



# **Pronouncements under Insolvency and Bankruptcy Code, 2016: Issue Analysis**



भारतीय दिवाला और सोल्वे अवसलता बोर्ड  
Insolvency and Bankruptcy Board of India

**ICSI INSOLVENCY PROFESSIONALS AGENCY**  
(A wholly owned subsidiary of ICSI and registered with IBI)

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18th November, 2017

## FOREWORD

There are three major sources of law, namely, statutory law, case law and custom. Usually the custom constitutes the bulk of laws relating to markets, but it takes much longer time to develop and acquire sacrosanctity. The statutory law is quite swift once it is decided to have it. The case law, which is a set of rulings of the Courts, is the bridge between the statutory law and custom. It clarifies what is permissible and what is not, and determines a point of law with reference to a transaction or a matter and, therefore, keeps on evolving.

Whenever a new statutory comes into existence, the stakeholders, depending upon their prior experience and at times coloured by their interests, tend to take different views on issues or matters dealt in that law. The judicial authorities settle such differences and thereby streamline the processes for future transactions. In the very first year of the Insolvency and Bankruptcy Code, 2016, the adjudicating authority, namely, National Company Law Tribunal, the appellate authority, namely, National Company Law Appellate Tribunal, and even the Hon'ble Supreme Court have settled several contentious issues. These include the nature of proceedings before the adjudicating authority, extent of principles of natural justice to be followed, the timeline for various tasks in each process under the Code, applicability of law of limitation, the position of various stakeholders, etc. More importantly, they have settled the issues based on sound legal principles with more than adequate elucidation. I am quite influenced by many of their utterances and feel tempted to quote some of them here. I am refraining from doing so as these are well covered in this publication, "Pronouncements under the Insolvency and Bankruptcy Code, 2016 - Issue Analysis", which presents the state of understanding on various issues.

An Insolvency Professional Agency (IPA) is responsible for development and regulation of the profession of insolvency professionals. In the initial days of the implementation of a new law, an IPA needs to operate a very aggressive knowledge management system to capture the emerging knowledge and transfer the learning quickly to its members for their immediate use. This publication of the ICSI IPA is an essential initiative in this direction, and I commend the ICSI IPA and its CEO, Ms. Alka Kapoor for this. I am certain, while serving as a guide for insolvency professionals and other insolvency practitioners, this publication will motivate inquisitive minds to delve deeper into the legal issues that would refine statutory law and custom in the days to come.

*M. S. Sahoo*  
(Dr. M. S. Sahoo)

## PREFACE

The doctrine of precedent is one of the principles that underpins common law. When a law is evolving, the precedents of higher court are binding on and set tone for the pronouncements by lower courts in terms of interpretational issues in law and also brings objectivity in judgments. Such binding precedents are critical especially for any emerging legislation, as the law settles on the basis of legal interpretations.

The Insolvency and Bankruptcy Code, 2016 (Code) is about a year old law and is built on a strong institutional adjudication mechanism. The adjudication mechanism for Corporate Insolvency Resolution Process under the Code is three tier, i.e., National Company Law Tribunal (NCLT), being the Adjudicating Authority, National Company Law Appellate Tribunal (NCLAT) being the Appellate Authority and Supreme Court being the Apex Court.

Since January 2017, there have been significant amount of increase in terms of number of filings under the Code and consequent increase in number of pronouncements by NCLT, NCLAT and the Supreme Court on various issues and rich jurisprudence is evolving fast as large number of issues are getting settled.

One of the critical factors in building effective adjudication process is creating awareness of judicial pronouncements. I am confident that “**Pronouncements under the Insolvency and Bankruptcy Code, 2016 : Issue Analysis**”, a joint publication by Insolvency and Bankruptcy Board of India (IBBI) and ICSI Insolvency Professionals Agency (ICSI IPA), would prove to be extremely helpful and handy for the readers who would be benefited from a quick understanding of issue wise analysis of judgments passed by Hon’ble Supreme Court, Hon’ble High Courts, NCLAT and various benches of NCLT.

I commend the dedicated efforts of the ICSI IPA team led by CS Lakshmi Arun, Head (Education & Training) and comprising of Mr. Amarjeet Singh, Mr. Vinay

Kumar Sanduja Senior Consultants, in preparing the manuscript of this publication. I appreciate and acknowledge the efforts of CS Alka Kapoor, Chief Executive Officer, ICSI IPA and officials of IBBI for thoroughly reviewing this joint publication and making value additions.

I wish grand success for professionals involved in the implementation of the Code.



**CS (DR.) SHYAM AGRAWAL**  
**President**

November 16, 2017

**The Institute of Company Secretaries of India**

## **ABOUT THE BOOK**

The Insolvency and Bankruptcy Code, 2016 (Code) being in its nascent stage, is ever-evolving and various issues are getting settled through judgments and orders pronounced by the Hon'ble Supreme Court of India, National Company Law Appellate Tribunal as well as different benches of National Company Law Tribunal. This has created a situation where it becomes essential to remain updated of these critical pronouncements.

**"Pronouncements under the Insolvency and Bankruptcy Code, 2016 : Issue Analysis"** addresses various issues, including, *inter alia*, the prescriptions as to mandatory/directory time lines; definition of the term 'dispute' whether an inclusive one; repugnancy between the Code and the state laws; principles of natural justice; ambit of moratorium; applicability of Limitation Act; effect of pending winding up petition, etc. which are being settled through different pronouncements.

ICSI Insolvency Professionals Agency, in its perennial efforts to keep the professional fraternity updated about the new and evolving legislation, has come out with this publication, jointly with the Insolvency and Bankruptcy Board of India and it is expected that the publication shall prove to be extremely beneficial to all stakeholders.

In any publication of this kind, there is always scope for further refinement. I would personally be grateful to receive feedback from the readers.



**CS ALKA KAPOOR**  
**Chief Executive Officer**

November 16, 2017

**ICSI Insolvency Professionals Agency**

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## ABBREVIATIONS

|                |   |  |
|----------------|---|--|
| BIFR           | : | Board for Industrial and Financial Reconstruction  |
| CIRP           | : | Corporate Insolvency Resolution Process  |
| Code           | : | Insolvency and Bankruptcy Code, 2016   |
| CoC            | : | Committee of Creditors   |
| DRT            | : | Debt Recovery Tribunal   |
| DRT Act        | : | Recovery of Debts due to Banks and Financial Institutions Act, 1993                                    |
| IBBI           | : | Insolvency and Bankruptcy Board of India   |
| IRP            | : | Interim Resolution Professional  |
| JLF            | : | Joint Lenders Forum  |
| Limitation Act | : | Limitation Act, 1963   |
| NCLT           | : | National Company Law Tribunal  |
| NCLAT          | : | National Company Law Appellate Tribunal  |
| RBI            | : | Reserve Bank of India  |
| RP             | : | Resolution Professional  |
| SARFAESI Act   | : | Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 |

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*CHAPTER - I*

**ISSUES SETTLED THROUGH JUDGMENTS  
PASSED BY  
HON'BLE SUPREME COURT OF INDIA**

**1. Whether a dispute exists only if there is a suit or arbitral proceedings pending, or does it include something more? In other words, whether the definition of term 'dispute' is inclusive or exclusive as per section 5(6) read with section 8 of the Code?**

**Legal Provision(s)**

- Section 5(6) of the Code reads as under::
  - "5. (6) dispute" includes a suit or arbitration proceeding relating to –*
    - (a) the existence of the amount of debt;*
    - (b) the quality of goods or service; or*
    - (c) the breach of a representation or warranty*
- Section 8 (1) of the Code reads as under:
  - "8. (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed."*

**NCLT View**

|   |
|---|
| <b>Term 'dispute' to be inclusive one</b> |
|---|

- ***M/s One Coat Plaster vs. M/s Ambience Private Limited***  
 [Company Application No. (IB) 07/PB/2017]  
 NCLT, Principal Bench, New Delhi  
 [Date of judgment: 1<sup>st</sup> March, 2017]
- ***Philips India Ltd. vs. Goodwill Hospital and Research Centre Ltd.***  
 [CP No. (IB)-03(PB)/2017]  
 NCLT, Principal Bench, New Delhi  
 [Date of judgment: 1<sup>st</sup> March, 2017]

**Observation of NCLT in above cases**

The definition of term 'dispute' is not an exhaustive, but illustrative. It is evident from the expression 'includes' which immediately succeeds the word 'dispute'

|   |
|---|
| <b>Term 'dispute' to be exclusive one</b> |
|---|

- **M/s DF Deutsche Forfait AG & Anr vs. M/s Uttam Galva Steel Ltd.**  
[CP No. 45/I&BP/NCLT/MAH/2017  
NCLT, Mumbai Bench, Mumbai  
[Date of judgment: 10<sup>th</sup> April, 2017]

**Observation of NCLT in above case**

The word 'includes' has to be read as 'means' and therefore, there is 'dispute' only when a suit or arbitral proceedings is pending.

**NCLAT View**

- NCLAT in **Kirusa Software Private Ltd. vs. Mobilox Innovations Private Ltd.** [Company Appeal (AT) (Insolvency) 6 of 2017], decided on 24<sup>th</sup> May, 2017, held that the term 'dispute' is inclusive one and the definition of the term 'dispute' cannot be restricted to a pending suit or arbitral proceeding.
- NCLAT observed as under:

*"31. ...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."*

*35. ...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."*

- However, NCLAT left a question unanswered i.e. what about genuine disputes which have not been raised so far before any court of law or any competent authority?

#### **Supreme Court of India view**

- Hon'ble Supreme Court in ***Mobilox Innovations Private Limited vs. Kirusa Software Private Limited***, [Civil Appeal No. 9405 of 2017] decided on 21<sup>st</sup> September, 2017, provided much required clarity on the expression "existence of dispute" and put to rest the confusion regarding the meaning of term 'dispute' and held that the term 'dispute' is inclusive one and cannot be restricted to pending suit or arbitral proceedings.
- The Apex Court also read the word 'and' in section 8(2) (a) of the Code as 'or' because if a genuine dispute arose few days back to filing of the insolvency application, it would cause extreme hardship to the Corporate Debtor resulting into initiation of CIRP.
- Hon'ble Supreme Court observed as under:
 

*"29. ...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 and Bankruptcy Code, 2016 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..."*
- It was further held by Apex Court that at the initial stage of admission, NCLT is to only see whether there is a plausible contention which requires further investigation and that the 'dispute' sought to be raised is not a patently feeble legal argument or an assertion of fact unsupported by evidence.
- **Thus, the definition of the term 'dispute' is inclusive.**

## 2. Whether in case of repugnancy, the provisions of Central Act i.e. Insolvency and Bankruptcy Code, 2016 would prevail over the provisions of any state law?

### Legal Provision(s)

- The Constitution of India has earmarked the subjects on which the Central Government and the State Government can make laws. There are some subjects on which both, the Central Government and the State Government can make laws. These subjects are mentioned in 7<sup>th</sup> Schedule to constitution of India. List I contains subjects on which Central Government can make laws, List II contains subjects on which State Government can make laws while List III contains subjects on which both, the Central Government and State Government can make laws.
- The Code has been enacted by the Central Government under Entry 9, List III in 7<sup>th</sup> Schedule to Constitution of India under the subject "*Bankruptcy and Insolvency*"
- Section 238 of the Code reads as under:

*"238. The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

### NCLAT view

- In *M/s Innoventive Industries Ltd. vs. ICICI Bank & Anr.* [Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017], decided on 15<sup>th</sup> May, 2017, when ICICI Bank initiated proceeding under the Code against M/s Innoventive Industries Ltd. ("**Innoventive**"), it was already taking benefit under Maharashtra Relief Undertaking (Special Provisions) Act ("**State law**"). Under the State law, the State Government could take over the management of the relief undertaking (i.e. Innoventive), after which a temporary moratorium in much the same manner as contained in section 13 and 14 of the Code takes place under section 4 of the State Act. Thus, the State law covered the same field as the Code.
- NCLAT, however, held that the State law operates in different field from the Code and that, there was no repugnancy between the State law and the Code.
- The above judgment was challenged before the Hon'ble Supreme Court of India by Innoventive.

**Supreme Court of India view**

- In *M/s Innoventive Industries Ltd. vs. ICICI Bank & Anr.*, [Civil Appeal No. 8337-8338 of 2017] decided on 31<sup>st</sup> August, 2017, the issue before the Hon'ble Supreme Court was whether there was conflict between the State law and the Code and if yes, which law would prevail.
- In order to ascertain repugnancy, the Hon'ble Supreme Court considered the field of operations of the two legislations.
- The Hon'ble Supreme Court held that there was conflict between the State law (in this case) and the Code in as much as, by giving effect to the State law, the plan or scheme which is adopted under the Code, will directly be hindered and/or obstructed.
- Once it was held that both the statutes i.e. the Central law and the State law covered same field and that there was repugnancy, the Hon'ble Supreme Court went on to examine the case laws to decide as to which statute shall prevail. The Hon'ble Supreme Court culled out the propositions with regard to repugnancy between the Central law and the State law and observed at para 50(viii) as under:

*"50. The case law referred to above, therefore, yields the following propositions:*

*(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..."*

- The Hon'ble Supreme Court also relied upon section 238 of the Code and observed at para 55 as under:

*"55. ...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.”*

- **Thus, it was held that in view of section 238 of the Code relating to non obstante clause, the Code shall prevail over an earlier State law covering the same field.**

### 3. Whether the time period of 7 days given to a Financial Creditor/ Operational Creditor/Corporate Applicant to rectify defects in an application is mandatory or directory?

