



# Analysis of NCLT & NCLAT orders on IBC, 2016



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# Agenda



- 1) Operating Provisions of IBC 2016 - Recap
- 2) Case Study
- 3) Grounds for Rejection
- 4) Q & A

# **Case Analysis – Financial Creditor matters**

# Case Study 1

**Innoventive Industries Ltd Vs ICICI Bank Anr.**

# Case Study 1: Innoventive Industries Ltd Vs ICICI Bank Anr.

## ➤ Facts of the Case in brief:

- ✓ Innoventive (CD) defaulted in repayment of facilities availed from ICICI Bank to the tune of Rs. 101.92 Crores
- ✓ ICICI Bank (FC) filed application u/s. 7 with NCLT Mumbai for initiation of CIRP

## ➤ Defense by Innoventive:

- ✓ Innoventive intervened in the petition before admitting. Tribunal not served any notice to CD.
- ✓ As on date of filing Debts of Innoventive was suspended under Maharashtra Relief Undertaking (Special Provisions) Act, 1958 for a period of one year
- ✓ Maharashtra Govt has given subsidy to the tune of Rs. 115.36 Crores
- ✓ This suspense was as a measure of preventing unemployment in the Company.
- ✓ Innoventive argued that since “**Industry, Energy and Labour Dept. of Maharashtra**” has passed above relief suspending its liabilities for One year, ICICI Bank should not have invoked this provisions and filed a petition under IBC
- ✓ To substantiate their case, Counsel of Innoventive submitted that
  - Sec 4 of above act provides for Non-obstante Clause with overriding effect.
  - Non-obstante clause in Section 238 of IBC, 2016 and in above Act operates in different fields.

# Case Study 1: Contd..

## ➤ NCLT order – Grounds of admission and the Case in brief:

- ✓ Bench observed that both IBC and Relief act has non-obstante Clauses
- ✓ Code being a later legislation would prevail over Relief Undertaking Act
- ✓ Object of Relief Undertaking Act is to prevent unemployment, - passing of order U/s. 7 of Code will not cause any obstruction to their employment until 180 days even if the Company goes in liquidation
- ✓ **Liability suspended** in Relief Undertaking Act is **being inconsistent with the default occurred** to the debt payable to the Creditor
- ✓ **Bench noted that the Innoventive defaulted the debt** and hence admitted the application
- ✓ Appointed IRP and Moratorium was announced.

# Case Study 1: Appeal to NCLAT

## ➤ Innoventive appealed to NCLAT, Delhi on the following grounds:

- ✓ Tribunal Passed order without notice to appellant against the Principles Natural justice as stipulated u/s. 424 of CA, 2013 [NCLT and NCLAT are guided by CPC and Pri of Natural Justice]
- ✓ Serious civil consequences ensue due to public announcement of the initiation of CIRP and appointment of IRP to manage affairs
- ✓ Tribunal being a creation of CA, 2013 is bound by Section 420 which stipulates 'reasonable opportunity of being heard' to be given to all parties before passing order.
- ✓ Section 424 of CA, 2013 grants liberty to Tribunal to **regulate its own procedure** so these section cast a duty on Tribunal to serve a notice
- ✓ Maharashtra Relief Undertaking Act being **beneficial piece of legislation** will prevail over IBC, 2016
- ✓ Maharashtra Relief Undertaking Act being a legislation referable under Entry 24 of List II to Schedule & of the Constitution operates in different field
- ✓ **Non-application of mind by Tribunal** as Section 7 cast a **duty on tribunal to ascertain** the default, which is not possible without verifying the documents with CD
- ✓ **No material with regard to record of default in IU** is submitted by ICICI Bank

