

# **KNOWLEDGE REPONERE**

**(A WEEKLY BULLETIN)  
(21-25 AUGUST, 2017, 28  
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# **INSOLVENCY PROFESSIONALS AGENCY**

## **KNOWLEDGE REPONERE**

**(A Weekly Bulletin: 21-25 August, 2017, 28 August-1<sup>st</sup> September, 2017  
& 4-8 September, 2017)**

*“All our dreams can come true, if we have the courage to pursue them.”*

**Dear Professional Members,**

The provisions of Insolvency and Bankruptcy Code 2016 relating to companies and LLPs were notified on December 01, 2016. In the last 9 months, the code has been evolving and setting precedents on different issues including disputes, applicability of limitation act, serving of notice and principles of natural justice, Applicability of mandatory vs directory timelines, withdrawal of application for insolvency due to settlement between the creditor and debtor after admission of an application and so on through judgements by National Company Law Tribunal(NCLT), National Company Law Appellate Tribunal(NCLAT) and the Supreme Court as well. One of such recent precedent was the judgement of Supreme Court in case of M/s. Innoventive Industries V/s. ICICI Bank dismissing an appeal of corporate debtor (Innoventive Industries) holding that the Central Legislation (i.e the Insolvency and Bankruptcy Code) would prevail over the state law (Maharashtra Relief Undertakings)(Special Provisions) Act.

### **1) CASE UPDATES**

The speedy filing of the cases under the Code at various NCLT Benches is taking a new turn every day. The newly admitted cases with regard to Corporate Insolvency Resolution Process (CIRP) under the Code are as below:

<b>S. No.</b>	<b>Case Title</b>	<b>Relevant Section</b>	<b>NCLT Bench</b>	<b>Amount in default as mentioned in application (in Rupees)</b>
1	Inderpreet Singh V/s. Mariners Buildcon India Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	New Delhi	12.47 Lakhs
2	Punjab National Bank V/s. Samtel Color & Ors.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	New Delhi	236.20 Crores

3	Neelam Singh V/s. Mega Soft Infrastructure Private Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	New Delhi	1.73 Crores
4	Axis Bank V/s. M/s. Ketu Highway Developers Private Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Ahmedabad	Amount not mentioned in order
5	Inderpreet Singh V/s. Mariners Buildcon India Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	New Delhi	8 Lakhs
6	Kalol Nagrik Sahakari Bank Ltd. V/s. Shakti Nutraceuticals Private Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	New Delhi	1.10 Crores
7	Union Bank of India V/s. Era Infra Engineering Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	New Delhi	681.04 Crores
8	Neelam Singh V/s. M/s. Mega Soft Infrastructure Pvt. Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	New Delhi	1.73 Crores
9	Sacrato Capital Pvt. Ltd. V/s. Anil Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Ahmedabad	8.87 Crores
10	Reliance Commercial Finance Ltd. V/s. Anil Nutrients Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Ahmedabad	8.87 Crores
11	IndusInd Bank Limited V/s. Gallium Industries Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	New Delhi	Order not available

12	Ajithnath Steels Pvt. Ltd. V/s. Ellora Paper Mills Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Mumbai	3.42 Crores
13	Rio Glass Solar SA V/s. Shriram EPC Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Chennai	EUR 41,51,570.52 plus interest EUR 2,51,028.18
14	Shah Brothers Ispat Private Limited V/s. Tech Megacorp International Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Chennai	Rs. 4.18 Crores
15	Delta Corporate Services Private Limited V/s. Boss Profiles Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Kolkatta	1.74 Crores
16	M/s. Quantum Projects Infra Pvt Ltd VS Amrapali Silicon City Pvt Ltd	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	29.20 Lakhs
17	Bank of Baroda V/s. Amrapali Silicon City Pvt Ltd	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	59.38 Crores
18	Lenergizer IT Services Pvt. Ltd. V/s. Free Culture Apparels Pvt. Ltd.	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	34.16 Lakhs
19	BCC Fuba India Limited V/s. SBJ Exports & MFG Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	25.31 Lakhs
20	Mechano Engineering Works V/s. Propel Valves Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Chennai	12.45 Lakhs

