

# **KNOWLEDGE REPONERE**

**(A WEEKLY BULLETIN)  
(JANUARY 22 – FEBRUARY 2,  
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# INSOLVENCY PROFESSIONALS AGENCY

## KNOWLEDGE REPONERE

(A Weekly Bulletin: January 22 - February 2, 2018)

Dear Professional Members,

Greetings!

We are pleased to share with you our 32<sup>nd</sup> bulletin on the Insolvency and Bankruptcy Code, 2016 (“Code”).

- Economic Survey 2017-18

As you are aware, as per the recent economic survey 2017-18, over 525 cases of corporate insolvency have been admitted across all the National Company Law Tribunal (NCLT) benches. In addition, 108 Voluntary Liquidation proceedings and one Fast-Track Corporate Insolvency Resolution have also been initiated. (data till January 06, 2018). 10 Resolution plans have been approved and 30 liquidation orders have been passed by various NCLT benches. The major sectors in respect of which the insolvency resolution has initiated includes steel, construction, trading and textiles.

- Insolvency and Bankruptcy Code (Amendment) Act, 2017 notified in Gazette of India

The Legislative Department of the Ministry of Law and Justice, Government of India, on 19<sup>th</sup> January, 2018, notified the Insolvency and Bankruptcy Code (Amendment) Act, 2017 (“Amendment Act”) in the Gazette of India. The Amendment Act received the assent of President on 18<sup>th</sup> January, 2018. Earlier, both the Houses of the Parliament had passed the Amendment Act. The Amendment Act shall be deemed to have come into force on the 23<sup>rd</sup> day of November, 2017 i.e., the date on which the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 came into force. The Amendment Act has inserted section 29A in the Code which prohibits certain class of persons from submitting a resolution plan. The Amendment Act also prohibits a liquidator to sell the immovable and movable property or actionable claims of a corporate

debtor in liquidation to any person who is not eligible to be a resolution applicant. Further, the Amendment Act has inserted section 235A in the Code which provides that if any person contravenes any of the provisions of this Code or the rules or regulations made there under for which no penalty or punishment is provided in this Code, the such person shall be punishable with fine which shall not be less than one lakh rupees but which may extend to two crore rupees.

The Amendment Act can be accessed at

[http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jan/182066\\_2018-01-20%2023:35:02.pdf](http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jan/182066_2018-01-20%2023:35:02.pdf)

- The Insolvency and Bankruptcy Board of India (“IBBI”) on 16<sup>th</sup> January, 2018, in exercise of its powers under section 196 read with section 208 of the Code, issued 2 circulars.
- **Fee for Insolvency Professional**
  - i. The *first* circular clarified that an insolvency professional shall render services for a fee which is a reasonable reflection of his work, raise bills / invoices in his name towards such fees, and such fees shall be paid to his bank account. Any payment of fees for the services of an insolvency professional to any person other than the insolvency professional shall not form part of the insolvency resolution process cost.  
Any other professional appointed by an insolvency professional shall raise bills / invoices in his / its (such as registered valuer) name towards such fees, and such fees shall be paid to his / its bank account.

The circular can be accessed at

[http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jan/Fees%20payable%20to%20an%20Insolvency%20professional%20and%20to%20other%20professionals%20appointed%20by%20an%20Insolvency%20professional\\_2018-01-16%2017:57:32.pdf](http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jan/Fees%20payable%20to%20an%20Insolvency%20professional%20and%20to%20other%20professionals%20appointed%20by%20an%20Insolvency%20professional_2018-01-16%2017:57:32.pdf)

- ii. The *second* circular provides that an insolvency professional shall disclose his relationship, if any, with (i) the Corporate Debtor, (ii) other Professional(s) engaged by him, (iii) Financial Creditor(s), (iv) Interim Finance Provider(s), and (v) Prospective Resolution Applicant(s) to the

Insolvency Professional Agency (“IPA”) of which he is a member, within the time specified as under

<b>Relationship of the Insolvency Professional with</b>	<b>Disclosure to be made within three days of</b>
Corporate Debtor	his appointment.
Other Professionals [Registered Valuer(s) / Accountant(s) / Legal Professional(s) / Other Professional(s)] appointed by him	appointment of the other Professional.
Financial Creditor(s)	the constitution of Committee of Creditors.
Interim Finance Provider(s)	the agreement with the Interim Finance Provider.
Prospective Resolution Applicant(s)	the supply of information memorandum to the Prospective Resolution Applicant.
If relationship with any of the above comes to notice or arises subsequently	of such notice or arising.

