

KNOWLEDGE REPONERE

**(A WEEKLY BULLETIN)
(25 TO 29 SEPTEMBER, 2017
AND 2 TO 6 OCTOBER, 2017)**

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“Be fearless in the pursuit of what sets your soul on fire.”

Dear Professional Members,

ICSI Insolvency Professionals Agency (ICSI IPA) in its constant endeavour to educate and train the Insolvency Professionals (IPs), have started organising intensive training in the form of three days Certification Course on Insolvency and Bankruptcy Code, 2016 (Code) at various places. The pilot programme was organized at Delhi from 5th to 7th October, 2017, followed by a programme at Mumbai which is being organised from October 12-14, 2017. The programme was attended by 28 registered insolvency professionals at Delhi and is being attended by and 29 insolvency professionals at Mumbai. We propose to organise the same at Chennai, Kolkata and other places where benches of National Company Law Tribunal are situated. The training is being given by leading insolvency professionals, eminent faculties from business and industry who possess rich experience in financing, accounting, legal, banking, accounting, corporate restructuring and insolvency sectors.

This course focuses practical aspects including taking over the business of corporate debtor as going concern, negotiation skills, understanding of contractual obligations, drafting of applications to NCLT during CIRP, dealing with non-co-operative corporate debtor, management of meeting of committee of creditors, understanding financial aspects of CIRP, analysis of landmark judgements, preparation of information memorandum/resolution plan.

We have also brought out a publication titled “Practical Aspects of Insolvency Law” was released at the hands of Dr M S Sahoo, Chair Person, IBBI and Dr Shyam Agrawal, President, ICSI at our Delhi Programme. This publication focuses on practical aspects of Corporate Insolvency Resolution Process including analysis of landmark judgments, model applications for initiating Corporate Insolvency Resolution Process (CIRP), model application to National Company Law Tribunal (NCLT) during CIRP, model formats of notices/agenda of meetings of Committee of Creditors, Model Information Memorandum, Model Resolution Plan. A copy of the said publication is being given to the participants of this three day certificate course on complimentary basis.

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:

S. No.	Case Title	Relevant SECTION	NCLT Bench	Amount in default mentioned in application (in Rupees)
1	Tata Capital Financial Services Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Principal Bench	3.64 Crores
2	Bank of Baroda V/s. Amrapali Infrastructure Pvt. Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Principal Bench	44.59 Crores
3.	Magma Fincorp Limited V/s. Amrapali Infrastructures Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Principal Bench	1.11 Crores
4.	Bank of Baroda V/s. Ultra Home Construction Private Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Principal Bench	31.92 Crores
5.	Indian Bank V/s. M/s. Athena Demwe Power Limited	Section 7 of the Code dealing with initiation of CIRP by financial	New Delhi	333.80 Crores

		creditor.		
6.	Modi Hitech India Limited V/s. Patel Heat Exchangers Private Limited	Section 9 of the Code dealing with initiation of CIRP by corporate debtor.	Ahmedabad	4.16 Lakhs
7.	Coburg Print & Pack V/s. Today's Writing Instrument Limited	Section 9 of the Code dealing with initiation of CIRP by corporate debtor.	Ahmedabad	18.98 Lakhs
8.	Lakshmi Steels V/s. Hounslow Builders Private Limited	Section 9 of the Code dealing with initiation of CIRP by corporate debtor.	New Delhi	18.62 Lakhs
9.	M/s. Oxygen Communications V/s. Iris Computers	Section 9 of the Code dealing with initiation of CIRP by corporate debtor.	New Delhi	60.41 Lakhs
10.	Lakshmi Steels V/s. Amrapali Infrastructure Pvt. Ltd.	Section 9 of the Code dealing with initiation of CIRP by corporate debtor.	Principal Bench	7.03 Crores
11.	Vivek Agarwal V/s. Kanak Resource Management Limited	Section 9 of the Code dealing with initiation of CIRP by corporate	Principal Bench	9.64 Lakhs

		debtor.		
12.	M.S. Motors V/s. Preet Tractors Private Limited	Section 9 of the Code dealing with initiation of CIRP by corporate debtor.	Chandigarh	29.68 Lakhs
13.	JM Financial Asset Reconstruction Company V/s. Indus Finance Limited	Section 9 of the Code dealing with initiation of CIRP by corporate debtor.	Mumbai	14.58 Crores
14.	M/s. Consolidated Construction Consortium Limited V/s. M/s. VA Tech Wabag Limited	Section 9 of the Code dealing with initiation of CIRP by corporate debtor.	Chennai	1.50 Crores
15.	Parte Casters Private Limited	Section 10 of the Code dealing with initiation of CIRP by corporate debtor.	Mumbai	5.63 Crores
16.	Manika Moulds Private Limited V/s. Alfa Batteries Private Limited	Section 9 of the Code dealing with initiation of CIRP by corporate debtor.	Mumbai	15.84 Lakhs

