

KNOWLEDGE REPONERE

**(A WEEKLY BULLETIN)
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“Passion is energy. Feel the power that comes from focusing on what excites you.” –Oprah Winfrey

Dear Professional Members,

At every phase of Corporate Insolvency Resolution Process, the Resolution Professionals face different types of challenges that vary from the nature of industry, size of corporate debtor, geographical location etc. As the challenges evolve, the Regulators, Adjudicating authorities, Insolvency Professional Agencies and Insolvency Professionals work together to overcome the same. For example, in the first phase, the challenge is with regard to taking over management of Corporate Debtor, verification of claims, constitution of Committee of Creditors. Recently in the case of “**Ashok Magnetics Limited**”, the Chennai Bench of NCLT, directed superintendent of Police to give required assistance in taking over of management. Similarly, raising of interim finance to run the business of Corporate Debtor is also a bigger challenge as most of the assets of Corporate Debtor would have been encumbered and the fresh financier may not be willing to contribute, inspite of the interim finance being part of Insolvency Resolution Process Costs and being on the top priority in the payment waterfall. The Resolution professionals also face challenges such as creating a market for liquidation assets, identifying the sources of funds for resolution plan, marketability of resolution plan and so on. These challenges can be overcome over a period of time through joint deliberations, regulatory facilitations, capacity development programmes and so on.

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	Punjab National Bank V/s. Samtel Color Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Principal Bench, New Delhi	Rs. 236.20 Crores
2	Macro Leafin Private Limited V/s. Arrow Resources Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Principal Bench, New Delhi	Rs. 5.36 Lakhs

3	IDBI Bank Ltd. V/s. BCC Estate Private Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Ahmedabad	Rs. 38.31 Crores
4	Reliance Commercial Finance Limited V/s. Maharashtra Vidhyut Nigam Private Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Mumbai	Rs. 12.43 Crores
5	J M Financial Assets Reconstruction Company Limited V/s. Sandhya Prakash Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Ahmedabad	Rs. 30 Crores
6	ICICI Bank Limited V/s. Oceanic Tropical Fruits Private Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Chennai	Rs. 100.94 Crores
7	ICICI Bank Limited V/s. Oceanic Edibles International Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Chennai	Rs. 39.21 Crores
8	Havels India Limited V/s. Electrostreet Steels Limited	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	Kolkatta	Rs. 90.85 Lakhs
9	Maxim Tubes Company Pvt. Ltd. V/s. International Coil Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Principal Bench, New Delhi	Rs. 1.70 Crores

2) NCLAT CASE BRIEFS

M/s Annapurna Infrastructure Pvt. Ltd. V/s. M/s SORIL Infra Resources Ltd.

Appellant	M/s Annapurna Infrastructure Pvt. Ltd. (Operational Creditor)
Respondent	M/s SORIL Infra Resources Ltd. (Corporate Debtor)
Relevant Section	Section 9 of the Code dealing with the initiation of Corporate Insolvency

The appeal was filed by Appellant against the order of the NCLT, Principal Bench, New Delhi (Adjudicating Authority) whereby the application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) filed by appellant was dismissed by the Adjudicating Authority on the ground that there was a existence of dispute pending adjudication between the parties.

Material Facts

- Pursuant to a Lease Deed executed in 2005 between the parties, appellant rented the premises to respondent for which rent was not paid. Arbitration clause in the Lease Deed was invoked and the Sole Arbitrator passed an award on 9th September, 2016 in favour of the appellant.
- Respondent's challenge to the Award under 34 of the Arbitration & Conciliation Act, 1996 (Act) was rejected on 19th December, 2016 thereby affirming the award.
- As a consequence, appellant issued a demand notice dated 13th January, 2017 under Section 8 of the Code which was replied by respondent vide letter dated 27th January, 2017 raising objection that there was existence of dispute with regard to 'Operational Debt'. It was also stated by respondent that appeal under Section 37 of the Act has been preferred against the order dated 19th December, 2016. Further, execution proceedings were also pending to recover the amount of the award.

