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ICSI IPA Insolvency and Bankruptcy Journal

ICSI INSOLVENCY PROFESSIONALS AGENCY
(A Wholly Owned Subsidiary of ICSI and Registered with IBBI)

ABOUT ICSI INSOLVENCY PROFESSIONALS AGENCY

ICSI Insolvency Professionals Agency (ICSI IPA) is a frontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI) under the Insolvency and Bankruptcy Code, 2016 (Code). It 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 enrols professionals who satisfy the criteria and are eligible to be enrolled as Insolvency Professionals (IP's). ICSI IPA is cast with ardous task of not only enrolling, educating, training, monitoring the performance of the members practising as Insolvency Professionals and laying down the standards of professional conduct for them but also to develop, defuse and further advance the law relating to insolvency in India under the aegis of the Code.

ICSI IPA inherits, from its holding company, ICSI, the legacy of disseminating knowledge and fostering development of high calibre Insolvency Professionals. In its constant endeavour to update the professionals on the latest development in the insolvency law, ICSI IPA has taken upon itself the responsibility which includes organising professional development programmes including conferences, seminars, round tables, study circles, webinars and workshops on the code either on its own or in association with IBBI or industry chambers or other similar organisations. ICSI IPA has also brought out publications of repute including *inter alia* "Practical Aspects of Insolvency Law", "IBC Case Law Compendium (with case briefs)", "Interim Resolution Professional: A Handbook" as well as a handy compilation of Code and Rules and Regulations made thereunder. It's weekly bulletin titled "Knowledge Reponere" keeps the professional members of ICSI IPA abreast with the latest judicial pronouncements on the Code. ICSI IPA has also organised Certificate Course on the Code on a pan India basis to train the Insolvency Professionals on the practical nuances of the Code including business, management and accounting aspects and aims to equip the Insolvency Professionals to face the real world challenges under the new insolvency regime.

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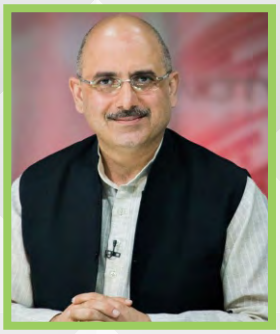
GOVERNING BOARD OF ICSI INSOLVENCY PROFESSIONAL AGENCY

The Governing Board of ICSI IPA, being in line with the mandate of Chapter III of Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 is endowed with an optimal mix of Promoter Directors and Independent Directors. The Governing Board of ICSI IPA oversees the activities and the functioning of the Company and consists of a total of seven directors out of which four are Independent Directors. The Independent Directors of ICSI IPA are from diversified fields of law, capital market, education, corporate sector and management.

The composition of the Governing Board is as follows:

CHAIRMAN



1. MR. NALIN KOHLI – Independent Director (Advocate, Supreme Court of India)

Mr. Nalin Satyakam Kohli is an Advocate at the Supreme Court of India and also the Additional Advocate General for the State of Rajasthan and Assam. He is a political personality who has over two decades of professional experience in the Education, Media and Entertainment sector. He is also a government nominee on the disciplinary committee of the ICSI. National Spokesperson of the Bharatiya Janata Party (BJP) and also the Director of the party's Public Policy Research Centre (PPRC). Mr. Nalin is also the party in-charge for the state of Meghalaya in the North East of India.

INDEPENDENT DIRECTORS

2. MR. ASHISH KUMAR CHAUHAN – Managing Director and CEO, BSE Ltd.

Mr. Ashish Chauhan currently works as the MD & CEO of BSE (Bombay Stock Exchange), the first stock exchange of Asia. He is one of the founders of India's National Stock Exchange ("NSE") where he worked from 1992 to 2000. At NSE, he was instrumental in setting up the first screen based trading in India, equities market and first commercial satellite communications network for India. He is best known as the father of modern financial derivatives in India. He also created several path breaking frameworks including Nifty index, NSE certifications in financial markets, etc. From 2000 to 2009, he worked as the President and Chief Information Officer of Reliance group and also acted as the CEO of the cricket team Mumbai Indians in its formative years.

3. MRS. SUSHMA BERLIA – President, Apeejay Stya & Svran Group and Chairperson, Apeejay Education Society

Mrs. Sushma Paul Berlia is a leading Entrepreneur, Industrialist and Educationist who has devoted her life to nation building with global footprints. Spearheading the Apeejay Stya & Svrán Group - a leading industrial & business house with diversified interests in India and abroad, as its Co-Promoter & President, she has earned accolades for building a diverse range of companies with a focused culture of innovation and decision-making, with social responsibility and impact in mind. She is the Co-Founder & Chancellor of Apeejay Stya University, India's first industry-centric technology & liberal arts Based University and Chairman of the Apeejay Education Society, which runs 29 schools and higher education institutions across the country.

Mrs. Berlia was the first woman to lead a multi-state apex chamber of commerce in India, serving as the President of the PHDCCI in 2005-06. She is also member of the Apex Chamber of Commerce like FICCI, CII, PHDCCI, and ASSOCHAM. She is also Member of the National Board of Ministry of Micro, Small & Medium Enterprise, Government of India.

4. MR. SIDHARTH BIRLA – Past President-FICCI and Chairman, Xpro India Limited.

Mr. Sidharth K. Birla holds an MBA Degree from IMEDE (now IMD), Switzerland and a Science Degree (Honors in Physics) from Calcutta University. He is also an Alumnus of the Harvard Business School.

He is a Company Director and Entrepreneur with core business interests in manufacturing. He is Chairman of Xpro India Ltd. - a polymers processing company where he is also the founder, and of Digjam Ltd., manufacturer of woollen worsted suiting fabrics. He has financial sector interests and links in private business, and an enduring connect with corporate laws having chaired FICCI's Corporate Laws Committee for an extended period.

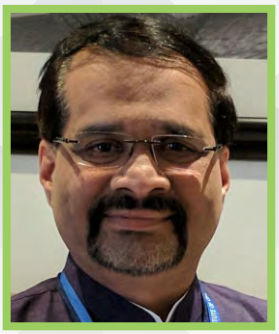
OTHER DIRECTORS

5. CS (Dr.) SHYAM AGRAWAL - President, ICSI

A man of stupendous vision, professional vigour and colossal discipline having an unyielding belief in prosperity of revered profession of Company Secretaries, **CS (Dr.) Shyam Agrawal** has taken over as the zenithal torch-bearer of Corporate Governance profession in India for the year 2017 on joining the ICSI as **'the President'** from 19th January 2017.

He is also a recipient of the Prestigious "Emerging Leader of the Year" Award in the year 2016. He holds positions of Director, Governance Research and Knowledge Foundation, ICSI and Director, ICSI Insolvency Professional Agency and vouches for taking the profession of Company Secretaries of India on a sky-scraping pedestal of governance globally.

6. CS MAKARAND LELE - Vice President, ICSI



Fellow Company Secretary (FCS) and a member of ICSI since 1992. He is a Commerce graduate from Garware College of Commerce Pune and Law graduate from ILS Law College Pune. He has co-founded MRM ASSOCIATES, a firm of Company Secretaries in Pune in the year 2001 and MRM Corporate Advisor Private Limited.

He is also a Central Council Member of ICSI for the term of 2015-2019 and is elected to the post of Vice- President, ICSI for the year 2017. He was the first Chairman of Auditing Standards Board formed by ICSI.

He has recently been empanelled as "Mediator & Conciliator" by the Government of India.

7. CS ASHISH GARG - Council Member, ICSI

CS Ashish Garg, is a Post Graduate in Economics and Commerce and Graduate in Law from the Vikram University, Ujjain and a Fellow Member of the ICSI. He has been elected to the Central Council of the ICSI for the term 2015-2018. He was the Chairman of Practicing Company Secretaries Committee of the ICSI for the year 2015 and 2016 and Core Group of GST of ICSI for the year 2016 and presently he is the Chairman of Centre of Corporate Governance, Research and Training (CCGRT), known for its training and research in the Corporate Governance. He is also member the Cost Accounting Standards Board of the Institute of Cost Accountants of India for the year 2017 nominated from the ICSI.

He is a Practicing Company Secretary at Indore, financial capital of Central India Region since more than 16 years and having specialization in corporate laws, organizational restructuring and corporate legal counselling to companies and appearances before National Company Law Tribunal and Ministry of Corporate Affairs.

CEO

CS Alka Kapoor - Chief Executive Officer (Designate), ICSI IPA

Ms. Alka Kapoor is the Chief Executive Officer (Designate) of ICSI Insolvency Professionals Agency. Prior to this, she was holding the senior position of Joint Secretary in ICSI. She is a Fellow Member of the Institute of Company Secretaries of India and a Post Graduate in English Literature.

She has over 25 years of experience in the areas of Corporate Laws and Corporate Governance. She has contributed immensely in the drafting of the New Company Law and has been advising MCA on various matters of policies and regulatory framework. She has contributed significantly in bringing out Secretarial Standards, institution of ICSI Award for Excellence in Corporate Governance, PMQ Course on Corporate Governance and bringing out various publications of ICSI.

Ms. Alka Kapoor has been a regular participant at the OECD Asian Roundtable on Corporate Governance and was a moderator at OECD Roundtable on "Reform Priorities in Asia: Taking Corporate Governance to a Higher Level" in 2011 at Bali, Indonesia. She was a lead discussant at the OECD Asian Roundtable on Corporate Governance held at Bangkok in 2015 and also represented ICSI at the OECD Conference on "Improving women's access to leadership: What works?" held at Paris in March, 2016.

Messages

पी.पी. चौधरी
राज्य मंत्री
विधि और न्याय
और
कारपोरेट कार्य
भारत सरकार

सत्यमेव जयते

स्वच्छ भारत
एक कदम स्वच्छता की ओर

P.P. CHAUDHARY
Minister of State
Law & Justice
and
Corporate Affairs
Government of India

Date: 30th October, 2017

Message

A speedy, transparent and time-bound mechanism for business resolution is the hallmark of the Insolvency and Bankruptcy Code, 2016 (Code). The Code aims to strengthen the institutional mechanism to tackle the issues of bankruptcy and insolvency in the Indian economy. The Code attempts to provide a robust framework to financial institutions and banks to deftly deal with Non-Performing Assets (NPAs) arising out of failed corporate ventures.

With the operationalizing of the Code, newer challenges & opportunities have arisen for the numerous stakeholders involved in the Insolvency and Bankruptcy regime. It has become an imperative for them to constantly stay updated with the new developments occurring in this field. An initiative in the form of a *monthly journal* would immensely assist the stakeholders in this regard.

ICSI Insolvency Professionals Agency (IPA) deserves accolades for coming up with this insightful journal which would keep its readers abreast of the developments in this dynamic field. I wish them success in their future endeavours.

(P.P. Chaudhary)

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B. N. SRIKRISHNA
Former Judge, Supreme Court of India

MESSAGE

I am delighted to learn that ICSI Insolvency Professionals Agency will be publishing a monthly Journal to update its professional members about the latest developments in insolvency law, particularly with regard to the state of law in other jurisdictions, delegated legislations made by the Insolvency & Bankruptcy Board as also decisions of NCLT, High Courts and Supreme Court having a bearing on this emerging branch of law. This is an important and laudable effort which will help in ensuring coordinated and efficacious development of the law on this vital subject which has serious ramifications on the economy of the country.

My hearty congratulations and good wishes on the occasion.

Mumbai,

November 16, 2017

B. N. SRIKRISHNA

Chief Justice (Retd.) M. M. Kumar
President

राष्ट्रीय कम्पनी विधि अधिकरण
National Company Law Tribunal

3rd November 2017

Message

1. The Insolvency and Bankruptcy Code, 2016 (IBC) is gradually progressing towards its maturity. Various principles have started emerging providing a new jurisprudence. It is setting out a mechanism where, through the collective efforts of all the stakeholders as well as the institutional pillars of the entire insolvency eco-system, efforts are made to firstly, resolve the financially distressed entities and putting them back into the mainstream or, in case the same is not possible, making way for others by providing for liquidation of such entities, so that the resources continues to serve the economy in long run.

2. The IBC is witnessing a number of applications before the NCLT for insolvency resolution process from different stakeholders every day. The cases have now started reaching Hon'ble Supreme Court and we now have many authoritative pronouncements from the Apex Court settling many crucial issues.

3. It is hearting to know that ICSI Insolvency Professionals Agency, is bringing out its monthly Journal of Insolvency and Bankruptcy Code, 2016 covering all the latest developments in the insolvency law including recent regulations and notifications promulgated on IBC as well as the gist of the landmark judgments pronounced by the various benches of NCLT, NCLAT and Hon'ble Supreme court. It would go a long way in benefiting the professional fraternity.

4. I commend the perennial efforts of ICSI Insolvency Professionals Agency in disseminating knowledge and making the professionals aware about the latest in insolvency law.

(Justice M.M. Kumar)

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Dr. T. K. VISWANATHAN
Chairman, Bankruptcy Law Reforms Committee
Formerly Union Law Secretary & Secretary General Lok Sabha

MESSAGE

As the Chairman of the ***Bankruptcy Law Reforms Committee (BLRC)*** it gives me immense pleasure to write the foreword to First Edition of the monthly journal launched by the ICSI Insolvency Professional Agency to keep its members abreast of the new Jurisprudence which is rapidly evolving around the provisions of the recently enacted land mark legislation of the century, ***the Insolvency and Bankruptcy Code 2016.***

2. As readers are aware the India lacked a robust and comprehensive insolvency and bankruptcy framework for many years. The law relating to individual insolvency was developed by the courts under the Presidency Towns Insolvency Act 1909 and the Provincial Insolvency Act 1920 whereas the law relating to corporate insolvency was governed by the Companies Act. Due to the unsatisfactory state of affairs few other legislations like the Sick Industrial Companies (Special Provisions) Act, 1985 the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Recovery of Debts Due to Banks and Financial Institutions Act,1993were added to the statute book to address the loopholes which existed in the bankruptcy framework which were exploited by the vested interests. Since insolvency and bankruptcy of corporates, individuals, partnerships and LLP were dealt under various provisions scattered in different Acts and interpreted by different judicial organs, the evolution of law of insolvency and bankruptcy was haphazard and asymmetrical.

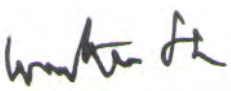
3. A single law which comprehensively deals with corporates, individuals, partnerships and LLP has a great advantage. This was lacking under the Indian legal Framework. The Insolvency and Bankruptcy Code 2016 attempts to address these shortcomings by bringing under a single umbrella corporates, individuals, partnerships and LLP.

