

DISPUTED CLAIMS ON ASSETS IN INSOLVENCY: A BLIND SPOT IN THE INSOLVENCY AND BANKRUPTCY CODE, 2016?

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ABSTRACT

This paper examines the jurisprudence of Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ('Code') and the powers of the National Company Law Tribunal ('NCLT') to decide disputes over assets in insolvency. While the Supreme Court has held that the NCLT, administering specific functions under the Code through summary proceedings, cannot adjudicate disputes arising outside of the Code, we find that NCLTs often travel beyond their jurisdiction and decide such disputes where the asset is crucial to the revival of the Corporate Debtor. The Code and the jurisprudence on the issue do not clarify when and how such disputes are to be adjudicated, given the moratorium on suits against the Corporate Debtor during insolvency and the "Clean Slate Doctrine" that prevents any fresh proceedings against the Corporate Debtor post-insolvency.

We propose statutory amendments to the Code to allow for disputes over assets in insolvency to be adjudicated by the civil court or other appropriate authority even after the conclusion of insolvency. The civil court's jurisdiction to so adjudicate the dispute may be made contingent on the NCLT prima facie finding that we propose statutory amendments to the Code to allow for disputes over assets in insolvency to be adjudicated by the civil court or other appropriate authority even after the conclusion of insolvency the dispute is valid. The inclusion of the asset in question in the CIRP and Resolution Plan may be made subject to the outcome of such adjudication. While not being without its own limitations, such an approach limits the jurisdiction of the NCLT and balances the needs of effective resolution of the Corporate Debtor with the right of third-party claimants to have their disputes adjudicated.

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I. INTRODUCTION

The Insolvency and Bankruptcy Code, 2016¹ ('the Code') made a fundamental switch in India's approach to insolvent corporate entities with a shift in focus from winding up to revival through a time-bound process of resolution of the Corporate Debtor ('Corporate Debtor'). The shift in favour of efficiency and quick revival has left a blind spot in the Code on the fate of disputed claims on assets in insolvency. This paper argues that in the absence of a statutory mandate in this regard, there has been no uniform approach in the jurisprudence on the power of the National Company Law Tribunal ('NCLT') under Section 60(5)² of the Code to decide disputes concerning the assets of the Corporate Debtor. While a series of judgments have conclusively held that the NCLT, tasked with administering specific functions under the Code through summary proceedings, cannot adjudicate disputes concerning claims and rights arising outside of the provisions of the Code, many NCLTs have often proceeded to decide such disputes where the asset is crucial to the revival of the Corporate Debtor.

¹ Insolvency and Bankruptcy Code 2016

² Insolvency and Bankruptcy Code 2016, s 60(5).

The inconsistency in the positions taken across NCLTs and the National Company Law Appellate Tribunals (‘NCLAT’) in this regard leaves several questions unanswered, including the question of when the NCLT can exercise its jurisdiction in a summary proceeding under Section 60(5) of the Code to decide disputes over assets in insolvency. If such disputes are not to be decided by the NCLT and only by the civil courts, another question that arises is when such disputes can be adjudicated, given the moratorium on any suits against the Corporate Debtor under Section 14³ of the Code during the Corporate Insolvency Resolution Process (‘CIRP’) and the “Clean Slate Doctrine” that wipes the Corporate Debtor clean of all such claims being raised post-insolvency. Further, what is the treatment of such disputed assets in Resolution Plans for revival of the Corporate Debtor? The Code does not provide any answers to these questions.

This paper traces the jurisprudence on the jurisdiction of the NCLT under Section 60(5) of the Code to adjudicate disputes on assets in insolvency and proposes the adoption of an approach that balances the interest of resolution of the Corporate Debtor with the right of third parties to have their legitimate claims over assets in insolvency to be adjudicated by the civil court or such other appropriate authority through trial.

II. SHIFT IN STATUTORY REGIME OF INSOLVENCY AND WINDING UP WITH THE INTRODUCTION OF THE CODE

The Code was enacted with the objective of consolidating and amending all laws relating to reorganization and insolvency resolution of corporate persons including the Sick Industrial Companies (Special Provisions) Act,

³ Insolvency and Bankruptcy Code 2016, s 14.

1985,⁴ the Presidency Towns Insolvency Act, 1909,⁵ Provincial Insolvency Act 1920,⁶ and the Companies Act, 2013.⁷ As stated in its Objectives, the Code was intended to make the insolvency process time bound for maximisation of the value of assets, promote entrepreneurship, and balancing the interest of all stakeholders.

The Code grants the NCLT the jurisdiction to preside over the Corporate Insolvency Resolution Process and liquidation (in the event of failure of the CIRP except in voluntary liquidation) of the Corporate Debtor under the Code. Previously, the Board for Industrial and Financial Reconstruction that was set up under the Sick Industrial Companies (Special Provisions) Act, 1985 was the only statutory body and legislation that allowed for revival of sick industrial companies. The Companies Act, 1956⁸ and subsequently the Companies Act, 2013 did not provide for insolvency resolution and in turn only allowed creditors to apply for winding up of a company where the debtor was unable to pay the debt due to the applying creditor.

Unlike the Companies Act, 1956 and 2013 that provided only for winding up, and the Sick Industrial Companies (Special Provisions) Act, 1985 which provided for revival but only of certain select debtors, the Code consolidated the law to provide at the first instance, a mechanism for insolvency resolution of the Corporate Debtor, only failing which, the Debtor would be liquidated. The applying creditor no longer needs to establish that the Corporate Debtor is unable to pay its debt as required under the Companies Act, 2013. Under the Code, the mere existence of the debt and the default is sufficient for a

⁴ The Sick Industrial Companies (Special Provisions) Act 1985.

⁵ The Presidency Towns Insolvency Act 1909.

⁶ Provincial Insolvency Act 1920.

⁷ Companies Act 2013.

⁸ Companies Act 1956.

Corporate Debtor to be admitted into the Corporate Insolvency Resolution Process.