#### Legal Provision(s)

- Proviso to Section 7(5) of the Code reads as under:

*"7. (5) Where the Adjudicating Authority is satisfied that – (a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or (b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:*

*Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority."*

- Proviso to Section 9(5) of the Code reads as under:

*"9. (5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order –*

*Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority."*

#### NCLAT view

- NCLAT, in **J K Jute Mills Company Limited vs. M/s Surendra Trading Company** [Company Appeal (AT) No. 09 of 2017], decided on 1<sup>st</sup> May, 2017, while considering various timelines under the Code, held that, the period of 7 days given to a Financial Creditor/Operational Creditor/ Corporate Applicant who has filed an application, to cure the defects in such application, is mandatory and failure to remove such defects entails rejection of application.

#### Supreme Court view

- In appeal before the Hon'ble Supreme Court in **M/s Surendra Trading Company vs. M/s Juggilal Kamlapat Jute Mills Co. Ltd. & Ors.** [Civil

Appeal No. 8400 of 2017], decided on 19<sup>th</sup> September, 2017, Hon'ble Supreme Court, while only considering the time period of 7 days given to an applicant to cure the defects, held, that the said time period is not mandatory and is merely directory and the failure to cure the defects in 7 days time period would not entail dismissal of application.

- The Hon'ble Supreme Court observed that it has to be seen whether the rejection would be treated as rejection of application on merits thereby debarring filing of fresh application or the same is merely an administrative order. In the former case, it would lead to travesty of justice as even though the case may have merits, the applicant would be shown the door without adjudication. If it is the latter case, then rejection of application in the first instance is not going to serve any purpose as applicant would be entitled to file fresh application which would have to be entertained. Thus, in either case, no purpose is served by treating the aforesaid provision as mandatory.
- It was observed by Hon'ble Supreme Court at para 20 as under:

*“(20) We are not able to decipher any valid reason given while coming to the conclusion that the period mentioned in proviso is mandatory. The order of the NCLAT, thereafter, proceeds to take note of the provisions of Section 12 of the Code and points out the time limit for completion of insolvency resolution process is 180 days, which period can be extended by another 90 days. However, that can hardly provide any justification to construe the provisions of proviso to sub-section (5) of Section 9 in the manner in which it is done. It is to be borne in mind that limit of 180 days mentioned in Section 12 also starts from the date of admission of the application. Period prior thereto which is consumed, after the filing of the application under Section 9 (or for that matter under Section 7 or Section 10), whether by the Registry of the adjudicating authority in scrutinising the application or by the applicant in removing the defects or by the adjudicating authority in admitting the application is not to be taken into account. In fact, till the objections are removed it is not to be treated as application validly filed inasmuch as only after the application is complete in every respect it is required to be entertained. In this scenario, making the period of seven days contained in the proviso as mandatory does not commend to us. No purpose is going to be served by treating this period as mandatory. In a given case there may be weighty, valid and justifiable reasons for not able to remove the defects within seven days. Notwithstanding the same, the effect would be to reject the application.”*

- However, the Hon'ble Supreme Court also put a rider. It held that while refilling the application after removing objections, applicant would be required to file an application in writing showing sufficient cause as to why the applicant could not remove the objections within seven days. When such an application comes, NCLT is to decide whether sufficient cause is shown or not.
- **Thus, the period of 7 days notice period granted by NCLT to Financial Creditor, Operational Creditor, Corporate Applicant for curing defects in an application filed under section 7, 9 or 10 of the Code is directory, subject to the rider above mentioned.**

#### **4. Whether institution of suits or continuation of pending suits or proceedings against the Corporate Debtor, including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority is barred upon imposition of moratorium?**

##### **Legal Provision(s)**

- Section 14 (1) (a) of the Code reads as under:

*"14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: –*

*(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;"*

##### **Supreme Court view**

- In ***Alchemist Asset Reconstruction Company Ltd. vs. M/s Hotel Gaudavan Pvt. Ltd.*** [Civil Appeal No. 16929 of 2017], decided on 23<sup>rd</sup> October, 2017, application under the Code was filed by Alchemist Asset Reconstruction Company Ltd., Financial Creditor ("**Alchemist ARC**") against M/s Hotel Gaudavan, the Corporate Debtor ("**Hotel Gaudavan**") and the same was admitted by NCLT resulting in imposition of moratorium.
- Meanwhile despite the moratorium, a letter was issued by Hotel Gaudavan invoking arbitration clause between the parties and an Advocate was appointed as Sole Arbitrator who entered upon the reference. Further, Hotel Gaudavan managed to get an FIR registered against the IRP.
- The arbitral proceedings ended against the Alchemist ARC and an appeal was filed under section 37 of the Arbitration and Conciliation Act.
- The Hon'ble Supreme Court observed that the moment petition is admitted, the moratorium that comes into effect under section 14 (1) (a) of the Code, expressly interdicts institution or continuation of pending suits or proceedings against the corporate debtors.
- Apart from setting aside the order of the District Judge in relation to arbitration proceedings instituted after imposition of the moratorium under the Code, Hon'ble Supreme Court quashed F.I.R. against IRP and observed that F.I.R. has been taken in a desperate attempt to see that the IRP does not continue with the proceedings under the Code which are strictly time bound.

- Hon'ble Supreme Court also gave directions that the steps that have to be taken under the Code will continue unimpeded by any order of any other Court.
- **Thus, after the imposition of moratorium under the Code, no suit or proceedings against the Corporate Debtor shall be instituted or continued.**

*CHAPTER -II*

**ISSUES SETTLED THROUGH JUDGMENTS  
PASSED BY  
HON'BLE HIGH COURTS**

**1. Whether section 7 of the Code is unconstitutional being violative of principles of natural justice since section 7 does not afford any opportunity of hearing to a Corporate Debtor before admission of application for initiation of CIRP?**

**Legal Provision(s)**

- Section 7 (1) of the Code reads as under:

*"7. (1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.*

*Explanation – For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor."*

- Section 424 (1) of the Companies Act, 2013 reads as under:

*"424. Procedure before Tribunal and Appellate Tribunal. –*

*(1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure"*

**High Court's view**

- In ***Sree Metaliks Limited and Anr. vs. Union of India and Anr.*** [Writ Petition No. 7144 of 2017] decided on 7<sup>th</sup> April, 2017, the Hon'ble High Court of Calcutta considered the question of constitutional validity of section 7 of the Code on the ground of violation of principles of natural justice.
- The vires of section 7 of the Code were challenged on the ground that it does not afford any opportunity of hearing to a Corporate Debtor and thus, violates principles of natural justice.
- Hon'ble High Court held that since NCLT and NCLAT are constituted under the Companies Act, 2013 and procedure before these authorities is guided

by Section 424 of Companies Act, 2013 which mandates following the principles of natural justice.

- Hon'ble High Court observed that even though NCLT is not bound to follow code of civil procedure, it can regulate its procedure subject to the provisions of section 424 of the Companies Act, 2013, which requires adherence to the principles of natural justice.
- Hon'ble High Court further observed that where the statute does not expressly bar the adherence to the principles of natural justice, the same can and should be read into it.
- **Thus, provisions of section 7 of the Code are not unconstitutional and the principles of natural justice are implicit in section 7 of the Code.**

## 2. Territorial jurisdiction of NCLT Benches

### Legal Provision(s)

- Section 60 (1) of the Code reads as under:

*“60. (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.”*

### High Court's view

- In ***Kusum Products Limited (KPL) vs. Union of India and Anr.*** [W.P. (c) No. 236 of 2017], decided on 29th August, 2017, a scheme for rehabilitation under the Sick Industrial Companies (Special Provisions) Act, 1985 had been sanctioned by the Board for Industrial and Financial Reconstruction (BIFR) with regard to the Kusum Products Limited, Corporate Debtor – (“**Kusum Products**”) vide order passed in 2012.
- The Income Tax authorities proceeded against Kusum Products for certain tax liabilities. However, Kusum Products contended that it was not liable for the same in view of the scheme being sanctioned by BIFR.
- Kusum Products filed writ petition before the Hon'ble High Court of Delhi for grant of certain reliefs under the Income Tax Act in compliance with the scheme sanctioned by BIFR.
- The Hon'ble High Court observed that the scheme of the Code is such that the Corporate Debtor shall approach the NCLT in whose jurisdiction, its registered office is situated and in the present case, the registered office of the Kusum Products was situated in West Bengal. Thus, Kusum Products has no option but to approach NCLT, Calcutta Bench for appropriate orders.
- **Thus, the Corporate Debtor shall approach the NCLT having territorial jurisdiction over the place where its registered office is located.**

*CHAPTER - III*

**ISSUES SETTLED THROUGH JUDGMENTS  
PASSED BY  
NATIONAL COMPANY LAW APPELLATE  
TRIBUNAL**

## 1. Whether Limitation Act is applicable to the proceedings under the Code?

### Legal Provision(s)

- Section 60 (6) of the Code reads as under:

*“60. (6) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.”*

- Section 433 of the Companies Act, 2013 reads as under:

*“433. Limitation – The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be.”*

### NCLAT view

**Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustees Ltd. [Company Appeal (AT) (Insolvency) No. 44 of 2017] decided on 11<sup>th</sup> August, 2017**

- In the aforesaid case, an application was filed by Urban Infrastructure Trustees Ltd. , Financial Creditor, (“**Urban Infrastructure**”) – under section 7 of the Code against Neelkanth Township and Construction Pvt. Ltd, Corporate Debtor (“**Neelkanth Township**”).
- The application was filed in the year 2017 on the basis of debenture certificates issued by Neelkanth Township., which were due for redemption in the years 2011, 2012 and 2013. NCLT accepted the application. Before NCLAT, issue raised was whether the Limitation Act was applicable to the proceedings under the Code or not.
- NCLAT held that since the Code is not an Act for recovery of money claim and it relates to initiation of CIRP, hence default in payment of debt with continuous course of action cannot be barred by limitation.
- The above case was, however, appealed before the Hon’ble Supreme Court as **Neelkanth Township and Construction Pvt. Ltd. Versus Urban Infrastructure Trustees Ltd.** [Civil Appeal No. 10711 of 2017], decided on

23<sup>rd</sup> August, 2017. The Hon'ble Supreme Court of India dismissed the appeal. However, it was held that the question i.e. whether the Limitation Act is applicable to proceedings under the Code is left open.

**M/s Speculum Plast Pvt. Ltd. vs. PTC Techno Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 47 of 2017], decided on 7<sup>th</sup> November, 2017**

- In the aforesaid case, the precise question for consideration before the NCLAT was whether Limitation Act is applicable for triggering CIRP under the Code.
- NCLAT, after hearing the submissions of Ld. Amicus Curiae, observed that for determination of the issue, it is poignant to decide whether the Code is a 'self-contained' Code or not. To answer this query, the NCLAT noted the recent decision of the Hon'ble Supreme Court in **M/s Innoventive Industries Ltd. vs. ICICI Bank & Anr.** and held that the Insolvency and Bankruptcy Code, 2016 is a complete code in itself.
- Thereafter, NCLAT took note of the decision of Hon'ble Supreme Court in **Hukumdev Narain Yadav vs. Lalit Narain Mishra** (1974) 2 SCC 133 wherein it was held that even if there exists no express exclusion in the special law, the court reserves the right to examine the provisions of the special law, to arrive at the conclusion as to whether the legislative intent was to exclude the operation of the Limitation Act, 1963 or not.
- Next, the NCLAT went on to examine the legislative intent whether the Code excludes the operation of the Limitation Act. To decipher that, NCLAT took note of the provisions of previous Act on insolvency i.e. the Presidency-Towns Insolvency Act, 1909 ('1909 Act') and Provincial Insolvency Act, 1920 ('1920 Act'). NCLAT noted that a completely different time frame has been provided under the Code for various stages. Further, NCLAT noted that the provisions of computing the period of limitation prescribed for any suit or legal proceedings, as ordered to be excluded in the 1909 Act and 1920 Act, have been retained with appropriate modification under sub-section (6) of section 60 of the Code.
- As regards the contention with regard to application of section 433 of the Companies Act, 2013, NCLAT observed that by section 249 of the Code, section 24 of the DRT Act, which contained provisions with regard to applicability of Limitation Act, has been amended and the section 24 of the DRT Act has not been amended. Similar change was noted with regard to the changes made in SARFAESI Act.
- NCLAT looked at the issue from another angle. It observed that if the Limitation

Act is held to be applicable, then, one may take a plea that default of debt is barred by limitation to initiate CIRP under section 7 and 9 of the Code. However, such a stand cannot be taken where corporate applicant itself applies for initiation of CIRP under section 10 of the Code. The law of limitation cannot be made applicable for filing an application under section 10, which otherwise will render the provisions of section 10 of the Code redundant.

- Thus, the NCLAT held that the Limitation Act is not applicable for initiation of CIRP. However, at the same time, NCLAT held 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 of the Code can be entertained after long delay, amounting to laches, and thereby the person forfeited his claim.
- **Thus, as of now, the law is settled in terms of the judgment of NCLAT that Limitation Act is not applicable to proceedings under the Code in absence of any authoritative pronouncement by Hon'ble Supreme Court.**

## 2. Whether the time period of 14 days provided under the Code to NCLT to either admit or reject an application is mandatory or directory?

