

KNOWLEDGE REPONERE

**(A WEEKLY BULLETIN)
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(A Weekly Bulletin: December 04, 2017- December 08, 2017)

Dear Professional Members,

Greetings!

We are pleased to share with you our next issue of weekly bulletin on the Insolvency and Bankruptcy Code, 2016 (“Code”).

Insolvency and Bankruptcy Board of India (“IBBI”) has issued the IBBI (Grievance and Complaint Handling Procedure) Regulations, 2017. The regulations enable a stakeholder, namely, debtor, creditor, claimant, service provider, resolution applicant or any other person having an interest in an insolvency resolution, liquidation, voluntary liquidation or bankruptcy transaction under the Code, to file a grievance or a complaint against a service provider, namely, insolvency professional agency, insolvency professional, insolvency professional entity or information utility. The detailed regulations are available at http://ibbi.gov.in/webadmin/pdf/whatsnew/2017/Dec/180723_2017-12-09%2009:58:17.pdf

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 as mentioned in application (in Rupees)
1.	Nitin Gupta V/s. M/s. Applied Electro Magnetic Pvt. Ltd.	Section 9 of the Code dealing with initiation of CIRP by operational	New Delhi	46.77 Lakhs

		creditor.		
2.	M/s. Regal Metals and Ferro Alloys V/s. M/s. SPM Auto Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	5.55 Crores
3.	JBB Enterprises V/s. YMS Mobitech Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Allahabad	1.88 Crores
4.	Lakshmi Vilas Bank Limited V/s. Orchid Pharma Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Chennai	Amount not mentioned in the order
5.	M/s. Surya Balaji Steels Pvt. Ltd. V/s.	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Chennai	Amount not mentioned in the order

2) NCLAT JUDGEMENTS

D. Muthukumar V/s. A. Premkumar & Another

Date of Judgment: 06.12.2017

Brief facts:

- A. Prem Kumar & Another, Financial Creditors, Respondents in the present case initially filed a petition under section 433 (e) and (f) of the Companies Act, 1956 before the Hon'ble High Court of Madras which was transferred to National

Company Law Tribunal (“NCLT”), Chennai Bench, pursuant to the Companies (Transfer of Pending Proceedings) Rules, 2016.

- NCLT, treated the petition under section 433(e) and (f) of the Companies Act, 1956 to be an application under section 7 of the Code, 2016 read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (“**Adjudicating Authority Rules**”), and thereafter admitted the application and passed order of moratorium.

It was contended by Mr. D. Muthukumar, the Appellant that Mr. A. Prem Kumar & Another, Respondents are not financial creditors within the meaning of sub-section (7) read with sub-section (8) of section 5 of the Code. Mr. D. Muthukumar, the Appellant also enclosed copies of cheques apart from copies of relevant pages of ledger book to suggest that repayment has already been made to Mr. A. Prem Kumar i.e. the 1st Respondent.

- Mr. A Prem Kumar, 1st Respondent, alleged that the income tax return submitted by Mr. D. Muthukumar, the Appellant suggests that the amount was taken from Mr. A Prem Kumar, 1st Respondent and shown as ‘loan’ and despite approaching the Mr. A Prem Kumar, the Appellant for repayment of dues, the amount was not paid.

Decision of NCLAT and reasons thereof:

- The NCLAT observed that as per section Rule 4 (1) of the Companies (Transfer of Pending Proceedings) Rules, 2016 and Adjudicating Authority Rules it was clear that an applicant is required to provide information as required under Form-I. Further, Rule 4 (3) of Adjudicating Authority Rules, mandates the applicant to provide the copy of the application to a Corporate Debtor, immediately after filing of application. NCLAT also noted that as per Form-I, i.e. the format for filing application under section 7 of the Code, various details and documents are to be provided and attached.
- NCLAT noted from the records, that except for the information as mentioned in the petition under section 433(e) and (f) of the Companies Act, 1956, no further information was provided by respondents in terms of rule 5 of the Companies (Transfer of Pending proceedings) Rules, 2016. Further, the documents

mentioned in Part V of Form-I had not been supplied by respondents before the NCLT.

