

INSI INSTITUTE OF INSOLVENCY PROFESSIONALS

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(Formerly known as ICSI Insolvency Professionals Agency)

KNOWLEDGE REPONERE
(02nd-16thDecember, 2019)

Dear Professional Members,

Greetings!

We are pleased to share with you our next issue of the knowledge bulletin on the Insolvency and Bankruptcy Code, 2016 ("**Code**").

EVENTS

- 1. National Seminar on Insolvency and Bankruptcy Code held on 14th December, 2019 | Bhubaneswar**



L-R: CS Priyadarshi Nayak, VC, EIRC, ICSI; Dr. Binoy J. Kattadiyil, MD, ICSI IIP; Sh. Ananta Kumar Sethi, RoC, MCA, Odisha; Ms. Sucharitha R., Judicial Member, NCLT, Cuttack; Sh. Rameshwar Dhariwal, CGM, IBBI; CS Siddhartha Murarka, Central Council Member, ICSI; CS Soumya Sujit Mishra, Chairman, Bhubaneswar Chapter, ICSI.

REGULATORY UPDATE

IMPACT OF INSOLVENCY AND BANKRUPTCY CODE (SECOND AMENDMENT) BILL, 2019

Section sought to be Amended / Inserted	Existing Provision	Proposed Amendment	Impact
Proviso to 5(12)	Provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or section 10 the Insolvency commencement date shall be the date on which such Interim Resolution Professional is appointed by the Adjudicating Authority.	To omit the proviso to clause (12) of section 5 of the Code.	To clarify that the insolvency commencement date is the date of admission of an application for initiating corporate insolvency resolution process. Consequently Section 16(1) of the code shall also be amended as proposed in the bill.
7	Initiation of corporate insolvency resolution process by financial creditor	Insert certain provisos in sub-section (1) of Section 7 of the Code, before the Explanation.	Provisos shall specify a minimum threshold for certain classes of financial creditors for initiating insolvency resolution process.
11	Persons not entitled to make application	Insert Explanation II in Section 11 of the Code.	To clarify that a corporate debtor should not be prevented from filing an application for initiation of corporate insolvency resolution process against other corporate debtors.

Section sought to be Amended / Inserted	Existing Provision	Proposed Amendment	Impact
14	Moratorium	<ul style="list-style-type: none"> • Insert explanation in sub-section (1). • Insert Sub-section 2A after sub-section (2) • In sub-section (3), for clause (a), the clause shall be substituted 	To clarify that a licence, permit, registration, quota, concession, clearances or a similar grant or right cannot be terminated or suspended during the Moratorium period
16 (1)	The Adjudicating Authority shall appoint an interim resolution professional within fourteen days from the insolvency commencement date.	In sub-section (1) of Section 16 of the Code, for the words " <i>within fourteen days from the insolvency commencement date</i> ", the words " <i>on the insolvency commencement date</i> " shall be substituted	To provide that an insolvency resolution professional should be appointed on the date of admission of the application for initiation of insolvency resolution process
Proviso to 23(1)	Provided that the resolution professional shall, if the resolution plan under sub section (6) of section 30 has been submitted, continue to manage the operations of the Corporate Debtor after the expiry of the corporate insolvency resolution process period until an order is passed by the Adjudicating Authority under	The proviso in sub section (1) of Section 23 shall be substituted.	To enable the " <i>resolution professional</i> " to manage the affairs of the corporate debtor during interim period between the expiry of corporate insolvency resolution process till the appointment of a liquidator

Section sought to be Amended / Inserted	Existing Provision	Proposed Amendment	Impact
	Section 31.		
32 (A)		New Section 32 (A) to be inserted	To provide that the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease under certain circumstances.
227	Powers of Central Government to notify financial sector providers, etc.	To substitute words " <i>examined in this Code</i> ", with the words " <i>contained in this Code</i> "	To clarify that the insolvency and liquidation proceedings for financial service providers may be conducted with such modifications and in such manner as may be prescribed.

