

Series 1

**Judicial Pronouncements
under
Insolvency and Bankruptcy Code, 2016**



**Insolvency and Bankruptcy Laws Group under
Corporate Laws & Corporate Governance Committee
and
Indian Institute of Insolvency Professionals of ICAI
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi**

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Message

The Insolvency and Bankruptcy Code, 2016 as we all know provides for insolvency resolution process in a time bound manner. The effective and timely functioning of the mechanism of insolvency resolution indeed depends on the institutions involved in the implementation of the law.

This feature of the Insolvency and Bankruptcy Code will facilitate the growth of society. In case of liquidation as per earlier laws, due to long term litigations and other factors, protecting the interest of creditors and labourers was a matter of concern and also due to efflux of time, cost of machinery goes down and it was sold in scrap. With this Code in place, as there is a time bound process, the payment of these creditors and labourers is to be made in priority to others and also one of the aim of this Code is to maximise the value of assets which will in turn help society to grow.

The Indian Institute of Insolvency Professionals of ICAI (IIPI), the Insolvency Professional Agency as formed by The Institute of Chartered Accountants of India, promotes professional development of its members, who play a key role in the conduct of the insolvency resolution process. IIPI is taking various initiatives towards capacity building of its members.

As more and more Corporates are being admitted into resolution process, the Code is also evolving to take care of the emerging implementation issues. The latest development in this direction is the promulgation of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

At this juncture, I am very happy that the Insolvency and Bankruptcy Laws Group under Corporate Laws & Corporate Governance Committee of ICAI and Indian Institute of Insolvency Professionals of ICAI have taken this joint initiative of bringing out the first series of the publication “Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016” to help the professionals for clear understanding of the Code.

I would like to specially thank the Insolvency and Bankruptcy Laws Group (under CL & CGC) of ICAI under the Convenorship of CA. Nihar Niranjana Jambusaria and CA. Ranjeet Kumar Agarwal, Deputy Convenor of the Insolvency and Bankruptcy Laws Group under CL& CGC and also thank the members of the Board of IIPI, Shri I.Y.R.Krishna Rao, Shri M. Damodaran, Shri Biswamohan Mahapatra, Shri M.D.Mallya for this joint initiative. I would

sincerely thank CA. Naveen N.D.Gupta, CA. Nilesh S. Vikamsey, CA. Devaraja Reddy M and CA. Dhinal A. Shah- the Directors of IIIPI, for their guidance and support in this endeavour.

I would like to appreciate the efforts put in by Ms. S. Rita, CA. Sarika Singhal of the ICAI team and Shri Susanta Sahu of the IIIPI team in putting together the Judicial pronouncements.

I am confident that this publication would be of immense help to the professionals and other stakeholders.

Justice Anil R. Dave (Retd.)

Chairman, Indian Institute of Insolvency Professionals of ICAI

Date: 1st July, 2018

Place: New Delhi

Foreword

The implementation of the Insolvency and Bankruptcy Code, 2016 effectively started with the enforcement of provisions relating to Corporate Insolvency Resolution Process under the Code in December 2016. In a short span of one and a half year, the Code has witnessed remarkable growth in terms of its utilisation in the Indian debt resolution landscape.

With the withdrawal of various Stressed Assets Resolution processes viz., CDR, SDR, S4A etc. by the issuance of the Revised Framework by RBI, the Insolvency and Bankruptcy Code (IBC) now becomes the central mechanism for Corporate Insolvency Resolution. The number of cases for corporate insolvency under the Code will rise considerably. Also when the insolvency framework for Individuals and Firms will be introduced, there will be further admission of cases under the Code from this sphere also.

The IBC, being a recent legislation, the various Judicial Pronouncements under the Code are very important resource to understand the various provisions of the Law.

I congratulate the Insolvency and Bankruptcy Laws Group under Corporate Laws & Corporate Governance Committee (CL&CGC) and Indian Institute of Insolvency Professionals of ICAI (IIPI) in taking this initiative of bringing out the publication “Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016” to facilitate professionals to appreciate the aspects of the Code.

I extend my sincere appreciation to the entire Group and specially appreciate the efforts put in by CA. Nihar Niranjana Jambusaria, Convenor of the Insolvency and Bankruptcy Laws Group under CL&CGC for initiating this publication. I put on record my appreciation to CA. Ranjeet Kumar Agarwal, Deputy Convenor of the Insolvency and Bankruptcy Laws Group under CL&CGC, CA. Dhinal A Shah, Central Council Member and Director, IIPI, CA. K. Sripriya, Central Council Member and Member of the Group and CA. (Dr.) Debashis Mitra, Chairman, Corporate Laws & Corporate Governance Committee for bringing out this useful publication.

I am sure that this publication would be of great help to the members and other stakeholders.

CA. Naveen N.D. Gupta
President ICAI
Director IIIPI

Date:1st July, 2018
Place: New Delhi

Preface

The Insolvency and Bankruptcy Code, 2016 (IBC) is one of the most important and major economic reforms that took place in the country recently. We are witnessing the implementation of Insolvency Resolution Framework as established in the Code, which is focussed on revival of businesses by resolution process. This will clearly bring the change in the prospects of both creditors and debtors.

To strengthen the framework, further amendments are being made to the Code and the Regulations. The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 was promulgated by the President in November 2017. The Ordinance later got replaced by Insolvency and Bankruptcy Code (Amendment) Act 2018 in January 2018. Recently promulgation of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 took place on 6th June 2018. Some of the Regulations under the Code have also been amended.

It has been an year now since RBI identified 12 Accounts for Reference by Banks under IBC. One case out of 12 has been resolved as of now. The outcome of the other cases are been eagerly awaited by all stakeholders involved in the proceedings. Besides these, the developments in the other major cases are also been keenly watched.

Precedents in the form of some complex case laws may help the resolution of cases in future. So the Judicial Pronouncements are of utmost importance for the professionals and other stakeholders to understand the various aspects of the Insolvency and Bankruptcy Law.

The Insolvency and Bankruptcy Laws Group under Corporate Laws & Corporate Governance Committee (CLCGC), formed by the Institute with a view to give specific focus on the Insolvency and Bankruptcy Laws, has taken various initiatives towards creation of awareness and knowledge dissemination about the new Code and the professional opportunities in this new area of practice. The Group conducts Intensive training programmes/webcast for preparation of IBBI Limited Insolvency Examination. The Group also brings out publications to help members to understand the Code better.

In furtherance of all these initiatives, the Insolvency and Bankruptcy Laws Group jointly with the Indian Institute of Insolvency Professionals of ICAI (IIPI) has decided to bring out a publication on Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016 in the form of a series. The Series 1 is being brought out with this publication.

The publication would cover important Case Analysis based on the decisions by Supreme Court, High Courts, NCLAT and NCLT on issues under the Code.

We take this opportunity to thank the President of ICAI and Director IIPI, CA. Naveen N. D. Gupta and Vice President of ICAI, CA. Prafulla Premeek Chhajed for their encouragement and moral support in bringing out the publication.

We express our sincere gratitude towards the Board of IIPI comprising of Hon' ble Mr. Justice Anil R. Dave (Retd.), Chairman of the Board and other Directors, Shri I.Y.R Krishna Rao, Shri M. Damodaran, Shri Biswamohan Mahapatra, Shri M.D. Mallya, CA. Nilesh S. Vikamsey, Immediate Past President, ICAI and CA. M. Devaraja Reddy, Past President, ICAI for joining in this initiative.

We would like to thank CA. (Dr.) Debashis Mitra, Chairman, Corporate Laws & Corporate Governance Committee for his support in this initiative. We would like to place on record our appreciation to all the Group Members for their support and would like to appreciate the help extended by CA. Dhinal A Shah, Central Council Member and Director, IIPI and CA. K. Sripriya, Central Council Member and Member of the Group in bringing out this publication.

We would like to thank CA. Snehal Kamdar, CA. Apoorva Bookseller, CA. Prasad Dharap, CA. Devang P Sampat, CA. Siddharth Mathur, CA. Viral Doshi, CA. Pravin Navandar and CA. Ankit Sanghavi, for summarising and analysing the Cases.

Our appreciation to the Group Secretariat and the Committee Secretariat comprising of Ms. S. Rita, CA. Sarika Singhal, CA. Choshal Patil and to Shri Susanta Sahu of IIPI for their contribution and efforts in putting together the Case Analysis.

We sincerely believe that the members of the profession, industries and other stakeholders will find the publication immensely helpful.

CA. Nihar Niranjan Jambusaria

Convenor

Insolvency and Bankruptcy Laws Group, CLCGC, ICAI

CA. Ranjeet Kumar Agarwal

Deputy Convenor

Insolvency and Bankruptcy Laws Group, CLCGC, ICAI

Date: 1st July, 2018

Place: New Delhi

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Chapter 1

**Orders passed by Supreme Court of
India**

SECTION-7

CASE NO. 1

Chitra Sharma & Ors (Petitioner)

Vs.

Union of India & Ors (Respondent)

Writ Petition(s)(Civil) No(s).744/2017

Date of order: 11-09-2017

Section 7 – Application for Initiation of Corporate Insolvency Resolution Process by Financial Creditor (IDBI Bank Vs Jaypee Infratech Ltd [JIL])

Facts:

Present case arose from the aforesaid popular case and was part of the said case wherein the Supreme Court vide its order dated 04.09.2017 has stayed the order passed by the National Company Law Tribunal, Allahabad. Learned Attorney General for India appearing for respondent submitted that the order passed by this Court (SC) on 04.09.2017 needs to be vacated or modified because the consequence of the stay would be that the Management of respondent No.3 – Jaypee Infratech Ltd. would stand restored. This was not a consequence intended by this Court. It is urged by him that if the erstwhile Management of the said company continues, it will affect the rights of the creditors and the consumers as well.

The court was informed that after the order of stay was passed by this Court, the Interim Resolution Professional (IRP) has handed over records to respondent No. 3 – Jaypee Infratech Ltd. (“JIL”). It was submitted by learned Attorney General that some time should be granted to the IRP to formulate at least a preliminary scheme so that the interest of all stakeholders is protected. He has also shown his concern for the interest of the home buyers.

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The learned Senior Counsel appearing for IDBI Bank Limited – (respondent No.6 in the writ petition) submits that under the statutory scheme, the IRP has to take over otherwise the letter and spirit of the Act is likely to be affected.

Learned counsel appearing for the home buyers, in contra, submits that they belong to the lower and middle income group and have invested life savings with JIL and with its holding company, Jai Prakash Associates Ltd. ("JAL"). It has been assiduously urged that the investments of flat purchasers are with JIL and JAL and, therefore, the interest of the purchasers may be protected. It is also argued that if the IRP is restored, there should be a representative from the home buyers or this Court may appoint someone on this Committee of Creditors and espouse the interests of the home buyers.

Decision:

Having heard learned counsel for the parties at length, in modification of the order dated 04.09.2017, the court has issued the following directions:

- a) The IRP shall forthwith take over the Management of JIL. The IRP shall formulate and submit an Interim Resolution Plan within 45 days before this Court. The Interim Resolution Plan shall make all necessary provisions to protect the interests of the home buyers;
- b) Mr. Shekhar Naphade, learned senior counsel along with Ms. Shubhangi Tuli, Advocate-on-Record, shall participate in the meetings of the Committee of Creditors under Section 21 of the Insolvency and Bankruptcy Code, 2016 to espouse the cause of the home buyers and protect their interests;
- c) The Managing Director and the Directors of JIL and JAL shall not leave India without the prior permission of this Court;
- d) JAL which is not a party to the insolvency proceedings, shall deposit a sum of Rs.2,000 crores (Rupees two thousand crores) before this Court on or before 27.10.2017. For the said purpose, if any assets or property of JAL have to be sold, that should be done after obtaining prior approval of this Court. Any person who was a Director or Managing Director of JIL or JAL on the date of the institution of the insolvency proceedings against JIL as well as the present Directors/Managing Director shall also not leave the country without prior permission of this Court. The foregoing restraint shall not apply to nominee Directors of lending institutions (IDBI/ICICI/SBI);

Orders passed by Supreme Court of India

- e) All suits and proceeding instituted against JIL shall in terms of Section 14(1)(a) remain stayed as we have directed the IRP to remain in Management.

CASE NO. 2

**Neelkanth Township and Construction Pvt Ltd
(Appellant/ Financial Creditor)**

Vs.

Urban Infrastructure Trustees Ltd. (Respondent/ Corporate Debtor)

Civil Appeal no. 10711 of 2017

Date of Order: 23-08-2017

Facts:

The financial creditor was an investor and a debenture holder of 'Optionally Convertible Debenture Bond' payable on maturity which was issued by the corporate debtor. The zero interest OCD bonds amounted to 1.27 crores, 1.24 crores and 48 crores each and matured as of 25.12.2012, 14.02.2013 and 30.04.2011. The liability to redeem the debentures on maturity along with a redemption premium lay on the debtor which was not made. In addition, 98% of the debtor company's funding was through these bonds. Thus, principal amount claimed is 51 crores.

Initially, a CIRP application was filed by the financial creditor which was dismissed by the adjudicating authority on the grounds that 'default amount' and 'claim amount' are the same and not to be segregated.

Therefore, the present application has been filed by the creditor afresh rectifying the defects against the debtor before NCLT Mumbai. NCLT admitted the application declaring moratorium. Aggrieved by the order, debtor appealed to NCLAT only to get further dismissal.

Contentions by Corporate Debtor (BEFORE NCLT AND NCLAT)

1. The application petition is incomplete since it has not complied with the requirements u/s 7(3) of IB Code 2016 and record of evidence of default is not as specified under the Board Regulations under Section 240 of IBC, 2016

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2. Deficiency of stamp duty under S.35 of Indian Stamp Act 1899 will invalidate the debenture certificates.
3. The 3-year limitation period for seeking remedy for the debenture certificates is expired since the date of its maturity.
4. The creditor does not have a capacity to file the petition since they do not come under the meaning of 'financial creditor' and only an investor-cum-shareholder in the company.
5. The application under Section 7 of IBC 2016 is time-barred as the debt related to years 2011, 2012 and 2013.
6. The 'debenture certificate' does not come within the term 'financial debt'.

NCLT Order:

NCLT vide its order dated 25.04.2017 put forth the following explanations for the arguments of the debtor while admitting the application petition:

The debenture certificates and the balance sheets containing the transaction details itself is enough and ascertain the overdue on part of the debtor company.

The Rule 8 of IBBI (Insolvency for Corporate Persons) Rules 2016 is clear in its words to mean that either one of the following requirements is enough – financial contract having debt claims, financial certificate or annual report evidencing the default of debt or any court order adjudicating the same debt claim. Subject to that, the financial statement and annual report of the debentures produced by the creditor is enough to ascertain the debt.

Since debtor company is a private limited company and for these OCDs cannot be transferred like in a public company. And further a non-payment on its maturity takes away its marketable nature and does not require a stamp duty under the Stamp Act 1899.

Question of time-barred debts is 'ex-facie' and therefore such argument is baseless. It need not be profoundly said that admission appearing in the financial statement is an acknowledgement covered by S.18 of Limitations Act. It is 'in-rem' in nature and construed as existence of debt. The Limitation Act does not apply to IB code proceedings.

Orders passed by Supreme Court of India

Pendency of arbitration proceedings will not have a bearing in this case. There is no legal bar to be against the financial creditor and deprive of his right to file a claim. More funding being made, he is competent to file CIRP proceedings as a shareholder and a financial creditor

NCLAT Order:

NCLAT dismissed the appeal on the following grounds:

A procedural provision cannot override or affect the substantive obligation of the adjudicating authority to deal with applications under Section 7 merely on the ground that Board has not stipulated or framed any regulations with regard to Section 7(3)(a).

Board has framed 'Insolvency Resolution Process for Corporate Persons, Regulations, 2016' where 'Form-c' attached to the regulations relates to proof of claim and under serial no.10, financial creditor is supposed to submit the list of documents as given under R.11(2) of the same regulations. Therefore, the stand that there are no regulations made by the board in case of Section 7(3) (a) cannot be accepted.

There is nothing on record that Limitation Act 1963 is applicable to IB Code 2016 and debtor failed to lay hand as to what provision which suggests such applicability. IB code does not is not an Act for recovery of claims but relates to CIRP proceedings. If there is a debt including interest and is in continuing course of action, the argument that it is time-barred by limitation is baseless.

The arguments relating to 'locus-standi' of financial creditor is invalidated by the terms of 'financial creditor' under Section.7. Being a debenture-holder and shareholder of the company does make the creditor entitled to claim debt amount.

With the debenture payable, as on the maturity date with interest, it was disbursed against consideration for the time value of the money. Thus, it cannot be said that debentures on maturity do not come under that purview of Section 5(8)(c).

There is a liability to redeeming the debenture amount of 51 crores on part of the corporate debtor by the provisions of Section 7, Section 5 and Section 3(11) & 3(12) and above grounds.

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

Subsequent Development

The Corporate Debtor challenged the above judgment of Appellate Authority before the Hon'ble Supreme Court of India.

1. The Hon'ble Supreme Court dismissed the appeal filed by Corporate Debtor.
2. However, it observed that the question of law viz. Whether limitation act is applicable to Insolvency proceedings is left open.

SECTION-8

CASE NO. 3

Macquarie Bank Limited

Vs.

Shilpi Cable Technologies Ltd.

Date of order: 15-12-2017

Sections 8, 9 and 238 of the Insolvency and Bankruptcy Code, 2016 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 30 of the Advocates Act - A fair construction of Section 9(3)(c), in consonance with the object ought to be achieved by the Code, would lead to the conclusion that it cannot be construed as a threshold bar or a condition precedent - The non-obstante clause contained in Section 238 of the Code will not override the Advocates Act as there is no inconsistency between Section 9, read with the Adjudicating Authority Rules and Forms referred to hereinabove, and the Advocates Act - A conjoint reading of Section 30 of the Advocates Act and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order.

The present appeals raise two important questions which arise under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code"). The first question is whether, in relation to an operational debt, the provision contained in Section 9(3)(c) of the Code is mandatory; and secondly, whether a demand notice of an unpaid operational debt can be issued by a lawyer on behalf of the operational creditor.

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The Supreme Court held as follows:

The true construction of Section 9(3)(c) is that it is a procedural provision, which is directory in nature, as the Adjudicatory Authority Rules read with the Code clearly demonstrate. The Code cannot be construed in a discriminatory fashion so as to include only those operational creditors who are residents outside India who happen to bank with financial institutions which may be included under Section 3(14) of the Code. It is no answer to state that such person can approach the Central Government to include its foreign banker under Section 3(14) of the Code, for the Central Government may never do so. Argument that such persons ought to be left out of the triggering of the Code against their corporate debtor, despite being operational creditors as defined, would not sound well with Article 14 of the Constitution, which applies to all persons including foreigners. Therefore, as the facts of these cases show, a so called condition precedent impossible of compliance cannot be put as a threshold bar to the processing of an application under Section 9 of the Code.

It is true that the expression “initiation” contained in the marginal note to Section 9 does indicate the drift of the provision, but from such drift, to build an argument that the expression “initiation” would lead to the conclusion that Section 9(3) contains mandatory conditions precedent before which the Code can be triggered is a long shot. Equally, the expression “shall” in Section 9(3) does not take us much further when it is clear that Section 9(3)(c) becomes impossible of compliance in cases like the present. It would amount to a situation wherein serious general inconvenience would be caused to innocent persons, such as the appellant, without very much furthering the object of the Act, therefore, Section 9(3)(c) would have to be construed as being directory in nature.

It is unnecessary to further refer to arguments made on the footing that Section 7 qua financial creditors has a process which is different from that of operational creditors under Sections 8 and 9 of the Code. The fact that there is no requirement of a bank certificate under Section 7 of the Code, as compared to Section 9, does not take us very much further. The difference between Sections 7 and 9 has already been noticed by this Court in *Innoventive Industries Ltd. v. ICICI Bank & Anr.*, Civil Appeal Nos. 8337-8338 of 2017 decided on August 31, 2017. The fact that these differences obtain under the Code would have no direct bearing on whether Section 9(3)(c).

A fair construction of penal statutes based on purposive as well as literal interpretation is the correct modern day approach. Any arbitrary

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

interpretation, as opposed to fair interpretation, of a statute, keeping the object of the legislature in mind, would be outside the judicial ken. The task of a Judge, when he looks at the literal language of the statute as well as the object and purpose of the statute, is not to interpret the provision as he likes but is to interpret the provision keeping in mind Parliament's language and the object that Parliament had in mind. With this caveat, it is clear that judges are not knight-errants free to roam around in the interpretative world doing as each Judge likes. They are bound by the text of the statute, together with the context in which the statute is enacted; and both text and context are Parliaments', and not what the Judge thinks the statute has been enacted for. Also, it is clear that for the reasons stated by us above, a fair construction of Section 9(3)(c), in consonance with the object ought to be achieved by the Code, would lead to the conclusion that it cannot be construed as a threshold bar or a condition precedent.

Supreme Court on Notice issued by Lawyer on behalf of Operational Creditor:

Section 8 of the Code speaks of an operational creditor delivering a demand notice. It is clear that had the legislature wished to restrict such demand notice being sent by the operational creditor himself, the expression used would perhaps have been "issued" and not "delivered". Delivery, therefore, would postulate that such notice could be made by an authorized agent. In fact, in Forms 3 and 5 of the Adjudicating Authority Rules, it is clear that this is the understanding of the draftsman of the Adjudicatory Authority Rules, because the signature of the person "authorized to act" on behalf of the operational creditor must be appended to both the demand notice as well as the application under Section 9 of the Code.

The position further becomes clear that both forms require such authorized agent to state his position with or in relation to the operational creditor. A position with the operational creditor would perhaps be a position in the company or firm of the operational creditor, but the expression "in relation to" is significant. It is a very wide expression, as has been held in *Renusagar Power Co. Ltd. v. General Electric Co.*, (1984) 4 SCC 679 at 704 and *State of Karnataka v. Azad Coach Builders (P) Ltd.* (2010) 9 SCC 524 at 535, which specifically includes a position which is outside or indirectly related to the operational creditor. It is clear, therefore, that both the expression "authorized to act" and "position in relation to the operational creditor" go to show that an authorized agent or a lawyer acting on behalf of his client is included within the aforesaid expression.

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The non-obstante clause contained in Section 238 of the Code will not override the Advocates Act as there is no inconsistency between Section 9, read with the Adjudicating Authority Rules and Forms referred to hereinabove, and the Advocates Act.

Since there is no clear disharmony between the two Parliamentary statutes in the present case which cannot be resolved by harmonious interpretation, it is clear that both statutes must be read together. Also, we must not forget that Section 30 of the Advocates Act deals with the fundamental right under Article 19(1)(g) of the Constitution to practice one's profession. Therefore, a conjoint reading of Section 30 of the Advocates Act and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order.

The expression "an operational creditor may on the occurrence of a default deliver a demand notice....." under Section 8 of the Code must be read as including an operational creditor's authorized agent and lawyer, as has been fleshed out in Forms 3 and 5 appended to the Adjudicatory Authority Rules.

Case Review: Judgement of NCLAT, set aside

SECTION-9

CASE NO. 4

Mobilox Innovations Private Limited (Appellant/Corporate Debtor)

Vs.

Kirusa Software Private Limited (Respondent/Operational Creditor)

Date of order: 21-09-2017

Section 9 read with Section 8 of the Insolvency and Bankruptcy Code, 2016 – Application for initiation of corporate Insolvency resolution process by operational creditor- The expression "and" occurring in section 8(2)(a) may be read as "or" in order to further the object of the statute and/or to avoid an anomalous situation - once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility - So long as a dispute truly exists in fact and is not spurious, hypothetical or

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illusory, the adjudicating authority has to reject the application - A “dispute” is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6)

In terms of purchase order issued by the Appellant/Corporate Debtor the Respondent/Operational Creditor provided certain services and raised monthly invoices between December, 2013 and November, 2014. The bills so raised were payable within 30 days of receipt by the appellant. It is pertinent to note here that a non-disclosure agreement (NDA) was executed between the parties on 26th December, 2014 with effect from 1st November, 2013. In view of non-payment of dues, a demand notice dated 23rd December, 2016 was sent by the respondent under Section 8 of the Code. To this notice, the appellant responded that there exists serious and bona fide disputes between the parties and that nothing was payable as the respondent had been told on 30th January, 2015 that no amount would be paid to the respondent since it had breached the NDA.

The NCLT rejected the application filed under section 9 of the Code on the ground that the default payment being disputed by the Corporate Debtor and that, the operational creditor has admitted that the notice of dispute has been received, the claim made is hit by Section (9)(5)(ii)(d) of the Code.

On appeal the NCLAT set aside the order of the NCLT and remitted the case for consideration with the following observation:

“In the present case the adjudicating authority has acted mechanically and rejected the application under sub-section (5)(ii)(d) of Section 9 without examining and discussing the aforesaid issue. If the adjudicating authority would have noticed the provisions as discussed above and what constitutes ‘dispute’ in relation to services provided by operational creditors then it would have come to a conclusion that condition of demand notice under sub-section (2) of Section 8 has not been fulfilled by the corporate debtor and defence claiming dispute was not only vague, got up and motivated to evade the liability.”

On appeal, the Supreme Court held as follow:

The adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- (i) Whether there is an “operational debt” as defined exceeding Rs.1 lakh? (See Section 4 of the Act)
- (ii) Whether the documentary evidence furnished with the application

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shows that the aforesaid debt is due and payable and has not yet been paid? and

- (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected.

Apart from the above, the adjudicating authority must follow the mandate of Section 9, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.

Another thing of importance is the timelines within which the insolvency resolution process is to be triggered. The corporate debtor is given 10 days from the date of receipt of demand notice or copy of invoice to either point out that a dispute exists between the parties or that he has since repaid the unpaid operational debt. If neither exists, then an application once filed has to be disposed of by the adjudicating authority within 14 days of its receipt, either by admitting it or rejecting it. An appeal can then be filed to the Appellate Tribunal under Section 61 of the Act within 30 days of the order of the Adjudicating Authority with an extension of 15 further days and no more.

Section 64 of the Code mandates that where these timelines are not adhered to, either by the Tribunal or by the Appellate Tribunal, they shall record reasons for not doing so within the period so specified and extend the period so specified for another period not exceeding 10 days. Even in appeals to the Supreme Court from the Appellate Tribunal under Section 62, 45 days time is given from the date of receipt of the order of the Appellate Tribunal in which an appeal to the Supreme Court is to be made, with a further grace period not exceeding 15 days. The strict adherence of these timelines is of essence to both the triggering process and the insolvency resolution process. One of the principal reasons why the Code was enacted was because liquidation proceedings went on interminably, thereby damaging the interests of all stakeholders, except a recalcitrant management which would continue to hold on to the company without paying its debts. Both the Tribunal and the Appellate Tribunal will do well to keep in mind this principal objective sought to be achieved by the Code and will strictly adhere to the time frame within which they are to decide matters under the Code.

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It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. The notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which “the existence of a dispute” alone is mentioned. Even otherwise, the word “and” occurring in Section 8(2)(a) must be read as “or” keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as “or”. If read as “and”, disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an arbitral tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an arbitral tribunal or a court for upto three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended. One of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties. It is settled law that the expression “and” may be read as “or” in order to further the object of the statute and/or to avoid an anomalous situation.

In the first Insolvency and Bankruptcy Bill, 2015 that was annexed to the Bankruptcy Law Reforms Committee Report, Section 5(4) defined “dispute” as meaning a “bona fide suit or arbitration proceedings...”. In its present *avatar*, Section 5(6) excludes the expression “bona fide” which is of significance. Therefore, it is difficult to import the expression “bona fide” into Section 8(2)(a) in order to judge whether a dispute exists or not.

It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the

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operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, 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. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.

Facts:

According to the respondent, the definition of “dispute” would indicate that since the NDA does not fall within any of the three sub-clauses of Section 5(6), no “dispute” is there on the facts of this case.

The Supreme Court held that:

First and foremost, the definition is an inclusive one, and that the word “includes” substituted the word “means” which occurred in the first Insolvency and Bankruptcy Bill. Secondly, the present is not a case of a suit or arbitration proceeding filed before receipt of notice – Section 5(6) only deals with suits or arbitration proceedings which must “relate to” one of the three sub clauses, either directly or indirectly. A “dispute” is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6). The correspondence between the parties would show that on 30th January, 2015, the appellant clearly informed the respondent that they had displayed the appellant’s confidential client information and client campaign information on a public platform which constituted a breach of trust and a breach of the NDA between the parties. They were further told that all amounts that were due to them were withheld till the time the matter is resolved. On 10th February, 2015, the respondent referred to the NDA of 26th December, 2014 and denied that there was a breach of the NDA. The respondent went on to state that the appellant’s claim is unfounded and untenable, and that the appellant is trying to avoid its financial obligations, and that a sum of Rs.19,08,202.57 should be paid within one week, failing which the respondent would be forced to explore legal options and initiate legal process for recovery of the said amount. This email was refuted by the appellant by an e-mail dated 26th

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February, 2015 and the appellant went on to state that it had lost business from various clients as a result of the respondent's breaches. Curiously, after this date, the respondent remained silent, and thereafter, by an e-mail dated 20th June, 2016, the respondent wished to revive business relations and stated that it would like to follow up for payments which are long stuck up. This was followed by an e-mail dated 25th June, 2016 to finalize the time and place for a meeting. On 28th June, 2016, the appellant wrote to the respondent again to finalize the time and place. Apparently, nothing came of the aforesaid e-mails and the appellant then fired the last shot on 19th September, 2016, reiterating that no payments are due as the NDA was breached.

Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defence is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defence as vague, got-up and motivated to evade liability.

According to the respondent, the breach of the NDA is a claim for unliquidated damages which does not become crystallized until legal proceedings are filed, and none have been filed so far.

The Supreme Court held that:

The period of limitation for filing such proceedings has admittedly not yet elapsed. Further, the appellant has withheld amounts that were due to the respondent under the NDA till the matter is resolved. Admittedly, the matter has never been resolved. Also, the respondent itself has not commenced any legal proceedings after the e-mail dated 30th January, 2015 except for the present insolvency application, which was filed almost 2 years after the said e-mail. All these circumstances go to show that it is right to have the matter tried out in the present case before the axe falls.

Therefore, the appeal was allowed and the judgment of the Appellate Tribunal was set aside.

Case Review: Order dated 24-05-2017 of NCLAT in Kirusa Software Private Ltd. Vs. Mobilox Innovations Private Ltd, Company Appeal (AT) (Insolvency) 6 of 2017, *set aside*.

CASE NO. 5

M/s. Surendra Trading Company (Appellant)

Vs.

**M/s. Juggilal Kamlatpat Jute Mills Company Limited and Others
(Respondent)**

Civil Appeal no. 8400 of 2017

With

**Civil Appeal no.15091 of 2017
(Arising out of Diary no. 22835 of 2017)**

Date of Order : 19-09-2017

Section 9 – Application for Initiation of Corporate Insolvency Resolution Process by Operational Creditor

Facts:

The precise question of law which was framed by the NCLAT for its decision is to the following effect:

“Whether the time limit prescribed in Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as Code 2016) for admitting or rejecting a petition or initiation of insolvency resolution process is mandatory?”

The question before the NCLAT was as to whether time of fourteen days given to the adjudicating authority for ascertaining the existence of default and admitting or rejecting the application is mandatory or directory. Further question (with which this Court is concerned) was as to whether the period of seven days for rectifying the defects is mandatory or directory.

The NCLAT has held that period of fourteen days prescribed for the adjudicating authority to pass such an order is directory in nature, whereas period of seven days given to the applicant/operational creditor for rectifying the defects is mandatory in nature.

Decision:

Aforesaid provision of removing the defects within seven days is directory and not mandatory in nature. However, the court said that it would like to enter a caveat.

We are also conscious of the fact that sometimes applicants or their counsel may show laxity by not removing the objections within the time given and

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make take it for granted that they would be given unlimited time for such a purpose. There may also be cases where such applications are frivolous in nature which would be filed for some oblique motives and the applicants may want those applications to remain pending and, therefore, would not remove the defects. In order to take care of such cases, a balanced approach is needed. Thus, while interpreting the provisions to be directory in nature, at the same time, it can be laid down that if the objections are not removed within seven days, the applicant while refilling the application after removing the objections, file an application in writing showing sufficient case as to why the applicant could not remove the objections within seven days. When such an application comes up for admission/order before the adjudicating authority, it would be for the adjudicating authority to decide as to whether sufficient cause is shown in not removing the defects beyond the period of seven days. Once the adjudicating authority is satisfied that such a case is shown, only then it would entertain the application on merits, otherwise it will have right to dismiss the application.

In fine, these appeals are allowed and that part of the impugned judgment of NCLAT which holds proviso to sub-section(5) of Section 7 or proviso to sub-section (5) of Section 9 or proviso to sub-section (4) of Section 10 to remove the defects within seven days as mandatory and on failure applications to be rejected, is set aside.

SECTION-14

CASE NO. 6

**Alchemist Asset Reconstruction Company Ltd
(Petitioner/ Financial Creditor)**

Vs.

Hotel Gaudavan Pvt. Ltd. (Respondent/ Corporate Debtor)

**Civil Appeal No. 16929 of 2017
(Arising out of S.L.P. (C) No. 18195/2017)**

Date of Order: 23-10-2017

Facts :

The Corporate Debtor was sanctioned term loan by SBI, and the repayment for the same was defaulted continuously, despite of the fact that the opportunity was given to the Corporate Debtor to regularize the account by

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means of restructuring the loan. Considering the default being for Rs. 33.93 crores inclusive of interests, SBI invoked the provision under the SARFAESI Act for recovery of the loan. The initial petition was challenged successfully by the Corporate Debtor with DRT and DRAT. SBI further in 2014, had absolutely assigned all the rights, title and interest in the financial assistance granted by him to the company, in favour of Alchemist Asset Reconstruction Company Ltd. (Alchemist ARC)

Though initially rejected by the DRT and DRAT, a fresh notice issued under the SARFAESI Act was allowed by the High Court when appealed to by Financial Creditor.

Taking into the consideration the records produced by the Learned Counsel for the Financial Creditor that the Corporate Debtor is heavily indebted not only to it but also to other secured and unsecured creditors, confirmed that there is clear case for initiation of the Insolvency Resolution Process as contemplated under IBC for the benefit of all the stake holders.

An opportunity of being heard was given to the Corporate debtor, to which the corporate debtor has filed objections with an intention to get the petition rejected by Tribunal.

However, based on the facts presented and considering the decision given in various cases in the similar matter, the Adjudicating Authority (National Company law Tribunal), Special Bench, New Delhi admitted the application, passed order of moratorium and appointed an 'Interim Resolution Professional' with certain directions.

Corporate Debtor filed Writ Petition before the Hon'ble High Court of Rajasthan challenging the order passed, to which the Hon'ble High Court refused to look into the merits of the order and left it open to be examined by the Appellate Tribunal.

Thereafter, the Corporate Debtor along with another shareholder moved before the Hon'ble Supreme Court in SLP(C) No.12606-12707 of 2017 against different orders passed by Adjudicating Authority which were also dismissed on 26th April, 2017

The 'Corporate Debtor' thereafter moved before the Arbitral Tribunal and against such action the 'Insolvency Resolution Professional' moved before the Adjudicating Authority which decided the matter against the 'Corporate Debtor' on 31st May, 2017.

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The Interim Professional Filed Contempt Petition against the Directors for non-compliance with the order of the Adjudication Authority which was passed on 29th July 2017.

The 'Corporate Debtor' had filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 wherein certain orders were passed against which the Appellant (s) preferred the appeal before the District Judge, Jaisalmer, who admitted the appeal, issued notice to the Respondents and passed interim orders.

Decision:

Against the said order, the Financial Creditor moved before Hon'ble Supreme Court in Civil Appeal No. 16929 of 2017 (arising out of S.L.P. (C) No. 18195/2017 which was in favour of the Financial Creditor.

Hon'ble Supreme court set aside the order of the District Judge and further stated that the effect of Section 14 (1) (a) is that the arbitration that has been instituted after the aforesaid moratorium is non est in law.

Further, ongoing Criminal proceeding under F.I.R. No.0605 which was taken in a desperate attempt to see that IRP does not continue with the proceedings under the Insolvency Code which are strictly time bound was quashed.

As a result, the appeal was allowed and the steps that have to be taken under the Insolvency Code will continue unimpeded by any order of any other Court.

SECTION-238

CASE NO. 7

M/s. Innoventive Industries Ltd. (Appellant/Corporate Debtor)

Vs.

ICICI Bank & Anr. (Respondents/Financial Creditor)

Date of Order: 31-08-2017

Section 238 of the Insolvency and Bankruptcy Code, 2016 read with Section 4 of the Maharashtra Relief Undertaking (Special Provisions) Act, 1958 read with Article 254 of the Constitution of India – Provision

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of this Code to override other Laws - Once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company - The Insolvency and Bankruptcy Code, 2016 is an Act to consolidate and amend the laws relating to reorganization and insolvency resolution, *inter alia*, of corporate persons – The Insolvency and Bankruptcy Code is a Parliamentary law that is an exhaustive code on the subject matter of insolvency in relation to corporate entities - On reading of section 238 of the code it is clear that the later non-obstante clause of the Parliamentary enactment will also prevail over the limited non-obstante clause contained in Section 4 of the Maharashtra Act and therefore, the Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under the Code - There would be repugnancy between the provisions of the two enactments

In its order dated 17th January 2017 the NCLT held that the Insolvency and Bankruptcy Code, 2016 (Code) would prevail against the Maharashtra Relief Undertaking (Special Provisions) Act, 1958(Maharashtra Act) in view of the non-obstante clause in Section 238 of the Code. It, has further, held that the Parliamentary statute would prevail over the State statute and this being so; it is obvious that the corporate debtor had defaulted in making payments, as per the evidence placed by the financial creditors. Hence, the application was admitted and a moratorium was declared. The second application with a different plea filed by the Corporate Debtor was rejected by the NCLT vide its order dated 23rd January 2017 on the ground that it was filed belatedly and thus, not maintainable.

