I. FINANCIAL SERVICE PROVIDERS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

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ABSTRACT

Financial Service Providers ("**FSPs**") are the backbone of the economy of any country and hence their insolvency and resolution become a matter of public concern. Although much is known about the resolution and liquidation of a company in general, a lot remains unexplored in the domain of insolvency of FSPs. The authors via this article attempt to explore the above-stated and, in the process, have consolidated the laws and procedures surrounding the resolution of an FSP prior to and after the commencement of the Insolvency and Bankruptcy Code, 2016 ("**Code**"). Further, we analyze in detail the ratio laid down in the matters concerning the insolvency of Dewan Housing Finance Limited ("**DHFL**"), the first FSP to undergo insolvency under the Code. The insolvency of DHFL is of utmost importance for it went on to settle multiple legal principles in regard to the insolvency of FSPs and has paved the way for future FSP resolutions.

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I. BACKGROUND

The Indian economy is dominated by financial service providers (**"FSPs"**) led by banking institutions which are closely followed by insurance companies, non-banking financial companies, and mutual funds.[1] Many of these FSPs are responsible for critical functions fundamental to the economy of the country. At the time of the inception of the Insolvency and Bankruptcy Code, 2016 (**"the Code"**), the insolvency and liquidation of FSPs were not intended to be covered by the provisions of the Code. The rationale of the legislature behind such demarcation was rooted in the fundamental difference between other companies covered under the Code and FSPs, as other corporate debtors under the Code are engaged in independent business operations, whereas FSPs are engaged in services such as managing public funds, deposits, settlement and recording of monetary transactions, securities, and derivative contracts, etc.[2] If one has to gauge the effect of the failure of an FSP on the economy of a country, the failure of Lehman Brothers during the 2008 financial crisis in the United States can be seen as an appropriate example which left thousands bankrupt and jobless and wiped out the saving of millions of investors from the market. The article is an attempt to analyze the legal framework for the resolution of FSPs under IBC and other legal frameworks.

Within its purview FSPs include all non-banking financial companies, micro-financing companies, insurance companies, and depositories. Further,

[1] Joyjayanti Chatterjee, 'The Case for a Specialised Resolution Law for Financial Institutions' (2018) NLS Bus L Rev 43 <https://www.nlsblr.com/_files/ugd/f10044_cc036a228ca1491db8b9663342dcba9f.pdf> accessed 14 January 2023.

[2] Debanshu Mukherjee and Aditya Ayachit, 'Resolution of Distressed Financial Institutions: An Overview of Recent Reforms in India' (2017) NLS Bus L Rev 129 <https://www.nlsblr.com/_files/ugd/f10044_e3a049486a3e4f07a8fb7f76cb0527fb.pdf> accessed 14 January 2023.

it is interesting to note that the definition of "corporate person" under the Code excludes FSPs and reads as follows:

> "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;[3]

This exclusion demonstrates that legislative intent was to keep FSPs out of the purview of the Code during its initiation.

A. What are FSPs?

As per section 2(17) of the Code, FSPs are defined as follows:

"financial service provider" means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator;

Further, "financial services" includes the following services under Section 2(16) of the Code:

- accepting of deposits;
- safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so;
- effecting contracts of insurance;

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[3] Insolvency and Bankruptcy Code 2016 (Act 31 of 2016) (IBC 2016), s 3(7).

- offering, managing;
- or agreeing to manage assets consisting of financial products belonging to another person;
- rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of–
    - buying, selling, or subscribing to, a financial product;
    - availing a financial service; or
    - exercising any right associated with a financial product or financial service;
- establishing or operating an investment scheme;
- maintaining or transferring records of ownership of a financial product;
- underwriting the issuance or subscription of a financial product; or
- selling, providing, or issuing stored value or payment instruments or providing payment services;

B. Pre-IBC Framework for Resolution of FSPs

Previously, the resolution of FSPs was governed under various legal frameworks however the said legislative frameworks remained ineffective and untested. Some of the said frameworks included the following:

- National Housing Bank Act, 1987- The National Housing Bank ("**NHB**") can file an application for winding up of a Housing Finance Company on

its inability to pay debt, in the exercise of its powers under the National Housing Bank Act, 1987.[4]