### Legal Provision(s)

- Section 7 (4) of the Code reads as under:

*“7. (4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).”*

- Similar time period is provided in case of filing of application by an Operational Creditor or a Corporate Applicant under sub-section (5) of section 9 or sub-section (4) of section 10 of the Code respectively.

### NCLAT view

- In ***J K Jute Mills Company Limited vs. M/s Surendra Trading Company*** [Company Appeal (AT) No. 09 of 2017], decided on 1<sup>st</sup> May, 2017, an application was filed by M/s Surendra Trading Company, Operational Creditor, (“**Surendra Trading**”) against J K Jute Mills Company Limited, Corporate Debtor (“**J K Jute**”). However, the application was not decided by NCLT, Allahabad Bench, within the period of 14 days and hence, J K Jute filed an appeal contending that the NCLT had become *functus officio*.
- In the appeal, NCLAT while considering various time lines under the Code, held that the time period of 14 days, within which NCLT is mandated to either admit or reject an application filed by Financial Creditor/Operational Creditor/Corporate Applicant, is only directory and not mandatory.
- NCLAT reasoned that since the nature of provisions contained in Sub-section (4) of Section 7, sub-section (5) of section 9 and sub-section (4) of section 10 of the Code are merely procedural in nature, the same cannot be treated to be a mandate of law and the object behind these provisions is only to prevent delay in hearing and disposal of cases.
- It was observed by NCLAT at para 39 as under:

*“39. The time period of 14 days prescribed under sub-section (4) of the section 7, sub-section (5) of section 9 and sub-section (4) of section 10 are 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’. We have noticed that the Registry*

*is required to find out whether the application is in proper form and accompanied with such fees as may be prescribed. So, the Registry will take certain time and during such period, the applications are not brought to the notice of the 'Adjudicating Authority.' Therefore, 14 days' period granted to the Adjudicating Authority under the provisions of the Code cannot be counted from the 'date of filing of the application' but from the date when such application is presented before the Adjudicating Authority i.e., 'the date on which it is listed for admission/order'.*

- **Thus, the time period of 14 days within which NCLT is mandated to either admit or reject application under section 7, 9 or 10 of the Code is directory.**

### 3. Whether the time period of 180 days or 270 days (including 90 days extended period), provided under the Code for completion of CIRP is mandatory or directory?

#### Legal Provision(s)

- Section 12 of the Code reads as under:

*"12. (1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.*

*(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of seventy-five per cent. of the voting shares.*

*(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:*

*Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once."*

#### NCLAT view

- NCLAT in ***J K Jute Mills Company Limited vs. M/s Surendra Trading Company*** [Company Appeal (AT) No. 09 of 2017], decided on 1<sup>st</sup> May, 2017, while considering various time lines under the Code, held that the time period of 180 days, within which the CIRP must be completed, is mandatory.
- Failure to complete the CIRP within the above period of 180 days, unless extended by a onetime extendable period of 90 days, would entail liquidation of the Corporate Debtor under the provisions of the Code.
- It was observed by NCLAT at para 46 of the above case as under:

*"46. The resultant effect of non-completion of insolvency resolution process within the time limit of 180 days + extended period of 90 days i.e. total 270 days will result in to initiation of liquidation proceedings under section 33. As the end result of Resolution Process is approval of*

*resolution plan or initiation of liquidation proceedings, we hold the time granted under section 12 of the Code is mandatory.”*

- **Thus, the time period of 180 days or 270 days (including 90 days extended period) for completion of CIRP is mandatory.**

**4. Whether a Lawyer/Chartered Accountant/Company Secretary can issue demand notice under section 8 of the Code to Corporate Debtor, before filing an application under section 9 of the Code?**

**Legal Provision(s)**

- Section 8 of the Code read as under:

*“8.(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.*

*(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor –*

- (a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;*
- (b) the repayment of unpaid operational debt –*
  - (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or*
  - (ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.*

*Explanation – For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.*

- Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 reads as under:

*“5. Demand notice by operational creditor –*

- (1) An operational creditor shall deliver to the corporate debtor, the following documents, namely.-*
  - (a) a demand notice in Form 3; or*
  - (b) a copy of an invoice attached with a notice in Form 4.*

- (2) *The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to the corporate debtor,*
- (a) *at the registered office by hand, registered post or speed post with acknowledgement due; or*
- (b) *by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.*
- (3) *A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any."*

#### **NCLAT view**

- In ***Uttam Galva Steels Limited vs. DF Deutsche Forfait AG & Anr.*** [Company Appeal (AT) (Insolvency) 39 of 2017], decided on 28<sup>th</sup> July, 2017, an application was filed by two Operational Creditors namely M/s DF Deutsche Forfait AG ("**Deutsche**") and Misr Bank Europe GmbH ("**Misr Bank**") against Uttam Galva Steels Limited, Corporate Debtor, ("**Uttam Galva**") stating that the Corporate Debtor had defaulted in making payment of an amount payable towards 20,000 tons of prime steel billets supplied by German Company named AIC Handels GmbH ("**AIC Handels**").
- The debt, running to the tune of around Rs. 110 crores, was initially assigned by AIC Handels to Deutsche by entering into a discount agreement. Thereafter Deutsche, in turn, subsequently assigned a part of this debt to Misr Bank. This is how the application came to be filed by above two Operational Creditors.
- The application was accepted by NCLT and CIRP was initiated against Uttam Galva .
- In appeal before NCLAT, a contention was raised by Uttam Galva that the demand notice under section 8 of the Code was issued by a law firm, whereas, the demand notice could have only been issued by the Operational Creditor or any person authorized by it.
- NCLAT, upon perusal of Form 3 and Form 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, observed that the Operational Creditor can either apply himself or through a person authorized to act on behalf of Operational Creditor.
- Further, a person authorized to act on behalf of operational creditor is also

required to state "his position with or in relation to the operational creditor". Thus, the person authorized by Operational Creditor must be holding some position with or in relation to Operational Creditor and only such person can apply.

- NCLAT observed at para 32 and 33 as under :
  - “32. 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.
  - 33. In the present case as an advocate/lawyer has given notice and there is nothing on record to suggest that the lawyer has been authorised by ‘Board of Directors’ of the Respondent - ‘DF Deutsche Forfait AG’ and there is nothing on record to suggest that the lawyer held any position with or in relation with the Respondents, we hold that the notice issued by the lawyer on behalf of the Respondents cannot be treated as a notice under section 8 of the I&B Code and for that the petition under section 9 at the instance of the Respondents against the Appellant was not maintainable.”
- **Thus, a Lawyer/ Chartered Accountant/Company Secretary cannot issue demand notice under section 8 of the Code to Corporate Debtor, before filing an application under section 9 of the Code.**

## 5. Whether two or more operational creditors can file a joint application under section 9 of the Code?

### Legal Provision(s)

- Section 7 (1) of the Code reads as under:

*"7. (1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.*

*Explanation – For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor."*

- Section 9 (1) of the Code reads as under:

*"9. (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process."*

### NCLAT view

- In ***Uttam Galva Steels Limited vs. DF Deutsche Forfait AG & Anr.*** [Company Appeal (AT) (Insolvency) 39 of 2017], decided on 28<sup>th</sup> July, 2017, an application was filed by two Operational Creditors namely M/s DF Deutsche Forfait AG ("**Deutsche**") and Misr Bank Europe GmbH ("**Misr Bank**") against Uttam Galva Steels Limited, Corporate Debtor ("**Uttam Galva**") stating that the Corporate Debtor had defaulted in making payment of an amount payable towards 20,000 tons of prime steel billets supplied by German Company named AIC Handels GmbH ("**AIC Handels**").
- The debt, running to the tune of around Rs. 110 crores, was initially assigned by AIC Handels to Deutsche by entering into a discount agreement, thereafter Deutsche, in turn, subsequently assigned a part of this debt to Misr Bank. This is how the application came to be filed by above two Operational Creditors.
- The application was accepted by NCLT and CIRP was initiated against Uttam Galva.

- In appeal before NCLAT, a contention was raised by Uttam Galva that the joint application filed two Operational Creditors was not maintainable.
- NCLAT, upon perusal of definition of section 9 and section 7 of the Code, came to the conclusion that since the language used in section 9 of the Code is different from section 7 of the Code, two or more operational creditors cannot file a joint application under section 9 of Code. NCLAT noted that in section 7 of Code, it is specifically written that a Financial Creditor can file application either by 'itself or jointly with other financial creditors', whereas, such phrase is not used in section 9 of Code.
- NCLAT observed that:
  - “20. *Otherwise also it is not practical for more than one 'operational creditor' to file a joint petition. Individual 'Operational Creditors' will have to issue their individual claim notice under Section 8 of the I&B Code. The claim will vary which will be different. Date of notice under Section 8 of the I&B Code in different cases will be different. It will have to be issued in format(s). Separate] to be filled. Petition under Section 9 in the format will contain, separate individual data.*
  - 21. *The Respondents have relied on Rule 23A on the NCLT Rules, 2016 but as the said Rule has not been adopted by section 10 of the I&B Code, 2016, the Rule 23A is not applicable to the application under Section 9 of the I&B Code, 2016. For the reasons aforesaid, we hold that a joint application by 'operational creditor' is not maintainable”*
- **Thus, two or more operational creditors cannot file a joint application for initiation of CIRP under section 9 of the Code.**

## 6. Whether filing of certificate from financial institutions maintaining accounts of operational creditor is mandatory at the time of filing of application by operational creditor under section 9 of Code?

### Legal Provision(s)

- Section 9(3) (c) of the Code reads as under:

*“9. (3) The operational creditor shall, along with the application furnish–*

*(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor;”*

- Section 3(14) of the Code read as under:

*“(14) “financial institution” means –*

*(a) a scheduled bank;*

*(b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934;*

*(c) public financial institution as defined in clause (72) of section 2 of the Companies Act, 2013; and*

*(d) such other institution as the Central Government may by notification specify as a financial institution;”*

### NCLAT view

- In **Smart Timing Steel Ltd. vs. National Steel and Agro Industries Ltd.** [Company Appeal (AT) (Insolvency) No. 28 of 2017], decided on 19<sup>th</sup> May, 2017, the application filed by Smart Timing Steel Ltd., Operational Creditor (“**Smart Timing Steel**”), which was a foreign company of Hong-Kong having no office or bank account in India, was dismissed by NCLT on the ground that no certificate from financial institute under section 9(3)(c) of the Code.
- In appeal, the issue before NCLAT was precisely whether filing of certificate from financial institutions maintaining accounts of Operational Creditor is mandatory at the time of filing of application by Operational Creditor under section 9 of the Code.
- NCLAT observed that a reading of the provisions of section 9(3)(c) of the Code made it clear that, the use of word ‘shall’ has to be given its usual and ordinary meaning, that is, the word ‘shall’ must be read as ‘mandatory’.

- Further, NCLAT observed in para 21 as under:

*“21. The argument that the foreign companies having no office in India or no account in India with any “Financial Institution” will suffer in recovering the debt from Corporate Debtor cannot be accepted as apart from the ‘I & B Code’, there are other provisions of recovery like suit which can be preferred by any person.”*

- **Thus, it is mandatory to file a certificate from financial institutions maintaining accounts of operational creditor at the time of filing of application by operational creditor under section 9 of the Code.**

## 7. Is it mandatory for a Financial Creditor to obtain the consent of JLF before proceeding under section 7 of the Code for initiation of CIRP?

### Legal Provision(s)

- Section 7 (4) and 7 (5) of the Code reads as under:

*"7. (4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).*

*(5) Where the Adjudicating Authority is satisfied that –*

*(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or*

*(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:*

*Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority."*

### NCLAT view

- In *M/s Innoventive Industries Ltd. vs. ICICI Bank & Anr.*, [Civil Appeal No. 8337-8338 of 2017] decided on 31<sup>st</sup> August, 2017, ICICI Bank, Financial Creditor ("**ICICI**") was part of a JLF of M/s Innoventive Industries Ltd., Corporate Debtor ("**Innoventive**"). Before the application was filed, ICICI had not obtained any permission of JLF.
- In appeal before NCLAT, a contention was raised that obtaining such permission was necessary.
- NCLAT held that beyond ensuring that a default has occurred and that the application is complete and there is no disciplinary proceedings pending

against proposed insolvency RP, NCLT is not required to look into any other factor.