4. Since the ***pre-2016 insolvency and bankruptcy jurisprudence*** revolves around the multiple judicial pronouncements of different judicial organs and the Insolvency and Bankruptcy Code 2016 has repealed many of those provisions, the Adjudicating Authorities under the Code especially the National Company Law Tribunal and the National Company Law Appellate Tribunal have pivotal role to play in laying down the foundations of new Insolvency and Bankruptcy Jurisprudence.

5.Though we in the BLR Committee tried our level best to deal with all possible contingencies yet no legislation can be comprehensive and provide for all possible situations leading to disputes and it is for the Presiding Officers and members of the NCLT and NCLAT to deal with unprecedented situations which require judicial innovation. In this context it is worth recalling a passage from Justice Benjamin Cardozo`s Nature of the Judicial Process wherein he states***"It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins***" In such a situation according to Cardozo the judge has to draw inspiration from the reading of life.

6. This transition from an old bankruptcy Order to a new legal Order which focusses on revival of firms and enterprises requires unlearning and relearning on the part of lawyers and judges and is the crying need of the hour. The journal will be a valuable source of information for all those practitioners whether as judges or as resolution professional or as lawyers in keep in themselves upto date on latest developments under the new Code.

7. I congratulate ICSI for taking the lead in bringing out this monthly journal.



Dr. T. K. VISWANATHAN

New Delhi

15th November 2017

सत्यमेव जयते

भारतीय दिवाला और शोधन अक्षमता बोर्ड
Insolvency and Bankruptcy Board of India

Dr. M. S. Sahoo
Chairperson

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E-mail: chairperson@ibbi.gov.in Web.: www.ibbi.gov.in

6th November, 2017

MESSAGE

As stated in its long title, the Insolvency and Bankruptcy Code, 2016 (Code) amends the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for **maximisation of value of assets** of such persons, to **promote entrepreneurship, availability of credit** and balance the interests of all the stakeholders. Thus, the Code has three foundational objectives.

Consider a firm that has freedom of entry and freedom to do business. It may, however, fail to deliver as planned, for a variety of reasons. Most often it is due to competition and innovation and for no fault of the entrepreneur. While competition and innovation contribute to growth significantly, they also increase the incidence of firm failure. The failure could also arise from faulty conceptualisation of business, inefficient execution of business, change of business environment, or even *malafide* design in rare cases. Irrespective of the reason, it dampens entrepreneurship. Through provisions for rehabilitation of viable firms, wherever feasible, and closure of non-viable firms, wherever required, the Code enables an entrepreneur to get in and get out of business with ease, undeterred by failure (honest failure for business reasons). The Code thus addresses business failures either by rescuing failed businesses or releasing resources from failed businesses and **thereby promotes entrepreneurship**.

Failure usually manifests as default in repayment obligations, indicating the firm in question in a state of insolvency. Default could arise also from a mismatch between cash inflows and outflows. It is the result of either illiquidity or insolvency and is often a legitimate outcome of business operations. The absence of a mechanism to address default hitherto has cost the economy dear in a number of ways. In the face of risk of default, lenders are not willing to lend. As the lenders do not get back their funds, the availability of funds at their disposal reduces limiting their ability to relend even for genuinely viable projects. On the other hand, low and delayed recovery pushes up the cost of lending, and consequently, credit becomes available at a higher cost at which many projects become unviable. Through provisions for resolution and liquidation, the Code enables lenders to recover funds from either future earnings, post-resolution or sale of liquidation assets. They can now distinguish and price credit risks across risk categories and offer differentiated and customized credit products across the value chain. On the other hand, the inevitable consequence of a resolution process (creditors get a right to decide the future of the firm) deters the management and promoter of the firm from committing a default and thereby minimizes the incidence of default. These increase supply of credit, reduce cost of funds, and develop debt market. The Code thus addresses default and **thereby enhances availability of credit for business**.

Default reflects relative under-performance (inefficiency) of a firm as compared to the most competitive firm in the industry. In other words, the resources at the disposal of a firm may not always be optimally utilised. This is not unusual. In competition, some will be ahead of others. Regardless of the reason, the failure, default, and underutilisation impact macro economy and micro economy in multiple of ways and need to be addressed expeditiously. The Code facilitates better utilisation of resources of the firm, while preserving the enterprise value. It enables the optimum

utilisation of resources, all the time, either by (a) preventing use of resources below the optimum potential, (b) ensuring efficient resource use within the firm through resolution of insolvency; or (c) releasing unutilised or under-utilised resources for efficient uses through closure of the firm. The Code thus addresses inefficiency of resource utilisation and **thereby maximises the value of assets**. I believe that if the resources, that are currently unutilised or underutilized or rusting for whatever reason, can be put to more efficient uses, the **growth rate may well go up by a few percentage points**, other things remaining unchanged, particularly when it is accompanied by availability of credit and entrepreneurship. To me, this constitutes probably the most significant reforms in the recent years. The economy witnessed freedom of entry in the 1990s, led primarily by reform in securities laws, and freedom to compete in the 2000s led primarily by reform in competition laws. The Code now provides the **ultimate economic freedom**, freedom to exit, led primarily by reform in insolvency and bankruptcy laws.

The implementation of the Code has been very swift thanks to the Government and all stakeholders. There is probably no parallel of such swift enactment and swift implementation. Debtors and creditors alike are undertaking corporate insolvency transactions. Nearly 400 corporate insolvency resolution processes, including 11 of the 12 big accounts identified by the Reserve Bank of India, are on. On recognising the progress in implementation of the Code, the World Bank improved **India's ranking from 136 to 103 in "Resolving Insolvency"** parameter in its report "Doing Business 2018".

This reform requires generation of knowledge and building capacity among the stakeholders for its sustenance. A journal that churns out fresh knowledge and provides deeper insights every month is the need of the hour. I compliment the ICSI Insolvency Professionals Agency for bringing out this monthly journal that would empower researchers and professionals, practitioners and academics, opinion and policy makers, to appreciate in detail the change that is in the offing and delve deeper into various aspects of the Code from an interdisciplinary perspective, **enriching the Indian literature on bankruptcy and insolvency in the days ahead**.

M. S. Sahoo

(Dr. M. S. Sahoo)

FROM THE CHAIRMAN'S DESK

Dear Friends,

The *raison d'etre* for the Insolvency and Bankruptcy Code, 2016 (IBC), simply put, has been the menace of non-performing assets and insolvency that had long been a matter of grave concern not only of the creditors but other stakeholders as well. Some such cases – involving thousands of crores of rupees of public money – have been showing up in recent times.

Soon after the IBC was enacted on 28th May, 2016, the Insolvency and Bankruptcy Board of India (IBBI) came on board on 1st October, 2016.

Continuing with its role as a Partner in Nation Building, the Institute of Company Secretaries of India, a frontline regulator, formed a section 8 company under the name and style of 'ICSI Insolvency Professionals Agency' (ICSI IPA) and incorporated the same under the Companies Act, 2017 on 25th November, 2016.

The Code is proving to be a game changer in the Indian economy with its core principles focusing on balancing the interest of all the stakeholders and timely decision. In a developing economy like ours, business entities, besides being a source of revenue, help in generation of opportunities of engagement/ employment – direct and indirect. However, considering that the Code at present is in its nascent stage, and also that evolution is a process without any break, various practical and interpretational issues crop up which necessitate further contemplation so as to remove any possible impediment in achieving the underlined objective of the Code in a smooth manner

On the eve of first anniversary of ICSI IPA, I, as the Chairman of its Governing Board, have an enormous sense of pride for the numerous initiatives that have been taken by the ICSI IPA in such a short span of less than one year

As there is yet a long way to go and lot more to accomplish, and as a step in that direction, the Governing Board has since decided that for the benefit of those interested in the subject matter, a Journal carrying, among others, articles on the related contemporary issues and the developments taking place be published every month. The first issue of the Journal in your hands is the resultant outcome. My compliments to you – being the recipients of the first issue of the Journal.

Let me take this opportunity to appeal, through this column, to you – and through you to all others interested in the subject matter, to take time out, read through the Journal and offer your considered suggestions in order that the Journal not only stands the test of time, but also emerges as the one eagerly look forward to.

Last, but not the least, the above would not have been possible, except for the pioneering and commendable efforts of Team ICSI-IPA under the able guidance of my illustrious colleagues on the Governing Board. I extend my heartfelt gratitude to them all.

With regards,

Nalin Satyakam Kohli
Chairman
Governing Board
ICSI-Insolvency Professional Agency

MESSAGE FROM THE PRESIDENT

At the dawn of its Golden Jubilee Year, the Institute of Company Secretaries of India (ICSI) displayed to the world its ceaseless efforts towards achieving its mission, at the same time, being cognizant of its vision.

The Insolvency and Bankruptcy Code, 2016 (Code) is just a year old but the ripple it has created in the Indian economy is already making headways.

Recently, the Code gave a glorious moment to India as it helped India notch 100th rank in the World Bank's Index on Ease of Doing Business, a jump of 30 ranks from the last year's 130th position. The Code has, in fact, proved to be the second biggest catalyst, after tax reforms helping India to secure the position.

ICSI Insolvency Professionals Agency (ICSI IPA) is a frontline regulator registered with Insolvency and Bankruptcy Board of India (IBBI) and is involved extensively to augment the progress of the Code.

I truly appreciate the efforts of ICSI Insolvency Professionals Agency in coming out with a monthly Journal on Insolvency and Bankruptcy Code, 2016. The Journal shall prove extremely helpful to the professional fraternity as well as to the students, bankers and general public equally as it incorporates the latest in the insolvency law not only at the level of the regulators, adjudicators but also, from the international front as well.

CS (Dr.) Shyam Agrawal

MESSAGE FROM THE CEO

Dear Professionals,

It gives me immense pleasure to announce the release of the pioneer issue of the monthly Journal "ICSI IPA Insolvency and Bankruptcy Journal" by ICSI Insolvency Professionals Agency (ICSI IPA). ICSI IPA was incorporated under Section 8 of the Companies Act, 2013 and is registered as an Insolvency Professional Agency with the Insolvency and Bankruptcy Board of India (IBBI) under the Insolvency and Bankruptcy Code, 2016 (Code).

In line with the mandate of the Code, ICSI IPA is playing the dual role of enrolling the Insolvency Professionals and laying down their standards of professional conduct on the one hand and at the same time ensuring their capacity building and professional development on the other hand.

ICSI IPA has relentlessly continued to demonstrate stirring growth right from its incorporation on 25th November, 2016, having enrolled with itself more than 450 Insolvency Professionals as on date and still counting. ICSI IPA has played a pivotal role in not only augmenting the professional growth of its members but also in advocating the Code to the masses by bringing out publications, booklets, brochures, convening seminars, round table conferences, study circle meets, webinars, workshops, training programmes et al on the Code.

ICSI IPA has brought out publications of repute including inter alia, "Practical Aspects of Insolvency law", "IBC Case Law Compendium (with case briefs)" and Interim Resolution Professional- A Handbook. In its constant endeavour to update the professionals on the latest in the insolvency realm, ICSI IPA is organising pan India, a 3 Day Certificate Course covering the practical nuances of the Code. It also organises Study Circle Meetings to provide professionals a forum to deliberate on the various issues including those emanating from judicial pronouncements and in respect of the Role, Powers, Duties and Challenges being faced by Insolvency Professionals. ICSI IPA also organises Round Tables on draft rules and regulations put up for public comments by the Regulator.

Continuing with its perpetual efforts to equip its members with the latest in the insolvency law, ICSI IPA has taken this maiden initiative to bring out this monthly Journal which is the very first of its kind to incorporate the latest in the insolvency law including recent regulations and notifications brought out by the Regulator under the Code, the gist of the landmark judgments pronounced by the Hon'ble Supreme Court, NCLAT and the various benches of NCLT, articles from experts in the field and the contemporary advancements taking place globally in the field of insolvency and bankruptcy.

I am confident that this Journal, which has been conceptualised at this opportune time, will be instrumental in keeping its readers abreast with the progressions in the insolvency and bankruptcy ecosystem.

CS Alka Kapoor

Insights

- Challenges in Insolvency Resolution Process under Insolvency and Bankruptcy Code, 2016
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[2017] 1 IBJ (Art.) 2

Challenges in Insolvency Resolution Process under Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code aims to consolidate multiple outdated laws on insolvency and bankruptcy so as to have a time bound resolution process to revive the Corporate Debtor. The Article examines the critical challenges faced by the Insolvency Professionals and other stakeholders during the Resolution Process. The author commends the development of the jurisprudence on the Insolvency Law within a short period and expects that the existing problems are resolved at the earliest to ensure the success of the Code.

Introduction

The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "IBC" or the "Code", which was made effective in December 2016, within a short span of 9-10 months has gathered a lot of momentum. The excitement and anxiety amongst the stakeholders including banks, corporate, lawyers, IPs and IRPs is quite noticeable. As of August 2017, more than 200 insolvency proceedings are going in different benches of the NCLT. The IBC has altered the way, insolvency and bankruptcy law is practised in India and has become an effective way to take actions, especially against the wilful defaulters. In this article, the focus will be to understand and discuss the critical challenges faced by Insolvency Professionals (IPs) or Interim Resolution Professionals (IRPs) and other stakeholders during the insolvency resolution process.

Important features of IBC

Before we discuss the major challenges in the IBC, let's discuss the major features of the IBC. The Insolvency and Bankruptcy Code, 2016:

- The IBC consolidated multiple outdated laws on insolvency and bankruptcy including repealing the Presidency Towns Insolvency Act, 1909, and Provincial Insolvency Act, 1920 and amending 11 major legislations.
- Creation of multiple bodies and professionals to manage and facilitate the whole insolvency process in a structured and time bound manner including – Insolvency and Bankruptcy Board of India (IBBI), Information Utilities (IU), Insolvency Professionals (IP), Insolvency Professional Entities (IPE), Insolvency Professionals Agency (IPA).
- Time bound resolution of insolvency within a period of 180 days, which may be further extended to upto 270 days.

- Financial creditors, operational creditor where the debt is above Rupees 1 lakh as well as the corporate debtor itself can initiate the insolvency process before the National Companies Law Tribunal (NCLT).
- The insolvency resolution process to be managed and conducted by licensed insolvency professional (IP) with the overall supervision of the NCLT.
- The insolvency resolution process seeks to form a resolution plan to revive the corporate debtor and in case the resolution process fails, then to liquidate the company.

