

KNOWLEDGE REPONERE

**(A WEEKLY BULLETIN)
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INSOLVENCY PROFESSIONALS AGENCY

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*“Education is what remains after one has forgotten what one has learned in school –
Albert Einstein*

Dear Professional Members,

With a view to ensure that the interest of all stakeholders are protected, the Insolvency and Bankruptcy Board of India (IBBI), issued an Notification dated 5th October, 2017 whereby the **Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016** were amended. The amendment has introduced sub-regulation (1A) to be inserted after sub-regulation (1) of Regulation 38 of the above Regulations and reads as under:

“(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.”

Thus, it now becomes mandatory for a resolution professional, while conducting the Corporate Insolvency Resolution Process (CIRP), to take a holistic view and ensure that the interests of all stakeholders is dealt with.

The amendment is a step in the right direction since it now makes explicit, what can always be said to have been implicit. The principles on which the Insolvency and Bankruptcy Code, 2016 (Code), as delineated in the Report of the Banking Law Reforms Committee (BLRC), is, *“a collective mechanism for resolving insolvency within a framework of equity and fairness to all stakeholders to preserve economic value in the process”*. Further, even the object clause of the Code stresses upon balancing the interest of all stakeholders. In line with the objectives mentioned in BLRC Report and the object clause of the Code, section 31(1) of the Code provides that the Resolution Plan approved by the Adjudicating Authority shall be binding on, *inter alia*, ‘all the other stakeholders.’ Similarly, a liquidator has power to ‘consult any of the stakeholders’ entitled to a distribution of proceeds. Thus, balancing the interest of stakeholders is imbibed in the Code.

1) Case Updates

The details of the newly admitted cases are tabulated below:

S. No.	Case Title	Relevant Section	NCLT Bench	Amount in default as mentioned in application (in Rupees)
1	Sahara Fincon Private Limited V/s. Tirupati Ceramics Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Chandigarh	Amount not mentioned in the order
2	Allahabad Bank V/s. M/s. Supreme Tex Mart Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Chandigarh	Amount not mentioned in the order
3.	Central Bank of India V/s. Deivaanai Sinter Metals Private Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Chennai	6.97 Crores
4.	Punjab National Bank V/s. Linkson International Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Mumbai	106.97 Crores
5.	Punjab National Bank V/s. Linkson Ispat & Energies Private Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Mumbai	52.45 Crores
6.	M/s. KG Marketing V/s. Suvidha Sign Studios Private Limited	Section 9 of the Code dealing with initiation of CIRP by corporate debtor.	New Delhi	1.41 Crores

7.	M/s. Seaways Shipping and Logistics Limited V/s. Cargo planners Limited	Section 9 of the Code dealing with initiation of CIRP by corporate debtor.	New Delhi	74.82 Lakhs
8.	M/s. Vimal Organics Limited V/s. M/s. Anya Polytech and Fertilizers Private Limited	Section 9 of the Code dealing with initiation of CIRP by corporate debtor.	New Delhi	81.48 Lakhs
9.	Nr Switch N Radio Services Private Limited V/S. Zte Telecom India Private Limited	Section 9 of the Code dealing with initiation of CIRP by corporate debtor.	Chandigarh	4.14 Crores
10.	M.S. Motors V/s. Preet Tractors Pvt. Ltd.	Section 9 of the Code dealing with initiation of CIRP by corporate debtor.	Chandigarh	Amount not mentioned in the order
11.	M/s. Consolidated Construction Consortium Limited V/s. VA Tech Wabag Limited	Section 9 of the Code dealing with initiation of CIRP by corporate debtor.	Chennai	1.50 Crores
12.	Chennai Ferrous Industries Limited V/s. Surya Balaji Steels Private Limited	Section 9 of the Code dealing with initiation of CIRP by corporate debtor.	Chennai	84.56 Lakhs
13.	Shaw Traders V/s. Balaji Paper and Newsprint Private Limited	Section 9 of the Code dealing with initiation of CIRP by corporate debtor.	Kolkatta	92.63 Lakhs

2) BRIEF NOTE

NCLAT Judgments

Anu Elastics Pvt. Ltd.

... Appellant - Corporate Debtor

vs.

Aggarwal Elastics

... Respondent - Operational Creditor

Date of Judgment: 10th October, 2017

- The appeal was filed by the appellant - Corporate Debtor against the order dated 25th July, 2017 passed by NCLT, New Delhi Bench (Adjudicating Authority) whereby the application under section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) filed by respondent - Operational Creditor was admitted.

Grounds of appeal by Corporate Debtor

- i. It was contended that no notice was issued or served by the Adjudicating Authority on the Corporate Debtor
- ii. There was existence of dispute and yet, the application was admitted by Adjudicating Authority. In this regard, Corporate Debtor relied upon a reply dated 1st June, 2016 given in response to a legal notice dated 9th March, 2016 issued by Operational Creditor.

Submission of the Operational Creditor

- i. The Operational Creditor submitted that the notice was issued by the Adjudicating Authority by Dasti i.e. through the Operational Creditor. The operational creditor relied upon the affidavit filed by it before the Adjudicating Authority to contend that Corporate Debtor was in fact, served.