- **Thus, it is not necessary for a financial creditor to obtain the consent of JLF before proceeding under section 7 of the Code for initiation of CIRP.**

**8. Whether NCLT is bound to issue a notice to Corporate Debtor and afford opportunity of hearing before acceptance of application by financial creditor under section 7 of the Code as part of Principles of Natural Justice?**

**Legal Provision(s)**

- Section 7 of the Code reads as under:

*"7. (1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.*

*Explanation – For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.*

*(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.*

*(3) The financial creditor shall, along with the application furnish–*

- (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;*
- (b) the name of the resolution professional proposed to act as an interim resolution professional; and*
- (c) any other information as may be specified by the Board.*

*(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).*

*(5) Where the Adjudicating Authority is satisfied that –*

- (a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or*

*(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:*

*Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.*

*(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).*

*(7) The Adjudicating Authority shall communicate –*

*(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;*

*(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.”*

- Section 424(1) of the Companies Act, 2013 reads as under:

*“424. Procedure before Tribunal and Appellate Tribunal. –*

*(1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure”*

#### **NCLAT view**

- In ***M/s Innoventive Industries Ltd. vs. ICICI Bank & Anr.***, [Civil Appeal No. 8337-8338 of 2017] decided on 31<sup>st</sup> August, 2017, following question arose before NCLAT:

*“Whether a notice is required to be given to the Corporate Debtor for initiation of Corporate Insolvency Resolution Process under the Code and if so, at what stage and for what purpose?”*

- NCLAT examined various decisions of Hon'ble Apex Court on question as to how far rules of natural justice are an essential element. It also took note of the judgment in Shree Metaliks case as passed by Hon'ble Calcutta High Court.
- NCLAT, after observing the provisions of section 424 of Companies Act, 2013 and clause 3 of Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, held that NCLT 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 corporate debtor and to find out whether the application is complete or there is any other defect required to be removed.
- However, NCLAT was also mindful of the decisions of Hon'ble Apex Court observing that 'useless formality' being one of the exceptions to the rule of natural justice, the adherence to same in every situation is not warranted.
- NCLAT held that adherence to principles of natural justice would not mean that in every situation NCLT is required to afford reasonable opportunity of hearing to the corporate debtor before passing its order.
- In the present case, NCLAT observed that even though no notice was given to the Corporate Debtor before admission of the case, however, since the Corporate Debtor had intervened before admission of the case and all objections raised by it had been noticed, discussed and considered by NCLT before passing an order for admission of application and initiation of CIRP, there was no violation of principles of natural justice and thus, there was no need to give any notice to Innoventive Industries Ltd.
- **Thus, NCLT is bound to follow principles of natural justice subject to certain exceptions as laid out in the judgment.**

## 9. Whether it is mandatory to issue demand notice to corporate debtor under section 8 of the Code?

### Legal Provision(s)

- Section 8 (1) of the Code reads as under:

*"8.(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed."*

### NCLAT view

- In ***Era Infra Engineering Ltd. vs. Prideco Commercial Projects Pvt. Ltd.*** [Company Appeal (AT)(Ins) No. 31 of 2017], decided on 3<sup>rd</sup> May, 2017, the Prideco Commercial Projects Pvt. Ltd., Operational Creditor, ("**Prideco Commercial**") who had initially issued notice under section 271 of Companies Act, 2013, filed application under section 9 of the Code when the Code came into force. At the time of filing of such application, Prideco Commercial did not issue notice under section 8 of the Code.
- In appeal before the NCLAT, Era Infra Engineering Ltd, Corporate Debtor ("**Era Infra**") raised contention that no notice under section 8 of the Code was issued.
- NCLAT held that issuance of notice under section 8 of the Code was mandatory and the notice under section 271 of Companies Act, 2013 could not be treated as notice under section 8 of the Code.
- NCLAT in para 8 and 9 of the judgment observed as under:
  - "8. Admittedly, no notice was issued by the Operational Creditor under section 8 of the I&B Code, 2016. Demand notice by Operational Creditor stipulated under Rule 5 in Form 3 has not been served. Therefore, in absence of any expiry period of tenure of 10 days there was no question of preferring an application under section 9 of the I&B Code, 2016.*
  - 9. The Adjudicating Authority has failed to notice the aforesaid facts and the mandatory provisions of law as discussed above. Though the application was not complete and there was no other way to cure the defect, the impugned order cannot be upheld".*
- **Thus, it is mandatory to issue demand notice under section 8 of the Code.**

**10. Whether an application for initiation of CIRP under section 7, 9 or 10 of the Code by the Financial Creditor, Operational Creditor or Corporate Applicant, which has been admitted by NCLT, be withdrawn on the basis of compromise between the parties?**

**Legal Provision(s)**

- Rule 8 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 reads as under:

*“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.”*

**NCLAT view**

- In ***Lokhandwala Kataria Construction Pvt. Ltd. vs. Nisus Finance & Investment Mangaer LLP*** [Company Appeal (AT)(Insolvency) No. 95 of 2017], decided on 13<sup>th</sup> July, 2017, NCLAT held that reading the provisions of Rule 8, it is clear that an application can be withdrawn only before its admission by NCLT. Once an application is admitted, neither NCLAT nor NCLT has power to order withdrawal of application.
- A contention was raised that NCLAT has inherent powers to order withdrawal of application. However, NCLAT noted that Rule 11 of NCLAT Rules, which provides for inherent powers of NCLAT, has not been adopted for the purposes of Code and only Rule 20 to 24 and Rule 26 of NCLAT Rules has been adopted. There was no specific provision which empowered NCLAT with inherent powers
- Thus, an application by the Financial Creditor, Operational Creditor or Corporate Applicant under section 7, 9 or 10 of the Code, which has been admitted by NCLT, cannot be withdrawn by the applicant, on the basis of compromise between the parties.
- The above case was however, appealed before the Hon’ble Supreme Court of India and the Hon’ble Supreme Court in ***Lokhandwala Kataria Construction Private Limited vs. Nisus Finance and Investment Managers LLP*** [Civil Appeal No. 9279 of 2017], decided on 24<sup>th</sup> July, 2017 while exercising its power under Article 142 of the Constitution of India permitted the withdrawal of the application.
- Recently, the Hon’ble Supreme Court in ***Uttara Foods and Feeds Pvt. Ltd. vs. Mona Pharmachem*** [Civil Appeal No. 18520 of 2017], decided on 13<sup>th</sup> November, 2017 observed as under :

*“...in view of Rule 8 of the I & B (Application to Adjudicating Authority) Rules, 2016, the National Company Law Appellate Tribunal prima facie could not avail of the inherent powers recognised by Rule 11 of the National Law Appellate Tribunal Rules, 2016 to allow a compromise to take effect after admission of the insolvency petition. We are of the view that instead of all such orders coming to the Supreme Court as only the Supreme Court may utilise its powers under Article 142 of the Constitution of India, the relevant Rules be amended by the competent authority so as to include such inherent powers. This will obviate unnecessary appeals being filed before this Court in matters where such agreement has been reached. On the facts of the present case, we take on record the settlement between the parties and set aside the NCLAT order.”*

- **Thus, neither NCLT nor NCLAT have power to order withdrawal of an application, on the basis of compromise between the parties, which has once been admitted. However, Hon'ble Supreme Court of India can permit withdrawal of such application.**

### **11. Whether the Corporate Debtor can prefer appeal under section 61 of the Code through the Board of Directors, which stand suspended after admission of an application for initiation of CIRP?**

#### **Legal Provision(s)**

- Section 61(1) and 61(2) of the Code read as under:
 

*“61. (1) Notwithstanding anything to the contrary contained under the Companies Act 2013, any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.*

*(2) Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal:*

*Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.*

#### **NCLAT view**

- In ***Steel Konnect (India) Private Limited vs. M/s Hero Fincorp Limited*** [Company Appeal (AT)(Insolvency) No. 51 of 2017], decided on 29<sup>th</sup> August, 2017, NCLAT held that though the Board of Directors or partners of Corporate Debtor is suspended (for a limited period of maximum 180 days or extended by 90 days i.e. 270 days), but they continue to remain as Directors and members of the Board of Directors for all purpose in the records of Registrar of Companies under the Companies Act, 2013.
- Thus, a Corporate Debtor can prefer an appeal under section 61 of the Code through the Board of Directors, which, though, stands suspended after admission of application for initiation of CIRP.
- Here, it is pertinent to mention that even though the Hon'ble Supreme Court in ***M/s Innoventive Industries Ltd. vs. ICICI Bank & Anr.***, [Civil Appeal No. 8337-8338 of 2017] decided on 31<sup>st</sup> August, 2017, in para 11 of the said judgment, observed that “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”.
- NCLT observed in Para 11 as under :
 

*“11. Having heard learned counsel for both the parties, we find*

*substance in the plea taken by Shri Salve that the present appeal at the behest of the erstwhile directors of the appellant is not maintainable. Dr. Singhvi stated that this is a technical point and he could move an application to amend the cause title stating that the erstwhile directors do not represent the company, but are filing the appeal as persons aggrieved by the impugned order as their management right of the company has been taken away and as they are otherwise affected as shareholders of the company. 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. However, we are not inclined to dismiss the appeal on this score alone..."*

- The above observation by Hon'ble Supreme Court however, can, at best, be held to be an *obiter dicta* and not the *ratio decidendi* of the case since the issue before the Hon'ble Supreme Court was something entirely different.
- **Thus, Corporate Debtor can prefer appeal under section 61 of the Code through the Board of Directors, which stand suspended after admission of an application for initiation of CIRP.**

## 12. Whether the property not owned by the Corporate Debtor come within the protective umbrella of “moratorium” under section 14 of the Code?

### Legal Provision(s)

- Section 14 (1) (c) of the Code reads as under:

*“14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: –*

*(c) any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;”*

### NCLAT view

- In ***Alpha & Omega Diagnostics (India) Ltd. vs. Asset Reconstruction Company of India Ltd. & Ors.*** [Company Appeal (AT) (Insol.) No. 116 of 2017] decided on 31st July, 2017, an application was filed by Alpha & Omega Diagnostics (India) Ltd. Corporate Debtor (“**Alpha & Omega**”) under section 10 of the Code.
- Alpha & Omega obtained loan from bank who had granted the loan facility against the mortgage of personal immovable properties of the Directors by executing equitable mortgage deeds. On failure to service the loan, the bank filed application before DRT. Upon assignment of debt, the financial creditor i.e. Asset Reconstruction Company of India Ltd. (“**ARC of India Ltd**”) was brought on record.
- The last order passed by DRT indicated that upon steps being taken by ARC of India Ltd to take possession of the properties of Directors of Corporate Debtor, the Corporate Debtor agreed to make certain payment.
- Before the NCLT, Alpha & Omega insisted on passing the order under section 10 of the Code. After considering the documents, NCLT held that the application was entitled to be admitted.
- However, the NCLT observed that the provisions of Moratorium are sometimes used by Corporate Debtor to thwart or frustrate the recovery proceedings. In this case, the properties mortgaged were not owned by Alpha & Omega. The NCLT laid emphasis on word “its” used in section 14 of the Code.

- On appeal by Alpha & Omega, NCLAT observed that the use of the word "its" in section 14 of the Code is significant. The plain language of the section 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.
- **Thus, the property not owned by the Corporate Debtor would not come within the protective umbrella of moratorium under section 14 of the Code.**

### 13. Whether a Power of Attorney holder of Financial Creditor can initiate insolvency proceedings under the Code?

#### Legal Provision(s)

- Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 reads as under :

*"4. Application by financial creditor. –*

*(1) A Financial Creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process against a Corporate Debtor under section 7 of the Code in Form 1, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.*

*(2) Where the applicant under sub-rule (1) is an assignee or transferee of a financial contract, the application shall be accompanied with a copy of the assignment or transfer agreement and other relevant documentation to demonstrate the assignment or transfer.*

*(3) The applicant shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the Corporate Debtor.*

*(4) In case the application is made jointly by financial creditors, they may nominate one amongst them to act on their behalf."*

- Entry 5 & 6 (Part I) of Form 1 mandates the Financial Creditor to submit name and address of person authorized to submit application. Further, the particulars shall be signed by person authorized to act on behalf of financial creditor at the end.
- Similar provision is made with regard to application by Operational Creditor and corporate applicant i.e. the application must be signed by a person authorized.
- Rule 23(1) of NCLT Rules reads as under:

*"23. Presentation of petition or appeal – (1) Every petition, application, caveat, interlocutory application, documents and appeal shall be presented in triplicate by the appellant or applicant or petitioner or respondent, as the case may be, in person or by his*

*duly authorised representative or by an advocate duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same.”*

#### **NCLAT View**

- In ***Palogix Infrastructure Pvt. Ltd. v. ICICI Bank Ltd.*** [Company Appeal (AT) (Insol.) No. 30 of 2017], decided on 20<sup>th</sup> September 2017, ICICI Bank Ltd., Financial Creditor (“**ICICI**”) filed an application under section 7 of the code for initiation of the CIRP against Palogix Infrastructure Pvt. Ltd., Corporate Debtor (“**Palogix**”).
- The case was first heard by a two-member bench of the NCLT. Having noticed that Palogix preferred the application through a power of attorney holder, the NCLT passed two separate orders: one held that the application through power of attorney is not maintainable (Judicial Member), and the other that the application was maintainable (Technical Member). The Technical Member found that the power of attorney was given in favour of the Legal Manager to initiate proceedings before the NCLT.
- The case was then referred to the President, NCLT, exercising power under section 419(5) of the Companies Act, 2013 for constituting a larger bench for decision, wherein by majority judgment, the NCLT held that there should be specific authorisation to the power of attorney holder to initiate the CIRP. Since ICICI had not filed such specific authorisation, it was directed to rectify the defects.
- ICICI challenged the said order on appeal before the NCLAT on the ground that no specific authorisation is required for initiation of the CIRP.
- Rule 23(1) of NCLT Rules, 2016 which has been adopted for the purposes of the Code, 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. Upon perusal of the aforesaid rules and Form 1, it was noted that a financial creditor being a juristic person can only act through an “authorised representative”.
- NCLAT observed that the ‘I&B Code’ is a complete Code by itself and 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 there under. NCLAT held that a ‘Power of Attorney Holder’ is not competent to file an application on behalf of a ‘Financial Creditor’ or ‘Operational Creditor’ or ‘Corporate Applicant’.