21	Maxim Tubes Company Pvt. Ltd. V/s. International Coil Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	1.68 Crores
22	Paharpur Cooling Towers Limited V/s. M/s. Ankit Metal & Power Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Kolkatta	75.49 Lakhs
23	Multi Trade V/s. Transparent Technologies Pvt. Ltd.	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Mumbai	18.28 Lakhs
24	Loiwal Steel House V/s. Varadha Steel Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Chennai	6.38 Crores
25	M/s. Shree Ram Lime Products Pvt. Ltd. V/s. Gee Ispat Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	85.59 Lakhs
26	M/s. Globe Express Services (Overseas Group) Ltd. & Anr. V/s. MM Cargo Container Line Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	24 Lakhs
27	Brown Kraft Industries Limited	Section 10 of the Code dealing with initiation of CIRP by Corporate Debtor.	Mumbai	23 Crores
28	Shiv Cotgin Private Limited	Section 10 of the Code dealing with initiation of CIRP by Corporate Debtor.	Ahmedabad	37 Crores
29	Dev Cotex Private Limited V/s. State Bank of India	Section 10 of the Code dealing with initiation of CIRP	Ahmedabad	12.56 Crores

		by Corporate Debtor.		
30	Metal Link Alloys Limited V/s. State Bank Of India & Ors.	Section 10 of the Code dealing with initiation of CIRP by Corporate Debtor.	Ahmedabad	61.20 Crores
31	Indian Overseas Bank Metal Holdings India Pvt. Ltd. V/s. Indian Overseas Bank	Section 10 of the Code dealing with initiation of CIRP by Corporate Debtor.	Ahmedabad	350Lakhs

## 2) NCLT CASE BRIEFS

### Union bank of India V/s. Era Infra Engineering Ltd.

<b>Applicant</b>	Union bank of India (Financial Creditor)
<b>Respondent</b>	Era Infra Engineering Ltd. (Corporate Debtor)
<b>Relevant Section under which case was filed before NCLT</b>	Section 7 of the Code dealing with the initiation of Corporate Insolvency Resolution Process by Financial Creditor.
<b>Amount in default</b>	Rs. 681 Crores as loans plus 11 Million \$ as External Commercial Borrowings

- The present application was filed by Financial Creditor (Applicant) before the NCLT, Principal Bench, New Delhi (Adjudicating Authority) against the Corporate Debtor (Respondent) under section 7 of the Insolvency and Bankruptcy Code, 2016 (Code)
- The facts in brief are that the respondent is engaged in execution of large construction projects like highways , airports etc. It availed various loan facilities from applicant. A perusal of the application filed by applicant indicated that the sanctioned amount was to the tune of Rs. 1506.33 crores and amount claimed in default was to the extent of Rs. 681.04 crores and in addition External Commercial Borrowing of USD 11,971,939.12 as on 31.05.2017 was in default.
- Notice of application was issued and respondent put in the appearance.
- On 11.07.2017, Principal Bench framed the following question:

*Whether the process under the Insolvency and Bankruptcy Code, 2016 ('Code') can be triggered in the face of the pendency of the winding up petitions or it is to be considered as an Independent process?*

- Thereafter, the matter was listed for 25.07.2017. However, since the Principal Bench was not sitting on that date, Special Bench was constituted for hearing the case.