- Banking Regulation Act, 1949- For commercial banks, the Banking Regulation Act, 1949 provides for three types of resolution instruments:
    - mergers (including reconstruction);
    - acquisition of undertaking; and
    - court-ordered winding up (where RBI may be appointed as the liquidator).
- In cases of mergers, RBI may apply to the Central Government for a moratorium on a banking company and thereafter prepare a scheme for merger with any other banking institution. It is to be noted that RBI does not have the power for the resolution of public sector banks and they can only be wound up by an order of the Central Government.[5]
- Insurance Act, 1938- Under the Insurance Act, 1938, the Insurance Regulatory and Development Authority of India (**"IRDAI"**) may formulate and sanction a scheme of amalgamation and appoint an administrator for the management of the insurance business.[6] In the event of insolvency or non-compliance of the insurance company with the Insurance Act, 1938, the High Court/National Company Law Tribunal have also been empowered to wind up the company if its continued operation prejudices the policyholders.[7] Further, under Section 53 of the Insurance Act, insurance companies can apply for voluntary winding-up for effecting amalgamation or reconstruction or in the event it is unable to continue business on account of liabilities.[8] The IRDAI Act, 1999 also

[4] National Housing Bank Act 1987 (Act 53 of 1987), s 33B.
[5] The Banking Regulation Act. 1949 (Act 10 of 1949), s 45.
[6] The Insurance Act, 1938 (Act 4 of 1938), s 35-37A, 52A, 52C.
[7] ibid s 53.
[8] ibid s 54.

envisages (a) the appointment of an administrator by IRDAI, (b) winding up on the application of a requisite number of shareholders or policyholders and IRDAI under the Companies Act, 2013, and (c) amalgamation of the insurer with another insurer. Specifically, pursuant to the Life Insurance Corporation Act 1956, it is only the central government that can pass an order for the dissolution of LIC.[9]

Section 227 of the Code empowers the Central Government to notify FSPs for their insolvency and liquidation.[10] However, there were no unified and detailed guidelines for the resolution of the FSPs. In this regard, the Central Government brought forth the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 (**"FSP Rules"**) three years post the introduction of the Code. The FSP Rules are applicable to financial service providers, as may be notified by the Central Government under Section 227 of the Code, from time to time, for their insolvency and liquidation proceedings.

II. TREATMENT OF FSPS UNDER THE CODE AND FSP RULES

The insolvency of an FSP differs from that of any other entity in that, vide the provision of Section 227 of the Code, only the Central Government may if it considers necessary, in consultation with the appropriate financial sector regulator, shall notify the insolvency or liquidation proceedings of a FSP or categories of FSPs. It is to be noted that as per the provisions of the Code, "financial sector regulator" shall mean an authority or body constituted under any law to regulate services or transactions of the financial sector and

[9] Life Insurance Corporation Act 1956 (Act 31 of 1956), s 38.
[10] IBC 2016, s 227.

includes the Reserve Bank of India, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority of India, the Pension Fund Regulatory Authority and such other regulatory authorities as may be notified by the Central Government.[11]

The person carrying out the corporate insolvency resolution process (**"CIRP"**) and/or the liquidation of the FSP is known as an "Administrator" who under the FSP Rules has been endowed with the powers and functions of the insolvency professional (**"IP"**), interim resolution professional (**"IRP"**), resolution professional (**"RP"**), or the liquidator for the purpose of insolvency and liquidation proceedings of FSPs.[12] Further, as per Rule 9 of the FSP Rules, the Administrator shall also have the same duties, obligations, responsibilities, and rights as an IP, IRP, RP, and liquidator, as the case may be. The adjudicating authority may appoint or replace the administrator on an application made by the appropriate regulator.