- NCLAT held that a power of attorney holder is not authorised to present application for CIRP under sections 7, 9 and 10 of the Code. It is only authorised representatives, duly authorised by board resolution, who are eligible to present the same.
- **Thus, only an authorised person of the Financial Creditor/Operational Creditor or Corporate Applicant can make an application under Section 7, 9 and 10 of the Code. Therefore, a 'Power of Attorney Holder' is not competent to file an application for CIRP under the Code on behalf of a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant'.**

**14. Whether a buyer who enters into Agreement/Memorandum of Understanding with Builder with builder promising assured return to buyer, come within the meaning of 'Financial Creditor' as defined under the provisions of sub-section (5) of Section 7 of the Code?**

**Legal Provision(s)**

- Section 5 (7) of the Code reads as under:

*"5. (7) 'financial creditor' as any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to."*

**NCLAT view**

- In ***Nikhil Mehta and Sons vs. AMR Infrastructure Ltd.*** [Company Appeal (AT)(Insolvency) No. 07 of 2017], decided on 21<sup>st</sup> July, 2017, the Nikhil Mehta and Sons claiming themselves to be Financial Creditors, filed application under section 7 of the Code before NCLT, Principal Bench, New Delhi.
- The NCLT, Principal Bench, New Delhi rejected the application on the ground that Nikhil Mehta and Sons in this case were not financial creditors to AMR Infrastructure Ltd., Corporate Debtor, ("**AMR Infrastructure**").
- In this case, Nikhil Mehta and Sons had signed a Memorandum of Understanding (MoU) with AMR Infrastructure with regard to purchase of three units viz., residential flat, shop and office space. In return for a substantial portion of the total money paid up front, AMR Infrastructure promised to pay monthly "assured returns" from the time of signing of the MOU till the time the possession was delivered to Nikhil Mehta and Sons. After paying these assured returns for some time, the AMR Infrastructure defaulted on its payments. Following this, an application under section 7 of the Code was filed which was to rejected.
- The question to be decided by NCLAT was whether the aforesaid arrangement was a simple sale transaction and Nikhil Mehta and Sons were mere buyers or, whether Nikhil Mehta and Sons were financial creditors under section 5 (7) read with section 5(8) of the Code and therefore allowed to make an application under section 7 of the Code.
- Nikhil Mehta and Sons contended that, the transaction was a method of raising fund from the market at low rate and the "assured returns" were in the nature of interest. Nikhil Mehta and Sons also relied upon on an order passed by Securities and Exchange Board of India, wherein it held that

such transactions where the developer assured to pay assured returns to the buyer "are not pure real estate transactions, rather they satisfy all the ingredients of a Collective Investment Scheme as defined under section 11AA of the SEBI Act".

- To support this contention, Nikhil Mehta and Sons also relied on the fact that in the balance sheet of the Corporate Debtor, these assured returns were getting shown as "Commitment Returns" under "Financial Cost" and were also deducting TDS on this amount under the head "Interest, other than Interest on Securities."
- NCLAT held that. Nikhil Mehta and Sons in this case were "investors" and had chosen the "committed return plan". AMR Infrastructure in turn agreed upon to pay monthly committed return to the investors. Thus, the amount due to Nikhil Mehta and Sons – buyers came within the meaning of "debt" defined under section 3(11) of the Code. Furthermore, NCLAT noted from the Annual Return and Form 16-A of the AMR Infrastructure that they had treated the buyers, Nikhil Mehta and Sons as "investors" and borrowed amount pursuant to sale purchase agreement for their commercial purpose was treated at par with loan in income tax return filed by AMR Infrastructure.
- NCLAT observed in para 9 to 11 as under:
  9. *It is the case of the Appellants that they are undoubtedly "creditors" of the Respondent as defined under the I & B Code, to whom an admitted and quantified "debt" is owed by the Respondent and who have a valid "claim" against the Respondent as has been defined under the I & B Code and therefore, the Adjudicating Authority should have heard and allowed the claim/ application of the Appellants holding them to be "Financial Creditors" as defined under the I & B Code.*
  10. *Further case of the Appellants is that as per the latest balance sheet of the respondent, the amount which is to be paid to the Appellants by the Respondent as Committed Returns/Assured Returns is shown as "Commitment Charges" under the header of "Financial Costs". The Respondents has not filed any reply to the said claim of the Appellants despite of being given an opportunity to do so by this Appellate Tribunal. The said balance sheet is at pages 34-63 of the paper book dated 17.04.2017 of the Appellants and the relevant entry is at page 60 of the said paper book.*

11. *According to Appellants they are the "Financial Creditors" of the Respondent, and the Respondent was deducting TDS on the amount which it was paying to the Appellants as Committed Returns/Assured Returns under Section 194(A) of the Income Tax Act, which is applicable to deduction of TDS on the amount which is paid to some as "Interest, other than Interest on Securities". This therefore, makes it clear that the payment made by the Respondent to the Appellants in the form of Committed Returns/ Assured Returns is nothing but a payment of "interest" to the Appellants by the Respondent thereby making the amount paid by the Appellants to the Respondent at the time of booking of their unit a Loan given by the Appellants to the Respondent for constructing the project. In support of the above claim the Appellants have placed on records, their Form 16A and 26AS which are at pages 5-33 of their paper book dated 17.-04.2017, filed before this Appellate Tribunal."*

### 15. Whether debenture certificates issued by Corporate Debtor falls under the category of 'financial debt' under the Code?

#### Legal Provision(s)

- Section 5 (8) (c) of the Code reads as under:

*"5.(8) "financial debt" as to mean a debt along with interest, if any, which is disbursed against consideration for the time value of money and includes –*

*(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument."*

#### NCLAT view

- In **Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustees Ltd.** [Company Appeal (AT) (Insolvency) No. 44 of 2017] decided on 11<sup>th</sup> August, 2017, an application was filed by Neelkanth Township and Construction Pvt. Ltd., Financial Creditor ("**Neelkanth Township**") before the NCLT, Mumbai Bench and the same was admitted by NCLT, Mumbai Bench.
- Neelkanth Township had subscribed to optionally convertible debentures issued by the Urban Infrastructure Trustees Ltd., Corporate Debtor ("**Urban Infrastructure**"). The debentures carried nil or 1% p.a. interest rate and matured in years 2011, 2012 and 2013.
- Before the NCLAT, Urban Infrastructure contended that Neelkanth Township is actually an investor and not a 'Financial Creditor' as defined under the Code.
- NCLAT took note of the definition of 'Financial Creditor' under section 5 (7) of the Code. NCLAT noted that a financial creditor is one to whom a financial debt is owed. NCLAT also noted the definition of financial debt under Section 5(8) of the Code.
- It was argued by Urban Infrastructure that considering that the interest rate on the optionally convertible debentures was 0 or 1%, they were not issued against consideration for the time value of money. In fact, the subscriber to the optionally convertible debentures was an investor in the company and not a financial creditor.
- NCLAT held that section 5(8) (c) of the Code makes it clear that a debenture comes within the meaning of financial debt.
- **Thus, debenture certificates issued by Corporate Debtor comes within the definition of financial debt as it relates to amount raised pursuant to debentures.**

**16. Whether NCLT has power to appoint an IRP, without obtaining suggestions from IBBI on its own, and where the name of an IRP has also not been suggested by Operational Creditor in the application for CIRP?**

**Legal Provision(s)**

- Section 16 (1) and 16 (3) of the Code read as under:

*“16 (1) The Adjudicating Authority shall appoint an interim resolution professional within fourteen days from the insolvency commencement date.*

*16 (3) Where the application for corporate insolvency resolution process is made by an Operational Creditor and –*

- (a) no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional;*
- (b) a proposal for an interim resolution professional is made under sub-section (4) of section 9, the resolution professional as proposed, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.”*

**NCLAT view**

- NCLAT in ***Sandeep Reddy & Anr. vs. Jaycon Infrastructure Ltd.*** [Company Appeal (AT) (Insolvency) No. 228 of 2017], decided on 26<sup>th</sup> October, 2017, was hearing the appeal of the Sandeep Reddy & Anr, Corporate Debtor (“**Sandeep Reddy**”) against whom NCLT had admitted the application filed by Jaycon Infrastructure Ltd., Operational Creditor (“**Jaycon Infrastructure**”)
- Sandeep Reddy contended that there is a dispute in existence prior to issuance of notice of demand under sub-section (1) of Section 8 of the Code.
- It was further contended that the NCLT without calling for name of any IRP from the IBBI appointed IRP, without any such suggestion from the Jaycon Infrastructure or the IBBI.
- Jaycon Infrastructure admitted that the IRP was not appointed on the suggestion made by it.

- NCLAT observed that the application for CIRP under Section 9 of the Code was not maintainable since it was not disputed by Jaycon Infrastructure that there was a dispute in existence prior to issuance of demand notice under sub-section (1) of Section 8 of the Code and that parties have already reached the settlement
- NCLAT observed that, *prima facie* it was of the opinion that the Code does not empower the NCLT to suggest any name or appoint any IRP/RP of its own choice.
- Since the parties had settled the dispute and initiation of resolution process under section 9 of the Code was not maintainable, in view of existence of dispute, NCLAT left the question open as to whether the NCLT had power to appoint any person of its own choice or not.

**17. Whether an application preferred by Financial Creditor under Section 7 of the Code is fit to be rejected, where the application is incomplete, misleading and being not bonafide?**

**Legal provision(s)**

- Section 7 (1) and 7 (3) of the Code read as under:

*“7.(1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a Corporate Debtor before the Adjudicating Authority when a default has occurred.*

*Explanation – For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the Corporate Debtor.*

*7(3) The financial creditor shall, along with the application furnish – (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified; (b) the name of the resolution professional proposed to act as an interim resolution professional; and (c) any other information as may be specified by the Board.”*

**NCLAT View**

- In ***M/s. Starlog Enterprises Limited Vs. ICICI Bank Limited***, [Company Appeal (AT) (Insolvency) No. 5 of 2017], decided on 24<sup>th</sup> May 2017, NCLAT dealt with an objection that the – ICICI Bank Ltd., Financial Creditor (“**ICICI**”) misrepresented material facts before the NCLT in order to obtain order of admission of the application.
- NCLAT observed that ICICI had shown incorrect claim, moved the application in a hasty manner and obtained an ex-parte order from NCLT which admitted such an incorrect claim and ICICI could not disprove its mala fide intention by stating that the claim submitted is correct amount.
- NCLAT also noted that the Code does not provide for any such mechanism where post-admission, the applicant – financial creditor can modify their claim amount.
- NCLAT observed that in some of the cases, an insolvency resolution process can and may have adverse consequences on the welfare of the company.
- In this regard, NCLAT noted that this makes it imperative for the NCLT to adopt a cautious approach in admitting insolvency applications and also ensuring adherence to the principles of natural justice.

### 18. Whether CIRP can be closed upon satisfaction of all creditors and on non existence of any default with any other creditors?

#### Legal Provision(s)

- Rule 8 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 reads as under:

*“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.”*

#### NCLAT view

- In ***Prowess International Pvt. Ltd. vs. Parker Hannifin India Pvt. Ltd.*** [Company Appeal (AT) (Insol.) No. 89 of 2017], decided on 18<sup>th</sup> August, 2017, an application for initiation of CIRP was filed by Operational Creditor - Parker Hannifin India Pvt. Ltd. Immediately upon coming to know of the initiation of proceedings against it, Corporate Debtor - Prowess International Pvt. Ltd. (“**Prowess**”) settled its dues with the operational creditor as well as other creditors.
- Prowess filed an application for closure of the CIRP.
- NCLT dismissed the application. Upon appeal, NCLAT observed as under :

*“18. ...Thereafter, in case(s) where all creditors have been satisfied and there is no default with any other creditor, the formality of submission of resolution plan under section 30 or its approval under section 31 is required to be expedited on the basis of plan if prepared. In such case, the Adjudicating Authority without waiting for 180 days of resolution process, may approve resolution plan under section 31, after recording its satisfaction that all creditors have been paid/ satisfied and any other creditor do not claim any amount in absence of default and required to close the Insolvency Resolution Process...”*

*19. It is made clear that Insolvency Resolution Process is not a recovery proceeding to recover the dues of the creditors. I & B Code, 2016 is an Act relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner...”*

*CHAPTER - IV*

**ISSUES SETTLED THROUGH JUDGMENTS  
PASSED BY  
VARIOUS BENCHES OF  
NATIONAL COMPANY LAW TRIBUNAL**

## 1. Whether a Guarantor to a Principal Borrower (Corporate Debtor), undergoing CIRP, can be proceeded against under the Code?

### Legal Provision(s)

- Section 5 (8) (c) of the Code reads as under:

*"5. (8) "financial debt" as to mean a debt along with interest, if any, which is disbursed against consideration for the time value of money and includes –*

- (i) the amount of any liability in respect of any of the guarantee or identity for the any of the items mentioned in clauses (a) to (h) of this clause."*

### NCLT view

- The NCLT, Ahmedabad Bench in **IDBI Bank Ltd. vs. BCC Estate Pvt. Ltd.** [CP. (I.B) No. 80/7/NCLT/AHM/2017], decided on 6<sup>th</sup> September, 2017, held that the liability of Guarantor is co-extensive with that of the Principal Borrower. It is for the creditor to choose against whom he wants to proceed. There is thus, no bar in the law which prevents any creditor to proceed against both, the Principal Borrower and Guarantors.
- Objection that the resolution plan for Principal Borrower, undergoing CIRP i.e. Corporate Debtor, would also include corporate guarantor was rejected by NCLT as the corporate guarantor is an independent corporate body.