Major challenges in the Insolvency resolution process

With the disposal of ongoing cases, a large number of grey areas which are open to interpretation are being clarified by the Courts and the Tribunals, thus eliminating the confusion in interpreting the Code. However, there are few challenges for the IRPs and the stakeholders in the insolvency process which are not only creating practical difficulties but putting the whole process of insolvency resolution at stake, which must be resolved both institutionally as well as legislatively. Some of the major challenges in the insolvency resolution process are as follows:

1. *Stringent timelines* – While stringent timelines under IBC is a welcome move from the erstwhile insolvency laws, however, it some cases it is practically impossible to complete the whole procedure with necessary approvals within the given timeline of 180/270 days, considering the practical difficulties of getting necessary information as well as dealing with multiple stakeholders. It is important to create and facilitate supporting structures, guidelines and bodies like IUs in place at the earliest, to ensure that the deadlines are met without creating backlogs and delays which the Indian legal system is quite known for.
2. *Non availability of interim finance* – As most of the companies against whom insolvency are bought are already in high debt and financially stressed, getting interim finance during the corporate insolvency resolution process (CIRP) is a challenge. Running and reviving the company under CIRP without availability of interim finance is a big challenge for an IP.
3. *Late starting of IU* – Inspite of notification of the Information Utilities Regulations, effective from 1 April 2017, only one information utility (IU) - National E-Governance Services Limited (NeSL) has been registered on 25th September 2017, which is yet to start commercial services. Without having adequate number of IUs and its infrastructure in place, it is hard for IRP/IPs to gather required information under the Code within the defined timelines. IU is an essential limb of the Code, and without IUs in place it has become a practical challenge for the IRPs to complete the resolution process within given timelines.
4. *Dealing with the existing management and promoters* – As the powers of the Board is suspended during the CIRP and the effective power is transferred to the IP/IRP, the promoters and the existing management see it as a threat to their company and sometimes try to impede the IP/IRPs from working in the most efficient manner. The challenge not only include in training the IP/IRPs in how to deal with such situations, but also in sensitising the promoters and communicating with them in a manner that will allow IP/IRPs to understand how the process might help them in reviving the company.
5. *Lack of support from operational creditors and regulators* – Once a company is into CIRP, existing vendors do not want to continue business and want their dues to be cleared, while new vendors request for advance payment. Without cooperation from vendors, it might be challenging for the IP/IRP to sustain business operations. IP/IRPs need to inform that during the period, all costs are given priority under the Code. Moreover, due to lack of awareness about the new law, sometimes regulators are taking actions like freezing the bank accounts or disconnecting the electricity connection causing further

stress for the company and the IRP/IP to maintain on-going business or to revive the company.

6. *Ineffective decision making by CoC* – Without standard protocols and guidelines to deal with decision making by the Committee of Creditors (CoC), there are often indifferences within the creditors which are leading to delays and resulting in non-compliance with the given timelines and in some cases such decisions might not be commercially sound. It is suggested that a standard guideline or protocol may be developed by IBBI in consultation with the stakeholders to increase efficiency in the decision making by the CoC.

7. *Role of IP in case plan is not approved in 270 days* – The law is currently silent on the fact what will be the role of the IP, in case the plan is not approved by NCLT within the statutory 270 days period. This issue needs to be clarified either by a judicial order or through a Removal of Difficulty Order. This might be important considering the fact that in case the IP is required to continue with managing the corporate debtor, it might impact the other resolution process undertaken by the same IP.

8. *Preparing the information memorandum* – One of the most important document that an IP/IRP is required to prepare is the information memorandum (IM), which forms the basis for the CoC to take effective decision. However, for most the stressed companies, the accounts and documentations are not maintained properly. Moreover, getting accurate information from the promoters and the officers is a challenging job, for which in some cases application needs to be filed with the NCLT to get discovery orders against such officers. Due to lack of correct information or adequate information, preparation of the IM within the deadlines might be difficult. The IP/IRP in some cases might have to appoint external experts who can investigate and find out fraudulent transactions and other important financial information that may be crucial for preparing the information memorandum.

9. *Cross-border insolvency* – One of the highly debated and criticised aspects of the Code is the lack of or limited provision to cover cross-border insolvency. Though the Code has granted the power to the Central government to enter into bilateral treaties with other countries to apply the Code in relation to assets of the corporate debtor situated outside India. However, it is highly inadequate, it is important that the IBBI notify a framework to allow for an effective resolution process for cross-border insolvency.

10. *Legal liability of IRPs/IPs* – As the IP is in control of the corporate debtor, certain creditors and government bodies are filing suits against the IP directly and sometimes frivolous suits are being made against the IRP/IP. Though Section 233 of the Code provides for immunity of the IP for actions taken in good faith, many frivolous law suits are being made against the IP, which not only hampers the resolution process but also deterring the IPs from taking up new assignment. There is no insurance product available in India to cover professional liability for IPs/IRPs. It is important that insurance companies come up with such insurance products which can cover the IP/IRPs from professional liabilities. On this regards IBBI and other stakeholders must take this up with the insurance companies, so that such insurance policies are made available at the earliest.

Conclusion

It is quite commendable to see the development of the jurisprudence on insolvency laws developing within a short period of 9-10 months. The successful submission of a resolution plan in the case of *Chhaparia Industries and Synergies Dooray Automotive* to recast debt has boosted the confidence of the stakeholders in the new Code to resolve debt. However, it is important that the existing problems are resolved at the earliest by involving the stakeholders and all working together to ensure the Code becomes a success.

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[2017] 1 IBJ (Art.) 5

Information Utility - The Eyes and Ears of the Bankruptcy Code

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The Code has envisaged the creation of the Information Utility (IU) that shall collect, collate and disseminate financial information. The information maintained with the IU would be the most vital and important input in the entire insolvency resolution process. The Article focuses on the challenges which would be faced by the (IU) in incorporating the unstructured data at the same time ensure speedy information on real time basis to the information seeker. The key challenge for the (IU) would be to use the technology to secure its behemoth of information and have adequate disaster recovery mechanism. The Author has further suggested some changes that may be incorporated in the Regulations to give true power to the (IU) for benefit of all the stakeholders.

Historically, winding up and insolvency proceedings in India has met with limited success. The reasons were extant legal & structural framework and suboptimal operational cum data infrastructure. Specifically, with respect to the structural framework apart from being debtor protectionary in nature it required multiple forums dealing with cases of default and insolvency.It was imperative that a uniform law be carved out to address this issue at a fundamental level as the prevalent laws did not address or aid the recovery/ restructuring process befittingly. To address these critical needs and in order to improve the business environment and provide a fillip to investor confidence and loan recovery, the Government of India introduced the Insolvency and Bankruptcy Code Bill in November 2015. The final Insolvency and Bankruptcy Code was passed in August 2016 (Code).

While the newly minted Bankruptcy Code will go a long way in resolving the issues its success would require support at operational and informational infrastructure level. To enable this The Insolvency and Bankruptcy Board of India ("Board") has been set up to regulate and provide regulatory oversight over Insolvency Professionals, Insolvency Professional Agencies and Information Utilities.

The operational support for successful and speedy resolution of bankruptcy process will be enabled byInsolvency Resolution Professional (IRP).The IRP shall be vested with the powers of managing the affairs of the corporate and will also be entitled to access all records maintained with the IU. In cases where the resolution plan fails and the IRP recommends liquidation, then similar rights/ powers available with the IRP are also available with the Liquidator. In a way IRP are the hands and legs of the Bankruptcy Code.

The Code envisages the creation of an Information Utility (IU) that shall collect, collate and disseminate financial information.The IU shall be regulated in terms of the Information Utility Regulations(IU Regulations) (as amended from time to time) issued by the Board.The information maintained with the IU will be utilized to inter alia prove (i) default; (ii) existing security interest; and/or (iii) existing disputes in respect of an underlying debt/ asset. Thus information maintained with the IU is clearly of

vital importance and is an important input element in the entire insolvency proceedings. In a sense the IU will form the eyes and ears of the Bankruptcy code.

IU To Facilitate Faster Decisioning

The Code mandates that financial creditors seeking to file an insolvency application is required to furnish a copy of the evidenceof the default recorded with the IU. Under the Code the Adjudicating Authority shall, within fourteen days of the receipt of the application ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditors. In the case of insolvency applications filed by operational creditors the Adjudicating Authority shall admit the application within fourteen days of receipt interalia in case there is no dispute recorded with the IU. The Adjudicating Authority shall be within its powers to reject the application in case where a dispute is recorded with the IU.

Given that all applications made before the Adjudicating Authority are required to either be admitted / rejected within fourteen days, the resolution processes commences forthwith.

A Fast Track Resolution under the Code requires the entire process to be completed in ninety days from the insolvency commencement date and in such case the proof of the debt/ default is to be established only the basis of the records maintained with the IU.

What will a 'full' IU contain?

The Code specifies that in cases where the debt for which an application has been filed by a creditor is registered with the IU, the debtor shall not be entitled to dispute the validity of such debt. An IU is thus a critical pillar under the Code and the entire insolvency eco-system as they will aid in reducing the judicial time taken for "proving debt" and/or "proving claims" in respect of an entity.

The Code has defined Financial Information to inter alia include:

- Details/records of outstanding loans;
- Liabilities and assets of an entity;
- Existing security interests created on assets;
- Existing claims against an entity/ its assets;
- Balance sheet and cash-flow statements of a person;
- Contractual terms and conditions binding an entity/ its assets; and
- Existing disputes.

As per the Code, the core services to be provided by the IU involve: — (a) accepting electronic submission of financial information in such form and manner as may be specified; (b) safe and accurate recording of financial information; (c) authenticating and verifying the financial information submitted by a person; and (d) providing access to information stored with the information utility to persons as may be specified;

The Responsibilities of the IU

With great power, comes greater responsibility and hence the IUs are obliged to ensure the following under the Code:-

(a) create and store financial information in a universally accessible format;

(b) accept electronic submissions of financial information from persons who are under obligations to submit financial information in such form and manner as may be specified by regulations;

(c) accept, in specified form and manner, electronic submissions of financial information from persons who intend to submit such information;

(d) meet such minimum service quality standards as may be specified by regulations;

(e) get the information received from various persons authenticated by all concerned parties before storing such information;

(f) provide access to the financial information stored by it to any person who intends to access such information in such manner as may be specified by regulations;

(g) publish such statistical information as may be specified by regulations;

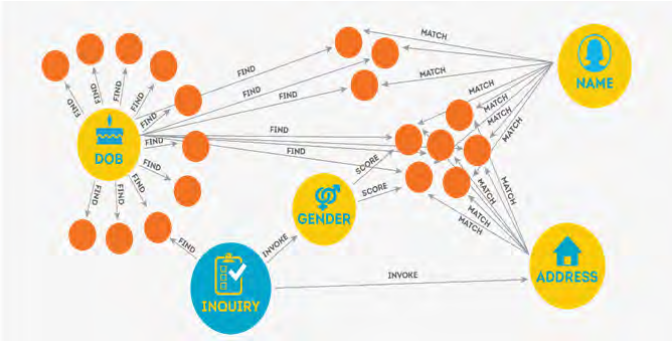
(h) have inter-operability with other information utilities.

What will it take to be an IU?-Technology and Data Handling Capability

Needless to state the IU will be dealing with very large volumes of data hence it is critical that the IU entity has the capability to deal with big data. This means that the entity should have the ability to leverage cutting-edge technologywith advanced search-&-match and analytical capabilities and top-notch operations

capability (incl. dispute-handling, etc.). Big data handling requires agility to deal with volume, variety and velocity of data which on a conservative estimate may mean 50M rows (number of business entities in India), 5000+ columns (firmographics, financial, operational data, etc.)

Certain data sets received by the IU may be structured data (tabular information coming from banks, etc.) but the IU will need to have the capability to ingest semi-structured data formats (XML data). The true challenge will be in incorporating unstructured data that may be available in the form of pictures of contracts, invoices, purchase orders, etc. IU will also need to ensure that enough velocity in order to be able to ensure real-time information absorption & storageof data. The complexity of the data will require the IU to be able to provide an instantaneous search-and-match on every query made to the IU. Further the IU systems should be swiftly render simultaneous responses to hundreds of users querying the database. The below diagram is a representation of the complexities involved in a typical search – match logic that may need to be developed by an IU.



To facilitate the above, infrastructure capability of the IU will need to ensure speed to deliver/ extensive reach and reliability of the system, database and application. A robust platform that can support big data and analytics with scalability and flexibility will be a key feature of the IU. The ancillary element of these systems will be a robust Information Security Environment that ensure data safety / monitored access rights and compliance with the applicable data protection laws.

The cornerstone of any successful repository is its rigorous operational environment that can boast of end to end operational capabilities such as data acquisition,data quality and data processing. This entails the onerous task of ensuring acquisition of different types of data across different entity-types. It shall be prudent for the IU to ensure that a standardized data reporting format is developed so that information asymmetry is minimized and the data available with the IU is not fragmented. It is imperative that the post - acquisition the data is funneled past a thorough data cleaning exercise. The complicated task of data processing involves retrieving the right data at the right time in an effective & efficient manner. The ability to provide customized reports to users will be a key feature in the IU product suite. On account of the fact that large volumes of data will be available with the IU , there is a possibility that during the phase of authentication disputes may be raised between parties and the IU should be able to record disputes in real-time. It is critical that the IU is able to have / facilitate an automated dispute workflows. The IU should also build out a stakeholder-outreach for dispute resolution and clear mechanism to handle suits that it may be made a party to.

Great start but more needs to be done

Given that the Code is a vary nascent development it is imperative that the IU eco- system is created immediately so as to ensure that the bankruptcy process is streamlined with the IU really becoming the first port of call for the IRPs. In order to create a deep impact on the bankruptcy process, it is essential that IUs facilitate the creation of an all-encompassing repository that is easy to submit data to and access on a real time basis. To further this cause and in order to really provide teeth to this pillar some changes may need to be made to the Code/ IU Regulations that will true power of the IU is unearthed.

- Registration with the IU is made mandatory for every business, regardless of the form of the commercial enterprise and its incorporation. The Udyog Adhaar can be leveraged for the same.
- In addition to financial information other forms of debt obligation will need to be included the other datasets that need to be considered for submission to the IU are as under
  - (i) *Statutory Dues Data* – This date could be made available by the Statutory Authorities – Income Tax Department / State Tax Collection Authorities/ Labour Law Authorities (PFRDA / Gratuity Offices)
  - (ii) *Employee Payments* – Data with regard to employee payments that are made by the enterprise needs to be submitted to the IU. This would include salary payment/ TDS payments/ Cash payments to employee(s).

(iii) Whilst operational creditors are advised to record their debts with the IU, it is apprehended that this may be the most critical and challenging form of information collection/ collation and dissemination. Such payments are presently handled at an internal level in the enterprise and hence there is no reporting obligation attached to the same. Since the code envisages that operation debtors too can file for bankruptcy, it is imperative to suggest that such transaction should then be registered at the outset with the IU. On registration of such transactions with the IU by the seller, the buyer will be required to provide an acceptance/ acknowledgement of liability in connection therewith.It may be considered is the details as recorded with the GSTN database can be leveraged in this regard.

