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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**  
*Date of decision: 28<sup>th</sup> November, 2022*  
+ **W.P.(C) 10189/2018 & CM APPL. 39715/2018**  
INSOLVENCY AND BANKRUPTCY BOARD OF  
INDIA ..... Petitioner  
Through: Mr. Vikas Mehta, Advocate.

versus

STATE BANK OF INDIA & ORS ..... Respondents  
Through: Mr. Akshit Kapur & Mr. Tushar  
Bagga, Advocates for R-1/SBI (M-  
7982535712)

**CORAM:**  
**JUSTICE PRATHIBA M. SINGH**

**Prathiba M. Singh, J. (Oral)**

1. This hearing has been done through hybrid mode.
2. The present writ petition has been filed by the Petitioner - Insolvency and Bankruptcy Board of India (*hereinafter, "IBBI"*) challenging the impugned order dated 5<sup>th</sup> September, 2018 passed by the NCLT in **CA-809(PB)/2018** titled ***State Bank of India v. Su Kam Power Systems Ltd.*** Vide the said impugned order, the NCLT has held that Regulation 36A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("*Regulation 36A*") is *ultra vires* Section 240(1) of the Insolvency and Bankruptcy Code, 2016 ("*IBC*"). The said provision reads:

***"36A. INVITATION OF RESOLUTION PLANS***

***(1) The resolution professional shall issue an invitation, including evaluation matrix, to the***

*prospective resolution applicants in accordance with clause (h) of sub-section (2) of section 25, to submit resolution plans at least thirty days before the last date of submission of resolution plans.*

*(2) Where the invitation does not contain the evaluation matrix, the resolution professional shall issue, with the approval of the committee, the evaluation matrix to the prospective resolution applicants at least fifteen days before the last date for submission of resolution plans.*

*(3) The resolution professional may modify the invitation, the evaluation matrix or both with the approval of the committee within the timelines given under sub regulation (1) or sub regulation (2), as the case may be.*

*(4) The timelines specified under this regulation shall not apply to an ongoing corporate insolvency resolution process-*

*(a) where a period of less than thirty-seven days is left for submission of resolution plans under sub-regulation (1);*

*(b) where a period of less than eighteen days is left for submission of resolution plans under sub-regulation (2).*

*(5) The resolution professional shall publish brief particulars of the invitation in Form G of the Schedule:*

*(a) on the website, if any, of the corporate debtor; and*

*(b) on the website, if any, designated by the Board for the purpose.”*

***Section 25(2)h of the IBC, 2016***

*25.(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:-*

*(a) to (g).....*

*(h) invite prospective lenders, investors, and any other persons to put forward resolution plans;”*

3. The matter came to the NCLT by way of an application filed under Section 12(2) of the IBC by the Respondent No. 1 - State Bank of India (SBI) where extension was sought for the completion of the Corporate Insolvency Resolution Process (CIRP) by a further period of 90 days. During the course of hearing this application, the NCLT noticed that an expression of interest was floated however, no resolution plans were filed in response to the same.

4. This splitting of the CIRP into inviting expression of interest and then seeking resolution plans as provided in Regulation 36A became the subject matter of the impugned order. The NCLT then held Regulation 36A<sup>1</sup> to be *ultra vires* of Section 240(1) of the IBC, despite there being no specific challenge to the said Regulation. The reason given by the NCLT was that it was contrary to the speedy disposal of the Resolution Process. The operative portion of the impugned order reads as under:

*“We are further of the view that Section 25 (2) (h) added on 23.11.2017 by way of amendment does not contemplate floating of any expression of interest. It is beyond our understanding as to how the IBBI has taken upon itself the task of framing Regulation 36A of IBBI (Insolvency Resolution Process for Corporate Persons), Regulations, 2016 using the expression 'invitation of expression of interest' along with Form 'G'. Such an assumption of power would be beyond the competence of IBBI as the source of power to frame Regulation under the IBC is drawn from Section 240 of IBC, 2016. Section 240(1) in categorical terms provides that the IBBI may by notification make regulation consistent with the Insolvency and Bankruptcy Code, and further subject to the Rules*