## 2. Whether NCLT can appoint a new IRP in case the certificate of practice of IRP appointed by NCLT has expired after admission of application for initiation of CIRP?

### Legal Provision(s)

- section 16 (1) of the Code reads as under:

*“16. (1) The Adjudicating Authority shall appoint an interim resolution professional within fourteen days from the insolvency commencement date;”*
- Section 5 (12) of the Code reads as under:

*‘5(12) “insolvency commencement date” means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be;’*

### NCLT view

- In **Macro Leafin Private Limited vs. Arrow Resources Limited** [CA No. 259(PB)/2017 in CP No. (IB)-152(PB) of 2017], decided on 7<sup>th</sup> September, 2017, an issue arose whether the NCLT can appoint a new IRP in place of IRP whose certificate of practice expired before the insolvency commencement date. .
- In this case, an application for CIRP was filed on 02<sup>nd</sup> June 2017. The application was admitted by NCLT on 09<sup>th</sup> August 2017 and an IRP was appointed.
- During the CIRP, an application was filed before NCLT for change of IRP as the IRP was not in the position to discharge his professional services because certificate of practice of IRP appointed by NCLT expired on 16<sup>th</sup> June 2017.
- It was contended that the NCLT can make such order as may be necessary for meeting the ends of justice and to prevent the abuse of process of the NCLT.
- NCLT observed that, in the absence of RP, no steps can be taken to proceed with the insolvency process. NCLT noted that the CoC can proceed with the replacement of the RP under Section 27 of the Code only if meeting of the CoC is convened which obviously have to be done by IRP.
- The Code being silent on the issue and the applicant having no other alternative efficacious remedy, NCLT deemed it fit to admit the application

and appointed a new IRP.

- NCLT accepted the application and appointed new IRP in view of the facts of the case and in the interest of justice; and for smooth conduct of CIRP. However, NCLT imposed cost of Rs. 25,000/- on the applicant.

### 3. Whether the period of 180 days for completion of CIRP can be reduced by NCLT?

#### Legal Provision(s)

- Section 12 (1) of the Code reads as under:

*“12. (1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.”*

#### NCLT View

- In ***M/s Amit Spinning Industries Ltd.*** [CP No. IB-131(PB)/2017] decided on 1<sup>st</sup> August, 2017, M/s Amit Spinning Industries Ltd., the Corporate Applicant (“**Amit Spinning Industries**”) filed application under section 10 of the Code for initiating CIRP.
- Before filing application under section 10 of the Code, Amit Spinning Industries had been declared sick by BIFR under Sick Industrial Companies (Special Provisions) Act, 1985.
- Accordingly, Amit Spinning Industries had been enjoying moratorium under section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 before the BIFR for more than five years. During that period, Amit Spinning Industries had not been able to give any viable scheme to the operating agency appointed by BIFR for its revival.
- In such fact situation, NCLT, even though accepted the application, however, in the fitness of things, opined that the Insolvency Resolution Process should be completed in speedy manner, preferably within a period of 100 days.

#### **4. Whether shareholders of Corporate Debtor, who have not filed an application for impleadment/intervention, can contest the application for initiation of CIRP filed against the corporate debtor?**

##### **Legal Provision(s)**

- Rule 10 (1) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 reads as under:

*"10. Filing of application and application fee. –*

*(1) Till such time the rules of procedure for conduct of proceedings under the Code are notified, the application made under sub-section (1) of section 7, sub-section (1) of section 9 or sub-section (1) of section 10 of the Code shall be filed before the Adjudicating Authority in accordance with rules 20, 21, 22, 23, 24 and 26 of Part III of the National Company Law Tribunal Rules, 2016."*

##### **NCLT view**

- In ***Engenious Engineering Pvt. Ltd. vs. Onex Natura Pvt Ltd.*** [C.P. (I.B) No. 92/7/NCLT/AHM/2017], decided on 20<sup>th</sup> September, 2017, an application was filed by Engenious Engineering Pvt. Ltd., Financial Creditor ("**Engenious Engineering**") under section 7 of the Code for initiating CIRP against the Onex Natura Pvt. Ltd., Corporate Debtor ("**Onex Natura**").
- Earlier, two of the shareholders of Onex Natura had filed an application before the erstwhile Company Law Board, Mumbai Bench alleging acts of oppression and mismanagement when the Authorized Share Capital of Onex Natura had been increased from Rs. 1 crore to Rs. 5 crore. The said petition was disposed off by the Company Law Board holding that 5,25,000 shares allotted to the financial creditor were cancelled.
- It is for these 5,25,000 shares that the Engenious Engineering filed the application.
- Upon filing of the application, notice was given to Onex Natura but Onex Natura did not appear. On the next date too, a letter was received from a firm of advocates who did not file any vakalatnama but only requested the NCLT to post the matter with some another case. The NCLT however, did not pass any order since the said firm of advocates did not have any locus standi in absence of filing of vakalatnama.
- On the next date, an advocate appeared who only had a scanned copy of

vakalatnama sent by a group of shareholders of Onex Natura who were not party to the application filed by Engenious Engineering.

- NCLT held that there is no rule that enjoins upon it to give notice to all the shareholders of Onex Natura. NCLT noted that the shareholders did not choose to file any intervening application.
- **Thus, merely filing of scanned vakalatnama on behalf of group of shareholders of company who are not parties to the application would not make it obligatory for NCLT to hear them under the Code.**

## 5. Whether an admitted winding up petition pending before High Court is a bar on the NCLT to entertain and pass orders under the Code?

### Legal Provision(s)

- Section 14 (1) (a) of the Code reads as under:

*"14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely : –*

*(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*

- Section 238 of the Code reads as under:

*"238. The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

### NCLT View

- NCLT, Ahmedabad Bench, in **ICICI Bank Ltd. vs. ABG Shipyard Ltd.** [C.P.(I.B) No. 53/7/NCLT/AHM/2017], decided on 1<sup>st</sup> August, 2017, held that admission of the winding up petition by the High Court is no bar to the initiation of CIRP under the Code.
- In such cases, since no winding up order is passed and no provisional liquidator is appointed, section 446 of the Companies Act, 1956 (which prohibits institution or continuation of any suit or proceedings where an order for winding up has been made or provisional liquidator has been appointed) is not applicable.
- It is pertinent to mention that different benches of NCLT have opined differently on the above issue. In view of the same, NCLT, Special Bench, New Delhi in **Union bank of India Versus Era Infra Engineering Ltd.** [C.P. IB-190(PB)/2017], decided on 21<sup>st</sup> August, 2017, has placed the following issue, amongst others, before the President, Principal Bench, NCLT for purpose of being transferred to a Larger Bench in accordance with section 419 of Companies Act, 2013, viz., *Whether the process under the Code can be triggered in the face of pendency of winding petitions before the respective HC or it is to be considered as independent process?*

**6. Whether the insolvency resolution proceedings under the Code can be initiated, in view of pendency of proceedings before DRT and invocation of Section 13(4) of the SARFAESI Act?**

**Legal Provision(s)**

- Section 238 of the Code reads as under:

*“238. The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”*

**NCLT View**

- NCLT, Ahmedabad Bench, in ***Sarthak Creations Pvt. Ltd. vs Bank of Baroda & Others***, [C.P. No. (IB) 85/10/NCLT/AHM/2017], decided on 30<sup>th</sup> August, 2017, held that the pendency of proceedings before DRT or invocation of Section 13(4) of SARFAESI Act, is no ground not to commence CIRP in view of non-obstante clause under section 238 of the Code.
- NCLT further noted that the prime objective of the Code is to revive and resolve the company as against the recovery of the debt, and if not possible then go for liquidation.

## 7. Whether a creditor is entitled to make a claim by invoking a corporate guarantee against the corporate debtor after the insolvency commencement date?

### Legal Provision(s)

- Section 5(12) of the Code reads as under:
 

*“5 (12) “insolvency commencement date” means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be;”*
- Regulation 13(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 reads as under:
 

*“13. Verification of claims.*

*(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.”*

### NCLT view

- In **Axis Bank & DBS Bank vs. Edu Smart Services Pvt. Ltd.** [C.P. (IB)-102(PB)/2017], dated 27th October, 2017, an application was filed by Axis Bank Limited (“**Axis Bank**”) under section 60(5) of the Code for setting aside the decision of RP where the RP had rejected the claim filed by Axis Bank in regard to CIRP of Edu Smart Services Pvt. Ltd., Corporate Debtor (“**Edu Smart**”).
- An application under section 7 of the Code was filed by DBS Bank Limited, Financial Creditor (“**DBS Bank**”) and the said application was admitted on 27th June, 2017 i.e., the insolvency commencement date
- Axis Bank filed a claim of around Rupees 396 crores before the RP on the basis of a corporate guarantee given by Edu Smart.
- RP communicated to Axis Bank intimating that the claim cannot be verified as the corporate guarantee had not been invoked.
- Subsequently, Axis Bank invoked corporate guarantee and informed RP to process the claim, who earlier rejected the claim filed by Axis Bank

- The claim was rejected by RP on the ground that the liability under corporate guarantee was contingent as on date of commencement of insolvency process on 27<sup>th</sup> June, 2017, and thus, not verifiable.
- NCLT held that as per Regulation 13(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, RP shall verify claims, as on the insolvency commencement date.
- Since the claim of Axis Bank arose on the basis of invocation of guarantee on 21<sup>st</sup> July, 2017, i.e. after the insolvency commencement date, the claim was not correctly verified by RP.

## 8. When can NCLT exercise its power to impose penalty for fraudulent or malicious initiation of proceedings under the Code?

### Legal Provision(s)

- Section 65(1) of the Code reads as under:

*“65.(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.”*

### NCLT view

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| <b>Neeta Chemicals (I) Pvt. Ltd. vs. State Bank of India [C.P. No. (IB)/ 128/ 10/HDB/2017], decided on 14<sup>th</sup> August, 2017</b> |
|---|

- In the aforesaid case, Neeta Chemicals (I) Pvt. Ltd., Corporate Applicant (“**Neeta Chemicals**”) filed an application for initiation of CIRP against itself under section 10 of the Code.
- State Bank of India (“**SBI**”) was the only financial creditor to Neeta Chemicals and filed objection to the application filed by Neeta Chemicals contending that the same was abuse of the process of law and was filed only to scuttle the proceedings under SARFAESI Act, 2002. SBI contended that it had taken all the steps according to law starting from issuance of notice under section 13(2) of the SARFAESI Act, 2002 to taking over possession and e-auction of the property of Neeta Chemicals was also about to take place shortly.
- NCLT observed that SBI had taken all the steps according to law while Neeta Chemicals had all along denied having committed default. NCLT noted that in order to delay the process, Neeta Chemicals filed an application for initiation of CIRP contending that default had occurred and wanted to undergo CIRP under the Code.
- NCLT held that this was a clear misuse of provisions of the Code for selfish ends and that too, against public interest. The Courts/Tribunal being ultimate custodian of public funds cannot be party to misuse of the provisions of the Code.
- Accordingly, NCLT dismissed the application under section 10 of the Code filed by Neeta Chemicals and also imposed penalty of Rupees One Lakh.

- NCLAT however, in appeal, stayed the imposition of penalty by NCLT and the matter is under adjudication before NCLAT.

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| <b>Hotel Gaudavan Pvt. Ltd. [CP (IB) 23/PB/2017]</b> |
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- In the aforesaid case, an application under section 7 of the Code was filed by Alchemist Asset Reconstruction Company Limited, Financial Creditor, ("**Alchemist ARC**") which was admitted by NCLT, Principal Bench, New Delhi vide order dated 31.03.2017.
- Hotel Gaudavan Pvt. Ltd., corporate Debtor ("**Hotel Gaudavan**"), challenged the above order as well as constitutional validity of certain provisions of the Code before the Hon'ble High Court of Rajasthan by way of a writ petition. Along with the petition, an application for interim relief was also filed by Hotel Gaudavan.
- The Hon'ble High Court admitted the writ petition only to the extent of examining constitutional validity of certain provisions of the Code but refused to entertain the writ petition as regards the merits of the case were concerned. Further, the Hon'ble High Court also refused to grant any interim relief.
- Hotel Gaudavan challenged the above order of the High Court before Hon'ble Supreme Court, however, the same was dismissed.
- Hotel Gaudavan challenged the order dated 31.03.2017, whereby CIRP was initiated, before NCLAT.
- NCLAT however, dismissed the appeal filed by Corporate Debtor without granting any liberty to challenge the order dated 31.03.2017 before the NCLT.
- Even though no liberty was granted, Corporate Debtor filed an application before NCLT for recall of order dated 31.03.2017 under section 60(5) of the Code.
- NCLT observed that the application filed was an abuse of the process of law as the order had attained finality at all levels i.e. at High Court, Supreme Court and NCLAT. Further, Hotel Gaudavan also misled the court by writing that the NCLAT had granted liberty to Hotel Gaudavan to file application before NCLT whereas no such liberty was granted.
- On facts, NCLT dismissed the application and imposed a cost of Rs. 10 lakhs to be paid by applicant from its own account and not from the account of Hotel Gaudavan and the same shall be paid in the company pool of Hotel Gaudavan.