2) SUPREME COURT CASE BRIEFS

**M/s. Surendra Trading Company
V/s.
M/s. Juggilal Kamlatpat Jute Mills Company Limited & Ors.**

Appellant	M/s Surendra Trading Company
Respondent	M/s Juggilal Kamlatpat Jute Mills Company Limited & Ors.
Relevant Section	Section 9 of the Code dealing with the initiation of Corporate Insolvency Resolution Process by Operational Creditor.
Date of Judgement	19.09.2017

The issue before the Hon'ble Supreme Court in the present case was whether the time period of seven days prescribed in proviso to sub-section (5) of section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) is mandatory in nature and if, the defects contained in the application by 'operational creditor' for initiating Corporate Insolvency Resolution Process against a Corporate Debtor are not removed within seven days of receipt of notice for removal of such objections, then whether, such an application filed under section 9 of the Code is liable to be rejected?

Brief facts

- Respondent No. 1 namely M/s Juggilal Kamlatpat Jute Mills Company Limited (Corporate Debtor) was declared sick industrial company by Board for Industrial & Financial Reconstruction (BIFR) in 1994 as a result of which it came under the protective umbrella of section 22(1) of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) (i.e. no proceedings could have been initiated or continued upon admission of reference by BIFR). Appellant (Operational Creditor) supplied raw jute to respondent no. 1 in the year 2001, 2002 and 2003. In 2004, respondent no. 1 issued certificate acknowledging the debt, however, appellant could not recover its debt due to BIFR proceedings.
- In 2007, Rainey Park Suppliers Pvt. Ltd. invested in Respondent No. 1 and took over its management. Appellant sent legal notice but no payment was made.
- When SICA was repealed and Code came into effect, appellant issued statutory notice in prescribed format. Thereafter, application before NCLT, Allahabad Bench (Adjudicating Authority) was filed by appellant. There were some procedural defects

in the application filed by appellant which were not removed by appellant within time.

- Adjudicating Authority passed an interim order directing respondent no. 1 to maintain status quo which was challenged by respondent no. 1 before NCLAT (Appellate Authority)
- Appellate Authority allowed the appeal on the ground that the application under section 9 filed by appellant was incomplete and defective and was fit to be rejected.
- Accordingly, the present appeal was filed.

Decision of the Hon'ble Supreme Court and the reasons thereof

- The Hon'ble Supreme Court noted the procedure after admission of application and observed that time is the essence of the Code. Despite that, NCLAT held that fourteen days time period is not mandatory. Even though the said part of the order (i.e. with regard to fourteen days period) was not under challenge, the Hon'ble Supreme Court observed that it was apposite to see the reasoning for holding such by NCLAT.
- It was observed that right after analysing the provisions of fourteen days time within which Adjudicating Authority is to pass the order, NCLAT jumped to another conclusion viz., the period of seven days and there was no discussion on this aspect. Hon'ble Supreme Court observed that there was no valid reason given by NCLAT to come to such conclusion. The period of 180 days starts from admission of application. Period prior to that is not to be counted. Thus, no purpose is served by treating the period of seven days as mandatory.
- Looked at from another angle, Hon'ble Supreme Court observed that it has to be seen whether the rejection would be treated as rejection of application on merits thereby debarring filing of fresh application or the same is merely an administrative order. In the former case, it would lead to travesty of justice as even though the case may have merits, the applicant would be shown the door without adjudication. If it is the latter case, then rejection of application in the first instance is not going to serve any purpose as applicant would be entitled to file fresh application which would have to be entertained. Thus, in either case, no purpose is served by treating the aforesaid provision as mandatory.

- However, Hon'ble Supreme Court also put a rider. It noted that many frivolous applicants would file the application but would not cure the defects. In such case, a caveat has been put and that is, that if objections are not removed within seven days, the applicant, while refilling the application after removing objections, would be required to file an application in writing showing sufficient case as to why the applicant could not remove the objections within seven days. When such an application comes, Adjudicating Authority is to decide whether sufficient cause is shown or not.

