

# **KNOWLEDGE REPONERE**

**(A WEEKLY BULLETIN)  
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# INSOLVENCY PROFESSIONALS AGENCY

**KNOWLEDGE REPONERE**  
**(February 5 - February 17, 2018)**

**Dear Professional Members,**

Greetings!

We are pleased to share with you our 33<sup>rd</sup> issue of the bulletin on the Insolvency and Bankruptcy Code, 2016 (“Code”).

**A. Impact of the Union Budget 2018-19 on Insolvency and Bankruptcy Code, 2016**

The recent Union Budget speech delivered by Hon’ble Finance Minister, Mr. Arun Jaitley, provided for the following changes with regard to insolvency.

- **[Clause 1 - Annexure V to Part B of Budget Speech]**

*“It is proposed that the provision of section 79 of the Income-tax Act (the Act) regarding restriction on shareholding for the purpose of carry forward loss shall not apply in case of change of shareholding pursuant to an approved resolution plan under IBC, 2016 where an opportunity of being heard has been given to the Principal Commissioner or Commissioner”*

Section 79 of the IT Act specifically states that losses cannot be carried forward if majority shareholding changes hands. The government had given a leeway to startups from this section and the proposal to do same for companies under the Code would be a great benefit for investors.

- **[Clause 2 - Annexure V to Part B of Budget Speech]**

*“In respect of companies where an application under Insolvency and Bankruptcy Code (IBC), 2016 has been admitted, it is proposed to provide that for the purpose of computation of Minimum Alternative Tax (MAT)*

*the aggregate amount of unabsorbed depreciation and brought forward loss shall be allowed to be reduced from the book profit"*

Under the MAT, tax liability is calculated on the basis of Book Profits. Book Profit means the net profit as shown in the profit & loss account for a year as increased and decreased by various additions and deductions.

Under the regime of Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA"), the companies got the benefit of MAT which was not applicable under the insolvency regime. For instance, if a company's loan stood at Rs. 50,000 crore and under the insolvency process, it gets sized to Rs 25,000 crore, the reduced amount is gain to the company. Under the SICA regime, this notional gain was adjusted against the accumulated losses or there was concession provided under the MAT provisions. For an incoming management or investor under the insolvency regime, this will be a huge liability. However, with the extension of this relaxation, it will be a huge incentive for prospective investors.

- **[Clause 3 - Annexure V to Part B of Budget Speech]**

*"It is proposed to provide that the insolvency resolution professional shall verify the return of income in case of a company where an application under IBC, 2016 has been admitted."*

## **B. Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018**

The Insolvency and Bankruptcy Board of India ("IBBI") has, vide Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018 ("CIRP Amendment Regulations 2018") dated 6<sup>th</sup> February, 2018, amended the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations").

Before the amendment, an Interim Resolution Professional ("IRP") or the Resolution Professional ("RP"), as the case may, was required to appoint two registered valuers to determine the liquidation value of the corporate debtor, whereas now, as per the CIRP Amendment Regulations, 2018, only

the RP, and not IRP, is required to appoint two registered valuers to determine the fair value and liquidation value of the corporate debtor.

*'Fair value' has been defined by the CIRP Amendment Regulations, 2018 as 'the estimated realizable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion.'*

The CIRP Amendment Regulations, 2018 have also substituted Regulation 35 of the CIRP Regulations which provides for the manner of determination of liquidation value. The new regulation now provides for the manner of determination of fair value and liquidation value as well as requires an RP to provide the above values to every member of the committee in electronic form on receiving an undertaking as to confidentiality. The said regulation further provides that fair value and liquidation value shall be shared by RP only after receipt of resolution plans in accordance with the Code.

Regulation 36A has been inserted in the CIRP Regulations which provides for invitation of resolution plans. This regulation mandates, *inter alia*, that the RP shall issue an invitation, including evaluation matrix to the prospective resolution applicants, to submit resolution plan at least thirty days before the last date of submission of resolution plans.

*'Evaluation matrix' has been defined by CIRP Amendment Regulations, 2018 to be mean 'such parameters to be applied and the manner of applying such parameters, as approved by the committee, for consideration of resolution plans for its approval.'*

It is also mandated now that the information memorandum shall contain, *inter alia*, details of the assets and liabilities of corporate debtor. Details have been defined to mean 'details such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details.'