Upon admission of a Corporate Debtor into CIRP, the management of the Corporate Debtor stands suspended and vested with the Interim Resolution Professional⁹ ('IRP') and a moratorium comes into operation under Section 14 of the Code¹⁰ which inter alia prohibits the institution or continuation of pending suits or proceedings against the Corporate Debtor and other actions towards debt recovery from the Corporate Debtor. The CIRP of the Corporate Debtor is complete only upon the approval by the Committee of Creditors and thereafter the NCLT, of a Resolution Plan for the revival of the Corporate Debtor.¹¹

Key to this resolution process is the certainty of the position of claims against the Corporate Debtor. The operation of the moratorium under Section 14¹² brings to a halt all separate recovery action against the Corporate Debtor and instead provides only one remedy to all creditors to recover their dues – by submission of claims with the IRP.¹³ The Resolution Applicant, therefore, at the time of submitting its Resolution Plan,¹⁴ is well aware of the exact extent of the Corporate Debtor's liabilities. Following the resolution of the Corporate Debtor, the slate is wiped clean, with no further claims being permitted to be made for pre-CIRP defaults of the Corporate Debtor. The "Clean Slate Doctrine" as interpreted in Committee of Creditors of *Essar Steel India Limited v. Satish Kumar Gupta and Others* ('Essar Steel') prevents any new suit or action against the Corporate Debtor after the

⁹ Insolvency and Bankruptcy Code 2016, s 17.

¹⁰ Insolvency and Bankruptcy Code 2016, s 14.

¹¹ Insolvency and Bankruptcy Code 2016, s 31.

¹² *ibid.*

¹³ Insolvency and Bankruptcy Code 2016, s 18(b).

¹⁴ Insolvency and Bankruptcy Code 2016, s 30.

approval of the Resolution Plan.¹⁵ Several subsequent judgments such as *Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.*¹⁶ have followed the footsteps of Essar Steel in holding that no undecided claims can exist post resolution save for those admitted by the IRP/Resolution Professional during the CIRP. Consequently, the “Clean Slate Doctrine” would prevent the continuation or filing of suits against the Corporate Debtor for claims arising from the pre-CIRP period.

III. POSITION OF DISPUTED CLAIMS IN INSOLVENCY

The Code is a complete code on all aspects concerning insolvency of the Corporate Debtor¹⁷ with Section 238¹⁸ providing that the Code will have effect notwithstanding anything inconsistent in any other provisions of existing law. Under Section 63,¹⁹ the Code also explicitly bars the jurisdiction of the civil court or authority from entertaining any suit or proceeding in respect of any matter on which the NCLT or NCLAT would have jurisdiction under the Code.

Moratorium under Section 14²⁰ prevents the continuation of an existing suit during the period of moratorium. The “Clean Slate Doctrine” also disallows the Resolution Applicant being faced with new claims post-insolvency. While the erstwhile company courts were to decide all suits pertaining to a company being wound up as per the unamended Section 446(3) of the Companies Act, 1956,²¹ the NCLT does not exercise such

¹⁵ *Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta* (2020) 8 SCC 531 (SC).

¹⁶ *Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.* (2022) SCC OnLine 2241 (SC).

¹⁷ *M/s Innoventive Industries Ltd v. ICICI Bank* AIR (2017) SC 4084 (SC).

¹⁸ Insolvency and Bankruptcy Code 2016, s 238.

¹⁹ Insolvency and Bankruptcy Code 2016, s 63.

²⁰ Insolvency and Bankruptcy Code 2016, s 14.

²¹ Companies Act 1956, s 446(3).

jurisdiction under the Code. The NCLT is not conferred with the jurisdiction to conduct trials to decide disputed claims against the Corporate Debtor. While the NCLT has the limited jurisdiction²² to decide, through a summary proceeding, the admission or rejection of claims by the Resolution Professional²³ in terms of the provisions of the Code, it cannot adjudicate on the rights and liabilities of parties concerning disputed questions of fact arising outside of the Code.²⁴ The fate of disputed claims was therefore left uncertain, with the NCLT not having the jurisdiction to decide such claims and the moratorium along with the “Clean Slate Doctrine” preventing the civil court or arbitral tribunal from deciding these claims during or after resolution under the CIRP.

The Supreme Court addressed this uncertainty in *Fourth Dimension Solutions v. Ricoh India*, holding that certain pre-existing arbitration proceedings between the Corporate Debtor and a third party can continue to be decided on merits as per law even after revival of the Corporate Debtor.²⁵ This judgment understandably caused confusion as to the scope of the “Clean Slate Doctrine” and the impact of any arbitral award passed on the resolution of the Corporate Debtor, given the possibility of the Resolution Applicant being presented with a fresh claim post CIRP.

Subsequent to *Fourth Dimension*, the Jharkhand High Court in *Electrosteel Steel Ltd. v. Ispat Carriers Pvt. Ltd.*,²⁶ while deciding whether an arbitral proceeding can resume subsequent to resolution of the Corporate Debtor post CIRP, held that since the arbitration proceeding was pre-existing

²² Insolvency and Bankruptcy Code 2016, s 60(5)(b).

²³ Insolvency and Bankruptcy Code 2016, s 18(b).

²⁴ *Embassy Property Developments Pvt. Ltd. v State of Karnataka* (2020) 13 SCC 308 (SC).

²⁵ *Fourth Dimension Solutions v Ricoh India* MANU/SCOR/48929/2021 (SC).

²⁶ *Electrosteel Steel Ltd. v. Ispat Carriers Pvt. Ltd.* (2023) SCC OnLine Jhar 1035 (JHC).

the CIRP and has also been noted in the Resolution Plan, it can resume after completion of the CIRP. However, the Court also noted that the claim preferred by Electro Steep, which was partly admitted by the IRP, was not earmarked for a 'Nil' payout in the Resolution Plan. On the basis of this distinction, the Court held that the claim of Electro Steel was never actually decided by the Resolution Professional or the NCLT and hence, the arbitral tribunal can decide the said claim. However, the judgment was again silent on how an award arising out of this claim can be executed, since the Resolution Plan did not specifically provide for any payout pursuant to the result of this arbitration or even factored it as a contingent claim. The judgment in Electro Steel has been appealed before the Supreme Court²⁷ and has been reserved for judgment at the time of writing of this article.

The dilemma created by Fourth Dimension was subsequently clarified by the Supreme Court in *Adani Power Ltd. v. Shapoorji Pallonji & Co Pvt Ltd*²⁸ wherein, when deciding the fate of pre-existing arbitration proceedings involving the Corporate Debtor, it was held that while the parties to the arbitration may choose to proceed with the arbitration even after CIRP, the final arbitral award would be subject to the terms of the approved Resolution Plan. Unless a contingent claim towards the claim in the arbitration was factored in the Resolution Plan, any subsequent arbitral award will have no bearing on the successful Resolution Applicant. Additionally, if such a contingent claim was provided for, then the successful party in the arbitration will be entitled under the award, an amount only to the extent of the contingent claim, even if the actual award was to be significantly higher. This balancing act ensured the certainty of the position of the debts of the

²⁷ *Electrosteel Steel Ltd. v. Ispat Carriers Pvt. Ltd.* MANU/SCOR/110820/2023 (SC)

²⁸ *Adani Power Ltd. v. Shapoorji Pallonji & Co Pvt Ltd* [2023] ibclaw.in 338 (SC).

