

KNOWLEDGE REPONERE

**(A WEEKLY BULLETIN)
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Published by:

 **INSOLVENCY PROFESSIONALS AGENCY**

1st Floor, ICSI House, 22, Institutional Area, Lodi Road
New Delhi-110003

Phones: 011-4534 1099/33

Email: info@icsiipa.com

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(A Weekly Bulletin: October 16 – October 20, 2017)

*“Education is the most powerful weapon which you can use to change the world –
Nelson Mandela*

Dear Professional Members,

Greetings!

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

The Insolvency and Bankruptcy Board of India (“IBBI”) has invited public comments on **(i) the draft Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Individuals and Firms) Rules, 2017, and (ii) the draft Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Individuals and Firms) Regulations, 2017** for implementation of the provisions of the Code dealing with insolvency of individuals and firms latest by October 31, 2017. I request members to send their suggestions/comments at mehreen.rahman@icsi.edu so that we can consolidate the suggestions and send the same to the IBBI latest by 31st October, 2017.

In another development, Ministry of Corporate Affairs (“MCA”) has issued a clarification dated 25.10.2017 as to whether approval of shareholders/members of the Corporate Debtor is required for a resolution plan at any stage during the corporate insolvency resolution process under Section 30 and 31 of the Code. The detailed clarification is available at the following link: http://www.mca.gov.in/Ministry/pdf/CircularIBC_25102017.pdf

On October 25, 2017, Hon’ble Supreme Court of India in *Chitra Sharma & Ors Vs Union of India & Ors.* extended time to deposit the sum of Rs. 2,000 crores by Jaiprakash Associates Limited till 5th November 2017 in relation to its order dated 11th September 2017.

1) BRIEF OF SOME OF THE DECIDED CASES

National Company Law Appellate Tribunal (“NCLAT”) Judgments

Black Pearl Hotels Pvt. Ltd. ...Appellant – Operational Creditor
V/s.
Planet M Retail Ltd. ...Respondent – Corporate Debtor

Date of Judgment: 17th October, 2017

Brief facts:

- An appeal was filed by Black Pearl Hotels Pvt. Ltd., the Operational Creditor (“**Black Pearl**”) challenging the order of NCLT, Mumbai Bench dismissing the application for initiation of corporate insolvency resolution process under section 9 of the Code .
- Briefly stated, Black Pearl filed application under section 9 of the Code against Planet M Retail Ltd. (“**Planet M Retail**”) for failure to pay conducting fee since October 2011 amounting to Rs. 3,92,38,405 pursuant to Business Conducting Agreement wherein planet M was responsible for conducting and managing the business of running a music concept store by name ‘Planet M’ on behalf of Black Pearl.
- NCLT while hearing application noticed that an arbitration application was filed by Black Pearl which was dismissed on 4th April, 2014. NCLT dismissed the application filed under section 9 of the Code on one of the grounds that the application was barred by limitation. NCLT was of the opinion that in order to save the limitation for this period i.e. November, 2011 to March, 2012, Black Pearl should have obtained liberty to proceed against Planet M Retail.

Decision of the NCLAT and the reasons thereof:

- NCLAT relied on its earlier decision of *Neelkanth Township and Construction Pvt. Ltd. Vs. Urban Infrastructure Trustees Limited* wherein it was observed that there is nothing on the record that Limitation Act, 2013 is applicable to the Code. NCLAT noted that the Code is not an Act for recovery of money claim, it relates to initiation of Corporate Insolvency Resolution

Process. NCLAT also noted that if there is a debt which includes interest and there is default of debt and having continuous course of action, the argument that the claim of money by Respondent is barred by Limitation cannot be accepted.

- NCLAT, observed that, in the present case, even if it accepted that Limitation Act, 1963 for initiation of Corporate Insolvency Resolution Process is applicable, then, in that case, Article 137 of the Limitation Act, 1963 which provides for time period for filing any other application for which no period of limitation is provided anywhere in Limitation Act, 1963 would be attracted and in such cases time from which period begins to run is three years from the date when the right to apply accrues.
- NCLAT observed that since the Code has come into force with effect from 1st December, 2016, therefore, the right to apply under the Code accrues only on or after 1st December, 2016. As the right to apply under section 9 of the Code accrued to Black Pearl since 1st December, 2016, the application cannot be held to be barred by limitation.
- NCLAT noted that, in the present case, there was no objection raised by Planet M Retail with regard to existence of dispute prior to issuance of notice under section 8 (1) of the Code and further as no arbitral dispute is pending, the application cannot be rejected by NCLT.
- NCLAT thus, allowed the appeal and remitted the case back to NCLT for admission of application.