### C. Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018

Similar to the amendments made in CIRP Regulations, 2016, IBBI has also amended the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“**Fast Track Regulations**”) by way of Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018 (“**Fast Track Amendment Regulations**”) dated 7<sup>th</sup> February, 2018. The amendments introduced by way of Fast Track Amendment Regulations are in line with the amendments brought out by CIRP Amendment Regulations, 2018.

#### 1) CASE UPDATES

Cases under the Code are being filed expeditiously across the various benches of NCLT. It is therefore imperative for our readers to be cognizant of the developments taking place. 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.	Siddhi Interiors Private Limited v/s. Hi Tech City Developers Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	70.10 Lakhs
2.	L & T Finance Limited v/s. Mega Dredging Company Private Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Chennai	22.74 Lakhs

3.	Phoenix Arc Private Limited v/s. Sarbat Cotfab Private Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Chandigarh	23.31 Crores
4.	Siddhi Interiors Private Limited v/s. Amarpali Zodiac Developers Private Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	4.19 crores
5.	IFCI Limited v/s. Era Housing & Developers (India) Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Principal bench	92.04 Crores
6.	Bank of India V/s. OSIL Exports Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Chandigarh	154.63 Crores
7.	Columbia Petro Chem Pvt. Ltd.	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	8.82 Crores
8.	Hajura Singh Bhim Singh V/s. Best Foods Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Chandigarh	25.77 Lakhs
9.	M/s. Kamal Chand v/s. Avadh Rail India Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Chennai	23.24 Lakhs

## 2) BRIEF NOTE

### NCLAT JUDGMENT

**Mr. Devendra Padamchand Jain**

**...Applicant/Resolution Professional**

**Versus**

**State Bank of India & Ors.**

**...Respondents**

**Date of Judgment: 31.01.2018**

- The appeal was filed by Mr. Devendra Padamchand Jain, the Resolution Professional for VNR Infrastructures Limited (“VNR”) against the order dated 24<sup>th</sup> August, 2017 passed by NCLT, Hyderabad Bench, Hyderabad whereby NCLT removed Mr. Devendra Padamchand Jain and appointed Mr. T. S. N. Raja, as the liquidator of VNR.
- The main plea taken by Mr. Devendra Padamchand Jain (“Mr. Jain”) is that the impugned order passed by NCLT replacing Mr. Jain as resolution professional to liquidator and not appointing him as liquidator is beyond its jurisdiction
- It was submitted by Mr. Jain that as per sub-section (1) of Section 34 of the Code, NCLT while passing the order for liquidation of VNR under Section 33 of the Code is required to appoint the resolution professional as the liquidator for the purpose of resolution process under Chapter II. NCLT can only replace the resolution professional, for the reasons mentioned in sub-section (4) of Section 34 of the Code. Since the resolution plan was not rejected for failure to meet any requirement and in fact the draft resolution was not approved, the stage of sub-section (2) of Section 30 never reached.
- However, according to counsel for SBI, since NCLT came to the prima facie view that the existing resolution professional had not assisted NCLT to its satisfaction during the resolution process, and the Code being a time bound process, it was open to NCLT to replace the resolution professional and to appoint another person as a liquidator
- NCLT observed that the CIRP was started under section 10 of the Code at the instance of VNR and quoted various provisions of the Code.



- After quoting the provisions of the Code, NCLT summed up and observed that following facts emerge:
  - (a) An IRP can be appointed as RP [Refer sub-section (2) of Section 22]
  - (b) CoC can replace the IRP by another RP [Refer sub-section (2) of Section 22]
  - (c) CoC can replace RP by requisite board if it is of opinion that the RP appointed under section 22 of the Code is required to be replaced is to be made in the manner as prescribed under Section 27 [ Refer : Section 27]
  - (d) NCLT is also empowered to replace RP in case the resolution plan submitted under Section 13 is rejected for failure to meet the requirement mentioned sub-section (2) of Section 30 [ Refer : sub-section (4) of Section 34]
  - (e) Normally, the RP appointed is to act as liquidator for the purpose of liquidation unless replaced by NCLT under sub-section (4) of Section 34 [Refer : sub-section (1) of Section 34]
  
- In view of the aforesaid provisions, it was observed that NCLT is empowered to remove the RP, apart from the Committee of Creditors, but it should be for the reasons and in the manner as provided under the relevant provisions.
  