The circular further provides that an insolvency professional shall ensure disclosure of the relationship, if any, of the other professional(s) engaged by him with (i) himself, (ii) the Corporate Debtor, (iii) Financial Creditor(s), (iv) Interim Finance Provider(s), and (v) Prospective Resolution Applicant(s) to the IPA of which he is a member, within the time specified as under:

<b>Relationship of the other Professional(s) with</b>	<b>Disclosure to be made within three days of</b>
The Insolvency Professional	the appointment of the other Professional.
Corporate Debtor	the appointment of the other Professional.
Financial Creditor(s)	constitution of Committee of Creditors.
Interim Finance Provider(s)	the agreement with the Interim Finance Provider or three days of the appointment of the other Professional, whichever is later.

Prospective Resolution Applicant(s)	the supply of information memorandum to the Prospective Resolution Applicant or three days of the appointment of the other Professional, whichever is later.
If relationship with any of the above comes to notice or arises subsequently	of such notice or arising.

Under this circular, the IPAs have also been cast with a responsibility to disseminate such disclosures on its website within three working days of receipt of the disclosure.

Complete circular can be accessed at:

[http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jan/Disclosures-Circular-12.01.2018%20\(1\)-1\\_2018-01-16%2018:17:52.pdf](http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jan/Disclosures-Circular-12.01.2018%20(1)-1_2018-01-16%2018:17:52.pdf)

- IBBI has issued an information brochure (“**brochure**”) on Insolvency Resolution of Corporate Persons on January 22, 2018. The brochure describes the process as under:
  - Approach
  - Insolvency Resolution Process for Corporate Persons
  - Fast Track Insolvency Resolution Process for Corporate Persons

Although there is a disclaimer with the brochure which states that the same is issued solely for the purpose of creating awareness on the subject and must not be used as a guide for taking or recommending action or decision, commercial or otherwise.

Complete brochure can be accessed at:

[http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jan/CIRP%20and%20Fast%20Track%20Information%20Brochure%2022012018\\_2018-01-22%2020:16:27.pdf](http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jan/CIRP%20and%20Fast%20Track%20Information%20Brochure%2022012018_2018-01-22%2020:16:27.pdf)

- In appeal filed before NCLAT against the judgment of NCLT, Hyderabad Bench in the matter of Kamineni Steel & Power India Pvt. Ltd. wherein NCLT approved the resolution plan despite not being approved by 75% of voting share of Committee of Creditor (“CoC”), NCLAT, in the hearing held on

January 23, 2018, directed Kamineni Steel & Power India Pvt. Ltd. to file its reply and adjourned the matter to February 8, 2018.

The order of NCLAT is available at:

[http://www.nclat.nic.in/interim\\_orders/Jan2018/23012018AT3352017.pdf](http://www.nclat.nic.in/interim_orders/Jan2018/23012018AT3352017.pdf)

## 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.	Bank of Baroda v/s. M/s. Metaphor Exports Pvt. Ltd.	Section 7 of the Code dealing with initiation of CIRP by financial creditor.	New Delhi	7.56 Crores
2.	Blueview Properties Pvt. Ltd. v/s. Swift Equipments Pvt. Ltd.	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	New Delhi	39 Lakhs
3.	Mr. Pradeep M. R. v/s. M/s. Merchem Limited	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Chennai	3.20 Lakhs
4.	M/s. Chava Bharath Kumar & 2 Ors. v/s. M/s. Leather Export	Section 9 of the Code dealing with initiation of CIRP	Chennai	1.67 Crores

	House (India) Pvt. Ltd.	by operational creditor.		
5.	M/s. Phoenix Marketing United Limited	v/s. Phoenix Breweries	Section 9 of the Code dealing with initiation of CIRP by operational creditor.	Bengaluru 1.82 Crores

## 2) BRIEF NOTE

### NCLT JUDGMENT

**Mr. Chava Bharath Kumar & 2 Ors. ...Applicants/Operational Creditors**  
**Versus**  
**M/s Leather Export House (India) Pvt. Ltd ...Respondent/Corporate Debtor**