# Case Study 1: Appeal at NCLAT

## ➤ NCLAT Findings:

- ✓ Appellate Tribunal reviewed various Supreme Courts judgements submitted by ICICI Bank Counsel and found that as the initiation of CIRP will adverse consequences, **Tribunal should adopt cautious approach and ensure adherence to Principals of Natural Justice.**
- ✓ In this as the Innoventive intervened before the admission of case and the Tribunal heard the objections, **mere absence of notice may not make the Tribunal order illegal.**
- ✓ Maharashtra Relief undertaking Act is a state legislation. **IBC 2016 is union Act and legislated later** so the non-obstante clause in 238 will prevail over Maharashtra Relief Undertaking Act
- ✓ Adjudicating Authority is required to satisfy the following conditions before admitted the petition:
  - Whether a default has occurred?
  - Whether an application is complete? And
  - Whether any disciplinary proceedings against IRP?
- ✓ Proceeding before Tribunal are not adversarial proceedings
- ✓ Appeal dismissed as it finds no merits in it.



# Case Study 2

Urban Infrastructure Trustee Ltd (FC)

**Vs**

Neelakanth Township and Construction Pvt Ltd. (CD)

# Case Study 2: Urban Infrastructure Trustee Ltd (FC) vs Neelakanth Township and Construction Pvt Ltd. (CD)

## ➤ Facts of the Case in brief:

- ✓ Neelakanth issued Optionally Fully Convertible Debentures (OFCDs) of Rs. 100/- each to FC
- ✓ Neelakanth defaulted in repayment on maturity
- ✓ FC has filed the petition u/s. 7 for initiation of CIRP

## ➤ Objections by Neelakanth:

- ✓ **No evidence of proof** that they have committed default
- ✓ **No Stamp duty** is paid on Debentures and hence they are admissible as an evidence as provided in Section 35 of the Indian Stamp Act
- ✓ Basing on the Debenture Certificate **3 Years limitation period has expired** and hence this petition is liable to be dismissed
- ✓ **Default showing** in the Balance Sheet **does not amount to acknowledgement of debt**
- ✓ **Claim** for repayment was **already been disputed under Section 21** of Arbitration and Conciliation Act, 1996 and arbitration proceedings have commenced.

# Case Study 2: Urban Infrastructure Trustee Ltd (FC) vs Neelakanth Township and Construction Pvt Ltd. (CD)

## ➤ NCLT Findings:

**NCLT heard both the parties and decided to examine and answer the following questions:**

- ✓ Whether enough evidence u/s. 7 is submitted?
- ✓ Whether deficiency of Stamp Duty will invalidate the debenture certificates or not?
- ✓ Whether debt is time barred or not?
- ✓ Whether pendency of Arbitration Proceedings will have bearing on this proceedings?
- ✓ Whether applicant herein can file the application as FC while he is continuing as one of the Shareholder?

# Case Study 2: Urban Infrastructure Trustee Ltd (FC) vs Neelakanth Township and Construction Pvt Ltd. (CD)

## ➤ NCLT Findings:

### ❖ Whether enough evidence u/s. 7 is submitted?

- ✓ CD consistently showing the default of repayment of OFCDs in their Annual Reports and notes of the Financial Statements despite debentures matured in the past
- ✓ The CD counsels' contention that 'record or evidence of default' appearing in Section 7 (3) (a) cannot in any manner be read to mean 'any other document or any other evidence' as contemplated under Section 240 (2) (f) of code.
- ✓ As CD consistently showing the default of repayment of OFCDs in their Annual Reports and notes to the Financial Statements, it cant say that 'record or evidence of default' as specified under the regulations or rules has not been provided
- ✓ Reg 8 of IRP for CP regulation provides that financial statements is one of the basis for evidence of debt.