2) REJECTED CASES

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

Case Title	Brief Facts and Reasons for rejection
<p>M/s Dolphin Offshore Enterprises (India) Ltd. [Operational Creditor] vs. M/s Instrumentation Ltd. [Corporate Debtor]</p> <p>Date of Judgment: 17.10.2017</p> <p>(NCLT, Principal Bench, New Delhi)</p>	<p><u>Brief facts:</u></p> <ul style="list-style-type: none">• The application was filed by M/s Dolphin Offshore Enterprises (India) Ltd., Operational Creditor (“Dolphin Offshore”) against M/s Instrumentation Ltd., Corporate Debtor under section 9 of the Code for initiating the corporate insolvency resolution process in relation to total amount of unpaid debt with Rs. 4.90 crores as principal amount and Rs. 2,62,55,270/- towards interest on the principal amount for jobs done and completed.• In this case, M/s Instrumentation Ltd., was granted a contract by ONGC on 29.05.2009 for executing structural modification work at 27 unmanned platforms in Maharashtra for development of modular rig. Lump-sum price of the tender was Rs. 142 crores inclusive of taxes, duties, levies, insurance, octroi etc.• M/s Instrumentation Ltd., on 16.06.2009, issued Letter of Intent (LOI) in favour of Dolphin Offshore to perform the work assigned to it by ONGC on a lump-sum basis for Rs. 106 crore. The LOI was a back to back contract and all the terms and conditions were taken to be binding on Dolphin Offshore.• Dolphin Offshore completed all the work assigned to it by M/s Instrumentation Ltd., on behalf of ONGC within time and a completion certificate was also issued by ONGC.

- Dolphin Offshore raised invoices for which only part payment was made and thus, application under section 9 of the Code was filed claiming total amount of unpaid debt i.e. Rs. 4.90 crores as principal amount and Rs. 2.62 crores as interest.
- M/s Instrumentation Ltd. stated that after completion of the job, ONGC released payment of Rs. 132 crores to M/s Instrumentation Ltd and the it, in turn, released a substantial amount to the Dolphin Offshore.
- In 2014, Govt. of Maharashtra, Sales Tax Department issued a demand notice of VAT for Rs. 8,56,35,646/- pertaining to year 2010-11. Out of the above amount, Rs. 7.58 crores (approx) pertained to aforesaid contract awarded to Dolphin Offshore.
- M/s Instrumentation Ltd asked the Dolphin Offshore to pay the above amount of Rs. 7.58 crores (approx) which was refused by Dolphin Offshore. M/s Instrumentation Ltd. challenged the aforesaid demand notice and the matter was still pending.
- A meeting was held on 11.05.217 wherein Dolphin Offshore agreed for a One time Settlement (OTS) to settle the matter of pending tax liability with the M/s Instrumentation Ltd. and agreements were also executed.
- M/s Instrumentation Ltd alleged that there was dispute in relation to payment of Rs. 7.58 crores (approx) by Dolphin Offshore and settlement agreement have also been signed between the parties.

Decision of NCLT and reasons thereof:

- NCLT noticed that the M/s Instrumentation Ltd had raised dispute about the pending tax

liability in respect of the work contract which is evident from an MOU executed between the parties wherein Dolphin Offshore had tried to settle the matter of pending tax liability.

- NCLT relied upon the judgment of *Mobilox Innovative Pvt. Ltd. vs. Kirusa Software Pvt. Ltd.*, passed by Hon'ble Supreme Court of India wherein Hon'ble Supreme Court of India observed that all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. In this regard, NCLT noted the observation of Hon'ble Supreme Court that, the Court does not need to be satisfied that the defence is likely to succeed. NCLT noted that the Court does not at this stage examine the merits of the dispute except to the extent indicated above. NCLT also noted that so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.
- NCLT held that on facts that there was existence of 'dispute' in the present case and accordingly, the application was rejected on the ground that there was a 'dispute' in existence.

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

Wish you good luck in all your endeavors!!

CS ALKA KAPOOR
CHIEF EXECUTIVE OFFICER
(Designate)