LIST OF COMPANIES THAT HAVE RECENTLY UNDERGONE LIQUIDATION

S. No	Case Title	Bench	Date of Order
	<i>In the matter of Satkar Terminals Ltd.</i>	New Delhi	03.12.2019

BRIEF OF JUDGEMENTS

S. No.	Case Details	Date of Order	Courts	Brief	Case link
1.	<i>M/s Embassy Property Developments Pvt. Ltd v. State of Karnataka &Ors.</i>	03.12.2019	Supreme Court	<p>Three appeals were preferred, one filed by the Resolution Applicant, the second filed by the Corporate Debtor through the Resolution Professional and the third filed by the Committee of Creditors, all of which challenged an Interim Order passed by the Division Bench of High Court of Karnataka in a writ petition whereby the operation of a direction contained in the order of the NCLT, on a Miscellaneous Application filed by the Resolution Professional was stayed.</p> <p>The questions of law put up before the Hon'ble Supreme Court of India were as follows:</p> <p>1. Whether the High Court ought to interfere, under</p>	https://ibbi.gov.in/uploads/order/b30ab5f506b119e8450ad06818d82814.pdf

Article 226/227 of the Constitution, with an order passed by NCLT in a proceeding under the IBC, 2016, despite the availability of a statutory alternative remedy of appeal to NCLAT?

2. Whether questions of fraud can be inquired into by the NCLT/NCLAT in the proceedings initiated under the Insolvency and Bankruptcy Code, 2016?

Hon'ble Supreme Court in answer to the first question held:

"45. ... NCLT did not have jurisdiction to entertain an application against the Government of Karnataka for a direction to execute Supplemental Lease Deeds for the extension of the mining lease. Since NCLT chose to exercise a jurisdiction not vested in it in law, the High Court of Karnataka was justified in entertaining the writ

				<p><i>petition, on the basis that NCLT was coram non judge."</i></p> <p>Hon'ble Supreme Court in answer to the second question held:</p> <p><i>"51. ... Therefore, it is clear that NCLT has jurisdiction to enquire into allegations of fraud. As a corollary, NCLAT will also have jurisdiction. Hence, fraudulent initiation of CIRP cannot be a ground to bypass the alternative remedy of appeal provided in Section 61."</i></p>	
2.	<i>Hindustan Antibiotics Ltd. & Anr v. Union of India & Ors</i>	06.12.2019	Bombay High Court	<p>A writ petition was filed by M/s Hindustan Antibiotics Ltd. (a Government of India company) before Bombay High Court <i>inter</i> legal validity of ss. 3(8), 3(23), 7,8,9 and 238, IBC being in direct conflict with Companies Act, 2013 and also violative of Article 14, Constitution of India insofar as these provisions are made applicable to the Government</p>	<p>https://mk0barandbenchgqge2s.kinstacdn.com/wp-content/uploads/2019/12/Bombay-HC-stays-insolvency-proceedings-against-Hindustan-Antibiotics.pdf</p>

Companies. The Petitioner (before High Court) had contended that in the proceedings initiated against it/s 9, IBC before NCLT (Mumbai), a question regarding applicability of IBC to Government Companies was posed and since there was a difference of opinion amongst the Technical and Judicial member, the matter was referred to a third member.

After considering the facts and circumstances of the case, the High Court held that since there is a constitutional challenge (as aforementioned) pending before the High Court, the NCLT should not proceed with the matter. It was further held that the NCLT exercises jurisdiction conferred on it by IBC, and that the issue with regard to constitutional validity of IBC provisions is before the High Court and thus cannot be decided by

				<p>the NCLT.</p> <p>Issuing notice to the Ld. Attorney General on the point whether IBC provisions (aforementioned) are <i>ultra vires</i> Article 14, the Division Bench (High Court) passed an interim order staying the proceedings before NCLT Mumbai Bench.</p>	
3.	<i>JSW Steel Limited v. Ashok Kumar Gulla & Ors.</i>	04.12.2019	NCLAT	<p>An appeal was preferred by JSW Steel Limited, Successful Resolution Applicant, in the CIRP of Vardhman Industries Limited (Corporate Debtor) challenging the part of impugned order dated 16th April, 2019 insofar as it related to right to receivables', 'carry forward losses' and 'subsidiaries, associate companies and joint ventures of the Company'.</p> <p>With regard to 'right to receivables', the Adjudicating Authority directed that any amount recovered by the Corporate Debtor due from any third</p>	<p>https://nclat.nic.in/Useradmin/upload/7102751305de8a93feafcd.pdf</p>

party which has been written off as bad debts or which stands in the books but has not been recovered as on the date, Adjudicating Authority approved that before being put to any other use, the amount would be used to pay the balance amount to dissenting Financial Creditors.