Corporate Debtor for the Resolution Applicant but also allowed the claimant to pursue its claim.

In *Power Grid Corporation v. Jyoti Structures Ltd.*,²⁹ the Delhi High Court tried to make a distinction between arbitration proceedings to decide a claim and subsequent execution proceedings for enforcing an arbitral award against the Corporate Debtor during CIRP. The Delhi High Court in this case had held that, (i) the moratorium under Section 14 only barred proceedings which lead to dissipation of the assets of the Corporate Debtor; and (ii) an arbitration proceeding or proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 are not barred by the moratorium.³⁰ In the event an award is passed against the Corporate Debtor, the restriction under Section 14 of the Code will act against the execution of the said award. However, the court also further observed that since the IRP is in control of the Corporate Debtor at this instance, it is necessary that the IRP is made aware of the proceedings and consents to it. This requirement of the IRP's consent does not find basis in the Code itself. This judgment however, came to be set aside by the Supreme Court in *P. Mohanraj v. Shah Bros. Ispat (P) Ltd.*,³¹ by noting that even proceedings under Section 34³² of the Arbitration and Conciliation Act, 1996 are 'proceedings' covered by Section 14³³ of the Code as it may lead to an award under which the Corporate Debtor may have to pay monies.

The Delhi High Court had also followed a similar reasoning in the subsequent judgment in *SSMP Industries Ltd. v. Perkan Food Processors*

²⁹ *Power Grid Corporation v. Jyoti Structures Ltd* (2017) SCC OnLine Del 12189 (DHC).

³⁰ The Arbitration and Conciliation Act 1996, s 34.

³¹ *P. Mohanraj v. Shah Bros. Ispat (P) Ltd* (2021) AIR 2021 SC 1308 (SC).

³² Arbitration and Conciliation Act 1996, s 34.

³³ Insolvency and Bankruptcy Code 2016, s 14.

Pvt. Ltd.,³⁴ where it observed that if the nature of a counter claim by the defendant against the Corporate Debtor in a suit initiated by it requires proper pleadings to be filed, defences and stands of both parties to be considered, evidence to be recorded and then issues to be adjudicated, the NCLT cannot be bogged down with deciding these claims as the Resolution Professional cannot conduct trial and the NCLT only conducts summary proceedings. Accordingly, the Delhi High Court refused to stay the adjudication of the counter claim and opined that the restriction under Section 14³⁵ will be triggered only when the decree is passed against the Corporate Debtor. The Delhi High Court, in these cases, did not give clarity on the effect of the “Clean Slate Doctrine” on an award passed post CIRP.

IV. NEED FOR CERTAINTY OVER THE ASSETS OF THE CORPORATE DEBTOR

As held in *Essar*,³⁶ the prospective Resolution Applicant has a right to receive complete information as to the assets and debts of the Corporate Debtor prior to its admission into CIRP. This information is contained in the information memorandum published by the IRP under Section 29 of the Code.³⁷ The proposed Resolution Plan is required to maximize the value of the Corporate Debtor’s assets – this may include the transfer or sale of assets or part thereof. To this end, the exact rights of the Corporate Debtor over the assets in CIRP is important to provide certainty to the resolution process.

The IRP, in addition to collating the claims of the Corporate Debtor, is also required to take control of the assets of the Corporate Debtor over which

³⁴ *SSMP Industries Ltd. v. Perkan Food Processors Pvt. Ltd.* (2019) SCC OnLine Del 9339 (DHC).

³⁵ Insolvency and Bankruptcy Code 2016, s 14.

³⁶ *Essar* (n 15).

³⁷ Insolvency and Bankruptcy Code 2016, s 29.

it has ownership rights, including in terms of Section 18(f)(vi),³⁸ i.e., “assets subject to the determination of ownership by a court or authority”. To this end, the Resolution Professional under Section 25(2)(b)³⁹ of the Code is also empowered to represent and act on behalf of the Corporate Debtor and exercise rights for its benefit in judicial, quasi-judicial or arbitration proceedings. Therefore, the Code makes it clear that the IRP and the Resolution Professional can continue to prosecute the rights of the Corporate Debtor over its assets in judicial proceedings. The moratorium only bars the institution or continuation of suits by third parties against the Corporate Debtor.⁴⁰ When seen through the “Clean Slate Doctrine,” the moratorium attempts to consolidate all claims and recovery against the same to be routed through the NCLT and the CIRP without leaving the Corporate Debtor to defend multiple proceedings. The definition of “Claim” under the Code refers to a right of payment or right to remedy for breach of contract, if such breach leads to a right to payment.⁴¹ The Code is silent on disputed claims (including non-monetary claims) over the assets included as part of the CIRP and consequently the Resolution Plan.

For instance, we may consider a pending title dispute suit pertaining to an immovable property over which the Corporate Debtor also claims ownership as a defendant. If during the pendency of such suit proceedings, the Corporate Debtor is admitted into insolvency, Section 14⁴² of the Code would prevent the continuation of such suit and consequently the adjudication of this title dispute. What would be the fate of the immovable property in question – would it automatically be considered the property of

³⁸ Insolvency and Bankruptcy Code 2016, s 18(f)(vi).

³⁹ Insolvency and Bankruptcy Code 2016, s 25(2)(b).

⁴⁰ Insolvency and Bankruptcy Code 2016, s 14.

⁴¹ Insolvency and Bankruptcy Code 2016, s 3(6).

⁴² Insolvency and Bankruptcy Code 2016, s 14.

the Corporate Debtor and included as part of the Resolution Plan, or would it be excluded from the CIRP entirely? Further, would the question of title be decided by the NCLT or would the property be included in the CIRP subject to subsequent determination by the civil court of the dispute as to the title of the property?

If the “Clean Slate Doctrine”, rendered in the context of wiping the slate clean against all Claims (as defined under Section 3(6) of the Code) against the Corporate Debtor post CIRP, is taken to not be extended to claims (not strictly monetary as provided in the Code) on the assets in insolvency, then it may be argued that the suit, though stayed during the CIRP, may be revived and decided by the civil court post resolution of the Corporate Debtor. Section 60(6)⁴³ of the Code hints at such provision being available when providing that in computing the period of limitation specified for any suit or application by or against the Corporate Debtor, the period for which the moratorium is in place shall be excluded. However, it may also be argued that Section 60(6)⁴⁴ is only confined to circumstances where the Corporate Debtor is not resolved through CIRP and instead where the debts are settled through intervening circumstances such as a settlement under Section 12A⁴⁵ of the Code or where the order admitting the Corporate Debtor into CIRP is set aside in appeal.