# Case Study 2 contd..

## ➤ NCLT Findings:

### ❖ **Whether deficiency of Stamp Duty will invalidate the debenture certificates or not?**

- As the OFCDs are unlisted and hence not a marketable security and requires no Stamp Duty
- More over OFCDs are already matured so, stamp duty not paid contention would not arise

### ❖ **Whether debt is time barred or not?**

- ✓ As the debt is shown due in FS for 2015-16 which are *rem in nature* it is to be construed as an acknowledgment of debt

### ❖ **Whether pendency of Arbitration Proceedings will have bearing on this proceedings?**

- ✓ Combined reading of Section 63, 231 and 238 of the Code provides that no Civil Court has jurisdiction in respect of matters in IBC
- ✓ Pendency of any proceedings before any court will not have any bearing

### ❖ **Whether applicant herein can file the application as FC while he is continuing as one of the Shareholder?**

- ✓ There is no legal bar against this applicant even though 90% of the fund risen is though this claim

# **Case Analysis – Operational Creditor Matters**

# **Case Study 3**

**Uttam Galva Steel Ltd.**

**Vs**

**DF Deutsche Forfait AG and Anr.**

# Case Study 3: Uttam Galva Steel Ltd Vs DF Deutsche Forfait AG and Anr.

## ➤ Facts of the Case in brief:

- ✓ DF Deutsche Fortait AG (Deutsche) and Misr Bank Europe GmbH (Misr Bank) are Operational Creditors
- ✓ Op Cs filed application u/s. 9 for initiation of CIRP for default of USD 1,65,42,886.33 (principle plus interest) towards supply of 20,000 tons of prime steel billet supplied by a German Company **AIC Handels GmbH**
- ✓ AIC Handels GmbH entered into *forfeiting Agreement* with Deutsche, which Uttam Acknowledged
- ✓ Later Deutsche assigned part of receivable to Misr Bank by entering into *forfeiting agreement* with, which Uttam has not acknowledged.
- ✓ Both Deutsche and Misr Bank filed application u/s. 8 with NCLT Mumbai for initiation of CIRP



# Case Study 3: Uttam Galva Steel Ltd Vs DF Deutsche Forfait AG and Anr.

## ➤ Defense by Innoventive:

- ✓ Goods delivered are to 3<sup>rd</sup> Party namely M/s. Aartee Commodities Ltd and not to Uttam
- ✓ Subsequent assignment to Misr Bank is not valid as Uttam has not acknowledged by it
- ✓ Uttam has timely raised notice of dispute within 10 days after receipt of demand notice u/s. 8
- ✓ Petition is incomplete as no affidavit stating no notice of demand has not been filed by OCs
- ✓ Deutch and Misr Bank are not Operational Creditors of Uttam
- ✓ Deutch and Misr Bank never initiated recovery proceedings until this petition filed
- ✓ Since Deutch further assigning is dispute in fact not to be tried u/s. 9
- ✓ Sale contract is governed by English Law
- ✓ Interest on principle was not admitted by Uttam
- ✓ Power of Attorney given to OCs does not specifically provided for approaching NCLT under IBC
- ✓ Uttam is listed Company providing employment 1,4000 people and has impeccable track record

# Case Study 3: Uttam Galva Steel Ltd Vs DF Deutsche Forfait AG and Anr.

## ➤ NCLT Mumabi Bench Analysis of IBC, 2016:

- ✓ There can't be any pleading part in FORMS filed u/s 7, 9 & 10
- ✓ No pleading or defending party, the terminology like Petitioner / Respondent or plaintiff / defendant is not present in the CODE
- ✓ IBC does not provide that proceedings under IBC are adversarial proceedings and no law in India provides that Court proceedings are adversarial proceedings
- ✓ We can't hang on to the conventional approach which has been inherent in us that a legal proceedings shall be adversarial only, we are governed by democratic system, henceforth we have to go by the mandate given by legislature
- ✓ The definition of "dispute" includes a suit or arbitration proceedings, now point for determination is as to whether the word "includes" is extensive as generally understood or in any other way?
- ✓ On perusal of Section 7,8,9 & 10 the word "Dispute" nowhere appears except in Section 8 & 9 and hence the definition has to be understood in a meaningful way.