On appeal, the NCLAT upheld the order passed by the NCLT, however, held that the Code and the Maharashtra Act operate in different fields and, therefore, are not repugnant to each other and therefore, the appellant cannot derive any advantage from the Maharashtra Act to stall the insolvency resolution process under Section 7 of the Code.

The appellant/Corporate Debtor filed this appeal against the order of NCLAT which had upheld the order passed by the NCLT before the Supreme Court.

On maintainability of the appeal the Apex Court held:

Once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company. In the present case, the

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company is the sole appellant. This being the case, the present appeal is obviously not maintainable.

However, we are not inclined to dismiss the appeal on this score alone. Because this is the very first application that has been moved under the Code, we thought it necessary to deliver a detailed judgment so that all Courts and Tribunals may take notice of a paradigm shift in the law.

Entrenched managements are no longer allowed to continue in management if they cannot pay their debts.

After going through the Statement of Objects & reasons and various relevant provisions of the Code the Supreme Court held as follows:

The Insolvency and Bankruptcy Code, 2016 has been passed after great deliberation and pursuant to various committee reports. One of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor.

The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

On the other hand, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future

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date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.

The rest of the insolvency resolution process is also very important. The entire process is to be completed within a period of 180 days from the date of admission of the application under Section 12 and can only be extended beyond 180 days for a further period of not exceeding 90 days if the committee of creditors by a voting of 75% of voting shares so decides. It can be seen that time is of essence in seeing whether the corporate body can be put back on its feet, so as to stave off liquidation.

As soon as the application is admitted, a moratorium in terms of Section 14 of the Code is to be declared by the adjudicating authority and a public announcement is made stating, inter alia, the last date for submission of claims and the details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims. Under Section 17, the erstwhile management of the corporate debtor is vested in an interim resolution professional who is a trained person registered under Chapter IV of the Code. This interim resolution professional is now to manage the operations of the corporate debtor as a going concern under the directions of a committee of creditors appointed under Section 21 of the Act. Decisions by this committee are to be taken by a vote of not less than 75% of the voting share of the financial creditors. Under Section 28, a resolution professional, who is none other than an interim resolution professional who is appointed to carry out the resolution process, is then given wide powers to raise finances, create security interests, etc. subject to prior approval of the committee of creditors.

Under Section 30, any person who is interested in putting the corporate body back on its feet may submit a resolution plan to the resolution professional, which is prepared on the basis of an information memorandum. This plan must provide for payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the plan, and implementation and supervision of the plan. It is only when such plan is approved by a vote of not less than 75% of the voting share of the financial creditors and the adjudicating authority is satisfied that the plan, as approved, meets the statutory requirements mentioned in Section 30, that it ultimately approves such plan, which is then binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders. Importantly, and this is a major departure from previous

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legislation on the subject, the moment the adjudicating authority approves the resolution plan, the moratorium order passed by the authority under Section 14 shall cease to have effect. The scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up, in which event the management is handed over under the plan so that the corporate body is able to pay back its debts and get back on its feet. All this is to be done within a period of 6 months with a maximum extension of another 90 days or else the chopper comes down and the liquidation process begins.

In answer to the application made under Section 7 of the Code, the appellant only raised the plea of suspension of its debt under the Maharashtra Act, which, therefore, was that no debt was due in law. The adjudicating authority correctly referred to the non-obstante clause in Section 238 and arrived at a conclusion that a notification under the Maharashtra Act would not stand in the way of the corporate insolvency resolution process under the Code.

The Supreme Court observes its various judgments and yields the following proposition:

- (i) Repugnancy under Article 254 arises only if both the Parliamentary (or existing law) and the State law are referable to List III in the 7th Schedule to the Constitution of India.
- (ii) In order to determine whether the Parliamentary (or existing law) is referable to the Concurrent List and whether the State law is also referable to the Concurrent List, the doctrine of pith and substance must be applied in order to find out as to where in pith and substance the competing statutes as a whole fall. It is only if both fall, as a whole, within the Concurrent List, that repugnancy can be applied to determine as to whether one particular statute or part thereof has to give way to the other.
- (iii) The question is what is the subject matter of the statutes in question and not as to which entry in List III the competing statutes are traceable, as the entries in List III are only fields of legislation; also, the language of Article 254 speaks of repugnancy not merely of a statute as a whole but also “any provision” thereof.
- (iv) Since there is a presumption in favour of the validity of statutes generally, the onus of showing that a statute is repugnant to another has to be on the party attacking its validity. It must not be forgotten that

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that every effort should be made to reconcile the competing statutes and construe them both so as to avoid repugnancy – care should be taken to see whether the two do not really operate in different fields qua different subject matters.

- (v) Repugnancy must exist in fact and not depend upon a mere possibility.
- (vi) Repugnancy may be direct in the sense that there is inconsistency in the actual terms of the competing statutes and there is, therefore, a direct conflict between two or more provisions of the competing statutes. In this sense, the inconsistency must be clear and direct and be of such a nature as to bring the two Acts or parts thereof into direct collision with each other, reaching a situation where it is impossible to obey the one without disobeying the other. This happens when two enactments produce different legal results when applied to the same facts.
- (vii) Though there may be no direct conflict, a State law may be inoperative because the Parliamentary law is intended to be a complete, exhaustive or exclusive code. In such a case, the State law is inconsistent and repugnant, even though obedience to both laws is possible, because so long as the State law is referable to the same subject matter as the Parliamentary law to any extent, it must give way. One test of seeing whether the subject matter of the Parliamentary law is encroached upon is to find out whether the Parliamentary statute has adopted a plan or scheme which will be hindered and/or obstructed by giving effect to the State law. It can then be said that the State law trenches upon the Parliamentary statute. Negatively put, where Parliamentary legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying the general provisions made in it, there can be said to be no repugnancy.
- (viii) A conflict may arise when Parliamentary law and State law seek to exercise their powers over the same subject matter. This need not be in the form of a direct conflict, where one says “do” and the other says “don’t”. Laws under this head are repugnant even if the rule of conduct prescribed by both laws is identical. The test that has been applied in such cases is based on the principle on which the rule of implied repeal rests, namely, that if the subject matter of the State legislation or part thereof is identical with that of the Parliamentary legislation, so that they cannot both stand together, then the State legislation will be said to be repugnant to the Parliamentary legislation. However, if the State

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legislation or part thereof deals not with the matters which formed the subject matter of Parliamentary legislation but with other and distinct matters though of a cognate and allied nature, there is no repugnancy.

- (ix) Repugnant legislation by the State is void only to the extent of the repugnancy. In other words, only that portion of the State's statute which is found to be repugnant is to be declared void.
- (x) The only exception to the above is when it is found that a State legislation is repugnant to Parliamentary legislation or an existing law if the case falls within Article 254(2), and Presidential assent is received for State legislation, in which case State legislation prevails over Parliamentary legislation or an existing law within that State. Here again, the State law must give way to any subsequent Parliamentary law which adds to, amends, varies or repeals the law made by the legislature of the State, by virtue of the operation of Article 254(2) proviso.

After going through the Maharashtra Act, the Apex Court held that there is no doubt that this Maharashtra Act is referable to Entry 23, List III in the 7th Schedule to the Constitution. On the other hand, the Insolvency and Bankruptcy Code, 2016 is an Act to consolidate and amend the laws relating to reorganization and insolvency resolution, *inter alia*, of corporate persons.

There can be no doubt, therefore, that the Code is a Parliamentary law that is an exhaustive code on the subject matter of insolvency in relation to corporate entities, and is made under Entry 9, List III in the 7th Schedule which reads as, "9. Bankruptcy and insolvency".

On reading its provisions, the moment initiation of the corporate insolvency resolution process takes place, a moratorium is announced by the adjudicating authority *vide* Sections 13 and 14 of the Code, by which institution of suits and pending proceedings etc. cannot be proceeded with. This continues until the approval of a resolution plan under Section 31 of the said Code. In the interim, an interim resolution professional is appointed under Section 16 to manage the affairs of corporate debtors under Section 17.

It is clear, therefore, that the earlier State law is repugnant to the later Parliamentary enactment as under the said State law, the State Government may take over the management of the relief undertaking, after which a temporary moratorium in much the same manner as that contained in Sections 13 and 14 of the Code takes place under Section 4 of the

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Maharashtra Act. There is no doubt that by giving effect to the State law, the aforesaid plan or scheme which may be adopted under the Parliamentary statute will directly be hindered and/or obstructed to that extent in that the management of the relief undertaking, which, if taken over by the State Government, would directly impede or come in the way of the taking over of the management of the corporate body by the interim resolution professional. Also, the moratorium imposed under Section 4 of the Maharashtra Act would directly clash with the moratorium to be issued under Sections 13 and 14 of the Code. It will be noticed that whereas the moratorium imposed under the Maharashtra Act is discretionary and may relate to one or more of the matters contained in Section 4(1), the moratorium imposed under the Code relates to all matters listed in Section 14 and follows as a matter of course. In the present case it is clear, therefore, that unless the Maharashtra Act is out of the way, the Parliamentary enactment will be hindered and obstructed in such a manner that it will not be possible to go ahead with the insolvency resolution process outlined in the Code. Further, the non-obstante clause contained in Section 4 of the Maharashtra Act cannot possibly be held to apply to the Central enactment, inasmuch as a matter of constitutional law, the later Central enactment being repugnant to the earlier State enactment by virtue of Article 254 (1), would operate to render the Maharashtra Act void vis-à-vis action taken under the later Central enactment.

On reading of section 238 of the code it is clear that the later non-obstante clause of the Parliamentary enactment will also prevail over the limited non-obstante clause contained in Section 4 of the Maharashtra Act. For these reasons, we are of the view that the Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under the Code.

The appellant argued that the notification under the Maharashtra Act only kept in temporary abeyance the debt which would become due the moment the notification under the said Act ceases to have effect.

The Supreme Court however held that the notification under the Maharashtra Act continues for one year at a time and can go upto 15 years. Given the fact that the timeframe within which the company is either to be put back on its feet or is to go into liquidation is only 6 months, it is obvious that the period of one year or more of suspension of liability would completely unsettle the scheme of the Code and the object with which it was enacted, namely, to bring defaulter companies back to the commercial fold or otherwise face liquidation. If the moratorium imposed by the Maharashtra Act were to continue from one year upto 15 years, the whole scheme and object of the Code would be set at naught.

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The appellant then argued that since the suspension of the debt took place from July, 2015 onwards, the appellant had a vested right which could not be interfered with by the Code.

The Supreme Court however held that it is precisely for this reason that the non-obstante clause, in the widest terms possible, is contained in Section 238 of the Code, so that any right of the corporate debtor under any other law cannot come in the way of the Code. For all these reasons, we are of the view that the Tribunal was correct in appreciating that there would be repugnancy between the provisions of the two enactments. The judgment of the Appellate Tribunal is not correct on this score because repugnancy does exist in fact.

As regards to the rejection of second application the Tribunal as well as the Appellate Tribunal it was held by the Apex Court that the Tribunal and the Appellate Tribunal were right in not going into this contention for the very good reason that the period of 14 days within which the application is to be decided was long over by the time the second application was made before the Tribunal. Also, the second application clearly appears to be an after-thought for the reason that the corporate debtor was fully aware of the fact that the MRA had failed and could easily have pointed out these facts in the first application itself. However, for reasons best known to it, the appellant chose to take up only a law point before the Tribunal. The law point before the Tribunal was argued on 22nd and 23rd December, 2016, presumably with little success. It is only as an after-thought that the second application was then filed to add an additional string to a bow which appeared to the appellants to have already been broken.

The obligation of the corporate debtor was, therefore, unconditional and did not depend upon infusing of funds by the creditors into the appellant company. Also, the argument taken for the first time before us that no debt was in fact due under the MRA as it has not fallen due (owing to the default of the secured creditor) is not something that can be countenanced at this stage of the proceedings. In this view of the matter, we are of the considered view that the Tribunal and the Appellate Tribunal were right in admitting the application filed by the financial creditor ICICI Bank Ltd.

Case Review: Order dated 17th January, 2017 and Order dated 23rd January, 2017 passed by NCLT, Mumbai Bench, Mumbai in ICICI Bank Ltd. Vs. M/s. Innoventive Industries Ltd. (C.P. No. 1/I&BP/NCLT/MB/MAH/2016) and order dated 15th May 2017 passed by the NCLAT in M/s. Innoventive Industries Ltd. Vs. ICICI Bank Ltd., *Upheld*.

RULE-8

of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

CASE NO. 8

**Lokhandwala Kataria Construction Pvt. Ltd.
(Appellant/Corporate Debtor)**

Vs.

Nisus Finance & Investment Manager LLP. (Financial Creditor)

Dated: 24-07-2017

Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 – Withdrawal of Application - In view of Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the National Company Law Appellate Tribunal (NCLAT) could not utilise the inherent power recognised by Rule 11 of the National Company Law Appellate Tribunal Rules, 2016.

An appeal was filed by the appellant/Corporate Debtor against the order passed by the Adjudicating Authority (NCLT, Mumbai Bench) whereby the application under section 7 of the Insolvency and Bankruptcy Code, 2016 (the Code) has been admitted. The parties have settled the dispute and part amount has already been paid. The NCLAT held that such settlement cannot be ground to interfere with the impugned order in absence of any other infirmity. The NCLAT further held that Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 has not been adopted for the purpose of the Code and only Rules 20 and 26 have been adopted in absence of any specific inherent power and where there is no merit, the question of exercising inherent power does not arise.

On appeal, the Supreme Court held that:

In view of Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the National Company Law Appellate Tribunal (NCLAT) could not utilise the inherent power recognised by Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 to allow a compromise before it by the parties after admission of the matter.

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

Case Review: Order dated 13th July 2017 passed by the NCLAT in Lokhandwala Kataria Construction Pvt. Ltd. Vs. Nisus Finance & Investment Manager LLP. in CP (AT) (Insolvency) No. 95 of 2017, *upheld*.

CONSTITUTIONAL VALIDITY

CASE NO. 9

Shivam Water Treaters Pvt. Ltd. (Petitioner)

Vs.

Union of India (Respondent)

Petition(s) for Special Leave to Appeal (C) No(s).1740/2018

Date of Order : 25-01-2018

The said case is arising out of impugned final judgment and order dated 15-01-2018 in SPLCA No.19808/2017 passed by the High Court of Gujarat at Ahmedabad

Decision:

Having heard learned counsel for the parties, the Court was inclined to request the High Court to address the relief limited to any action taken by the respondents or any order passed by the National Company Law Tribunal. Barring this, the High Court should not address any other relief sought in the prayer clause. The High Court is requested not to enter into the debate pertaining to the validity of the Insolvency and Bankruptcy Code, 2016 or the constitutional validity of the National Company Law Tribunal.

Our present order does not debar the petitioner to challenge the validity of composition of the National Company Law Tribunal and the validity or the constitutionality of the Insolvency and Bankruptcy Code, 2016 before this Court under Article 32 of the Constitution.

The special leave petition stands disposed of accordingly.

Chapter 2

Orders passed by High Courts

SECTION-7

CASE NO. 1

HIGH COURT AT CALCUTTA

Sree Metaliks Limited and Anr. (Corporate Debtor)

Vs.

Union of India & Anr.

W.P. 7144 (W) OF 2017

Date of Order: 07-04-2017

Section 7 read with section 61 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 and Section 424 of the Companies Act, 2013 – Initiation of Corporate Insolvency Resolution Process by Financial Creditor

Facts:

An application under section 7 of the Code of 2016 was filed against the first petitioner (Corporate Debtor) before the NCLT Kolkata Bench. According to the first petitioner it had received a notice from a firm of practicing company Secretaries with regard to the filing of the Company Petition, however the notice does not contain any information as to the date of hearing of the company petition. The Corporate Debtor further contended that NCLT had proceeded to admit the company petition without affording any opportunity of hearing to it and therefore NCLT had acted in breach of the principles of natural justice in doing so. The order of NCLT was assailed by the Corporate Debtor before the NCLAT. The Corporate Debtor submitted that it had no objection to the admission of the Insolvency petition but objected to the appointment of the IRP. However, it did not press the point of breach of the principles of natural justice before NCLAT. The NCLAT disposed the appeal and only replaced the IRP appointed by the NCLT.

A writ petition was filed before the Calcutta High Court by the corporate

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debtor on the ground that Section 7 of the Insolvency and Bankruptcy Code, 2016 (Code of 2016) and the relevant Rules under the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 are vires as it does not afford any opportunity of hearing to a corporate debtor in a petition filed under Section 7 of the Code of 2016.

Decision:

In the scheme of the Code of 2016, an application under Section 7 of the Code of 2016 is to be first made before the NCLT. An appeal of the order of NCLT will lie before the NCLAT. NCLT and NCLAT are constituted under the provisions of the Companies Act, 2013 (Act, 2013). The procedure before the NCLT and the NCLAT is guided by Section 424 of the Companies Act, 2013.

Section 424 of the Companies Act, 2013 requires the NCLT and NCLAT to adhere to the principles of the natural justice above anything else. It also allows the NCLT and NCLAT the power to regulate their own procedure. Fretters of the Code of Civil Procedure, 1908 does not bind it. However, it is required to apply its principles. Principles of natural justice require an authority to hear the other party. In an application under Section 7 of the Code of 2016, the financial creditor is the applicant while the corporate debtor is the respondent. A proceeding for declaration of insolvency of a company has drastic consequences for a company. Such proceeding may end up in its liquidation. A person cannot be condemned unheard. Where a statute is silent on the right of hearing and it does not in express terms, out the principles of natural justice, the same can and should be read into in. When the NCLT receives an application under Section 7 of the Code of 2016, therefore, it must afford a reasonable opportunity of hearing to the corporate debtor as Section 424 of the Companies Act, 2013 mandates it to ascertain the existence of default as claimed by the financial creditor in the application. The NCLT is, therefore, obliged to afford a reasonable opportunity to the financial debtor to contest such claim of default by filing a written objection or any other written document as the NCLT may direct and provide a reasonable opportunity of hearing to the corporate debtor prior to admitting the petition filed under Section 7 of the Code of 2016. Section 7(4) of the Code of 2016 requires the NCLT to ascertain the default of the corporate debtor. Such ascertainment of default must necessarily involve the consideration of the documentary claim of the financial creditor. This statutory requirement of ascertainment of default brings within its wake the extension of a reasonable opportunity to the corporate debtor to substantiate by document or otherwise, that there does not exist a default as claimed

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against it. The proceedings before the NCLT are adversarial in nature. Both the sides are, therefore, entitled to a reasonable opportunity of hearing.

The requirement of NCLT and NCLAT to adhere to the principles of natural justice and the fact that, the principles of natural justice are not ousted by the Code of 2016 can be found from Section 7(4) of the Code of 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Rule 4 deals with an application made by a financial creditor under Section 7 of the Code of 2016. Sub-rule (3) of Rule 4 requires such financial creditor to despatch a copy of the application filed with the adjudicating authority, by registered post or speed post to the registered office of the corporate debtor. Rule 10 of the Rules of 2016 states that, till such time the Rules of procedure for conduct of proceedings under the Code of 2016 are notified, an application made under Sub-section (1) of Section 7 of the Code of 2017 is required to be filed before the adjudicating authority in accordance with Rules 20, 21, 22, 23, 24 and 26 or Part-III of the National Company Law Tribunal Rules, 2016.

Adherence to the principles of natural justice by NCLT or NCLAT would not mean that in every situation, NCLT or NCLAT is required to afford a reasonable opportunity of hearing to the respondent before passing its order.

In a given case, a situation may arise which may require NCLT to pass an ex-parte ad interim order against a respondent. Therefore, in such situation NCLT, it may proceed to pass an ex-parte ad interim order, however, after recording the reasons for grant of such an order and why it has chosen not to adhere to the principles of natural justice at that stage. It must, thereafter proceed to afford the party respondent an opportunity of hearing before confirming such ex-parte ad interim order.

In the facts of the present case, the petitioner submits that, orders have been passed by the NCLT without adherence to the principles of natural justice. The petitioner was not heard by the NCLT before passing the order. It would be open to the parties to agitate their respective grievances with regard to any order of NCLT or NCLAT as the case may be in accordance with law. It is also open to the parties to point out that the NCLT and the NCLAT are bound to follow the principles of natural justice while disposing of proceedings before them.

In such circumstances, the challenge to the vires to Section 7 of the Code of 2016 fails.

CASE NO. 2

HIGH COURT OF GUJARAT

Essar Steel India Limited & 1 Petitioner(s)

Vs.

Reserve Bank of India & 3 Respondent(s)

Special Civil Application No. 12434 of 2017

Date of order : 17-07-2017

Section 35 (AA) and (AB) of the Banking Regulations Act, 1949 read with Sections 7 and 9 of the Insolvency and Bankruptcy Code, 2016 and Article 14, 19 and 226 of the Constitution of India – Power of Reserve Bank of India to give Directions

The petitioner Essar Steel India Limited has invoked jurisdiction of the Court under Article 14, 19(1)(g) and 226 of the Constitution of India in the matter of the provisions of Insolvency and Bankruptcy Code, 2016 (in short 'IBC') by challenging the Decision of the Reserve Bank of India (in short 'RBI') vide their Press Release dated 13.06.2017 directing banks to initiate proceedings against 12 Companies including the Petitioner under the Provisions of IBC and the decision of Consortium of Lenders to initiate Petition under Section 9 of The Insolvency and Bankruptcy Code, 2016 and failure of the Consortium of Banks led By State Bank of India (in short 'SBI') to implement the package of debt restructuring approved by the Board of Directors of the Petitioner – Company.

The Gujarat High Court held as under:

Filing of insolvency proceedings would be a decision of the concerned person, who is entitled to file such application and, therefore, to that extent, it cannot be said either respondent No.2 (SBI) or 3 (SCB) can be restrained from filing such application in accordance with law.

It is undisputed fact that filing of such application itself cannot be questioned or that action cannot be quashed, but it goes without saying that such filing would not amount to admitting or allowing the petition for insolvency without offering reasonable opportunity to the company, which is requested to be taken into insolvency by any such person. Therefore, the adjudicating authority being NCLT herein, which is constituted in place of the Company Court, needs to decide on its own based upon factual details that whether the insolvency petition is required to be entertained as such or not.

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For the purpose, adjudicating authority, certainly requires to extend hearing and reasonable opportunity to the company to explain that why such an application should not be entertained. In other words, filing of an application may not result into mechanical admission of application as seen and posed by RBI in impugned press release. It would be a decision based on judicial discretion by the adjudicating authority to deal with such application in accordance with law and based upon facts, evidence and circumstance placed before it.

Then, remains the only issue that whether RBI is empowered to publish press release dated 13.6.2017 or not. So far as directions to the Bank to initiate insolvency proceedings against companies, which are in debt to certain level or extent, the amended provisions of the Banking Regulation Act, 1949 in the form of Sections 35(AA) and (AB), certainly makes it clear that, now, RBI has such powers to issue certain directions to certain Banks and banking companies so as to see that there is proper recovery of public money or for any other such purpose. Therefore, the issuance of press release alone, cannot be quashed and set-aside.

The issue that remains is now limited to the scrutiny that whether such press release is in accordance with law and whether it results into infringing any fundamental right of anybody, more particularly, present petitioner and whether it is arbitrary, discriminatory and without applying proper provisions of concerned law.

The bare reading of Section 35(AA) makes it clear that the RBI is authorised to issue directions to initiate insolvency resolution process in respect of a default, and explanation makes it clear that the default has the same meaning as assigned to it in Clause (12) of Section 3 of the Insolvency and Bankruptcy Code, which means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor as the case may be. Therefore, when it is undisputed fact that the petitioner company has not paid its debt to the tune of more than Rs.32,000 Crores at the end of 31.3.2017 and when total debt is more than Rs.45,000 Crores, it is clear and obvious that RBI is authorised to direct any banking company to initiate insolvency resolution process.

When RBI has categorically confirmed that their decision is based upon the advise received from their Internal Advisory Committee, and more particularly, when decision is to the effect that the companies which have outstanding debt with more than 60% non-performing accounts for more than

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a year beyond Rs.5,000 Crores, the concerned Bank should initiate insolvency proceeding at the earliest. It cannot be said that there is classification of companies in any nature whatsoever. So far as identifying disclosure in paragraphs 3 and 4 of press release dated 13.6.2017 as classification is concerned, in fact there is no classification because in paragraph 4 also, it is stated that for rest of the companies against whom advise is issued for initiating insolvency resolution proceedings at the earliest, wherein petitioner No.1 includes the concerned Banks, which finalised a resolution plan within six months and if resolution plan is not agreed upon by companies within six months, then in those cases also, Banks are required to file insolvency proceedings. Therefore, practically, there is no classification, but only time schedule is given that companies whose debt is more than Rs.5,000Crores, which is totalling 25% of current gross NPA of the country, insolvency proceedings need to be initiated at the earliest and in rest of the companies, if resolution plan could not be finalised within six months, then, insolvency proceedings should be initiated. Therefore, there is no direction that insolvency proceeding is to be initiated only against particular company(ies) and not to be initiated against any particular company(ies). It goes without saying that any action is to be started with someone and may not lie against all at the time. It also goes without saying, as already recorded herein above that for filing any such proceeding, none of the financial company or Bank requires either the permission or direction from RBI for other agency or authority because it is their independent and absolute right to initiate any such proceeding/s. Therefore also, when respondents No.2 and 3 can initiate insolvency proceedings irrespective of any such directions, either by RBI or by any other authority, it cannot be said that direction by RBI or filing of petition by respondents No.2 and 3 is unwarranted or arbitrary. However, as already discussed herein above, filing of petition is different from admitting or allowing the petition and to that extent, this Court has issued notice to ascertain, affirm and reconfirm the position that it would be solely at the discretion of the adjudicating authority either to admit the petition and to proceed further in accordance with law or to refuse to admit the petition. It is also clear that such decision of the adjudicating authority, would be a judicial determination and, therefore, such authority has to deal with the rival submissions and factual details on the subject before taking any decision. Thereby, such adjudicating authority cannot be considered as mere rubberstamp authority at the hands of RBI or any other institution. In view of above facts, the petition needs to be disposed of with certain observations when petitioner is not entitled to any relief/s as prayed in this petition.

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When petitioner has not challenged the provision of Insolvency and Bankruptcy Code, I have not to deal with such issue at this stage except to dispose of this petition, more particularly, when there is no scope of granting interim relief in favour of the present petitioner. Refusal of interim relief is obvious because petitioner company is in debt of more than Rs. 45,000 Crores for couple of years, its NPA was more than Rs. 32,000 Crores in last year and more than Rs. 31,000 Crores in previous year. It is also clear that when total debt is more than Rs. 45,000 Crores, there is no option, but to leave the issue at the discretion of the lenders to take appropriate steps in accordance with law, thereby, without interference of this Court under the constitutional mandate. However, at the cost of repetition, it is made clear that factual details and on-going process of restructuring plan and other details would be taken care of by NCLT before taking any decision on merits.

Conclusion

- (A) The Respondent No. 1 RBI has to be careful while issuing press releases; it must be in consonance with the Constitutional Mandates, based upon sound principles of Law, but in any case should not be in the form of advise, guidelines or directions to judicial or quasi-judicial authorities in any manner what so ever.
- (B) Since the press release is referring the earlier press release dated May 22, 2017, and since in such press release there is reference of S4A - Scheme for Sustainable Structuring of Stressed Assets, which is also introduced on the same day i.e. 13.6.2017; it would be appropriate for RBI to see that benefit of all its schemes is equally offered and extended to all without any discrimination. It is quite clear and obvious that Court has to see that there is no arbitrariness or discrimination by State or its authorities.
- (C) It cannot be held that directions under reference is in nature of classification or such classification is irrational, unjust, arbitrary or discriminatory; but it would be appropriate for RBI to see that benefit of all its schemes is equally offered and extended to all without any discrimination.
- (D) It cannot be held that Banking Company is not entitled to initiate insolvency proceedings without the directions of the RBI u/s 35AA of BRA.
- (E) It cannot be held that directives of RBI under reference by impugned press release is binding upon SCB and therefore SCB is bound to

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consider the restructuring proposal by the petitioner, wherein petitioner has offered to start payment of dues only after 25 years and that too only with 1 % interest. Therefore relief in terms of para 7(c) cannot be granted.

- (F) Only because SCB has corresponded to SBI for its proposal with reference to JLF activities, it cannot be held that SCB could not have initiated insolvency proceedings but it has done it only because of RBI guidelines by way of press release.
- (G) Provisions of IBC may be drastic to some extent, but since it is part of statute which is yet not declared unconstitutional and therefore they are to be followed, but in consonance with Constitutional mandate by all concerned i.e.
 - (1) Not to act upon it mechanically and that all provisions may not be treated mandatory but it could be treated directive only based upon facts, circumstances and evidence available before the authority (judgment dated 1.5.2017 in Company Appeal (AT) No.09 of 2017 between J.K. Jute Mills Co. Ltd. v. M/s. Surendra Trading Company by the National Company Law Tribunal);
 - (2) Without being guided by any advice or directions in any form or nature viz: impugned press release. There is reason to say so because RBI has tried to do so and changed its document when called upon to explain their stand; and
 - (3) Thereby it is obvious that adjudicating authority may though proceed in accordance with Law, there should not be undue pressure on it by administration and period of pendency of present petition can certainly be considered as reasonable ground to count the time limit from the date of receipt of writ of this order.
- (H) So far factual details of Petitioner Company with reference to its activities and exercise of restructuring through JLF is concerned, it would be appropriate not to enter into any determination on such point since that would be the subject matter before the Adjudicating Authority under IBC (i.e. NCLT) and therefore it is left open for it to consider it for its determination in accordance with Law, to avoid any prejudice to either party by discussion and determination on any such issue at this stage by this Court, where core issue is whether there is reasonable classification by the RBI and not that whether insolvency proceedings should be admitted or continued or not.

Orders passed by High Courts

- (I) For the same reason, issue of suppression of material facts or false statement is not much material at this stage because to decide that information or fact if at all suppressed or false is whether material or not would require same exercise and that may prejudice either side. Moreover, petition can be disposed of even without determining such issue and therefore no determination is required on such issue.
- (J) Pursuant to decision in Ionic Metaliks (supra), no writ can be issued against SCB and therefore petition stands dismissed against Respondent No. 3/SCB. Factual details between the Petitioner and SCB has been avoided to be discussed further because this Court has not to decide the validity or propriety of action by SCB against the petitioner when petition by SCB against petitioner is pending before the NCLT and therefore discussion and determination on factual issues may prejudice either side.

CASE NO. 3

HIGH COURT AT CALCUTTA

Akshay Jhunjunwala & Anr.

Vs.

Union of India through the Ministry of Corporate Affairs & Ors.

W.P. No. 672 of 2017

Date of Order: 02-02-2018

Section 7, 8, 9 of the Act and its Constitutional Validity

Facts:

According to Petitioner distinction between a financial and an operational creditor in respect of a corporate debtor does not have a rational and intelligible basis. The differentiation between the two categories of creditors being unintelligible and irrational, the provisions of Sections 7, 8 and 9 of the Code of 2016 should be struck down. He has submitted that, undue preference has been given to a financial creditor. A financial creditor has a right to be in the Committee of Creditors (COC) of a corporate debtor in an insolvency proceeding. An operational creditor, although such creditor may have a claim far in excess than that of the financial creditor, will have no say in the Committee of Creditors. In a given situation, a corporate debtor may have only one financial creditor. Such financial creditor will constitute COC,

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

without any participation from any other category of creditors of a corporate debtor including that of an operational creditor, although such operational creditor in a given case may have a claim in excess of the financial creditor and the number of operational creditors may exceed the number of financial creditors. Such a distinction between two categories of creditors in respect of the same financial debtor is unjust, unfair, impracticable, irrational and ought not to be countenanced by the Court.

Decision:

The Bankruptcy Committee gives a rationale to the financial creditors being treated in a particular way vis-à-vis an operational creditor in an insolvency proceeding with regard to a company. The rationale is a plausible view taken for an expeditious resolution of an insolvency issue of a company. Courts are not required to adjudge a legislation on the basis of possible misuse or the crudities or inequalities that may be perceived to be embedded in a legislation. The rationale of giving a particular treatment to a financial creditor in the process of insolvency of a company under the Code of 2016 cannot be said to offend any provisions of the Constitution of India. The contentions of breach of principles of natural justice were raised and considered in *Sree Metaliks Limited & Anr. and Innoventive Industries Limited*. Such contentions were found to be misplaced. Nothing is placed on record that, a different view should be taken on the ground of breach of principles of natural justice in a proceeding under the Code of 2016.

Constitutional Validity of The Code has been upheld.

SECTION-14

CASE NO. 4

HIGH COURT OF DELHI

Power Grid Corporation of India Ltd (Petitioner)

Vs.

Jyoti Structures Ltd.(Respondent)

O.M.P.(COMM.) 397/2016

Date of Order: 11-12-2017

Section 14 : Is section 14 moratorium applicable to all proceedings both in favour & against Corporate Debtor or just against the corporate debtor?

Facts:

There was Arbitration proceeding under section 34 and pure money decree was in favor of the corporate debtor (CD). During the pendency of these proceedings under section 34 of the Act, an application under Section 7 of the Insolvency and Bankruptcy Code 2016 (IBC) admitted against the CD. The question now has arisen is if the present proceedings under Section 34 of the Act, (Beneficial to CD) need to be stayed, per Section 14 (1)(a) of the Code?

Decision:

The continuation of these proceedings shall cause no harm to either party's rights to seek determination of issues under section 34 of the Act and object of the code shall be preserved rather than defeated.

Section 14(1)(a) viz., (a) "proceedings do not mean all proceedings". Moratorium under section 14(1)(a) of the code is intended to prohibit debt recovery actions against the assets of corporate debtor. The use of narrower term "against the corporate debtor" in Section 14(1)(a) as opposed to the wider phrase "by or against the corporate debtor" used in Section 33(5) of the Code further makes it evident that Section 14(1)(a) is intended to have restrictive meaning and applicability.

Chapter 3

Orders passed by National Company Law Appellate Tribunal (NCLAT)

SECTION-5(21)

CASE NO. 1

Gurcharan Singh Soni & Kuldeep Kaur Soni

Versus

Unitech Ltd.

Section 5 (21) - Home buyers can they be treated as operational creditors ?

Company Appeal (AT) (Insol.) No. 55 of 2017

Date of Order: 23-08-2017

Facts:

Appellants have challenged the order dated 21st March, 2017 passed by Ld. Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in Company Petition No. (IB)-29(PB)/2017, whereby and where under application preferred by Appellants-'Operational Creditor' has been rejected in terms of order passed in "Sajive Kunwar v. AMR Infrastructure" decided on 15th February, 2017 by the Adjudicating Authority.

Decision:

In view of the section 5 (21), held that there is a 'debt' due to the appellants and there is default on the part of the respondents-'Corporate Debtor'. However, the appellants do not come within the meaning of "Operational Creditor".

Insolvency And Bankruptcy Code (Amendment) Ordinance 2018 treats home buyers as financial creditors.
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SECTION-7

CASE NO. 2

Palogix Infrastructure Private Limited (Appellant /Corporate Debtor)

Vs.

ICICI Bank Limited (Respondent / Financial Creditor)

Company Appeal (AT) (InsoL) No. 30 and 54 of 2017

Date of Order: 20-09-2017

Issue: Whether the 'Power of Attorney Holder' given power of attorney prior to enactment of Insolvency & Bankruptcy Code, 2016, is entitled to file an application under Section 7 or 9 or 10 of the Insolvency & Bankruptcy Code, 2016.

Facts:

ICICI Bank Limited filed an application under section 7 of the Code for initiation of 'Corporate Insolvency Resolution Process' ("CIRP") against Palogix Infrastructure Private Limited.

The 'Financial Creditor' preferred the application under section 7 through Power of Attorney Holder. Separate orders were passed by Kolkata bench of the NCLT, one holding the application through Power of Attorney is not maintainable (Member Judicial) and the other (Member Technical) held that the application was maintainable as the Power of Attorney was given in favour of the Legal Manager to initiate proceedings. The case was referred to the Hon'ble President, NCLT exercising power under sub Section (5) of Section 419 of the Companies Act, 2013 for constituting a larger Bench.

By majority judgment, the Adjudicating Authority held that for initiation of CIRP, there should be specific authorization to the Power of Attorney Holder to initiate the CIRP. The 'Financial Creditor' having not filed specific authorization to initiate CIRP, was directed by the order dated 12th April, 2017 to rectify the defects.

The Corporate Debtor challenged the said order and made appeal before the NCLAT.