**Decision of Adjudicating Authority and reasons thereof:**

- At the time of hearing, it was noticed that different benches of NCLT have taken different viewpoints on the above question framed by Principal Bench.
- Views of NCLT coordinate benches on the above said question are :
  - 1) **In matter of M/s Alcon Laboratories (India) Pvt. Ltd. –Vs- M/s. Vascon Health Care Pvt. Ltd.- NCLT Chennai-** The pendency of winding up petition can't be a bar under the Code for initiating CIRP, reason being the Hon'ble High Court has not passed any order for winding up of CD and no official liquidator appointed.
  - 2) **Industrial and Commercial bank of China –Vs- Alok Industries- NCLT Ahmedabad-** As similar as NCLT Chennai above.
  - 3) **M/s Nauvata Engineering Pvt. Ltd.- Vs- Punj Lloyds Ltd.- NCLT Principal Bench-** Where winding up proceedings are pending against a company, then it would not be conducive for Tribunal to trigger insolvency process as there is likelihood of conflict between two statutory entities, namely Official Liquidator and Insolvency Resolution Professional and therefore **Delhi H.C. may constitute a better basis of adjudication.**
  - 4) **In Nikhil Mehta & Sons – Vs- AMR infrastructure Ltd.- NCLT Principal Bench-** The present petition would not be maintainable as winding up petitions have been filed before Delhi H.C. and official liquidator has been appointed. (although the matter is presently before the NCLAT with interim directions)
  - 5) **In M/s Nowfloats Technologies Pvt. Ltd. – vs- m/s Getit Infoservices Pvt ltd. – NCLT Special Bench –** Where official liquidator has been appointed then the proceedings cannot be sustained before this Tribunal without obtaining leave of the H.C.

**Decision**

- Considering that differing views were taken by different benches of NCLT, the Adjudicating Authority placed the matter before the Hon'ble President NCLT for the purpose of being transferred to Larger Bench or as the Hon'ble President may deem fit in accordance with second proviso to sub-section (2) of section 419 of Companies Act, 2013.
- The questions to be referred to such Bench, as Hon'ble President may deem fit, were:



- 1) Whether the process under IBC can be triggered in the face of pendency of winding petitions before the respective HC or it is to be considered as independent process?
- 2) In case the process not considered independent, whether the petition filed under the Code is required to be transferred to the concerned High Court which is having the winding up proceedings or await the outcome of the winding up proceedings by adjourning it sine die?
- 3) Whether the Code gives any room for discretion to be exercised for adjourning its status in view of statutory mandate given under Section 7, 9 and 10 of the Code for expeditious disposal of cases by either admitting or rejecting it within the fixed time frame?
- 4) In case if the petition is adjourned status and if the winding up petition is dismissed or set aside in appeal subsequently whether there is scope in such an eventuality of power of revival within the framework of the Code, conferred on this Tribunal?

### Neelkanth Township and Construction Pvt. Ltd. V/s. Urban Infrastructure Trustees Ltd.

<b>Applicant</b>	Neelkanth Township and Construction Pvt. Ltd. (Financial Creditor)
<b>Respondent</b>	Urban Infrastructure Trustees Ltd.(Corporate Debtor)
<b>Relevant Section under which case was filed before NCLT</b>	Section 7 of the Code dealing with the initiation of Corporate Insolvency Resolution Process by Financial Creditor.
<b>Amount in default</b>	Rs. 51 Crores

- The present appeal was filed before the NCLAT (Appellate Authority) by the Corporate Debtor (appellant) against the order of the NCLT, Mumbai Bench, Mumbai (Adjudicating Authority) whereby the application filed by Financial Creditor (respondent) was allowed.

#### **Contentions of Appellant – Corporate Debtor**

- Application filed by Respondent under section 7 of the Insolvency and Bankruptcy Code, 2016 (Code) was defective being not accompanied by mandated documents
  - 1) Application under section 7 of the Code can be filed only when accompanied by documents under sub-section (3) of section 7 of Code and none other, namely (a) record of default as recorded by Information Utility (b) such other record or evidence of default ‘as may be specified’. ‘As may be specified’ can only be by Insolvency and Bankruptcy Board of India (Board) by way of Regulations.
  - 2) It was the duty of the Board to specify Regulations and in absence of same, proceedings under section 7 of the Code cannot be initiated.

- 3) Reliance was placed on Smart Timing Steel Limited to contend that provisions of section 3(a) of section 7 is mandatory
- Application was time barred
    - 1) The application was time barred as the debenture certificates were due for redemption as far back as in the years 2011, 2012 and 2013 and the application filed in 2017 is hopelessly time barred.
  - ‘Default of debt’ has not been admitted by Corporate Debtor
  - Respondent is not a ‘Financial Creditor’, but an investor
    - 1) It was contended that the respondent does not come within the ambit of ‘Financial Creditor’ as no ‘financial debt’ is owed.
    - 2) The claim of Financial Creditor was against Debenture Certificates which does not fall under ‘financial debt’. A debt is a financial debt only when it is disbursed against consideration for time value of money. Since debenture certificates issued to Financial Creditor was carrying only zero interest and another was carrying one percent interest, the same was not issued against consideration for time value of money and the Financial Creditor was merely an investor.