# Case Study 3: Uttam Galva Steel Ltd Vs DF Deutsche Forfait AG and Anr.

## ➤ NCLT Mumabi Bench Analysis of IBC, 2016:

- ✓ Tribunal disagrees with the view that the word “and” should be read as “or” so as to harmonise with the inclusive definition to the word “dispute”
- ✓ NCLT finds that “**definition section will not govern the substantive law**”
- ✓ Definition has to be **understood in the context of substantive law**
- ✓ “**Dispute is a genesis, pendency of suit or arbitration proceedings are species.**”
- ✓ If CD reply is given denying the dispute despite default occurrence is clear, does it mean that no application can be filed by any Op C even though the Op C makes a case of default occurrence?
- ✓ If this is so, **it will be virtually ousting Op C filing any case u/s. 9.** If this scenario emerges, then it will be nothing but throwing this law into dust bin.
- ✓ Though there are many decisions of Supreme Court holding that the word ‘includes’ is extensive in nature, there are **equally many number of cases saying that this word has to be understood in the context it is applied.**
- ✓ Section 8 is cause of action to Section 9. So if any provision in Sec 9 appears inconsistent that provision has to be read in harmony with Section 8
- ✓ A miss out in one case can’t become a ratio to repeat the same mistake again and defeat the

# Case Study 4

Mr. Sanjay Kumar Ruia  
Chartered Accountant

Vs

M/s. Magna Opus Hospitality Private Ltd.

# Case Study 4: Mr. Sanjay Kumar Ruia vs Magna Opus Hospitality Pvt Ltd.

## ➤ Facts of the Case in brief:

- ✓ Mr. Sanjay Kumar Ruia is a Chartered Accountant and Op Creditor
- ✓ Op C has provided Professional Services and Advisory Services to C D
- ✓ OC defaulted in payment to Op C
- ✓ NCLT directed Op C to serve notice to C D
- ✓ Amount involved is Professional Fee of Rs. 2,29,345 and Rs. 38,44, 389/- toward Advisory Services
- ✓ Op C claim that amount outstanding against CD is in the nature of Professional Fees
- ✓ “Operation Debt” means a claim in respect to provision of goods or services including employment...
- ✓ The definition of “Service” includes the professional services rendered by Chartered Accountant

# Case Study 4: Mr. Sankay Kumar Ruia vs Magna Opus Hospitality Pvt Ltd.

## ➤ NCLT Mumbai Bench Findings:

- ✓ Professional services provided by a Chartered Accountant definitely fall under the expression “Services” as incorporated in “Operational Debt” defined under Section 5 (21)
- ✓ Once it is held that the impugned debt falls within the ambit of “Operational Debt” it is to be adjudicated under Section 8 and 9 of IBC, 2016
- ✓ After the expiry of 10 days period, Op C has not received any payment nor notice of existence of dispute
- ✓ Application admitted and declared CIRP commenced
- ✓ IRP appointed

# Case Study 5

M/s Surendra Trading Company

Vs

M/s. JL Jute Mills Company Ltd.

# Case Study 5: Mr. Sankay Kumar Ruia vs Magna Opus Hospitality Pvt Ltd.

## ➤ Facts of the Case in brief:

- ✓ Mr. Sanjay Kumar Ruia is a Chartered Accountant and Op Creditor
- ✓ Op C has provided Professional Services and Advisory Services to C D
- ✓ OC defaulted in payment to Op C
- ✓ NCLT directed Op C to serve notice to C D
- ✓ Amount involved is Professional Fee of Rs. 2,29,345 and Rs. 38,44, 389/- toward Advisory Services
- ✓ Op C claim that amount outstanding against CD is in the nature of Professional Fees
- ✓ “Operation Debt” means a claim in respect to provision of goods or services including employment...
- ✓ The definition of “Service” includes the professional services rendered by Chartered Accountant



# Case Study 5: Mr. Sankay Kumar Ruia vs Magna Opus Hospitality Pvt Ltd.

## ➤ NCLT Mumbai Bench Findings:

- ✓ Professional services provided by a Chartered Accountant definitely fall under the expression “Services” as incorporated in “Operational Debt” defined under Section 5 (21)
- ✓ Once it is held that the impugned debt falls within the ambit of “Operational Debt” it is to be adjudicated under Section 8 and 9 of IBC, 2016
- ✓ After the expiry of 10 days period, Op C has not received any payment nor notice of existence of dispute
- ✓ Application admitted and declared CIRP commenced
- ✓ IRP appointed