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<sup>1</sup> Inserted vide Insolvency Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2018

*framed by the Government under Section 239 of IBC, 2016 for carrying out the provisions of the Code. It has been repeatedly emphasised culminating in the rendered in aforesaid judgment that speed is the essence of CIR Process and inviting 'expression of interest' would impede to the speed. In the case of Innoventive Industries Ltd. v. ICICI Bank Ltd. (2018) 1 see 407 passed by Hon'ble Supreme Court has highlighted that the speed is one of the salient features of the IBC, 2016. By use of the words 'expression of interest' the speed is retarded and time is wasted. In the present case on 04.06.2018 'expression of interest' was invited and last date for expressing interest to submit the resolution plan was 18.06.2018 without in fact inviting any resolution plan. Such a course is negation of the salient features highlighted by Supreme Court that the speed is essence of the IBC, 2016, therefore, we have no other option except to declare Regulation 36A as ultra-vires of Section 240(1) of IBC, 2016. The IBBI is directed to frame Regulation according to its competence and the source of power as given to it by the Code. We do not say anything more on this aspect.”*

5. The Petitioner has challenged the said impugned order before this Court on several grounds including on the ground that the NCLT does not have the jurisdiction and power to decide upon the validity and legality of Regulations.

6. Vide previous order dated 26th September, 2018, this court directed that the impugned order passed by the NCLT shall not come in the way of the matters where 'Expression of Interest' has already been issued. The relevant part of the said order is as follows:

*“4. The question involved in the present petition is whether the National Company Law Tribunal*

*(hereafter "the NCLT") could strike down the provisions of Section 36A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016. The NCLT has held that the procedure for calling for 'Expression of Interest' is ultra-vires of the Insolvency and Bankruptcy Code, 2016 given the time bound manner in which the process is to be completed.*

*5. At this stage, this Court is not inclined to interfere with the impugned order. However, it is pointed out that in some cases, the 'Expression of Interest' has already been issued by the Resolution Professionals. This Court is of the view that the process in those cases, need not be interdicted. Therefore, it is directed that the impugned order dated 05.09.2018 passed by NCLT in the matter of State Bank of India vs. Su Kam Power Systems Ltd.: CA-809(PB)/2018 in (IB)-540(PB)/2017 shall not come in the way of the matters where 'Expression of Interest' has already been issued.*

7. An appeal was preferred by the IBBI, challenging the said order being **LPA No.566/2018** titled **Insolvency & Bankruptcy Board of India v. State Bank of India & Ors.** Vide order dated 5<sup>th</sup> October, 2018, the ld. Division Bench granted an *interim* order in the following terms:

*In the meanwhile, there shall be stay of the order dated 5th September, 2018 passed by the National Company Law Tribunal, Principal Bench, New Delhi to the extent it declares Regulation 36A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 as ultra vires, shall remain stayed.*

8. Thereafter, vide order dated 4<sup>th</sup> May, 2022, the Appeal being **LPA No.566/2018** was disposed of in the following terms:

“1. This appeal is directed against an interlocutory order dated 26.09.2018, passed by the learned single judge in W.P.(C) No.10189/2018.

2. Via the impugned order, the learned single judge allowed the existing ‘Expression of Interest’, which had been issued by the Resolution Professional [in short “RP”], to progress further.

2.1. The learned single judge has also observed in the very same order, that in view of the said direction, the order dated 05.09.2018 passed by the National Company Law Tribunal [in short “NCLT”] in the matter of State Bank of India vs. Su Kam Power Systems Ltd will not come in the way in matters wherein ‘Expression of Interest’ has already been issued by the RPs.

2.2. The record shows that the appellant had assailed by way of W.P.(C) No.10189/2018, the order dated 05.09.2018 passed by the NCLT, which is referred to hereinabove.

2.3. Clearly, the said writ petition i.e., W.P.(C) No. 10189/2018 is pending adjudication before the learned single judge.