- NCLAT also noted that there was doubt submitted as to whether the 1st respondent i.e. Mr. A. Prem Kumar, 1st Respondent could claim to be a financial creditor. In this regard, NCLAT noted that the ITR enclosed by 1st Respondent treated him to be a ‘creditor’ but the debt shown was unsecured loan. Further, the Mr. A. Prem Kumar, 1st Respondent could not show that the debt along with interest had been disbursed against ‘consideration for time value of money’.
- NCLAT observed that NCLT did not ascertain the question as to whether 1st respondent was a financial creditor or not, particularly in absence of any pleading which showed non-application of mind on part of NCLT.
- In view of aforesaid, NCLAT allowed the appeal and held that the application under section 433 (e) and (f) of the Companies Act, 1956 transferred to NCLT could not be treated as application under section 7 of the Code.

3) NCLT JUDGEMENTS

K. Sashidhar V/s. Kamineni Steel & Power India Pvt. Ltd.

Dated of Judgment: 27.11.2017

Brief facts:

- Kamineni Steel & Power India Pvt. Ltd. (“**Kamineni**”) filed an application under section 10 of the Code, 2016 for initiating corporate insolvency resolution process (“**CIRP**”) against itself. The application was admitted by NCLT *vide* order dated 10.02.2017 and an Interim Resolution Professional (“**IRP**”) was appointed.
- During the 4th meeting of Committee of Creditors (“**CoC**”), it was decided that Kamineni must come out with a concrete resolution plan including offering One-Time Settlement (“**OTS**”) acceptable to the lenders.
- During the 5th meeting of CoC, it was unanimously resolved that the NCLT shall be approached for extension of time period for another 90 days since approval of

the resolution plan submitted by Kamineni would require time. Upon extension of the period of CIRP by 90 days, meetings took place between the financial creditors and Kamineni wherein various resolution plans were submitted with changes as indicated by financial creditors from time to time.

- For the purposes of taking decision at CoC, as on 30.10.2017, the percentage of consenting financial creditors for approving the resolution plan by way of OTS was 66.67. Whereas, the percentage of dissenting lender banks not approving the resolution plan by way of OTS was 26.97. While the percentage of lender banks which remained open for the approval of the resolution plan by way of OTS was 6.36.
- Since, no resolution plan submitted by Kamini was approved by a minimum of 75% of voting share of financial creditors, the IRP, who was later affirmed as the Resolution Professional (“**RP**”), filed the application before the NCLT and submitted that the revised resolution plan submitted by Kamineni must be approved by the NCLT relying upon the following:
 - i. NCLT, Mumbai Bench in *Raj Oil Mills Ltd. and Edelwise Asset Reconstruction Company Limited*, while dealing with section 22 of the Code in para 8.1 observed that “the term ‘may’ used has prescribed a jurisdiction to deal with the issue of percentage of voting share depending upon the facts and circumstances of each case”
 - ii. RBI, vide its notification of May, 2017, relating to timelines for Stressed Assets Resolution relating to “Framework for Revitalising Distressed Assets in the Economy – Guidelines on Joint Lenders’ Forum (JLF) and Corrective Action Plan (CAP)” has reiterated that the lenders must scrupulously adhere to the timelines prescribed in the frame work for finalizing and implementing the CAP. Further, the notification provided that in order to facilitate timely decision making, the decisions agreed upon by a minimum of 60 percent of creditors by value and 50 percent of creditors by number in the JLF would be considered as the basis for deciding the CAP and will be binding on all lenders.
 - iii. The process of liquidation of Kamineni’s assets, if opted for, is a time consuming process and realization of the assets will take a minimum of 2 to 3 years.

- iv. The Central Bank of India, with voting share of 11.82% had not provided any reasons for dissenting to the resolution plan by way of OTS proposal.
- v. As per provisions of section 30(2) of the Code and regulation 28 and 29(4) of the IBC (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“**CIRP Regulations**”), the resolution plan meets all the requirements.

In light of the above contentions, RP prayed before NCLT for treating the resolution plan as approved.