Submissions of Appellant

- Appellant is an 'operational creditor' within the meaning of Section 9 r/w Section 5(20) and 5(21) of the Code.
- Award passed by the Learned (Ld.) Arbitrator had attained finality as application under Section 34 of the Act has been dismissed on 19th December, 2016
- 'Arbitral Proceedings' cannot be said to be pending under Section 8(2)(a) of the Code because under Section 21 of the Act, arbitral proceedings commence on the date on which request for referring the matter for arbitration is received by respondent and terminate on passing of the award in terms of Section 32 of the Act. Thus, arbitration proceedings came to an end on passing of the award on 9th September, 2016.

Submissions of the Respondent

- The respondent does not owe any 'operational debt' to the appellant.
- A claim arising out of 'supply of goods' and providing 'services', which may include employment would not *ipso facto* amount to 'operational debt'.
- 'Debt' is not arising under the law for the time being in force and would be attracted only when the said debt is payable as per Section 5(21) of the Code.
- Provisions of Section 8, 9, 5(20) and 5(21) must be construed in accordance with the object of the Code.

Questions for determination of NCLAT

- Whether there is an 'existence of dispute' between the parties, the award passed by Arbitral Tribunal having affirmed by the Court under Section 34 of the Act?

- Whether pendency of a proceeding for execution of an award or a judgment and decree bars an operational creditor to prefer any petition under the Code?
- Whether the 1st Appellant is 'operational creditor' within the meaning of Section 5(20) r/w Section 5(21) of the Code?

Answer to Question (i) and (ii) above

- The NCLAT observed that a perusal of Section 8(2) (a) of the Code shows that pendency of an arbitration proceedings has been termed to be an 'existence of dispute' and not the pendency of an application under Section 34 or Section 37 of the Act.
- Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (Rules) required to be filled to apply under Section 9 of the Code indicates order passed by Arbitral Panel as one of the document, record and evidence of default.
- Section 36 of the Act makes arbitral award executable as decree but it can be enforced only after the time for filing application under Section 34 of the Act has expired and no application has been made or such application having been made, has been rejected. Thus, arbitral award reaches finality after expiry of enforceable time under Section 34 and/or if application under Section 34 is filed and rejected.
- For the purpose of 'dispute' as 'existence of dispute', only pendency of arbitral proceedings has been accepted as one of the ground of dispute whereas, as can be seen from Form 5 of the Rules, Arbitral Award has been held to be a document of debt and non-payment of awarded amount amounts to 'default' debt.
- Therefore, NCLAT held that the observations of Adjudicating Authority that, a dispute is pending, is not only against the provisions of law and rules framed there under, but is also against the decision of NCLAT in *Kirusa Software Pvt. Ltd.*
- Thereafter, NCLAT observed that the Code is an act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons in a time bound manner. Insolvency Resolution Process is neither a money suit for recovery nor a suit for execution of decree or award. Thus, CIRP can be initiated for default of debt, as awarded under the Act, however, the finding of the Adjudicating Authority that it is an executable matter is against the essence of the Code. The question of availing any effective remedy or alternative remedy, in case of default of debt for an 'operational creditor' was thus, held to be not based on any sound principle of law.

Answer to Question (iii)

- The NCLAT observed that the Adjudicating Authority had not considered all the contentions of the respondent to contend that the appellant is not an 'operational creditor'. Having agreed with the above submission of the respondent, the NCLAT remanded the matter back to Adjudicating Authority to decide on the issue whether the appellant was an 'operational creditor' or not.
- Accordingly, the appeal of the appellant was allowed on above two questions. NCLAT held that if the Adjudicating Authority holds that the appellant is an operational creditor, it would decided other issues whether the application is complete or not and decide thereon.

Steel Konnet (India) Pvt. Ltd. V/s. M/s Hero Fincorp Limited

Appellant	M/s Steel Konnet (India) Pvt. Ltd. (Corporate Debtor)
Respondent	M/s Hero Fincorp Limited (Financial Creditor)
Relevant Section	Section 7 of the Code dealing with the initiation of Corporate Insolvency Resolution Process by Financial Creditor.

- The appeal was filed by Appellant against the order of the NCLT, Ahmedabad Bench, Ahmedabad (Adjudicating Authority) whereby the application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (Code) filed by respondent was allowed by the Adjudicating Authority and Interim Resolution Professional (IRP) was appointed.