3. Furthermore, the record also shows that the predecessor Bench in the instant appeal vide order dated 05.10.2018, has stayed the operation of the order dated 05.09.2018 passed by the NCLT.

**3.1. In effect, Regulation 36A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 continues to operate.**

4. Given this position, in our view, the writ petition needs to be heard and a final decision is required to be rendered in the said writ petition.

5. Accordingly, the appeal is disposed of, with a request to the learned single judge to take up the writ petition for hearing and final disposal.

6. It is further directed that pending the disposal of the writ petition, interim order dated 05.10.2018 passed by

*the Division Bench will continue to operate.*

*7. Consequently, pending application shall stand closed.”*

9. As on date, the aforementioned order dated 4<sup>th</sup> May, 2022 passed in the **LPA No.566/2018** continues and in effect therefore, Regulation 36A continues to operate.

10. Today, Mr. Vikas Mehta, Id. Counsel appearing for the Petitioner submits that the power of the Petitioner - IBBI can be traced to Section 196(1)(t) and Section 240 of the IBC. He further submits Section 25(2)(h) of IBC is also important in the context of the Regulation 36A.

11. Id. Counsel further submits that in the scheme of the IBC, the NCLT does not have any power to rule on the *vires* of any Regulations. He relies upon the judgment of the NCLAT in **M/s Mohan Gems & Jewels Pvt. Ltd. v. Vijay Verma & Anr.** being **Company Appeal (Insolvency) No. 849 of 2020** to submit that the NCLAT has categorically held that the legality and propriety of a Regulation cannot be ruled upon by the NCLT. He further places reliance upon the judgment of the Supreme Court in **BSNL v. Telecom Regulatory Authority of India & Ors., Civil Appeal No. 5253 of 2010.**

12. On behalf of the Respondent No.1, it is submitted by Mr. Kapur, Id. Counsel that Respondent No.1 is not a contesting party in this matter and had merely filed an application for seeking extension of the CIRP period.

13. Heard. The Court has perused the IBC as also the judgements cited by the Id. Counsel for the Petitioner. A perusal of the IBC would show that Section 3(1) of the IBC defines 'Board' as the Insolvency and Bankruptcy Board of India established under Section 188(1) of the IBC. The Board is

*inter alia*, entrusted the functions of registration of insolvency professional agencies, promotion and development of such agencies, supervision of insolvency professional agencies and insolvency professionals, investigation for insolvency professionals, the maintenance and publication of information and data as may be provided in the regulations, conduct periodic studies, alliances with other statutory authorities etc. The IBC also specifies a mechanism for issuing Regulations after doing a public consultation process. Establishment and constitution of the Board is stipulated in Sections 188 and 189 of the IBC and the powers are stipulated in Section 196 of the IBC. A perusal of the powers and functions of the Board shows that the overall supervision and functions under the IBC are to be carried out by the Board. Section 196(2) of the IBC also vests with the Board, the power to make model bylaws to be adopted by the insolvency professional agencies. The Board's power to issue Regulations are recognized in Section 240 of the IBC. Lastly, Section 196(1)(u) of the IBC is a broad provision which stipulates that the IBBI can perform such other functions as may be prescribed. The relevant provisions of the IBC are set out below:

***“Section 3 of the IBC, 2016***

*“3. In this Code, unless the context otherwise requires,  
(1) "Board" means the Insolvency and Bankruptcy Board of India established under sub-section (1) of section 188*

***Section 188 of the IBC, 2016***

*188. (1) With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Code, a Board by the name of the Insolvency and Bankruptcy Board of India.*

*(2) The Board shall be a body corporate by the name*



*aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Code, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.*

*(3) The head office of the Board shall be at such place in the National Capital Region, as the Central Government may, by notification, specify.*

*Explanation.—For the purposes of this section, the expression "National Capital Region" shall have the same meaning as assigned to it in clause (f) of section 2 of the National Capital Region Planning Board Act, 1985. (4) The Board may establish offices at other places in India.*

#### ***Section 196(1) of the IBC, 2016***

*196. (1) The Board shall, subject to the general direction of the Central Government, perform all or any of the following functions namely:-*