Observations on the IU Regulations

The IU Regulations under Chapter V deal with Core Services that are to be provided by the IU. It requires registered users only to be enabled with access rights to the IU Database. These registered users can either submit or access information stored with the IU. Further the regulations prescribe various other entities who can access the information with the IU. In order to ensure data security and safety it would be recommended all parties who access IU data should be registered users with the IU.The IU Regulations prescribe that once a person registers with an IU, they will not register with other IU(s). However data can be contributed to any IU. This may create some confusion and hence will need to be considered carefully. Further IU are required to ensure inter-operatability- and this will require IU(s) to provide a functionality to enable users to access information stored with any information utility, which they are entitled to access. This needs careful deliberation as this may mean that each IU shall allow the information stored by it to be accessible through a Central API. Any user authorized to access information stored with an IU will have the ability to use the Central API to extract all information available for any one corporate debtor /individual from all IUs through the Central API;

Further the IU Regulations prescribe that on receipt of information of default an IU shall expeditiously undertake the process of authentication and verification of information. This may be a challenging task for the IU as at the stage of default the parties will not co-operate and hence authentication should be ensured at the time of registration itself in order to be effective.

It needs to be clarified that data correction obligations rest with the users only and the IU cannot make any changes unilaterally. In all cases where data correction has been sought a clear mechanism whereby any correction/ deletion/ addition in the data should be made by the IU only after the said change has been certified as correct by both the corporate debtor /individual and the creditor. This is the only way in which the IU shall retain its independence and remain a neutral party in the insolvency proceedings.

The IU Regulations envisage that the IU can import information from such registries as may be notified by the Board from time to time and in order to make the infrastructure more powerful data from statutory authorities should be considered to be notified as statutory dues and employee dues are part of the waterfall mechanism for payouts as outlined under the Code.

The IU is a for profit enterprise and needs to ensure that a steady cash flow is generated as a steep annual fee is also required to be paid to the Board by the IU on an annual basis. However, the Code nor the IU Regulations do not address the different ways and means of monetization for the IU. Also the pricing mechanism needs to be freed up and not prescribed and the market mechanism can help discover the right price for the IU products. IU will eventually have a whole host of datasets that can be leveraged for non-core products/ services and in that context it is imperative for the IU regulations to make available this product set/ suite for non-insolvency users as well

Conclusion

The IBC is indeed an important legislation and is expected to ensure a time bound exit mechanism for both lenders and debtors. It obliterates the need of a complicated legal hierarchy that caused inordinate delays in corporate insolvency and debt recovery cases.A robust IU will facilitate eliminating information asymmetry that will assist the insolvency eco- system in an expeditious manner. A key requirement for the success of the IU will be cutting edge technology capability, secure infrastructure, and adequate disaster recovery mechanism. It is estimated that over time the IU will be a behemoth of information and hence the ability to toggle with big data,analytics and access to next generation automation technologies will make the IU a radical catalyst in the years to come.

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[2017] 1 IBJ (Art.) 9

Insolvency Code : Variances in Behaviour of Stakeholders at Cross with the Overall Objective

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Each Stakeholder will have its own interest and these interests would often be divergent from the stated overarching objective of the resolution process. The Stakeholders would be expected to behave in a manner so as to maximise the value for themselves. This article examines the impact on the overall objective of the behaviour and the differential interests of the key stakeholders in the Insolvency Resolution Process.

The Insolvency and Bankruptcy Code, 2016 (the "Code") is among the most significant laws adopted in the Indian economic sphere in the recent times. The Code has laid out the governance framework, process, and rules for resolution of corporate insolvency. There are multiple stakeholders or participants in a corporate insolvency resolution process (CIRP). The stakeholders and their objectives often change at various stages of the process. A successful resolution would require that the interests of the stakeholders are aligned to the maximum degree with the overall objective of resolution.

An optimal alignment of interests would require an understanding of:

a) The interests of all stakeholders;

b) Likely paths of behaviour of the stakeholders.

Based on the above set of inputs, the likely paths of movement in an insolvency process can be evolved using the principles of game theory. The rights and responsibilities of the various stakeholders need to be designed, keeping in mind the likely behaviour of the stakeholders and the defined principal objective of the process. This knowledge can be very useful in developing the policy framework for an optimal outcome in the insolvency resolution process.

A high level view of the differential interests of the key stakeholders is presented below. While the illustrations in each case are at a fairly broad level, they help in explaining the crux of the issue of differential incentives and behaviour of the stakeholders.

1) *Secured financial creditors (SFCs)* – The SFCs want to have their dues paid at the earliest. The means by which a debtor may settle the dues is not of prime concern to them. However, the limited objective of the existing set of lenders may at times be undesirable from a systemic point of view. It may be possible that the debtor provides inaccurate information to a new set of creditors or investors to raise funds. The SFCs may, at times, knowingly ignore such trespasses.

   There is also a likelihood of divergence in risk preferences between the SFCs. This would be on account of differences in the SFCs with respect to their own capital structures, credit ratings, growth objectives, differential or exclusive security on

the loans, etc. Each resolution plan has a given level of risk and return, for the lenders, embedded in it. As a result of the differences in the risk preferences of the lenders, it is quite likely that the SFCs would not easily agree on a resolution plan. Even in cases, where they agree on a plan, the support on specific and related issues may not be uniform. For example, a resolution plan may involve replacement of a promoter with a fresh investor. However, the choice of a fresh investor would involve several elements which may not be uniformly agreeable to all SFCs.

As a result of the variances in the risk preferences and expected outcomes for the various SFCs, the deliberations between them and the outcomes may not be naturally aligned towards realising the maximum value for all constituents. Since the approval of a resolution requires at least 75% of the creditors' approval, it could get force-fitted at the minimum common denominator among the lenders.

In order to deal with divergences between the SFCs, the non-consenting SFCs may be provided the flexibility to sell out their stakes, which must be purchased, pro rata, by the SFCs consenting to the approved resolution plan.

2) *Promoter of the corporate debtor* – The promoter of a debtor enjoys the benefit of asymmetric information, and the ability to influence the affairs of the business of the debtor through pre-existing relationships with the management, employees, and external stakeholders. At the same time, the promoter may not have the legal liability or interest to settle the dues of the debtor to the creditors. The interest of a promoter would be conditional on whether the promoter will be able to maintain his/ her control over the debtor.

   If yes, the interest of the promoter would be best served in preserving the value of the debtor. The promoter would also like to settle the dues fast and be open to any strategies proposed by the creditors with respect to business, financing, or capital structure.

   If no, the promoter may dissociate, and in some cases, even act in a way that may destroy the value of the debtor. The promoter may not be interested in whether or how the dues are settled or whether the business of the debtor is affected.

   Thus, it would be desirable to not force fit all the lenders into a single basket for the recovery mechanism, but allow a limited flexibility to allow for a suitably progressive resolution process.

3) *Unsecured creditors (UC)* – The interest of the UCs would be similar to that of the SFCs to the extent that they would both want maximising the value of dues to be paid by the debtor. However, the UC would differ from the SFCs in the mode or basis of distribution of repayment/ recovery proceeds, in case the same is not enough to cover all creditors.

   In such a case, the UCs would act in a way to block any actions till they can establish their claims at a similar priority level as the SFCs.

   It is therefore important to allow for a designed flexibility in the negotiations between the secured and unsecured creditors to arrive at an overall maximisation of realised value of recovery from the debtor.

4) *Insolvency Resolution Professional (IRP)* – The role of an IRP is to help in arriving at, and steering towards, a resolution plan that is acceptable to the majority of the creditors. So, in a sense, the IRP is an intermediary between the debtor and the creditors. The actions of an IRP can have a significant impact on the timelines, choices, and outcomes of the resolution plans.

   The IRP may have an incentive, though not necessarily induced by any party, to align with a certain party or parties who is/ are likely to emerge as the perceived winner(s) in the negotiations. In other words, there may be a unconscious confirmation bias or even a conscious and purported bias if the IRP is not truly independent.

   It is important to align the incentive of the IRP with the success of the CIRP, in an objectively defined manner.

SUMMARY

In summary, each stakeholder will have its own interest and these interests would often be divergent from the stated overarching objective of the resolution process. The stakeholders would be expected to behave in a manner so as to maximise the value for themselves.

Without explicitly recognising the variations in the interests and the likely behavioural patterns, the stipulated standard resolution process may not be the most optimal process. Hence, the behaviour of the various stakeholders need to be modelled in detail and should lead to appropriate allowances and improvisations in the design of the resolution framework.

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Judicial Pronouncements

This section covers two significant pronouncements by the Hon'ble Supreme Court and one by NCLAT wherein crucial issues under the Code have been exhaustively dealt with and put to rest.

- Mobilox Innovations (P.) Ltd. v. Kirusa Software (P.) Ltd. **(SC)**
- Innoventive Industries Ltd. v. ICICI Bank and Anr. **(SC)**
- JK Jute Mills Co. Ltd. v. Surendra Trading Co. **(NCLAT)**

[2017] 1 IBJ (JP) 2

SUPREME COURT OF INDIA

Mobilox Innovations (P.) Ltd.

v.

Kirusa Software (P.) Ltd.

CA No. 9405 of 2017

R F Nariman & Sanjay Kishan Kaul, JJ

21st September 2017

The adjudicating authority is bound to reject the application for initiation of corporate insolvency resolution process in a case where a dispute truly exists in fact and is not spurious, hypothetical or illusory.

[*Insolvency and Bankruptcy Code, 2016 – Sections 8 and 9 – Corporate insolvency resolution process – Initiation by operational creditor – Application for*]

❖ **Whether adjudicating authority is bound to reject the application for initiation of corporate insolvency process though complete if notice of dispute has been received by the operational creditor?**

Once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application. **[Para 40]**

The word "and" occurring in clause (a) of sub-section (2) of section 8 after the words 'the existence of a dispute, if any' and before the words 'record of the pendency of the suit or arbitration proceedings' must be read as "or" keeping in mind the legislative intent.

[*Insolvency and Bankruptcy Code, 2016 – Sections 8 – Corporate insolvency resolution process – Initiation by operational creditor – Interpretation of Word 'and'*]

❖ **Whether the word 'and' occurring in clause (a) of sub-section (2) of section 8 must be read as 'or'?**

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" because If read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an arbitral tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an arbitral tribunal or a court for upto three years, such persons would be outside the purview of section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the Legislature nor has it so been intended. **[Para 29]**

JUDGMENT

Nariman, J

1. The present appeal raises questions as to the triggering of the Insolvency and Bankruptcy Code, 2016 when it comes to operational debts owed to operational creditors. The appellant was engaged by

Star TV for conducting tele-voting for the "Nach Baliye" program on Star TV. The appellant in turn sub-contracted the work to the respondent and issued purchase orders between October and December, 2013 in favour of the respondent. In the "Nach Baliye" program, the successful dancer was to be selected on various bases, including viewers' votes. For this purpose, the respondent was to provide toll free telephone numbers across India, through which the viewers of the program could cast their votes in favour of one or more participants. For this purpose, a software was customised by the respondent, who then coordinated the results and provided them to the appellant. Since the respondent obtained toll free numbers from telephone operators in terms of the purchase orders, the appellant was liable to make payment of rentals for the toll free numbers, as well as primary rate interface rental to the telecom operators. The respondent provided the requisite services and raised monthly invoices between December 2013 and November 2014 – the invoices were payable within 30 days from the date on which they were received. The respondent followed up with the appellant for payment of pending invoices through e-mails sent between April and October 2014. It is also important to note that a non-disclosure agreement ('the NDA') was executed between the parties on 26th December, 2014 with effect from 1st November, 2013.

2. More than a month after execution of the aforesaid agreement, the appellant, on 30th January, 2015, wrote to the respondent that they were withholding payments against invoices raised by the respondent, as the respondent had disclosed on their webpage that they had worked for the "Nach Baliye" program run by Star TV, and had, thus, breached the NDA. The correspondence between the parties finally culminated in a notice dated 12th December, 2016 sent under section 271 of the Companies Act, 2013. Presumably because winding up on the ground of being unable to pay one's debts was no longer a ground to wind up a company under the said Act, a demand notice dated 23rd December, 2016 was sent for a total of Rs.20,08,202.55 under section 8 of the new Insolvency and Bankruptcy Code, 2016 ('the Code'). By an e-mail dated 27th December, 2016, the appellant responded to the aforesaid notice stating that there exists serious and bona fide disputes between the parties, that the notice issued was a pressure tactic, and that nothing was payable inasmuch as the respondent had been told way back on 30th January, 2015 that no amount will be paid to the respondent since it had breached the NDA.

3. An application was then filed on 30th December, 2016 before the National Company Law Tribunal under sections 8 and 9 of the new Code stating that an operational debt of Rs.20,08,202.55 was owed to the respondent.

4. On 19th January, 2017, the respondent was orally intimated to remove a defect in the application, in that it did not contain the appellant's notice of dispute. This was rectified by an affidavit in compliance dated 24th January, 2017, by which various other documents were also supplied by the respondent to the Tribunal. On 27th January, 2017, the Tribunal dismissed the aforesaid application in the following terms :

"On perusal of this notice dated 27th December, 2016 disputing the debt allegedly owed to the petitioner, this Bench, looking at the corporate debtor disputing the claim raised by the petitioner in this CP, hereby holds that the default payment being disputed by the corporate debtor, for the petitioner has admitted that the notice of dispute dated 27th December, 2016 has been received by the operational creditor, the claim made by the petitioner is hit by section (9)(5)(*ii*)(*d*) of the Insolvency and Bankruptcy Code, hence, this petition is hereby rejected."

5. An appeal was then filed before the National Company Law Appellate Tribunal which was decided on 24th May, 2017. This appeal was allowed in the following terms :

> "39. In the present case the adjudicating authority has acted mechanically and rejected the application under sub-section (5)(*ii*)(*d*) of section 9 without examining and discussing the aforesaid issue. If the adjudicating authority would have noticed the provisions as discussed above and what constitutes 'dispute' in relation to services provided by operational creditors then it would have come to a conclusion that condition of demand notice under sub-section (2) of section 8 has not been fulfilled by the corporate debtor and the defence claiming dispute was not only vague, got up and motivated to evade the liability.

40. For the reasons aforesaid we set aside the impugned order dated 27th January, 2017 passed by adjudicating authority in CP No.01/I&BP/NCLT/MAH/2017 and remit the case to adjudicating authority for consideration of the application of the appellant for admission if the application is otherwise complete.