M/s. Mobilox Innovations Private Limited
V/s.
M/s Kirusa Software Private Limited

Appellant	M/s Mobilox Innovations Private Limited
Respondent	M/s Kirusa Software Private Limited
Relevant section	Section 9 of the Code dealing with the initiation of Corporate Insolvency Resolution Process by Operational Creditor.
Date of Judgment	21.09.2017

- The interpretation of term 'dispute' defined under section 5(6) of the Insolvency and Bankruptcy Code, 2016 (Code) came up for consideration before the Hon'ble Supreme Court in this case.
- The NCLAT (Appellate Authority) in the impugned judgment had held the term to be illustrative, and not exhaustive.

Brief facts

- The Appellant (Corporate Debtor) was engaged by Star TV for conducting tele-voting for the dance programme *Nach Baliye*. The appellant had sub-contracted the same to the Respondent (Operational Creditor), which was to provide toll-free numbers through which viewers could cast their votes in favour of contestants of their choice.
- The appellant was liable to pay the respondent for rentals for the toll-free numbers, as well as primary rate interface rental to the telecom operators. The respondents had

raised invoices of the same between November 2013 and December 2014. A non-disclosure agreement (NDA) was signed between the two parties on December 26, 2014.

- Then, in January 2015, the appellant had informed the respondent that they were withholding payments due to them, as the latter had revealed on their website that they had worked for the *Nach Baliye* program, thus, violating the terms of the NDA.
- In response, the respondent sent a demand notice to the appellant claiming dues of over Rs. 20 Lakhs, under Section 8 of the Code.
- On refusal of the appellant to pay for the dues raised in invoice, the respondent preferred an application before the NCLT (Adjudicating Authority) claiming an operational debt of Rs. 20 lakh.
- The application was rejected by the Adjudicating Authority on the ground that it was hit by Section 9(5)(ii)(d) i.e., there was existence of a 'dispute'.
- The said order was appealed before the Appellate Authority and the Appellate Authority held that, considering the propositions with regard to dispute laid down by Appellate Authority, it is clear that there was no dispute in existence in the present case and accordingly, the Appellate Authority remanded the case back to the Adjudicating Authority with a direction to "consider the application of the Appellant (the respondents before the Supreme Court) for admission if the Application is otherwise complete."
- The above impugned order passed by Appellate Authority was challenged before the Hon'ble Supreme Court by the appellant.

Submissions of Appellant

- There was no certificate from a financial institution viz. IDBI that maintained accounts of operational creditor i.e., the respondent, which confirmed that there was no payment of any unpaid operational debt by appellant.
- There was existence of 'dispute' and under section 8(2)(a), the expression 'existence of dispute, if any, and record of the pendency of the suit or arbitration proceedings filed...' must be read as existence of a dispute "or" record of the pendency of the suit or arbitration proceedings i.e., reading them disjunctively. Thus, according to appellant, the definition of word 'dispute' is inclusive one.

Submissions of Respondent

- The ground with regard to absence of certificate from financial institution was never raised before the Appellate Authority and thus, the same cannot be raised before the Hon'ble Supreme Court
- The expression 'dispute' under section 5(6) covers only three things, namely, existence of amount of debt, quality of goods or services or breach of a representation or warranty and since what was sought to be brought as a defence was that the NDA was breached, it would not come within the definition of 'dispute under section 5(6).

Decision of the Hon'ble Supreme Court and the reasons thereof

- The Hon'ble Supreme Court, after going into the history of the Code and the evolution of the provisions therein, noted that in the first Insolvency and Bankruptcy Bill, 2015, that was annexed to the Bankruptcy Law Reforms Committee Report, section 5(4) defined 'dispute' as meaning a 'bona fide suit or arbitration proceedings...'. In the present avatar, section 5(6) excludes the expression 'bona fide' which is of significance. It held that the definition of dispute has thus become an inclusive one, after the phrase "bona fide" has been deleted after the phrase "suit or arbitration proceedings".
- Further, the Bench held that, keeping in mind the legislative intent, the word "and" in Section 8(2) must be read as "or". It was observed that *"...if read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an arbitral tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an arbitral tribunal or a court for upto three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended..."*
- Coming to its interpretation of the term "existence of dispute", the Court held that once the same has been brought to the notice of the operational creditor, *"...all that the adjudicating authority is to see at this stage is whether there is a plausible*

contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence... The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical.”