Decision:

The Appellate Authority rejected the appeal based on following observation:

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

- Section 7 of the Insolvency & Bankruptcy Code, 2016 and Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "Adjudicating Authority Rules") and the 'form and manner' in which an application under section 7 of the Insolvency & Bankruptcy Code, 2016 is to be filed by a 'Financial Creditor' is provided in 'Form-1' of 'Adjudicating Authority Rules' recognize that a 'Financial Creditor' being a juristic person can only act through an "Authorised Representative". Entry 5 & 6 (Part I) of Form No.1 mandates the 'Financial Creditor' to submit "name and address of the person authorised to submit application on its behalf.
- Rule 2(6) of the National Company Law Tribunal Rules, 2016 (the "NCLT Rules") defines an "authorised representative" to be a person authorised in writing by a party to present his case before the NCLT as the representative of such party, as provided under section 432 of the Companies Act. Since the said rule had not been adopted under the IBC or rules framed thereunder, the NCLAT was of the view that no reliance can be placed on such rule. Order III of the Code of Civil Procedure, 1908 ("CPC") provides for recognised agents and pleaders, but the CPC is not applicable for filing an application under the IBC.
- Section 179 of Companies Act empowers the board of directors to do all such acts that a company is authorised to do. A company being a juristic person is capable of initiating and defending legal proceedings and, therefore, the board of directors is empowered to exercise such rights on behalf of the company, or it may duly empower an authorised representative to do so on its behalf. By this, the person authorised by the board of directors is duly empowered to initiate or defend any legal proceedings by or against the corporate debtor in any court of law, including the matters relating to insolvency and bankruptcy proceedings.
- A power of attorney is an authorisation by a 'principal' to its 'agent' to do an act. A fortiori, such authorisation can only be of acts which are in the contemplation and knowledge of the principal as on the date when such authorisation is given. If the principal itself is unaware of an eventuality, it cannot authorise its agent for such eventuality. For instance, in situations where the financial creditor executed the power of attorney, but it could not have visualised even remotely that the attorney would be required one day to initiate a corporate insolvency proceeding under

Orders passed by National Company Law Appellate Tribunal (NCLAT)

section 7, the attorney cannot initiate the corporate debt resolution proceedings as he lacks the requisite authority.

- Reliance were made on various judgements where by as per Section 2 of Power of Attorney Act, 1882, the donee of a power-of-attorney may, if he thinks fit, execute or do any instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof. This section applies to powers-of-attorney created by instruments executed either before or after this Act comes into force. But Section 2 of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a party-in-person.
- The power of attorney holder is the agent of the grantor. When the grantor, authorises the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates such legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder in his personal capacity.
- IBC is a completely new regime in place. The IBC is a complete code in itself. It is settled law that a consolidating and amending act like the present Central enactment forms a code complete in itself and is exhaustive of the matters dealt with therein.
- It is a settled principle of law that the power of attorney needs to be interpreted strictly, with the reason behind such principle being that the powers given are not abused by agent, or that the actions are restricted only to the extent the power is indicated or given. It was further held that when the grantor of a power of attorney had authorised the attorney to initiate suits, the attorney, being armed with such a power of attorney, cannot initiate a winding up proceeding since a winding up proceeding under the company law can never be equated with a suit.
- This apart, authorisation in the case of a company would mean a specific authorisation by the board of directors of the company by passing a resolution. Therefore, the application under section 7 of the IBC, if signed and filed by a 'general power of attorney holder' without specific authorisation is not maintainable. Also, the pre- requisites under the IBC are mandatory and they should be strictly construed; barring a

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

specific power of attorney, no application can be entertained. In this regard, rule 10 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (the “Adjudicating Authority Rules”) states that until the time rules of procedure for conduct of proceedings under the IBC are notified, an application made under section 7(1) shall be filed before the adjudicating authority (i.e., the NCLT) in accordance with rules 20, 21, 22, 23, 24 and 26 of Part III of NCLT Rules, 2016.

- Rule 23(1) permits an authorised representative to present an application or petition before the tribunal. The form and manner in which an application under section 7 is to be filed by a financial creditor is provided in Form 1 of such Adjudicating Authority Rules. Upon perusal of the aforesaid rules and Form 1, it may be duly noted that the IBC and the rules thereunder recognise that a financial creditor being a juristic person can only act through an “authorised representative”. Entries 5 and 6 (Part I) of Form No. 1 mandate that the financial creditor submit the “name and address of the person authorised to submit application on its behalf” and requires the authorisation to be enclosed. Further, the signature block of Form 1 requires the authorised person’s detail to be inserted and includes, *inter alia*, the position of the authorised person in relation to the financial creditor.
- If a plea is taken by the authorised officer that he was authorised to sanction loan and had done so, the application under section 7 cannot be rejected on the ground that no separate specific authorisation letter has been issued by the financial creditor in favour of such officer.
- Accordingly, it was held that a 'Power of Attorney Holder' is not empowered to file application under section 7 of the Code but an authorised person has power to do so. The Appellate tribunal had rejected the appeal and the order of admission of application under section 7 was affirmed.

CASE NO. 3

S3 Electrical & Electronics Pvt. Ltd. (Appellant / Corporate Debtor)

Vs.

Brian Lau (Respondent / Financial Creditor)

Company Appeal (AT) (Insolvency) No. 104 of 2017

Date of Order: 02-08-2017

Section 7 – Application for Initiation of Corporate Insolvency Resolution Process by Financial Creditor

Facts:

The respondent-Brian Lau, a resident of Hong Kong preferred an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 with a prayer to initiate Corporate Insolvency Resolution Process against the appellant-'Corporate Debtor'-S3 Electrical and Electronics Private Limited. Learned Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, by judgement & order dated 28th June,2017, admitted the application and the appeal was preferred by the corporate debtor, against the said order.

According to the appellant-Andhra Bank were bankers of Corporate Debtor and that there is no default shown in the account. The Andhra Bank is satisfied with the performance of the 'Corporate Debtor'.

The appellant-'Corporate Debtor' has assailed the impugned judgement mainly on the ground that:

- (a) The Adjudicating Authority, Principal Bench, New Delhi passed the impugned judgement & order without notice to the 'Corporate Debtor', in violation of the rules of natural justice;
- (b) The respondent, 'who claimed to be 'Financial Creditor' do not come within the meaning of 'Financial Creditor' as defined under sub-section (7) read with sub-section (8) of Section 3 of the I&B Code;
- (c) The respondent failed to produce any record of default or such other record or evidence of default as specified by the Insolvency and Banking Board of India; and
- (d) The notice under Section 8 was not issued by respondent but by his Lawyer which is not permissible.

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

Decision:

The Appellate Tribunal was of the view that though the learned counsel for the respondent has produced some records and communications to show the evidence of 'Default' such documents cannot be taken into consideration for the purpose of initiation for Insolvency Resolution Process under section 7 of the I&B Code and also the order passed by the Adjudicating Authority without notice to 'Corporate Debtor' is in violation of rules of natural justice and hence the said order is fit to be set aside.

CASE NO. 4

(Arising out of Order dated 11th August 2017 passed by the Adjudicating Authority (National Company Law Tribunal) Hyderabad Bench, Hyderabad in Company Petition (IB) No. 977/HDB/2017)

IN THE MATTER OF:

Mack Soft Tech Pvt Ltd.	 Appellant
	Versus	
Quinn Logistics India Ltd.	 Respondent

IN THE MATTER OF:

Logvis AG	 Appellant
	Versus	
Quinn Logistics India Ltd.	 Respondent

IN THE MATTER OF:

Mecon FZE	 Appellant
	Versus	
Quinn Logistics India Ltd.	Respondent

Company Appeal (AT)(Insolvency) No. 143 of 2017

Date of Order: 21-05-2018

Facts:

Mack Soft Tech Private Limited ('Corporate Debtor') was developing an office complex by the name of 'Q-City' in Hyderabad. While it was in developing process, the 'Quinn Logistics India Private Limited' ('Financial Creditor') acquired the entirety/majority of the shareholding of the 'Corporate Debtor' for a total consideration of Rs.126.73 crores.

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According to the 'Quinn Logistics India Private Limited' ('Financial Creditor'), 'Mack Soft Tech Private Limited' ('Corporate Debtor') becomes subsidiary Company of the 'Financial Creditor'. During the period 2007-2010, the 'Financial Creditor' disbursed an interest free unsecured loan of Rs. 62.90 crores to the 'Corporate Debtor' for development of 'Q-City'. Such interest free loan at the relevant time was permitted under the provision of Section 327A (8) of the Companies Act, 1956.

'Mack Soft Tech Private Limited' ('Corporate Debtor'), 'Quinn Logistics India Private Limited' ('Financial Creditor'), 'Quinn Investments Sweden AB' and 'Quinn Logistics Sweden AB' were all part of a group of companies controlled by an Irish businessman, Mr. John Sean Ignatius Quinn, and his family ("Quinn Family"). They were part of a group of Companies known as the "Quinn Group". In April 2011, the "Quinn Group" defaulted in repayment of loans amounting to 2.8 billion Euro taken from one Anglo Irish Bank Ltd. (now known as Irish Bank Resolution Corporation (In Special Liquidation) ("IBRC")), which is controlled by the Minister of Finance for the Government of Republic of Ireland in terms of the Irish Bank Resolution Corporate Act, 2013.

Part of default included default by 'Quinn Investments Sweden AB' under a guarantee furnished to IBRC in respect of such loans. It resulted in IBRC initiating bankruptcy proceedings in Sweden against 'Quinn Investments Sweden AB'.

Subsequent to reserving of such order the Board of Directors of the 'Corporate Debtor' (Mack Soft Tech Private Limited) purported to show dilution of the Respondent's shareholding in 'Mack Soft Tech Private Limited' by allegedly issuing 376,301 fresh equity shares to one 'Mecon FZE', a Dubai Company, for a consideration of only INR 40,71,578/- in the year 2011. Since then 'Mack Soft Tech Private Limited'- ('Corporate Debtor') ceased to be a subsidiary of the 'Quinn Logistics India Private Limited'- ('Financial Creditor').

On the date of such issue, the Board of Directors of the 'Quinn Logistics India Private Limited' ('Financial Creditor') was under control by the Quinn Family as the Quinn Family was in control of the 'Quinn Investments Sweden AB' and the 'Quinn Logistics Sweden AB'. Such issue of shares to 'Mecon FZE' is the subject matter of challenge in Suit No. OS21 of 2012 filed, *inter-alia*, by the 'Quinn Logistics India Private Limited'- ('Financial Creditor') before the learned District Judge, Rangareddy Court, Hyderabad.

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

The 'Quinn Logistics India Private Limited'-(Financial Creditor) by its letter ("Loan recalled notice") dated 15th June 2017, called upon the 'Mack Soft Tech Private Limited'- ('Corporate Debtor') to repay the alleged outstanding loan amount of Rs. 62,90,45,905/- (Sixty-two crores ninety lakh forty-five thousand nine hundred five only) on or before 30th June 2017.

In response to the letter, the 'Mack Soft Tech Private Limited'- ('Corporate Debtor') by letter dated 29th June 2017, sought time to verify its records to clarify the position.

According to the 'Mack Soft Tech Private Limited'- ('Corporate Debtor'), there is no amount outstanding in the books of account of the 'Corporate Debtor' payable to the 'Quinn Logistics India Private Limited'- ('Financial Creditor').

Having not received the amount, the 'Quinn Logistics India Private Limited'- ('Financial Creditor') filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") for initiation of the 'Corporate Insolvency Resolution Process' before the Adjudicating Authority against the Mack Soft Tech Private Limited- ('Corporate Debtor').

On notice from the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, the 'Mack Soft Tech Private Limited'-(Corporate Debtor) raised its objections. However, objections were not accepted by the Adjudicating Authority. By impugned order dated 11th August 2017 ("Insolvency Commencement Date") passed in CP (IB) No. 97/7/HDB/2017, admitted the application, order of 'Moratorium' was passed and 'Interim Resolution Professional' has been appointed with certain directions.

Arguments presented before the AA by Learned Senior Counsel for the appellant:

Learned Senior Counsel for the Appellant- 'Mack Soft Tech Private Limited' ('Corporate Debtor') submitted that the Respondent- ('Financial Creditor') was the parent company of the 'Mack Soft Tech Private Limited'-(Corporate Debtor). The books of account of the Appellant- ('Corporate Debtor') used to be maintained by the Respondent- ('Financial Creditor') and the common auditor. Since 2011, there being a change in control of shareholding and management and the current shareholder took control of the 'Corporate Debtor' and therefore, the Respondent- 'Financial Creditor' was no longer the parent company of the Appellant- "Corporate Debtor".

Orders passed by National Company Law Appellate Tribunal (NCLAT)

It was submitted that at the time of takeover (since 2009) the balance sheet showed a book entry of Rs. 62.9 Crores as owing to the Respondent- ('Financial Creditor'). In the second suit they have casually referred to Rs. 62 Crores payable by the Appellant- ('Corporate Debtor') but had not sought to recover the same in its prayer.

Further, according to the Appellant- ('Corporate Debtor'), in respect of books of account entry of Rs. 62.9 Crores from 2011 to 2017, the Respondent- ('Financial Creditor') did not treat it as a debt that was due and payable but merely as a book entry.

It was submitted that the Appellant- ('Corporate Debtor') having realized that there was no document in support of the accounts for this entry and in absence of any correspondence, claim or demand the Appellant changed the entry from its balance sheet and removed the name of the Respondent- ('Financial Creditor'). Therefore, according to the Appellant- ('Corporate Debtor'), as per the legal and accounting advice as the amount was required to be kept on the books until the debt was time barred, after it became time barred in the year 2016, the amount has not been reflected.

It was submitted that since 2016 there was no demand or correspondence made by the 'Financial Creditor' in respect of Rs. 62.9 Crores alleged loan and on legal advice the loan has been wrote-off. Even if any such loan was given, it cannot be shown in the books as a claim, it being time barred.

Further, according to learned Senior Counsel for the Appellant on 15th June 2017 a demand notice was sent but with no reference to any loan agreement or document stating how the loan was repayable on the said date. The notice was sent only with the malicious intention to initiate insolvency proceedings against the Appellant- ('Corporate Debtor').

It was submitted that on 29th June 2017, the Appellant- ('Corporate Debtor') informed the Respondent- ('Financial Creditor') that it requires two-three weeks' time to verify its records. However, without waiting, in a premeditated manner, they moved an application under Section 7 of the 'I&B Code' on the ground that the 'Corporate Debtor' defaulted in payment of debt of Rs. 62.9 Crores.

In "M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr. 2017", the Hon'ble Supreme Court raised the question of maintainability of the appeal by the 'Corporate Debtor' after initiation of 'Corporate Insolvency Resolution Process' and observed:

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

“According to us, once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company. In the present case, the company is the sole appellant. This being the case, the present appeal is obviously not maintainable. Entrenched managements are no longer allowed to continue in management if they cannot pay their debts.”

According to the learned Senior Counsel for the Appellant-‘Corporate Debtor’, the appeal under Section 61 was maintainable as it has been filed through Director. Reliance has been placed on the decision of this Appellate Tribunal in “*Steel Konnect (India) Pvt. Ltd. V. M/s. Hero Fincorp Ltd.- Company Appeal (AT) (Insolvency) No. 51 of 2017*”, wherein this Appellate Tribunal held that after initiation of ‘Corporate Insolvency Resolution Process’, the aggrieved parties including the ‘Corporate Debtor’ can prefer the appeal under Section 61 of the ‘I&B Code’.

Grounds for appeal filed by the appellant:

Learned Senior Counsel for the Appellant challenged the impugned order on the ground that the application did not satisfy the basic requirements of Section 7.

A bare perusal of the statutory requirements would show that the same is bereft of the information required statutorily to be provided under Section 7(2) and (3) of the ‘I&B Code’.

It was further submitted that the Respondent- (‘Financial Creditor’) has not filed any documents “in order to prove the existence of financial debt, the amount and the date of default”, as it required in the statutory Form-1.

It was submitted that the Applicant in terms of Section 7(3) of the ‘I&B Code’ is required to provide clear proof of default, either maintained by an Information Utility or any other additional documents to prove default of the ‘financial debt’, which they failed to provide.

NCLAT Observations:

NCLAT has heard the parties and also perused Form 1. Respondent- (‘Financial Creditor’) has shown the amount disbursed by way of payments made for, and on behalf of the Appellant- (‘Corporate Debtor’) between October 2007 and July 2010.

The amount claimed to be shown as Rs. 62,90,45,905/- and the date of default has been shown as 15th June 2017, when the ‘Corporate Debtor’ failed to repay the outstanding loan amount in spite of notice.

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On bare perusal of the aforesaid Part V of Form 1, it shows that the Form is complete and there is no infirmity in the same.

Learned Senior Counsel appearing on behalf of the Appellant-('Corporate Debtor') submitted that certain payments have been made in favour of the 'Indu Projects', which has been shown as debt of Appellant.

However, no detail deliberation is required to be made on such issue, as it has been brought on record that the payments were made by the Respondent- ('Financial Creditor') to Indu Projects on behalf of the 'Corporate Debtor', which is not in dispute.

In the present case, it is not in dispute that the Respondent-('Financial Creditor') given loan to the Appellant- ('Corporate Debtor') in connection with 'Q-City' project. The Appellant- ('Corporate Debtor') has taken plea that the amount so paid is now time barred which is a different issue but the Appellant- ('Corporate Debtor') had taken debt from the Respondent- ('Financial Creditor') has not been disputed. It is not the case of the Appellant- ('Corporate Debtor') that there is no debt, or no default has occurred in a sense that the debt, which may also be included a disputed claim is not true. The debt cannot be claimed to be not due being payable in law and in fact the Appellant- ('Corporate Debtor') having accepted that it obtained loan from the Respondent- ('Financial Creditor').

The default has occurred as evident from the fact that the Respondent- ('Financial Creditor') asked for refund of the amount by notice dated 15th June, 2017. In reply after asking for two weeks' time, the Appellant- ('Corporate Debtor') failed to pay the amount.

This Appellate Tribunal in "*M/s. Speculum Plast Pvt. Ltd. Vs. PTC Techno Pvt. Ltd. — Company Appeal (AT) (Insolvency) No. 47 of 2017*" held that the law of limitation is not applicable to 'I&B Code' and observed as follows:

"In view of the settled principle, while we hold that the Limitation Act, 1963 is not applicable for initiation of 'Corporate Insolvency Resolution Process', we further hold that the Doctrine of Limitation and Prescription is necessary to be looked into for determining the question whether the application under Section 7 or Section 9 can be entertained after long delay, amounting to laches and thereby the person forfeited his claim."

If there is a delay of more than three years from the date of cause of action and no laches on the part of the Applicant, the Applicant can explain the

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

delay. Where there is a continuing cause of action, the question of rejecting any application on the ground of delay does not arise.

Therefore, if it comes to the notice of the Adjudicating Authority that the application for initiation of 'Corporate Insolvency Resolution Process' under section 7 or Section 9 has been filed after long delay, the Adjudicating Authority may give opportunity to the Applicant to explain the delay within a reasonable period to find out whether there is any laches on the part of the Applicant."

NCLAT Conclusion Remarks:

In the present case, there is a continuous cause of action which will be evident from the books of account of the 'Corporate Debtor', wherein it is accepted the liability of loan payable to the Respondent- ('Financial Creditor'). There being a continuous cause of action, the application under Section 7 of the 'I&B Code' cannot be held to be barred by limitation.

It is not in dispute that the Appellant- ('Corporate Debtor') was developing an office complex by the name of Q-City Hyderabad. In the process of developing such office complex on prescribed date, the Respondent- ('Financial Creditor') acquired the majority of the shareholding of the Appellant- ('Corporate Debtor') for a total consideration of Rs. 162.73 Crores. Subsequently, in between 2007-2010, the 'Financial Creditor' granted interest free unsecured loan of Rs. 62.90 Crores to the Appellant- ('Corporate Debtor') for development of 'Q-City'.

Grant of loan and to get benefit of development is object of the Respondent- ('Financial Creditor'), as apparent from their 'Memorandum of Association'. Thus, we find that there is a 'disbursement' made by the Respondent- ('Financial Creditor') against the 'consideration for the time value of money'. The investment was made to derive benefit of development of 'Q-City', which is the consideration for time value of money. Thus, we find that the Respondent- ('Financial Creditor') come within the meaning of 'Financial Creditor' and is eligible to file an application under Section 7, there being a 'debt' and 'default' on the part of the 'Corporate Debtor'.

For the reasons aforesaid, we are not inclined to interfere with the impugned order dated 11th August 2017 passed by the Adjudicating Authority in CP (IB)No. 97/7/HDB/2017. All other connected appeals being preferred by the other shareholders of the 'Corporate Debtor' against same very impugned order dated 11th August 2017 also fail for reason aforesaid.

CASE NO. 5

Bharti Defence And Infrastructure Limited (Appellant)

Vs.

Edelweiss Asset Reconstruction Company Limited (Respondent)

Company Appeal (AT) (Insolvency) No. 71 of 2017

Date of Order: 17-10-2017

[Arising out of Order Dated 6th June, 2017 passed by NCLT (Mumbai Bench)]

Section 7 read with section 239 and section 240 and Chapter- V of Part IV of the Insolvency and Bankruptcy Code, 2016 (IBC) – Initiation of Corporate Insolvency Resolution Process (CIRP) by Financial Creditor

Facts:

An Application under section 7 of the IBC was filed against the Appellant before the NCLT Mumbai bench. The Application was admitted and the Order was passed. This was challenged in this appeal.

Appellants Justification

The Appellant stated that the 'Financial Creditor' failed to produce the record of evidence of default in terms of section 7(3)(a) of the IBC, as by virtue of Notification dated 30th March, 2017 the provisions contained in Chapter V of Part IV of IBC relating to Information Utility have been notified. Under section 215 of IBC, a financial creditor is required to submit in prescribed form to the 'Information Utility', financial information and information relating to assets in relation to which any security interest is created. As per the Appellant, in the absence of record of the default recorded with the information utility[as seen from SN 3 of Form 1 prescribed under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016], no application can lie before the Adjudicating Authority.

The Applicant further contended that no regulation has been framed by the Insolvency and Bankruptcy Board of India (IBBI) through the power given in sec 240(2)(f) for specifying "such other record of evidence of default" for the purpose of sec 7(3)(a) and therefore in its absence the petition is not maintainable.

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As per sec 239(2)(c) of the IBC the power under the said section given to Central Government cannot be construed to include specification of the record of default, which are required to be submitted to the Adjudicating Authority u/s 7 as it includes only the form, manner and fee for making the application .

Therefore, power is conferred only with the Board under sec 240(2)(f) and no regulation have been framed.

Further as per Regulation 8 of the Insolvency Regulations the records of default to be submitted to the 'Insolvency Resolution Professional' as a later stage, cannot be made applicable in the pre-admission stage of furnishing evidence before the Adjudicating Authority.

It was further stated that the details in terms of Form 1 is required to be given, the provisions being mandatory. Merely writing not applicable against the particulars at SN 3 of Part V of Form 1 of "whether the information is contained in the Information Utility" is not justified.

Respondents Justification

The Respondent stated that the Adjudicating Authority is required to ascertain only the existence of default from the documents filed u/s 7. It was also mentioned that the application u/s 7 in Form-1 of the Adjudicating Authority Rules along with all the annexures were complete.

Decision:

The Appellate Tribunal referred to the case of ***Neelkanth Township and Construction Pvt Ltd Vs Urban Infrastructure Trustees Limited*** wherein it was held that:

- The procedural provision cannot override the substantive obligation of the adjudicating authority to deal with applications u/s 7 merely on the ground that Board has not stipulated or framed regulations with regard to sec 7(3)(a).
- In the absence of regulation framed by IBBI, "the documents", "record" and "evidence of default" prescribed at Part V of Form – 1, of Adjudicating Authority Rules 2016 will hold good to decide the default of debt for the purpose of Sec 7.
- Regulation 8 of Corporate Person Regulation, 2016 relate to claims by 'Financial Creditor'. Regulation 11(2) relates to 'existence of debt due

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to Financial Creditors' which is to be proved on the basis of document mentioned therein.

- Therefore, the stand of the appellant that the Board has not framed any Regulation, relating to sec 7(3)(a) cannot be accepted.

The Appellate Tribunal held that the Respondent had enclosed in the Application under Section 7 in Form 1 the details of the record of debt and record of default. Hence, since the application was complete, it was admitted.

CASE NO. 6

Ravi Mahajan (Appellant)

Vs.

Sunrise Denmark A/S, Denmark (Respondent)

Company Appeals (AT) (Insolvency) Nos. 141 & 146 of 2017

Date of Order: 06-12-2017

Facts:

Application u/s 7 is filed by Sunrise 14 A/S, Denmark a company incorporated under Danish Law against M/S Muskan Power Infrastructure Limited (Corporate Debtor).

NCLT, Chandigarh Bench vide order dated 28/07/2017 admitted the application and declared moratorium and vide order dated 3/08/2017 appointed Interim Resolution Professional (IRP) and passed certain directions.

Both the orders passed by NCLT, Chandigarh Bench are under appeal.

Ld. Counsel of the Appellant submitted that;

- As per section 7(3)(a) of IBC, record of default or certificate from financial institution is to be furnished along with the application u/s 7 of IBC.
- In Part V of Form 1 submitted by the Respondent, it was mentioned that these documents referred to record of default are not filed.
- Therefore, as no documents for record of default were submitted by Financial Creditor, application is not maintainable as per section 7 of IBC.

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Ld. Counsel of the Respondent submitted that;

- Objections were not raised by Appellant before Adjudicating Authority.
- Adjudicating Authority should follow Golden Rule of Principles of Interpretation to interpret existence of default. The Court should follow the purposive interpretation to achieve the objective i.e. existence of default to the satisfaction of the Appellate Authority which has been done.
- Therefore it cannot be alleged that there is failure on the part of Respondent to product record of default in terms of section 7(3)(a)

Appellate Authority on hearing both the parties and perusal of record contented that;

- In part V of Form 1, details of financial contracts have been mentioned to prove existence of financial debt and date of default, however no record of default is recorded with information utility or any other evidence of default has been enclosed as per IBC.
- Though the application is in the form and manner along with fees prescribed as per section 7 (2), it is mandatory to comply with subsection 3 of section 7 regarding record of default.
- As per Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, Financial Creditor has to make an application u/s 7 in Form 5 accompanied with documents and records required.
- Section 7(3) read with Rule 6/Form 5 of Adjudicating Authority Rules, it is mandatory to provide relevant documents and enclose relevant records of default to the application.
- In case of no enclosure or information, application shall be treated as defective/incomplete and liable to be rejected.
- As the application is not complete as per section 7 of IBC and also this has been filed by Mr Rohit Khanna, who is neither Authorized Representative nor holds any position with or in relation to Financial Creditor, the application is not maintainable.
- Hence impugned orders dated 28/07/2017 and 03/08/2017 cannot be sustained and are set aside.
- The appellant company is released from the rigour of law and is allowed to function independently from immediate effect.

CASE NO. 7

Nikhil Mehta and Sons HUF (Appellants)

Vs.

AMR Infrastructure Ltd. (Respondent)

Company Appeal (AT) (Insolvency) No. 07 of 2017

Date of Order: 21-07-2017

Section 7 read with section 5(7) of the Insolvency and Bankruptcy code, 2016 read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 and section 424 of the Companies Act, 2013-Initiation of Corporate Insolvency Resolution process by financial Creditor.

Facts:

The appellants entered into different agreements/Memorandum of Understandings with Respondent/Corporate Debtor for purchase of 3 units in a project developed by Respondent.

One of the unit was purchased by the appellant under the 'Committed Return Plan' as per which if the appellant pays a **substantial portion of the total sale consideration upfront at the** time of execution of the MOU. The Respondent would pay a particular amount to the appellant each month as committed return/assured return each month from the date of execution of MOU till the time of handing over the physical possession of the unit.

The Respondent started paying the committed returns to the Appellant as per the MOU for some time, but stopped thereafter.

In view of the above, the appellants filed application under Section 7 of the Code before the Adjudicating Authority which was dismissed vide the impugned order.

Respondent's stand

Respondent appeared but did not file any affidavit denying the averments made by appellants.

Decision:

The Appellate Authority noted that following two questions arose before it for consideration

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Whether the appellants who reached with agreements/ Memorandum of Understandings with respondent for the purchase of three units being a residential flat, shop and office space in the projects developed, promoted and marketed by the respondent come within the meaning of 'Financial Creditor' as defined under the provisions of subsection (5) of Section 7 of the Code?

and

Whether an application for triggering insolvency process under Section 7 of the Code is maintainable where winding up petitions have been initiated and pending before the Hon'ble High Court against the 'Corporate Debtor'?

As regards the first question, the Appellate Authority quoted the provisions of section 5(7), section 5(8) and section 7 of the Code as well as the extracts of the judgment passed by the Learned Adjudicating Authority with regard to the appellants being Financial Creditors.

Thereafter, the Appellate Authority noted the relevant clause of one of the MOU dated 12th April, 2008 executed between appellants and respondent.

After scrutinizing the above provisions, the Appellate Authority held that the appellants are investors and had chosen the committed return plan.

The respondent in their turn agreed upon to pay monthly committed return to the investors.

Thus, the amount due to the appellants came within the meaning of debt defined under section 3(11) of the Code.

Furthermore, the Appellate Authority noted from the Annual Return and Form 16A of the respondent that the respondent had treated the appellants as investors and borrowed amount pursuant to sale purchase agreement for their commercial purpose treating at par with loan in their return.

Thus, the Appellate Authority held that the amount invested by appellants came within the meaning of Financial Debt as defined under section 5(8)(f) of the Code, subject to satisfaction of as to whether such disbursement against consideration is for time value of money.

For determining time value of money, the Appellate Authority perused the MOU between the parties providing for monthly committed returns to be paid to the appellants.

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The Appellate Authority held that it was clear from the MOU that the amount disbursed by appellant was against consideration of time value of money and respondent raised the amount by way of sale-purchase agreement, having commercial effect of borrowing.

This was clear from the annual returns of respondent wherein the amount so raised/borrowed was shown as commitment charges under the head financial cost.

Thus, the appellants were Financial Creditors under section 5(7) of the Code.

Accordingly, the Appellate Authority allowed the appeal and remitted the matter to the Adjudicating Authority to admit the application subject to the condition that other conditions of section 7 of the Code are satisfied by the appellants.

CASE NO. 8

PEC Ltd (Appellant/ Financial Creditor)

Vs.

Sree Ramkrishna Alloys Ltd (Respondent/ Corporate Debtor)

Company Appeal (AT) (Insolvency) No. 225 of 2017

Date of Order: 13-12-2017

(Arising out of Order dated 29.08.2017 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad in Company Petition No. (IB)-39/7/HDB/2017)

Facts:

The Appellant- 'M/s. PEC Ltd.' is a Government of India Enterprise, and is a 'Financial Creditor' of Respondent(s)- 'Corporate Debtor(s)' of both the appeals.

The case of the Appellant is that the Respondent- 'M/s. Sree Ramakrishna Alloys Limited' defaulted of Rs.15,16,26,907/- as on 6th March, 2017. Initially, on demand, the Respondent- 'M/s. Sree Ramakrishna Alloys Limited' issued three cheques which have been bounced, three Criminal Complaints under Section 138 of the Negotiable Instrument Act, 1881 has been instituted against the said Respondent being Criminal Complaint No. 40156/2016, Criminal Complaint No. 18535/2016 and Criminal Complaint No. 18399/2017 pending in Patiala House Courts, New Delhi.

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According to Appellant, the Respondent(s)- 'M/s. Sree Ramakrishna Alloys Limited' has also sold the goods pledged by the Appellant and has misappropriated the sale proceeds of the stock of pledged goods for which Criminal Complaints have also lodged by filing FIR before Station House Officer (SHO), Parawada Police Station, Visakhapatnam-CII.

The Appellant- 'M/s. PEC Ltd' filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") for initiation of 'Corporate Insolvency Resolution Process' against 'M/s. Sree Ramakrishna Alloys Limited'. The said application on notice has been admitted by impugned order dated 29th August, 2017, order of moratorium has been passed and 'Interim Resolution Professional' has been appointed. The grievance of the Appellant is that though the application was preferred by the Appellant under Section 7 of the 'I&B Code', at the request of the Respondent- 'M/s. Sree Ramakrishna Alloys Limited' ('Corporate Debtor'), the application has been treated to be an application under Section 9 of the 'I&B Code', and order of admission has been passed.

Learned counsel appearing on behalf of the Appellant submits that in view of the fact that the application under Section 7 of the 'I&B Code' has been treated to be an application under Section 9 of the 'I&B Code', the Appellant is now deprived of its right as 'Financial Creditor' and cannot take part as a member of 'Committee of Creditors' which has a vital role to play. It was further submitted that the application having filed under Form-1 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, (hereinafter referred to as "Adjudicating Authority Rules") the same cannot be treated to be an application under Form-5 of the Adjudicating Authority Rules, as per which different informations and records are to be provided and enclosed.

From the record of both the appeals, we find that the agreement reached between the Appellant-'M/s. PEC Ltd.' and respective Respondent(s) are verbatim similar. For the said reason, we are referring one of the agreement, language of both the agreements being same, except the name of one of the party.

From relevant fact as pleaded we find that 'M/s. Sree Ramakrishna Alloys Limited' ('Corporate Debtor') by their letter dated 19th February, 2014 intimated the Appellant- 'M/s. PEC Ltd.' that the said Respondent has proposed to procure 'M.S. Billets' as per the policies of the Appellant. So, the

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Appellant was requested to approve and grant clearance for the purchase of 'M.S. Billets' through ILC for Rs. 4,99,97,493/- (Rupees Four Crores Ninety-Nine Lakhs Ninety-Seven Thousand Four Hundred and Ninety-Three Only) and enclosed the offer and proforma invoice with request to the Appellant- 'M/s. PEC Ltd.' to arrange an amount of Rs.63,75,000/- (Sixty-Three Lakh Seventy-Five Thousand Only) towards the 12.5% margin money with conditions as mentioned therein.

NCLAT Observations:

From the letter referred to above and the agreement, we find that the Appellant-M/s. PEC Ltd. has disbursed the amount to 'M/s. Sree Ramakrishna Alloys Limited' against the consideration for the time value of money. It is also clear that M/s. Sree Ramakrishna Alloys Limited by the agreement dated 24th February, 2014 has borrowed money from the Appellant-M/s. PEC Limited against the payment of interest. Thus, the Appellant-M/s. PEC Ltd. come within the meaning of 'Financial Creditor' and is eligible to file an application under Section 7 of the 'I&B Code' there being a debt and default on the part of the Respondent.

Decision:

For the reasons aforesaid, we hold that the Adjudicating Authority failed to appreciate that the application(s) preferred by Appellant under Section 7 of the 'I&B Code' cannot be treated as an application under Section 9 of the 'I&B Code' and the Appellant who is a 'Financial Creditor' cannot be treated as 'Operational Creditor'.

Further, we hold that if an application is filed by a person under Section 7 of the 'I&B Code' and in case the Adjudicating Authority comes to the conclusion that the Applicant is not a 'Financial Creditor' in such case the Adjudicating Authority has jurisdiction to reject the application under Section 7 of the 'I&B Code', but the said Authority cannot treat the format of the application under Section 7 of the 'I&B Code' (Form-1) as an application under Section 9 of the 'I&B Code' (Form-5), nor can treat such person an 'Operational creditor', in absence of any claim made under Section 9 of the 'I&B Code'. Further, as the informations required to be given in Form-1 varies from the informations as required to be given in Form-5 (As per Section 9), including instructions made below the requisite form(s), no application filed under Section 7 can be treated as an application under Section 9 of the 'I&B Code'.

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Further, for filing an application under Section 9 of the 'I&B Code' it is mandatory to issue a demand notice/invoice of payment under sub-section (1) of Section 8, but no such requirement is there for filing an application under Section 7 of the 'I&B Code'. Therefore, in absence of a notice under sub-section (1) of Section 8 of the 'I&B Code', an application under Section 7 cannot be treated to be an application under Section 9.

In the present case, as the application preferred by the Appellant under Section 7 in both the appeals are maintainable and have been admitted, order of moratorium has been passed and 'Interim Resolution Professionals' have been appointed, no interference is called for against the impugned order dated 29th August, 2017 challenged in Company Petition No. (IB)-39/7/HDB/2017 and the impugned order dated 29th August, 2017 challenged in Company Petition No. (IB)-40/7/HDB/2017, except to modify the part of the order whereby the Appellant is treated to be an 'Operational Creditor'. Both the applications for all purpose should be treated to be an application under Section 7 of the 'I&B Code' and the Appellant-'M/s. PEC Ltd.' in both the cases should be treated as 'Financial Creditor'. The 'Interim Resolution Professionals' are directed to treat the Appellant accordingly, and include the Appellant as a Member of 'Committee of Creditors' in both the cases for taking decisions in accordance with law.

Both the appeals are allowed with aforesaid observations and directions.

SECTION-8

CASE NO. 9

Senthil Kumar Karmegam

Versus

Dolphin Offshore Enterprises (Mauritius) (P.) Ltd.

Company Appeal (AT) (Insolvency) No. 154 of 2017

Date of Order: 02-11-2017

Section 8 (1) -Can Advocate issue Notice

Facts:

Appeal against admission of application for initiation of 'Corporate Insolvency Resolution Process' & order of moratorium has been admitted on Grounds -

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that the demand notice under sub-Section (1) of Section 8 was not issued by the Operational Creditor but by an advocate (and not in prescribed forms 3 or form 4) on behalf of the 'Operational Creditor', which is not permissible.

Decision:

In view of provisions of I&B Code, read with Rules, as referred to above, we hold that an 'Advocate/Lawyer' or 'Chartered Accountant' or 'Company Secretary' in absence of any authority of the Board of Directors, and holding no position with or in relation to the Operational Creditor cannot issue any notice under Section 8 of the I&B Code, which otherwise is a 'lawyer's notice' as distinct from notice to be given by operational creditor in terms of section 8 of the I&B Code.

In the present case as the demand notice has been given by an advocate and there is nothing on record to suggest that the advocate in question holds any position with or in relation to the respondent – Dolphin Offshore Enterprises (Mauritius) Pvt. Ltd. and the demand notice has not been issued in mandatory Form 3 or Form 4, as stipulated, under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the initiation of resolution process cannot be upheld.