Decision of the Appellate Authority and the reasons thereof:

- i. The Appellate Authority observed that from a perusal of the order dated 3rd July, 2017, vide which the Adjudicating Authority held that notice was served upon Corporate Debtor, it was clear that the affidavit filed by operational creditor stated that there was 'no such office at the give address'. Thus, it could not have been held by Adjudicating Authority that there the Corporate Debtor was duly served.
- ii. However, a perusal of the letter dated 1st June, 2016 issued by Corporate Debtor, it was clear that there was in fact, existence of dispute.
- iii. Accordingly, the impugned order passed by the Adjudicating Authority was set aside and the application filed by operational creditor was dismissed.

Smartcity (Kochi) Infrastructure Pvt. Ltd ...Appellant - Corporate Debtor
vs.
Synergy Property Development Services
Private Limited and Another ...Respondent - Operational Creditor

Date of Judgment: 12th October, 2017

- The appeal was filed by appellant - Corporate Debtor challenging the order dated 9th June, 2017 passed by NCLT, Chennai Bench (Adjudicating Authority) whereby the application under section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) filed by respondent - Operational Creditor was admitted.

Grounds of appeal by Corporate Debtor

- i. Notice under sub-section (1) of section 8 of the Code was not issued by the 'operational creditor' but by the 'law firm' which is not in accordance with law.
- ii. Notice under rule 4(3) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for short "Application to Adjudicating Authority Rules") was not sent by the 'operational creditor' but by a 'law firm' and
- iii. There is a dispute in existence and therefore, the application under section 9 was not maintainable.

Submission on behalf of Operational Creditor

- i. The fact regarding issuance of notice by law firm was admitted, however, the counsel for the operational creditor submitted that the matter had been settled.

Decision of the Appellate Authority and the reasons thereof:

- i. The Appellate Authority, relying upon the Section 8(1) of the Code read with Rule 5 of the Application to Adjudicating Authority Rules observed that the notice in the present case was not issued by the operational creditor but, by a law firm. The Appellate Authority quoted the judgment passed by it in M/s Uttam Galva Steels Limited vs. DF Deutsche Forfait AG & Anr. wherein it was held that the demand notice under section 8 of the Code must be issued by the Operational Creditor and not by any 'lawyer', 'chartered accountant' or 'company secretary'.
- ii. In the present case, the notice was issued by a law firm and there was nothing on record to show that the said law firm has been authorized by the Board of Directors of the 'operational creditor'. Thus, the application under section 9 of the Code was not maintainable.
- iii. On the issue of 'existence of dispute', the Appellate Authority noted that, much prior to issuance of notice by operational creditor, the Corporate

Debtor had issued a notice letter dated 12.11.2016 wherein the Corporate Debtor intimated the operational creditor that the latter had discontinued the service and abandoned the work and requested the operational creditor for completion of work. Thus, the Appellate Authority was of the view that there was existence of dispute.

- iv. Accordingly, the impugned order passed by the Adjudicating Authority was set aside and the application filed by operational creditor was dismissed.

3) **REJECTED CASES**

Out of the cases filed with different NCLT Benches, various cases have been rejected and dismissed by the Tribunal. A brief summary of the rejected and dismissed cases is compiled below:

S. No	Case Title	Brief Facts and Reasons for rejection
1.	<p>NR Swtich N Radio Services Private Limited vs. ZTE Telecom India Private Limited</p> <p>Date of Judgment: 11.10.2017 (NCLT, Chandigarh Bench)</p>	<ul style="list-style-type: none"> • The application was filed under section 9 of the Code. Before filing the application, demand notice dated 27.05.2017, in Form No. 3 was sent to Corporate Debtor which was replied disputing the claim • Briefly stated, the parties entered into three different agreements and the applicant started to provide services under the agreements. Initially, Corporate Debtor made payments on issuance of invoices, however, later on, the payment for invoices raised was not made. • The Corporate Debtor stated, inter alia, that the work under the agreements got concluded in 2014 and hence, the invoices from period 2011 to 2014 were time barred. Furthermore, many of the invoices were paid for by the Corporate Debtor. It was stated that invoices issued after 2014 were an afterthought. • It was also stated that the application has not filed statement/certificate from the relevant bank, as required under the

law.

- It was stated that the Corporate Debtor was not liable to pay amount of Rs. 2,18,12,493/, rather, the application owed Rs. 4,14,949/- to the Corporate Debtor.
- The Adjudicating Authority rejected the submission of the Corporate Debtor that the applicant is bound to issue financial statements from the year 2011 contenting that the language of section 9(3)(c) does not warrant such interpretation. The Adjudicating Authority held that there was due compliance of such provision by applicant.
- The contention with regard to claim being time barred was also rejected on the ground that part payment was made in the year 2016 and thus, fresh period of limitation would start from that period.
- On the issue of 'existence of dispute' the Adjudicating Authority observed that from the perusal of the emails and letters exchanged between the parties, it was clearly established that there was existence of dispute. The Adjudicating Authority noted that 47 invoices were relied upon by applicant and all are dated 01.03.2017. Before this, the last invoice was dated 08.11.2015.
- One such invoice dated 01.03.2017 pertains to purchase order dated 25.08.2014 and a perusal of the documents annexed with this invoice shows that it actually pertains to invoice dated 26.02.2015.
- Furthermore, the Adjudicating Authority noted that of the 47 invoices relied upon by the applicant, only 16 invoices were annexed with Form No. 3 by the applicant. The contention of the applicant was that it was not necessary

		<p>to annex all the invoices. However, the Adjudicating Authority rejected the said contention contending that the claim of applicants is based on invoices and not ledger account. Thus, the demand notice was not valid.</p> <ul style="list-style-type: none">• Accordingly, the application was rejected.
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Wish you good luck in all your endeavors!!

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