#### **Contentions of Respondent – Financial Creditor**

- In the absence of Regulations framed by Board, the Code cannot be made ineffective.
- The Adjudicating Authority, before admitting the application, looked at the Balance Sheet of Corporate Debtor and ‘Form C’ under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations)

#### **Decisions of Appellate Authority and reasons thereof:**

Issues–

- Whether in absence of record of default as recorded with information utility or ‘any other record or evidence of default’ specified by Board, application under section 7 is maintainable.
  - 1) The Appellate Authority noted the provisions of section 7 of the Code. It observed that it was a settled principle of law that procedural provisions cannot override or affect substantive obligations of Adjudicating Authority to deal with applications under section 7 of the Code merely because Board has not specified Regulations.

- 2) The Appellate Authority noted that under section 239 of the Code, the Central Government has framed rules known as Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (Adjudicating Authority Rules). As per Rule 41, Financial Creditor filing application under section 7 of the Code is required to apply under Form I. Part V of Form I deals with Financial Debts, which include documents, record and evidence of default
  - 3) The Appellate Authority also noted that Board has framed CIRP Regulations which, under Regulation 8, provide for filing of claim by Financial Creditor under Form C
  - 4) The rules framed by Central Government having prescribed the documents, record and evidence of default, the Appellate Authority rejected the contention that in absence of Regulations being framed by Board, the application deserved to be dismissed.
- Whether claim filed by Financial Creditor is barred by Limitation
    - 1) The Appellate Authority observed that there is nothing on the record that Limitation Act, 2013 is applicable to the Code. Moreover, the Code is not an Act for recovery of money claim, it relates to initiation of corporate insolvency resolution process, hence default in payment of debt with continuous course of action cannot be barred by limitation.
  - Whether the respondent comes within the definition of 'Financial Creditor'
    - 1) Section 5(8)(c) of the Code defines the term 'financial debt' to include, *inter-alia*, as – any amount raised pursuant to any note purchase facility or the issue of bonds, notes, *debentures*, loan stock or any similar instruments. Therefore, from above said provisions, it is clear that 'debentures' comes within the meaning of 'Financial Debt'

Accordingly, the Appellate Authority dismissed the appeal filed by Corporate Debtor

### **Subsequent Development**

The Corporate Debtor challenged the above judgment of Appellate Authority before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court dismissed the appeal filed by Corporate Debtor. However, it observed that the question of law viz. Whether limitation act is applicable to Insolvency proceedings is left open.

### 3) SUPREME COURT JUDGEMENT

<b>Case Title</b>	M/s Innoventive Industries Ltd V/s. ICICI Bank & Anr.
<b>Appellant</b>	M/s Innoventive Industries Ltd
<b>Respondent</b>	ICICI Bank & Anr.
<b>Relevant Section under which case was filed before NCLT</b>	Section 9 of the Code dealing with the initiation of Corporate Insolvency Resolution Process by Operational Creditor.