There is no explicit provision either permitting or disallowing revival of the suit proceedings post CIRP or conversely allowing the NCLT to decide on these disputes during insolvency. Consequently, there is no clarity on the fate of such assets and their inclusion in the assets of the Corporate Debtor for the purpose of the CIRP where such dispute remains. The exclusion of

⁴³ Insolvency and Bankruptcy Code 2016, s 60(6).

⁴⁴ *ibid.*

⁴⁵ Insolvency and Bankruptcy Code 2016, s 12A.

the disputed asset may well have the effect of the corporate death of the Debtor if the asset is vital to its revival. The lack of any statutory clarity on this has naturally led to the reliance on Section 60(5)⁴⁶ which provides inter alia that the NCLT shall have the 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” to decide disputed claims (including non-monetary claims) including on assets in insolvency. Section 60(5) itself, however, does not clarify the extent of the NCLT’s jurisdiction to decide questions of fact concerning rights and obligations outside of the Code.

V. THE POSITION LAID DOWN BY THE SUPREME COURT ON THE NCLT’S JURISDICTION UNDER SECTION 60(5) TO ADJUDICATE DISPUTES OVER ASSETS IN INSOLVENCY

The Supreme Court in *Embassy Property Developments Pvt. Ltd. v. State of Karnataka*, (*Embassy*)⁴⁷ examined the extent of jurisdiction of the NCLT under Section 60(5) in the context of an order passed by the NCLT directing that the refusal to grant a deemed extension of a mining lease in favour of the Corporate Debtor under the Mines and Minerals (Development and Regulation Act), 1957⁴⁸ (‘MMDC Act’) was violative of the moratorium under Section 14⁴⁹ of the Code. The Supreme Court found that if the NCLT did in fact have the jurisdiction to decide all types of claims to property of the Corporate Debtor, Section 18(1)(f)(vi)⁵⁰ of the Code would not provide

⁴⁶ Insolvency and Bankruptcy Code 2016, s 60(5).

⁴⁷ *Embassy* (n 24).

⁴⁸ Mines and Minerals (Development and Regulation Act) 1957.

⁴⁹ Insolvency and Bankruptcy Code 2016 , s 14.

⁵⁰ Insolvency and Bankruptcy Code 2016 , s 18(1)(f)(vi).

for the Resolution Professional to take control and custody of assets of the Corporate Debtor “subject to the determination of ownership by a court or other authority”. The Court further relied on the duties of the Resolution Professional under Section 25⁵¹ which places an obligation on the Resolution Professional to represent the Corporate Debtor before judicial and quasi-judicial authorities towards preserving and protecting the assets of the Corporate Debtor, to conclude that the Code made it evident that wherever the Corporate Debtor has to exercise rights that fall outside the purview of the NCLT it could not do so under Section 60(5)⁵² of the Code. The Supreme Court accordingly ruled that the actions taken under the MMDC Act being administrative actions taken by statutory or quasi-judicial authorities would only be subject to judicial review of administrative actions and not review by the NCLT.

The Supreme Court also noted particularly that the NCLT is not a civil court which has jurisdiction by virtue of Section 9 of the Code of Civil Procedure, 1908, to try all suits of a civil nature except where barred under law. The NCLT can only exercise such jurisdiction within the contours of the jurisdiction as prescribed in the Code, the law in respect of which it is called upon to administer its functions.

Though rendered in the context of the NCLT reviewing actions taken in the realm of public law, it would appear from a reading of Embassy⁵³ that the position is settled that the NCLT cannot adjudicate on any rights and disputes arising outside of the Code. While in the context of Embassy, the remedy for the Resolution Professional would lie in approaching the High Court in a writ against the administrative action taken by the state under the MMDC Act (as

⁵¹ Insolvency and Bankruptcy Code 2016, s 25.

⁵² Insolvency and Bankruptcy Code 2016, s 60(5).

⁵³ Embassy (n 24).

this remedy is not affected by the moratorium), the judgment is silent on any other disputes involving the assets of the Corporate Debtor where the remedy otherwise available under law, such as the filing of a civil suit, is barred under Section 14 of the Code.⁵⁴

In the context of a contractual dispute, the Supreme Court in *Gujarat Urja Vikas Nigam v. Amit Gupta and others* ('Gujarat Urja')⁵⁵ Once again had the opportunity to consider the jurisdiction of the NCLT under Section 60(5)(c)⁵⁶ of the Code to consider the validity of termination of a Power Purchase Agreement ('PPA') with the Corporate Debtor by Gujarat Urja Vikas Nigam using an ipso facto termination clause in the PPA that allowed it to terminate the Agreement in the event of insolvency of the Corporate Debtor. The Supreme Court, while carefully setting out that its decision was on the limited context of the facts before it, found that the NCLT had the jurisdiction to decide the issue under Section 60(5)(c)⁵⁷ as in the said case, the termination of the PPA had been solely on the ground of insolvency of the Corporate Debtor and second, as the effect of the termination of the PPA in the instant case would push the Corporate Debtor into liquidation.⁵⁸ The Supreme Court further added that the jurisdiction of the NCLT would not be invoked in matters where a termination may occur on grounds unrelated to insolvency. The finding in *Gujarat Urja* also, therefore, remained consistent with the finding in the *Embassy*⁵⁹ that the NCLT could only decide the contractual dispute where the issue arose directly under the insolvency, but added an additional condition that it could invalidate such termination by a third party

⁵⁴ Mines and Minerals (Development and Regulation Act) 1957, s 14.

⁵⁵ *Gujarat Urja Vikas Nigam v. Amit Gupta and others* (2021) 7 SCC 209 (SC).

⁵⁶ Insolvency and Bankruptcy Code 2016, s 60(5)(c).

⁵⁷ *ibid.*

⁵⁸ Insolvency and Bankruptcy Code 2016, s 33.

⁵⁹ *Embassy* (n 24).

only in the event that the contract was of such nature that its loss would spell the death of the Corporate Debtor.