- NCLT observed that resolution plan was filed by the VNR itself which was rejected by CoC. However, the CoC did not recommend the name of any other person as the liquidator. The Financial Creditors of VNR, having 100% voting right had accepted that the RP (appellant herein) was not assisting NCLT to its satisfaction during hearing. The RP (appellant herein) was required to examine the Resolution Plan but had not stated that the plan submitted by him provides for all the requirements as provided under subsection (2) of Section 30. The CoC i.e. Financial Creditor, who has 100% right is also not satisfied with the RP and taken plea that they are happy with Mr. T.S.N. Raja, the new Liquidator who has been appointed and performing the duty since September, 2017 in accordance with law.
  
- In view of the aforesaid stand taken by the parties, it was held that NCLT has jurisdiction to remove the RP if it is not satisfied with its functioning of

the RP, which amounts to non-compliance of sub-section (2) of Section 30 of the Code.

- Accordingly, the appeal was dismissed.

### NCLT JUDGMENTS

<b>M/s Hajura Singh Bhim Singh</b>	<b>Versus</b>	<b>...Applicant/Operational Creditor</b>
<b>M/s Best Foods Limited</b>		<b>...Respondent/Corporate Debtor</b>

**Date of Judgment: 02.02.2018**

- M/s Hajura Singh Bhim Singh, a sole proprietorship concern, claiming to be the operational creditor of M/s Best Foods Limited (“**M/s Best Foods**”) filed application under section 9 of the Code claiming an unpaid operational debt of Rs. 25,77,097/-.
- M/s Hajura Singh Bhim Singh (“**Bhim Singh**”) stated that he was a commission agent and middleman who used to procure paddy from farmers to be supplied on demand. As a commission agent, he used to get 2.5% of the commission from every transaction.
- Bhim Singh supplied paddy to M/s Best Foods during paddy season from 21.11.2014 to 21.12.2014. The total quantity of paddy sold was 1683 quintals for total price of Rs. 47,26,788/-. While M/s Best Foods made part payment of Rs. 39,52,749/- against invoices raised, it failed to pay the remaining amount. It even issued cheques but they were dishonored.
- An application was filed by Bhim Singh but the same was dismissed as withdrawn with liberty to file fresh application.
- Before filing the instant application, Bhim Singh issued demand notice which was received by M/s Best Foods and was even replied by contending that the quality of paddy was not good.
- Before NCLT, M/s Best Foods put up a defence that it (M/s Best Foods) had purchased the paddy from Mandi (Market) through Pacca Arthias only

whereas, Bhim Singh was a Kaccha Arthia. It further stated that there was dispute as to quality of paddy.

- It was observed by NCLT that in the debit notes and VAT-D2 form dated 22.06.2016, which is a declaration of VAT Dealer while making purchases in pursuance of sale in course of export outside India, relied upon by M/s Best Foods, name of the supplier is mentioned as “Hajura Singh Bhim Singh”.
- NCLT observed M/s Best Foods had never raised any issue about quality of the paddy before. Further, M/s Best Foods kept on making payments at intervals and thus, there was no ‘existence of dispute’ in the present case.
- Accordingly, the application was admitted.

**Bank of Baroda**

**...Applicant**

**Versus**

**M/s Metaphor Exports Pvt. Ltd**

**...Respondent**

**Date of judgment: 19.01.2018**

- Bank of Baroda, Financial Creditor (“**BOI**”) filed an application under section 7 of the Code against M/s Metaphor Exports Pvt. Ltd., Corporate Debtor (“**M/s Metaphor**”) for initiation of CIRP.
- BOI sanctioned, vide letter dated 28.03.2013, working capital facility of Rs. 9 crores to M/s Metaphor which, in turn, executed a Demand Promissory Note of Rs. 9 crores, Deed of Composite Hypothecation Agreement, in addition to a General Form of Guarantee executed by Directors of M/s Metaphor whereby the Directors, in their individual capacities, unconditionally guaranteed to pay on demand, all sums of money due under the said limit of Rs. 9 crores sanctioned.
- M/s Metaphor failed to service the loan amount. Request made by it to restructure its account was rejected by BOI. Consequently, as M/s Metaphor failed to liquidate the dues of the bank despite regular follow up, the account of the company was declared as Non-Performing Asset (“**NPA**”) on 30.06.2014.