As per the FSP Rules, the provisions of the Code pertaining to the CIRP of a corporate debtor shall mutatis mutandis apply to the insolvency resolution of FSPs with certain modifications including the following:

A. Corporate Insolvency Resolution Process

1. Initiation of CIRP

Insolvency proceedings against FSPs committing default under Section 4 of the Code can only be initiated on an application made by the appropriate regulator in a format provided under Form 1 of the FSP Rules. Such an application is to be treated in a manner akin to an application made

[11] IBC 2016, s 2(18).
[12] Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019, G.S.R. 852(E), reg 3(a).

by a financial creditor under Section 7 of the Code. Upon admission of the application, the adjudicating authority shall appoint an individual of the choice of the regulators as the 'administrator' of the concerned FSP.[13]

2. Moratorium

An interim moratorium shall apply on the FSP from the date of filing of the CIRP application by the regulator till its admission or rejection. It may be noted that the license or registration of the FSP to engage in the business of providing financial services shall not be suspended or canceled both during the period of the interim moratorium and throughout the CIRP.[14]

3. Advisory Committee

Under the FSP Rules, the regulator has the discretion to constitute an advisory committee to advise the administrator on the operations of the FSP within 45 days of the insolvency commencement date. The advisory committee shall consist of three or more members who shall be persons of ability, integrity, and standing and having expertise or experience in finance, economics, accountancy, law, public policy, or any other profession in the area of financial services or risk management, administration, supervision or the resolution of FSPs. The regulator has been accorded the right to determine the terms and conditions of the members of the advisory committee along with the manner of conducting meetings and observance of rules and procedures.[15]

4. Resolution Plan

The resolution applicant shall include a statement justifying the requirement of its engagement in the business of the concerned FSP as per the

[13] ibid reg 5(a).
[14] ibid reg 5(b).
[15] ibid reg 5(c).

concerned law. The administrator upon approval of the resolution plan by the committee of creditors (**"CoC"**) shall apply to the appropriate financial regulator for a no-objection certificate (**"NOC"**) for the successful resolution applicant which shall be issued on the basis of 'fit and proper' criteria applicable to the business of the FSP. Such NOC shall be deemed to have been given if the regulator does not refuse the application within forty-five days of its receipt.[16]

B. Liquidation

Similar to CIRP, the liquidation process under the Code shall apply mutatis mutandis to an FSP with the following exceptions:

- the license of the concerned FSP shall not be canceled without affording an opportunity to the liquidator of being heard;
- the adjudicating authority shall provide the appropriate regulator an opportunity of being heard before passing an order for the following under the Code:
- liquidation of the FSP under Section 33; and
- dissolution of the FSP under Section 54.[17]

C. Voluntary Liquidation

The provisions of the Code for voluntary liquidation shall apply mutatis mutandis to FSPs but for the following:

- FSP to obtain prior permission from the concerned regulator for initiating voluntary liquidation proceedings under Section 59 of the Code;

[16] ibid reg 5(d).
[17] ibid reg 7.

- the affidavit from the majority of directors as required under Section 59(3)(a) of the Code shall include a declaration that such appropriate permission has been obtained by the FSP from the concerned regulator; and
- the adjudicating authority shall provide the concerned regulator an opportunity of being heard before proceeding to issue an order for dissolution of the FSP under Section 59 of the Code.[18]

D. Third-Party Assets

Moratorium under the Rule 5 of the FSP Rules and Section 14 of the Code shall not apply to any third-party assets or properties in custody or possession of the FSP, including any funds, securities, and other assets required to be held in trust for third parties or depositors. The administrator shall take control and custody of such assets in a manner notified by the Central Government under Section 227.[19]

E. Claims by Depositors of FSPs

Under the Code, deposits are included within the ambit of "financial product" under Section 2(15) of the Code while the process of inter alia accepting deposits by an FSP along with safeguarding and administering assets consisting of financial products belonging to another person comes under the scope of "financial service" under Section 2(16) of the Code. The report of the 'Insolvency Law Committee for Notification of Financial Service Providers Under Section 227 of the Insolvency and Bankruptcy Code, 2016'

[18] ibid reg 8.
[19] ibid reg 10.

dated 4 October 2019[20] (**"Report"**) specifically addressed that the amounts deposited by depositors with an FSP will be treated as financial debt and as such depositors of an FSP shall be classified as financial creditors and will be treated accordingly under the Code. The position of law in this regard has also been clarified by various judicial precedents to include depositors as financial creditors under the Code.