The Supreme Court in *Gujarat Urja* also distinguished its earlier judgment in *Municipal Corporation of Greater Mumbai v. Abhilash Lal ('Abhilash Lal')*⁶⁰ by observing that while *Abhilash Lal* concerned disputes over the property of a statutory authority, the dispute in *Gujarat Urja* concerned the property of the Corporate Debtor. The Supreme Court made it clear that the principles in *Gujarat Urja*⁶¹ would not be directly applicable to property not belonging to the Corporate Debtor. The Supreme Court in *Abhilash Lal* was concerned with land owned by the Municipal Corporation of Greater Mumbai ('MCGM') on which the Corporate Debtor had been contracted to develop a hospital following which a lease deed would be executed by MCGM in favour of the Corporate Debtor. The Supreme Court was deciding the rights of the Corporate Debtor over the property in circumstances where the development was not complete and the lease in favour of the Corporate Debtor was not created when it was admitted into insolvency. The Supreme Court, on an examination inter alia of Section 92 of the Municipal Corporation of Greater Mumbai Act 1888,⁶² which governed the question of disposal of property belonging to MCGM, concluded that Section 238 of the Code⁶³ could not be read to override MCGM's right to control and regulate how its properties are to be dealt with, and further that Section 238⁶⁴ would be of relevance only where the properties and assets belong to the Corporate Debtor and not when a third party like MCGM is involved. It therefore decided against the asset

⁶⁰ *Municipal Corporation of Greater Mumbai v Abhilash Lal* (2020) 13 SCC 243 (SC).

⁶¹ *Gujarat* (n 55).

⁶² Municipal Corporation of Greater Mumbai Act 1888, s 92.

⁶³ Insolvency and Bankruptcy Code 2016, s 238.

⁶⁴ Insolvency and Bankruptcy Code 2016, s 238

automatically being included in the CIRP of the Corporate Debtor where there was a dispute as to the parties' rights to the asset.

The Supreme Court in *Tata Consultancy Services Ltd v. SK Wheels (P) Ltd ('TCS')*⁶⁵ was faced with the termination by the Tata Consultancy Services Ltd ('Tata') of a facility agreement with the Corporate Debtor under which the Corporate Debtor was required to provide premises to Tata for conducting examinations. The termination notice was issued by Tata during the period of CIRP, albeit for reasons of non-performance by the Corporate Debtor unrelated to insolvency. The Supreme Court, while considering the powers of the NCLT under Section 60(5)⁶⁶ of the Code to set aside the said termination, relied on *Gujarat Urja* and found that the termination in the instant case, being unrelated to the factum of insolvency of the Corporate Debtor, did not satisfy the narrow test laid down in *Gujarat Urja*⁶⁷ in order for the NCLT to exercise its jurisdiction under Section 60(5) of the Code. The Court, however, did not proceed to determine how disputes concerning assets and contracts of the Corporate Debtor would be determined where they were outside of the jurisdiction of the NCLT.

A reading of the above makes clear that, (i) the NCLT cannot adjudicate on rights claimed outside of the Code; (ii) even when faced with contractual disputes arising from application of ipso facto clauses arising directly from the insolvency event, the NCLT can exercise its jurisdiction and pass directions only where loss of the asset would lead to the death of the Corporate Debtor; and that (iii) the NCLT cannot exercise its jurisdiction

⁶⁵ *Tata Consultancy Services Ltd v SK Wheels (P) Ltd* (2022) 2 SCC 583 (SC).

⁶⁶ Insolvency and Bankruptcy Code 2016, s 60(5).

⁶⁷ *Gujarat* (n 55).

under Section 60(5)⁶⁸ by relying on Section 238⁶⁹ and Section 14⁷⁰ of the Code to have the NCLT adjudicate claims arising on properties belonging to third parties; and further, (iv) disputed rights over assets cannot automatically be decided in favour of the Corporate Debtor for inclusion in CIRP on account of the moratorium under Section 14.⁷¹

VI. BLIND SPOT OVER DISPUTED ASSETS IN INSOLVENCY WHERE THE RIGHTS CLAIMED ARISE OUTSIDE OF THE CODE

While holding that the jurisdiction of the NCLT is not to extend outside of adjudicating rights and liabilities arising directly under the Code, the current jurisprudence does not answer how disputes over assets or contracts with the Corporate Debtor are to be decided. This lacuna is of concern given the moratorium under Section 14 of the Code, which bars the adjudication of such disputes by a civil court during the CIRP and the Clean Slate Doctrine, which prevents such adjudication after resolution of the Corporate Debtor. The judgments in *Gujarat Urja*,⁷² *TCS*,⁷³ and *Embassy*⁷⁴ involved the Resolution Professional taking steps to protect the assets of the Corporate Debtor. The solution to the issue in the facts of these decisions may be as simple as that the Resolution Professional is not prohibited under Section 14⁷⁵ from initiating proceedings to protect the assets of the Corporate Debtor and therefore could have initiated a suit or other appropriate proceedings to adjudicate the issue. However, what of disputes raised against the assets of

⁶⁸ Insolvency and Bankruptcy Code 2016, s 60(5).

⁶⁹ Insolvency and Bankruptcy Code 2016, s 238.

⁷⁰ Insolvency and Bankruptcy Code 2016, s14.

⁷¹ *ibid.*

⁷² *Gujarat* (n 55).

⁷³ *Tata* (n 65).

⁷⁴ *Embassy* (n 24).

⁷⁵ Insolvency and Bankruptcy Code 2016, s 14.

the Corporate Debtor by third parties, which are most certainly barred by the moratorium from being decided during the period of CIRP and thereafter on account of the Clean Slate Doctrine?

Whilst relying on the aforementioned judgments, there has not been a consistent approach by the NCLT, NCLAT and the Courts in considering the question of the jurisdiction of the NCLT under Section 60(5)⁷⁶ in deciding disputes concerning the assets of the Corporate Debtor. The Supreme Court in *Victory Iron Works Ltd v. Jitendra Lohia & Others*,⁷⁷ in fact, sought to distinguish the judgments in *Embassy*,⁷⁸ *Gujarat Urja*⁷⁹ and *TCS*⁸⁰, holding that they were not concerned with immovable property belonging to the Corporate Debtor, and accordingly affirmed the order of the NCLT in passing restrictive orders on certain disputed assets in insolvency.

In *KL Jute Products Pvt Ltd v. Tirupati Jute Industries Ltd*,⁸¹ the NCLAT was deciding the question of a Resolution Plan that provided for the cancellation of the lease deed of the Corporate Debtor leasing out one of its properties to a third party and the jurisdiction of the NCLT under Section 60(5) of the Code to order eviction of the said third party. The NCLAT categorically found that it was not within the NCLT's jurisdiction to order eviction of a third party, and the appropriate forum would have to be moved for the same. The NCLAT also found that the approval of the Resolution Plan by the Committee of Creditors had been in disregard of Section 30(2)(e)⁸² of

⁷⁶ Insolvency and Bankruptcy Code 2016, s 60(5).

⁷⁷ *Victory Iron Works Ltd v Jitendra Lohia and others* (2023) 7 SCC 227 (SC).