*(a) to (s).....*

*(t) make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for time bound disposal of the assets of the corporate debtor or debtor; and*

*(u) perform such other functions as may be prescribed.*

#### ***Section 240 of the IBC, 2016***

*240. (1) The Board may, by notification, make regulations consistent with this Code and the rules made thereunder, to carry out the provisions of this Code.*

*(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely.....*

14. Thus, the IBBI is in effect an authority which is carrying out a large number of functions related to the implementation of the IBC. On the other hand, the Adjudicating Authority in the present case i.e. NCLT is established in terms of Section 60 of the IBC. The powers of the NCLT as per Section 60 of the IBC are as follows:

***“Section 60 of the IBC, 2016***

*60. (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.*

*(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or bankruptcy of a personal guarantor of such corporate debtor shall be filed before such National Company Law Tribunal.*

*(3) An insolvency resolution process or bankruptcy proceeding of a personal guarantor of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.*

*(4) The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).*

*(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—*

- (a) any application or proceeding by or against the corporate debtor or corporate person;
- (b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and
- (c) any question of priorities or any question of law or facts, ***arising out of*** or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.
- (6) .....

15. A perusal of the powers of the NCLT shows that, broadly the NCLT is vested with the power of adjudicating any application or proceeding before it and adjudicating any claims and also deciding on questions of law or fact ***arising out of*** the insolvency resolution or liquidation proceedings.

16. On first blush, it appears that Section 60(5)(c) of the IBC would include any question of law or facts. However, a closer reading of the provision would show that questions of law or facts ought to be in respect of those proceedings which are pending before the NCLT and they ought to *arise out of* or in relation to the resolution or liquidation proceedings. This in the opinion of the Court cannot include the power to declare a Regulation itself as being *ultra vires*.

17. Moreover, the rules and regulations which are framed by the Central Government or the IBBI are to be placed before Parliament in terms of Section 241 of the IBC. The same is extracted below:

***“Section 241 of the IBC, 2016***

*241. Every rule and every regulation made under this Code shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive*

*sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.”*

18. A perusal of the judgment in ***M/s Mohan Gems & Jewels Pvt. Ltd.*** (*Supra*) clearly shows that the NCLAT is of the view that the need for judicial intervention or innovation from the NCLT & NCLAT should be kept at its bare minimum and should not disturb the foundational principles of the IBC. The relevant part of the said judgement is as follows:

*“ 26. It is a well settled proposition that the legality of propriety of any Regulation/ Notification / Rules / Act cannot be looked into by NCLT or NCLAT. The Tribunal can only ascertain whether the procedures provided for under the Code / Companies Act, 2013 are being followed or not. The Adjudicating Authority cannot go beyond this.*

*27. In ‘Arun Kumar Jagatramka’ Vs. ‘Jindal Steel Power Ltd. & Anr.’ Reported in Civil Appeal No. 9664 of 2019, the Hon’ble Apex Court while discussing the issue, ‘whether in a liquidation proceeding under the Code, a person ineligible under Section 29 A of the Code, is permitted to propose a scheme for revival under Section 230 of the Companies Act, 2013, has noted in the epilogue that ‘the need for judicial intervention or innovation from the NCLT &*

*NCLAT should be kept as its bare minimum and should not disturb the foundational principles of the IBC.*

28. *Keeping in view the scope and spirit of the Code, read with Section 54 of the Code, Regulation 39C of CIRP Regulations, Regulations 32 (e) & (f), 32A and 45 (3) of the Liquidation Process Regulations, we are of the view that the sale of the 'Corporate Debtor Company' was carried out by the liquidator in accordance with the Regulations and we are constrained to observe that the Adjudicating Authority, has, apart from travelling beyond its jurisdiction in making observation regarding the power and functions of framing of Regulations by IBBI, has also not appreciated the ratio laid down by the Hon'ble Supreme Court in a catena of Judgements that the Liquidation of the Company is to be seen only as a last resort and every attempt should be made to revive the Company and to continue it as a 'going concern'.*"

19. Insofar as the present case is concerned, there was no challenge to Regulation 36A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 before the NCLT. Therefore, in an application seeking extension of time to complete the CIRP process, the NCLT has gone ahead and declared the Regulation 36A as *ultra vires*.