The Appellant submitted that the Resolution Plan was found to be in accordance with Section 30(2) of the Code and was further approved by the CoC with 100% voting shares. In absence of any objection by any of the parties, the Adjudicating Authority while passing order under Section 31 of its own, was not empowered to impose any condition either relating to 'right to receivables' or 'carry forward losses' or 'subsidiaries, associate companies and joint ventures of

the Company’.

Hon’ble NCLAT held:

"10. We agree with the submissions made on behalf of the Appellant that the Adjudicating Authority has no jurisdiction to impose such conditions with regard to amount as may be recoverable by the Corporate Debtor’ in future."

Hon’ble NCLAT, thus, set aside part of the impugned order and substituted with clarification that if the Corporate Debtor has any right over the ‘subsidiaries’ or ‘associate companies’ or ‘joint ventures’ of the Corporate Debtor, once the ‘Successful Resolution Applicant’ takes over the ‘Corporate Debtor’, it is for the CD to decide whether they will continue with such right over the ‘subsidiaries’ or ‘associate companies’ or ‘joint ventures’ and others.

4.	<i>Union of India, Through Serious Fraud Investigation Office (SFIO) v. Maharashtra Tourism Development Corporation & Anr</i>	02.12.2019	NCLAT	<p>A bunch of appeals were preferred by Union of India against the orders passed by the Adjudicating Authority, Principal Bench, New Delhi in two different applications filed by the Resolution Professional (now Liquidator) in respect of investigation into the affairs of the 'Luxury Train Pvt. Ltd.' and 'Zynke Exports Pvt. Ltd.' respectively. Vide the impugned orders, AA had directed Serious Fraud Investigation Office (SFIO), an investigation agency of the Central Government, to carry out investigation about allegations of siphoning of funds in respect of public money which was noticed by the Adjudicating Authority by its earlier orders. The issue that arose in these set of appeals was whether the Adjudicating Authority has the jurisdiction to direct the SFIO to</p>	https://ibbi.gov.in/uploads/order/e9375bcc30cda7c1a140e7462b0ad9.pdf
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investigate about the allegations of fraud or siphoning of funds, if any, committed by the Company (Corporate Debtor).

The NCLAT, while deciding the said issue, relied on its own judgment delivered in the matter of *Mr. Lagadapati Ramesh v. Mrs. Ramanathan Bhuvaneshwari* wherein it was held that “the Adjudicating Authority was not competent to straight away direct any investigation to be conducted by the ‘Serious Fraud Investigation Office’. However, the Adjudicating Authority (Tribunal) being competent to pass order under Section 213 of the Companies Act, 2013, it was always open to the Adjudicating Authority/Tribunal to give a notice with regard to the aforesaid charges to the Promoters and others, including the Appellants herein

and after following the procedure as laid down in Section 213, if prima facie case was made out, it could refer the matter to the Central Government for investigation by the Inspector or Inspectors and on such investigation, if any, actionable material is made out and if the Central Government feels that the matter requires investigation through the 'Serious Fraud Investigation', it can proceed in accordance with the provisions as discussed above. Impugned order shows parties have been heard on the charges claimed by the 'Resolution Professional'."

NCLAT, thus, referred the matter to the Central Government (through the Secretary, Ministry of Corporate Affairs) to get the matter investigated by 'Inspector' or 'Inspectors' following the procedure in

				terms of Section 213 of the Companies Act, 2013 read with Section 70 of the Code and Section 447 of the Companies Act, 2013 or any other offence punishable under Chapter VII of the Code.	
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We trust you will find this issue of our Bulletin useful and informative.

Wish you good luck in all your endeavors!!

Team ICSI IIP

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