⁷⁸ *Embassy* (n 24).

⁷⁹ *Gujarat* (n 55).

⁸⁰ *Tata* (n 65).

⁸¹ *K.L. Jute Products Private Limited v. Tirupati Jute Industries Ltd.* (2021) 15 Comp Cas-OL 663.

⁸² Insolvency and Bankruptcy Code 2016, s 30(2)(e).

the Code, which provides that the Resolution Plan cannot contradict any provision of law in force.

In a similar vein, the NCLAT in *SICOM Ltd v. Kitply Industries Ltd*,⁸³ while deciding a dispute surrounding an agreement to sell immovable property to the Corporate Debtor, relying on the tests in Gujarat Urja⁸⁴ found that the issue was not one that could be decided in a proceeding under the Code and would need to be examined by a Court of competent jurisdiction.

In *Dynepro Pvt Ltd v. V Nagaraj ('Dynepro')*,⁸⁵ the NCLAT, while deciding a dispute concerning the ownership of material in the possession of the Corporate Debtor, held that the issue concerned claims and counter claims made by several parties on certain materials and that the dispute could not be decided by the NCLT under Section 60(5).⁸⁶ The NCLAT instead held that it is open to the persons in the dispute to file a suit before the appropriate forum after the moratorium was lifted and after “it is finally decided that the material belongs to the Corporate Debtor.”

The above decisions, while holding that the NCLT did not have the jurisdiction to decide the disputes in question, did not answer the question as to how these disputes would in fact be decided. The judgment in *Dynepro*⁸⁷ however, while not considering the applicability of the Clean Slate Doctrine to disputes on assets in insolvency, it does go on to suggest that a suit would be maintainable post-resolution. The treatment of this asset in the insolvency is itself not answered in explicit terms.

⁸³ *SICOM Ltd. v. Kitply Industries Ltd.* (2023) SCC OnLine NCLAT 1066 (NCLAT).

⁸⁴ Gujarat (n 55).

⁸⁵ *Dynepro Private Limited v. V. Nagarajan* (2019) 6 Comp Cas-OL 672.

⁸⁶ Insolvency and Bankruptcy Code 2016, s 60(5).

⁸⁷ *Dynepro* (n 85).

Contrary to the above, there has been a separate host of decisions of the NCLT and NCLAT which use the exceptions carved out in Gujarat Urja⁸⁸ to exercise jurisdiction under Section 60(5)⁸⁹ to decide disputes against the Corporate Debtor.

In Sangam (India) Ltd v. Aarti Suitings Pvt Ltd,⁹⁰ the question faced by the NCLT was whether it had jurisdiction to order the eviction of a tenant from the property of the Corporate Debtor. On a narrow reading of Gujarat Urja⁹¹ and Section 238⁹², 63⁹³ and 60(5)⁹⁴ of the Code, the NCLT found that its jurisdiction under Section 60(5)⁹⁵ could be exercised to protect the Corporate Debtor from certain corporate death as the property in this case was the only asset of the Corporate Debtor. Accordingly, the tenants were directed to hand over possession of the property to the Corporate Debtor. In this selective reading of Gujarat Urja,⁹⁶ the NCLT ignored the primary ratio of Gujarat Urja, namely that only where the issues and rights arose directly under the Code could the NCLT exercise jurisdiction under Section 60(5).⁹⁷ Instead, it was only the immediate contingency of keeping the Corporate Debtor out of liquidation that was given primacy in deciding to exercise jurisdiction.

The NCLAT, Delhi in *Ramesh Singh Rawat v. SPG Global Distributions Pvt Ltd ('Ramesh Singh Rawat')*⁹⁸ in another such instance of a selective

⁸⁸ Gujarat (n 55).

⁸⁹ Insolvency and Bankruptcy Code 2016, s 60(5).

⁹⁰ *Sangam (India) Ltd. v. Aarti Suitings (P) Ltd.* (2021) SCC OnLine NCLT 12298 (NCLT).

⁹¹ Gujarat (n 55).

⁹² Insolvency and Bankruptcy Code 2016, s 238.

⁹³ Insolvency and Bankruptcy Code 2016, s 63.

⁹⁴ Insolvency and Bankruptcy Code 2016, s 60(5).

⁹⁵ *ibid.*

⁹⁶ Gujarat (n 55).

⁹⁷ Insolvency and Bankruptcy Code 2016, s 60(5).

⁹⁸ *Ramesh Singh Rawat v. SPG Global Distribution (P) Ltd.* (2024) SCC OnLine NCLAT 1984 (NCLAT).

reading of the judgment in Gujarat Urja⁹⁹ and in a similar context of an application seeking eviction of third parties from the property of the Corporate Debtor, found that as the issue related to the title of assets in CIRP, it was a question relating to insolvency resolution as was the case in Gujarat Urja. Accordingly, the NCLAT held that the NCLT was within its jurisdiction under Section 60(5) of the Code to direct the eviction of the third party from the property owned by the Corporate Debtor. The NCLAT in adopting this misreading of Gujarat Urja, entirely failed to appreciate that the rights and obligations in dispute were entirely outside of the Code. Further, to reason that any asset in insolvency would bring disputes concerning such asset within the jurisdiction of the NCLT under Section 60(5)¹⁰⁰ would be squarely opposed to the position in Embassy¹⁰¹ and Gujarat Urja.¹⁰²

A similar interpretation has also been followed by the NCLAT, Delhi in *Gloster Cables v. Fort Gloster Industries Ltd & Others*¹⁰³ where the NCLAT proceeded to affirm the jurisdiction of the NCLT in deciding a dispute as to the ownership of a trademark by the Corporate Debtor under Section 60(5).¹⁰⁴ Similar to the reasoning by the NCLAT in Ramesh Singh Rawat,¹⁰⁵ the NCLAT reasoned that the question relating to the assets in insolvency would come within the tests laid down in Gujarat Urja¹⁰⁶ for the NCLT to exercise its jurisdiction.

⁹⁹ Gujarat (n 55).

¹⁰⁰ Code, section 60(5).

¹⁰¹ Embassy (n 24).

¹⁰² Gujarat (n 55).

¹⁰³ *Gloster Cables Ltd. v. Fort Gloster Industries Ltd.* (2024) SCC OnLine NCLAT 147. As on date of writing of this paper, this judgment has been stayed by the Supreme Court in C.A. 2996 of 2024.

¹⁰⁴ Insolvency and Bankruptcy Code 2016, s 60(5).

¹⁰⁵ Ramesh (n 98).

¹⁰⁶ Gujarat (n 55).