41. The appeal is allowed with the aforesaid observations. However, in the facts and circumstances there shall be no order as to cost."

6. Shri Mohta, learned counsel on behalf of the appellant, raised various contentions before us. According to learned counsel, the application should have been dismissed on the ground that the operational creditor did not furnish a copy of the certificate from a financial institution, *viz*. IDBI in the present case, that maintained accounts of the operational creditor, which confirmed that there is no payment of any unpaid operational debt by the corporate debtor under section 9(3)(*c*) of the Code. This being so, the application ought to have been dismissed at the very threshold. Apart from this, the learned counsel took us through various committee reports and the provisions of the Code and argued that under section 8 of the Code, the moment a corporate debtor, within 10 days of the receipt of a demand notice or copy of invoice, brings to the notice of the operational creditor the existence of a dispute between the parties, the Tribunal is obliged to dismiss the application. According to him, under section (8)(2)(*a*), the expression "existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed ..." must be read as existence of a dispute 'or' record of the pendency of the suit or arbitration proceedings filed, *i.e.,* disjunctively. According to the learned counsel, the definition of 'dispute' under section 5(6) of the Code is an inclusive one and the original draft bill not only had the word 'means' instead of the word 'includes', but also the word "bona fide" before the words "suit or arbitral proceedings", which is missing in the present Code. Therefore, learned counsel argued that the moment there is existence of a dispute, meaning thereby that there is a real dispute to be tried, and not a sham, frivolous or vexatious dispute, the Tribunal is bound to dismiss the application. Learned counsel went on to argue that there is a fundamental difference between applications filed by financial creditors and operational creditors. A financial creditor's application is dealt with under section 7 of the Code, in which the adjudicating authority has to ascertain the existence of a default on the basis of the records of an information utility or other evidence furnished by the financial creditor. In contrast to this scheme, all that a corporate debtor needs to do is to file a reply within a period of 10 days of the receipt of demand notice or copy of invoice from an operational creditor, showing the existence of a dispute, which then does not need to be 'ascertained' by the adjudicating authority. He was at pains to point out that the application itself must contain all the documents that are required by the statute and that the timelines indicated in the statute are mandatory. For this purpose, he referred us to sections 61, 62 and 64 in addition to sections 7 to 9 of the Code. Finally, on facts, according to learned counsel, the Tribunal was wholly incorrect in remanding the matter on both counts – first, to find out whether the application is otherwise complete and, second, because the Tribunal found that the dispute in the present case was vague, got up and motivated to evade the liability, which, according to learned counsel, was a perverse conclusion reached on the facts of this case.

7. Shri Jawaharlal, learned counsel appearing on behalf of the respondent, has argued in reply that the only notice given to rectify the defects by the Tribunal was an oral notice of 19th January, 2017 and that too only to supply the notice of dispute by the appellant. This was done within time and the Tribunal, therefore, dismissed the application only on non-fulfillment of the conditions laid down in section 9. No plea was ever taken before the Tribunal that the IDBI certificate was not furnished. This plea was taken for the first time only in appeal, and since the Tribunal did not think it fit to dismiss the application on a technical ground, this ground does not avail the appellants. The counsel then submitted that the expression 'dispute' under section 5(6) covers only three things, namely, existence of the amount of debt, quality of goods or services or breach of a representation or warranty and since what was sought to be brought as a defence was that the NDA was breached, it would not come within the definition of 'dispute' under section 5(6). He further went on to state that, at best, the breach of the NDA is a claim for unliquidated damages which does not become crystallised until legal proceedings are filed,

and none have been filed so far. Therefore, there is no real dispute on the facts of the present case and the Tribunal was correct in its finding that the dispute was a sham one.

8. Before going into the contentions of fact and law argued by both counsel, it is a little important to trace the background of this path-breaking legislation, *viz*., the Insolvency and Bankruptcy Code, 2016. The starting point is a Resolution of the UN General Assembly, Resolution No.59/40, passed on 2nd December, 2004, by which it was stated :

> "*Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law*
>
> *The General Assembly,*
>
> *Recognising* the importance to all countries of strong, effective and efficient insolvency regimes as a means of encouraging economic development and investment,
>
> *Noting* the growing realisation that reorganisation regimes are critical to corporate and economic recovery, the development of entrepreneurial activity, the preservation of employment and the availability of finance in the capital market,
>
> *Noting* also the importance of social policy issues to the design of an insolvency regime,
>
> *Noting with satisfaction* the completion and adoption of the Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law by the Commission at its thirty-seventh session, on 25th June, 2004,
>
> *Believing* that the Legislative Guide, which includes the text of the Model Law on Cross-Border Insolvency and Guide to Enactment recommended by the General Assembly in its resolution 52/158 of 15 December 1997, contributes significantly to the establishment of a harmonised legal framework for insolvency and will be useful both to States that do not have an effective and efficient insolvency regime and to States that are undertaking a process of review and modernisation of their insolvency regimes,
>
> *Recognising* the need for cooperation and coordination between international organisations active in the field of insolvency law reform to ensure consistency and alignment of that work and to facilitate the development of international standards,
>
> *Noting* that the preparation of the Legislative Guide was the subject of due deliberations and extensive consultations with Governments and international inter-governmental and non-governmental organisations active in the field of insolvency law reform,
>
> 1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for the completion and adoption of its Legislative Guide on Insolvency Law ;
> 2. *Requests* the Secretary-General to publish the Legislative Guide and to make all efforts to ensure that it becomes generally known and available ;
> 3. *Recommends* that all States give due consideration to the Legislative Guide when assessing the economic efficiency of their insolvency regimes and when revising or adopting legislation relevant to insolvency ;
> 4. *Recommends* also that all States continue to consider implementation of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law."

9. The purpose of the Legislative Guide for various nations was stated as follows :

> "The purpose of the *Legislative Guide on Insolvency Law* is to assist the establishment of an efficient and effective legal framework to address the financial difficulty of debtors. It is intended to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations. The advice provided in the *Guide* aims at achieving a balance between the need to address the debtor's financial difficulty as quickly and efficiently as possible and the interests of the various parties directly concerned with that financial difficulty, principally creditors and other parties with a stake in the debtor's business, as well as with public policy concerns. The *Guide* discusses issues central to the design of an effective and efficient insolvency law, which, despite numerous differences in policy and legislative treatment, are recognised in many legal systems. It focuses on insolvency

proceedings commenced under the insolvency law and conducted in accordance with that law, with an emphasis on reorganisation, against a debtor, whether a legal or natural person, that is engaged in economic activity. Issues specific to the insolvency of individuals not so engaged, such as consumers, are not addressed."

In stating some of the key objectives of effective and efficient insolvency law, the Legislative Guide goes on to state :

"When a debtor is unable to pay its debts and other liabilities as they become due, most legal systems provide a legal mechanism to address the collective satisfaction of the outstanding claims from assets (whether tangible or intangible) of the debtor. A range of interests needs to be accommodated by that legal mechanism : those of the parties affected by the proceedings including the debtor, the owners and management of the debtor, the creditors who may be secured to varying degrees (including tax agencies and other government creditors), employees, guarantors of debt and suppliers of goods and services, as well as the legal, commercial and social institutions and practices that are relevant to the design of the insolvency law and required for its operation. Generally, the mechanism must strike a balance not only between the different interests of these stakeholders, but also between these interests and the relevant social, political and other policy considerations that have an impact on the economic and legal goals of insolvency proceedings....

An insolvency law should be transparent and predictable. This will enable potential lenders and creditors to understand how insolvency proceedings operate and to assess the risk associated with their position as a creditor in the event of insolvency. This will promote stability in commercial relations and foster lending and investment at lower risk premiums. Transparency and predictability will also enable creditors to clarify priorities, prevent disputes by providing a backdrop against which relative rights and risks can be assessed and help define the limits of any discretion. Unpredictable application of the insolvency law has the potential to undermine not only the confidence of all participants in insolvency proceedings, but also their willingness to make credit and other investment decisions prior to insolvency. As far as possible, an insolvency law should clearly indicate all provisions of other laws that may affect the conduct of the insolvency proceedings (*e.g.*, labour law ; commercial and contract law ; tax law ; laws affecting foreign exchange, netting and set-off and debt for equity swaps ; and even family and matrimonial law).

An insolvency law should ensure that adequate information is available in respect of the debtor's situation, providing incentives to encourage the debtor to reveal its positions and, where appropriate, sanctions for failure to do so. The availability of this information will enable those responsible for administering and supervising insolvency proceedings (courts or administrative agencies, the insolvency representative) and creditors to assess the financial situation of the debtor and determine the most appropriate solution."

While referring to the commencement of insolvency proceedings, the Legislative Guide states :

"The standard to be met for commencement of insolvency proceedings is central to the design of an insolvency law. As the basis upon which insolvency proceedings can be commenced, this standard is instrumental to identifying the debtors that can be brought within the protective and disciplinary mechanisms of the insolvency law and determining who may make an application for commencement, whether the debtor, creditors or other parties.

As a general principle it is desirable that the commencement standard be transparent and certain, facilitating access to insolvency proceedings conveniently, cost-effectively and quickly to encourage financially distressed or insolvent businesses to voluntarily commence proceedings. It is also desirable that access be flexible in terms of the types of insolvency proceedings available (reorganisation and liquidation), and the ease with which the proceedings most relevant to a particular debtor can be accessed, and that conversion between the different types of proceeding can be achieved. Restrictive access can deter both debtors and creditors from commencing proceedings, while

the effects of delay can be harmful to the value of assets and the successful completion of insolvency proceedings, in particular in cases of reorganisation. Ease of access needs to be balanced with proper and adequate safeguards to prevent improper use of proceedings. Examples of improper use may include application by a debtor that is not in financial difficulty in order to take advantage of the protections provided by the insolvency law, such as the automatic stay, or to avoid or delay payment to creditors and application by creditors who are competitors of the debtor, where the purpose of the application is to take advantage of insolvency proceedings to disrupt the debtor's business and, thus, gain a competitive edge."

10. On the fixation of time limits and denial of an application to commence proceedings, the Legislative Guide states :

"Where a court is required to make a decision as to commencement, it is desirable that that decision be made in a timely manner to ensure both certainty and predictability of the decision-making and the efficient conduct of the proceedings without delay. This will be particularly important in the case of reorganisation to avoid further diminution of the value of assets and to improve the chances of a successful reorganisation. Some insolvency laws prescribe set time periods after the application within which the decision to commence must be made. These laws often distinguish between applications by debtors and by creditors, with applications by debtors tending to be determined more quickly. Any additional period for creditor applications is designed to allow prompt notice to be given to the debtor and provide the debtor with an opportunity to respond to the application.

Although the approach of fixing time limits may serve the objectives of providing certainty and transparency for both the debtor and creditors, the achievement of those objectives may need to be balanced against possible disadvantages. For example, a fixed time period may be insufficiently flexible to take account of the circumstances of the particular case. More generally, such time periods may be set without regard to the resources available to the body responsible for supervising insolvency proceedings or of the local priorities of that body (especially where insolvency is only one of the matters for which it has responsibility). It may also prove difficult to ensure that the decision-making body adheres to the established limit and to provide appropriate consequences where there is no compliance. The time period between application and the decision to commence proceedings should also reflect the type of proceeding applied for, the application procedure and the consequences of commencement in any particular regime. For example, the extent to which notification of parties in interest and information gathering must be completed prior to commencement will vary between regimes, requiring different periods of time. For these reasons, it is desirable that an insolvency law adopt a flexible approach that emphasises the advantages of quick decision-making and provides guidance as to what is reasonable, but at the same time also recognises local constraints and priorities.

(*d*) *Denial of an application to commence proceedings*

The preceding paragraphs refer to a number of instances where it will be desirable, in those cases where the court is required to make the commencement decision, for the court to have the power to deny the application for commencement, either because of questions of improper use of the insolvency law or for technical reasons relating to satisfaction of the commencement standard. The cases referred to include examples of both debtor and creditor applications. Principal among the grounds for denial of the application for technical reasons might be those cases where the debtor is found not to satisfy the commencement standard ; *where the debt is subject to a legitimate dispute or off-set in an amount equal to or greater than the amount of the debt* ; where the proceedings will serve no purpose because, for example, secured debt exceeds the value of assets ; and where the debtor has insufficient assets to pay for the insolvency administration and the law makes no other provision for funding the administration of such estates.

Examples of improper use might include those cases where the debtor uses an application for insolvency as a means of prevaricating and unjustifiably depriving creditors of prompt payment of debts or

of obtaining relief from onerous obligations, such as labour contracts. *In the case of a creditor application, it might include those cases where a creditor uses insolvency as an inappropriate substitute for debt enforcement procedures* (*which may not be well developed*) *; to attempt to force a viable business out of the market place ; or to attempt to obtain preferential payments by coercing the debtor* (*where such preferential payments have been made and the debtor is insolvent, investigation would be a key function of insolvency proceedings*).

As noted above, where there is evidence of improper use of the insolvency proceedings by either the debtor or creditors, the insolvency law may provide, in addition to denial of the application, that sanctions can be imposed on the party improperly using the proceedings or that that party should pay costs and possibly damages to the other party for any harm caused. Remedies may also be available under non-insolvency law. Where an application is denied, any provisional measures of relief ordered by the court after the time of the application for commencement should terminate (see chap. II, para. 53)." [Emphasis supplied]

Ultimately, recommendation 19 of the Legislative Guide reads as under :

"*Commencement on creditor application* (*paras.57 and 67*)

19. The law generally should specify that, where a creditor makes the application for commencement :

(*a*) Notice of the application promptly is given to the debtor ;

(*b*) The debtor be given the opportunity to respond to the application, by contesting the application, consenting to the application or, where the application seeks liquidation, requesting the commencement of reorganisation proceedings ; and

(*c*) The court will promptly determine its jurisdiction and whether the debtor is eligible and the commencement standard has been met and, if so, commence insolvency proceedings."

11. The legislative history of legislation relating to indebtedness goes back to the year 1964 when the 24th Law Commission recommended amendments to the Provincial Insolvency Act of 1920. This was followed by the Tiwari Committee of 1981, which introduced the Sick Industrial Companies Act, 1985. Following economic liberalisation in the 1990s, two Narsimham Committee Reports led to the Recovery of Debts and Bankruptcy Act, 1993 and the SARFAESI Act, 2002. Meanwhile, the Goswami Committee Report, submitted in 1993, condemned the liquidation procedure prescribed by the Companies Act, 1956 as unworkable and being beset with delays at all levels – delaying tactics employed by the management, delays at the level of the Courts, delays in making auction sales, etc. This then led to the Eradi Committee Report of 1999, which proposed amendments to the Companies Act and proposed the repeal of SICA. This Committee echoed the findings of the Goswami Committee and recommended an overhaul of the liquidation procedure under the Companies Act.