However, one of the three dissenting bank, Indian Overseas Bank, as also other dissenting banks, took following grounds to reject the resolution plan:

- i. That, the resolution plan does not factor in the liabilities of the corporate guarantors and personal guarantors and evaluation of their respective assets.
- ii. There is no clarity on the source of funds required for the proposed pay out. Bank’s internal rules do not allow any compromises/settlements wherein the repayment is beyond 12 months.

Decision of NCLT and reasons thereof:

NCLT observed that:

- i. Kamineni was incorporated in the year 2008. The company was functional till the financial year 2014-15 and it could not continue due to shortage of working capital and various other factors which included mismatch of cash flow and financial crises leading to heavy operational losses and consequent erosion of entire net worth.
- ii. It is clear that the resolution plan submitted by Kamineni fulfils all the eligibility criteria for its approval except the condition prescribed under section 30(4) of the Code regarding minimum 75% of voting share of the financial creditors.
- iii. Out of the 8 financial creditors, 5 approved the resolution plan. Even the lead banker of JLF i.e. Indain Bank approved the resolution plan. CoC authorized the lead banker for various activities viz. Approval of valuers, appointment of professionals, etc. however, at the time of approval of resolution plan, the

other banks, instead of following lead bank or majority of other banks, have taken different stand and appears that they are interested mostly in liquidation of the Corporate Debtor rather than its revival, which is the main aim of the Code.

- iv. Contrary to the RBI notification of May, 2017, the dissenting banks did not have mandate to approve the resolution plan submitted by resolution professional
- v. The Corporate Debtor i.e. Kamineni, even revised the OTS amount upwards to Rs. 600 crores from Rs. 525 crores and has also reduced the tenure of the repayment from 2 ½ years to 2 ¼ years.
- vi. NCLT granted sufficient time of hearing to the Bank Officials on two occasions. In spite of spending considerable time; and given the whole picture of the need for resolution of Kamineni, a company which provided direct employment to around 450 employees till recently and a number of indirect employees/facilities/beneficiaries, possible contribution by way of revenue to exchequer, contribution to GDP; the Senior Officials of the dissenting bank did not even move an inch from their previous stand and they simply reiterated that the revised OTS amount proposed was very less. No amount was quoted by the said officials.
- vii. Even a private sector Asset Reconstruction Company namely JMF ARC Limited accepted the revised OTS scheme which was also agreed by other Public Sector Banks (“PSBs”) which constitutes 66.67% of the total voting share of CoC. Although, the private sector ARC as well as the PSB were willing to take a haircut, the three dissenting PSBs were not willing to take a haircut.
- viii. Since the Insolvency and Bankruptcy Code, 2016 is a new Code/law and still evolving, the above percentage has to be read with various circulars issued by RBI, which is the regulator for the Banking sector. As per the RBI guidelines, 60% of the creditors by value and 50% of the creditors by number if they approve the plan, the same will be binding on other lenders. Thus, considering the RBI circular, though 75% of lenders in value did not approve the revised OTS Scheme, considering the entire issue, the Adjudicating Authority was inclined to approve the revised OTS scheme.

- ix. In the Code, at various places, the word 'may' and 'shall' is used. However, section 30(4) of the Code merely states that resolution plan **may** be approved by a vote not less than 75% of voting share of the financial creditors. It does not say whether such percentage is out of total voting share of financial creditors or those present during meeting of CoC. Further, section 31 of the Code states that "if the adjudicating authority is satisfied...". Therefore, the paramount duty is cast upon the Adjudicating Authority while approving the resolution plan to exercise judicious mind in the facts and circumstances of the specific case.
- x. Accordingly, the NCLT was of the view that the considering the resolution plan, circulars/guidelines issued by RBI from time to time, economy of the Country, social obligations cast on the part of Government to create employment, rural development, the resolution plan ought to be accepted. NCLT noted that three dissenting PSBs did not exhibit even one percent concern towards social object of the county.
- xi. NCLT observed that it was satisfied that the Resolution Plan contained all mandatory provisions and RP followed all extant provisions of the Code, rules and regulations made there under apart from following principles of natural justice.
- xii. NCLT exercising its powers under section 31 (1) of the Code and taking into account the facts of the case, provisions of the Code and taking practical approach considering the place in which unit is situated, to meet the ends of justice allowed the petition and directed approval of resolution plan as per revised OTS Scheme submitted by RP was approved and held to be binding on the Corporate Debtor and its creditors, employees, members. NCLT also directed Managing Director of Kamineni to reinstate all the 450 employees who were on the rolls of the Kamineni before stopping its operations.
- xiii. NCLT also expressed guidelines/instructions in relation to insolvency process. NCLT stated that in order to avoid difficulties faced in the instant CIRP, it would be appropriate for the authorities to issue necessary guidelines especially for the members of CoC to attend those meetings with full mandate from their competent authorities so as to take a final call during the meetings itself instead of expressing their acceptance or otherwise outside