**Date of judgment: 17.01.2018**

- Mr. Chava Bharath Kumar along with two other operational creditors (collectively referred to as "OCs") jointly filed an application under section 9 of the Code for initiation of CIRP against M/s Leather Export House (India) Pvt. Ltd., Corporate Debtor ("M/s Leather Export") before NCLT, Chennai Bench.
- The reason for filing application collectively by OCs was that a Memorandum of Understanding ("MoU") dated 09.08.2014 had been executed between the three OCs and M/s Leather Export. Thus, they are parties to the MoU and the agreement is joint in nature.
- Case of the OCs was that they together had executed a MoU with M/s Leather Export for the purchase of land/building in the industrial estate measuring 12330 sq. fts. As per the MoU, an amount of Rs. 1 crore had been advanced to M/s Leather Export by way of a cheque dated 09.08.2014.
- The MoU stipulated the conditions that in case the balance amount was not paid by OCs, then 75% of the advance amount shall be returned to them and balance 25% of the advance shall be retained by M/s Leather Export as damages for breach of the terms of the MoU. However, it also stated that if OCs paid the balance amount and M/s Leather Export breaches the terms of MoU,



then, on amount advanced by OCs, interest at the rate of 24% shall be paid by M/s Leather Export.

- OC served notice dated 05.11.2014 to M/s Leather Export stating that it is ready to pay the balance amount provided the latter fulfills its obligation as provided in the MoU. OCs served another notice dated 24.08.2015 demanding the advance amount along with interest at the rate of 24% stating that M/s Leather Export had not fulfilled its obligations as provided under the MoU.
- OCs also sent demand notice dated 15.05.2017 under section 8 of the Code demanding payment of the outstanding amount.
- NCLT observed that M/s Leather Export had committed default in making payment of the outstanding debt claimed by the OCs. Further, it was observed that all the requirements of the law for admission of the application were fulfilled.
- Hence, the application was admitted and the commencement of CIRP was ordered.

<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.

**Roofit Industries Limited**

**...Corporate Applicant**

**Jitender Kumar Jain**

**Resolution Professional**

**...Applicant**

**Date of Judgment: 22.01.2018**

- Mr. Jitender Kumar, Resolution Professional (“**applicant**”) filed the present application under section 33 read with section 60(5) of the Code for liquidation of Roofit Industries Ltd. (“**Roofit**”).
- Roofit had filed an application under section 10 of the Code for initiating CIRP against itself. The application was admitted on 28.06.2017 and applicant was appointed as Interim Resolution Professional (“**IRP**”). In the first meeting of CoC, applicant was confirmed as Resolution Professional.
- The period of 180 days expired on 26.12.2017. No expansion of CIRP period was sought.
- Roofit had nine (9) immovable properties. No resolution plan was received except for the B-42 Gummidipoondi Faactory of Roofit, which was submitted

by Gummidipoondi Roofit Employees' Association on the last day of completion of CIRP.

- The said plan was not presented before the CoC because of the reason that the applicant did not have enough time to examine the resolution plan.
- Since the CIRP period of 180 days ended on 26.12.2017 and no resolution plan for Roofit was received except for B-42, Gummidipoondi Factory, applicant filed application for liquidation under section 33 of the Code.
- Considering the fact that resolution plan was submitted only in respect of one property, NCLT was of the view that the resolution plan could not be considered as a resolution plan under the Code and accordingly, NCLT ordered liquidation of Roofit.
- To the resolution professional's plea that he is not willing to act as a liquidator of Roofit, the Bench underscored that the Code provides that where the Bench passes an order for liquidation of the corporate debtor, the resolution professional appointed for the CIRP process shall act as a liquidator unless replaced by it. In view of this provision, applicant's request was not conceded.
- Apart from this, given that the resolution professional had dealt with Roofit for the last six months, the Bench observed that it was not advisable to make somebody else a liquidator for the mere reason that no funds were available with the corporate debtor to remunerate the resolution professional.
- The Bench directed that the fee shall be paid to the liquidator as envisaged under the relevant regulation of the Insolvency and Bankruptcy Board of India (Liquidation Process), which forms part of the liquidation cost.

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

**...Applicant/Operational Creditors**

**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 of our weekly bulletin useful and informative.

Wish you good luck in all your endeavors!!

**Team ICSI IPA**