- Applying this to the facts of the present case, the Court agreed with the submissions of appellant i.e., the Corporate Debtor that a dispute between the parties clearly existed, and that the application ought to have been dismissed by the Adjudicating Authority.
- Thus, the Hon'ble Supreme Court allowed the appeal and set aside the ruling of the Appellate Authority.

3) NCLAT JUDGEMENT

Appellant	Centech Engineers Pvt. Ltd. & Anr.
Respondent	Omicron Sensing Pvt. Ltd.
Relevant section	Section 9 of the Code dealing with the initiation of Corporate Insolvency Resolution Process by Operational Creditor.
Date of Judgment	05.10.2017

- The appeal was filed by Appellants – Corporate Debtor against the judgment of the NCLT, Mumbai Bench (Adjudicating Authority) whereby the application filed by respondent – operational creditor under section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) was admitted.

Submissions of Appellant

- The appellant submitted that the demand notice in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (Rules) in terms of Rule 5, was not issued by ‘operational creditor’ but, by Advocates Association, namely, SPS & Associates.
- Appellant relied upon **‘Macquarie Bank Limited vs. Uttam Galve Metallics Ltd.’ – Company Appeal (AT) (Insol.) No. 96 of 2017** wherein, it was held that an advocate/lawyer or Chartered Accountant or a Company Secretary or any other

person, in the absence of any authority by the ‘operational creditor’, cannot issue notice under section 8 of the Code.

Decision of the Appellate Authority and the reasons thereof

- The Appellate Authority observed that admittedly, in the present case, notice was given by ‘Associate of Advocates’ and there is nothing on record to suggest that ‘Associate of Advocates’ was authorized by respondent – operational creditor or was holding any position with or in relation to respondent company, and the so-called notice cannot be treated as notice under Section 8 of the I&B Code.
- The counsel for respondent admitted that notice was issued by ‘Associate of Advocates’ and also submitted that the due amount has been paid by Corporate Debtor.
- Thus, it cannot be said that notice was issued by ‘operational creditor’ or ‘any person authorized by it’.
- Accordingly, the Appellate Authority dismissed the application under section 9 of the Code filed by the operational creditor.

4) REJECTED CASES

Numerous cases have been filed under the Code across different benches of NCLT. However, recently few cases have been rejected by NCLT on specific grounds while majority have been rejected on routine grounds such as non presence of parties at the time of hearing, mutual consent between the parties to withdraw the case, inadequate documents etc.

S. No	Case Title	Reasons for rejection
1.	M/s. Manit Steel V/s. Amrapali Infrastructure Pvt. Ltd. (Date of Order : 15 th September, 2017)	<ul style="list-style-type: none">• The application was filed before the NCLT, New Delhi Principal Bench (Adjudicating Authority) u/s 9 of the Code.• Applicant is engaged in trading of iron and steel (goods) and in normal course of

its business, supplied the same and raised invoices based on the purchase orders placed by Corporate Debtor.

- As on 31.03.2016, the amount due from the Corporate Debtor, for the supply of goods was stated to be Rs. 1,22,76,607/-. The Corporate Debtor issued cheques to clear the outstanding however, a request was made not to present them. Upon insistence from applicant, the same were presented which dishonoured for the reason “payment stopped”.
- Applicant issued legal notice under section 434(e) of the Companies Act, 1956 for winding up of Corporate Debtor before Hon'ble High Court of Delhi.
- Since the notice of winding up petition was not served upon respondent – Corporate Debtor and, in the meantime, the Code came into force, the matter was transferred to NCLT, Principal Bench, New Delhi (Adjudicating Authority) vide order dated 22.02.20217 passed by Hon'ble High Court.
- The same was listed before the Adjudicating Authority on 22.03.2017.
- The Adjudicating Authority directed the applicant to comply with the provisions of the Code since the notice under section 8 of the Code had not been served.
- The applicant, pursuant to the direction

issued by Adjudicating Authority, issued demand notice dated 28.03.2017 under section 8 of the Code.

- The applicant also filed another affidavit of service of notice upon Corporate Debtor, however, none appeared for Corporate Debtor.
- The Adjudicating Authority observed that the application was defective, in as much as, there was violation of mandatory provisions of section 9(3)(a) to (c) of the Code.
- Further, it was observed that the notice of demand under section 8 of the Code was issued by the Advocate and the authorization for the advocate to act on behalf of the applicant had not been produced.
- Relying upon the NCLAT judgment in Uttam Galva Steel Limited vs. DF Deutsche Fortain AG & Anr., the Adjudicating Authority observed that all the above mandatory provisions had to be complied by the applicant, the application was thus 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)