## 9. Whether pendency of proceedings before DRT is a proof of occurrence or non-occurrence of default?

### Legal Provision(s)

- Section 7 of the Code reads as under:

*"7. (1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a Corporate Debtor before the Adjudicating Authority when a default has occurred.*

*Explanation – For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the Corporate Debtor.*

- (2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.*
- (3) The financial creditor shall, along with the application furnish–*
- (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;*
  - (b) the name of the resolution professional proposed to act as an interim resolution professional; and*
  - (c) any other information as may be specified by the Board.*
- (4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).*
- (5) Where the Adjudicating Authority is satisfied that –*
- (a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or*
  - (b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is*

*pending against the proposed resolution professional, it may, by order, reject such application:*

*Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.*

(6) *The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).*

(7) *The Adjudicating Authority shall communicate –*

*(a) the order under clause (a) of sub-section (5) to the financial creditor and the Corporate Debtor;*

*(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.”*

- Section 3 (12) of the Code reads as under:

*“3.(12) “default” means the 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.”*

#### **NCLT View**

- NCLT, Ahmedabad Bench, in ***State Bank of India vs. Radheshyam Fibres Pvt. Ltd.***, [C.P. (I.B.) No. 51/7/NCLT/AHM/2017], decided on 7<sup>th</sup> August, 2017, considered the objection that pendency of recovery proceedings before DRT cannot be said that default by Corporate Debtor.
- NCLT observed that pending proceedings, though is not a proof of the occurrence of the default, is in no way contradictory to the fact of the occurrence of default. The opposite party needs to establish a good defence in such case to prove that no default occurred. Moreover, the material on record was taken into account to conclude that default had, in fact, occurred.

**10. Whether set-off or counter-claim by Corporate Debtor can be treated as a 'dispute' relating to financial debt and where a Corporate Debtor is entitled to set-off or counter-claim, can it be said that there is no 'default'?**

**Legal Provision(s)**

- Section 5 (6) of the Code reads as under –
  - “5 (6) “dispute” includes a suit or arbitration proceeding relating to –*
    - (a) the existence of the amount of debt;*
    - (b) the quality of goods or service; or*
    - (c) the breach of a representation or warranty*
- Section 3 (12) of the Code reads as under –
  - “3(12) “default” means the 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.”*

**NCLT View**

- In ***V.R. Polyfab Pvt. Ltd. vs. Sadhbhav Enterprise Pvt. Ltd.*** [CP No. (IB) No. 115/7/NCLT/AHM/2017], decided on 19<sup>th</sup> September, 2017, NCLT, Ahmedabad Bench, considered an objection raised by Corporate Debtor that instead of the Financial Creditor, the Corporate Debtor is entitled to claim an amount from the Financial Creditor and as such, there is no default.
- NCLT observed that even assuming that the Corporate Debtor is entitled for certain amount from the Financial Creditor, the same can only be treated as a set off or counter claim and therefore it cannot be treated as a 'dispute' relating to financial debt due to the financial creditor from the Corporate Debtor. Further, NCLT observed that though Corporate Debtor has pleaded counter-claim or set-off, but it cannot be said that there is no default in repayment of financial debt by Corporate Debtor.

## 11. Whether NCLT can refuse to appoint an IRP on the ground of large number of assignments held by such IRP?

### Legal Provision(s)

- Section 16 (1) of the Code reads as under:

*"16(1) The Adjudicating Authority shall appoint an interim resolution professional within fourteen days from the insolvency commencement date.*

- Section 5 (12) of the Code reads as under:

*"5(12) "insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be;"*

### NCLT view

- NCLT, in ***IDBI Bank Limited vs. Lanco Infratech Limited***. [C.P. (I.B) No. 111/7/HDB/2017], decided on 7<sup>th</sup> August, 2017, considered an application where objection was raised to the appointment of an IRP who was already handling three big assignments.
- NCLT took note of paragraph 22 of the Code of Conduct for Insolvency Professionals as provided in First Schedule of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 which provides that an insolvency professional must refrain from accepting too many assignments, if he is unlikely to be able to devote adequate time to each of his assignments.
- NCLT in this case denied the appointment of IRP on the ground that he was already handling three big assignments and had recently been appointed as IRP for two large companies, one of them being with regard to a company which was one of the 12 big defaulters identified by RBI. In such fact situation, NCLT observed that most of the activities prescribed in Code are time bound and such insolvency professional would not find sufficient time to act as IRP. Therefore, the insolvency professional should be very judicious and careful in accepting too many assignments on their plate which they are unable to chew. If they do so, they may make some money in the short term but are running a huge risk of losing their reputation, respect and credibility in the long run, if they are not able to handle such assignment effectively and to the satisfaction of the stakeholders.

## 12. Whether NCLT has power to issue directions for personal appearance of statutory auditors and promoters of Corporate Debtor?

### Legal Provision(s)

- Section 19 of the Code reads as under:

*“19. (1) The personnel of the Corporate Debtor, its promoters or any other person associated with the management of the Corporate Debtor shall extend all assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the Corporate Debtor.*

*(2) Where any personnel of the Corporate Debtor, its promoter or any other person, required to assist or cooperate with the interim resolution professional, does not assist or cooperate, the interim resolution professional may make an application to the Adjudicating Authority for necessary directions.*

*(3) The Adjudicating Authority, on receiving an application under sub-section (2), shall by an order, direct such personnel or other person to comply with the instructions of the resolution professional and to cooperate with him in collection of information and management of the Corporate Debtor.”*

### NCLT view

- In **Anil Kumar vs. Rolex Cycles Private Limited & Ors.** [C.A. Nos. 122-124/2017 in CP (IB) No. 37/CHD/PB/2017], decided on 8<sup>th</sup> September, 2017, an application was filed by the IRP seeking directions from NCLT as the Corporate Debtor failed to co-operate.
- When the IRP went to take over the management of the Corporate Debtor, the IRP was told to come the next day. On the next day, IRP observed that there was no plant, machinery, tools, equipments, workers etc at the site as all the things had been removed. The Chartered Accountant of the Corporate Debtor informed that he was not in possession of any financial documents of the Corporate Debtor.
- Further, the Corporate Debtor also managed to put pressure on the IRP by calling the Police and informed the IRP that a complaint has been filed before the police officials in Ludhiana.

- In such a scenario, the IRP had to approach the NCLT under section 19(2) of the Code for obtaining appropriate directions.
- NCLT observed that the Statutory Auditors had failed to hand over any information and/or financial documents. Further, NCLT observed that there was no proper monitoring by the Regional Office of the Bank holding major voting share in the committee of creditors.
- In such fact situation, NCLT passed an order directing the Commissioner of Police to provide protection to IRP. Further, notice was given to Director of Corporate Debtor and Statutory Auditors of Corporate Debtor to appear in person as to why action should not be initiated against them for violating order of NCLT.

### 13. Whether the NCLT is bound by the decision of CoC to grant extension of 90 days period for completion of CIRP under section 12(2) of the Code?

#### Legal Provision(s)

- Section 12 of the Code reads as under:

*"12. (1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.*

*(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of seventy-five per cent of the voting shares.*

*(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:*

*Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once."*

#### NCLT view

- In the matter of **REI Agro Limited** [C.A. No. 364/KB/2017], decided on 24<sup>th</sup> August, 2017, an application was filed by the IRP for extension of period for completion of CIRP for another period of 90 days on the basis of a resolution passed by Committee of Creditors.
- The CIRP against REI Agro Limited, Corporate Debtor, ("**REI Agro**") had been initiated on the basis of an application filed by a Director under section 9 of the Code as Operational Creditor claiming an amount of around 10 lakhs as salary. The order admitting the application was passed in February, 2017. The 180 days period was to expire on 26<sup>th</sup> August, 2017.

- The application for extension of time of 90 days was filed on the basis that, *firstly*, the RP took charge from IRP on 22.05.2017, *secondly*, the valuers appointed by IRP could not deliver their reports within the stipulated and agreed time because of wide spread locations of land and building, plant and machinery and wind turbine generators. The report of valuers was submitted in last week of July and liquidation value of REI Agro was arrived at. *Thirdly*, a provisional attachment order was passed by the Director of Enforcement, Delhi, Ministry of Finance, Government of India, whereby the assets of REI Agro had been attached by them under the FEMA, PML Act. Since the RP was under an obligation to safeguard and protect the assets of the REI Agro, the RP took up the matter with the authorities. *Fourthly*, the Central Bureau of Investigation had been investigating on the affairs of REI Agro for sharing of information to find out the under-valued and preferred transactions and correct liquidation value could not be arrived at unless the information from CBI is obtained and the order issued by Director of Enforcement is received.
- NCLT observed that sub-section (2) of section 12 of the Code clearly gives the jurisdiction to extend a further period of 90 days but it can be passed only in case the NCLT is satisfied that the resolution process cannot be completed within 180 days.
- Further, NCLT took note of the order passed by the Director of Enforcement attaching assets of REI Agro; fact that Central Bureau of Investigation had been conducting investigations on the affairs of REI Agro .
- Thus, NCLT held that from the records it appeared that even after extending the time, ultimate result would be liquidation. In such fact situation, the NCLT thought it fit not to extend the period of completion of CIRP for another period of 90 days and rejected the application and ordered liquidation of Corporate Debtor.

**14. Whether copy of application served on director of the Corporate Debtor is sufficient compliance of Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which mandates service of copy of application at registered office of Corporate Debtor?**

**Legal Provision(s)**

- Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 reads as under :

*"4. Application by financial creditor. –*

*(1) A financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process against a Corporate Debtor under section 7 of the Code in Form 1, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.*

*(2) Where the applicant under sub-rule (1) is an assignee or transferee of a financial contract, the application shall be accompanied with a copy of the assignment or transfer agreement and other relevant documentation to demonstrate the assignment or transfer.*

*(3) The applicant shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the Corporate Debtor.*

*(4) In case the application is made jointly by financial creditors, they may nominate one amongst them to act on their behalf."*

**NCLT View**

- In ***Inderpreet Singh vs. Mariners Buildicon India Ltd.*** [Company Petition No. (IB)- 185 (PB)/2017], decided on 24<sup>th</sup> August 2017, an application was filed by the applicant under section 7 of the Code before the NCLT, Special Bench, New Delhi.
- Before filing the application, Financial Creditor served a copy of the application under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. As per the Rule, the application was to

be served at the registered address of the Corporate Debtor. The application could not be served at the registered address as the same had shifted; however, the application was served to one of the Directors of the Corporate Debtor who duly acknowledged the same.

- NCLT observed that though the copy of the application had not been served at the registered address of the Corporate Debtor, the same had been served on one of the Director of the Corporate Debtor whose name was also listed in the Master Data of the Company as maintained by Ministry of Corporate Affairs. The said Director had not only acknowledged but also replied to the Applicant contending that the *“Corporate Debtor is currently in financial distress on account of default in payment by its customers. It is trying its best to ensure recoveries from its customers, however, it appears that such recoveries will take longer time than they anticipated and thus they are not in a position to clear your outstanding at the current moment.”*
- Hence, when the debt in default was acknowledged by the Director and also acknowledged receipt of the application of the Financial Creditor in Form-1, NCLT held that the requirement of serving notice on Corporate Debtor was duly complied with and application to initiate CIRP was admitted.

## 15. Whether NCLT can issue directions to Reserve Bank of India to ensure mandatory compliance of provisions of the Code?

### Legal Provision(s)

- Section 9 (3) of the Code reads as under:
  - “9. (3) The operational creditor shall, along with the application furnish –
    - (a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the Corporate Debtor;
    - (b) an affidavit to the effect that there is no notice given by the Corporate Debtor relating to a dispute of the unpaid operational debt;
    - (c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the Corporate Debtor; and
    - (d) such other information as may be specified.”

### NCLT view

- In *M/s SoftwareOne India Pvt. Ltd. vs. M/s Emkor Solutions Ltd.* [CP (IB) 253 (ND)/ 2017], decided on 28<sup>th</sup> September, 2017, an application was filed by the M/s SoftwareOne India Pvt. Ltd., Operational Creditor (“**SoftwareOne**”) before the NCLT, New Delhi Bench-II, New Delhi wherein SoftwareOne did not file a certificate from the financial institution, as mandated under section 9(3)(c) of the Code.
- It was submitted by SoftwareOne before NCLT that despite requesting the Bank a number of times for grant of certificate under section 9(3)(c) of the Code, the Bank has failed to provide such certificate.
- In such circumstances, notice was issued to the Chief Manager of the Bank to show cause as to why no action should be taken against him for refusal to comply with the mandatory provisions of the Code.
- On appearance, the Chief Manager of the Bank deposed that the Bank is unable to provide a certified copy as required under Section 9(3) (c) of the Code because of the limitation of the working system between the Banks.
- In such situation, NCLT observed that “appropriate directions shall be given by the Bench in separate proceedings to the Regulator i.e. the RBI as to why the mandatory compliance of Section 9(3)(c) is not being made by the Banks and what steps are contemplated by it for directing statutory adherence to the procedure under the Code”

## 16. Whether NCLT has power to restore an application which has been dismissed for non-prosecution under Rule 48 of the National Company Law Tribunal Rules, 2016?