As such, the procedure for submission of claims by a depositor is identical to that of a financial creditor and covered under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**"CIRP Regulations"**).[21] The procedure of the same may be encapsulated as follows:

- the depositor of an FSP shall submit a claim with proof to the interim resolution professional(**"IRP"**) in electronic form in Form C of the Schedule-I of the CIRP Regulations (claim may also be submitted as a class of financial creditors vide Form CA). The depositor may also submit supplementary documents or clarifications in support of the claim before the constitution of the CoC;
- the existence of a financial debt due to the depositors may be proved by:
  - the records available with an information utility, if any; or
  - other relevant documents, including:
  - financial contract supported by financial statements as evidence of the debt;

[20] Sub-committee of the Insolvency Law Committee, *Report of the sub-committee of the insolvency law committee for notification of financial service providers under section 227 of the Insolvency and Bankruptcy Code, 2016* (4 October 2019).
[21] The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), IBBI/2016-17/GN/REG004, reg 8.

- a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility have been drawn by the corporate debtor;
- financial statements showing that the debt has not been paid; or
- an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.
- Further, as per Regulation 10 of the CIRP Regulations, the IRP or RP may call for other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim.[22]

In the event there are a large number of depositors constituting a class, they shall be appointed with an authorized representative in terms of Section 21(6A) of the Code who shall represent such class of depositors in the CoC of the FSP and vote on behalf of them to the extent of their voting share. The criteria for the appointment of the authorized representative is as follows –

- a trustee or agent shall be appointed to represent the depositors in the CoC if the terms of their deposits provide for such appointment;
- the NCLT shall appoint the authorized representative before the first meeting of the CoC on an application made by the IRP if the financial debt is owed to a class of creditors who exceed the specified number[23] as provided by the Insolvency and Bankruptcy Board of India; and

[22] Ibid reg 10.
[23] Insolvency and Bankruptcy Board of India, 'Appointment of Authorised Representative for Classes of Creditors under section 21 (6A) (b) of the Insolvency and Bankruptcy Code, 2016' (Circular dated 13 July 2018).

- wherein the financial creditors are represented by a guardian or administrator, the same shall act as the authorized representative for such class of creditors.

III. EXAMPLES OF INSOLVENCY OF FSPS UNDER THE CODE

Dewan Housing Finance Limited (**"DHFL"**) was the largest mortgage lender in the country and its insolvency was a big blow to the economy of the country along with affecting the public at large who had deposited their funds with DHFL. It was also the first FSP to be notified for insolvency resolution under Section 227 of the Code by the Reserve Bank of India. Prior to its insolvency, various lacunas remained regarding the insolvency of FSPs which were answered by the National Company Appellate Law Tribunal (**"NCLAT"**) in primarily three judgements-

- *Air Force Group Insurance Society v. Mr. R. Subramaniakumar, Administrator of Dewan Housing Finance Corporation Limited & Ors. and Mr. Anup Kumar Shrivastava & Ors. v. Mr. R. Subramaniakumar, Administrator of Dewan Housing Finance Corporation Limited & Ors.*, vide order passed on 27 January 2022[24] (**"DHFL Case 1"**);
- *Vinay Kumar Mittal & Ors. v. Dewan Housing Finance Corporation Limited & Ors.*, vide order passed on 27 January 2022[25] (**"DHFL Case 2"**); and

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[24] *Air Force Group Insurance Society v. Mr. R. Subramaniakumar, Administrator of Dewan Housing Finance Corporation Limited & Ors.*, Company Appeal (AT) (Insolvency) No. 546 and 552 of 2021 (NCLAT India).

[25] *Vinay Kumar Mittal & Ors. v. Dewan Housing Finance Corporation Limited & Ors.*, Company Appeal (AT) (Insolvency) No. 506 & 507 and 516 of 2021 (NCLAT India).

- *Mr. Raghu K S & Ors. v. Mr. R. Subramaniakumar, Administrator of Dewan Housing Finance Corporation Limited*, dated 7 February 2022[26] (**"DHFL Case 3"**).

A. DHFL Case 1

1. Factual Background

The appellant was a group of depositors who had deposited their funds as fixed deposits with the FSP DHFL against whom CIRP was initiated in November 2019 under Rule 5 of the FSP Rules.