12. It was for the first time, in 2001, that the L.N. Mitra Committee of the Reserve Bank of India ('RBI') proposed a comprehensive Bankruptcy Code. This was followed by the Irani Committee Report, also of the RBI in 2005, which noted that the liquidation procedure in India is costly, inordinately lengthy and results in almost complete erosion of asset value. The Committee also noted that the insolvency framework did not balance stakeholders' interests adequately. It proposed a number of changes including changes for increased protection of creditors' rights, maximisation of asset value and better management of the company in liquidation. In 2008, the Raghuram Rajan Committee of the Planning Commission proposed improvement to the credit infrastructure in the country, and finally a Committee of Financial Sector Legislative Reforms in 2013 submitted a draft Indian Financial Code, which included a "resolution corporation" for resolving distressed financial firms.

13. All this then led to the Bankruptcy Law Reforms Committee, set up by the Department of Economic Affairs, Ministry of Finance, under the Chairmanship of Shri T K Viswanathan. This Committee submitted an interim report in February 2015 and a final report in November of the same year. It was, as a result of the deliberations of this Committee, that the present Insolvency and Bankruptcy Code of 2016 was finally born.

14. The interim report went into the existing law on indebtedness in some detail and discussed the tests laid down in *Madhusudan Gordhandas* v. *Madhu Woollen Industries (P.) Ltd.* [1972] 2 SCR 201, by which a petition presented under the Companies Act on the ground that the company is "unable to pay its debts" can only be dismissed if the debt is bona fide disputed, *i.e.,* that the defence of the debtor is genuine, substantial and is likely to succeed on a point of law. The interim report also adverted to an amendment made in the Companies Act, 2003, by which the threshold requirement of Rs.500 was replaced by Rs.1 lakh.

15. The interim report found :

> "Once the petitioning creditor has proved the inability of the debtor-company to pay debts, van Zwieten states that courts in India have recognised a wide discretion that enabled it to give time to the debtor to make payment or even dismiss the petition. This is in stark contrast with the position in the UK (from where the law was transplanted) where once the company's inability to pay debts has been proven, the petitioning creditor is ordinarily held to be entitled to a winding up order (although it should be noted that there is an alternative corporate rescue procedure, 'administration', which a debtor may be entitled to enter).
>
> The effect of these abovementioned judicial developments has been to add significant delays in the liquidation process under CA 1956 and to add uncertainty regarding the rights of the creditors in the event of the company's insolvency. Consequently, this has made creditor recourse to the liquidation procedure as a means of debt enforcement rather difficult, and secondly, rendered the liquidation procedure ineffective as a disciplinary mechanism for creditors against insolvent debtors."

The interim report then recommended :

> **'Recommendations** :
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> - In order to re-instate the debt enforcement function of the statutory demand test for winding up, if a company fails to pay an undisputed debt of a prescribed value as per section 271(2)(*a*), the creditor should be entitled to a winding up order irrespective of whether it is insolvent (in commercial or balance sheet terms) or not. Further, the NCLT should have the discretion to refer the company for rehabilitation under Chapter XIX before making a winding up order on such ground, if the company appears to be prima facie viable. Further, in order to prevent abuse of the provision by creditors and ensure that it is not used to force debtor companies to settle disputed debts, the provision should specify the factors that the NCLT may take into account to determine whether the debt under consideration is disputed or not. As laid down by the courts, a petition may be dismissed if the debt in question is bona fide disputed, *i.e.,*, where the following conditions are satisfied : (*i*) the defence of the debtor-company is genuine, substantial and in good faith ; (*ii*) the defence is likely to succeed on a point of law ; and (*iii*) the debtor-company adduces prima facie proof of the facts on which the defence depends. Further, as with initiation of rescue proceedings, the NCLT should also have the power to impose sanctions/costs/damages on a petitioning creditor and disallow reapplications on the same grounds if it finds that a petition has been filed to abuse the process of law.
> - The Government may also consider revising the present value for triggering the statutory demand test under section 271(2)(*a*) from "one lakh rupees" to a higher amount or revise the provision to state "one lakh rupees or such amount as may be prescribed".
> - "Balance sheet insolvency" and "commercial insolvency" should be identified as separate grounds indicating a company's "inability to pay debt" in order to avoid conflicts/confusion with the statutory demand test (as is the case of the IA 1986 where the statutory demand test, the commercial insolvency test and the balance sheet insolvency test are alternate grounds for determining a company's inability to pay debts under section 123(1)(*a*),123 (1)(*e*) and 123(2), respectively).'

16. By the final report dated November 2015, the recommendation of the interim report was shelved.

The Committee made a distinction between financial contracts and operational contracts. It stated :

"4.3.3 *Information about the liabilities of a solvent entity*

Operational contracts typically involve an exchange of goods and services for cash. For an enterprise, the latter includes payables for purchase of raw-materials, other inputs or services, taxation and statutory liabilities, and wages and benefits to employees....

The Code specifies that if the Adjudicator is able to locate the record of the liability and of default with the registered IUs, a financial creditor needs no other proof to establish that a default has taken place....

The second set of liabilities are operational liabilities, which are more difficult to centrally capture given that the counterparties are a wide and heterogeneous set. In the state of insolvency, the record of all liabilities in the IUs become critical to creditors in assessing the complexity of the resolution required. Various private players, including potential strategic acquirers or distressed asset funds, would constantly monitor entities that are facing stress, and prepare to make proposals to the committee of creditors in the event that an insolvency is triggered. Easy access to this information is vital in ensuring that there is adequate interest by various kinds of financial firms in coming up to the committee of creditors with proposals. It is not easy to set up mandates for the holders of operational liabilities to file the records of their liabilities, unlike the case of financial creditors. However, their incentives to file liabilities are even stronger when the entity approaches insolvency.

4.3.4 *Information about operational creditors*

Once the invoice or notice is served, the debtor should be given a certain period of time in which to respond either by disputing it in a court, or pay up the amount of the invoice or notice. The debtor will have the responsibility to file the information about the court case, or the repayment record in response to the invoice or notice within the specified amount of time. If the debtor does not file either response within the specified period, and the creditor files for insolvency resolution, the debtor may be charged a monetary penalty by the adjudicator. However, if the debtor disputes the claim in court, until the outcome of this case is decided, the creditor may not be able to trigger insolvency on the entity. This process will act as a deterrent for frivolous claims from creditors, as well as act as a barrier for some types of creditors to initiate insolvency resolution."

The Committee then went on to consider as to who can trigger the insolvency process. In paragraph 5.2.1 the Committee stated :

'*Box 5.2 – Trigger for IRP*

1. The IRP can be triggered by either the debtor or the creditors by submitting documentation specified in the Code to the adjudicating authority.
2. For the debtor to trigger the IRP, she must be able to submit all the documentation that is defined in the Code, and may be specified by the Regulator above this.
3. The Code differentiates two categories of creditors : financial creditors where the liability to the debtor arises from a solely financial transaction, and operational creditors where the liability to the debtor arises in the form of future payments in exchange for goods or services already delivered. In cases where a creditor has both a solely financial transaction as well as an operational transaction with the entity, the creditor will be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt is more than half the full liability it has with the debtor.
4. The Code will require different documentation for a debtor, a financial creditor, and an operational creditor to trigger the IRP. These are listed in Box 5.3 under what the Adjudicator will accept as requirements to trigger the IRP.

5.2.1 *Who can trigger the IRP ?*

Here, the Code differentiates between financial creditors and operational creditors. Financial creditors are those whose relationship with the entity is a pure financial contract, such as a loan or a debt security. Operational creditors are those whose

liability from the entity comes from a transaction on operations. Thus, the wholesale vendor of spare parts whose spark plugs are kept in inventory by the car mechanic and who gets paid only after the spark plugs are sold is an operational creditor. Similarly, the lessor that the entity rents out space from is an operational creditor to whom the entity owes monthly rent on a three-year lease. The Code also provides for cases where a creditor has both a solely financial transaction as well as an operational transaction with the entity. In such a case, the creditor can be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt.

5.2.2 *How can the IRP be triggered ?*

An application from a creditor must have a record of the liability and evidence of the entity having defaulted on payments. The Committee recommends different documentation requirements depending upon the type of creditor, either financial or operational. A financial creditor must submit a record of default by the entity as recorded in a registered Information Utility (referred to as the 'IU') as described in section 4.3 (or on the basis of other evidence). The default can be to any financial creditor to the entity, and not restricted to the creditor who triggers the IRP. The Code requires that the financial creditor propose a registered insolvency professional to manage the IRP. Operational creditors must present an "undisputed bill" which may be filed at a registered information utility as requirement to trigger the IRP. The Code does not require the operational creditor to propose a registered insolvency professional to manage the IRP. If a professional is not proposed by the operational creditor, and the IRP is successfully triggered, the Code requires the adjudicator to approach the Regulator for a registered Insolvency Professional for the case.

When the adjudicator receives the application, she confirms the validity of the documents before the case can be registered by confirming the documentation in the information utility if applicable. In case the debtor triggers the IRP, the list of documentation provided by the debtor is checked against the required list. The proposal for the RP is forwarded to the Regulator for validation. If both the documentation and the proposed RP checks out as required within the time specified in regulations, the Adjudicator registers the IRP.

In case the financial creditor triggers the IRP, the adjudicator verifies the default from the information utility (if the default has been filed with an information utility, it shall be incontrovertible evidence of the existence of a default) or otherwise confirms the existence of default through the additional evidence adduced by the financial creditor, and puts forward the proposal for the RP to the Regulator for validation. In case the operational creditor triggers the IRP, the Adjudicator verifies the documentation. Simultaneously, the Adjudicator requests the Regulator for an RP. If either step cannot be verified, or the process verification exceeds the specified amount of time, then the Adjudicator rejects the application, with a reasoned order for the rejection. The order rejecting the application cannot be appealed against. Instead, application has to be made afresh. Once the documents are verified within a specified amount of time, the Adjudicator will trigger the IRP and register the IRP by issuing an order. The order will contain a unique ID that will be issued for the case by which all reports and records that are generated during the IRP will be stored, and accessed."

17. Annexed to this Committee Report is the Insolvency and Bankruptcy Bill, 2015. Interestingly, section 5(4) defined "dispute" as :

'5. *Definitions*. – In this Part, unless the context otherwise requires –....

(4) "dispute" means a bona fide suit or arbitration proceeding regarding (*a*) the existence or the amount of a debt ; (*b*) the quality of a good or service ; or (*c*) the breach of a representation or warranty ;'

Sections 8 and 9 in the said Bill read as under :

'8. *Insolvency resolution by operational creditor.* – (1) An operational creditor shall, on the occurrence of a default, deliver a demand notice or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form as may be prescribed, through an information utility,

wherever applicable, or by registered post or courier or by any electronic communication.

(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*) the existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed at least sixty days prior to the receipt of such invoice or notice in relation to such dispute through an information utility or by registered post or courier or by any electronic communication ;

(*b*) the repayment of unpaid operational debt – (*i*) by sending an attested copy of electronic transfer of the unpaid amount from the bank account of the corporate debtor ; or (*ii*) by sending an attested copy of proof that the operational creditor having encashed a cheque issued by the corporate debtor.

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

9. *Application for initiation of corporate insolvency resolution process by operational creditor.* – (1) After the expiry of the period of ten days from the date of delivery of the invoice or notice 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 with the adjudicating authority in the prescribed form for initiating a corporate insolvency resolution process.

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

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

(*a*) the invoice demanding payment or notice delivered by the operational creditor to the corporate debtor ;

(*b*) 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 confirmation from the financial institutions maintaining accounts of the operational creditor that there is no payment of an unpaid operational debt by the corporate debtor ; and

(*d*) such other information or as may be specified.

(4) The adjudicating authority shall, within two days of the receipt of the application under sub-section (2), admit the application and communicate such decision to the operational creditor and the corporate debtor if, –

(*a*) the application is complete ;

(*b*) there is no repayment of the unpaid operational debt ;

(*c*) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor ; and

(*d*) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility.

(5) The adjudicating authority shall reject the application and communicate such decision to the operational creditor and the corporate debtor if –

(*a*) the application made under this section is incomplete ;

(*b*) there has been repayment of the unpaid operational debt ;

(*c*) the creditor has not delivered the invoice or notice for payment to the corporate debtor ; and

(*d*) notice of dispute has been received by the operational creditor and there is no record of dispute in the information utility.

(6) Without prejudice to the conditions mentioned in sub-section (3), an operational creditor initiating a corporate insolvency resolution process under this section, may also propose a resolution professional to act as an interim resolution professional.

(7) The corporate insolvency resolution process shall

commence from the date of admission of the application under sub-section (4) of this section.'

18. Meanwhile, the Insolvency and Bankruptcy Bill that was annexed to the Bankruptcy Law Reforms Committee Report underwent a further change before it was submitted to a Joint Committee of the Lok Sabha. In this Bill, the definition of "dispute" now read as follows :

'5. *Definitions*. – In this Part unless the context otherwise requires, –....

(6) "dispute" includes a suit or arbitration proceedings 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 ;"

Sections 8 and 9 read as follows :

'8. *Insolvency resolution by operational creditor.* – (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form as may be prescribed, through an information utility, wherever applicable, or by registered post or courier or by such electronic mode of communication, as may be specified.

(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*) the existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed prior to the receipt of such notice or invoice in relation to such dispute through an information utility or by registered post or courier or by such electronic mode of communication as may be specified ;

(*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.

9. *Application for initiation of corporate insolvency resolution process by operational creditor.* – (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.

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

(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.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The adjudicating authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order –

(*i*) admit the application and communicate such decision to the operational creditor and the corporate debtor if, –

(*a*) the application made under sub-section (2) is complete ;

(*b*) there is no repayment of the unpaid operational debt ;

(*c*) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor ;

(*d*) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility ; and

(*e*) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any ;

(*ii*) reject the application and communicate such decision to the operational creditor and the corporate debtor, if –

(*a*) the application made under sub-section (2) is incomplete ;

(*b*) there has been repayment of the unpaid operational debt ;

(*c*) the creditor has not delivered the invoice or notice for payment to the corporate debtor ;

(*d*) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility ; or

(*e*) any disciplinary proceeding is pending against any proposed resolution professional :

Provided that adjudicating authority, prior to rejecting an application under sub-clause (*a*) of clause (*ii*) of this sub-section, shall give a notice to the applicant to rectify the defect in his application within three days of the date 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).'

19. The Notes on Clauses annexed to the Bill are extremely important and read as follows :

"*Notes on Clauses*

Clause 6 provides that where a corporate debtor has defaulted in paying a debt that has become due and payable but not repaid, the corporate insolvency resolution process under Part II may be initiated in respect of such corporate debtor by a financial creditor, an operational creditor or the corporate debtor itself.