The aforementioned judgments make it evident that there has been no consistent approach in deciding where the NCLT can exercise jurisdiction under Section 60(5)¹⁰⁷ in deciding disputed questions on the assets of the Corporate Debtor. Where the NCLT has proceeded to exercise its jurisdiction, the same has often been on the basis of a selective reading of Gujarat Urja¹⁰⁸ on the vitality of the concerned asset in reviving the Corporate Debtor. A convoluted reading is often adopted of the second test in Gujarat Urja, laying down that the NCLT can only exercise its jurisdiction where the rights in dispute arise directly from the insolvency to find that as long as the dispute was regarding an asset in insolvency, the same could be decided by the NCLT.

On the contrary, the decisions rejecting the NCLT's jurisdiction to decide disputed questions concerning assets of the Corporate Debtor in finding that the same would have to be decided by a civil court or appropriate authority, have not proceeded to engage with when such dispute may be decided given the moratorium against any suits against the Corporate Debtor and the Clean Slate Doctrine that prevents any subsequent claims post resolution of the Corporate Debtor. Furthermore, there is no certain position on the inclusion of such disputed assets in the proposed Resolution Plan of the Corporate Debtor – or in the liquidation if it comes to follow.

Therefore, a few of the questions that arise are:

- Would the disputed asset stand entirely excluded from the CIRP, to be included only once a decision is made in favour of the Corporate Debtor's rights in such asset?

¹⁰⁷ Insolvency and Bankruptcy Code 2016, s 60(5).

¹⁰⁸ Gujarat (n 55).

- When would such a suit be instituted and decided? If such suits are permitted to be prosecuted post resolution, would it be permissible for any and all persons to initiate such proceedings post resolution or would the same be restricted to only those claimants who made such claims prior to the completion of CIRP or even prior to the declaration of moratorium?
- If the claim or dispute on an asset in insolvency is to be brought prior to resolution, is it sufficient for such claims to be intimated to the Resolution Professional, or would the NCLT have to find prima facie merit in such claim in order to have the asset either removed from insolvency or to provide necessary caveats for the Resolution Applicant that the rights of the Corporate Debtor over the asset would be subject to determination in judicial proceedings?

As elaborated above, a carve-out has been facilitated on proceedings concerning monetary claims against the Corporate Debtor in Adani Power¹⁰⁹ where proceedings were permitted to continue post-resolution of the Corporate Debtor while limiting the final award to the extent provided as a “contingent claim” in the Resolution Plan. This limited carve out does a balancing act between the need for certainty for the Resolution Applicant on the liabilities of the Corporate Debtor while also allowing for effective dispute resolution before the appropriate authority (and not a summary proceeding before the NCLT).

¹⁰⁹ Adani (n 28).

VII. BALANCING ACT BETWEEN THE NEED FOR CERTAINTY WITH EFFECTIVE ADJUDICATION OF DISPUTES OVER ASSETS

The core understanding behind the Clean Slate Doctrine, as stated in *Essar*¹¹⁰, was to prevent the uncertainty of undisclosed claims arising after CIRP and the resolution of the Corporate Debtor. It is arguable that the Clean Slate Doctrine is applicable only to “Claims” being monetary claims as defined under Section 3(6)¹¹¹ of the Code. However, even keeping aside this question, the prospect of undisclosed but previously existing claims on assets of the Corporate Debtor in insolvency, arising post resolution would defeat the goal of having certainty on the assets and liabilities of the Corporate Debtor when a Resolution Plan is put forward and thereby defeats the chances of successful resolution. This is particularly the case where the asset in question is vital to the resolution of the Corporate Debtor. On the contrary however, foreclosing all resolution of disputes on assets of the Corporate Debtor, including those disclosed either before or during the CIRP, when seen in light of the settled position that the NCLT is not to adjudicate rights and claims arising outside of the Code, often also leads to a situation where the issue is prejudged in favour of the Corporate Debtor merely by virtue of the moratorium. Consequently, the asset is included in the CIRP or the NCLTs are forced to decide the issue on a summary basis under Section 60(5)¹¹² without any trial or appreciation of evidence and in a manner entirely outside of its jurisdiction.

While not deciding on all the questions raised above, the NCLAT in *Maharashtra Industrial Development Corporation v. Santanu Ray* (*Santanu*

¹¹⁰ *Essar* (n 15).

¹¹¹ Insolvency and Bankruptcy Code 2016, s 3(6).

¹¹² Insolvency and Bankruptcy Code 2016, s 60(5).

Ray'),¹¹³ while deciding the question of revocation of a lease of property by the Corporate Debtor on account of a breach of the terms of the lease by it, held that on account of the moratorium under Section 14,¹¹⁴ the Lessor could not have taken possession of the property leased to the Corporate Debtor. However, the NCLAT went on to observe that there is no fetter on the right of the lessor to initiate such proceedings after the CIRP was over, on the cause of action of such breach of terms of the lease by the Corporate Debtor. The NCLAT further observed that even upon inclusion of this land in the Resolution Plan, the Resolution Applicant could not acquire a better right to this property than the Corporate Debtor or wash out its liability merely on the approval of the Plan. This position appears akin to the balancing act adopted in *Adani Power*¹¹⁵ where the need for certainty of the Resolution Applicant is balanced with the right of the claimant to have its rights and claims adjudicated by the appropriate authority through the course of a full trial and not the NCLT in summary proceedings.

While it is important that the NCLT does not assume jurisdiction to adjudicate disputes outside of the Code during the CIRP or alternatively to have assets removed from the CIRP merely because of the existence of dispute which cannot be adjudicated by the NCLT, permitting fresh and previously undisclosed disputes over the assets in CIRP to be raised post CIRP before the civil court would defeat the Clean Slate Doctrine and prejudice resolution. For the purpose of ensuring that the Resolution Applicant is not bogged down by frivolous litigation after resolution, the Code may be amended to provide that any claims made by third parties on the assets of the Corporate Debtor be filed before the NCLT. The NCLT may

¹¹³ *Maharashtra Industrial Development Corpn. v. Santanu T. Ray* (2022) SCC OnLine NCLAT 180 (NCLAT).

¹¹⁴ Insolvency and Bankruptcy Code 2016, s 14.