Subsequently, under the resolution process, the resolution plan put forth by Piramal Capital & Housing Finance Limited was approved by the CoC and thereafter approved by the adjudicating authority (**"Approval Order I"**). The Approval Order I further went on to make the following suggestions to the CoC-

- Enhance the percentage of the payment made to small investors under the resolution plan by about 40% i.e. the same payout as received by the secured Financial Creditors (**"FCs"**); and
- Repay the entire admitted claim amount of the Army Group Insurance Fund without any deduction and in the process treat them as a separate class or sub-class of creditors considering the nature of their duties.

The above suggestions were recommended considering the nature of the corporate debtor which was an FSP and had the savings of numerous investors including senior citizens who had dire need of the same, especially during the Covid-19 pandemic. Hence, the adjudicating authority stated in

[26] *Mr. Raghu K S & Ors. v. Mr. R. Subramaniakumar, Administrator of Dewan Housing Finance Corporation* Limited, Company Appeal (AT) (Insolvency) No. 538 of 2021 (NCLAT India).

favour of full repayment of the Army group's entire fund claims by taking into account the nature of their jobs which included protecting the country, risking and sacrificing their lives in order to keep the peace in the country.

The appellant which saved funds for officers of the air force, relying on the above had requested the CoC of DHFL for the reconsideration of the approved resolution plan, however the same was rejected by the CoC of DHFL by an 89.19% majority. Thereby, the appellant vides the present appeal challenged the Approval Order I contending that it would fall in the same class of creditors as the Army Group Insurance Fund and not providing the same is in contravention of the National Housing Bank Act, 1987 (**"NHB Act, 1987"**). It was also contended that the approved resolution plan gave the appellants the biggest haircut despite them being the most vulnerable class of creditors.

2. Observation

The NCLAT after due consideration of the submissions of all parties stated the following observations:

- In light of the Supreme Court's decision in *N. Raghvender v. State of Andhra Pradesh*[27] and *Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC (India) Ltd.*,[28] it was held that the bank is not a trustee for the money deposited by the customers and that their relationship is that of a creditor and debtor. Since the FSP took fixed deposits from the appellants on agreed interest on the amount invested, their relationship was contractual in nature and that of a creditor and debtor. It was also observed that the appellants had not submitted any documentation or proof which had the effect of proving their assets were held in trust by DHFL. Hence,

[27] *N. Raghvender v. State of Andhra Pradesh*, 2021 SCC OnLine SC 1232.
[28] *Jaypee Kensington Boulevard Apartments Welfare Association v NBCC (India) Ltd.*, 2021 SCC OnLine SC 253.

the assets of the appellants cannot be protected under Rule 10 of the FSP Rules.

- In view of the Apex's court stance in *Essar Steel v. Satish Kumar Gupta and Ors (*"**Essar Steel**"),[29] the NCLAT reiterated that the CoC in its commercial wisdom may negotiate and accept the resolution plan involving differential payment to a different class of creditors along with differences in the distribution amounts between different classes. The approved resolution plan shall be binding on all parties including dissenting creditors and cannot be interfered with by the adjudicating authority. It was further noted that the limited judicial review that is available with respect to the decision of the CoC is to ensure that the CoC has taken into account all the factors required to maintain the going concern status of the corporate debtor, maximization of value of the assets and protection of the interests of all stakeholders, including operational creditors.
- Further, considering Essar Steel, the NCLAT stated that having participated in the insolvency resolution process, the appellants cannot challenge the actions of the CoC which is otherwise in compliance with the provisions of the Code. The NCLAT unequivocally stated that the task of the CoC members is to work towards the maximization of value for all stakeholders of the corporate debtor and not the depositors alone. The appellants who were financial creditors and hence a part of the CoC, by seeking payment outside the resolution plan are acting *in silo*. Such action is not only detrimental to the interest of other stakeholders but also against a holistic resolution for maximization of value and distribution of funds among other creditors.

[29] *Essar Steel v. Satish Kumar Gupta and Ors*, (2020) 8 SCC 531.