Early recognition of financial distress is very important for timely resolution of insolvency. A default based test for entry into the insolvency resolution process permits early intervention such that insolvency resolution proceedings can be initiated at an early stage when the corporate debtor shows early signs of financial distress rather than at the point where it would be difficult to revive it effectively. It also provides a simple test to initiate resolution process.

This clause permits any financial creditor to initiate the corporate insolvency resolution process where the corporate debtor has defaulted in paying a debt that has become due and payable but not repaid. Financial creditors are those creditors to whom a financial debt (*i.e.*, a debt where the creditor is compensated for the time value of the money lent) is owed.

Further, the Code also permits the corporate debtor itself to initiate the insolvency resolution process once it has defaulted on a debt. Additionally, operational creditors (*i.e.*, creditors to whom a sum of money is owed for the provision of goods or services or the Central/State Government or local authorities in respect of payments due to them) are also permitted to initiate the insolvency resolution process. This will bring the law in line with international practices, which permit unsecured creditors (including employees, suppliers, etc., who fall under the definition of operational creditors) to file for the initiation of insolvency resolution proceedings.

Clause 7 lays down the procedure for the initiation of the corporate insolvency resolution process by a financial creditor or two or more financial creditors

jointly. The financial creditor can file an application before the National Company Law Tribunal along with proof of default and the name of a resolution professional proposed to act as the interim resolution professional in respect of the corporate debtor. The requirement to provide proof of default ensures that financial creditors do not file frivolous applications or applications which prematurely put the corporate debtor into insolvency resolution proceedings for extraneous considerations. The adjudicating authority/Tribunal can, within fourteen days from the date of receipt of the application, ascertain the existence of a default from the records of a regulated information utility. A default may also be proved in such manner as may be specified by the Insolvency and Bankruptcy Board of India.

Once the adjudicating authority/Tribunal is satisfied as to the existence of the default and has ensured that the application is complete and no disciplinary proceedings are pending against the proposed resolution professional, it shall admit the application. The adjudicating authority/Tribunal is not required to look into any other criteria for admission of the application. It is important that parties are not allowed to abuse the legal process by using delaying tactics at the admissions stage.

Clause 8 lays down the procedure for the initiation of the corporate insolvency resolution process by an operational creditor. *This procedure differs from the procedure applicable to financial creditors as operational debts* (*such as trade debts, salary or wage claims*) *tend to be small amounts* (*in comparison to financial debts*) *or are recurring in nature and may not be accurately reflected on the records of information utilities at all times. The possibility of disputed debts in relation to operational creditors is also higher in comparison to financial creditors such as banks and financial institutions. Accordingly, the process for initiation of the insolvency resolution process differs for an operational creditor.*

Once a default has occurred, the operational creditor has to deliver a demand notice or a copy of an invoice demanding payment of the debt in default to the corporate debtor. *The corporate debtor has a period of ten days from the receipt of the demand notice or invoice to inform the operational creditor of the existence of a dispute regarding the debt claim or of the repayment of the debt. This ensures that operational creditors, whose debt claims are usually smaller, are not able to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It may also facilitate informal negotiations between such creditors and the corporate debtor, which may result in a restructuring of the debt outside the formal proceedings.*

Clause 9 On the expiry of the period of ten days from the date of receipt of the invoice or demand notice under clause 8, if the operational creditor does not receive either the payment of the debt or a notice of existence of dispute in relation to the debt claim from the corporate debtor, he can file an application with the adjudicating authority for initiating the insolvency resolution process in respect of such debtor. He also has to furnish proof of default and proof of non-payment of the debt along with an affidavit verifying that there has been no notice regarding the existence of a dispute in relation to the debt claim. *Within fourteen days from the receipt of the application, if the adjudicating authority/Tribunal is satisfied as to* (*a*) *the existence of a default, and* (*b*) *the other criteria laid down in clause 9*(*5*) *being met, it shall admit the application. The adjudicating authority/Tribunal is not required to look into any other criteria for admission of the application. It is important that parties are not allowed to abuse the legal process by using delaying tactics at the admissions stage."* [emphasis supplied]

20. The Joint Committee in April, 2016 made certain small changes in the said Bill, by which the Committee stated :

'17. *Mode of delivery of demand notice of unpaid operational debt – Clause 8*

The Committee find that clause 8(1) of the Code provides that an operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form as may be prescribed, through an information utility, wherever applicable, or by registered post or courier or by such electronic mode of communication, as may be specified.

The Committee are of the view that the details of the mode of delivery of demand notice can be provided in the rules. The Committee, therefore, decide to substitute words "in such form as may be prescribed, through an information utility, wherever applicable, or by registered post or courier or by such electronic mode of communication, as may be specified" as appearing in clause 8(1) with the words "in such form and manner, as may be prescribed". Besides as a consequential amendment words "through an information utility or by registered post or courier or by such electronic mode of communication as may be specified" as appearing in clause 8(2) may also be omitted.'

The Committee also revised the time limits set out in various sections of the Code from 2, 3 and 5 days to a longer uniform period of 7 days.

21. The stage is now set for setting out the relevant provisions of the Code insofar as operational creditors and their corporate debtors are concerned.

'3. *Definitions.* – In this Code, unless the context otherwise requires, –....

(*12*) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be ;

5. *Definitions.* – In this Part, unless the context otherwise requires, –....

(6) "dispute" includes a suit or arbitration proceedings 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 ;....

(*20*) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred ;

(*21*) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority ;

8. *Insolvency resolution by operational creditor.* – (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or 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.

9. *Application for initiation of corporate insolvency resolution process by operational creditor.* – (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.

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

(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.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The adjudicating authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order –

(*i*) admit the application and communicate such decision to the operational creditor and the corporate debtor if, –

(*a*) the application made under sub-section (2) is complete ;

(*b*) there is no repayment of the unpaid operational debt ;

(*c*) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor ;

(*d*) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility ; and

(*e*) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(*ii*) reject the application and communicate such decision to the operational creditor and the corporate debtor, if –

(*a*) the application made under sub-section (2) is incomplete ;

(*b*) there has been repayment of the unpaid operational debt ;

(*c*) the creditor has not delivered the invoice or notice for payment to the corporate debtor ;

(*d*) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility ; or

(*e*) any disciplinary proceeding is pending against any proposed resolution professional :

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.

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

22. Together with section 8(1), the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, speak of demand notices by the operational creditor and applications by the operational creditor in the following terms :

"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.

6. *Application by operational creditor.* – (1) An operational creditor, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 9 of the Code in Form 5, 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) The applicant under sub-rule (1) shall despatch 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.

FORM 3

[*See* clause (*a*) of sub-rule (1) of rule 5]

FORM OF DEMAND NOTICE/INVOICE DEMANDING PAYMENT UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

(Under rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

[*Date*]

To,

[*Name and address of the registered office of the corporate debtor*]

From,

[*Name and address of the registered office of the operational creditor*]

Subject : Demand notice/invoice demanding payment in respect of unpaid operational debt due from [corporate debtor] under the Code.

Madam/Sir,

1. This letter is a demand notice/invoice demanding payment of an unpaid operational debt due from [name of corporate debtor].

2. Please find particulars of the unpaid operational debt below :

PARTICULARS OF OPERATIONAL DEBT		
1	Total amount of debt, details of transactions on account of which debt fell due, and the date from which such debt fell due	
2	Amount claimed to be in default and the date on which the default occurred (attach the workings for computation of default in tabular form)	
3	Particulars of security held, if any, the date of its creation, its estimated value as per the creditor. Attach a copy of a certificate of registration of charge issued by the registrar of companies (if the corporate debtor is a company)	
4	Details of retention of title arrangements (if any) in respect of goods to which the operational debt refers	
5.	Refers record of default with the information utility (if any)	
6.	Provision of law, contract or other document under which debt has become due	
7.	List of documents attached to this application in order to prove the existence of operational debt and the amount in default	

3. If you dispute the existence of amount of unpaid operational debt (in default) please provide the undersigned, within ten days of the receipt of this letter, of the pendency of the suit or arbitration proceedings in relation to such dispute filed before the receipt of this letter/notice.

4. If you believe that the debt has been repaid before the receipt of this letter, please demonstrate such repayment by sending to us, within ten days of receipt of this letter, the following :

(*a*) an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor ; or

(*b*) an attested copy of any record that [*name of the operational creditor*] has received the payment.

5. The undersigned, hereby, attaches a certificate from an information utility confirming that no record of a dispute raised in relation to the relevant operational debt

has been filed by any person at any information utility, (if applicable)

6. The undersigned request you to unconditionally repay the unpaid operational debt (in default) in full within ten days from the receipt of this letter failing which we shall initiate a corporate insolvency resolution process in respect of [*c*].

Yours sincerely,

Signature of person authorised to act on behalf of the operational creditor

Name in block letters

Position with or in relation to the operational creditor

Address of person signing

Instructions

1. Please serve a copy of this form on the corporate debtor, ten days in advance of filing an application under section 9 of the Code.

2. Please append a copy of such served notice to the application made by the operational creditor to the adjudicating authority.

FORM 4

[*See* clause (*b*) of sub-rule (1) of rule 5]

FORM OF NOTICE WITH WHICH INVOICE DEMANDING PAYMENT IS TO BE ATTACHED

(Under rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

[*Date*]

To,

[*Name and address of registered office of the corporate debtor*]

From,

[*Name and address of the operational creditor*]

Subject : Notice attached to invoice demanding payment

Madam/Sir,

[*Name of operational creditor*], hereby provides notice for repayment of the unpaid amount of INR [*insert amount*] that is in default as reflected in the invoice attached to this notice.

In the event you do not repay the debt due to us within ten days of receipt of this notice, we may file an application before the adjudicating authority for initiating a corporate insolvency resolution process under section 9 of the Code.

Yours sincerely,

Signature of person authorised to act on behalf of the operational creditor

Name in block letters

Position with or in relation to the operational creditor

Address of person signing

FORM 5

[*See* sub-rule (1) of rule 6]

APPLICATION BY OPERATIONAL CREDITOR TO INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER THE CODE

(Under rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

[*Date*]

To,

The National Company Law Tribunal

[*Address*]

From,

[*Name and address for correspondence of the operational creditor*]

In the matter of [*name of the corporate debtor*]

Subject : Application to initiate corporate insolvency resolution process in respect of [name of the corporate debtor] under the Insolvency and Bankruptcy Code, 2016.

Madam/Sir,

[*Name of the operational creditor*], hereby submits this application to initiate a corporate insolvency resolution process in the case of [*name of corporate debtor*]. The details for the purpose of this application are set out below :

PART – I

PARTICULARS OF APPLICANT		
1.	Name of operational creditor	
2.	Identification number of operational creditor (if any)	
3.	Address for correspondence of the operational creditor	

PART - II

PARTICULARS OF CORPORATE DEBTOR		
1.	Name of the corporate debtor	
2.	Identification number of corporate debtor	
3.	Date of incorporation of corporate debtor	
4.	Nominal share capital and the paid-up share capital of the corporate debtor and/or details of guarantee clause as per memorandum of association (as applicable)	
5.	Address of the registered office of the corporate debtor	
6.	Name, address and authority of person submitting application on behalf of operational creditor (enclose authorisation)	
7.	Name and address of person resident in india authorised to accept the service of process on its behalf (enclose authorisation)	

PART-III

PARTICULARS OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL [*IF PROPOSED*]		
1.	Name, address, email address and the registration number of the proposed insolvency professional	

PART-IV

PARTICULARS OF OPERATIONAL DEBT		
1.	Total amount of debt, details of transactions on account of which debt fell due, and the date from which such debt fell due	
2.	Amount claimed to be in default and the date on which the default occurred (attach the workings for computation of amount and dates of default in tabular form)	

PART-V

PARTICULARS OF OPERATIONAL DEBT [DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]		
1.	Particulars of security held, if any, the date of its creation, its estimated value as per the creditor. Attach a copy of a certificate of registration of charge issued by the registrar of companies (if the corporate debtor is a company)	
2.	Details of reservation/retention of title arrangements (if any) in respect of goods to which the operational debt refers	
3.	Particulars of an order of a court, tribunal or arbitral panel adjudicating on the default, if any (attach a copy of the order)	
4.	Record of default with the information utility, if any (attach a copy of such record)	
5.	Details of succession certificate, or probate of a will, or letter of administration, or court decree (as may be applicable), under the indian succession act, 1925 (10 of 1925) (attach a copy)	
6.	Provision of law, contract or other document under which operational debt has become due	
7.	A statement of bank account where deposits are made or credits received normally by the operational creditor in respect of the debt of the corporate debtor (attach a copy)	
8.	List of other documents attached to this application in order to prove the existence of operational debt and the amount in default	

I, [*Name of the operational creditor / person authorised to act on behalf of the operational creditor*] hereby certify that, to the best of my knowledge, [*name of proposed insolvency professional*], is fully qualified and permitted to act as an insolvency professional in accordance with the Code and the rules and regulations made thereunder. [*Where applicable*]

[Name of the operational creditor] has paid the requisite fee for this application through [state means of payment] on [date].

Yours sincerely,

Signature of person authorised to act on behalf of the operational creditor

Name in block letters

Position with or in relation to the operational creditor

Address of person signing

Instructions

Please attach the following to this application :

Annex I – Copy of the invoice / demand notice as in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 served on the corporate debtor.

Annex II – Copies of all documents referred to in this application.

Annex III – Copy of the relevant accounts from the banks/ financial institutions maintaining accounts of the operational creditor confirming that there is no payment of the relevant unpaid operational debt by the operational debtor, if available.

Annex IV – Affidavit in support of the application in accordance with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Annex V – Written communication by the proposed interim resolution professional as set out in Form 2 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. [*Where applicable*]

Annex VI – Proof that the specified application fee has been paid.

Note : Where workmen/employees are operational creditors, the application may be made either in an individual capacity or in a joint capacity by one of them who is duly authorised for the purpose."

Regulation 7 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is also relevant and reads as under :

"7. *Claims by operational creditors.* – (1) A person claiming to be an operational creditor, other than workman or employee of the corporate debtor, shall submit proof of claim to the interim resolution professional in person, by post or by electronic means in Form B of the Schedule :

Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.

(2) The existence of debt due to the operational creditor under this regulation may be proved on the basis of –

(*a*) the records available with an information utility, if any ; or

(*b*) other relevant documents, including –

(*i*) a contract for the supply of goods and services with corporate debtor ;

(*ii*) an invoice demanding payment for the goods and services supplied to the corporate debtor ;

(*iii*) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any ; or

(*iv*) financial accounts.