In effect, order(s) passed by Ld. Adjudicating Authority appointing any 'Interim Resolution Professional' or declaring moratorium, freezing of account, if any, and all other order(s) passed by Adjudicating Authority pursuant to impugned order and action taken by the 'Interim Resolution Professional', including the advertisement published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 9 of the I&B Code, 2016 is dismissed. Learned Adjudicating Authority will now close the proceeding. The appellant company is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

Learned Adjudicating Authority will fix the fee of 'Interim Resolution Professional', if appointed, and the appellant will pay the fees of the Interim Resolution Professional, for the period he has functioned.

Honorable Supreme Court of India

Macquarie Bank Limited vs Shilpi Cable Technologies Ltd an operational creditor may on the occurrence of a default deliver a demand notice..... under Section 8 of the Code must be read as including an operational creditor's authorized agent and lawyer, in Forms 3 and 5 appended to the Adjudicatory Authority Rules.

CASE NO. 10

JK Jute Mills Company Limited (Appellant)

Vs.

Surendra Trading Company Limited (Respondent)

Company Appeal (AT) No. 09 of 2017

Date of Order: 01-05-2017

[Arising out of Interim Order Dated 9th March, 2017 passed by NCLT (Allahabad Bench)]

Section 8 and section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) – Initiation of Corporate Insolvency Resolution Process (CIRP) by Operational Creditor

Question of Law:

Can AA on request of Operational Creditor grant order of status quo. ?

Whether the time limit prescribed in IBC for admitting or rejecting a petition or initiation of insolvency resolution process is mandatory?

Facts:

An Application under section 9 of the IBC was filed against the Appellant before the NCLT Allahabad bench. The OC as well as worker union requested for grant of status quo, as the CD may alienate it's assets. The CD oppose for grant of interim relief as there is no express provision in IBC. AA vide its order dated 09.03.2017 held that Tribunal is conferred under section 11 of NCLT Rules, for providing a substantial justice and directed CD to maintain status quo in respect of it's immovable property/ fixed assets until further order. The said interim order is challenged before NCLAT by CD.

The Appellant stated that the petition u/s 9 was filed without following the mandatory provision of Rule 6(2) OC sought time to rectify the defects, on next hearing more time was sought by OC. Subsequently, a third party J K Mills Majdur Sabha filed Misc. Application for intervention.

The CD submitted that the AA became 'functus officio' (whose duty / authority has come to an end) after the time period specified u/s 9 of IBC therefore it has no power to grant stay on sale of assets.

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The Respondent stated that the time limit prescribed u/s 9 of IBC is directory and not mandatory. The Court should avoid construction of an enactment which will lead to an unworkable, inconsistent or impracticable result.

NCLAT Observations:

There are various timelines stated u/s 7, 9, 10, 12 and 16 and mentioned that if an application is not disposed of or an order is not passed within a period specified in the Code, the AA may record the reasons for not doing so within the period specified and request the Hon'ble President of NCLT for extension of time, who may extend the period specified in the Act but not exceeding 10 days as specified in sec 64(1). The time is the essence of the IBC, but it is to be seen whether on failure to do so, the AA is competent to pass appropriate order. If the resolution process is not completed within the time prescribed, as per sec 33 it will lead to initiation of liquidation proceedings, which otherwise was not required to be initiated.

The period of 14 days prescribed u/s 9(5) is to be counted from the date of receipt of application. The word 'date of receipt of application' cannot be treated to be 'date of filing of the application' Time taken by Registry needs to be excluded and time should be counted from the date when such application is presented before the AA, i.e. the date on which it is listed for admission / order. The object behind the time period prescribed is to prevent the delay in hearing the disposal of the cases. The AA cannot ignore the provisions.

Decision:

In P.T. Rajan Vs. T.P.M. Sahir and Ors (2003), the Hon'ble Supreme Court observed that it is a well settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed, the same would be directory and not mandatory. Furthermore, a provision in statute which is procedural in nature although employs the word "shall" may not be held to be mandatory if thereby no prejudice is caused.

However, the 7 days period for rectification of defect as stipulated is required to be complied whose application otherwise being incomplete is fit to be rejected. The proviso to remove defect within 7 days are mandatory and on failure application are fit to be rejected.

The Court held that the end result of Resolution Process is approval of resolution plan or initiation of liquidation proceedings, hence the time granted

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u/s 12 of IBC is mandatory. The term allowed to Interim Resolution Professional u/s 16 for performance of the duties cannot be held to be mandatory.

As in the present case, the application was found to be defective hence the appeal was allowed.

SECTION-9

CASE NO. 11

Kirusa Software Private Ltd. (Appellant/ Operational Creditor)

Vs.

Mobilox Innovations Private Ltd. (Respondents/ Corporate Debtor)

Company Appeal (AT) (Insolvency) 6 of 2017

Date of Order: 24-05-2017

Section 9 read with sections 5, 7 & 8 of the Insolvency and Bankruptcy Code, 2016 – Application for Initiation of Corporate Insolvency Resolution Process by Operational Creditor

Facts:

The only question arises for considered in this appeal is what does "dispute" and "existence of dispute" means for the purpose of determination of a petition under section 9 of the 'I & B Code'?

Decision:

In sub-section (1) of Section 8 of the 'I & B Code', though the word "may" has been used, but in the context of Section 8 and Section 9 reading as a whole, an 'Operational Creditor,' on occurrence of a default, is required to deliver a notice of demand of unpaid debt or get copy of the invoice demanding payment of the defaulted amount served on the corporate debtor. This is the condition precedent under Section 8 and 9 of the 'I & B Code', before making an application to the Adjudicating Authority.

Thus it is evident from Section 9 of the 'I & B Code' that the Adjudicating Authority has to, within fourteen days of the receipt of the application under sub-section (2), either admit or reject the application.

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Section 9 has two-fold situations in so far as notice of dispute is concerned. As per sub-section (5)(1)(d) of Section 9, the Adjudicating Authority can admit the application in case no notice raising the dispute is received by the operational creditor (as verified by the operational creditor on affidavit) and there is no record of a dispute is with the information utility.

On the other hand, sub-section (5)(ii) of Section 9 mandates the Adjudicating Authority to reject the application if the operational creditor has received notice of dispute from the corporate debtor. Section 9 thus makes it distinct from Section 7. While in Section 7, occurrence of default has to be ascertained and satisfaction recorded by the Adjudicating Authority, there no similar provision under Sections 9.

Under Section 7 neither notice of demand nor a notice of dispute is relevant whereas under Sections 8 and 9 notice of demand and notice of dispute become relevant both for the purposes of admission as well as for and rejection.

Though the words 'prima facie' are missing in Sections 8 and 9 of the Code, yet the Adjudicating Authority would examine whether notice of dispute in fact raises the dispute and that too within the parameters of two definitions - 'debt' and 'default' and then it has to reject the application if it apparently finds that the notice of dispute does really raise a dispute and no other factual ascertainment is required. On the other hand, if the Adjudicating Authority finds that the notice of dispute lacks in particulars or does not raise a dispute, it may admit the application but in either case, there is neither an ascertainment of the dispute, nor satisfaction of the Adjudicating Authority.

Sub Section (6) of Section 5 defines "dispute", to include, unless the context otherwise requires, a dispute pending in any suit or arbitration proceedings relating to:

- (a) existence of amount of the debt;
- (b) quality of good or service;
- (c) breach of a representation or warranty.

The definition of "dispute" is "inclusive" and not "exhaustive". The same has to be given wide meaning provided it is relatable to the existence of the amount of the debt, quality of good or service or breach of a representation or warranty.

Once the term "dispute" is given its natural and ordinary meaning, upon reading of the Code as a whole, the width of "dispute" should cover all

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disputes on debt, default etc. and not be limited to only two ways of disputing a demand made by the operational creditor, i.e. either by showing a record of pending suit or by showing a record of a pending arbitration.

The intent of the Legislature, as evident from the definition of the term "dispute", is that it wanted the same to be illustrative (and not exhaustive). If the intent of the Legislature was that a demand by an operational creditor can be disputed only by showing a record of a suit or arbitration proceeding, the definition of dispute would have simply said dispute means a dispute pending in Arbitration or a suit.

The statutory requirement in sub-section (2) of Section 8 of the 'I & B Code' is that the dispute has to be brought to the notice of the Operational Creditor. The two comes post the word 'dispute' (if any) have been added as a matter of convenience and/or to give meaningfulness to sub-section (2) of Section 8 of the 'I & B Code'. Without going into the grammar and punctuation being hapless victim of pace of life, if one discovers the true meaning of sub-section (2)(a) of Section 8 of the 'I & B Code', having regard to the context of Sections 8 and 9 of the Code, it emerges both from the object and purpose of the 'I & B Code' and the context in which the expression is used, that disputes raised in the notice sent by the corporate debtor to the Operational Creditor would get covered within sub-section (2) of Section 8 of the 'I & B Code'.

The true meaning of sub-section (2)(a) of Section 8 read with sub-section (6) of Section 5 of the 'I & B Code' clearly brings out the intent of the Code, namely the Corporate Debtor must raise a dispute with sufficient particulars. And in case a dispute is being raised by simply showing a record of dispute in a pending arbitration or suit, the dispute must also be relatable to the three conditions provided under sub-section (6) of Section 5 (a)-(c) only. The words 'and record of the pendency of the suit or arbitration proceedings' under sub-section (2)(a) of Section 8 also make the intent of the Legislature clear that disputes in a pending suit or arbitration proceeding are such disputes which satisfy the test of subsection (6) of Section 5 of the 'I & B Code' and that such disputes are within the ambit of the expression, 'dispute, if any'. The record of suit or arbitration proceeding is required to demonstrate the same, being pending prior to the notice of demand under sub-section 8 of the 'I & B Code'.

It is a fundamental principle of law that multiplicity of proceedings is required to be avoided. Therefore, if disputes under sub-section (2)(a) of Section 8 read with sub-section (6) of Section 5 of the 'I & B Code' are confined to a

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dispute in a pending suit and arbitration in relation to the three classes under subsection (6) of Section 5 of the 'I & B Code', it would violate the definition of operational debt under sub-section (21) of Section 3 of the 'I & B Code' and would become inconsistent thereto, and would bar Operational Creditor from invoking Sections 8 and 9 of the Code.

Sub-section (6) of Section 5 read with sub-section (2)(a) of Section 8 also cannot be confined to pending arbitration or a civil suit. It must include disputes pending before every judicial authority including mediation, conciliation etc. as long there are disputes as to existence of debt or default etc., it would satisfy subsection (2) of Section 8 of the 'I & B Code'.

Therefore, as per sub-section (2) of Section 8 of the 'I & B Code', there are two ways in which a demand of an Operational Creditor can be disputed:

- (i) By bringing to the notice of an operational creditor, 'existence of a dispute'. In this case, the notice of dispute will bring to the notice of the creditor, an 'existence of a dispute' under the Code. This would mean disputes as to existence of debt or default etc.; or
- (ii) By simply bringing to the notice of an operational creditor, record of the pendency of a suit or arbitral proceedings in relation to a dispute. In this case, the dispute in the suit/arbitral proceeding should relate to matters (a)-(c) in sub-section (6) of Section 5 and in this case, showing a record of pendency of a suit or arbitral proceedings on a dispute is enough and to intent of the Legislature is clear, i.e. once the dispute (on matters relating to 3 classes in sub-section (6) of Section 5 of the 'I & B Code') is pending adjudication, that in itself would bring it within the ambit of sub-section (6) of Section 5 of the 'I & B Code'.

Thus the definition of 'dispute', 'operational debt' is read together for the purpose of Section 9 is clear that the intention of legislature to lay down the nature of 'dispute' has not been limited to suit or arbitration proceedings pending but includes other proceedings "if any".

Therefore, it is clear that for the purpose of sub-section (2) of Section 8 and Section 9 a 'dispute' must be capable of being discerned from notice of corporate debtor and the meaning of "existence" a "dispute, if any", must be understood in the context.

Mere raising a dispute for the sake of dispute, unrelated or related to clause (a) or (b) or (c) of Subsection (6) of Section 5, if not raised prior to application and not pending before any competent court of law or authority

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cannot be relied upon to hold that there is a 'dispute' raised by the corporate debtor. The scope of existence of 'dispute', if any, which includes pending suits and arbitration proceedings cannot be limited and confined to suit and arbitration proceedings only. It includes any other dispute raised prior to Section 8 in this in relation to clause (a) or (b) or (c) of sub-section (6) of Section 5. It must be raised in a court of law or authority and proposed to be moved before the court of law or authority and not any got up or malafide dispute just to stall the insolvency resolution process.

While sub-section (2) of Section 8 deals with "existence of a dispute", sub-section (5) of Section 9 does not confer any discretion on adjudicating authority to verify adequacy of the dispute. It prohibits the adjudicating authority from proceeding further if there is a genuine dispute raised before any court of law or authority or pending in a court of law or authority including suit and arbitration proceedings. Mere a dispute giving a colour of genuine dispute or illusory, raised for the first time while replying to the notice under Section 8 cannot be a tool to reject an application under Section 9 if the operational creditor otherwise satisfies the adjudicating authority that there is a debt and there is a default on the part of the corporate debtor.

The onus to prove that there is no default or debt or that there is a dispute pending consideration before a court of law or adjudicating authority shift from creditor to debtor and operational creditor to corporate debtor.

The dispute as defined in sub-section (6) of Section 5 cannot be limited to a pending proceedings or "lis", within the limited ambit of suit or arbitration proceedings, the word 'includes' ought to be read as "means and includes" including the proceedings initiated or pending before consumer court, tribunal, labour court or mediation, conciliation etc. If any action is taken by corporate debtor under any act or law including while replying to a notice under section 80 of CPC, 1908 or to a notice issued under Section 433 of the Companies Act or Section 59 of the Sales and Goods Act or regarding quality of goods or services provided by 'operational creditor' will come within the ambit of dispute, raised and pending within the meaning of sub-section (6) of Section 5 read with sub-section (2) of Section 8 of I&B code, 2016.

From the reply of the respondent-corporate debtor to the notice under section 8 of the code it could be seen that it has not raised any dispute within the meaning of sub-section (6) of Section 5 or sub-section (2) of Section 8 of I&B Code, 2016 and in that view of the matter, merely on some or other account the respondent has disputed to pay the amount, cannot be termed to be dispute to reject the application under Section 9 of the I&B Code, 2016 as was preferred by appellant-operational creditor.

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The requirement under sub-section (3)(c) of Section 9 while independent operational creditor to submit a certificate from the financial institution as defined in sub-section (4) of section 3 including Schedule Bank and public financial institution and like which is a safeguard prevent the operational creditor to bring a non-existence or baseless claim. Similarly the adjudicating authority is required to examine before admitting or rejecting an application under Section 9 whether the 'dispute' raised by corporate debtor qualify as a 'dispute' as defined under sub-section (6) of Section 5 and whether notice of dispute given by the corporate debtor fulfilling the conditions stipulated in sub-section (2) of Section 8 of I&B Code, 2016.

In the present case the adjudicating authority has acted mechanically and rejected the application under sub-section (5)(ii)(d) of Section 9 without examining and discussing the aforesaid issue. If the adjudicating authority would have noticed the provisions as discussed above and what constitute and as to what constitute 'dispute' in relation to services provided by operational creditor then would have come to a conclusion that condition of demand notice under subsection (2) of Section 8 has not been fulfilled by the corporate debtor and the defence claiming dispute was not only vague, got up and motivated to evade the liability.

Case Review: Order dated 27th January, 2017 passed by NCLT, Mumbai Bench, in Kirusa Software Private Ltd. Vs. Mobilox innovations Private Ltd. (C.P. No.01/I &BP/NCLT/MAH/2017), *set aside*.

CASE NO. 12

Black Pearl Hotels Pvt. Ltd. (Appellant/Operational Creditor)

Vs.

**Planet M Retail Ltd. (Respondent/ Corporate Debtor)
Company Appeal (AT) (Insolvency) No.91 of 2017**

Date of Order: 17-10-2017

Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Article 137 of the Limitation Act, 1963 – Application for Initiation of Corporate Insolvency Resolution Process by Operational Creditor - Insolvency and Bankruptcy Code, 2016 has come into force with effect from 1st December, 2016 and therefore, the right to apply under this Code accrues only on or after 1st December, 2016

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The applicant/Operational Creditor filed an application under section 9 of the Code before NCLT, Mumbai Bench on the ground that the respondent/Corporate Debtor (CD) had failed to pay its agreed dues. The Adjudicating Authority by its impugned order dated 4thMay 2017 dismissed the application on the ground that the application was barred by limitation.

On appeal, the NCLAT held as follows:

Insolvency and Bankruptcy Code, 2016 has come into force with effect from 1st December, 2016. Therefore, the right to apply under I&B Code accrues only on or after 1st December, 2016 and not before the said date (1st December, 2016). As the right to apply under section 9 of I&B Code accrued to appellant since 1st December, 2016, the application filed much prior to three years, the said application cannot be held to be barred by limitation.

In so far as the application under section 9 of the Arbitration and Conciliation Act, 1996 preferred by appellant, it has been specifically pleaded by the appellant and not disputed by the respondent that the appellant filed an application to withdraw the application under section 9 of the Arbitration Act, expressly reserving liberty to institute fresh proceeding for interim relief. In such circumstances and as no arbitral dispute is pending, the application cannot be rejected.

The Adjudicating Authority, Mumbai Bench was not correct in holding that the application was barred by limitation. For the said reason the order rejecting the application cannot be sustained.

Case Review: Order dated 04.05.2017 passed by the NCLT, Mumbai Bench, in Black Pearl Hotels Pvt. Ltd, Operational Creditor Vs. Planet M. Retail Ltd, Corporate Debtor, (C.P. No.464/I&BP/NCLT/MAH/201), *set aside*.

CASE NO. 13

M/s. Ksheeraabad Constructions Pvt. Ltd. (Appellant/ Corporate Debtor)

Vs.

M/s. Vijay Nirman Company Pvt. Ltd. (Respondent/ Operational Creditor)

Company Appeal (AT) (Insolvency) No. 167 of 2017

Date of Order: 20-11-2017

Sections 9 and 238 of the Insolvency and Bankruptcy Code, 2016 read with Sections 34 & 36 of the Arbitration and Conciliation Act, 1996 - Application for Initiation of Corporate Insolvency Resolution Process

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(CIRP) by the Respondent - The provision under the 'I&B Code' with regard to finality of an Arbitral Award for initiation of 'Corporate Insolvency Resolution Process' will prevail the provisions of the 'Arbitration and Conciliation Act, 1996'. No person can take advantage of pendency of a case under Section 34 of the Arbitration and Conciliation Act, 1996 to stall 'Corporate Insolvency Resolution Process' under Section 9 of the 'I&B Code'.

The question arises for consideration before the NCLAT is:

“Whether pendency of a case before a Court under Section 34 of the Arbitration and Conciliation Act, 1996 can be termed to be 'dispute in existence' for the purpose of subsection (6) of Section 5 of the 'I&B Code'.”

The Appellate Tribunal held as follows:

It is true that under Section 36 of the Arbitration and Conciliation Act, 1996, an Arbitral Award is executable as a decree. It can be enforced only after the time for filing the application under Section 34 has expired and/or, if no application is made or such application having been made has been rejected. Therefore, for the purpose of Arbitration and Conciliation Act, 1996, an Arbitral Award reaches its finality after expiry of enforcement time or if the application under Section 34 is filed and rejected. However, for the purpose of 'I&B Code' no reliance can be placed on Section 34 of the Arbitration and Conciliation Act, 1996, for the reasons stated below.

The 'I&B Code' being a Complete Code will prevail over all other Acts including Arbitration and Conciliation Act, 1996. As per, Section 238, provision of 'I&B Code' is to override other laws, including Arbitration Act, 1996. Therefore, the provision under the 'I&B Code' with regard to finality of an Arbitral Award for initiation of 'Corporate Insolvency Resolution Process' will prevail the provisions of the 'Arbitration and Conciliation Act, 1996'.

For the purpose of Section 9 of the 'I&B Code', the application to be preferred under Form-5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "Rules, 2016") as per which, the order passed by Arbitral panel/Arbitral Tribunal has been treated to be one of the documents/ records and evidence of default, as apparent from Part V of Form 5.

The aforesaid provisions made in the Form-5 if read with subsection (6) of Section 5 and Section 9 of the 'I&B Code' it is clear that while pendency of

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the suit or Arbitral Proceeding has been termed to be an 'existence of dispute', an order of a Court, Tribunal or Arbitral Panel adjudicating on the default (commonly known as Award), has been treated to be a "record of Operational Debt".

In view of the aforesaid provisions of law and mandate of 'I&B Code', we hold that no person can take advantage of pendency of a case under Section 34 of the Arbitration and Conciliation Act, 1996 to stall 'Corporate Insolvency Resolution Process' under Section 9 of the 'I&B Code'.

Case Review: Order dated 29th August, 2017 passed by the NCLT, Hyderabad Bench in Company Petition (IB) No. 100/9/HDB/2017), upheld.

CASE NO. 14

Shriram EPC Limited (Appellant /Corporate Debtor)

Vs.

Rio Glass Solar SA (Respondent / Operational Creditor)

Company Appeal (AT) (Insolvency) No. 133 of 2017

Date of Order: 02-11-2017

Issue: Whether the Demand Notice served by Advocate / Lawyers' firm which is required to be given by Operational Creditor under Section 8(1) of the Insolvency & Bankruptcy Code, 2016 is permissible – Whether the application under section 9 in Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 signed by the “Power of Attorney Holder” is permissible – Whether the certificate of financial institution in India maintaining accounts of the Operational Creditor confirming that there is no payment of an “Unpaid Operational Debt” by the Corporate Debtor in terms of Section 9(3)(c) of Insolvency and Bankruptcy Code is mandatory or directory -

Facts:

Rio Glass Solar SA preferred an application under section 9 of the Insolvency and Bankruptcy Code, 2016 seeking to set in motion the Corporate Insolvency Resolution Process against the appellant Shriram EPC Limited.

NCLT, Chennai Bench admitted the application, ordered moratorium, appointed “Interim Resolution Professional” with order of prohibition in terms of Insolvency and Bankruptcy Code, 2016.

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The Corporate Debtor challenged the said order and appeal before the NCLAT.

Decision:

The Appellate Authority accepted the appeal relying on various judgements with following observations:

- Reliance has been placed on the decision of this Appellate Tribunal in “Uttam Galva Steels Limited vs DF Deutsche Forfait AG & Other” wherein following observations made—
 - Form -3 and Form -4 read with sub rule (1) of Rule 5 and Section 8 of the Insolvency and Bankruptcy Code, 2016, an Operational Creditor can apply himself or through a person authorised to act on behalf of Operational Creditor. The person who is authorised to act on behalf of Operational Creditor is also required to state “his position with or in relation to the Operational Creditor” meaning thereby the person authorised by Operational Creditor must hold position with or in relation to the Operational Creditor and only such person can apply.
 - In view of provisions of Insolvency and Bankruptcy Code read with Rules, an “Advocate/Lawyer” or “Chartered Accountant” or “Company Secretary” in absence of any authority of the Board of Directors and holding no position with or in relation to the Operational Creditor cannot issue any notice under Section 8 of the Insolvency and Bankruptcy Code, which otherwise is a “lawyer’s notice” as distinct from notice to be given by operational creditor in terms of section 8 of the Insolvency & Bankruptcy Code.
- Reliance has been placed on the decision of this Appellate Tribunal in “Palogix Infrastructure Limited vs ICICI Bank Ltd” wherein following observations made—
 - The Insolvency & Bankruptcy Code is a complete code by itself. The provision of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder. Therefore, a “Power of Attorney Holder” is not competent to file an application on behalf of a Financial Creditors or Operational Creditors or Corporate Applicant.

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- Reliance has been placed on the decision of this Appellate Tribunal in “Smart Timing Steel Ltd vs National Steel and Agro Industries Ltd” – Company Appeal (AT)(Insol) No.28 of 2017 wherein following observations made–
 - Certificate from the “Financial Institution” maintaining accounts of the “Operational Creditor” confirming that there is no payment of unpaid operational debt by the Corporate Debtor, as prescribed under Section 9(3)(c) of the code is mandatorily followed and it is not empty statutorily formality.
- Reliance has been placed on the various decisions of Apex Court, for determining the provisions being “directory” or “mandatory”, it was held that where statute itself provide consequences of breach or non compliance, normally the provision has to be regarded as having mandatory in nature. The importance of the provisions disregarded and the relation of that provision to the general object intended to be secured. The determination of the question whether a provision is mandatory or directory would, in the ultimate analysis, depend upon the intent of the law maker and that has to be gathered not only from the phraseology of the provision but also by considering the nature, its design and consequences which would follow from construing it in one way or the other.

The application under Section 9 was not maintainable due to various reasons, accordingly, the order was set aside and the fees of “Interim Resolution Professional” appointed by Adjudicating Authority will be paid by the Corporate Debtor for the period he has functioned.

CASE NO. 15

Sobha Limited (Appellant)

Vs.

Pancard Clubs Ltd (Respondent)

Company Appeal (AT) (Insolvency) No. 162 of 2017

Date of Order: 04-12-2017

Facts :

Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 been rejected on the ground of ‘existence of a dispute’ and in view of action

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taken by the Securities and Exchange Board of India. Does SEBI Order constitute dispute? Hence Appeal to Honorable NCLAT.

SEBI has passed an order, inter alia, directing the 'Corporate Debtor' not to alienate, dispose or sell any of the assets of the Company except for the purpose of making refunds to its investors and the Ministry of Corporate Affairs and to initiate the process of winding up of the Respondent.

Arbitration Proceedings under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed by parties before the Hon'ble High Court much prior to service of notice under sub-section (1) of Section 8 of the 'I&B Code' and thereby, there is an 'existence of dispute'. Prayer was made to dismiss the application.

Decision:

Initiation of 'Corporate Insolvency Resolution Process' under 'I&B Code' cannot be nullified by any order passed by SEBI nor can be a ground to reject an application under Section 9 of the 'I&B Code' but as there is an 'existence of dispute' with regard to the invoices raised by the Appellant-'Operational Creditor', we hold that the application under Section 9 of the 'I&B Code' was not maintainable.

Sub Section (6) of Section 5 defines "dispute", to include, unless the context otherwise requires, a dispute pending in any suit or arbitration proceedings relating to:

- (a) existence of amount of the debt;
- (b) quality of good or service;
- (c) breach of a representation or warranty.

The definition of "dispute" is "inclusive" and not "exhaustive".

SEBI Order of Refunding money to depositor does not constitute dispute. Arbitration Proceedings under Section 11 of the Arbitration and Conciliation Act, 1996 as regards amount of claim payable constitute dispute.

CASE NO. 16

Philips India Ltd.

Versus

**Goodwill Hospital & Research Centre Ltd.
Karina Healthcare Pvt. Ltd.**

Company Appeal (AT) (Insolvency) No. 14 of 2017

Date of Order: 31-05-2017

Facts:

Operational Creditor had preferred two separate applications for initiation of Corporate Insolvency Resolution Process invoking provisions of Section 9 of Insolvency and Bankruptcy Code, 2016 (IBC)for default in making payment of Comprehensive Annual Maintenance Contract.

Decision:

Corporate debtor much prior to issuance of notice under section 8 had raised a dispute relating to quality of service/maintenance pursuant to notice under sections 433(e) and 434(1)(a) of the Companies Act, 1956 it can be safely stated that there is 'existence of dispute' about the claim of debt. Such objection cannot be called mere objection for the sake of 'dispute' and/or unrelated to clause (a) or (b) or (c) of sub-section (6) of section 5. Where adjudicating authority has accordingly refused to entertain application under section 9 of the Code, no ground is made out for interference with such orders.

Innoventive Industries Limited v. ICICI Bank Limited

Supreme court decision on dispute in this case needs to be noted.

The decision is on following points amongst others:

- (i) The concept of default under the Insolvency Code and how it must be ascertained
- (ii) The scope and extent of enquiry at the admission of a insolvency application;
- (iii) The scope of hearing to be provided to a corporate debtor.

CASE NO. 17

Ganesh Sponge Pvt. Ltd. (Appellant / Corporate Debtor)

Vs.

**Aryan Mining & Trading Corporation Pvt. Ltd.
(Respondent / Operational Creditor)**

Company Appeal (AT) (Insolvency) Nos. 124 & 125 of 2017

Date of Order : 23-08-2017

Section 9 – Application for Initiation of Corporate Insolvency Resolution Process by Operational Creditor

Facts:

Two issues were involved in the order passed by the Adjudicating Authority.

1. Adjudicating Authority rejected the joint application preferred by the appellant and the respondent to withdraw the petition.
2. Appellant contended, that the application was defective; the notice under Section 8 was not issued by the 'Operational Creditor' but by its lawyer and also stated that there was 'existence of dispute' regarding the quality of goods.

Decision:

On First Fact:

Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, which reads as follows:

"8. Withdrawal of application.—The Adjudicating Authority may permit withdrawal of the application made under rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission."

Thus it is clear that the learned Adjudicating Authority is empowered to permit withdrawal of the application under Section 7, 9 or 10 of the I&B Code, as the case may be, on the request made by the appellant before the admission, but such withdrawal cannot be permitted once the application is admitted. Thus, NCLAT in absence of any illegality found no ground to interfere with the order of Adjudicating Authority

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On the Second Fact:

Reliance was placed on decision of Appellate Tribunal in "Macquarie Bank Limited Vs. Uttam Galva Metallica Limited" - [Company Appeal (AT) (Insolvency) No. 96 of 2017, order dated 17th July, 2017. the Appellate Tribunal held as follows:

From bare perusal of Form-3 and Form-4, read with sub-Rule (1) of Rule 5 and Section 8 of the 'I & B Code, it is clear that the 'Operational Creditor' can apply himself or through a person authorized to act on behalf of the 'Operational Creditor', who hold same position with or in relation to the 'Operational Creditor'. Thereby such person(s) authorized by 'Operational Creditor', holding position with or in relation to the 'Operational Creditor' can only apply.

In view of such provision we hold that an advocate/lawyer or Chartered Account or a Company Secretary or any other person in absence of any authority by the 'Operational Creditor', and if such person do not hold any position with or in relation to the 'Operational Creditor', cannot issue notice under Section 8 of 'I & B Code', which otherwise can be treated as a lawyer's notice/pleader's notice, as distinct from notice under Section 8 of 'I & B Code."

As regards the 'Existence of Dispute' deductions for quality was already made and the remaining outstanding balance was confirmed. So no dispute remained on the date of notice.

In the meanwhile it was submitted that the parties have settled the dispute and the due amount has already been paid.

However, NCLAT held that we are not deciding the question as to whether the parties have settled the dispute or not, but in view of the fact that the impugned order passed by the learned Adjudicating Authority on the application under Section 9, which was not complete and the case of the appellant is covered by decision of this Appellate Tribunal in 'Macquarie Bank Limited Vs. Uttam Galva Metallica Limited (supra)', we set aside the impugned order.

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CASE NO. 18

Labdhi Enterprises (Appellant / Operational Creditor)

Vs.

Baramati Agro Pvt. Limited (Respondent / Corporate Debtor)

Company Appeal (AT) (Insolvency) No. 195 of 2017

Date of Order : 10-11-2017

Facts:

The appellant filed an application under Sections 433, 434(e) and 439 of the Companies Act, 1956 before the Hon'ble Bombay High Court, Mumbai for winding up the Respondent Company on the ground that the debtor Company defaulted in making payment of Rs. 27,97,696/- to the Appellant. Since by notification dated 7th December 2016, "The Companies (Transfer of pending proceedings) Rules 2016" came into force. the petition under Sections 439, 434(e) and 439 of the Companies Act, 1956, which was pending before the Hon'ble Bombay High Court was transferred to the Tribunal, Mumbai Bench, Mumbai.

Respondent took plea that the claim was barred by limitation and holding this contention the Adjudicating Authority refused to treat the Application under Section of 9 of the I & B Code on one of the grounds that the Appellant failed to show that the debtor Company acknowledged the debt due since last three years from 27th April, 2010 when it was payable and thereby the debt is time barred.

Decision:

The question as to whether the Limitation Act, 1963 will be applicable for triggering incorporate resolution process under Sections 7 or 9 of the I & B Code fell for consideration before the Appellate Tribunal in -"M/s Speculam Plast Pvt. Ltd. Vs. PTC PTC Techno Private Ltd."-in Company Appeal(AT) (Insolvency) No. 47/2017. In the said case this Appellate Tribunal, by judgment dated 07th November, 2017 held as follows:-

In view of the settled principle, NCLAT holds that the Limitation Act, 1963 is not applicable for initiation of 'Corporate Insolvency Resolution Process', and that the Doctrine of Limitation and Prescription is necessary to be looked into for determining the question whether the application under Section 7 or

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Section 9 can be entertained after long delay, amounting to laches and thereby the person forfeited his claim.

If there is a delay of more than three years from the date of cause of action and no laches on the part of the Applicant, the Applicant can explain the delay. Where there is a continuing cause of action, the question of rejecting any application on the ground of delay does not arise.

From Article 137 of the Limitation Act, 1963, it is clear that the period of three years' is to be counted from the date right to apply accrues to a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Debtor'.

For initiation of 'Corporate Insolvency Resolution Process', the right to apply accrues under Section 7 or Section 9 or Section 10 only with effect from 1st December, 2016 when 'I&B Code' has come into force, therefore, the right to apply under Section 7 or Section 9 or Section 10 in all present cases having accrued after 1st December 2016, such applications cannot be rejected on the ground that the application is barred by limitation."

Thus the impugned order of Adjudicating Authority cannot be upheld and the appellant is given liberty to file a fresh application under section 9 of I & B Code in accordance with the other provisions of the law.

CASE NO. 19

Paramjeet Singh (Appellant / Corporate Debtor)

Vs.

Maxim Tubes Company Pvt. Ltd (Respondent / Operational Creditor)

Company Appeal (AT) (Insolvency) No. 150 of 2017

Date of Order: 20-11-2017

Section 9 – Application for Initiation of Corporate Insolvency Resolution Process by Operational Creditor

Facts:

This appeal was preferred by the appellant Paramjeet Singh, Director of M/s. International Coil Limited against order dated 16th August, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Special bench, New Delhi in (IB)-120(PB)/2017 whereby and whereunder the application preferred by the respondent under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I&B Code') has been

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admitted, order of moratorium has been passed and the Interim Resolution Professional (IRP) has been appointed.

Earlier the NCLT has observed that, a strict onus is placed on 'Corporate Debtor' while raising the plea of dispute and that it must be genuine and bona fide in order to avoid the debt, which is claimed by 'Operational Creditor' as due from the 'Corporate Debtor' and in making payment of the same. However, in the instant case no merit is found in the contention of the 'Corporate Debtor'. Thus there is no pre existing dispute. After having considered other aspects and compliance of the I & B Code, the petition was maintained.

Decision:

Admittedly, operational creditor issued notice under sub-section (1) of Section 8 of I&B Code to the Corporate Debtor; in spite of receipt of such notice, the Corporate Debtor had not disputed the claim nor submitted any reply under sub-section (2) of Section 8 within a period of ten days. It was in the aforesaid circumstances application under Section 9 was filed in Form5, wherein it was specifically mentioned that 'no objection has been filed by Corporate Debtor under sub-Section (2) of Section 8. In the aforesaid circumstances and in absence of any specific evidence brought on record, we are not inclined to interfere with the impugned order dated 16th August, 2017. We find no merit in this appeal. It is accordingly dismissed.

CASE NO. 20

Siddharth Nahata Director / Shareholder of Tryst Industries Private Limited. Appellants (appellant / Corporate Debtor)

Vs.

**Billets Elektro Werke Pvt. Ltd. (Respondent / Operational Creditor)
Company Appeal (AT) (Insolvency) No. 199 of 2017**

Date of Order: 03-11-2017

Section 9 – Application for Initiation of Corporate Insolvency Resolution Process by Operational Creditor

Facts:

The respondent claimed to be an Operational Creditor & initiated the insolvency resolution process against the appellant (original respondent) Corporate Debtor on the grounds of default.

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The respondent had sent Section 8 notice dated 22nd May, 2017 and the appellant replied raising dispute vide reply dated 7th June, 2017. Reference was made to earlier exchange of correspondence dated 20th July, 2016 and 3rd August, 2017 and criminal complaint filed by appellant to show that the amount was yet not due for reasons stated.

When the matter came up before the learned NCLT, parties for both sides were heard but the learned NCLT did not find the dispute raised by the appellant acceptable and was of the opinion that it was illusory and without legs to stand upon. For reasons recorded the learned NCLT admitted the Insolvency Resolution Process

Decision:

Now when this appeal has come up, learned counsel for the appellant as well as the respondent both submit that the matter has been compromised between the Operational Creditor and the Corporate Debtor and even the necessary payments have been made as well as care has been taken regarding the payments of the Insolvency Resolution Professional, who has been appointed. Counsel for Appellant stated that there are no other Creditors there.

A Compromise has taken place would not be material for the decision of this appeal, once the process has been set into motion. We have to consider this appeal on its own merits.

Looking to the record, we find substance in the arguments of learned counsel for Appellant that indeed there was a prior existing dispute and the application under Section 9 should not have been admitted. In view of the above, the appeal is allowed. The impugned order admitting the Insolvency Resolution Process is quashed and set aside. The further proceedings in view of the impugned order are stopped.

CASE NO. 21

M/s MCL Global Steel Pvt. Ltd. & Anr. (Appellant / Corporate Debtor)

Vs.