- That in light of the decision of the Supreme Court *Innoventive Industries Limited v. ICICI Bank*,[30] *Rajendra K. Bhulla v. Maharashtra Housing and Development Authority & Ors.*[31] and *Principal Commissioner of Income Tax v. Monnet Ispat and Energy Limited,*[32] it is a settled principle that when two special statutes contain a non-obstante clause, the latter enacted statute shall prevail. Hence, in the event of any inconsistency between the provision of the Code and any other enactment, the provision of the Code will prevail including that over the NHB Act, 1987, and the Reserve Bank of India Act, 1934 (**"RBI Act, 1934"**).
- That, the Apex Court had in *Rajendra K Bhutta v. Maharashtra Housing and Area Development Authority and others* emphasized that Section 14 of the Code prohibits alienation, transfer, and disposal of any asset of the corporate debtor.[33] Since the Code is a time-bound process, every delay is detrimental and defeats the object behind imposing a moratorium which is to maintain the status quo for the corporate debtor for maximization of asset value and ensures recovery to the creditors of the corporate debtor. Therefore, any interest or fixed deposit payments made to the appellant during the moratorium of DHFL would violate Section 14 of the Code.
- The depositors of the DHFL stand on an equal footing with other financial creditors. They have already been provided with safeguards and representation under the Code by way of the appointment of an authorized representative for them and therefore there exists no rationale for treating them as a separate class with preferential treatment being accorded in the

[30] *Innoventive Industries Limited vs ICICI Bank*, (2018) 1 SCC 407.
[31] *Rajendra K. Bhulla v. Maharashtra Housing and Development Authority & Ors.*, (2020) 13 SCC 208
[32] *Principal Commissioner of Income Tax v. Monnet Ispat and Energy Limited*, (2018) 18 SCC 786.
[33] *Rajendra K Bhutta v Maharashtra Housing and Area Development Authority and others*, 2020 SCC online SC 292.

manner of distribution of funds. The appellate tribunal further reasoned that allowing the prayers of the appellant would subsequently invite similar claims for repayment of dues from other creditors including NCD holders, which would be damaging to the CIRP of DHFL. Further, any payments made to fixed deposit holders with matured deposits would provide them preference over depositors whose deposits are yet to mature, resulting in unequivocal treatment among similarly situated creditors. Therefore, no special dispensation can be provided outside of the mechanism/process of the Code in terms of the distribution of funds.

- That the powers of the adjudicating authorities under Section 60(5)(c) of the Code or Rule 11 of the NCLT Rules are limited in view of *Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC (India)* Ltd[34] and *Ebix Singapore (P) Ltd. v. Committee of Creditors of Educomp*.[35] The powers of the adjudicating authorities are related to the broader compliance with the insolvency framework and its underlying objective, one of which is the timely resolution of the corporate debtor. The appellate authority can only examine the challenge based on the grounds listed in Section 61(3) of the Code, which are limited to matters "other than an enquiry into the autonomy or commercial wisdom of the dissenting financial creditors."
- Neither the NHB Act, 1987 nor the RBI Act, 1934 provides for full payment of the holders of fixed deposits. The stated acts merely envisage the cancellation of the license of the FSP in the event of non-payment, after providing it with an opportunity to present its case. Additionally, the above acts operate in ordinary circumstances wherein the FSP is not undergoing

[34] *Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC (India) Ltd*, 2021 SCC OnLine 253.
[35] *Ebix Singapore (P) Ltd. v. Committee of Creditors of Educomp*, 2021 SCC OnLine SC 707.

insolvency. It is of utmost importance that once an FSP is admitted into insolvency, it is the Code that governs the entire process with respect to its resolution.

- Lastly, considering the decision of the Supreme Court in *Pratap Technocrats Private Limited v. Monitoring Committee of Reliance Infratel Limited & Anr.*,[36] the NCLAT stated that the adjudicating authorities are endowed with limited jurisdiction under the Code and cannot act as courts of equity.

3. Judgement

In view of the above observation, the NCLAT held that the adjudicating authority has limited powers to interfere with the commercial wisdom of the CoC and cannot exercise equitable jurisdiction to override the decision of the CoC. Therefore, the fixed deposits of the appellant made from the earnings of the employees cannot be a condition for interfering with the commercial wisdom of the CoC. It was further held that the allocation of recoveries to creditors of DHFL shall be based only on the approved resolution plan.