¹¹⁵ *Adani* (n 28).

assess and arrive at a prima facie view of whether a valid dispute exists as to the rights of the Corporate Debtor to the asset. Such contingent claims and disputes over the assets may be included in the Information Memorandum issued by the IRP under Section 29 of the Code. Where the NCLT is of the view that prima facie a valid dispute exists as to the asset in question, the inclusion of the asset in the CIRP and the Resolution Plan may be made subject to the final adjudication by the civil court or such other appropriate authority under law of the rights of the Corporate Debtor over the asset. The Resolution Plan may also mention the nature of the claim and dispute as to the asset in question. Therefore, the Resolution Applicant will not acquire better rights over the asset than the Corporate Debtor would have had, merely on account of the CIRP of the Corporate Debtor. At the same time, the Resolution Applicant at the time of submitting its Resolution Plan is aware of the exact claims on rights to assets in the CIRP and will not be bogged by additional such claims after resolution.

VIII. CONCLUSION: THE NEED FOR STATUTORY AMENDMENTS TO CORRECT THE BLIND SPOT OF DISPUTED CLAIMS OVER ASSETS IN INSOLVENCY

Despite 8 years of operation of the Code, a review of the jurisprudence on Section 60(5)¹¹⁶ makes it unfortunately clear that there remains a blind spot in the Code on the adjudication of disputes concerning assets in insolvency, particularly where the rights in the dispute arise outside of the Code. In the absence of a statutory mandate, the line often adopted is – how vital is this asset for the resolution of the Corporate Debtor? If the non-inclusion of this asset in the CIRP would lead to liquidation, the NCLT and

¹¹⁶ Insolvency and Bankruptcy Code 2016, s 60(5).

NCLAT through a selective reading of Gujarat Urja¹¹⁷ have often leaned in favour of deciding that the asset being part of the insolvency would be subject to the NCLT's jurisdiction under Section 60(5) of the Code to decide disputed rights over this asset.

Despite liberal misreading of these judgments, the position in Embassy,¹¹⁸ Gujarat Urja,¹¹⁹ Abhilash Lal¹²⁰ and TCS¹²¹ remain good law - the NCLT cannot decide disputes outside of rights and claims arising directly under provisions of the Code. Where such disputed questions arise, they are to be decided by the civil court or the appropriate authority under law. The NCLT exercising jurisdiction under Section 60(5)¹²² of the Code to decide disputed questions of fact without trial or appreciation of evidence is a leap of jurisdiction not envisaged under the Code. While prohibiting the exercise of such jurisdiction by the NCLT, these judgments are silent on the interplay of this position with the moratorium under Section 14¹²³ which prevents the initiation or continuation of suits during insolvency and the Clean Slate Doctrine that mandates that no fresh claims are made post-resolution.

The judgment in Santanu Ray¹²⁴ attempts a balancing act in proposing that the asset is included in the Resolution Plan with a caveat that the Resolution Applicant cannot secure a better right than the Corporate Debtor had. The suit proceedings to adjudicate the dispute over the asset may continue post-resolution of the Corporate Debtor. When read with Adani

¹¹⁷ Gujarat (n 55).

¹¹⁸ Embassy (n 24).

¹¹⁹ Gujarat (n 55).

¹²⁰ Municipal (n 60).

¹²¹ Tata (n 65).

¹²² Insolvency and Bankruptcy Code 2016, s 60(5).

¹²³ Insolvency and Bankruptcy Code 2016, s 14.

¹²⁴ Maharashtra (n 115).

Power,¹²⁵ an inclusion of the nature of the claim over the asset in the Resolution Plan could be used to limit the nature of claims over the asset that may be made in post-CIRP proceedings where the cause of action arose before resolution. This provides certainty to the Resolution Applicant of the existence and extent of claims on the assets of the Corporate Debtor.

In the absence of a statutory mandate in this regard, NCLTs and NCLAT have taken widely different positions in the exercise of their jurisdiction under Section 60(5)¹²⁶ in deciding disputes concerning assets in CIRP. In the absence of a statutory amendment, there has also been no certainty on the fate of proceedings pending before courts against the Corporate Debtor's assets when the Corporate Debtor is admitted into CIRP. The NCLT exercising jurisdiction beyond that prescribed under Section 60(5) has also deprived claimants of their legitimate right to have their disputes adjudicated as provided for under law.

There is a need to correct this blind spot through statutory amendments to the Code to ensure that disputes over assets in insolvency are adjudicated only by the civil court or appropriate authority under law, while also ensuring that frivolous disputes are not raised post resolution only in order to defeat revival of the Corporate Debtor. The Code may instead be amended to allow pre-existing disputes on assets in insolvency to be adjudicated even after resolution through CIRP where such disputed claims have been brought to the attention of the NCLT and affirmed by it as prima facie being a genuine dispute as to the rights over the asset. Such contingent claims over the assets shall be included in the Information Memorandum published by the IRP.¹²⁷ Such claims once affirmed, may be included as a caveat to the rights of the

¹²⁵ Adani (n 28).

¹²⁶ Insolvency and Bankruptcy Code 2016, s 60(5).

¹²⁷ Insolvency and Bankruptcy Code 2016, s 29.

Corporate Debtor over such asset in the Resolution Plan, with the Resolution Applicant being bound by any adjudication of rights over the disputed asset. Such inclusion balances the Resolution Applicant's need for certainty over the position of assets and liabilities of the Corporate Debtor – with claims of rights over assets in insolvency being restricted to those prima facie found to be genuine disputes by the NCLT, while also ensuring that assets are not included in the CIRP and Resolution Plan despite the existence of genuine disputes, only on account of the Corporate Debtor being admitted into CIRP. Such an approach also limits the jurisdiction of the NCLT to examine the validity of the dispute only to the limited extent necessary to determine whether inclusion of the asset in CIRP is to be made subject to the adjudication of such dispute.

The above approach however also has its limitations – first, a Resolution Plan is required to maximize the value of assets of the Corporate Debtor, including through the transfer or sale of its assets.¹²⁸ Where the rights of the Resolution Applicant are subject to final determination, it may limit the possibility of resolution if the Resolution Applicant is unable to freely put to use the said asset, particularly where the asset is vital to the revival of the Corporate Debtor. Second, in the event of liquidation of the Corporate Debtor, if the dissolution of the Corporate Debtor were to be kept pending the decision of the civil court as to rights of the Corporate Debtor over the said asset, the Code may meet the same inefficiency that plagued winding up proceedings under the Companies Act, 1956.

The position under the Code is clear that the NCLT cannot adjudicate disputes outside of the rights and obligations arising under the Code. Given

¹²⁸ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Reg 37.

the limitations to the jurisdiction of the NCLT, there is a need for legislative rethinking to correct this blind spot of how disputes over assets in insolvency and liquidation are resolved, while ensuring the rights of third-party claimants to have their disputes adjudicated effectively without compromising the resolution of the Corporate Debtor. The statutory amendments to the Code proposed in this paper are an attempt at addressing this blind spot while balancing the interests of the stakeholders in the insolvency.