M/s Essar Projects India Ltd. & Anr. (Respondent / Operational Creditor)

Company Appeal (AT) (Insolvency) No. 29 of 2017

Date of Order: 31-05-2017

Section 9 – Application for Initiation of Corporate Insolvency Resolution Process by Operational Creditor

Facts:

Earlier the application by M/s Essar Projects India Ltd. & Anr, Operational Creditor, was admitted by Adjudicating Authority, NCLT Mumbai vide its order dated 06.03.2017 and the said order is now contested by the Appellant M/s MCL Global Steel Pvt. Ltd. & Anr. on the following grounds:-

- The impugned ex parte order was passed by 'Adjudicating Authority without prior notice or intimation of hearing to the Appellants- against the principles of rules of natural justice.
- Learned 'Adjudicating Authority' has failed to notice that existence of dispute between the parties which 'Operational Creditor' did not bring to the notice of the 'Adjudicating Authority' while getting an ex parte order. If notice would have been served on 'Corporate Debtor' this fact would have been highlighted.
- The Respondents – Operational Creditor has concealed material fact that it has issued a winding up notice under Section 433 of Companies Act 1956 which was duly replied by Appellant and wherein the claim was denied. Also various emails during 2013, 2014 wherein concerns regarding the quality of construction work and non-completion of work within time frame clearly demonstrating the existence of 'dispute' between the parties were also not disclosed.

Decision:

In the present case as admittedly a notice was issued by Respondent - Operational Creditor under Section 433(e) and 434 of the Companies Act 1956 which was disputed by Appellant - 'Corporate Debtor' objecting quality of service and non-completion of the work within time which is much prior to

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enactment of 'I & B Code', 2016, and notice under Section 8 of the 'I & B code', NCLAT held that there is an "existence of dispute" for which the petition under Section 9 preferred by Respondent - Operational Creditor was not maintainable.

Further, as the impugned order dated 6th March 2017 was passed by Adjudicating Authority without notice to the Appellant - Corporate debtor in violation of principle of natural justice and the Adjudicating Authority failed to notice the relevant facts that there was a dispute raised and replied by the Corporate Debtor, the impugned order passed by Adjudicating Authority cannot be upheld.

CASE NO. 22

**Annapurna Infrastructure Pvt. Ltd.
(Appellant/ Operational Creditor)**

Vs.

**Soril Infra Resources Ltd. (Respondent and Corporate Debtor)
Company Appeal (AT) (Insolvency) No. 32 of 2017**

Date of Order: 29.08.2017

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 an existence of dispute pending adjudication between the parties.

Facts:

Disputes arose between Annapurna Infrastructure Pvt. Ltd. (Annapurna) and SORIL Infra Resources Ltd. (SORIL) relating to non-payment of rent by SORIL (the lessee) to Annapurna and others (the lessors). Arbitration clause in the lease deed between the parties was invoked and an arbitral award was passed in favour of Annapurna and others. The arbitral award was challenged by SORIL in an application under Section 34 of the A&C Act, which was dismissed by the Hon'ble High Court of Delhi.

Soon thereafter, the award holders, which included Annapurna, issued Demand Notices on SORIL under Section 8 (1) of IBC as operational creditors of SORIL, demanding the amounts stated in the arbitral award. A

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reply was issued by SORIL under Section 8 (2) of IBC, stating that there is an “existence of dispute” between the parties, principally on the ground that an appeal under Section 37 of the A&C Act had been filed and was pending against the Dismissal Order. It was also pointed out in the reply that execution proceedings to recover the award amount were pending. Subsequent thereto, Annapurna and others filed a Section 9 application under IBC before the Learned National Company Law Tribunal, Principal Bench, New Delhi (Adjudicating Authority), seeking initiation of CIRP of SORIL.

The Adjudicating Authority dismissed the Section 9 application on the ground that a dispute between the parties had already been subject to arbitration, which had yet to attain finality (as the appeal against the Dismissal Order under Section 37 of the A&C Act was still pending). The Adjudicating Authority also observed that as execution proceedings had already been initiated, a party could not invoke more than one remedy simultaneously and indulge in forum shopping.

Decision:

Questions for determination of NCLAT

1. 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?
2. 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?
3. 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 1 and 2 above

- i. The NCLAT observed that a perusal of Section 8(2) (a) of the Code shows that pendency of 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 A&C Act.
- ii. Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (Rules) required to be filled to apply under

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Section 9 of the Code indicates order passed by Arbitral Panel as one of the document, record and evidence of default.

- iii. 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 A&C Act has expired and no application has been made or such application having been made, has been rejected.
- iv. Thus, arbitral award reaches finality after expiry of enforceable time under Section 34 and/or if application under Section 34 is filed and rejected.
- v. 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.
- vi. 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.
- vii. 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.
- viii. Insolvency Resolution Process is neither a money suit for recovery nor a suit for execution of decree or award.
- ix. 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.
- x. 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 3

- i. 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.

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- ii. 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.
- iii. Accordingly, the appeal of the appellant was allowed on above two questions.
- iv. NCLAT held that if the Adjudicating Authority holds that the appellant is an operational creditor, it would decide other issues whether the application is complete or not and decide thereon.

CASE NO. 23

Achenbach Buschhutten Gmbh & Company (Appellant)

Vs.

Arcotech Limited (Respondent)

Company Appeal (AT) (Insolvency) No. 97 of 2017

Date of Order: 31-07-2017

Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 to initiate Corporate Insolvency Resolution Process in respect of Corporate Debtor.

Facts:

The corporate debtor approached the operational creditor for purchase of goods in the month of December 2014, which the petitioner agreed to sell. Pursuant thereto, the parties entered into a sale and purchase agreement dated 23.12.2014, where under respondent-corporate debtor accepted credit terms of payment to be made within 360 days after the said agreement. The goods were sent to the respondent-corporate debtor.

The total amount of debt to be default is said to be Euro 4,472,638.99 (equivalent to 31,41,13,436.26 calculated at the rate of 270.23 per Euro) upto 02.03.2017 along with interest at the rate of 12% per annum.

Thereafter the petitioner-operational creditor submitted that before filing of this petition, the operational creditor also sent a notice making a demand of total amount of Euro 4,472,638,99 giving all the particulars. The notice further states that if the respondent-corporate debtor raises the existence of dispute or the amount of unpaid operational debt in default is paid, the

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respondent was asked to provide the same within 10 days of receipt of the letter of the pendency of the suit or arbitration proceedings in relation to such a dispute filed before the receipt of this notice. The authorized representative stated that no notice was served by the corporate debtor raising a dispute in relation to the existence or amount of the unpaid operational debt due to the operational creditor.

The matter was listed before the Adjudicating Authority for the first time when the learned counsel for the petitioner sought time to place on record the reply received from the respondent-corporate debtor to the demand notice. The matter was adjourned with a direction to file affidavit and also the copy of the reply received supported by affidavit with the postal receipt and track report of the postal department stating that the instant petition along with the entire paper book was sent to the corporate debtor by a registered post.

In the reply the respondent has raised many serious issues which amount to raising of dispute as intended by the Legislature in the definition of Section 5 (6) of the Code. It is stated in the reply that as per terms of the agreement, the petitioner was under an obligation to dispatch the entire Mill within 11 months of signing of the agreement, but the petitioner failed to deliver the same within the stipulated period. It is further stated that due to delay in dispatching the said equipment, not only the objective of respondent to purchase the same has been frustrated, but also the respondent has suffered huge loss of money due to non-installing the same in time and commencing the business. It was emphasized that on that account, the respondent was not obliged to accept delivery, making the payment of the equipment and rather, claimed the refund of the amount already paid.

Decision:

The appeal against the order dated 25th May 2017 passed by NCLT Chandigarh Bench, Chandigarh in CP(IB) No. 21/Chd/Hry/2017 was further challenged in front of NCLAT.

One of the plea taken by the learned counsel for the appellant is referring to clause of arbitration, has not entertained the application on the ground that there is an existence of a dispute. We are of the view that mere clause of arbitration in an agreement cannot be termed to be an "existence of dispute" pending before the Arbitral Tribunal for the purpose of refusal of an application preferred under Section 9 of the I&B Code.

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Learned counsel for the respondent brought to our notice that the appellant has not enclosed any certificate granted by the 'Financial Institution' as stipulated under clause (c) of sub-Section (3) of Section 9 of the I&B Code. From the record, we find that the appellant has enclosed one letter relating to 'confirmation of receipt of payment' from foreign institution known as 'Sparkasse Siegen'.

The question as to whether filing of a copy of the certificate from the 'Financial Institution', "maintaining accounts of the Operational Creditor confirming that there is no payment of unpaid operational debt by the Corporate Debtor" as prescribed under clause (c) of sub-section (3) of Section 9 of the I&B Code is mandatory or directory, was considered by this Appellate Tribunal in "Smart Timing Steel Ltd. Vs. National Steel and Agro Industries Ltd.- [Company Appeal (AT) (Insolvency) No. 28 of 2017]".

Admittedly, the Bank in question is not a scheduled bank, nor is a 'financial institution' as defined under Section 45-I of Reserve Bank of India Act 1934 (2 of 1934). The Bank aforesaid also do not come within the meaning of 'Public Financial Institution' as defined in clause (72) of Section 2 of Companies Act 2013 (18 of 2013). The Central Government has also not issued any Notification specifying the Bank in question for the purpose of subsection (14) of Section 3 read with Section 9 of 'I & B Code'.

In the circumstances, we hold that the application preferred by the appellant was not maintainable in the absence of record of 'Financial Institution' as defined in sub-section (14) of Section 3 of the I&B Code.

We find no merit in this appeal and it is accordingly dismissed.

CASE NO. 24

Raj Hari Eswaran (Appellant)

Vs.

**CMI India (P.) Limited & Anr. (Respondents)
Company Appeal (AT) (Insolvency) No. 248 of 2017**

Date of Order: 28-11-2017

Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 to initiate Corporate Insolvency Resolution Process in respect of Corporate Debtor.

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

Facts:

The Corporate Debtor placed various purchase orders during the years 2012-13 and 2013-14 with the Operational Creditor for the supply of cables. The Appellant is a Shareholder and Managing Director of the 'Corporate Debtor'. According to the Appellant, as per the purchase orders the Operational Creditor was required to provide a warranty for 36 months, and that during 2015, the Corporate Debtor came to know that it was not going to be possible for the Operational Creditor to provide the warranty.

According to Appellant, the Corporate Debtor clearly indicated the 1st respondent that in case warranty was not possible, so the Operational Creditor was free to take away the cables. However, in spite of that the Operational Creditor issued a legal notice on 15th September 2016 through a lawyer calling upon the 'Corporate Debtor' to pay the outstanding sum to which the 'Corporate Debtor' replied by letter dated 17th October 2016 denying any liability.

The Operational Creditor filed a Company Petition before the Hon'ble High Court of Madras claiming the sum from the Corporate Debtor. After constitution of the Tribunal, the case was transferred to Adjudicating Authority, Chennai Bench.

On notice, the 'Corporate Debtor' appeared on 13th June 2017 and disputed the liability. On 31st July 2017, the 'Corporate Debtor' filed reply. The transferred application was treated to be an application under Section 9 of the 'I&B Code' and was admitted by impugned order dated 12th October 2017 giving rise to the present appeal.

Decision:

Admittedly, no notice was issued under sub-section (1) of Section 8 of the I & B Code. As per Rule-5, other information were also not placed before the Adjudicating Authority.

In effect, order passed by the Adjudicating Authority appointing 'Resolution Professional', declaring moratorium, freezing of account and all other order passed by the Adjudicating Authority pursuant to impugned order and action, if any, taken by the 'Resolution Professional, including the advertisement, if any, published in the newspaper calling for applications and all such orders and actions are declared illegal and are set aside.

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The application preferred by the 1st Respondent is dismissed as abated. Learned Adjudicating Authority will now close the proceeding. The 2nd Respondent company ('Corporate Debtor') is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

The Adjudicating Authority will fix the fee of 'Resolution Professional', and the Appellant will pay the fees for the period he has functioned. The appeal is allowed with aforesaid observation and direction. However, in the facts and circumstances of the case, there shall be no order as to cost.

CASE NO. 25

Paharpur Cooling Towers Limited (Appellant)

Vs.

Ankit Metal & Power Limited (Respondent)

Company Appeal (AT) (Insolvency) No. 204 of 2017

Date of Order: 09.11.2017

Section 9 read with section 61 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 and Section 424 of the Companies Act, 2013 – Initiation of Corporate Insolvency Resolution Process by Financial Creditor

Facts:

The petitioner has filed this application under Sec. 9 of the Insolvency & Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiation of corporate insolvency process against corporate debtor M/s. Ankit Metal & Power Ltd.

The petitioner has stated that pursuant to an agreement between the corporate debtor and the operational creditor the corporate debtor has agreed to appoint the operational creditor for supply, transportation, erection and commissioning of Air Cooled Condenser. The respondent corporate debtor has delayed in payment of the operational creditor for the goods supplied and erection of the ACC system done by the operational creditor and to the invoices raised by the operational creditor.

Corporate debtor has also promised to make payment of all instalments by

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

issuing post dated cheque to the operational creditor to clear off the outstanding dues. In breach of the contract the respondent has failed and neglected to make any further payment to the operational creditor.

In view of coming into effect of the Insolvency and Bankruptcy Code, 2016 by notification, winding up petition filed before the Hon'ble High Court was transferred to NCLT. Then again demand notice was issued under I & B Code, 2016. The petitioner has also stated that Company Secretary has been authorized to act on behalf of the operational creditor. In support of its contention the petitioner has also filed affidavit and the authorization letter which shows that the petitioner company by its resolution had authorized Chief Financial Officer and Company Secretary to file necessary suits, petitions, applications, appeals and caveat with the appropriate Court of law having jurisdiction on behalf of the applicant company. It is important to mention that by the above-mentioned Board resolution no specific authority was given to initiate corporate insolvency process. The above-mentioned authorization letter does not indicate that the Board of Directors of the applicant company had approved for initiation of corporate insolvency process against corporate debtor under I & B Code, 2016.

Operational creditor has also filed an affidavit to the effect that no notice has been given by the corporate debtor relating to a dispute of the unpaid part of the debt. The applicant has further stated in the affidavit that corporate debtor has failed to bring to the notice of the operational creditor an existence of a dispute or the pendency of the suit or arbitration proceedings filed before the service of the demand notice.

Decision:

This appeal has been preferred by M/s Paharpur Colling Towers Limited (Operational Creditor) against the order dated 21st August 2017 passed by the National Company Law Tribunal, Kolkata Bench whereby and whereunder the Adjudicating Authority dismissed the application under Section 9 of the Insolvency & Bankruptcy Code, 2016 on the ground that there is 'an existence of dispute' and Application was not filed directly by the 'Operational Creditor' but by its Company Secretary.

In this case, petitioner has filed resolution of Board of Directors but by that resolution, the Company has not authorized its Company Secretary to initiate corporate insolvency process against the corporate debtor. Therefore, it cannot be treated as a valid demand notice under Sec. 8 of the I & B Code, 2016.

Orders passed by National Company Law Appellate Tribunal (NCLAT)

Learned Counsel for the Appellant submits that the Appellant ought to have been granted more time to remove the defect and requested to allow the Appellant to file another Application under Section of 9 'I&B Code'. However, permission cannot be granted as the application filed by the Appellant has been dismissed also on the ground of existence of a dispute, even prior to the issuance of the demand notice sub-Section (1) of Section 8 of the 'I & B Code'.

From the impugned order we find that the Respondents brought to the notice of the Adjudicating Authority certain disputes. In reply, learned Counsel for the Appellant referred to a letter issued by an Advocate on behalf of the Appellant, but such stand has been disputed by the Respondent. However, even after dispute of the amount if certain amount is admitted by the Respondents but has not paid such amount the Appellant may prefer application under Section 9 after notice to the Respondent under Sub-Section (1) of Section 8 of the I & B Code giving a reference to such undisputed debt, if defaulted.

For the reasons aforesaid, while we are not inclined to interfere with the impugned order, we allow the Appellant to move before the appropriate forum in respect of the admitted dues if any. The Appeal stands disposed of with aforesaid observation.

SECTION-10

CASE NO. 26

Antrix Diamond Exports Pvt Ltd (Appellant / Corporate Debtor)

Vs.

**Bank of India & Ors (Respondents/ Financial Creditor)
Company Appeal (AT) (Insolvency) No.107 of 2017**

Date of Order: 12-01-2018

Section 10 of the Insolvency and Bankruptcy Code 2016 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016- Initiation of corporate insolvency resolution process by corporate applicant- Reliance on facts which are not relevant for adjudication under section 10 of the Insolvency and Bankruptcy Code, 2016

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

Facts:

M/s Antrix Diamond Exports Pvt. Ltd. filed an application u/s 10 of the Insolvency and Bankruptcy Code, 2016 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016. The application is complete and NCLT, Mumbai bench has accepted the same.

As per statements, the liability towards the Financial Creditors is Rs. 428.38 crores which are secured against the immovable properties, fixed deposits, hypothecation of the stock in trade as well as personal guarantees of its directors and others. A full bifurcation of the banks and amount due was presented before the NCLT, Mumbai Bench. But the NCLT, Mumbai Bench is of the view that it appears that the Corporate Debtor is eager to scuttle the proceedings before the SARFAESI as the consequential moratorium imposed u/s 14 of the code on admission of this Petition would automatically stay/stall the proceedings vide which the personal properties offered as securities are not enforced or taken possession of. The admission of the petition as initiation of the proceedings by the Corporate Debtor shall cause irreparable loss and injury to the Consortium of Banks, and an uncalled for protection to the borrowers and various guarantors. So, the petition stands dismissed.

The corporate applicant has challenged the impugned order mainly on the ground that the bench has relied on facts which are not relevant for adjudication under section 10 of the Insolvency and Bankruptcy Code, 2016.

Decision:

Reliance has been placed on the decision of this Appellate Tribunal in the case of “M/s Unigreen Global Pvt Ltd vs PNB & Others” on the similar issues whereby -

- The Adjudicating Authority on hearing the parties and on perusal of records, if satisfied that there is a debt and default has occurred and the Corporate Applicant is not ineligible under Section 11, the Adjudicating Authority has no option but to admit the application, unless it is incomplete, in which case the Corporate Applicant is to be granted time to rectify the defects.
- Section 10 does not empower the Adjudicating Authority to go beyond the records and the information as required to be submitted in Form 6 subject to ineligibility prescribed under Section 11.

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- Any facts unrelated or beyond the requirement under Insolvency and Bankruptcy Code or Forms prescribed under Adjudicating Rules are not required to be stated or pleaded.
- Non disclosure of facts unrelated to Section 10 and Form 6 cannot be termed to be suppression of facts or to hold that the Corporate Applicant has some malicious intention except non disclosure of any disqualification, if any, under section 11.
- Any action has taken by a “Financial Creditors” under Section 13(4) of the SARFAESI Act, 2002 against the Corporate Debtor or a suit is pending against the Corporate Debtor under Section 19 of DRT Act, 1993 before a Debt Recovery Tribunal or appeal pending before the Debt Recovery Appellate Tribunal can not be a ground to reject an application under Section 10, if the application is complete. In fact, any such proceedings can not proceed in view of the order of moratorium as may be passed.
- Case where a winding up proceedings has already been initiated against a Corporate Debtor by the Hon’ble High Court or Tribunal or liquidation order has been passed in respect of Corporate Debtor, no application under Section 10 can be filed by the Corporate Applicant in view of indelibility under Section 11(d) of Insolvency and Bankruptcy Code, 2016. However, mere pendency of a petition for winding up, where no order has been passed, cannot be ground to reject the application under Section 10.

In present case,

- The application is complete as required under Section 10 read with Form 6 as per Rule 7
- The NCLT has noticed extraneous factors unrelated to Corporate Insolvency Resolution Process which are not required to be disclosed in terms of Section 10 or Form 6
- The Corporate Applicant is not ineligible as prescribed under Section 10.

Case Review: Order dated 20th June, 2017 passed by NCLT, Mumbai Bench, (C.P. No. 1104/I & BP/NCLT/MAH/ 2017), *set aside*.

CASE NO. 27

Unigreen Global Private Limited (Appellant /Corporate Debtor)

Vs

Punjab National Bank and others (Respondents / Financial Creditors)

Company Appeal (AT) (Insolvency) No. 81 of 2017

Date of Order: 01-12-2017

Issue: Whether non-disclosure of facts beyond the statutory requirement under the Code read with relevant form, prescribed under the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016 ("Rules") can be a ground to dismiss an application for initiation of Corporate Insolvency Resolution Process - Whether the penalty imposed by the Adjudicating Authority under Section 65 of the Code is legal or not -

Facts:

Unigreen Global Pvt. Ltd., the Corporate Debtor filed an application under Section 10 of the Code read with Form 6 of the Insolvency and Bankruptcy (Adjudicating Authority) Rules, 2016 with the NCLT to initiate Corporate Insolvency Resolution Process.

The NCLT opined that admission of the Corporate Insolvency Resolution Process application would induce a moratorium on all other legal actions under Section 14 of the Code. Consequently, the Financial Creditors would unjustly be stayed from taking possession of the secured assets for a period of at least six months. The application preferred by Corporate Debtor seemed to be with the wrongful intention, and that the Tribunal would not support any such mala fide actions of corporate debtors. Tribunal cannot be a party to mala fide actions on the part of the corporate debtor, where there is a clear case of abuse of process of law. Accordingly rejected the application and imposed a penalty of Rs. 10,00,000/- on Unigreen and its directors under Section 65 of the Code.

The Corporate Debtor challenged the said order and appeal before the NCLAT.

Decision:

The Appellate Authority accepted the appeal and set aside the Adjudicating Authority order on following observations:

Orders passed by National Company Law Appellate Tribunal (NCLAT)

Section 10 of the Code does not empower the Adjudicating Authority to go beyond the records as prescribed under Section 10 and the information as required to be submitted by a corporate debtor in Form 6 of the Rules subject to ineligibility, if any, as prescribed under Section 11 of the Code. Section 11 of the Code prescribes conditions which make an applicant ineligible/disqualified to make an application under the Code to initiate corporate insolvency resolution process. An applicant is not required to disclose or plead any fact which is unrelated or beyond the requirements of the Code or forms prescribed under the Rules and thus non-disclosure of such facts cannot be termed as suppression of facts by a corporate debtor.

Reliance placed on the judgment of the Supreme Court of India passed in the matter of “Innoventive Industries Ltd. vs ICICI Bank and Others” dealing with Section 7 of the Code.

A comparison made between Section 7 and Section 10 of the Code and concluded that sub-section (4) of Section 7 is similar to sub-section (4) of Section 10. Thus, the two factors which are common under Section 7 and 10 of the Code are (i) there should be a debt due; and (ii) there should be a default in payment of such debt. Hence, another aspect to be seen by the Adjudicating Authority is existence of debt and default in payment of such debt.

Pendency of any Civil suits or any suits pending against the Corporate Debtor under Section 19 of Debt Recovery Tribunal Act, 1993 before a Debt Recovery Tribunal or appeal pending before the Debt Recovery Appellate Tribunal can not be a ground to reject an application under Section 10 of the Code, if the application is complete. Such suits cannot proceed in view of the order of moratorium as may be passed.

Section 238 of Code shall have the effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force including DRT Act, 1993; SARFAESI Act, 2002; money suits etc. Non Obstante Clause is there in the Section.

In any winding up proceedings has been initiated against the Corporate Debtor by the Hon'ble High Court or Tribunal or liquidation order has been passed, in such case the application under Section 10 is not maintainable. However, mere pendency for winding up, where no order of winding up or order of liquidation has been passed, can not be ground to reject the application under Section 10.

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With respect to imposing penalty under Section 65 of the Code, the Adjudicating Authority on the basis of the record is required to form a prima facie opinion that the person (Financial Creditor/Corporate Debtor/Operational Creditor) has filed the application for initiation of insolvency proceeding "fraudulently" or "with malicious intent" for the purpose other than the resolution of the insolvency or liquidation or that voluntary liquidation proceedings have been filed with the intent to defraud any person.

There is nothing on record that the Corporate Applicant has suppressed any facts or has not come with the clean hands, Appellate Tribunal allowed the appeal.

CASE NO. 28

Ameya Laboratories Limited (Corporate Applicant)

Vs.

Kotak Mahindra Bank

IDBI Bank Ltd

Asset Reconstruction Company (India) Limited

(Respondents)

Company Appeal (AT) (Insolvency) No.192 of 2017

Date of Order: 12.01.2018

[Arising out of order dated 21/08/2017 passed by NCLT Hyderabad Bench]

Facts:

Ameya Laboratories ("Corporate Applicant") filed an application under section 10 of ("IBC Code") for initiation of CIRP. NCLT Hyderabad Bench vide order dated 21/08/2017 rejected the application on various grounds including pendency of winding up proceeding.

Appeal against the order passed by NCLT Hyderabad Bench was filed with National Company Law Appellate Tribunal, New Delhi by Corporate Applicant.

Hon'ble High Court of Andhra Pradesh vide order dated 20/04/2015 concluded that Ameya Laboratories was unable to pay the debts and passed the order of winding up the company under section 433 and 434.

Orders passed by National Company Law Appellate Tribunal (NCLAT)

Corporate Applicant preferred an appeal against the order of winding up wherein division bench of the Hon'ble Andhra Pradesh High Court vide order dated 19/08/2015 granted interim stay.

Decision:

Learned Counsel of Corporate Applicant submitted that;

- There was no possibility of revival of the company;
- Application filed u/s 10 of IBC was complete in all aspects as per section 10 of IBC and Form 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016
- Adjudicating Authority has no jurisdiction to look into the revival of the company at the time of application u/s 10 of IBC.
- Therefore, Adjudicating Authority wrongly held that Corporate Applicant has already suffered liquidation.

Learned Counsel of Respondent placed reliance on order dated 20/04/2015 passed by Andhra Pradesh High Court where it is held that corporate applicant was unable to pay the debts and hence ordered winding up process.

Further, Ld Counsel of Appellant placed reliance on the interim stay granted by division bench of Andhra Pradesh High Court.

Further to this, Ld. Counsel of Respondent placed reliance on **Supreme Court decision of Shree Chamundi Mopeds Ltd Vs. Church of South India Trust Association**, where distinction between quashing of an order and stay of operation of an order is made.

Quashing of an order means restoration of the position as it was on the date of passing of the order which has been quashed.

Stay order means the order which has been stayed shall not be operative from the date of passing of stay order. It does not mean that the said order has been wiped out from existence.

In the given case, as an interim stay order is passed by division bench of High Court, which means that the winding up proceeding is already initiated by High Court but the same has become inoperative because of the stay order. The fact however remains the same regarding that winding up proceedings are initiated against the corporate applicant.

As per section 11(d) corporate debtor against whom liquidation order has been made is not entitled to make application for CIRP u/s 10 of IBC.

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

NCLAT New Delhi faced similar issue in case of **M/s Unigreen Global Pvt Ltd Vs. PNB and Others** wherein it is contended that;

When an application is filed u/s 10 “Financial Creditor” or “Operational Creditor” may dispute that there is no default or no debt is due or the Corporate debtor is not eligible to make an application as per section 11 of IBC.

Adjudicating Authority on hearing of the parties and perusal of record, if is satisfied that there is debt and default has been occurred and Corporate Debtor and Corporate Applicant is not ineligible as per section 11, the Adjudicating Authority has to admit the application unless it is incomplete. In case of incomplete application, Corporate Applicant shall be granted time to rectify the same, but the same cannot be rejected. Adjudicating Authority has no power to go beyond section 10 and Form 6 and reject the application.

Application can be rejected by Adjudicating Authority in case the applicant is not eligible as per section 11 of IBC.

Conclusion:

As per section 11(d) of IBC, if any winding up proceedings are initiated against the corporate debtor by High Court/Tribunal or liquidation order is passed, then the application u/s 10 is not maintainable.

In the given case, as winding up order has been passed and is pending against the corporate debtor, Application u/s 10 is not maintainable.

CASE NO. 29

Alpha & Omega Diagnostics (India) Ltd. (Corporate Debtor/ Appellant)

Vs.

Asset Reconstruction Co of India Ltd. (Respondents)

Company Appeal (AT) (Insol.) No. 116 of 2017

Date of Order: 31-07-2017

Facts:

An application under Section 10 of IBC 2016 was filed by the Corporate Debtor before the NCLT Mumbai Bench.

Adjudicating Authority (National Company Law Tribunal) Mumbai Bench, Mumbai, after notice to the 'Financial Creditor' and others passed impugned

Orders passed by National Company Law Appellate Tribunal (NCLAT)

order dated 10th July, 2017 in T.C.P. No. 11 17/I&BP/NCLT/MB/MAH/2017, admitting the application subject to qualification, as quoted below:

Decision:

The issue was whether Moratorium will cover property not owned by corporate debtor.

According to the appellant, the Moratorium should take into its recourse on the subject matters and assets relating to its matters pending before the Debt Recovery Tribunal (DRT) and under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI). However, we are not inclined to accept such submissions as Appellant-Corporate Applicant has sought for "its" own insolvency resolution process that will include only the assets of the Corporate Debtor and not any assets, movable or immovable of a third party, like any director or other. In so far as 'guarantor' is concerned, we are not expressing any opinion, as they come within the meaning of 'Corporate Debtor individually', as distinct from principal debtor who has taken a loan.

In the aforesaid background, if Ld. Adjudicating Authority, on careful reading of the provisions has come to the definite conclusion that on commencement of the insolvency process the "Moratorium" shall be declared for prohibiting any action to recover or enforce any security interest created by the 'Corporate Debtor' in respect of "its" property, no ground is made out to interfere with the said order.

NCLAT finds no merit in this appeal. It is accordingly dismissed.

CASE NO. 30

Schweitzer Systemtek India (P.) Ltd. (Appellant)

Vs.

Phoenix ARC Private Limited (Respondent)

Company Appeal (AT) (Insolvency) No. 129 of 2017

Date of Order: 09-8-2017

Facts:

The Appellant-Corporate Applicant has challenged the order dated 3rd July, 2017 passed by Ld. Adjudicating Authority (National Company Law Tribunal) Mumbai Bench, Mumbai in T.C.P. No.1059/I&BP/NCLT/MB/MAH/2017,

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whereby and whereunder the application preferred by appellant under Section 10 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I & B Code") has been admitted, an order of Moratorium has been passed and Insolvency Resolution Professional has been ordered to be appointed.

The grievance of the appellant is that the movable and immovable property of Guarantor (promoter) has been attached pursuant to Corporate Resolution Process initiated under section 10 against the Appellant-Corporate Applicant. However, such statement has been disputed by the Ld. Counsel appearing on behalf of 1st Respondent/'Financial Creditor'.

The main issue before the Tribunal was that "whether a property(ies) which is/are not 'owned' by a Corporate Debtor shall come within the ambits of the Moratorium?"

In the instant case the personal properties of the promoters have been given as security to the banks while taking loans.

Ld. Adjudicating Authority observed that the Moratorium shall prohibit the action against the properties reflected in the Balance Sheet of the Corporate Debtor. The Moratorium has no application on the properties beyond the ownership of the Corporate Debtor. As a result, the Order of the Hon'ble Court directing the Court Commissioner to take over the possession shall not fall within the clutches of Moratorium. Even otherwise, the provisions of The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (the SARFAESI Act) may be having different criteria for enforcement of recovery of outstanding debt, which is not the subject matter of this Bench. The SARFAESI Act may come within the ambits of Moratorium if an action is to foreclose or to recover or to create any interest in respect of the property belonged to or owned by a Corporate Debtor, otherwise not.

Decision:

In view of the observations made above, the impugned order having passed by Ld. Adjudicating Authority in accordance with law, we reject the prayer. The appeal is dismissed. However, in facts and circumstances of the case, the parties shall bear the respective costs.

SECTION-12

CASE NO. 31

Quinn Logistics India Private Limited (Appellant)

V/s

Mack Soft Tech Private Limited (Respondent)

Company Appeal (AT) (Insolvency) No. 185 of 2018

Date of Order: 8th May 2018

Facts:

The Insolvency and Bankruptcy Code, 2016 ("Code") was put in place to provide for a time bound process of insolvency resolution of various persons. In cases of corporate persons, as per Section 12 of the Code, a strict timeline of 180 days is required to be followed for completing the corporate insolvency resolution process ("CIRP Process"). Though, the period of 180 days could be extended by another period of 90 days it can only be done if an application is filed by the insolvency resolution professional upon the instructions of the committee of creditors ("COC") with 75% of their votes. The application for extension is filed under Section 12 of the Code with the Adjudicating Authority, i.e. the National Company Law Tribunal ("NCLT") which may or may not extend the period by a further 90 days. The proviso to Section 12(3) provides that no further extension beyond the additional 90 days can be granted.

That being the position of law, the CIRP Processes were being hampered on account of various applications and/ or appeals being filed by various aggrieved persons such as the suspended directors, the resolution applicants, resolution professionals, any member from the COC etc. Such applications/appeals were filed for various reasons such as challenging the initiation of the CIRP Process, or the constitution of the COC, or the resolution plan, or the non-consideration thereof, replacement of the resolution professional etc. When such applications were taken up, the NCLT would at times order a stay on the continuation of the CIRP Process. This created confusion and uncertainty amongst the participants of the CIRP Process as to the fate of the CIRP Process.

Insolvency Commencement Date: 11 Aug 2017

CIRP ends on: 07 Feb 2018

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AA vide its order dated 16 Jan 2018 extended the period of CIRP beyond 180 days for further period of 90 days.

AA vide its order dated 15 Sep 2017 directed the CoC to keep its proceedings pending till the next date of hearing of the case.

AA vide its order dated 31 Jan 2018 directed the Resolution Professional not to convene the CoC meeting till the next date of hearing

AA vide its order dated 28 Feb 2018 permitted the Resolution Professional to go ahead with convening of ensuing meetings of CoC of the Corporate Debtor and accordingly modified the interim order dated 31 Jan 2018.

Learned Counsel appearing for the FC and RP represented that for about 160 days the proceedings could not be taken up by the CoC in view of said order and it virtually resulted in stay of the CIRP Process.

In the context, the Learned counsel appearing on behalf of CoC and FC submitted that they have no objections if the CIRP period is extended till the next date of hearing.

Learned Counsel appearing for the FC and RP represented that period of litigation shall be excluded from the CIRP period from calculating the period of 270 days

NCLAT decision:

It is clear that if an application is filed by the Resolution Professional or the CoC or any person aggrieved person for justified reasons it is always open to AA to exclude certain period for the purpose of counting the total period of 270 days.

The NCLAT then went on to point out some examples which would justify extensions. They are as follows

- If the CIRP is stayed by a court of law or the AA or the NCLAT or the HC or the Hon'ble SC
- If no Resolution Professional is functioning for one or other reason during the CIRP such as removal
- The period between the date of order of admission/moratorium is passed and the date of receipt of the certified order by the IRP (in this case period between 11 Aug 2017 to 21 Aug 2017 is excluded-10 days is excluded from 270 days)

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- On hearing a case if order is reserved by the AA or the NCLAT or the HC or the SC and finally pass order enabling the RP to complete the CIRP
- If the CIRP is set aside by the NCLAT or order of the Appellant Tribunal is reversed by the Hon'ble Supreme court and CIRP is restored.
- Any other circumstances which justifies exclusion of certain period.

With the guidelines laid down by the NCLAT in Mack Soft case, strict timelines for completing the CIRP Process stand relaxed to the extent the CIRP Process gets hampered due to forces external to the CIRP Process.

The time prescribed for filing legal proceeding by or against Corporate Debtor is to be excluded for which an order of moratorium has been made.

CASE NO. 32

In the matter of:

Quantum Limited (Corporate Debtor/ Appellant)

Versus

Indus Finance Corporation Limited (Respondent)

Company Appeal (AT) (Insolvency) No. 35 of 2018

Date of Order: 20-02-2018

Facts:

This appeal was preferred by the Corporate Debtor through Resolution Professional against order dated 18th December 2017 passed by AA, Mumbai Bench. By impugned order the AA has rejected the application for extension of time on the ground that there is no provision to file such application after expiry of 180 days of the CIRP.

On the application moved by the Resolution Professional seeking extension of CIRP period for another 90 days under section 12(2) of the IBC 2016.

It has been noticed by Bench that this application has been filed on 30th Nov 2017 on a resolution dated 24th Nov 2017 passed by CoC seeking extension of time. By the time this application was moved by the Resolution Professional 180 days of CIRP was complete by 25th Nov 2017.

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NCLT Observations:

On visiting the provision of law, Members have noticed that this application shall be filed by the Resolution Professional for extension of CIRP period before Completion of CIRP period, but this application has been filed after expiry of the original period of 180 days of CIRP.

If at all this application is allowed it will be nothing but revival of CIRP period which was completed on 25th Nov 2017.

Since there is no provision for revival of CIRP period to provide another 90 days' extension as mentioned under Section 12(2) of the IBC especially when earlier 180 days period is complete, by the time application has been filed before Adjudicating Authority, The members strongly believe that it will become nothing but exercise of jurisdiction beyond the powers conferred upon this Bench under Section 12 of the Code.

Since it is a Tribunal created by this Code itself, this Adjudicating Authority has to be governed by the provisions of this Code. There can't be any doubt to say that extension can't be construed as revival, revival can be after expiry of period, whereas extension has to be given before expiry of original period.

"Since speed and time lines are hallmark of this Code and there being no provision either for condonation or revival under any of the Provisions of this Code, we are of the view that this Adjudicating Authority is devoid of jurisdiction to revive the CIRP period already completed by 25.11.2017, i.e. by the time this application has come before this Bench, therefore, we don't find any merit in this application, whereby this application is hereby dismissed."