- 1) The appellate filed the present appeal against the judgment of the NCLAT (Appellate Authority) whereby the Appellate Authority dismissed the appeal filed by appellant.
- 2) Briefly stated, the appellant began to suffer losses from August, 2012 owing to labour problems. Since the appellant was not able to service the financial assistance given to it by 19 banking entities, the appellant itself proposed corporate debt restructuring. The Joint Lenders Forum, in a meeting, approved the Corporate Debt Restructuring (CDR) plan submitted by the appellant. Accordingly, a Master Restructuring Agreement was entered by which funds were to be infused by creditors and certain obligations were to be med by debtor.
- 3) On 07.12.2016, an application was filed by ICICI Bank (Respondent Bank) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against the appellant. Reply was filed by appellant contending that there was no debt legally due inasmuch as vide two notifications dated 22<sup>nd</sup> July, 2015 and 18<sup>th</sup> July, 2016, issued under the Maharashtra Relief Undertakings (Special Provisions) Act, 1958, [State Act], all liabilities of appellant had been temporarily suspended for one year. This was the only point raised by appellant before the NCLT (Adjudicating Authority) to stall admission of application by Respondent Bank.
- 4) Vide judgment dated 17.01.2017, Adjudicating Authority allowed the application filed by Respondent Bank and held that the Insolvency and Bankruptcy Code, 2016 [Code], in view of the non-obstante clause in section 238 of the Code, would prevail against the State Act.
- 5) Appeal carried to Appellate Authority was dismissed. However, the Appellate Authority observed that the Code and the State Act operate in different fields and therefore, are not repugnant to each other.

#### **Submissions of Appellant**

- 1) The Appellant stated that the Appellate Authority, in fact, decided in its favour by holding that the two Acts operate in different fields and are not repugnant to each other, but, then went on to hold that the State Act would not apply.
- 2) Moratorium imposed by two notifications under the State Act continued in force at the time when insolvency application was made by Respondent Bank and thus, the Code would not apply.

- 3) Amounts due under the State Act had not fructified and for that reason, the application was premature.
- 4) Since there was no repugnancy between the two Acts, (as held by Appellate Authority), the State Act ought to have been given preference.

#### **Submissions of Respondent Bank**

- 1) The Counsel for Respondent Bank took the Hon'ble Supreme Court through various provisions of the Code and defended the judgments passed by Adjudicating Authority and Appellate Authority
- 2) There was conflict between the two acts inasmuch as, moratorium under the State Act and management taken over by the State government cannot stand together with the moratorium imposed under the Code and takeover of the management by Interim Resolution Professional.
- 3) It was also pointed out that the present appeal, at the behest of erstwhile directors of the appellants was not maintainable.

#### **Decision of the Hon'ble Supreme Court and the reasons thereof:**

- 1) The Hon'ble Supreme Court observed that once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, cannot maintain an appeal on behalf of the company. In the present case, company is the sole appellants. That being the case, present appeal was not maintainable. However, the Supreme Court was not inclined to dismiss the appeal on this ground alone and considering the fact that this was the very first application that has been moved under the Code, the Bench thought it necessary to deliver a detailed judgment so that all Courts and Tribunals could take notice of a paradigm shift in the law.
- 2) The Hon'ble Supreme Court thereafter observed the Statement of Objects and Reasons of the Code, went through the excerpts of Banking Law Reform Committee (BLRC) Report and various provisions of the Code. The Hon'ble Supreme Court noted the scheme of filing application by a Financial Creditor under section 7, by operational creditor under section 9 and the Corporate Debtor itself under section 10 of the Code.
- 3) On the issue of repugnancy between the State law and the subsequently enacted Central Act i.e. the Code, the Supreme Court observed various judgments passed by it on the subject and culled out the propositions on the same. The Hon'ble Supreme Court thereafter observed that the earlier State Law is repugnant to the Code as, under the State Law, the State Government may take over the management of the relief undertaking, after which a temporary moratorium comes into effect in much the same manner as contained in section 13 and 14 of the Code. Thus, by giving effect to the State law, the plan or scheme which is adopted under the Code, will directly be hindered and/or obstructed to that extent in that the management of relief undertaking, which, if taken over by the State Government, would directly impede or come in way of taking over the management of corporate body by IRP. Further, the moratorium declared under the State

Act would directly clash with the moratorium under the Code. Further, the later non-obstante clause of Parliamentary enactment will also prevail over the limited non-obstante clause contained in section 4 of the State Act.

- 4) Thus, it was held that the Central Act would prevail over State Act.
- 5) The appeal by Appellant was accordingly dismissed.

We hope these updates add value to your knowledge. Wish you good luck in all your endeavors!!

**CS ALKA KAPOOR**  
**CHIEF EXECUTIVE OFFICER**  
**(Designate)**

ICS/PA