20. In *BSNL (supra)* wherein the Supreme Court was considering the jurisdiction and powers of the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) wherein it ruled clearly that the TDSAT does not have the jurisdiction to entertain a challenge to the regulations framed by the

TRAI. The relevant part of the aforementioned judgement of the Hon'ble Supreme Court is as follows:

*"118. The Constitution Bench then considered the question whether Section 121 of the Electricity Act, 2003 can be read as conferring power of judicial review upon the Appellate Tribunal. The Bench referred to the judgment in Raman and Raman Ltd. v. State of Madras and observed:*

*"83. Applying the tests laid down in the above judgment to the present case, we are of the view that, the words 'orders, "instructions or "directions' in Section 121 do not confer power of judicial review in the Tribunal....."*

*Suffice it to state that, in the light of our analysis of the 2003 Act, e hereinabove, the words 'orders, instructions or directions' in Section 121 of the 2003 Act cannot confer power of judicial review under Section 121 to the Tribunal, which, therefore, cannot go into the validity of the impugned 2006 Regulations, as rightly held in the impugned judgment."*

*119. The summary of the findings of the Constitution Bench are contained in para 92, which is reproduced below:*

*"92. (i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by orders (decisions).*

*(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations.*

*(iii) A regulations under Section 178 is made under*

*the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.*

*(iv) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words 'orders', 'instructions' or 'directions' in Section 121 do not confer power of judicial review on the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity.*

*(v) If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178.*

*(vi) Applying the principle of "generality versus enumeration. it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(ze).Accordingly, we hold that CERC was empowered to cap the trading margin under the authority of delegated legislation under Section 178 vide the impugned Notification dated 23-1-2006.*

*(vii) Section 121, as amended by the Electricity (Amendment) Act 57 of 2003, came into force with effect from 27-1-2004. Consequently, there is no merit in the contention advanced that the said section has not yet been brought into force."*

*In our view, even though in para 94 of the judgment the Constitution Bench clarified that the judgment will not*

*govern the cases under the TRAI Act, the ratio of that judgment is clearly attracted in these cases.*

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*124. In the result, the question framed by the Court is answered in the following terms: in exercise of the power vested in it under Section 14 (b) of the TRAI Act, TDSAT does not have the jurisdiction to entertain the challenge to the regulations framed by TRAI under Section 36 of the TRAI Act.”*

21. In the present case, a conjoint reading of the provisions of the IBC clearly shows that the NCLT is the adjudicating authority under the IBC. Under Section 60(5) the categories of cases which can be adjudicated have been clearly enumerated. The jurisdiction to deal with the validity and legality of the Regulations framed under the IBC is not conferred upon the NCLT. The NCLT being a creature of the IBC, cannot assume to itself the power of declaring any provisions of the IBC or the Regulations as illegal or *ultra vires*. This is the clear view even of the NCLAT in *M/s Mohan Gems & Jewels Pvt. Ltd. (supra)*.

22. In view of the aforementioned discussion, since Regulation 36A has been amended and passed in accordance with law by the IBBI, the NCLT did not have the power to declare the same as being *ultra vires* merely on the ground that the two stage process provided in it i.e., of inviting an expression of interest first and then the financial bids, would be contrary to the speedier resolution of the Insolvency Resolution Process.

23. The impugned order dated 5<sup>th</sup> September, 2018 passed by the NCLT to the extent it holds Regulation 36A as *ultra vires* is accordingly set aside. It is however made clear that, before this Court, no challenge has been raised on merits to the validity or legality of Regulation 36A.



24. Writ petition is disposed of.
25. All pending applications, if any are disposed of.

**PRATHIBA M. SINGH  
JUDGE**

**NOVEMBER 28, 2022**

*Rahul/KS*

*(corrected & released on 1<sup>st</sup> December, 2022)*