# **Case Analysis – Corporate Debtor Matters**

# Case Study 6

## Unigreen Global Private Limited

# Case Study 1: Unigreen Global Private Ltd.

## ➤ Facts of the Case in brief:

- ✓ Corporate Applicant filed petition u/s. 10 of IBC, 2016 for initiation of CIRP
- ✓ Application in Form 6 prescribed under IBBI (Adjudication Authority) Rules, 2016 was filed with NCLT, Principal Bench, New Delhi

## ❖ NCLT Findings:

- ✓ IBC is to provide, inter alia, for CIRP by FC, Op C and CD
- ✓ CD should disclose the facts like, details of CD, date of incorporation, details of financial creditor and operational creditor, Amount of debt, amount in default, details of security provided, documents in support of existence of Financial Debt and Operational Debt and the amount in default
- ✓ All the above information is required to NCLT to provide for sufficient ground for initiating CIRP
- ✓ Since the process is self initiated all the disclosures must be trust 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

# Case Study 1: Unigreen Global Private Ltd.

## ❖ NCLT Findings:

- ✓ In view of large amount due to Financial Creditors, NCLT directed to give notice to Financial Creditors (4 Banks)
- ✓ NCLT has received objections from the Banks
- ✓ Banks demonstrated before the NCLT that CD has not disclosed the full facts in the petition
- ✓ Banks demonstrated that CD has instituted civil suits deliberately engineered and instigated with a view to remove the properties mortgage from the accountability of the creditors
- ✓ Petitioners Directors have deliberately kept properties mortgaged in a legal entanglement in the form of civil suit
- ✓ NCLT finds that the petitioners have not come with clean hands before this Tribunal in bring out the necessary facts
- ✓ Petition is dismissed
- ✓ As provided in Section 65 a penalty of Rs. 10,00,000/- was imposed on the Corporate Debtor and Directors

# **Case Analysis – Grounds for rejection of petition**

# Grounds for rejection

- Quantum of debt is not the criteria, it is the default which triggers the CIRP
- Operational Debtor can't become a Financial Debtor even though the terms of agreement provides for repayment of amounts paid in case of default
- Any incorrect Insolvency Claims will backfire – ICICI Bank Ltd
- Assured returns are not Financial Debt
- If FC has not nominated the IRP in the application and not filed the requisite records, petition is liable to be rejected
- Improper and incomplete filing of application will run the risk of dismissal of petition
- If debt is time barred as per the provisions of Limitation Act, 1963 the application will be rejected
- If total amount due from 11 Companies is enforced and claimed from one Company, then the petition is not in line with IBC, 2016

# Grounds for rejection

- When the matter is already pending for adjudication between the parties in a court having jurisdiction to adjudicate upon the same matter, then subsequent application on the same cause of action cannot be allowed to proceed
- Not annexing the proof of submission of demand notice is liable to be reject the petition
- If the documents is executed improperly and invoice raised given improper name – petition will be rejected
- Winding-up petition is pending before High Court and petitioner has not taken the leave of Hight Court – petition dismissed
- Non-performance of desired standards of services and any claim for demanding the amount deducted – will be outsider the IBC, 2016
- If jurisdiction of bench is out the relevant bench
- Petitioner suppressed the material fact that she is a Promoter of the Company – rejected
- Tribunal does not have powers to amend the orders of BIFR



# Grounds for rejection

- After Petition is admitted Petition changes to **Representative Suit** and Lis does not remain only between Op C and Op D – **Parker Hannifin India Private Ltd.**

7. After admission of Petition under IBC 2016, the nature of petition changes to representative suit and the lis does not remain only between Operational Creditor and Operational Debtor. Therefore, Operational Creditor and Operational Debtor alone have no right to withdraw the Petition after admission.



*Thank You*