Arguments presented by Learned Counsel appeared on behalf of the Resolution Professional:

Learned counsel for the Resolution Professional submits that sub-section (2) of Section 12 do not mandate that the application for extension of the time should be filed before completion of 180 days.

It can be filed, if instructed to do so by a resolution passed in a meeting of the committee of creditors by a vote of seventy-five per cent of the voting share, within 180 days. (In present case the Resolution Professional passed a resolution for extension of the CIRP within 180 days)

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From sub-section (2) of Section 12, it is clear that resolution professional can file an application to the Adjudicating Authority for extension of the period of the corporate insolvency resolution process, only if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of 75% of the voting shares.

The provision does not stipulate that such application is to be filed before the Adjudicating Authority within 180 days. If within 180 days including the last day i.e. 180th day, a resolution is passed by the committee of creditors by a majority vote of 75% of the voting shares, instructing the resolution professional to file an application for extension of period in such case, in the interest of justice and to ensure that the resolution process is completed following all the procedures time should be allowed by the Adjudicating Authority who is empowered to extend such period up to 90 days beyond 180th day.

In the present case, the Adjudicating Authority has not hold that the subject matter of the case does not justify to extend the period. It has not been rejected on the ground that the committee of creditors or resolution professional has not justified their performance during the 180 days.

In such circumstances, it was duty on the part of the Adjudicating Authority to extend the period to find out whether a suitable resolution plan is to be approved instead of going for liquidation, which is the last recourse on failure of resolution process.

NCLAT Conclusion:

For the aforesaid reasons, we set aside the impugned order and extend the period of resolution process for another 90 days to be counted from today.

The period between 181st day and passing of this order shall not be counted for any purpose and is to be excluded for all purpose.

SECTION-14

CASE NO. 33

State Bank of India (Appellant /Financial Creditor)

Vs.

V. Ramakrishnan (Respondent / Director of Corporate Debtor)

and

M/s. Veasons Energy Systems Pvt. Ltd.

(Respondent / Corporate Debtor)

Company Appeal (AT) (Insolvency) No. 213 of 2017

Date of Order: 28-02-2018

Issue: Applicability of the imposition of moratorium under Section 14 of the Code to the personal guarantors of the corporate debtors-

Facts:

Mr. V. Ramakrishnan, Director of M/s Veasons Energy Systems Pvt Ltd. ("Corporate Debtor") had given a personal guarantee and mortgagor of collateral securities of his assets with the State Bank of India against the facilities availed by the Corporate Debtor which comes within the meaning of "Personal Guarantor" as defined under Section 5(22) of the Insolvency and Bankruptcy Code 2016.

The State Bank of India invoked its rights under Section 13(2) of SARFAESI Act, 2002 against the "Personal Gaurantor". The notice was challenged by the Corporate Debtor before Hon'ble High Court of Madras, which was dismissed with costs. Thereafter, the State Bank of India issued a Possession Notice under section 13(4) of SARFAESI Act, 2002 and taken symbolic possession of the secured assets.

The Corporate Debtor invoked Section 10 of Insolvency & Bankruptcy Code, 2016 which was admitted and order of "Moratorium" was passed and an "Interim Resolution Professional" was appointed.

Even after declaration of the "Moratorium" the State Bank of India continued to take measure under SARFAESI Act, 2002 and proceeded against the property of the "Personal Guarantor" and issued a Sale Notice. Mr. V. Ramakrishnan filed application before the NCLT, Chennai ("Adjudicating Authority"), for stay of proceedings under SARFAESI Act, 2002, including

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Auction Notice which the Adjudicating Authority by impugned order observed that “Moratorium” prohibits transferring, encumbering, alienating or disposing of by the “Corporate Debtor” any of its assets or any legal right or beneficial interest therein.

In view of the provisions of Insolvency & Bankruptcy Code, 2016, Section 140 of the Indian Contract Act, 1872 and the decision of the Hon’ble High Court of Madras, the Adjudicating Authority allowed the Interlocutory Application preferred by Personal Guarantor and restrained State Bank of India from proceeding against the Personal Guarantor till the period of “moratorium” is over.

State Bank of India challenged the said order and appeal before the NCLAT.

Decision:

The Appellate Authority rejected the appeal based on following observations:

As per Part II, “Insolvency Resolution” and “Liquidation Proceedings” can be initiated only against the “Corporate Persons” and not against an individual, including “Personal Guarantor” as defined under Section 5(22) of the Insolvency and Bankruptcy Code. For the purpose of Section 5(8) of the Insolvency and Bankruptcy Code though counter-indemnity obligation in respect of a guarantee, if disbursed against the consideration for the time value of money comes within the meaning of “Financial Debt”, no insolvency and liquidation proceeding can be initiated against the Personal Guarantor under Part II.

A “Financial Creditor” if intends to proceed against the Personal Guarantor of the Corporate Debtor, may file an application relating to “Bankruptcy” of the “Personal Guarantor” before the same Adjudicating Authority. Though Part III of the Insolvency and Bankruptcy Code, 2016 has not yet notified but the Adjudicating Authority is vested with all the powers of Debt Recovery Tribunal (Adjudicating Authority under Part III) as contemplated under Part III of the Code for the purpose of Section 60(4) of the Code.

Section 14(1)(b) of the Code prohibits not only institution of suits or continuation of pending suits or proceedings against the Corporate Debtor but also transfer, encumbrance, alienation or disposal of any of its assets of the Corporate Debtor and / or any legal right or beneficial interest therein.

Section 14(1)(c) and (d) prohibits recovery or enforcement of any security interest created by the corporate debtor in respect of its property including the property occupied by it or in the possession of the Corporate Debtor.

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If “Resolution Plan” approved by Committee of Creditors under Section 30(4), meets the requirements as referred under Section 30(2) and approved by Adjudicating Authority, it is not only binding on the Corporate Debtor but also on its employees, members, creditors, guarantors and other stakeholders involved in the “Resolution Plan” including the “Personal Guarantor”.

For the aforesaid reasons, the appellate authority held that the Moratorium will not only be applicable to the property of Corporate Debtor but also on the Personal Guarantor.

CASE NO. 34

Dakshin Gujarat VIJ Company Ltd. (Applicant/Petitioner)

Versus

M/s. ABG Shipyard Ltd. & Anr. (Respondent)

Company Appeal (AT) (Insolvency) No. 334 of 2017

Date of Order: 08-02-2018

Facts:

- The appeal was filed by Dakshin Gujarat VIJ Company Ltd. (“Appellant”), before National Company Appellate Tribunal (“NCLAT”), raising the question whether the order of ‘Moratorium’ will cover the current charges for supply of water, electricity etc. payable by the Corporate Debtor.
- Learned counsel appearing for the Appellant submitted that the order of ‘Moratorium’ will be applicable only in respect of the amount as is payable by the Corporate Debtor to the Appellant towards supply of electricity as was due for the period prior to passing of order of ‘Moratorium’ only and is not applicable to the current dues towards supply of electricity during the period of ‘Moratorium’.
- On the other hand, learned counsel for the ‘Resolution Professional’ contended that in view of Regulation 31 & 32 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016(‘the Regulation’), the appellant is duty bound to supply the essential goods and services, including the electricity, water etc.
Earlier, on the application filed by the Resolution Professional requesting to extend the time granted by NCLAT for payment of the

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current charges for electricity, NCLAT vide order dated 15.01.2018, had directed the Resolution Professional to pay the electricity charges for the month of December 2017 by 7th February 2018, failing which the Appellant was open to disconnect the electricity.

- Learned counsel of the Resolution Professional also contended that the current electricity charge for the month of December 2017 have been paid to the Appellant pursuant to the above stated order, however, for the present, the Corporate Debtor had no funds to pay any further amount.

The NCLAT, examined the relevant regulations 31 and 32 of the Regulation and also the relevant provisions of the Code, including, section 14(2) and 5(13) and held that

- None of the aforesaid regulations or sections of the Code imposes any prohibition or bar towards the payment of current charges of essential services. Such prohibition is not covered by the order of "Moratorium".
- The Hon'ble NCLAT further held that Regulation 31 cannot override the substantive provisions of section 14. Therefore, if any cost is incurred towards the supply of the essential services during the "Moratorium", it may be accounted towards 'Insolvency Resolution Costs', but law does not stipulate that the suppliers of essential goods including the electricity or water to be supplied free of cost, till completion of the 'Moratorium' and that payment if made towards essential goods to ensure that the company remains on-going as made in the present case for the month of December, 2017, such amount can accounted towards 'Insolvency and Resolution Process Costs' but it does not mean that supply of essential goods and services to be supplied free of cost. If the Corporate Debtor has no fund even to pay for supply of essential goods, in such case the Resolution Professional cannot keep the company on-going just to put additional cost towards supply of electricity, water etc.
- The current dues if any payable may be adjusted in terms of Regulation 31 of the Insolvency Resolution Process for Corporate Persons.
- The Hon'ble NCLAT further held that during the 'Moratorium' period i.e. till the 'Resolution Plan' is approved by or rejected, the appellant will not disconnect the electricity connections of ABG Shipyard Limited.

SECTION-60

CASE NO. 35

M/s. Innoventive Industries Ltd. (Appellant/Corporate Debtor)

Vs.

ICICI Bank & Anr. (Respondents/Financial Creditor)

Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017

Date of Order: 15-05-2017

Section 60 read with sections 7,8 & 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4(3) of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 read with Section 424 of the Companies Act, 2013 and Section 4 of the Maharashtra Relief Undertaking (Special Provisions) Act, 1958 – Adjudicating Authority for Corporate Persons

Facts:

Pursuant to default in payment of dues the financial creditor filed an application under section 7 of the IB Code. The corporate debtor filed an interim Application stating that the Industry, Energy and Labour Department of Maharashtra has passed a relief under the provision of the Maharashtra Relief Undertaking (Special Provisions) Act, 1958 (Bombay Act XCVI of 1958) (hereinafter referred to as MRU Act 1958) suspending the liabilities of the Corporate Debtor and remedies against the debtor for one year from 22.7.2016 and therefore the financial Creditor could not have invoked this relief till 21st July, 2017.

The Adjudicating Authority/Tribunal held that IB Code has come into existence subsequent to MRU Act 1958 and therefore, Non-Obstante clause in section 238 of IBC prevails upon any other law for the time being in force, hence it could not be said that Notification given under MRU Act will become a bar to passing order u/s. 7 of the IB Code. Moreover, the objective under MRU Act, is to prevent unemployment of the existing employees of an industry which is recognized as relief undertaking, but by passing an order u/s. 7 it will not cause any obstruction to their employment until next 180 days, even if the company goes into liquidation, then also the rights of the employees are protected to the extent mentioned under IB Code. The Application filed by the Corporate Debtor was therefore dismissed. The

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Tribunal also dismissed the plea of the corporate debtor that notice has not been served on the ground that this plea pales into insignificance because this Bench has already heard the Corporate Debtor's application which was already been dismissed. The Adjudicating Authority/Tribunal on perusal of the documents filed by the financial creditor found that the application under section 7(2) is complete and therefore admitted the same declaring moratorium. Aggrieved with the order of the Tribunal the appellant/corporate debtor filed this appeal.

The questions involved in this appeal are:

- (i) Whether a notice is required to be given to the Corporate Debtor for initiation of Corporate Insolvency Resolution Process under IB Code and if so, at what stage and for what purpose?
- (ii) Whether MRU Act 1958 shall prevail over IB Code. In other words, whether a Corporate Debtor who is enjoying the benefit of MRU Act, can be subjected to IB Code? and
- (iii) Whether in a case where Joint Lender Forum (JLF) have reached agreement and granted permission to the Corporate Debtor prior consent of JLF is required by financial creditor, before filing of an application under Section 7 of the IB Code?

Decision:

1st issue: After considering various decisions of the Supreme Court it was observed that "useless formality" is another exception to the ratio of natural justice. Where on the admitted or undisputed facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not insist on the observance of the principles of natural justice because it would be futile to order its observance. Therefore, where the result would not be different, and it is demonstrable beyond doubt, order of compliance with the principles of natural justice will not be justified.

Further from the decisions of Hon'ble Supreme Court, the exception on the Principle of Rules of natural justice can be summarised as follows:-

- (i) Exclusion in case of emergency,
- (ii) Express statutory exclusion
- (iii) Where discloser would be prejudicial to public interests
- (iv) Where prompt action is needed,

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- (v) Where it is impracticable to hold hearing or appeal,
- (vi) Exclusion in case of purely administrative matters.
- (vii) Where no right of person is infringed,
- (viii) The procedural defect would have made no difference to the outcome.
- (ix) Exclusion on the ground of 'no fault' decision maker etc.
- (x) Where on the admitted or undisputed fact only one conclusion is possible - it will be useless formality.

There is no specific provision under the I&B Code, 2016 to provide hearing to corporate debtor in a petition under Section 7 or 9 of the I&B Code, 2016. I&B Code, 2016 empowers 'adjudicating authority' to pass orders under Section 7, 9 and 10 of the Code, 2016 and not the National Company Law Tribunal. It is by virtue of the definition under sub-Section (1) of Section 5 read with section 60 of the I&B Code, 2016, the National Company Law Tribunal plays role of an "adjudicating authority".

As amended Section 424 of the Companies Act, 2013 is applicable to the proceeding under the I&B Code, 2016, it is mandatory for the adjudicating authority to follow the Principles of rules of natural justice while passing an order under I&B Code, 2016. Further, as Section 424 mandates the 'Tribunal' and Appellate Tribunal, to dispose of cases or/appeal before it subject to other provisions of the Companies Act, 2013 or IB Code 2016 such as, Section 420 of the Companies Act, 2013 was applicable and to be followed by the Adjudicating Authority. Thus it is clear that sub-Rule (3) of Rule 4 of I&B (Application to Adjudicating Authority) Rules, 2016, mandates the applicant to dispatch forthwith, a copy of the application "filed with the Adjudicating Authority". Thereby a post filing notice required to be issued and not as notice before filing of an application. The purpose for the same being to put corporate debtor to adequate impound notice so that the Corporate Debtor may bring to the notice of Adjudicating Officer "mitigating factor/records before the application is accepted even before formal notice is received."

The insolvency resolution process under Section 7 or Section 9 of I&B Code, 2016 have serious civil consequences not only on the corporate debtor - company but also on its directors and shareholders in view of the fact that once the application under Sections 7 or 9 of the I&B Code, 2016 is admitted it is followed by appointment of an 'interim resolution professional' to manage the affairs of the corporate debtor, instant removal of the board of directors

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and moratorium for a period of 180 days. For the said reason also the Adjudicating Authority is bound to issue limited notice to the corporate debtor before admitting a case under section 7 and 9 of the 'I & B Code', 2016.

The Adjudicating Authority is bound to issue a limited notice to the corporate debtor before admitting a case for ascertainment of existence of default based on material submitted by the corporate debtor and to find out whether the application is complete and or there is any other defect required to be removed. Adherence to Principles of natural justice would not mean that in every situation the adjudicating authority is required to afford reasonable opportunity of hearing to the corporate debtor before passing its order.

The Adjudicating Authority post ascertaining and being satisfied that such a default has occurred may admit the application of the financial creditor. In other words, the statute mandates the Adjudicating Authority to ascertain and record satisfaction as to the occurrence of default before admitting the application. Mere claim by the financial creditor that the default has occurred is not sufficient. The same is subject to the Adjudicating Authority's summary adjudication, though limited to 'ascertainment' and 'satisfaction'.

It is evident from Section 9 of the I & B Code that the Adjudicating Authority has to, within fourteen days of the receipt of the application under sub-section (2), either admit or reject the application. Section 9 has two-fold situations insofar as notice of dispute is concerned. As per sub-section (5)(i) of Section 9, the Adjudicating Authority can admit the application in case no notice raising the dispute is received by the operational creditor (as verified by the operational creditor on affidavit) and there is no record of a dispute is with the information utility. On the other hand, sub-section (5)(ii) of Section 9 mandates the Adjudicating Authority to reject the application if the operational creditor has received notice of dispute from the corporate debtor. Section 9 thus makes it distinct from Section 7. While in Section 7, occurrence of default has to be ascertained and satisfaction recorded by the Adjudicating Authority, there no similar provision under Section 9. Under Section 7 neither notice of demand nor a notice of dispute is relevant whereas under Sections 8 and 9 notice of demand and notice of dispute become relevant both for the purposes of admission as well as for the rejection.

While ascertaining, the 'Adjudicating Authority' to comes to a conclusion whether there is an existence of default for the purpose of section 7 or there is a dispute raised by the corporate debtor and all other purpose whether an

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application is complete or incomplete, it is not only necessary to hear the Financial Creditor/Operational Creditor but also the Corporate Debtor.

The different decisions of the Hon'ble Supreme Court and exception of principles of natural justice as summarised in the preceding paragraphs is not applicable to the insolvency resolution process as it is not a case of emergency declared or prejudicial to public interest or that there is a statutory exclusion of rules of natural justice or it is impracticable to hold hearing. It is not the case that no right of any person has been affected, as immediately on appointment of an Interim Resolution Professional, the Board of directors stand superseded. There are other persons who are also affected due to order of moratorium. Therefore, the 'adjudicating authority' is duty bound to give a notice to the corporate debtor before admission of a petition under Section 7 or Section 9.

In the present case though no notice was given to the Appellant before admission of the case but it was found that the Appellant intervened before the admission of the case and all the objections raised by appellant has been noticed, discussed and considered by the 'adjudicating authority' while passing the impugned order dated 17th January 2017. Thereby, merely on the ground that the Appellant was not given any notice before admission of the case cannot render the impugned order illegal as the Appellant has already been heard. If the impugned order is set aside and the case is remitted back to the adjudicating authority, it would be 'useless formality' and would be futile to order its observance as the result would not be different. Therefore, order to follow the principles of natural justice in the present case does not arise.

However, in some of the cases initiation of Insolvency Resolution Process may have adverse consequences on the welfare of the Company. Therefore, it will be imperative for the "adjudicating authority" to adopt a cautious approach in admitting Insolvency Application by ensuring adherence to the principle of natural justice.

Find Issue: The Schedule to the MRU Act specifies only certain acts to which the restriction applies. Accordingly, the application of the MRU Act can only be extended to such acts as specified in the schedule and no other legislation. The legislations referred to in the 'schedule' to the MRU Act are employment welfare related which is in consonance with the objects and purposed of the MRU Act i.e. 'employment and unemployment'. The protection under the MRU Act, therefore, cannot be extended to other legislations especially to union legislation which is subsequent to the MRU

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Act and related to insolvency resolution i.e. I&B Code, 2016. Section 4 of the MRU Act, including Section 4 (iv), therefore, is limited in scope to the acts listed in the schedule thereto.

The MRU Act operates in a different field from the I&B Code, 2016. MRU Act is an Act to make temporary provisions for industrial relations and other matters to enable the State Government to conduct or to provide a loan, guarantee or financial assistance for the conduct of certain industrial undertakings 'as a measure of preventing unemployment or of unemployment relief.'

On the other hand the I&B Code, 2016 is an Act enacted to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders including alteration in the order of priority of payments of Government dues. The I&B Code, 2016, which is later act of greater specificity, seeks to balance the interests of all stake holders.

Section 238 of the I&B Code, 2016 is non-obstante clause which overrides the operation of the MRU Act. As per Section 238 of the I&B Code, 2016 the provisions of the Code are to be given effect to notwithstanding anything contrary contained *any other law* or any instrument having effect under such law.

In view of the aforesaid objects of the two enactments it is apparent that the two enactments operate in entirely different fields. This is further made clear by the fact that the MRU Act is enacted under Entry 23 of List III while the Code has been enacted under Entry 9 of the List III. The MRU Act has received Presidential assent under Article 254(2) of the Constitution of India, which is only required for statutes enacted by the State Government in exercise of its legislative competence under the Concurrent List.

In light of the aforementioned non-obstante provision (which is a subsequent Union Law), the provisions of the I&B Code, 2016 shall prevail over the provisions of the MRU Act and any instrument issued under the MRU Act including the Notification.

Following the law laid down by Hon'ble Supreme Court in *Yogender Kumar Jaiswal Vs. State of Bihar*, (2016) 3 SCC 183 and *Madras Pet Rochem Limited and Another Vs. Board for Industrial and Financial Reconstruction*

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and Others," (2016) 4 SCC 1 it was held that there is no repugnancy between I&B Code, 2016 and the MRU Act as they both operate in different fields. The Parliament has expressly stated that the provisions of the I&B Code, 2016 (which is a later enactment to the MRU Act) shall have effect notwithstanding the provisions of any other law for the time being in force. This stipulation does not mean that the provisions of MRU Act or for that matter any other law are repugnant to the provisions of the Code.

In view above, it was held that the Appellant was not entitled to derive any advantage from MRU Act, 1958 to stall the insolvency resolution process under Section 7 of the I&B Code.

Illrd Issue: The Tribunal has noticed that there is a failure on the part of appellant to pay debts. The Financial Creditor has attached different records in support of default of payment. Apart from that it is not supposed to go beyond the question to see whether there is a failure on fulfilment of obligation by the financial creditor under one or other agreement, including the Master Restructuring Agreement. In that view of the matter, the Appellant cannot derive any advantage of the Master Restructuring Agreement dated 8th September, 2014.

For initiation of corporate resolution process by financial creditor under sub-section (4) of Section 7 of the Code, the 'adjudicating authority' on receipt of application under sub-section (2) is required to ascertain existence of default from the records of Information Utility or on the basis of other evidence furnished by the financial creditor under sub-section (3). Under sub-section 5 of Section 7, the 'adjudicating authority' is required to satisfy:-

- (a) Whether a default has occurred;
- (b) Whether an application is complete; and
- (c) Whether any disciplinary proceeding is against the proposed Insolvency Resolution Professional.

Once it is satisfied that it is required to admit the case but in case the application is incomplete application, the financial creditor is to be granted seven days' time to complete the application. However, in a case where there is no default or defects cannot be rectified, or the record enclosed is misleading, the application has to be rejected.

Beyond the aforesaid practice, the 'adjudicating authority' is not required to look into any other factor, including the question whether permission or consent has been obtained from one or other authority, including the JLF.

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Therefore, the contention of the petition that the Respondent has not obtained permission or consent of JLF to the present proceeding which will be adversely affect loan of other members cannot be accepted and fit to be rejected.

In the aforesaid circumstances the 'adjudicating authority' having satisfied on all counts, including default and that the application is complete and that there is no disciplinary proceeding pending against the Insolvency Resolution Professional, no interference is called for against the impugned judgment.

Case Review: Order dated 17th January, 2017 and Order dated 23rd January, 2017 passed by National Company Law Tribunal, Mumbai Bench, Mumbai in ICICI Bank Ltd. Vs. M/s. Innoventive Industries Ltd. (C.P. No. 1/I&BP/NCLT/MB/MAH/2016), *Upheld*.

SECTION-61

CASE NO. 36

M/s. Starlog Enterprises Ltd. (Appellant/Corporate Debtor)

Vs.

ICICI Bank Ltd. (Respondent/Financial Creditor)

Company Appeal (AT) (Insolvency) No. 5 of 2017

Date of Order: 24-05-2017

Section 61 read with Sections 7, 9 & 75 of the Insolvency and Bankruptcy Code, 2016– Appeals and Appellate Authority

Facts:

Financial Creditor/Applicant having failed to realise the outstanding dues filed an application under section 7 of the Code before the Adjudicating Authority/NCLT. The applicant filed proof for service of notice to the corporate debtor. The NCLT satisfied that there was a default on the part of corporate debtor and passed an ex parte order admitting the application filed under section 7 of the Code declaring moratorium.

The corporate debtor/appellant filed an appeal against the order of NCLT on the following grounds:

1. In absence of notice given to the Appellant before admitting the case under Section 7 of the Code, the impugned order is violative of rules of natural justice.

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2. The application under Section 7 by the Financial Creditor is incomplete, misleading and being not bona fide was fit to be rejected.
3. The impact of the appointment of Insolvency Resolution Professional on the business and management of the appellant was that in view of the mismanagement the appellant has incurred financial losses as one of its contracts was terminated and also suffered loss of several valuable human resources.

Decision:

It is clear that before admitting an application under Section 9 of the Code it is mandatory duty of the 'adjudicating authority' to issue notice. In the present case admittedly no notice was issued by the 'adjudicating authority' to the corporate debtor, before admitting the application filed under Section 9 of the Code. For the said reason the judgement order cannot be upheld having passed in violation of principle of natural justice.

Showing an incorrect claim, moving the application in a hasty manner and obtaining an ex-parte order from the 'adjudicating authority' which admitted such an incorrect claim, the Financial Creditor cannot disprove its mala fide intention by stating that the claim submitted is correct amount. The I&B Code does not provide for any such mechanism where post-admission, the applicant financial creditor can modify their claim amount.

In some of the cases, an insolvency resolution process can and may have adverse consequences on the welfare of the company. This makes it imperative for the 'adjudicating authority' to adopt a cautious approach in admitting insolvency applications and also ensuring adherence to the principles of natural justice.

For the reasons aforesaid, the appellate Tribunal set aside the ex-parte impugned order passed by NCLT.

In effect the appointment of Interim Resolution Professional, order declaring moratorium, freezing of account and all other order passed by 'adjudicating authority' pursuant to impugned order and action taken by the Interim Resolution Professional, including the advertisement published in the newspaper calling for applications are declared illegal. The 'adjudicating authority' is directed to close the proceeding. The appellant company is released from the rigour of law and allow the appellant company to function independently through its Board of Directors from immediate effect.

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The Tribunal imposed a penalty of Rs. 50,000/- on Respondent/Financial Creditor.

Case Review: Order dated 17thFebruary, 2017 passed by NCLT, Mumbai Bench, in ICICI Bank Ltd. Vs. M/s. Starlog Enterprises Ltd. (C.P. No.12/I&B/NCLT/MAH/2017), *set aside*.

Chapter 4

Orders passed by National Company Law Tribunal (NCLT)

SECTION-7

CASE NO. 1

Bench	National Company Law Tribunal (NCLT), Mumbai Bench, Mumbai
Financial Creditor	M/s. Edelweiss Asset Reconstruction Co. Ltd.
Corporate Debtor	M/s. Murli Industries Ltd.
Amount of Default	1365.40 Cr.
Date of Order	05-04-2017
Relevant Section	Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 – Initiation of corporate Insolvency resolution process by Financial Creditor
Facts of the Case	The corporate debtor entered into a master reconstructing agreement with Bank of Baroda (Monitoring Institution) and other Lender Banks. The agreement says that the corporate debtor has requested the lenders for various financial assistance for setting up/implementation of the project and for other requirements for its operations. The lenders sanctioned the term loan and working capital facilities to the corporate debtor and the corporate debtor from time to time created security by way of hypothecation of its moveable assets and/or mortgage of its immovable properties. The corporate debtor requested the lenders

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	<p>for debt restructuring as the project under implementation has come under strain due to various internal or external reasons. Hence, the lenders and the corporate debtor agreed to enter into the master restructuring agreement to give effect to the corporate debt reconstruction package.</p> <p>Bank of Baroda which is a lead bank under consortium arrangement issued a notice to the corporate debtor u/s. 13 (2) of the SARFAESI Act for recovery of Rs. 1365.40 crores due to the consortium banks. Bank of Baroda has also issued a possession notice stating that it has taken symbolic possession of the property owned by the corporate debtor u/s. 13 (4) of the SARFAESI Act read with Rule 9 of security Interest (Enforcement) Rules 2002. Further, auditor's report has stated that the company has defaulted in repayment of dues to financial institutions and banks amounting to Rs. 1896.65 crores.</p> <p>The Edelweiss Asset Reconstruction Company Limited in its capacity as financial creditor filed this petition for initiation of corporate insolvency resolution process.</p>
Decision of the Tribunal	<p>This petition clearly reveals that there is a debt as defined in Section 3 (11) of the Code and also there is default in this case within the meaning of Section 3 (12) of the Code. Further, Section 5 (7) clearly provides that an assignee of a financial debt is also a financial creditor and hence the petition is well within the ambit of Section 7 of the Code.</p> <p>The Tribunal therefore admitted the petition and appointed an interim resolution professional.</p>

CASE NO. 2

Bench	National Company Law Tribunal (NCLT), Ahmedabad Bench, Ahmedabad
Financial Creditor	Hero FinCorp Ltd.
Corporate Debtor	Steel Konnect (India) Pvt. Ltd.
Amount of Default	6.63 Cr.

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

Date of Order	19-04-2017
Relevant Section	Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016– Initiation of corporate Insolvency resolution process by Financial Creditor
Facts of the Case	On the basis of Master Facility Agreement entered between the Financial Creditor and the Corporate Debtor a loan amounting to Rs. 7 Cr. was advanced. As per the agreed terms, instalments were required to be paid through ECS by way of Equated Monthly Instalments. The Corporate Debtor defaulted in making instalments and from November 2016 it had completely stopped making payments. The Corporate Debtor disputed that the claimed amount was not correct but could not deny the default or the Loan Agreement.
Decision of the Tribunal	From the material placed on record, this Adjudicating Authority is satisfied that a default has been committed by the Corporate Debtor in repayment of the loan amount. The petition was therefore admitted and Interim Resolution Professional was appointed.

CASE NO. 3

Bench	National Company Law Tribunal (NCLT), Ahmedabad Bench, Ahmedabad
Financial Creditor	State Bank of India / Standard Chartered Bank
Corporate Debtor	Essar Steels Ltd. / Essar Steels India Ltd.
Amount in Default	45000 Cr.
Date of Order	02-08-2017
Relevant Section	Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 and 9 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 – Initiation of corporate Insolvency resolution process by Financial Creditor

Orders passed by National Company Law Tribunal (NCLT)

Facts of the Case	<p>State Bank of India (SBI) and Standard Chartered Bank (SCB) initiated Corporate Insolvency Resolution Process (CIRP) under section 7 of the IBC against the respondent corporate debtor/Essar.</p> <p>The case of the ESSAR is that:</p> <ul style="list-style-type: none">• The operations of the ESSAR are very complex involving large number of stakeholders including suppliers, creditors, employees, promoters, customers, Government exchequer over and above the financial creditors.• ESSAR is on the path of improvement to carry on the operations at 80% capacity.• Debt Resolution Process was undertaken and there were discussions between the Lenders and ESSAR till 13th June, 2017 on the day on which Reserve Bank of India (RBI) issued a Press Release.• That the directions given by RBI to SBI triggered the reference before National Company Law Tribunal. According to ESSAR, Resolution Process has two risks. First, the process of formulation of Debt Resolution Process will have to be reinitiated and further time will be lost due to fresh start. The second one is potential risk to the operations and value of the Company under the hands of IRP.• ESSAR also stated that if the Company is in the hands of IRP who is an individual person it is difficult for him to oversee such complex operations in a short period of 180 days.• Further, the funding supported by the creditors and suppliers which were available to the Company under the stewardship of Board of Directors and promoters may not be available to IRP. According to the ESSAR, promoters, lenders, employees, creditors, suppliers, customers have invested time, efforts and resources to revive the Company and implement a satisfactory Debt Resolution Plan and if at this stage the Insolvency Resolution Plan is invoked it would adversely affect the interest of the
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Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

	<p>Company and all its stakeholders.</p> <ul style="list-style-type: none"> • It is further stated that in view of Section 13 and 16 of the IBC, the appointment of IRP shall be made only after the admission of the petition within 14 days. • Further, there are 4500 people working in the Company and all would be affected in case of commencement of Insolvency Resolution Process. • That National Company Law Tribunal has got discretion not to admit the petition in view of language used in Section 7.
<p>Decision of the Tribunal</p>	<p>There is no dispute about the proposition of law that in order to give appropriate meaning to the words "may" and "shall" used by the Legislature, the intent of the particular enactment and the attendant circumstances must be taken into consideration.</p> <p>This Adjudicating Authority is of the view that the order of admission of an Application for initiation of Corporate Insolvency Resolution Process is a judicial order which should be according to the provisions of the Code, principles of natural justice, and taking the consequences of the order into consideration. Therefore, there this Adjudicating Authority shall exercise its discretion in either admitting or rejecting the Insolvency Resolution Applications. It is needless to say that discretionary power has to be exercised in a judicious manner taking into consideration all the facts and circumstances of the case, the provisions of the applicable laws and the object of the Insolvency and Bankruptcy Code. This Adjudicating Authority shall look into the aspect of the occurrence of default, and, while doing so, shall take into consideration various factual and legal pleas raised by both parties in order to record its satisfaction. Therefore, the argument that the word "may" in Section 5(a) shall be read as "shall" and therefore it is mandatory on the part of the Adjudicating Authority to admit all the Insolvency Resolution Applications filed by the Financial Creditors, if they are</p>

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	<p>complete, do not merit acceptance.</p> <p>In the case on hand, from the material placed on record by SCB and SBI, it is clear that it is established that ESSAR has committed default in repayment of financial debt to SCB and SBI. The Applications filed by the SCB and SBI are complete in all respects. As can be seen from the Written Communications of proposed Interim Resolution Professionals filed by the SCB and SBI, no disciplinary proceedings are pending against them.</p> <p>Whether Debt Restructuring Process or Debt Restructuring Plan is going to absolve the ESSAR, Corporate Debtor from the Insolvency Resolution Process?</p> <p>From the material placed on record, it is in the year 2014 that Debt Reconstructing Process commenced. For one reason or the other, the Debt Reconstructing Process has not been finalised till today or till the date of filing of the Applications. It is not a case where ESSAR owed monies to Lenders in the previous year. The Lenders are there from the beginning of the ESSAR Company. As contended by ESSAR there are several reasons that prevented it from discharging the debts. No doubt, there are no allegations of siphoning of funds, diversion of funds or fraud. But, the fact remains that except showing a little progress in the last financial year, there appears to be no scope for the ESSAR to repay its debts till 25 years or in a span of 25 years. Therefore, the Debt Restructuring Process, which is going on for the last two years, may not be a factor not to enter into Insolvency Resolution Process. It is pertinent to mention here, that even in the Corporate Insolvency Resolution Plan, Debt Restructuring Plan can be taken into consideration by the Committee of Creditors as one of the Resolution Plans, if submitted by any of the Resolution Applicants. Therefore, commencement of Insolvency Resolution Process cannot be construed as putting an end to the Debt Restructuring Process which has been commenced. The apprehension of ESSAR, that, to</p>
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Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

	<p>again start Debt Restructuring Process would consume lot of time, appears to be not acceptable for the reason that Insolvency Resolution Plan is a time bound programme. There is no scope for the stakeholders to prolong the process without taking a decision and without finalising the Resolution Plan. Therefore, on the ground that when a Debt Restructuring Process is going on there is no need to commence the Insolvency Resolution Process under the IBC does not hold the field. If Insolvency Resolution Process is commenced by appointing Interim Resolution Professional, no doubt the Board of Directors would be suspended. That does not mean the entire machinery of the Company is suspended. Even after appointment of IRP, all the employees of the Company, top to bottom, would continue to function under the control of IRP instead of the Board of Directors. Therefore, the apprehension of ESSAR that suspension of Board of Directors may cause prejudice to the interest of the Company and the stakeholders may not be correct. The Object of the IBC is to chalk out a Resolution Plan to revive the Company, but not to liquidate the Company straightway. It is needless to say that a company like ESSAR need not be liquidated and there are several other alternatives to revive the Company. If all the eligible Creditors sit together; evolve a Resolution Plan, it would help not only the Company, its stakeholders, Steel Industry, and ultimately the economy of India. In chalking out such Resolution Plan, mainly the Lenders, must sacrifice to a great extent which makes the Company to revive. If a Resolution Plan is chalked out with such objectives in mind, the Resolution Plan will certainly help the Company and it would come out of the present situation. Therefore, as opined by the Hon'ble High Court of Gujarat (in Essar Steel India Ltd. Vs. RBI & others, Special Civil application No. 12434 of 2017), taking all the material facts, and the Debt Restructuring Plan, and the objects of the 1B Code, into consideration this Adjudicating Authority is of the view</p>
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Orders passed by National Company Law Tribunal (NCLT)

	<p>that it is only the Resolution Plan that would make the ESSAR Company survive which course would safeguard the interest of all the stakeholders of the Company. Therefore, there is no need for an apprehension that Resolution Plan is going to be detrimental to the interest of the Company. The finding of this Authority, after taking into all factual aspects, the complex activities of ESSAR, the ongoing Debt Restructuring Process, is that both Applications merit admission.</p> <p>In view of the above discussion, this Adjudicating Authority is of the considered view that the Applications filed by the SCB and SBI are complete, there is occurrence of default in respect of financial debts, and there are no disciplinary proceedings pending against the Insolvency Resolution Professionals proposed by both the Applicants, i.e., SCB and SBI. Hence, this Adjudicating Authority is hereby admitting both the Applications filed by SCB and SBI.</p> <p>Whether there is no need to appoint Interim Resolution Professional on the same day on which date admission order is passed and it can be passed within 14 days of the admission of the Applications?</p> <p>In case of admission of an Application under Section 7 of the Code, the Corporate Insolvency Resolution Process commences. Section 13 of the code says that after the admission of the Application under Section 7, the Authority shall declare moratorium, cause public announcement of initiation of Corporate Insolvency Resolution Process, and call for submission of claims under Section 15 of the Code, and appoint Interim Resolution Professional in the manner laid down in Section 16.</p> <p>No doubt, a reading of Sections 13, 14, 15 and 16 (1) of the Code goes to show that Adjudicating Authority need not appoint the Interim Resolution Professional on the same day on which Application under Section 7, 9 or 10 is admitted. But, there is no provision which bars the Adjudicating Authority from appointing Interim</p>
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Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

