to tax authorities defeats the purpose of the priority ranking and waterfall mechanism in the IBC and strikes at the foundation of IBC. This dictum would result in Government dues being treated *pari passu* with secured creditors and workmen's dues which may result in dilution of the rights enjoyed by workmen, as well as secured creditors as a whole. Further, putting secured creditors, tax authorities and workmen in the same pedestal would create a new tussle in the payment of dues on liquidation as well as other resolution processes. The phrase 'secured creditor' under IBC seeks to include and protect entities which took the risk of paying off the debts of the CD in instances of default and was not meant to enable the Government bodies to utilize it as a recovery mechanism. Also read our detailed article here

Subject	Details	*Key Ratio Decidendi*
The Financial Creditor can proceed against the guarantor without first suing the Principal Borrower.	*K. Parmasivam Vs. The Karur Vysya Bank Ltd. & Anr.*, Civil Appeal No. 9286 of 2019 [Date: 6th September, 2022]	**Facts:** 1. Maharaja Theme Parks and Resorts ('Corporate Guarantor'), stood guarantor for the loans availed by the three borrowers being a partnership firm and two sole proprietorships. 2. The Principal Borrowers failed to repay the loans. So, subsequently the financial creditor filed an application under Section 7 of the IBC for initiation of CIRP against the Corporate Guarantor. **Issues before SC:** Can CIRP proceedings be initiated against the guarantor without first proceeding against the principal borrower? **Decision:** The Hon'ble Supreme Court in the present case, relied on the decision passed by this Court in the matter of *Laxmi Pat Surana v. Union Bank of India and Another* where it was held that CIRP can be initiated against the Corporate Guarantor without proceeding against the principal borrower has been answered by the Court.