In terms of the appellant's contention of violation of the NHB Act, 1987, and the RBI Act, 1934, it was stated that insolvency proceedings were initiated against DHFL by the RBI due to its failure to meet the payment obligations. The NHB Act, 1987 and RBI Act, 1934 apply in normal circumstances wherein the FSP is solvent, however, it is a settled position of law that once a FSP is admitted to insolvency, it is the Code that is a comprehensive framework controlling the entire resolution process. Further,

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[36] *Pratap Technocrats Private Limited v. Monitoring Committee of Reliance Infratel Limited & Anr.*, 2021 SCC OnLine SC 569.

neither the NHB Act, 1987 nor the RBI Act, 1934 guarantee the full recovery of deposits, Hence, the creditors of DHFL cannot seek to enforce the provisions of the NHB Act, 1987 and the RBI Act, 1934 over and above the Code.

In light of the above observations, the appeals were dismissed with no interference with the approved resolution plan.

B. DHFL Case 2

1. Factual Background

The appellant had filed the stated appeals on behalf of himself and 444 other individual depositors and other charitable trusts holding fixed deposits in the FSP. They were filed against a common order dated 7 June 2021 of the NCLT, Mumbai Bench (**"Approval Order II"**) which had declared the appellant's objections raised post the approval of the resolution plan as infructuous and had disposed off their interim applications with the following suggestions to the CoC:

- that the CoC should reconsider the distribution method, distribution amongst various members of the CoC under the approved resolution plan;
- that the amount allotted to public depositors, Fixed Deposit holders, and subscribers to NCDs may be increased to the level of secured FCs i.e. approximately 40% of the amount to be received by the FCs under the resolution plan;
- that the Successful Resolution Applicant, Piramal Capital & Housing Finance Limited does have to pay anything more than that committed under the approved resolution plan and only the inter se distribution of

resolution money amongst various creditors may be reconsidered by the CoC.

The appellant depositors contented that the Approval Order II was passed by the NCLT without delving into their contention that the appellants had deposited assets in trust with DHFL. They further submitted that the depositors could not be legally subjected to the resolution process and that the NCLT erred in approving the resolution plan without considering the objections of the appellant depositors.

2. Observations

The NCLAT after due consideration of the submissions of all parties stated the following observations:

- As stated in DHFL 1 and further relying on *K. Shashidhar v. Indian Overseas Bank*,[37] the NCLAT reiterated that neither the adjudicating authority i.e. the NCLT nor the appellate authority under the Code has the power to change the commercial wisdom of the CoC or interfere with the business or commercial decisions made. Their power for judicial review is limited to ensure that the CoC had taken into account factors required to keep the corporate debtor as a going concern and to maximize its assets. The NCLAT further cautioned the adjudicating authorities from granting reliefs that may run counter to the timelines under the IBC. If a judicial creation of a procedural or substantive remedy was not originally provided in the statute, providing of the same by the judiciary would violate the principle of separation of powers and could change the way the IBC framework was intended to work.

[37] *K. Shashidhar v. Indian Overseas Bank*, (2019)12 SCC 150.

- Similar to DHFL 1, the NCLAT herein observed that there was no provision either under the NHB Act, 1987 or the RBI Act, 1934, or any other law in force which mandated full payment to the depositors and that the stated acts only provided for the revocation of license in the event of non-payment by an FSP to the depositors.
- While reiterating the view laid down in several judgements e.g., *Innoventive Industries Limited, ICICI Bank and anr.*[38] and *The Directorate of Enforcement v. Sh. Manoj Kumar Agarwal and Ors.*,[39] the tribunal held that it is a settled position of law that a special statute enacted on a later date will prevail over the earlier statute, in the event both contain a non-obstante clause. Hence, Section 238 of the Code shall prevail over the NHB Act, 1987, NHB Directions, and the RBI Act, 1934.
- The NCLAT while relying on the Report cemented the position of depositors as financial creditors in the insolvency of an FSP. Additionally, in light of the law laid down in *Chitra Sharma v. Union of India*,[40] the tribunal held that during the pendency of the CIRP, the depositors cannot claim a disbursement since the same shall amount to preferential treatment to a particular class of creditors which is impermissible under the Code.
- On the combined reading of the FSP Rules, related provisions of the Code along with the various precedents under it, it becomes clear that it is the Code that provides for a detailed mechanism whereunder the claims of the creditors, including the depositors have been sufficiently dealt with. Accordingly, the interest of the depositors as a class of