	<p>Resolution Professional on the same day on which the admission order was passed and simultaneously with the admission order. In an application filed under Section 9, in case if the Operational Creditor did not give the name of the IRP, then the Adjudicating Authority, availing the 14 days' time provided under Section 16(1), can appoint the Interim Resolution Professional within 14 days from the date of admission order. Suppose in a given case there is some omission in the Written Communication or there is some difficulty in the appointment of the recommended IRP, in such Cases the Adjudicating Authority may appoint IRP even in an application under Section 7 not on the date of order of admission, but on a subsequent date, but before 14 days from the date of admission. Therefore, there must be facts and circumstances that warrant the Adjudicating Authority to defer the appointment of IRP in an application filed under Section 7 of the Code. In the case on hand, no such circumstance exists which warrant deferring the appointment of Interim Resolution Professional to some other date but not on the date of admission order.</p> <p>No two stages or no two separate hearings are contemplated under the Code, namely, the first stage is admission and the second stage is appointment of Interim Resolution Professional. The object of the Code is to complete the entire process in a time bound programme. When such is the object of the Code, without any compelling circumstances, there is no need to defer the appointment of Interim Resolution Professional only to give an opportunity to the Corporate Debtor to agitate the decision of this Adjudicating Authority twice in two Appeals. The Corporate Debtor is entitled to prefer an Appeal against the order of admission and also against the appointment of Interim Resolution Professional. If both the orders, namely admission order and the order appointing Interim Resolution Professional are made separate, then the Corporate Debtor will file two</p>
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	Appeals at two stages and thereby gain more time, which is not the object of the Code. Therefore, the Code enjoins upon this Authority to declare Moratorium; to make public announcement of initiation of Corporate Insolvency Resolution Process; and to appoint Interim Resolution Professional on the date of commencement of Insolvency Resolution Process as Rule and the exception is differing the appointment of Interim Resolution Professional to some other date that depend upon the facts of the case.
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CASE NO. 4

Bench	National Company Law Tribunal- Ahmedabad Bench, Ahmedabad
Financial Creditor	Edelweiss Asset Reconstruction Co. Ltd
Corporate Debtor	Kalptaru Alloys Private Limited
Amount of Default	46.75 Cr.
Date of Order	05-09-2017
Relevant Section	Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 – Initiation of corporate Insolvency resolution process by Financial Creditor
Facts of the Case	Application was made under section 7 and was objected by corporate debtor (CD) on following grounds that nature & details of default not disclosed in application, CD was not a party to assignment proceedings, Bank has proceeded under SAFAESI Act and Corporate Debtor is disputing Amount, CD has no information about proposed Interim Resolution Professional.
Decision of the Tribunal	Can Asset Reconstruction Company (ARC) to which debt is assigned make Application as a financial creditor under section 7. Debt was assigned with knowledge of Debtor (Assignment Deed), Certificate Under Banker's Book

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	<p>Evidence Act show default, Balance Confirmation falls within Limitation Period. As per original Loan agreement the CD had agreed to pay to the Bank or assignee (In this case ARC).</p> <p>Initiation of proceedings under SARFAESI Act by the Bank is no bar for initiation of insolvency proceedings under the Code in view of overriding effect given to Section 238.</p> <p>Form 2 was signed by proposed Interim Resolution Professional. Hence the Application accepted.</p>
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CASE NO. 5

Bench	National Company Law Tribunal (NCLT), Ahmedabad Bench, Ahmedabad
Financial Creditor	ICICI Bank Ltd
Corporate Debtor	Innoventive Industries Ltd
Amount of Default	101.92 cr
Date of Order	17.01.2017
Relevant Section	<p>Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016</p> <p>Section 238 of Insolvency and Bankruptcy Code, 2016</p> <p>Section 4 of Maharashtra Relief Undertaking (Special Provisions) Act</p>
Facts of the Case	<p>An application under section 7 of the Code of 2016 was filed by the Applicant before the NCLT Mumbai Bench.</p> <p>The Corporate debtor made an argument stating that on the date of filing the application, the debts said to have been existing against the Corporate Debtor have been suspended under Maharashtra Relief Undertaking (Special Provisions) Act for a period of one year commencing on 22.07.2016 to serve as a measure of preventing unemployment and direct that in relation to section 4 such undertaking rights, obligations, liability</p>

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	<p>accrued or incurred before 22.07.2016 shall remain suspended and any proceeding relating thereto pending before any Court, Tribunal, Officers or Authority shall be stayed.</p> <p>Section 238 of Insolvency and Bankruptcy Code, 2016 also states of the non-obstante clause.</p> <p>The Applicant referred to the case of JM Financial Asset Reconstruction v/s State of Maharashtra 2016 SCC stating that the notification issued u/s 4 of MRU Act is limited to the enactment as specified in the Schedules to MRU Act. The plain reading of section 4 of MRU makes it clear that only the right, privilege, obligation or liability accrued or incurred before the undertaking in so far as the said right relates to availing of any remedy for enforcement is suspended and not existence/ continuation of debt or default itself, therefore suspension of indebtedness or default has not been contemplated or provided under the MRU Act.</p> <p>The Applicant also stated that as per sec 7 of the IBC 2016 only the fact of the event of default has to be ascertained and the Tribunal is only required the document specified under the Code if in the event of the same are not sufficient or there is any defect in the application. The Tribunal has discretion to direct the applicant to rectify the same. The notification given by the Industry, Energy and Labour Department of Maharashtra, on 22.7.2016, will not have any bearing on passing an order u/s 7 of the Code.</p>
Decision of the Tribunal	<p>It was observed that the non-obstante clause is present in both MRU Act and IB Code. But since the IB Code has come into existence subsequent to MRU Act therefore, notwithstanding clause in sec 238 of IBC prevails upon any other law for the time being in force, hence the Notification under MRU Act will not become a bar to passing this order u/s 7 of the IBC 2016. Moreover, the objective of MRU Act is to prevent unemployment, but by passing an order u/s 7 it will not</p>

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	<p>cause any obstruction to their employment until next 180 days, even if the company goes into liquidation, then also the rights of the employees are protected to the extent mentioned in the IB Code.</p> <p>The liability of the company has been dealt with by the MRU Act and also by IBC but both have different objectives. In MRU Act, it is to protect the interest of employees and in IBC, it is for protecting the creditors who have supplied fuel to the company to make it run. Since the liability suspended under MRU Act being inconsistent with the default occurred to the debt payable to the creditor, this order will not be against the ratio decided by Hon'ble Apex Court in Vishal N Kalsa v. Bank of India and Others (2016) (para 113), therefore the Application filed by the Corporate Debtor is dismissed.</p> <p>From the petition filed by the Financial Creditor as it was evident that the Corporate Debtor defaulted in making payment and has also placed the same on Information Utility. It has also placed the name of Insolvency Resolution Professional as Interim Resolution Professional. Hence as the Application is complete as per sec 7(2), it is admitted.</p>
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CASE NO. 6

Bench	National Company Law Tribunal (NCLT), Allahabad Bench, Allahabad
Financial Creditor	Bank of Baroda
Corporate Debtor	Rotomac Global Pvt. Ltd and Rotomac Exports Pvt Ltd
Amount of Default	553.78 cr
Date of Order	23-03-2018
Relevant Section	Section 7 read with section 33(1)(a) of the Insolvency and Bankruptcy Code, 2016
Facts of the Case	Application u/s 7 of the Code was admitted against corporate debtors before NCLT Allahabad Bench.

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	<p>In the COC meeting held on 20.02.2018, Resolution Professional stated that Corporate Debtor could not attend the meeting as CBI raid was in process on the Corporate Debtor. Resolution Professional also informed the COC about period of CIRP of 180 days is about to complete on 19/03//2018, hence recommended for application to extend CIRP by 90 days. In the e-voting, 96.08% of CoC voted against in the matter of Rotomac Global Pvt Ltd and 97.01% of CoC in Rotomac Exports Pvt Ltd voted against the extension of CIRP.</p> <p>Resolution Professional filed application u/s 33(1)(a) of IBC for initiation of Liquidation process against corporate debtors</p>
<p>Decision of the Tribunal</p>	<p>As per section 33(1)(a) of the Code, application can be filed for initiation of liquidation of Corporate Debtor as per Chapter III of the Code in case no Resolution Plan is received before the expiry of CIRP .</p> <p>The Resolution Professional proposed to extend the CIRP period for another 90 days on the ground that the time left for completion of CIRP was very short. The resolution for extension of CIRP failed As no Resolution Plan was received within 180 days of initiation of CIRP hence application under section 33(1)(a) for initiation of Liquidation admitted against corporate debtor.</p> <p>Further the order state as follows :-</p> <ul style="list-style-type: none"> A. Moratorium cease to effect. B. Registrar to send copy of the order to ROC. C. Approval of 33(5) shall not apply to a legal proceeding about the transaction as may be notified by the Central Govt. D. Liquidation order shall be deemed to be an intimation to discharge the officers, employees and workers. E. Liquidators shall be vested with all powers of the Board of Directors, Key managerial personnel. <p>Liquidator is directed to submit the progress report of liquidation process within 30 days.</p>

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CASE NO. 7

Bench	National Company Law Tribunal (NCLT), Principal Bench, New Delhi
Financial Creditor	Alchemist Asset Reconstruction Co. Limited
Corporate Debtor	Moser Baer India Limited
Amount of Default	185.37 cr
Date of Order	14-11-2017
Relevant Section	Section 7 read with Rule 4 of the Insolvency and Bankruptcy Code, 2016 for initiating the insolvency resolution process by Financial Creditor
Facts of the Case	<p>1. The Financial Creditor has filed the instant application with a prayer to trigger the Corporate Insolvency Resolution Process in the matter of Moser Baer India Ltd. It is appropriate to mention that the 'financial creditor' is a body corporate that acquired the secured debt of State Bank of Hyderabad (now merged with State Bank of India).</p> <p>2. In the application, the Financial Creditor has given the details of financial debt granted to the 'Corporate Debtor' with the dates of disbursement.</p> <p>The 'financial creditor' has placed on record an overwhelming amount of evidence to prove the amount advanced to the Corporate Debtor.</p>
Decision of the Tribunal	<p>The Learned Counsel for the Corporate Debtor accepted the notice of the application and stated at the hearing that filing of reply would not be necessary. Thus, it is apparent that the Corporate Debtor does not oppose the application of the Financial Creditor filed u/s 7 of IBC and accordingly has nothing to say in respect of commission of default.</p> <p>Thus the petition admitted by the Tribunal.</p>

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CASE NO. 8

Bench	National Company Law Tribunal (NCLT), Chandigarh Bench, Chandigarh
Financial Creditor	Punjab National Bank
Corporate Debtor	Rishi Ganga Power Corporation Limited
Amount of Default	75.04 cr
Date of Order	25-01-2018
Relevant Section	Section 7 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating the insolvency resolution process by Financial Creditor
Facts of the Case	<ol style="list-style-type: none">1. The respondent corporate debtor was incorporated for setting up a hydro power project on Rishi Ganga River. For the said purpose, the corporate debtor applied to the petitioner Bank for the sanction of term loan. It is further stated that the corporate debtor was in need of further finances and made a request for term loan for expansion of business.2. The corporate debtor applied for further finances and made application for the grant of additional term loan and overall facilities were increased. Since the project was not finished and the production had not started and that the repayment of the loan was to begin, the corporate-debtor made a request for the restructuring of the total loan.3. This request of the corporate-debtor was considered by the petitioner Bank and the existing term loan was restructured and repayment schedule was changed and a fresh FITL was sanctioned. It is stated that to secure various term loans and FITL facilities sanctioned by the Financial Creditor, various immovable properties were equitably mortgaged with the Bank

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	<p>4. The accounts of the corporate debtor became irregular and the accounts were classified as NPA. Thereafter, demand notice was issued to the corporate debtor as well as guarantors, demanding total amount including interest.</p> <p>The petitioner bank also filed along with the petition, the CIBIL Report</p> <p>5. The financial creditor is also said to have concealed factum of sanction of further loan to the corporate debtor for removal of debris at the project site. In fact, there was a cloud burst at the project site which led to huge disaster to the project of the company. This project was fully insured, and the claim has been filed and they are likely to receive the amount in due course.</p>
Decision of the Tribunal	The petition was found to be complete and hence admitted.

SECTION-8

CASE NO. 9

Bench	National Company Law Tribunal (NCLT), Kolkata Bench, Kolkata
Operational Creditor	Parker Hannifin India Pvt. Ltd. (Applicant)
Corporate Debtor	Prowess International (P) Ltd.
Amount of Default	45.73 Lakh
Date of Order	20-04-2017
Relevant Section	Section 8 read with section 9 of the Insolvency and Bankruptcy Code, 2016 –Insolvency resolution by Operational Creditor
Facts of the Case	The applicant Operational Creditor in response to the purchase order issued by the Corporate Debtor manufactured and supplied certain materials. An amount

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	of Rs. 45.73 Lakh was still due out of invoices raised for the amount Rs. 73.73 Lakhs. According to the Operational Creditor the purchase order alongwith the invoices constituted a legal, valid and binding contract between it and Corporate Debtor.
Decision of the Tribunal	It appears from the record that all the documents filed by the applicant. It is clear that the Corporate Debtor has committed default for not making payments of debt. The Tribunal therefore admitted the Petition and appointed the Insolvency Resolution Professional.

SECTION-9

CASE NO. 10

Bench	National Company Law Tribunal (NCLT), Principal Bench, New Delhi
Operational Creditor	Prideco Commercial Projects Pvt. Ltd.
Corporate Debtor	Era Infra Engineering Ltd.
Amount of Default	68.23 lakh
Date of Order	12-04-2017
Relevant Section	Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Limitation Act, 1963– Application for initiation of corporate Insolvency resolution process by operational creditor
Facts of the Case	<p>The Operational Creditor has completed the project as per work orders issued in 2009 by the Corporate Debtor. The Corporate Debtor had issued seven post-dated cheques in 2014 as a full and final settlement out of which only one cheque was honoured.</p> <p>On the issue whether the claim of the petitioner is covered by the period of limitation as provided by the Limitation Act, 1963 the petitioner submitted that the issuance of post-dated cheques and its non-payment would give a fresh lease of limitation period.</p>

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Decision of the Tribunal	<p>The Tribunal after going through the documents submitted by the Operational Creditor held that the requirements of section 9 of the Code are substantially fulfilled. The liability to pay has also not been disputed in view of the facts that the Operational Creditor had received seven post-dated cheques in lieu of full and final settlement dated 21-01-2014.</p> <p>As regard to the issue of limitation the Tribunal held that the claim is within the period of limitation of three years as the earliest cheque dishonoured was dated 15-03-2014 and the present petition was filed on 01-03-2017. The Tribunal also persuaded to take the view that issuance of a cheque amounts acknowledging the liability to pay as per the Division Bench judgment of Kerala High Court in the case of Ramakrishnan v. Parthasatadhy, 2003 (2) KLT 613. The Tribunal therefore admitted the Petition and appointed the Insolvency Resolution Professional.</p>
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CASE NO. 11

Bench	National Company Law Tribunal (NCLT), Mumbai Bench, Mumbai
Operational Creditor	Ashok Alco-Chem Ltd (Applicant)
Corporate Debtor	Unimark Remedies Ltd.
Amount of Default	61.36 lakh
Date of Order	04-04-2017
Relevant Section	Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 – Application for initiation of corporate Insolvency resolution process by operational creditor
Facts of the Case	Insolvency resolution process under section 9 of the Code was initiated on the ground of non-payment of debt owed to Operational Creditor. The petitioner had given statutory notice under section 433 and 434 of the

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	<p>Companies Act, 1956 and filed winding up petition before High Court. The debtor company raised an objection that notice under section 8 of the code was not issued before filing the petition.</p> <p>The NCLT vide its order dated 24-02-2017 held that the debtor company could not raise such objection as this petition happens to be transferred from High Court by virtue of jurisdictional change. The Tribunal further held that the petitioner has complied all statutory compliances and thus no dispute is in existence between the financial creditor and the corporate debtor in relation to the debt claim and admitted the petition and appointed the Insolvency Resolution Professional.</p> <p>The corporate debtor filed an application for recalling/review the order dated 24-02-2017 on the grounds that dispute between the parties has been resolved and that the application has been filed before the order has been communicated.</p>
Decision of the Tribunal	<p>When orders are passed in open court on the date of hearing after notice has been issued to the corporate debtor, such order cannot be called ex-parte order, that apart, it is not that this bench should not pass orders unless corporate debtor appears.</p> <p>Further this matter has been transferred from the Hon'ble High Court on the basis of the notification dated 7th December 2016. On perusal of this notification dated 7-12-2016, it is understood that all applications that have been transferred under this notification have to be treated as application u/s 7, 9 or 10 of the Code. Therefore, issuing another notice u/s 8 of the Code in the transferred case is not necessary, because the precondition of the issuing notice u/s 8 will not apply. Further there is neither a section of law envisaged to recall its own orders, nor a Rule set out to recall orders, and moreover the moratorium being rem in nature, this application is hereby dismissed in limine as not maintainable.</p>

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CASE NO. 12

Bench	National Company Law Tribunal (NCLT), Mumbai Bench, Mumbai
Operational Creditor	Sanjaya Kumar Ruia
Corporate Debtor	Magna Opus Hospitality Pvt. Ltd.
Amount of Default	40.73 lakh
Date of Order	12-04-2017
Relevant Section	Section 9 read with Section 8 & 5(21) of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 – Application for initiation of corporate Insolvency resolution process by Operational Creditor
Facts of the Case	The Operational Creditor, a Chartered Accountant had provided professional services as well as Advisory Services to the Corporate Debtor. The Corporate Debtor defaulted in payment of professional services as well as of Advisory service charges to the Operational Creditor. In his support the petitioner submitted documents that he had audited the accounts of the Debtor Company and also a letter issued by the Debtor Company assigning Advisory Services.
Decision of the Tribunal	Whether the 'Professional Services' shall fall under the definition of 'Operational Debt' as defined u/s 5(21) of the Insolvency and Bankruptcy Code? The term "Services" used in the definition of 5(21) has not been defined under this Code. However the expression "Services" as per Black Law Dictionary is "the act of doing something useful for a person or company, usually for a fees". Another meaning as per the Dictionary is, "an intangible commodity in the form of human effort, such as labour, skill or advises". Likewise, meaning of "Service Charge" as per the Dictionary is a charge accessed for performing a service. The Tribunal

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	<p>therefore held that a Professional Service provided by a Chartered Accountant definitely fall under the expression “Services” as incorporated in the definitions of “Operational Debt” u/s 5 (21) of the Code.</p> <p>In the light of documents submitted by the petitioner the Tribunal held that there is an existence of “debt” as defined u/s 3 (11) of the Code and a “default” exists as defined u/s 3(12) of the Code. Once it is established that there was an existence of “Default” then the provisions of Section 8 of the Code shall come into operation. Although in sub-section 8(2) of the section a Corporate Debtor is authorised to establish the existence of a dispute within 10 days on the receipt of the Demand Notice, but in the present case the “Operational Debtor” had not responded at all. The Tribunal therefore held that due to this reason the provision of section 9 of the Code shall come into operation. Accordingly the petition was allowed and the interim resolution professional was appointed.</p>
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CASE NO. 13

Bench	National Company Law Tribunal (NCLT), Chennai Bench, Chennai
Operational Creditor	M/s. Alcon Laboratories (India) Pvt. Ltd.
Corporate Debtor	M/s. Vasan Health Care Pvt. Ltd.
Amount of Default	Rs. 94.74 Crore
Date of Order	21-04-2017
Relevant Section	Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 – Application for initiation of corporate Insolvency resolution process by operational creditor
Facts of the Case	The Corporate Creditor had supplied various products to the Corporate Debtor Company on credit basis in lieu of various agreements entered between them. The Corporate debtor used the products but defaulted in

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	<p>payments for some of the products. A milestone agreement was entered between the parties where the corporate debtor agreed to pay the pending amounts in instalments. A hypothecation agreement was also entered between the parties. However the corporate debtor even failed to pay the first instalment. On notice under section 8 the corporate debtor did neither bother to pay the outstanding amount nor reply the statutory notice.</p>
<p>Decision of the Tribunal</p>	<p>The objections of the corporate debtor are answered by the Tribunal as under:</p> <p>1. Statutory notice was to be sent directly by the operational creditor.</p> <p>Tribunal: This objection is not sustainable for the reason that Form-3 itself provides for the signature of the persons authorized to act on behalf of the operational creditor. Therefore, the operational creditor can authorize any person to send the statutory notice on its behalf.</p> <p>2. Application not being in the Form prescribed.</p> <p>Tribunal: It is seen that all the information required are contained in the application filed under section 9 of IBC, 2016. Therefore, this objection is also not sustainable.</p> <p>Following the decision of Bombay High Court in Pramod Prabhakar Kulkani Vs. Balasaheb Desai Sahakari Sakhar Karkhana Ltd, (2001) III LLJ 741 Bom. the Tribunal held that the 'Forms' for notice and application as prescribed under the Rules are for providing/incorporating necessary information, which are required under the law. Thus, the substance is more important than the 'Form' and moreover there is no irregularity in the statutory notice sent and the application filed.</p> <p>3. The operational creditor are still under the ownership as per hypothecation agreement.</p> <p>Tribunal: It is a normal business practice being followed that unless the entire payment/consideration is paid by the buyer, the sellers will have lien over the goods</p>

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	<p>supplied, but that does not mean that the corporate debtor is not under obligation to make the payment for the supply of the goods to the supplier.</p> <p>4. The ‘operational creditors’ does not fall within the definition of the ‘operational debt’ as defined under sub-section 21 of Section 5 of the Code.</p> <p>Tribunal: Corporate debtor is misleading because the word “goods” used in the definition is of wider import and includes the machinery/equipment. Further it is on record that more than half of the outstanding amount is pertaining to the consumables supplied by the operational creditor. The objection raised by the corporate debtor is not tenable in the eye of law and therefore, stands rejected.</p> <p>5. The milestone agreement provides for resolving the disputes through negotiations, failing which by arbitration.</p> <p>Tribunal: This does not bar the operational creditor to file the application under section 9 of the Code against the corporate debtor as the Code does not envisage such a kind of bar for initiating the corporate insolvency resolution process by the operational creditor.</p> <p>6. Winding up petition is sub judice before the Hon’ble High Court.</p> <p>Tribunal: The pendency of the winding up petition cannot be a bar under the Code for initiating the corporate insolvency resolution process, because the Hon’ble High Court has not passed any order for winding up of the corporate debtor and no Official Liquidator has been appointed. Therefore, this objection is also rejected.</p> <p>On facts, the Tribunal held that it is also an admitted fact that the outstanding amount payable by the corporate debtor to the operational creditor is not under ‘dispute’. Since all the requirements under law have been fulfilled in the instant case allowed the application of the operational creditor and ordered the commencement of the corporate insolvency resolution process.</p>
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CASE NO. 14

Bench	National Company Law Tribunal (NCLT), Special Bench, New Delhi
Corporate Creditor	M/s. Nowfloats Technologies Pvt. Ltd. (Applicant)
Corporate Debtor	M/s. GetitInfo services Pvt. Ltd. (Respondent)
Amount of Default	1.93 Cr.
Date of Order	11-04-2017
Relevant Section	Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 – Application for initiation of corporate Insolvency resolution process by operational creditor
Facts of the Case	<p>The respondent company and the applicant had entered into a service agreement wherein the applicant company had agreed to render certain IT related services to the respondent company and that from time to time for the services rendered invoices since the year 2014 had been raised for the payment of service fee. However the respondent company had been defaulting in the payment of dues and that presently a sum of Rs. 1,93,37,105/- is due excluding interest payable by the respondent company to the applicant.</p> <p>In relation to the respondent company the Hon'ble High Court of Delhi has appointed the Official Liquidator as the provisional Liquidator in proceeding for winding up initiated before it in terms of section 450 of the Companies Act, 1956.</p>
Decision of the Tribunal	The provisions of Companies Act, 1956 will govern in relation to the proceedings pending before the Hon'ble High Court of Delhi and not the Companies Act, 2013 as contended by the applicant. If that be so, no suit or other legal proceeding shall be proceeded with, against the company, except by leave of the Court which is seized of the winding up proceedings. In the present instance

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	<p>no leave has been obtained by the applicant to proceed with present proceedings initiated by the applicant company before this Tribunal and obviously the Tribunal is therefore handicapped in proceeding further in relation to the above company petition.</p> <p>It is to be borne in mind that both winding up proceedings under the erstwhile Companies Act 1956 as well as the Insolvency Resolution Process is initiated for the benefit of the general body of creditors and is a representative action and not for the recovery of money of the individual creditor for which necessarily claims are required to be submitted to the Official Liquidator or the Interim Resolution Professional as the case may be. In the instant case in view of the matter pending before the Hon'ble High Court of Delhi which has also thought it fit to appoint the Official Liquidator as the Provisional Liquidator of the respondent company, the Interim Resolution Professional, if appointed will again be put on a collusive course with the Official Liquidator even in accepting the claims as may be filed as envisaged under Section 21 of the Code.</p> <p>Taking into consideration the above aspects and legal position the Tribunal rejected the application.</p>
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CASE NO. 15

Bench	National Company Law Tribunal (NCLT), Principal Bench, New Delhi
Operational Creditor	Macquarie Bank Ltd.(Applicant)
Corporate Debtor	Shilpi Cable Technologies Ltd
Amount of Default	19.55 Cr.
Date of Order	24-05-2017
Relevant Section	Section 9 read with Section 8 & 5(20) of the Insolvency and Bankruptcy Code, 2016 – Application for initiation of corporate Insolvency resolution process by operational creditor

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Facts of the Case	<p>Macquarie Bank Limited being an assignee of the S.V. Overseas Private Limited (“Supplier”) has filed the application under Section 8 and 9 of the Insolvency and Bankruptcy Code, 2016 against Shilpi Cable Technologies Limited for committing default in making the payment of operational debt. The application has been filed through its Power of Attorney holder who has been duly authorised.</p> <p>The debt originates from a transaction of supply of Copper rods by the Supplier. Corporate Debtor agreed to purchase the invoiced quantity of copper rods from the supplier from time to time against the purchase orders placed. The payment was to be made on demand by the Corporate Debtor upon presentation of commercial invoice by the Operational Creditor. If the payment was not made by the Corporate Debtor within a period of 180 days then it was to become due with interest calculated at 1% per month.</p> <p>The Corporate Debtors raised various objections on the application filed by the Operational Creditor.</p>
Decision of the Tribunal	<p>Issue: Whether the assignee of the debt is Operational Creditor as defined in Section 5(20) of the Code – Existence of dispute – whether the amount of transaction is insured to be mentioned in the application - Whether a demand notice of an unpaid operational debt can be issued by a Power of Attorney on behalf of the operational creditor -</p> <ul style="list-style-type: none"> • Section 5(20) of the Code defines the term “Operational Creditor” which means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. Therefore, an Operational Creditor is a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. • The statutory provision under Section 8(1)(2)(a) of the code provides that the dispute in the form of a civil suit or arbitration proceedings is required to be

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	<p>pending before the receipt of the demand notice or invoice in relation to such dispute. Further to this, the Operational Debt has not been disputed and there is no pendency of any suit or arbitration proceeding. A reference to arbitration notice or civil suit has to be reached before the receipt on demand notice in accordance to the expressed provision of the code. In case there is genuine dispute concerning quality and quantity then it may be considered on merit by the Tribunal.</p> <ul style="list-style-type: none"> • In case of the operational debt covered under insurance. The Operational Creditor has no privity of contract with the insurance company and it is a matter between the Corporate Debtor and the Insurance Company. Therefore, there is no suppression of material fact. • The Applicant should have filled up the name and address of the Power of Attorney which is condonable fault and can not constitute the defective application. <p>Accordingly, the application was admitted and moratorium, appointment of Interim Resolution Professional to be made as per code declared.</p>
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CASE NO. 16

Bench	National Company Law Tribunal (NCLT), Principal Bench, New Delhi
Operational Creditor	Annapurna Infrastructure Pvt. Ltd
Corporate Debtor	Soril Infra Resources Ltd
Date of Order	24-03-2017
Relevant Section	Application u/s 9 by Operational Creditor under Insolvency and Bankruptcy Code, 2016
Facts of the Case	Operational Debt is disputed. Appeal u/s 37 Arbitration Act is under adjudication. Applicant has filed a caveat and has also filed for execution of Award.

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Decision of the Tribunal	<p>It cannot be said Arbitration comes to end merely on dismissal of application u/s 34 of Arbitration Act as sought to be canvassed by the Applicant (Operational Creditor)</p> <p>Appeal u/s 37 still pending. Respondent still has time to appeal just because he has not filed appeal, Sec 9 of IBC cannot be invoked.</p> <p>Proceeding for execution of award has been initiated by the Applicant in HC. Effective remedy is already availed by Applicant.</p> <p>Cannot allow more than one remedy simultaneously—against principle of Judicial Administration. It would promote forum shopping which is impossible.</p> <p>Application does not warrant Admission. Dismissed with cost Rs. 1.00 lacs.</p>
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CASE NO. 17

Bench	National Company Law Tribunal (NCLT), Chandigarh Bench, Chandigarh
Operational Creditor	Macquarie Bank Limited
Corporate Debtor	Uttam Galva Metallics Limited
Amount of Default	43.11 cr
Date of Order	01-06-2017
Relevant Section	Section 9 read with section 8 of the Insolvency and Bankruptcy Code, 2016- Application for Institution of Corporate Insolvency Resolution process by Operational Creditor
Facts of the Case	The Operational Creditor has filed the application to set in motion the Corporate Insolvency Resolution Process as per Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule-6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 in relation to Corporate Debtor.

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	<p>The Counsel of the Debtor submitted that there is no certificate from the Financial Institution maintaining the accounts of the operational creditor, in terms of clause (c) of sub-section (3) of section 9 of the code; for which, learned counsel for the operational creditor sought time to file the affidavit and the document.</p> <p>The following issues arise for determination in the instant petition:</p> <ol style="list-style-type: none"> 1. Whether the instant petition has been filed on the basis of a valid power of attorney? 2. Whether the petitioner is entitled to file this petition as an assignee of the original supplier? 3. Whether there is non-compliance of clause (c) of Section 9 (3) of the Code? If so, its effect? 4. Whether the petitioner had the notice of the existence of the dispute, as defined in the Code? 5. Whether the petitioner does not have the locus-standi to file the instant petition, having already been reimbursed by the insurer of the goods?
Decision of the Tribunal	<ol style="list-style-type: none"> 1. The only remedy to a creditor against a company is to take steps for winding up of the company, for which the appropriate recourse is provided under Section 7 and 9 of the Code exclusively in respect of the financial and operational creditors respectively. 2. The petitioner would definitely come within the definition of the term 'operational creditor', as defined under Section 5(20) of the Code, as meaning a person to whom an operational debt is owed and includes the person to whom such debt has been legally assigned or transferred. 3. In the instant case, there being non-compliance of the mandatory requirement of Section 9 (3) (c) of the Code, the issue is held against the petitioner accordingly. 4. It is held that there was existence of dispute for which, the petition under Section 9 preferred by the

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	<p>operational creditor, was not maintainable and as such, this issue is also held against the petitioner.</p> <p>5. The right of the petitioner, if otherwise maintainable, could be defeated solely on that ground, as the corporate debtor cannot escape from its liability under the contract, in case it has made a default in payment of debt. The issue is accordingly held against the respondent.</p> <p>In view of the findings on the issues no. 3 and 4, the instant petition is rejected.</p>
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CASE NO. 18

Bench	National Company Law Tribunal (NCLT), Kolkata Bench, Kolkata
Operational Creditor	Mahendra Trading Co
Corporate Debtor	Hindustan Controls & Equipments (P.) Limited
Amount of Default	1.71 cr
Date of Order	19-01-2018
Relevant Section	Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 to initiate Corporate Insolvency Resolution Process in respect of Corporate Debtor.
Facts of the Case	<p>1. The Operational Creditor has stated that the goods were sold and delivered to the Corporate Debtor under purchase invoices of different dates between 22nd June 2012 to 29th March 2017. A total amount of outstanding debt has been calculated which is payable by the Corporate Debtor on account of supplies made by the Operational Creditor.</p> <p>2. The applicant has further stated that demand notice was issued to the Corporate Debtor on 18th September 2017 by the Operational Creditor, which was received on or about 22 September 2017 by</p>

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	<p>the Corporate Debtor, but no notice of dispute has been issued by the Corporate Debtor till filing of the application by the Operational Creditor. Even after receipt of the demand notice, the corporate debtor failed to make payment of the outstanding dues.</p> <p>3. The Corporate Debtor has stated that demand notice had been issued by only one of the partners of the Operational Creditor no.1 and the said notice is not in proper form and therefore has no existence in the eye of law.</p> <p>4. The Corporate Debtor has also stated that the purported claim of Rs.1,51,17,694/- being a portion of the claim as claimed in the instant application is already a subject matter of arbitration pending before the Arbitration Committee of The Calcutta Electric Traders Association and the said arbitral reference is pending since 31st August 2017, i.e. before the issuance of the purported demand notice.</p> <p>5. In this context, the Corporate Debtor also mentioned that at the request of the Operational Creditor, a letter dated 31st August 2017, was issued by the Calcutta Electric Trader Association commencing arbitral reference. Therefore, the instant application may not be entertained as the same arbitral proceedings is a dispute as specifically enshrined in the I.B. Code.</p> <p>6. The Corporate Debtor has also submitted that the claim of the Operational Creditor is illegally inflated as the amount of dispute before the Arbitration Committee was Rs. 1,51,17,694/- as on 31st August 2017 whereas before the Tribunal, it has been claimed as Rs.1,71,81,809/- as on 18th September 2017. Moreover, the Corporate Debtor has also raised objection to the extent that a portion of the purported claim of Rs.1,71,81,809/- is barred by the Limitation Act, 1963 as the same</p>
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	<p>arises out of invoices raised amounting to Rs.27,66,630/ for the claim during the period 22nd June 2012 to 20th March 2014.</p> <p>7. It was further stated that as per the MOU, none of the parties would take up any project or take any step which would be prejudicial to the interest of the parties. As per the MOU, the Corporate Debtor took up several projects for various companies. But the Operational Creditor no.3 was taking all the decisions with regard to taking up and execution of projects on behalf of the Corporate Debtor and was practically in control of the Corporate Debtor, which will be evident from the series of electronic mails and letters sent by him to third parties.</p>
<p>Decision of the Tribunal</p>	<p>1. All circumstances lead to a conclusion that there exist a genuine dispute prior to the filing of the application and before the date of issuance of the demand notice. The contentions taken by the respondent are not feeble, mala fide or hypothetical. Existence of MOU in between the parties and pendency of Arbitral proceedings seen not mentioned in the application. Existence of MOU is an important document produced on the side of the respondent. It deals with sharing of profits and loss between Corporate Debtor and Operational Creditor. Non-mentioning the above said fact is therefore amount to suppression of material facts.</p> <p>2. Taking into consideration of the above said facts and circumstances, and bare in mind the principle laid down in the above-cited judgment, the application has been rejected.</p>

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SECTION-10

CASE NO. 19

Bench	National Company Law Tribunal (NCLT), Principal Bench, New Delhi
Operational Creditor	M/s. Incredible Unique Buildcon Pvt. Ltd.
Corporate Debtor	M/s. Clutch Auto Ltd.
Amount of Default	12.88 Cr.
Date of Order	10-04-2017
Relevant Section	Section 10 of the Insolvency and Bankruptcy Code, 2016 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 – Initiation of corporate Insolvency resolution process by Corporate applicant
Facts of the Case	The 'corporate debtor' company is in default for the last more than 3 years. The list of 'operational creditors' which contains as many as 293 names and a total sum owed to them is declared to be Rs.12,88,32266. The petitioner has disclosed the details of property against which the loan of the corporate debtor is fully or partially secured along with details of the date of its creation, its estimated value etc. A copy of the audited financial statements of the 'corporate debtors' along with other relevant documents have been placed before the Tribunal. A reference was filed before the BIFR and the order of admission of reference passed in 2014 has also been placed before the Tribunal.
Decision of the Tribunal	A perusal of Section 10 would show that a corporate debtor may file such application for initiating the insolvency resolution process where it has committed a default. A perusal of the paper book would show that books of accounts and other attendant documents have

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	<p>been filed. The petitioner itself has admitted default. Accordingly, the Tribunal admitted the Petition and appointed the Insolvency Resolution Professional. The Tribunal dismissed the application filed by the operational creditor under section 9 of the Code with the observation that 'operational creditor' may file its claim before the Insolvency Resolution Professional.</p>
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CASE NO. 20

Bench	National Company Law Tribunal (NCLT), Chandigarh Bench, Chandigarh
Corporate Debtor	M/s. Sky Blue Papers Pvt. Ltd. (Corporate Applicant)
Amount of Default	18.29 Cr.
Date of Order	07-04-2017
Relevant Section	Section 10 of the Insolvency and Bankruptcy Code, 2016 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 – Initiation of corporate Insolvency resolution process by Corporate applicant
Facts of the Case	This is an application filed by a 'Corporate Debtor' company itself in Form 6 as prescribed by Rule 7(1) of the Application to Adjudicating Authority Rules. The total amount of default in respect of Financial and Operational Creditors is Rs. 18.29 crores. Due to default in making the payment of dues the Punjab National Bank has issued notices under section 13(2) and also under section 13(4) of SARFAESI Act, 2002.
Decision of the Tribunal	Section 10 of the Code confers a discretion on the Tribunal to either admit or reject the application and in case of rejection, to give an opportunity to the applicant before such rejection, to rectify the defects within seven days from the date of receipt of such notice from the Adjudicating Authority. The term 'Corporate Debtor' has

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	<p>been defined under Section 3 (8) of Part-I of the Code to mean a Corporate Person, who owes a debt to any person and 'default' is defined under Section 3 (12) of Part-I of the Code to mean "non-payment of debt when whole or nay part or instalment of the amount of debt has become payable and is not repaid by the debtor or the 'Corporate Debtor', as the case may be".</p> <p>The Financial Statements of the company indicates the losses and fall in revenue. It seems that the applicant has fallen into debt trap and is competent to set in motion the insolvency resolution process as contemplated under the Code. On the basis of the Financial Statements of the company the total debt raised by the 'Corporate Applicant' with regard to the financial and operational creditors is Rs.18.48 crores and it is further represented that the total amount of default is Rs.18.29 crores.</p> <p>The Tribunal therefore held that petition deserves to be admitted and accordingly appointed an interim resolution professional.</p> <p>The Tribunal however, observed that the Applicant Company save some sketchy particulars has not given any road map as to how it is going to keep itself afloat as a going concern. However, Keeping in perspective the objects for which the Code has been brought into force and to balance the interest of all stakeholders, it is satisfied that the instant application warrants to be admitted to prevent further erosion of capital and to safeguard the assets of the Applicant Company/ Corporate Debtor.</p>
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CASE NO. 21

Bench	National Company Law Tribunal (NCLT), Allahabad Bench, Allahabad
Financial Creditor	Union Bank of India
Corporate Debtor	Raman Ispat Pvt. Ltd. (Applicant)
Amount of Default	9.48 Crore

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Date of Order	11-04-2017
Relevant Section	Section 10 of the Insolvency and Bankruptcy Code, 2016 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 – Initiation of corporate Insolvency resolution process by Corporate applicant
Facts of the Case	The applicant/corporate debtor failed to pay an amount of Rs. 9.48 crore to the Bank and has mortgaged its assets as security. The Bank has issued notice under SARFAESI Act for taking possession of the mortgaged property. Hence, applicant company filed this application for insolvency resolution process.
Decision of the Tribunal	Corporate Debtor has complied with the provision of section 10 of the Code and therefore the petition deserved to be allowed. The Tribunal declared moratorium with consequential directions and appointed interim resolution professional.