### Legal Provision(s)

- Rule 48 of the NCLT Rules, 2016 reads as under:

*“48. Consequence of non-appearance of applicant. –*

- (1) Where on the date fixed for hearing of the petition or application or on any other date to which such hearing may be adjourned, the applicant does not appear when the petition or the application is called for hearing, the Tribunal may, in its discretion, either dismiss the application for default or hear and decide it on merit.*
- (2) Where the petition or application has been dismissed for default and the applicant files an application within thirty days from the date of dismissal and satisfies the Tribunal that there was sufficient cause for his non-appearance when the petition or the application was called for hearing, the Tribunal shall make an order restoring the same: Provided that where the case was disposed of on merits the decision shall not be re-opened.”*

### NCLT view

- In ***State Bank of India vs. Namdhari Food International Pvt. Ltd.*** [C.P. No. (I.B.)-189(ND)/2017], decided on 2<sup>nd</sup> August, 2017, an application was filed by State Bank of India, Financial Creditor, (“SBI”) against the Namdhari Food International Pvt. Ltd., Corporate Debtor (“**Namdhari Food**”) for initiation of CIRP on 27.06.2017. The same was listed on 05.06.2017 and adjourned for next day as SBI did not appear. On the next day also, i.e. 06.07.2017, the SBI did not appear and the matter came to be dismissed for non appearance of Financial Creditor.
- The application for restoration was filed by SBI on 07.07.2017.
- Counsel for SBI relied upon Rule 48 of the NCLT Rules, 2016 contending that the application for restoration was filed within 30 days of the order of dismissal and hence, the application should be restored.
- The NCLT was, however, of the view that the provisions of Rule 48 of the NCLT Rules, 2016 were not applicable to proceedings under the Code *stricto sensu* and under the Code, NCLT is required to deal with the insolvency application within a period of 14 days.

- However, since the SBI was diligent in as much as the application for restoration was filed the next day and further that the period of 14 days had not expired from the original filing date of 27.06.2017, the NCLT restored the original application for initiation of CIRP.

## 17. Whether voluntary CIRP filed by Corporate Debtor is to be permitted only if bona fide?

### Legal provision(s)

- Section 10 (1) of the Code reads as under:

*"10 (1) Where a Corporate Debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority."*

### NCLT view

- NCLT, in ***M/s. Krishna Kraftex Private Limited*** [C.P. No. (IB)- 78(ND)/2017], decided on 15<sup>th</sup> May 2017, held that it could never have been the intention of the legislature to consider a matter as serious as placing the Company in the hands of a RP in a mechanical way without due application of mind of NCLT.
- It was further observed that should this have been the case, then every corporate entity, who has no assets in hand and has incurred great liabilities be it acquisition of cars or assets acquired and to personal use of directors, would resort to a simple way of filing such an application to escape any recovery proceeding or even civil imprisonment on being declared insolvent.
- NCLT noted that taking a hyper technical view of the provisions would open the flood gates of people forming companies, incurring expenses in the name of the company and then filing for Insolvency Resolution Process under the Code for enjoying a moratorium. The object of the Code is not to provide for an escape route to a company or its directors who have incurred great debts and are unable to liquidate the liabilities after availing services and goods (stock in trade) from various suppliers, loans from banks, friends and family.
- Similarly, NCLT, Mumbai Bench in ***Leo Duct Engineers and Consultants Ltd*** [CP No. 1103/I&BP/NCLT/MAH/2017] decided on 22<sup>nd</sup> June 2017, while dismissing the application for initiation of CIRP filed by the Corporate Applicant - Leo Duct Engineers and Consultants Ltd ("**Leo Duct**"), observed that the Corporate Debtor was merely using this application as a dilatory tactic to scuttle the proceedings under the SARFAESI Act.
- NCLT observed that admitting the application would have a serious impact on the Financial Creditors, who had already set the wheel in motion to recover their debts and the secured assets of the Leo Duct were due to be repossessed by the Financial Creditors on the day of filing of the application.
- NCLT held that Leo Duct was evidently trying to abuse the process of law, to which the NCLT could not be party.

**18. Whether the IRP can continue after expiration of 30 day period while confirmation from the Insolvency and Bankruptcy Board of India as provided under section 22(5) of the Code is awaited?**

**Legal provision(s)**

- Section 22 (3) of the Code reads as under:

*“22. (3) Where the committee of creditors resolves under sub-section (2) –*

*(a) to continue the interim resolution professional as resolution professional, it shall communicate its decision to the interim resolution professional, the Corporate Debtor and the Adjudicating Authority; or*

*(b) to replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional.”*

- Section 22 (5) of the Code reads as under:

*“22. (5) Where the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional.”*

**NCLT view**

- NCLT, Mumbai Bench in ***UB Engineering Ltd.*** [MA 77-2017 in CP 1A (I&BP) 2017], decided on 9<sup>th</sup> March 2017, while disposing off an application under section 22 (3) (b) of the Code filed by the lead bank of CoC praying for the replacement of the IRP by their nominated RP, directed that the appointment of the IRP appointed earlier shall continue meanwhile i.e. beyond the period of 30 days provided in the Code while confirmation from the Insolvency and Bankruptcy Board of India as provided under section 22 (5) of the Code is awaited.

### **19. Whether concealment of facts by Corporate Debtor while making application for insolvency resolution process amounts to abuse of process of the Code?**

#### **Legal provision(s)**

- Section 10 (1) of the Code reads as under:

*“10(1) Where a Corporate Debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.”*

- Section 65(1) of the Code reads as under:

*“65.(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.”*

#### **NCLT view**

- NCLT in ***M/s Unigreen Global Private Limited***, [Company Petition No. IB-39 (PB)/2017] decided on 8<sup>th</sup> May 2017 took note of the fact that the Corporate Debtor – M/s Unigreen Global Private Limited (“**Unigreen**”) had not made complete disclosure in relation to the assets mortgaged and deliberately engineered civil suits in relation to the properties mortgaged.
- NCLT dismissed the application and with a view to discourage the parties from abusing the process of the Code, deemed it a fit case to impose costs of Rs. 10 lakhs.

**20. Whether IRP in discharge of functions of Board of Directors is required to approve annual accounts and reports of Corporate Debtor for periods prior to appointment of IRP?**

**Legal provision(s)**

- Section 17 (1) of the Code provides as under:

*“17. (1) From the date of appointment of the interim resolution professional –*

- (a) the management of the affairs of the Corporate Debtor shall vest in the interim resolution professional;*
- (b) the powers of the board of directors or the partners of the Corporate Debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional;*
- (c) the officers and managers of the Corporate Debtor shall report to the interim resolution professional and provide access to such documents and records of the Corporate Debtor as may be required by the interim resolution professional; (d) the financial institutions maintaining accounts of the Corporate Debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the Corporate Debtor available with them to the interim resolution professional.*

*(2) The interim resolution professional vested with the management of the Corporate Debtor shall –*

- (a) act and execute in the name and on behalf of the Corporate Debtor all deeds, receipts, and other documents, if any;*
- (b) take such actions, in the manner and subject to such restrictions, as may be specified by the Board;*
- (c) have the authority to access the electronic records of Corporate Debtor from information utility having financial information of the Corporate Debtor;*
- (d) have the authority to access the books of account, records and other relevant documents of Corporate Debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified.”*

**NCLT view**

- NCLT Kolkata Bench, in ***Nicco Corporation Ltd.***, [C.P.No. 03/2017], decided on 9<sup>th</sup> February 2017 noted that since the IRP has been appointed in supersession of Board of Directors of the Corporate Debtor, the Board of Directors' approval is required in the case of adoption of annual accounts and financial report. Therefore, the IRP, may, as provided in the Companies Act, 2013, discharge the functions of Board of Directors with regard to approving of annual accounts and reports pertaining to the periods prior to the appointment of IRP.

## 21. Whether personal property of promoter/guarantor can be considered as collateral of Corporate Debtor in CIRP?

### Legal provision(s)

- Section 18 (f) of the Code reads as under:

*“18. The interim resolution professional shall perform the following duties, namely: –*

*(f) take control and custody of any asset over which the Corporate Debtor has ownership rights as recorded in the balance sheet of the Corporate Debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including–*

- (i) assets over which the Corporate Debtor has ownership rights which may be located in a foreign country;*
- (ii) assets that may or may not be in possession of the Corporate Debtor;*
- (iii) tangible assets, whether movable or immovable;*
- (iv) intangible assets including intellectual property;*
- (v) securities including shares held in any subsidiary of the Corporate Debtor, financial instruments, insurance policies;*
- (vi) assets subject to the determination of ownership by a court or authority;*

*Explanation. – For the purposes of this sub-section, the term “assets” shall not include the following, namely: –*

- (a) assets owned by a third party in possession of the Corporate Debtor held under trust or under contractual arrangements including bailment;*
- (b) assets of any Indian or foreign subsidiary of the Corporate Debtor; and*
- (c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.”*

- Section 25 (1) of the Code reads as under:

*“25 (1) It shall be the duty of the resolution professional to preserve and protect the assets of the Corporate Debtor, including the continued business operations of the Corporate Debtor.”*

- Section 25 (2) (a) of the Code reads as under:

*“25. (2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: —*

*(a) take immediate custody and control of all the assets of the Corporate Debtor, including the business records of the Corporate Debtor;*

#### **NCLT view**

- NCLT, Mumbai Bench in ***Leo Duct Engineers and Consultants Ltd.*** [CP No. 1103/I&BP/NCLT/MAH/2017] decided on 22<sup>nd</sup> June 2017, observed that under the SARFAESI Act, a bank could proceed against any security provided by either the promoter/guarantor or the Corporate Debtor.
- NCLT noted that, however, personal properties of the promoter/guarantor do not fall within the purview of the Code.
- NCLT further noted that the RP is concerned only with the assets of the Corporate Debtor or any immovable property in its name and yet a moratorium under Section 14 of the Code automatically stalls all proceedings that involve the assets of the debtor as well as the personal property of the promoter/guarantor. Apart from aforesaid, NCLT noted that a guarantor could use the moratorium under the Code to scuttle SARFAESI Act proceedings and avoid being dispossessed of their personal immovable properties. NCLT also noted that the direction for imposing a moratorium would suit the directors and the guarantors perfectly from being dispossessed from their immovable properties under the SARFAESI Act.

**22. Whether NCLT, in exercise of its inherent powers, can convert an application under section 9 of the Code by an operational creditor to an application under section 7 of the Code by a Financial Creditor?**

**Legal Provision(s)**

- Section 7 (1) of the Code reads as under:

*“7.(1) A Financial Creditor either by itself or jointly with other Financial Creditors may file an application for initiating corporate insolvency resolution process against a Corporate Debtor before the Adjudicating Authority when a default has occurred.*

*Explanation – For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant Financial Creditor but to any other Financial Creditor of the Corporate Debtor.”*

- Rule 11 of the NCLT Rules, 2016 reads as under:

*“11. Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.”*

**NCLT view**

- In ***Sanjeev Jain vs. M/s Eternity Infracon Pvt. Ltd.*** [Company Petition no. (IB) 113(ND)/2017], decided on 12<sup>th</sup> July, 2017, an application was filed by one Mr. Sanjeev Jain (“**Mr. Jain**”), claiming himself to be ‘Operational Creditor’ of M/s Eternity Infracon Pvt. Ltd. Corporate Debtor (“**Eternity Infracon**”).
- Mr. Jain had invested an amount of Rs. 18 Lakhs in a commercial project developed by Eternity Infracon. Upon failure of Eternity Infracon to complete the construction or make an escalated price/return upon the investment, Mr. Jain filed the application.
- NCLT noted that the claim of Mr. Jain was neither in respect of provisions of goods or services including dues on account of employment or a debt in respect of repayment of dues arising under any law for the time being in force and payable to Centre or State Government. The claim was thus not an ‘operational debt’ nor was the applicant an ‘Operational Creditor’.
- As a saviour, an argument was raised to treat the application under section 9 of the Code as one under section 7 of the Code under the inherent powers of NCLT provided under Rule 11 of the NCLT Rules, 2016.

- NCLT observed as under :

*“16. ...The Code prescribes stipulated time frame to be followed at every relevant stage of the resolution proceedings. Besides the insolvency resolution process has serious civil consequences, which suggests for a cautious approach strictly in accordance with the procedure prescribed by the Code.*

*17. It is also pertinent to state here that the provisions and scope of Section 9 including the applicable rules, forms and procedure are totally distinct and separate from that of Section 7 of the Code. There is no provision in the code to convert a section 9 application into a section 7 application as prayed. On the contrary, the Code provides that applications filed under section 7, 9 or 10, as the case may be should either be admitted or rejected in accordance with respective provisions...”.*

## **ABOUT ICSI INSOLVENCY PROFESSIONALS AGENCY**

ICSI Insolvency Professionals Agency (ICSI IPA) is a company incorporated under Section 8 of the Companies Act, 2013 and is a wholly owned subsidiary of the Institute of Company Secretaries of India (ICSI). It is registered with Insolvency and Bankruptcy Board of India (IBBI) under the Insolvency and Bankruptcy Code, 2016 (Code). It enrolls, trains and monitors the performance of its members practicing as Insolvency Professionals and lays down the standards of professional conduct for them.

ICSI IPA in its constant endeavour to update the professionals on the latest developments in the insolvency law, regularly organises professional development programmes including conferences, seminars, round tables, study circles, webinars and workshops either on its own or in association with IBBI or industry chambers or other similar organisations. ICSI IPA also brings out, from time to time, publications of repute which are useful for the professionals, bankers, corporate, academicians, students and other stakeholders.

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