- BOI filed application for recovery before DRT and also filed petition for winding up before the Hon'ble High Court of Delhi.
- On coming into force of the Code, BOI gave demand notice to M/s Metaphor and thereafter, filed an application before NCLT. M/s Metaphor replied to the application and took an objection that there was no valid authorization in favour of BOI's representative to initiate CIRP. It was also objected that although Rs. 9 crore was sanctioned to M/s Metaphor but only Rs. 7 crores had been given and Rs. 2 crores was never released in favour of M/s Metaphor and thus, latter is not a willful defaulter.
- NCLT observed that the loan was sanctioned to M/s Metaphor and its account was declared NPA due to non-payment of amount. NCLT is not an authority to ascertain quantum of default. The only essential ingredient of section 7 of the Code is that a default must have been committed, which is evidently proved by BOI. Hence, the objections raised by M/s Metaphor cannot be sustained.
- Accordingly, the application was admitted.

<b>State Bank of India</b>		<b>...Financial Creditor</b>
	<b>Versus</b>	
<b>Monnet Ispat &amp; Energy Ltd.</b>		<b>...Corporate Debtor</b>
<b>Through</b>		
<b>Interim Resolution Professional</b>		<b>...Applicant</b>
	<b>Versus</b>	
<b>Government of India, Ministry of Coal</b>		
<b>Office of Nominated Authority</b>		<b>...Respondent</b>

**Date of Judgment: 16.01.2018**

- A miscellaneous application was filed by the Resolution Professional ("**applicant**") before NCLT, Mumbai Bench seeking to quash the operation and effect of termination letter dated 30.12.2017 issued by Government of India, Ministry of Coal ("**GOI**") for termination of Coal Mines Development and Production Agreement ("**agreement**") dated 02.03.2015 and vesting order

dated 23.03.2015 with regard to a coal mine in Chhattisgarh issued by GOI in favour of Monnet Ispat & Energy Ltd. (“**Monnet Ispat**”)

- Briefly stated, on 02.03.2015, the agreement was executed between Monnet Ispat and GOI with respect to allocation of a coal mine to Monnet Ispat. As per the agreement, Monnet Ispat had to comply with certain conditions for issuance of a vesting order which included, *inter alia*, furnishing a performance bank guarantee. Monnet Ispat furnished a performance bank guarantee of Rs. 329 crores issued by State Bank of Patiala and a vesting order was issued in favour of Monnet Ispat on 23.03.2015.
- In terms of the vesting order, certain rights were vested in favour of Monnet Ispat which included, *inter alia*, a right to ‘take possession of the mine’ specified in Annexure 1 to the vesting order. However, no mining lease was executed in favour of Monnet Ispat.
- Thereafter, in the year 2017 on an application filed by State Bank of India, Financial Creditor (“**SBI**”) under section 7 of the Code, NCLT declared moratorium on 18.07.2017.
- Thereafter, GOI issued a termination letter dated 30.12.2017 for termination of the agreement dated 02.03.2015 and vesting order dated 23.03.2015 issued in favour of Monnet Ispat.
- Monnet Ispat contended that the termination letter is hit by section 14(1)(d) of the Code which prohibits recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.
- Monnet Ispat relied upon the vesting order dated 23.03.2015 to contend that the possession of the mine had been given to it and that, Monnet Ispat was in possession of the same.
- The point for consideration before NCLT was as to whether or not the termination order dated 30.12.2017 issued by GOI was hit by section 14(1)(d) of the Code.