[38] *Innoventive Industries Limited, ICICI Bank and anr.*, (2018) 1 SCC 407.
[39] *The Directorate of Enforcement v. Sh. Manoj Kumar Agarwal and Ors*., Company Appeal (AT) (Ins) No 2019 (NCLAT India).
[40] *Chitra Sharma v. Union of India*, (2018) 18 SCC 575.

creditors has been adequately represented and protected in the CIRP and is valid in law. Considering the above, the tribunal held that the claims of the appellants must be viewed only in terms of the statutory mechanism under IBC and the FSP Rules.

- The order emphasized that when a statute has conferred the power to do an act and has laid down the method in which the power is to be exercised, the doing of the said act in any other manner is prohibited. In terms of the Code, the minimum amount to be paid under the resolution plan to a creditor is the liquidation value. Hence, the depositors (herein the dissenting financial creditors) cannot seek an amount that is beyond the liquidation value of their debt as the same is provided in terms of the Code.
- The objections of the depositors on being dissatisfied with the distribution under the approved resolution plan were found to be not maintainable on the ground that the NCLT/NCLAT has been endowed with limited jurisdiction and cannot act as a court of equity or exercise plenary powers. It was thereby held that CoC's commercial or business decisions are not open to judicial review by the NCLT or NCLAT under the Code.

3. Judgement:

In view of the above observation, the appellate authority stated that the NCLT did not make a mistake in approving the resolution plan which proposed to dismiss the claims of deposit holders without paying them in full and that the same does not contravene the statutory provisions of the NHB Act, 1987 or the RBI Act, 1934. In light of the above observations, the appeals were dismissed with no interference with the approved resolution plan.

C. DHFL Case 3

1. Factual Background

The facts of the present matter were similar to DHFL 1 and DHFL 2. The appellants had invested in the fixed deposit scheme of DHFL which had promised high-interest rates and security for the money and was given an AAA credit rating. Subsequently, DHFL was admitted into insolvency. The appellants were given the biggest haircut in terms of the distribution envisaged with only a sum equivalent to Rs. 1243 Crores (Rupees One Thousand Two Hundred Forty Three Crores Only) (23.08%) being allotted out of the admitted claim of Rs. 5375 Crores (Rupees Five Thousand Three Hundred and Seventy Five Crores Only). The allotted value fell short by a huge margin and was against the 40% (minimum) of the admitted claims agreed to be paid to secured financial creditors with a huge risk appetite.

Such action was opposed by the appellants via I.A. No 625/2021 preferred in C.P. (I.B)/ 4258/ (M.B.)/C-11/2019 which was disposed of by the NCLT with the direction of reconsideration to the CoC to enhance the payment to a minimum of 40% of the amount being paid to secured financial creditors in the resolution plan (**"Approval Order 3"**). Approval Order 3 was appealed against by the appellants under Section 60(5) of the Code who sought a declaration from the NCLAT to the effect that the resolution plan passed by the CoC was illegal and violative of the Code. Additionally, directions were also sought to the effect that the resolution plan be modified such that the fixed deposits of the appellants are refunded along with their interest in terms of the NHB Act.

2. Observations

The NCLAT considering the decision in DHFL Case 2 disposed of the appeals with the previous judgement being made part of the decision in DHFL Case 3.

IV. CONCLUSION

We have witnessed multiple FSPs running the risk of insolvency, various private banks undergoing forced mergers and presently, with the fears of recession looming ahead, it becomes increasingly imperative that the guidelines for the resolution of FSPs must be thought over and strengthened. As stated earlier, FSPs are crucial to the welfare of a country's economy and oversee the investments of multiple small investors. As such, it is to be noted that the regulators have been proactive in shielding their interests by foreseeing a procedure for the resolution of FSPs in the event of insolvency. Further, the NCLAT's decision in the DHFL cases has provided much-needed clarity with respect to the insolvency of an FSP. Most importantly, holding the Code above the provisions of any other statute in terms of the CIRP of an FSP shall go a long way in reducing the multiplicity of forums, preventing delays in FSP resolution, and conserving the fund value.