Submissions of Appellant

- Impugned Order passed by the Adjudicating Authority is in violation of principles of natural justice without giving notice to the appellant.
- No post filing notice under Rule 4(3) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (Rules) was given by respondent. Only pre filing notice with wrong date of admission of application was mentioned.
- Record of default recorded with the Information Utility or a record of default available with any Credit Information Company (CIBIL) or copies of entries in Banker's Book in accordance with Banker's Book of Evidence Act, 1891 as required in terms of Form-I read with Rule 4 of the Rules was not filed.

Submissions of the Respondent

- The appellant had no locus standi to file the present appeal after appointment of IRP who has already taken over the management of the appellant. The powers of Board of Directors since then stands suspended.
- Notice under Rule 4(3) of the Code was issued to appellant who appeared before the Adjudicating Authority and was given ample opportunity to present the case.
- Adjudicating Authority is required to issue only a limited notice to Corporate Debtor before admitting a case for ascertainment of existence of default.
- Adjudicating Authority, before admitting an application is only required to ascertain whether there has been a default of debt on part of the Corporate Debtor. In the present case, respondent, apart from filing statement of accounts duly certified by office of respondent, filed records of default which is available with CIBIL. It was submitted that Banker's Book of Evidence Act, 1891 was not applicable to the present case.

Decision of NCLAT and reasons thereof

- The NCLAT found that in the present case, post filing notice under rule 4(3) of the Rules along with application under Section 7 of the Code was issued. In the notice, date of hearing was written as 11th April, 2017 though the matter was listed on 10th April, 2017. On 10th April, the matter was adjourned to 19th April, 2017, notice was issued to appellant and the appellant appeared on that

date when both the parties were heard. Thus, even if no separate notice was issued by Adjudicating Authority but, the appellant having been heard before passing impugned order, the principles of natural justice cannot be said to have been violated. Accordingly, the plea of appellant that notice under Rule 4(3) of the Rules was a pre-filing notice and wrong date of hearing was shown was also rejected.

- As regards the mandatory nature of filing record of default or copies of entries in Banker's Book as required in terms of Form-I, read with Rule 4 of the Rules, the NCLAT observed that the said question arose before in Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustees Limited. It was observed that the issue is covered by the decision in Neelkanth Township (supra) and the contention raised by appellant was thus rejected.
- On the issue whether a 'Corporate Debtor' can prefer an appeal under Section 61 of the Code through the Board of Directors, which stands suspended after admission of an application, NCLAT observed that perusal of Section 17(1) (a) of the Code, makes it clear that the Management of affairs of the 'Corporate Debtor' stands vested with the 'Interim Resolution Professional' & such vesting is limited and restricted to the extent of power vested under Section 17(1) which empowers the IRP to act and execute in the name of Corporate Debtor all deeds, receipts and other documents, if any, to take such action in the manner and subject to such restrictions, as may be specified by Board. However, the IRP has not been vested with any specific power to sue any person on behalf of the Corporate Debtor.
- When an application under Section 7 or 9 of the Code is admitted, Corporate Debtor is a party to such proceedings. It is only after hearing the Corporate Debtor, the Adjudicating Authority can pass an order under Section 7 or 9, admitting or rejecting an application.
- Once the application under Section 7 or 9 is admitted, CIRP starts. In such case, one of the aggrieved party, being Corporate Debtor, has a right to prefer an appeal under Section 61 of the Code, part from any other aggrieved person like Director(s) of the company or members, who do not cease to be Director(s) or member(s), as they are not suspended but their function as 'Board of Director(s)' is suspended. They continue to remain as Directors and members of the Board of Directors for all purpose in the records of Registrar of Companies under the Companies Act, 2013
- Looked from another angle, if a Corporate Debtor is left to be represented though an IRP only, it would ultimately mean that IRP is challenging his own appointment. Further, no IRP would challenge the initiation of insolvency resolution process.
- The appeal filed by appellant was without merits and thus rejected.

We hope these updates add value to your knowledge. Wish you good luck in all your endeavors!!

CS ALKA KAPOOR
CHIEF EXECUTIVE OFFICER
(Designate)