- NCLT, after considering the terms and conditions of the agreement and vesting order observed that after obtaining the vesting order, a State Government grants mining lease on an application moved by the person in whose favour vesting order is issued. In the present case, admittedly, no mining lease has been granted in favour of Monnet Ispat. On a careful reading of the vesting order, it is clear that Monnet Ispat was only entitled to take possession of the mine with a caveat that vesting order is liable to be cancelled. This (vesting order) was the only document relied upon by Monnet Ispat to say that possession of the mine had been given to it but from that document, it was evident that transfer or vesting was only in respect to the rights mentioned thereof but not for delivery of possession of the mine to Monnet Ispat.
- NCLT further observed that as Monnet Ispat failed to achieve the timelines under the agreement like execution of mining lease, obtaining statutory clearances, permission etc., there was estimated loss of revenue of Rs. 314.3 crores to the State Exchequer. Further, the Bank Guarantee furnished by Monnet Ispat had also expired and was not renewed by it. Thus, NCLT held that the opinion of GOI that termination was in public interest cannot be invalidated or stayed.
- The judgments relied upon by Monnet Ispat to the effect that even a trespasser cannot be thrown out by owner was distinguished on the fact that the element of possession of Monnet Ispat was not established. Had Monnet Ispat been in possession of the mine, the judgments would have been applicable.
- NCLT further observed that under Schedule VII to the Constitution of India, mining subject is under Union List and State list. It is for this reason, after vesting order, the State Government has to grant a mining lease under Mines and Minerals (Development and Regulations) Act, 1957.
- In view of the above, NCLT dismissed the miscellaneous application filed by applicant.

**M/s Brys International Pvt. Ltd.  
Creditors**

**...Applicant/Operational**

**Versus**

**M/s Dignify Buildtech Pvt. Ltd.**

**...Respondent/Corporate Debtor**

**Date of Judgment: 15.01.2018**

- This application was filed M/s Brys International Pvt. Ltd. (“**M/s Brys**”) under section 9 of the Code against M/s Dignify Buildtech Pvt. Ltd. (“**M/s Dignify**”).
- M/s Brys, claiming to be the operational creditor of M/s Dignify, submitted that the former gave a sum of Rs. 8.8 crores to the latter for purchase of land in National Capital Region for developing a Group Housing Project. However, as per M/s Brys, M/s Dignify instead purchased a commercial space. On raising objection, a sum of Rs. 30 lakhs was returned bby M/s Dignify, however, Rs. 8.5 crores was neither returned nor was any land purchased. As per M/s Brys, the debt accrued on 31.05.2014 and 07.08.2014 when amounts were transferred via RTGS in account of M/s Dignify.
- M/s Dignify resisted the application on the ground that the M/s Brys does not qualify as operational creditor since neither any services were rendered nor any goods supplied. Further, M/s Dignify had duly replied to the demand notice which was deliberately suppressed by M/s Brys.
- On merits, M/s Dignify stated that the payment was in fact, made by one Shubhkamna Buildtech Pvt. Ltd. (“**Shubhkamna**”) via M/s Brys and the M/s Dignify had acknowledged Shubhkamna as its creditor in books of account. A letter of August, 2014, acknowledged by Shubhkamna and relied upon by M/s Dignify stated that the amount had, in fact, been paid through M/s Brys. A balance confirmation of April, 2015 gave details of amount due from M/s Dignify after reduction of liability for amounts routed though M/s Brys.
- NCLT, New Delhi Bench held that there exists a dispute with respect to the financial transactions between the parties. There appears to be a circuitous route involving another corporate, being Shubhkamna. The exchange of money appears in respect of business transactions in respect of land. The

averments in the application indicate that the money did not exchange hands from a buyer to a seller rather the same was entrusted to M/s Dignify as an intermediary to aggregate a land holding which cannot be construed as 'operational debt'. Element of dispute is also raised involving a tripartite transaction wherein money is reflected as being returned to third party i.e. Shubhkamna. The submissions may or may not be true and can be ascertained through trial but the dispute raised is sufficient to reject the prayer for initiation of CIRP. Thus, the application for initiation of CIRP was dismissed.

We trust you will find this issue useful and informative.

Wish you good luck in all your endeavors!!

**Team ICSI IPA**