CASE NO. 22

Bench	National Company Law Tribunal (NCLT), Mumbai Bench, Mumbai
Corporate Debtor	M/s. Schweitzer Systemtek India Private Limited
Financial Creditor	Phoenix ARC Private Limited
Amount in Default	4.69 Cr.
Date of Order	03-07-2017
Relevant Section	Section 10 of the Insolvency and Bankruptcy Code, 2016 – Initiation of corporate Insolvency resolution process by Corporate applicant
Facts of the Case	The main issue before the Tribunal was that “whether a property(ies) which is/are not ‘owned’ by a Corporate Debtor shall come within the ambits of the Moratorium? In the instant case the personal properties of the promoters have been given as security to the banks while taking loans.

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Decision of the Tribunal	<p>This code of 2016 has prescribed certain limitations which are inbuilt and must not be overlooked. The “Moratorium” indeed is an effective tool, sometimes being used by the corporate debtor to thwart or frustrate the recovery proceeding.</p> <p>The plain language of the Section 14 is that on the commencement of the Insolvency process the ‘Moratorium’ shall be declared for prohibiting any action to recover or enforce any security interest created by the Corporate Debtor in respect of “its” property. Relevant section which needs in-depth examination is section 14 (1) (c) of The Code.</p> <p>There are recognised canons of interpretation. Language of the Statute should be read as it existed. This is a trite law that no word can be added or substituted or deleted from the enacted Code duly legislated. Every word is to be read and interpreted as it exists in the statute with the natural meaning attached to the word. Rather in this Section the language is so simple that there is no scope even to supply ‘casus omissus’. I hasten to add that the doctrine of ‘Noscitur a Sociis’ is somewhat applicable that the associated words take their meaning from one another so that common sense meaning coupled together in their cognate sense be interpreted. As a result, “its” denotes the property owned by the Corporate Debtor. The property not owned by the Corporate Debtor does not fall within the ambits of the Moratorium. Even Section 10 is confined to the Book of the Accounts of the Corporate Debtor, due to the reason that section 10(3) has specified that the Corporate Applicant shall furnish “its” Books of Accounts. This Bench has no legislative authority to expand the meaning of the term “its” even under the umbrella of ‘Ejusdem generis’.</p> <p>The outcome of this discussion is that the Moratorium shall prohibit the action against the properties reflected in the Balance Sheet of the Corporate Debtor. The Moratorium has no application on the properties</p>
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Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

	<p>beyond the ownership of the Corporate Debtor. As a result, the Order of the Hon'ble Court directing the Court Commissioner to take over the possession shall not fall within the clutches of Moratorium. Even otherwise, the provisions of The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (the SARFAESI Act) may be having different criteria for enforcement of recovery of outstanding Debt, which is not the subject matter of this Bench. Before I Part with it is necessary to clarify my humble view that The SARFAESI Act may come within the ambits of Moratorium if an action is to foreclose or to recover or to create any interest in respect of the property belonged to or owned Debtor, otherwise not.</p> <p>The Application under section 10 of the Code is hereby "Admitted".</p>
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CASE NO. 23

Bench	National Company Law Tribunal (NCLT), Principal Bench, New Delhi
Financial Creditor	Punjab National Bank & others
Corporate Debtor	Unigreen Global Pvt. Ltd. (Applicant)
Amount of Default	Rs. 100 Crore
Date of Order	08-05-2017
Relevant Section	Section 10 read with Section 65 of the Insolvency and Bankruptcy Code, 2016 – Initiation of Corporate Insolvency Resolution Process by Corporate applicant
Facts of the Case	The applicant/corporate debtor company filed this application to initiate Corporate Insolvency Resolution process. In compliance to the provision of the Insolvency & Bankruptcy Code, 2016 (Code) it had furnished the details of the financial creditors and the operational creditors and also the list of immovable properties held securities by the financial creditors

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	<p>banks. As directed by the Tribunal the applicant served notice to the financial creditors. The application was objected by the lead financial creditor bank.</p>
<p>Decision of the Tribunal</p>	<p>The provisions of IBC, 2016 has predominantly been brought into force for the re-organization and insolvency resolution of corporate persons and that too in a time bound manner for the maximization of value of assets of such persons to promote entrepreneurship and balance the interest of all stake holders involved in relation to the insolvent.</p> <p>The corporate debtor to disclose all the facts including in relation to the debts owed by it to its creditors as well as securities offered to the creditors as well as of assets of the corporate debtor. Since the process is self-initiated in so far as the corporate debtor is concerned, all the disclosures must be true and correct and must not be made solely to scour for any concession it may get in the process, including moratorium, with a view to deny the recovery of bona fide and lawful debt owed to its creditors, including financial and operational.</p> <p>The Bank in its objection held that the corporate debtor and directors also being guarantors are trying to avoid making awful payments of the dues owed to the Bank and also thwarting the Bankers from realizing the securities by initiating several legal proceedings in different courts and Forums with the sole motive of removing their personal properties from the clutches of law and that the instant action before this Tribunal is yet another attempt in the same direction.</p> <p>Considering the contentions of both the parties the Tribunal held that once the instant petition by the Corporate Debtor is admitted, then the admission goes without saying will have a serious impact in relation to the objectors, namely, the financial creditors as whatever action which has culminated into taking physical possession of the secured assets will be automatically 'stayed' for a period of at least six months or even more depending upon the circumstances of the</p>

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	<p>process and seems to be the motivation for the petitioner to approach this Tribunal under IBC, 2016 rather than put into to effect the avowed objects for which IBC, 2016 has been enacted. The Tribunal cannot be a party to such mala fide actions on the part of the corporate debtor and this is a clear case of abuse of process of law which should be discouraged at the threshold.</p> <p>Taking into above position and as the applicant have not come with clean hands the Tribunal dismissed the petition and with a view to discourage the parties from abusing the process of Code the Tribunal imposed a penalty of Rs. 10 Lacs toward costs as contemplated under section 65 of the Code.</p>
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CASE NO. 24

Bench	National Company Law Tribunal (NCLT), Mumbai Bench, Mumbai
Corporate Debtor	Alpha & Omega Diagnostics (India) Ltd
Respondent	Asset Reconstruction Co of India Ltd
Date of Order	10.07.2017
Relevant Section	Section 10 read with section 14 of the Insolvency and Bankruptcy code, 2016 read with rule 7 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 and section 424 of the Companies Act, 2013
Facts of the Case	An application under Section 10 of IBC 2016 was filed by the Corporate Debtor before the NCLT Mumbai Bench. According to first petitioner, The Learned Chief Metropolitan Magistrate vide Order (supra) dated 11.04.2017 has appointed a Court Commissioner to take over the possession of the flats. The admitted position is that the Flats in question are not under the Ownership of the corporate Debtor. Even in the balance sheet of the Corporate Debtor these flats are not reflected. It is

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	further evidenced that the documents annexed have clearly demonstrated that the personal properties of the Promoters have been given as a "Security" to the banks.
Decision of the Tribunal	<p>The question is whether a property (ies) which is/are not 'owned' by a Corporate Debtor shall come within the ambit of the Moratorium.</p> <p>The Moratorium shall prohibit the action against the properties reflected in the Balance Sheet of the Corporate Debtor. SARFAESI Act may come within the ambits of Moratorium if an action is to foreclose or to recover or to create any interest in respect of the property belonged to or owned by a Corporate Debtor, otherwise not.</p> <p>The Application under Section 10 of the Code is hereby "Admitted" subject to the exception as carved out supra.</p>

SECTION-12

CASE NO. 25

Bench	National Company Law Tribunal (NCLT), Kolkata Bench, Kolkata
Financial Creditor	Bank of Baroda
Corporate Debtor	Binani Cement Ltd
Applicant	12 Applications filed u/s 60(5) , 30 and 31 of the Insolvency and Bankruptcy Code, 2016
Amount of Default	97.7 cr
Date of Order	02.05.2018
Relevant Section	<p>Preamble of the code- Maximization of Value as the objective of the code</p> <p>Section 12 ,Section 24 – Notice of the COC Meetings</p> <p>Regulation 21(3)(a) of the CIRP Regulations –Contents of the COC meeting notice</p> <p>Section 5(13) – CIRP Costs</p>

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	<p>Section 30 & 31 – Resolution Plan Regulation 37, 38&39 of the CIRP Regulations – Contents of the Resolution Plan Sub regulation 7 of schedule I of the IP Regulations</p>
<p>Facts of the Case</p>	<p>Four Key points have been dealt with in the main order</p> <ol style="list-style-type: none"> 1. Whether RP exceeds his power in appointing other professionals and outsourcing his work 2. Whether non consideration of revised offer from Ultratech is violative of the provisions of IBC 3. Whether the Resolution plan is discriminative against Unsecured Financial creditors 4. Whether RP has ignored claims of Operational Creditors <p>1. Whether RP exceeds his power in appointing other professionals and outsourcing his work</p> <p>The first key point dealt with in the order considers the circular No.IP/003/2018 issued by IBBI and whether RP incurred exemplary costs in violation of the code and the rules made thereunder:</p> <p>Key Facts discussed in the order :</p> <ol style="list-style-type: none"> a) The RP had appointed approx. 22 representatives/ professionals for various tasks – it has been brought to the attention of the NCLT that the RP had engaged in total 22 representatives for management of the affairs of the Corporate debtor. b) Employee / Management non co operation- RP brought to the attention of the NCLT that he had been facing employee non co operation and the management and workmen were non responsive in furnishing the information c) Discussions around issue of notices and conduct of COC meetings–Issue of COC

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	<p>notices, Conduct of the COC meetings and rights of suspended board of directors has been discussed in the order</p> <p>Discussions in the Order :</p> <p>RP not to incur exorbitant costs – Regulation 27 and Regulation 21(3) of the CIRP regulations -The tribunal observed that the costs incurred by the RP on engaging the professionals was exorbitant. The costs for the CIRP process need to be incurred keeping in view the volume of work and complexity of the resolution process. The NCLT observed that thereby RP had violated circular No.IP/003/2018 issued by IBBI. It is noteworthy that all the appointments were done after due approvals from the COC members and the costs were also ratified by the COC , which included COC counsel fees.</p> <p>2. Whether non consideration of revised offer from Ultratech is violative of the provisions of IBC</p> <p>Key Facts discussed in the order :</p> <p>a) Ultratech submission of multiple bids (revised thrice), consideration of only H1 bidder by the CoC- Ultratech cement rushed to the AA for non consideration of its revised bids and contended that the evaluation criteria as applied was to result in more than one RA coming close in the scoring has not been permitted to participate further in the bid process since COC decided to go ahead and negotiate with only H1 bidder. The same is violative of the mandate of the code for maximizing the value</p> <p>b) Ultratech’s Bid value was much higher than the bid approved by the CoC. The COC approved the bid of Rajputana Properties</p>
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	<p>c) The COC and the RP have adhered to the process set out in the Process Document</p> <p>d) The COC went ahead with the approval of the plan submitted by Rajputana Properties without according an opportunity to Ultratech, which is claimed as unjust and arbitrary</p> <p>e) Scoring not as H1 bidder was treated as a disqualification in participating in the bid process</p> <p>f) RP acted on the advise of the CoC on the identification of the bidders. Need for Process advisors has been thus questioned</p> <p>Discussions in the Order:</p> <ol style="list-style-type: none">1. Negotiation only with H1 bidder not a test under the code -The revised offer from Ultratech is to be considered by the CoC and non consideration of the revised offer is found not legally sustainable and is against the objective of maximization of the value as provided in the code and violative of the provisions of the code and regulations discussed in the order.2. RP To consider all plans -RP is duty bound to consider all offers and place the same before the COC for their consideration3. RPs Independence from COC & process advisors-RP is required to act independently as per Sub Regulation 5 of Schedule 1 of the IBBI IP Regulations 2016 and act independent of external influences. Need for appointment of Process advisors is questioned4. Process document is not a sacrosanct code -The process document is not legally binding on the RP and cannot override the objective of the code5. RP Independence & R Plan to be fair across category of creditors -RP is required
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	<p>to take decisions independent of the interference of the CoC. RP not to act under influence of COC members having majority voting share. The plan must take care of all class of creditors alike without any discrimination</p> <ol style="list-style-type: none">6. Maximization of Value - RP and COC have to work towards maximization of the value to the stakeholders7. Receipt on Email / incomplete plan not a criteria of rejection or non placement before COC-RP is duty bound to place before COC the plans received (even if they are received on email, not received in stipulated format etc.)8. Non compliance with Process document is a flimsy ground for denial -The premise that the Process document prevents the RP and COC to consider revised offer has no legal force at all. The process document itself contained provisions empowering the COC and RP to modify, alter or delete certain provisions.9. Duty bound to place all plans that satisfy requirements of Sec 30(2) -RP is duty bound to place all the plans that meet the requirements of section 30(2) to the COC, if certain points require modification/ revision , he can demand the revisions and then place the plans before the COC10. Coc / IBA guidelines / Process document cannot restrict the process of law i.e maximization of value- In Bhushan Steel order it has been already concluded that, a guideline framed by COC can not impose restrictions upon RA by denying them a legitimate right to participate in the bidding
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	<p>process and revise its offer till the bidding process is completed</p> <p>11. Any plan / bid submission till CIR Process is not concluded is to be taken to its logical conclusion</p> <p>The NCLT observed that the offer containing better revival of the Corporate debtor, consideration of better operational and unsecured financial creditors claim must be considered by the RP and COC .in the interest of justice, reconsideration of the better resolution plans available to the RP.</p> <p>3. Whether the Resolution plan is discriminative against Unsecured Financial creditors</p> <p>Key Facts discussed in the order :</p> <p>Inequality in consideration of the claims of Unsecured Financial Creditors –One of the unsecured Financial Creditor- SBI Hong Kong alleged inequality in consideration of their claims in the COC approved Resolution plan. SBI Hong Kong alleged that the plan envisaged settlement of their claims for 10% of the value giving them 90% haircut. Restructuring of the debt in the COC approved plan was questioned. One of the Financial creditors Exim bank alleged that the plan envisaged settlement of their claims at 72.59% and a haircut of 27.41 %. Both the banks claims had arisen out of Corporate Guarantee invocation.</p> <p>Discussions in the Order :</p> <p>NCLT observed that there has been discrimination in consideration of the claims of the financial creditors in the resolution plan and the Resolution Plan accordingly needed modifications.</p> <p>4. Whether RP has ignored claims of Operational Creditors</p> <p>Key Facts discussed in the order :</p>
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	<p>a) Ignorance of the Operational Creditors claims –8 Operational creditors jointly raised the issue with NCLT that their claims for operational dues were totally ignored in the Resolution Plan. The operational creditors brought before NCLT that their claims admission was pending with the RP.</p> <p>b) Slab wise settlement for Operational Creditors dues settlement in the Resolution Plan – the Resolution Plan submitted by Rajputana Properties had proposed slab wise settlement subject to maximum capping scheme for the Operational creditors dues where</p> <p><i>Verified Operational Creditors dues not exceeding 1 Cr -100%</i></p> <p><i>Verified Operational Creditors dues between 1 Cr – 5 Cr -40%</i></p> <p><i>Verified Operational Creditors dues between 5 Cr – 10 Cr -25%</i></p> <p><i>Verified Operational Creditors dues more than 10 Cr -5%</i></p> <p><i>Discussions in the Order :</i></p> <p>The NCLT observed that a reduction in the amounts payable to operational creditors is acceptable, however such reduction should be applicable to all class of creditors. The same has to be considered for each class of creditors like Financial Creditors, Unsecured Creditors and Operational creditors. Since the plan contained settlement at various class of creditors differently, the NCLT observed that the contention that the Resolution Plan does not contravene any of the provisions of the code is not found true. Such reduction was not in accordance with the regulations and in line with the objective of the code</p>
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Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

Decision of the Tribunal	<ol style="list-style-type: none"> 1. <i>The duration of Litigation period to stand excluded from Corporate Insolvency Resolution period</i> 2. <i>RP is directed to consider the revised offer from Ultratech within 3 days of the order and place the same before the COC</i> 3. <i>COC is directed to consider the revised plan of Ultratech</i> 4. <i>COC is directed to consider plan of RPPL if the Resolution Applicant is willing to reconsider his offer above the Ultratech offer</i> 5. <i>RP is directed to comply with provisions of the code and regulations and in issuing notices to the directors of the suspended board of the Corporate Debtor</i>
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SECTION-14

CASE NO. 26

Bench	National Company Law Tribunal, Chandigarh Bench, Chandigarh
Petitioner/Financial Creditor	Corporation Bank
Respondent/Corporate Debtor	Amtek Auto Ltd
Applicant/RP	Resolution Professional
Respondent Bank	Indian Overseas Bank
Amount of Default	824.00 cr
Date of Order	13.10.2017
Relevant Section	Under Sections 14, 17 (1) (d) read with Section 18, 20 & 74 of Insolvency and Bankruptcy Code,2016 read with Rule 11 of the NCLT Rules, 2016 for appropriate directions

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Facts of the Case	<p>The Interim Resolution Professional (IRP) asked the Respondent Bank to freeze all debit transactions until further communication and further instructed the bank not to allow payment of any cheque without the instructions of IRP. IRP also requested for registering change in the signatory of all the bank accounts maintained by the respondent bank and instructed the bank to operate the bank accounts in accordance with the instructions contained therein. Later IRP instructed respondent bank to transfer all the funds from the bank account of the corporate debtor lying with it to the operative account of the corporate debtor maintained with another bank.</p> <p>However the respondent bank replied and claimed that amount available in the current account of the corporate debtor is not an asset of the corporate debtor inasmuch as the dues of the corporate debtor in the books of respondent bank exceeds the amount available in the balance in the current account and therefore, they exercised the rights of set off and appropriated the amount towards the dues payable to the bank.</p>
Decision of the Tribunal	<p>Can Bank set off dues from funds lying in current account during moratorium against the instruction of resolution professional?</p> <p>Amount lying in the current account of the corporate debtor has to be placed at the disposal of the resolution professional without any scope of an adjustment in the manner, the respondent bank tried.</p>

SECTION-18

CASE NO. 27

Bench	National Company Law Tribunal (NCLT), Principal Bench, New Delhi
Financial Creditor	Punjab National Bank
Corporate Debtor	Bhushan Power & Steel Ltd
Applicant	Liberty House
Amount of Default	37,240.00 cr
Date of Order	23.04.2018
Relevant Section	Section 18, Section 25 , Section 28, Section 30 sub-section (4) of Insolvency and Bankruptcy Code, 2016 and Regulation 27, Regulation 35, Regulation 39, Regulation 37, Regulation 38
Facts of the Case	<p>Sequence of Events:</p> <ul style="list-style-type: none">i) The RP acted as per the bid process with respect to issuance of EOI, floating RFP, Acceptance of resolution plan. Liberty house had qualified the eligibility criteria and the RP treated the applicant to be qualified in terms of the eligibility criteriaii) One of the Resolution Applicant, LHG submitted its plan after the last date of submission of the Resolution Plan. The last date for submission of resolution plans was set in accordance with the bid process duly approved by the COC.iii) According to Resolution Applicant, non consideration of its Resolution Plan due to delays in submitting requisite resolution plan defeats the very objective of the code –value maximization.iv) According to RA, it was duty of the Resolution Professional to accept the plan, especially when there was no Resolution Plan approved by the COC yet. Further, there were considerable days

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	<p>left for the CIR process to end. According to RA, the deadlines put in place by RP/ COC were not sacrosanct but procedural in nature. Hence, rejection of RA's resolution plan by COC was unwarranted and unjust.</p> <p>v) Since CIR process is a time bound resolution process as laid down in the preamble of the IB Code, The COC had set in a bid process to ensure a fair, open and transparent process. Allowing resolution applicants to submit plans at the last moment may force the existing resolution applicants to withdraw their plans, thereby forcing the corporate debtor to liquidation for want of no successful resolution.</p> <p>vi) The RP was entitled under the code to prescribe the timelines for submission of the resolution Plans. RP had sent numerous emails to RA requesting several documents as required under the bid process and wherever possible, the deadlines were extended under the bid process.</p> <p>vii) And hence, it was claimed that the acceptance of Resolution plans from Liberty House would render the whole process unfair and arbitrary.</p> <p>viii) While COC and RP had filed their replies, one of the Resolution Applicant Tata Steel also filed their replies in the case and pleaded that such allowance of late bid submission was complete misuse of the process. Tata steel had filed their EOI and plan well in time as per the bid process. Tata had also written to the RP to cancel and reject the bids submitted by Liberty House. To this reply, Liberty house also filed its rejoinder.</p> <p>IBC Timelines: CIRP Start Date : 26th July 2017 CIRP End Date : 22nd April 2018</p> <p>Key Developments: EOI issued on – 21st September 2017</p>
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Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

	<p>Last date for receipt of documents confirming qualification criteria by RP – 6th Oct 2017</p> <p>RP receives 7 Expression of Interests (excluding Liberty House)</p> <p>Liberty House submits EOI – 12th Nov 2017 (Liberty House had missed the above date for submission of EOI and requested the COC to accept its EOI and allow them participation in the CIR Process)</p> <p>COC meeting – 17th Nov 2017</p> <p>RP requests Liberty House to submit Confidentiality Undertaking, MOA, AOA etc. for issuance of RFP. – 20th Nov 2017.</p> <p>Last date for submission of the bids – 8th Feb 2018(the timelines were revised three times with last dates for submission of the resolution plans being: 10th Jan 2018 , 28th Jan 2018 and finally 8th Feb 2018)</p> <p>Liberty writes to RP that its in process to submit a viable Resolution Plan – 13th Feb 2018</p> <p>Liberty House submits Resolution Plan - 20th Feb 2018</p> <p>COC meeting to examine all resolution plans –22nd Feb 2018</p> <p>COC and RP refused to open the Resolution Plan submitted by Liberty House citing delays in submission – 22nd Feb 2018</p>
Decision of the Tribunal	<ol style="list-style-type: none"> 1. Delays in bid process not to act as a bar :-The resolution plan of Liberty House was not to be rejected on the ground of delay emanating from the process document or any other document internally circulated by the RP /COC. The rejection should be on a substantive ground 2. RP to place the plan received from Liberty House before the COC-The RP was directed to place the unopened sealed cover containing the resolution plan received from Liberty House before the COC.

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	<p>3. Exclusion of time – The time spent during litigation to be excluded from CIR Process.</p> <p>4. COC is authorized to take commercial decisions – it was also ordered that since the resolution plan was under consideration and yet to be decided by the COC and since there was considerable time left for completion of the resolution process it was expected that COC would take appropriate commercial decision in terms of the code and rules and regulations framed thereunder to achieve the objectives of the code.</p>
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SECTION-29A

CASE NO. 28

Bench	National Company Law Tribunal(NCLT) Ahmedabad Bench, Ahmedabad
Financial Creditors	Standard Chartered Bank and State Bank of India
Corporate Debtor	Essar Steel India Ltd
Applicants	Numetal Limited, Arcellor Mittal India Pvt Ltd
Amount of Default	37,280.00 cr
Date of Order	19.04.2018
Relevant Section	<p>Section 29A :- Eligibility of the Resolution Applicant,</p> <p>Section 30 sub-section (3) :RP to present to the COC for its approval Resolution Plans which confirm the conditions referred in sub section (2).</p> <p>Section 30 sub-section (4) :-The committee of creditors to approve a Resolution Plan after considering its feasibility and viability,</p> <p>— Of the Insolvency and Bankruptcy Code, 2016</p>
Facts of the Case	<p>Sequence of Events:</p> <p>ix) The COC acted as per the views on eligibility expressed by the RP. RP has declared both</p>

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

	<p>Numetal and Arcellor as ineligible under section 29A of the IBC. The 29A background check for the Resolution Applicants was still ongoing as on date of concluding the RA ineligible.</p> <p>x) Both Arcellor Mittal India Limited and Numetal Limited claimed to be 29A compliant as per the provisions of the IBC</p> <p>xi) According to COC it's the duty of the RP to decide the eligibility of the RA</p> <p>xii) The COC acted on the report of the RP and invited fresh bid since both the RA were found ineligible for filing a valid Resolution plan in conformity with Section 29A of the IBC</p> <p>xiii) And hence, the Resolution plans received from both the RA (Numetal and Arcellor) were not placed before the CoC</p> <p>Relevant Facts as stated in the order for consideration:</p> <p>First Bid Process Timelines:</p> <p>EOI issued on – 6th /7th October 2017</p> <p>Receipt of 7 EOIs by -23rd October 2017</p> <p>Virtual Data room access granted – First week November 2017</p> <p>RFP issued on 24th Dec 2017</p> <p>Resolution Plans received from Arcellor and Numetal on – 12th Feb 2018</p> <p>Numetal:</p> <p>a) Advertisement inviting EOI issued by RP on – 6th Oct 2017</p> <p>b) EOI submitted on – 20th Oct 2017</p> <p>c) RFP issued on – 24th Oct 2017, Amended on 8th Feb 2018</p> <p>d) Resolution submitted on – 12th Feb 2018</p> <p>e) RP declared Numetal as ineligible on 23rd March 2018</p> <hr/> <p>Numetal accordingly filed an application before Hon'ble</p>
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Orders passed by National Company Law Tribunal (NCLT)

	<p>NCLT Ahmedabad to direct the COC and RP not to reject the Resolution Plan and invite fresh bids for Essar Steel Limited.</p> <p>In another application filed by Numetal with the same bench, it sought to declare Arcellor Mittal (Arcellor) as ineligible u/s 29A (Arcellor being promoters and in the management and control of KSS Petron and Uttam Galva Limited – being NPA accounts) and the sale of shares of Uttam Galva and KSS would not render Arcellor eligible u/s 29A</p> <p>Hence it could be observed that Numetal did not only seek remedies under the IBC in terms of their ineligibility u/s 29A against the decision taken by RP and COC but also sought directions from Hon'ble NCLT against another Resolution Applicant – Arcellor India Pvt. Ltd.</p> <p>Its noteworthy that Numetal had submitted its EOI for Essar Steel in a consortium with VTB Bank through Crinium Bay Holdings Ltd (VTB), Indo international Trading FZCO (INDO), JSC VO Tyazhpromexport (TPE) and Aurora Enterprise Ltd (Aurora).</p> <p>Arcellor :</p> <ul style="list-style-type: none">a) Resolution submitted on – 12th Feb 2018b) RP declared Arcellor as ineligible on 23rd March 2018 <hr/> <p>Arcellor accordingly filed an application before Hon'ble NCLT Ahmedabad to direct the COC and RP not to reject the Resolution Plan and invite fresh bids for Essar Steel Limited. And pass suitable orders to prevent the COC and RP from proceeding with the current CIRP process during pendency of the current application.</p> <p>The Tribunal in its interim order Dt. 20th March 2018 had shown its non-inclination towards stalling the meetings of the COC nor to interfere in the Resolution Process but asked the COC and RP to pass the resolutions if any or taking a decision subject to final outcome of the present applications.</p>
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Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

	<p>Fresh Bid Process:</p> <p>Since The RP and COC found both Numetal and Arcellor as ineligible on the process cut off date i.e 12th Feb 2018, they decided to go through fresh bid process for Essar Steel Limited.</p> <p>Numetal challenged the fresh bid process and sought directions from NCLT for the RP and COC not to open the Resolution Plans received under the fresh bid process OR the NCLT directs the RP and COC to receive the Resolution Plans received under the fresh bid process pending disposal of their application but not to open the same pending disposal of the application</p> <p>The RP and COC filed an affidavit with the Hon'ble NCLT and requested to vacate the interim directions issued by NCLT and to allow the RP and COC to open the fresh bids subject to pending outcome of the pending interlocutory applications, since the last date for CIRP was ending on 29th April 2018 and time was of prime essence to resolve the case.</p>
Decision of the Tribunal	<ol style="list-style-type: none"> 1. 30 days cure time to be allowed to cure NPA - If the RA are found ineligible under 29A (c) , he shall be allowed by COC such period not exceeding 30 days to make payment of the overdue amounts in accordance with proviso to clause (c) of section 29A 2. Follow procedure under sec 29A and Sec 30(4) - The COC did not follow the procedure prescribed in above stated sections of the code i.e Section 29A (c) read with section 30(4) to afford reasonable opportunity by making payment of the overdue amount in order to remove such disability. RP ought to have produced both the Resolution plans before the COC along with his notes on ineligibility for consideration before the CoC before rejection by following procedure under section 29A(c) and 30(4)

Orders passed by National Company Law Tribunal (NCLT)

	<p>3. RP and COC to consider both the Resolution Plans before fresh bids are invited - Matter is remanded back to the RP and COC with a direction to place all the Resolution plans as received by the RP before initiation of fresh bid for consideration of the CoC in light of provisions of section 29A(c) and 30(4). The procedure as laid down in the code is of paramount importance for the revival of the CD.</p> <p>4. Same process to be followed even for the second bid process :-The decision of the COC to go for inviting fresh bid may appear prudent but is not legally sound and valid. Even if the fresh bid is allowed to be opened, there may be some Resolution plans who may be ineligible under 29A(c) of the code, RP and COC are duty bound to provide an opportunity not exceeding 30 days for making payment of overdue amounts or to remove disability as per section 30(4) of the code</p> <p>5. Sufficient opportunity to the Resolution Applicant to cure the defects-The RP and COC not to act arbitrarily and discriminatively and follow procedure under the code and by not providing sufficient opportunity to the resolution applicant under the proviso to section 30(4). Principles of natural justice to be followed.</p> <p>Exclusion of time – The time lost between filing of the applications and the pronouncement of the order to be excluded from CIRP</p>
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SECTION-33(2)

CASE NO. 29

Bench	National Company Law Tribunal- Ahmedabad Bench, Ahmedabad
Financial Creditor	IDBI Bank Ltd & Ors.
Applicant/RP	Anshuman Chaturvedi, RP

Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

Date of Order	09.02.2018
Relevant Section	Section 33 (2) read with Section 34(4) of the Insolvency and Bankruptcy Code, 2016– Seeking order of liquidation
Facts of the Case	Mr. Anshuman Chaturvedi (RP Asian Natural Resources (India) Limited.) expressed his unwillingness to continue as liquidator – the company going into liquidation. COC recommended name of Mr. Abhishek Nagori.
Decision of the Tribunal	As per Section 34 (4), the Adjudicating Authority shall by order replace the resolution professional, if– (a) the resolution plan submitted by the resolution professional under section 30 was rejected for failure to meet the requirements mentioned in sub-section (2) of section 30; or (b) the Board recommends the replacement of a resolution professional to the Adjudicating Authority for reasons to be recorded Since Mr. Abhishek Nagori’s name was in the list of panel approved by IBBI, Adjudicating Authority appointed Mr. Abhishek Nagori as liquidator under section 34 (7).

CASE NO. 30

Bench	National Company Law Tribunal, Ahmedabad Bench, Ahmedabad
Financial Creditor	Punjab National Bank
Corporate Debtor	Siddhi Vinayak Logistic Ltd
Applicant	Sunrise Polyfilms Private Limited
Date of Order	04.05.2018
Relevant Section	Section 33(2) read with Section 7 of Insolvency and Bankruptcy Code,2016

Orders passed by National Company Law Tribunal (NCLT)

Facts of the Case	<p>The application filed under Section 7 of the IB code by the Financial Creditor was admitted on 12.09.2017 and thereafter public announcement was made on 15.09.2017. The Committee of Creditors was constituted, and the first meeting was held on 12.10.2017 and RP was appointed and confirmed as Resolution Professional in the e- voting held on 17.10.2017.</p> <p>In the second meeting held on 02.11.2017 the COC decided to liquidate the corporate debtor company without completing the resolution process and accordingly the COC also voted in favour of this decision.</p> <p>In the third meeting of the COC held on 16.11.2017 wherein they resolved and allowed the resolution professional to make application before the Adjudicating Authority under Section 33 (2) of the IB Code on the following grounds:</p> <ul style="list-style-type: none">• The company has not been operating for the last three years and the latest financial statement was filed on 31.03.2014;• The company is in the transport business and has inventory of 5600 trucks spread all over India, majority of the trucks are lying idle and in deteriorated in value. <p>It is further alleged that the promoters of the company have committed fraud and siphoned off the funds. The creditors have raised complaint against the promoters with, the CBI and ED.</p> <p>It is further contended in the petition that the Corporate Debtor has lost all its customers and the staff and employees have left the company. It is not possible to hire a large staff and revive the company in absence of the resources and funds.</p> <p>Under such circumstances and also in pursuant to the decision taken by CoC in the meeting held on</p>
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Judicial Pronouncements under Insolvency and Bankruptcy Code, 2016

	<p>16.11.2017, the instant application was filed for liquidation.</p> <p>Promoter of the instant company has filed objection against the application filed under Section 33 (2) of the IB Code denying the averments made by the applicant. Said objection is filed on 13.02.2018 i.e. after more than one month of filing of the application by the Resolution Professional.</p> <p>Objections raised by the promoter of the Corporate Debtor:</p> <ul style="list-style-type: none">• It is submitted that Corporate Debtor can easily be converted into a going concern and creditors can easily be paid more than liquidation value within a reasonable period of time.• Corporate debtor has further alleged that the CoC has failed to understand the basic procedure prescribed under Corporate Resolution Process and have blindly without even exploring the possibility of revival of corporate debtor has decided to liquidate the company and settle for a minimal 10% of total outstanding.• Corporate debtor further alleged that the Resolution Professional has failed to perform his part of duty as he has failed to comply with majority of his duties casted under Section 25 IB Code.• During pendency of the proceedings, an Intervention Application was filed on 15.02.2018 on behalf of Sunrise Polyfilms Private Limited wherein it is represented that the applicant has professional relationship with the corporate debtor and has been hiring their trucks for various projects and he recently came to know that the corporate debtor is under the Insolvency Proceedings. Further, he also came to know on 21.11.2017 that CoC has decided to initiate liquidation proceedings under Section 33 (2) of the IS Code by way of e- voting conducted by the Resolution Professional.
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Orders passed by National Company Law Tribunal (NCLT)

	<ul style="list-style-type: none"> • It is alleged by the intervener that the said decision of liquidation process has been taken merely after 50-55 days of the order of moratorium and the Resolution Professional has not invited any application for resolution plan and have decided to initiate the liquidation process in the second meeting itself.
Decision of the Tribunal	<ul style="list-style-type: none"> • Admittedly CoC decided to liquidate the Corporate Debtor without compliance of the resolution process prescribed under the provisions of IB Code. • As per section 25(2)(h)- Invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board to submit a resolution plan or plans. • Admittedly, Resolution Professional did not invite application for resolution plan and straight away decided to go for liquidation in its second meeting itself held on 22.11.2017. • The very object/intention of the Code is to revive a company under the CIRP and not to liquidate it. In the instant case it is clear that the resolution professional has omitted to perform his statutory duties and responsibilities nor the CoC seems to have shown much interest and made efforts to achieve the object of the Code for exploring the possibilities for revival of the company specifically when the suspended management of the company has suggested that there is chance for revival of the company and the company may be able to fetch more than liquidation value without investing extra money from bank and by investing other investors as the company was having 75 contracts

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	<p>of transportation for business and if considered the CD company can be made as going concern.</p> <ul style="list-style-type: none">• It is amply clear that the Resolution Professional has not invited prospective resolution applicants as per Section 25 of the IB Code. Therefore, the Resolution Professional is hereby directed to act as per Section 25 of the IS Code and give an opportunity to the prospective resolution applicant, if any, received by him and submit the same before CoC as per mandate of the Code.
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