the meetings of CoC. NCLT also noted that the functioning of 3 dissenting Banks namely Indian Overseas Bank, Central Bank of India, Bank of Maharashtra in resolving the bad loans/NPAs deserve to be carefully scrutinized by the Banking Sector Regulator and in this regard directed its Registry to forward a copy of the order to the Governor, RBI.

4) REJECTED ORDER

Smt. Srikanta Sarda vs. M/s Tansway Marketing Pvt. Ltd.

Date of Judgment: 04.12.2017

Brief facts:

- Smt. Srikanta Sarda, Financial Creditor (“**Smt. Sarda**”) filed application under section 7 of the Code against M/s Tansway Marketing Pvt. Ltd., Corporate Debtor (“**Tansway Marketing**”).
- Smt. Sarda alleged that, Tansway Marketing availed a cash loan of Rs. 5,00,000/- from her which was sanctioned as per letter dated 17.08.2016, a promissory note and duly signed by Tansway Marketing’s director Mr. Mukesh Kumar Singal. Smt Sarda alleged that Tansway Marketing defaulted repayment of amount as promised, it was liable to pay the amount with interest @ 15% p.a. and that despite repeated demand notices dated 28.01.2017 and 24.02.2017, Tansway Marketing failed to repay the amount.
- Tansway Marketing alleged that the application was not maintainable because Tansway Marketing was not in existence on the date of filing of the application. It was also alleged that the name of Tansway Marketing was struck off from the Company Master Data and therefore, Tansway Marketing could not file any reply.

Decision of NCLT and reasons thereof:

- As regards allegation of maintainability of the application on the ground that Tansway Marketing was not in existence, NCLT noted that Smt. Sarda filed Exhibit A which is copy of the Company Master Data downloaded on 16.06.2017

and it shows that Tansway Marketing was active as on that date. However, Company Master Data filed by Tansway Marketing dated 10.11.2017 shows the company status as strike off but when exactly the name of Tansway Marketing was struck off by Ministry of Corporate Affairs is not certain.

- NCLT took note of a resolution dated 20.10.2017 produced by Tansway Marketing purported to be issued by the Board of Directors of Tansway Marketing authoring the advocate for Tansway Marketing to appear before NCLT on its behalf. NCLT rejecting the argument of Tansway Marketing that it was not in existence at the time of filing the application (i.e. 01.08.2017) observed that reference of the resolution shows that Tansway Marketing was active when the Board of Directors convened meeting on 20.10.2017.
- NCLT held that the letter dated 17.08.2016 cannot be termed as promissory note and in this regard observed that the necessary ingredients of a promissory note i.e. a written promise by one party to pay another party an advance sum of money either on demand or at a specified future date was missing. Further, the alleged promissory note was not properly stamped in terms of Rule 5 of the West Bengal Stamp Rules.
- NCLT rejecting the contention of Smt Sarda that debt claimed by her is a financial debt observed that the letter dated 17.08.2016 nowhere mentions that Tansway Marketing agreed to repay the money with interest @ 15% interest p.a. in fact, it does not stipule any liability on part of Tansway Marketing to repay.
- NCLT observed that there is no requirement for a financial creditor to issue demand notice under section 7 of the Code and the applicant is obliged to show default. NCLT, dismissed the application filed by Smt. Sarda as it did not produce any record from information utility or any bank statement and the only document produced was the copy of demand notice.

We trust you will find this issue of our weekly bulletin useful and informative.

Wish you good luck in all your endeavors!!

Team ICSI IPA