FORM B

PROOF OF CLAIM BY OPERATIONAL CREDITORS EXCEPT WORKMEN AND EMPLOYEES

[*Under regulation 7 of the Insolvency and Bankruptcy Board of India* (*Insolvency Resolution Process for Corporate Persons*) *Regulations, 2016*]

[*Date*]

To

The Interim Resolution Professional / Resolution Professional [*Name of the Insolvency Resolution Professional / Resolution Professional*] [*Address as set out in public announcement*]

From

[*Name and address of the operational creditor*]

Subject : Submission of proof of claim.

Madam/Sir,

[*Name of the operational creditor*], hereby submits this proof of claim in respect of the corporate insolvency resolution process in the case of [*name of corporate debtor*]. The details for the same are set out below :

PARTICULARS		
1.	Name of operational creditor	
2.	Identification number of operational creditor (if an incorporated body provide identification number and proof of incorporation. If a	

	partnership or individual provide identification records* of all the partners or the individual)	
3.	Address and email address of operational creditor for correspondence	
4.	Total amount of claim (including any interest as at the insolvency commencement date)	
5.	Details of documents by reference to which the debt can be substantiated.	
6.	Details of any dispute as well as the record of pendency or order of suit or arbitration proceedings	
7.	Details of how and when debt incurred	
8.	Details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim	
9.	Details of any retention of title arrangements in respect of goods or properties to which the claim refers	
10.	Details of the bank account to which the amount of the claim or any part thereof can be transferred pursuant to a resolution plan	
11.	List of documents attached to this proof of claim in order to prove the existence and nonpayment of claim due to the operational creditor	

Signature of operational creditor or person authorised to act on his behalf

[*Please enclose the authority if this is being submitted on behalf of an operational creditor*]

Name in block letters

Position with or in relation to creditor

Address of person signing

*PAN number, passport, aadhaar card or the identity card issued by the Election Commission of India." [emphasis supplied]

23. In the passage of the Bills which ultimately became the Code, various important changes have taken place. The original definition of "dispute" has now become an inclusive definition, the word "bona fide" before "suit or arbitration proceedings" being deleted. In section 8(1), the words "through an information utility, wherever applicable, or by registered post or courier or by any electronic communication" have been deleted. Likewise, in section 8(2), the period of "at least 60 days ... through an information utility or by registered post or courier or by any electronic communication" has also been deleted. In section 9(5), the absence of a proviso similar to the proviso occurring in section 7(5) was also rectified. Further, the time periods of 2 and 3 days were uniformly substituted, as has been seen above, by 7 days, so that a sufficiently long period is given to do the needful.

24. The scheme under sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (*i.e.*, on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [section 8(1)]. Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [section 8(2)(*a*)]. What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – *i.e.*, it must exist before the receipt of the demand notice or invoice, as the case may be. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days send an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or send an attested copy of the record that the operational creditor has encashed a cheque or otherwise received payment from the corporate debtor [section 8(2)(*b*)]. It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational

creditor may trigger the insolvency process by filing an application before the adjudicating authority under section 9(1) and (2). This application is to be filed under rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form 5, accompanied with documents and records that are required under the said form. Under rule 6(2), the applicant is to dispatch by registered post or speed post, a copy of the application to the registered office of the corporate debtor. Under section 9(3), along with the application, the statutory requirement is to furnish a copy of the invoice or demand notice, an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt and a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Apart from this information, the other information required under Form 5 is also to be given. Once this is done, the adjudicating authority may either admit the application or reject it. If the application made under sub-section (2) is incomplete, the adjudicating authority, under the proviso to sub-section (5), may give a notice to the applicant to rectify defects within 7 days of the receipt of the notice from the adjudicating authority to make the application complete. Once this is done, and the adjudicating authority finds that either there is no repayment of the unpaid operational debt after the invoice [section 9(5)(*i*)(*b*)] or the invoice or notice of payment to the corporate debtor has been delivered by the operational creditor [section 9(5)(*i*)(*c*)], or that no notice of dispute has been received by the operational creditor from the corporate debtor or that there is no record of such dispute in the information utility [section 9(5)(*i*)(*d*)], or that there is no disciplinary proceeding pending against any resolution professional proposed by the operational creditor [section 9(5)(*i*)(*e*)], it shall admit the application within 14 days of the receipt of the application, after which the corporate insolvency resolution process gets triggered. On the other hand, the adjudicating authority shall, within 14 days of the receipt of an application by the operational creditor, reject such application if the application is incomplete and has not been completed within the period of 7 days granted by the proviso [section 9(5)(*ii*)(*a*)]. It may also reject the application where there has been repayment of the operational debt [section 9(5)(*ii*)(*b*)], or the creditor has not delivered the invoice or notice for payment to the corporate debtor [section 9(5)(*ii*)(*c*)]. It may also reject the application if the notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility [section 9(5)(*ii*)(*d*)]. Section 9(5)(*ii*)(*d*) refers to the notice of an existing dispute that has so been received, as it must be read with section 8(2)(*a*). Also, if any disciplinary proceeding is pending against any proposed resolution professional, the application may be rejected [section 9(5)(*ii*)(*e*)].

25. Therefore, the adjudicating authority, when examining an application under section 9 of the Act will have to determine :

(*i*) Whether there is an "operational debt" as defined exceeding Rs.1 lakh ? (see section 4 of the Act)

(*ii*) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid ? and

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

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

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

26. Another thing of importance is the timelines within which the insolvency resolution process is to be triggered. The corporate debtor is given 10 days from the date of receipt of demand notice or copy of invoice to either point out that a dispute exists between the parties or that he has since repaid the unpaid operational debt. If neither exists, then an application once filed has to be disposed of by the adjudicating authority within 14 days of its receipt, either by admitting it or rejecting it. An appeal can then be filed

to the Appellate Tribunal under section 61 of the Act within 30 days of the order of the adjudicating authority with an extension of 15 further days and no more.

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

28. It is now important to construe section 8 of the Code. The operational creditors are those creditors to whom an operational debt is owed, and an operational debt, in turn, means a claim in respect of the provision of goods or services, including employment, or a debt in respect of repayment of dues arising under any law for the time being in force and payable to the Government or to a local authority. This has to be contrasted with financial debts that may be owed to financial creditors, which was the subject-matter of the judgment delivered by this court on 31st August, 2017 in *Innoventive Industries Ltd.* v. *ICICI Bank* (Civil Appeal Nos.8337-8338 of 2017). In this judgment, we had held that the adjudicating authority under section 7 of the Code has to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor within 14 days. The corporate debtor is entitled to point out to the adjudicating authority that a default has not occurred ; in the sense that a debt, which may also include a disputed claim, is not due *i.e.,* it is not payable in law or in fact. This Court then went on to state :

> "29. The scheme of section 7 stands in contrast with the scheme under section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in section 8(1) of the Code. Under section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – *i.e.,* before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.
>
> 30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" *i.e.,* payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

29. It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in section 8(2)(*a*) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or". If read as "and", disputes

would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship ; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an arbitral tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an arbitral tribunal or a court for upto three years, such persons would be outside the purview of section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the Legislature nor has it so been intended. We have also seen that one of the objects of the Code *qua* operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties.

30. It is settled law that the expression "and" may be read as "or" in order to further the object of the statute and/or to avoid an anomalous situation. Thus, in *Samee Khan* v. *Bindu Khan* [1998] 7 SCC 59 at 64, this court held :

> '14. Since the word "also" can have meanings such as "as well" or "likewise", cannot those meanings be used for understanding the scope of the trio words "and may also" ? Those words cannot altogether be detached from the other words in the sub-rule. Here again the word "and" need not necessarily be understood as denoting a conjunctive sense. In *Stroud's Judicial Dictionary*, it is stated that the word "and" has generally a cumulative sense, but sometimes it is by force of a context read as "or". *Maxwell on Interpretation of Statutes* has recognised the above use to carry out the interpretation of the Legislature. This has been approved by this court in *Ishwar Singh Bindra* v. *State of UP* AIR 1968 SC 1450 : 1969 Crl. LJ 19. The principle of noscitur a sociis can profitably be used to construct the words "and may also" in the sub-rule.'

31. In *Gujarat Urja Vikas Nigam Ltd.* v. *Essar Power Ltd.* [2008] 4 SCC 755 at 765, this court held :

> '26. It may be noted that section 86(1)(*f*) of the Act of 2003 is a special provision for adjudication of disputes between the licensee and the generating companies. Such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitration. In our opinion the word "and" in section 86(1)(*f*) between the words "generating companies" and "to refer any dispute for arbitration" means "or". It is well settled that sometimes "and" can mean "or" and sometimes "or" can mean "and" (vide *GP Singh's Principles of Statutory Interpretation*, 9th Edn., 2004, p. 404).
>
> 27. In our opinion in section 86(1)(*f*) of the Electricity Act, 2003 the word "and" between the words "generating companies" and the words "refer any dispute" means "or", otherwise it will lead to an anomalous situation because obviously the State Commission cannot both decide a dispute itself and also refer it to some arbitrator. Hence, the word "and" in Section 86(1)(*f*) means "or".'

32. In a recent judgment in *Maharishi Mahesh Yogi Vedic Vishwavidyalaya* v. *State of M.P.* [2013] 15 SCC 677 at 718, this court held :

> '93. Besides the above two decisions, which discuss about the methodology of interpretation of a statute, we also refer to the following decisions rendered by this court in Ishwar Singh Bindra [*Ishwar Singh Bindra* v. *State of UP*, AIR 1968 SC 1450 : 1969 Cri LJ 19], wherein in para 11 it has been held as under : (AIR p. 1454)
>
> "11. ... It would be much more appropriate in the context to read it disconjunctively. In *Stroud's Judicial Dictionary*, 3rd Edn., it is stated at p. 135 that 'and' has generally a cumulative sense, requiring the fulfilment of all the conditions that it joins together, and herein it is the antithesis of or. Sometimes, however, even in such a connection, it is, by force of a context, read as 'or'. Similarly in *Maxwell on Interpretation of Statutes*, 11th Edn., it has been accepted that 'to carry out the intention of the Legislature it is occasionally found necessary to read the conjunctions "or" and "and" one for the other'."
>
> 94. We may also refer to para 4 of the decision rendered by this court in *Director of Mines Safety* v. *Tandur & Nayandgi Stone Quarries (P.) Ltd*. [(1987) 3 SCC 208] : (SCC p. 211, para 4)

"4. According to the plain meaning, the exclusionary clause in sub-section (1) of section 3 of the Act read with the two provisos beneath clauses (*a*) and (*b*), the word 'and' at the end of para (*b*) of sub-clause (*ii*) of the proviso to clause (*a*) of section 3(1) must in the context in which it appears, be construed as 'or' ; and if so construed, the existence of any one of the three conditions stipulated in paras (*a*), (*b*) and (*c*) would at once attract the proviso to clauses (*a*) and (*b*) of sub-section (1) of section 3 and thereby make the mine subject to the provisions of the Act. The High Court overlooked the fact that the use of the negative language in each of the three clauses implied that the word 'and' used at the end of clause (*b*) had to be read disjunctively. That construction of ours is in keeping with the legislative intent manifested by the scheme of the Act which is primarily meant for ensuring the safety of workmen employed in the mines."

33. This being the case, is it not open to the adjudicating authority to then go into whether a dispute does or does not exist ?

34. It is important to notice that section 255 read with the Eleventh Schedule of the Code has amended section 271 of the Companies Act, 2013 so that a company being unable to pay its debts is no longer a ground for winding up a company. The old law contained in *Madhusudan* (*supra*) has, therefore, disappeared with the disappearance of this ground in section 271 of the Companies Act.

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

36. The expression "existence" has been understood as follows :

'The *Shorter Oxford English Dictionary* gives the following meaning of the word "*existence*" :

(*a*) Reality, as opp to appearance.

(*b*) The fact or state of existing ; actual possession of being. Continued being as a living creature, life, esp. under adverse conditions.

Something that exists ; an entity, a being. All that exists. (Page 894 – *Oxford English Dictionary*)'

37. Two extremely instructive judgments, one of the Australian High Court, and the other of the Chancery Division in the UK, throw a great deal of light on the expression "existence of a dispute" contained in section 8(2)(*a*) of the Code. The Australian judgment is reported as *Spencer Constructions Pty Ltd* v. *G & M Aldridge Pty Ltd.* [1997] FCA 681. The Australian High Court had to construe section 459H of the Corporations Law, which read as under :

"(*a*) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates ;....

The expression "genuine dispute" was then held to mean the following :

Finn J was content to adopt the explanation of "genuine dispute" given by McLelland CJ in Eq in *Eyota Pty. Ltd.* v. *Hanave Pty. Ltd.* [1994] 12 ACSR 785 at 787 where his Honour said :

"In my opinion [the] expression connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the "serious question to be tried" criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat. This does not mean that the court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit 'however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently and probable in itself, it may be not having "sufficient prima facie plausibility to merit further investigation as to [its] truth" {*cf Eng Mee Yong* v. *Letchumanan* [1980] AC 331 at 341}, or "a patently feeble legal argument or an assertion of facts unsupported by evidence" : *cf South Australia* v. *Wall* [1980] 24 SASR 189 at 194."

His honour also referred to the judgment of Lindgren J in *Rohala Pharmaceutical Pty Ltd.* (*supra*) where, at 353, his honour said :

"The provisions [of section 459H(1) and (5)] assume that the dispute and offsetting claim have an 'objective'

existence the genuineness of which is capable of being assessed. The word 'genuine' is included [in 'genuine dispute'] to sound a note of warning that the propounding of serious disputes and claims is to be expected but must be excluded from consideration."

There have been numerous decisions of Single Judges in this court and in State Supreme Courts which have analysed, in different ways, the approach a court should take in determining whether there is "a genuine dispute" for the purposes of s 459H of the Corporations Law. What is clear is that in considering applications to set aside a statutory demand, a court will not determine contested issues of fact or law which have a significant or substantial basis. One finds formulations such as :

"... at least in most cases, it is not expected that the court will embark upon any extended enquiry in order to determine whether there is a genuine dispute between the parties and certainly will not attempt to weigh the merits of that dispute. All that the legislation requires is that the court conclude that there is a dispute and that it is a genuine dispute".

See Mibor Investments Pty Ltd v Commonwealth Bank of Australia (1993) 11 ACSR 362 at 366-7, followed by Ryan J in Moyall Investments Services Pty Ltd v White (1993) 12 ACSR 320 at 324.

Another formulation has been expressed as follows :

"It is clear that what is required in all cases is something between mere assertion and the proof that would be necessary in a court of law. Something more than mere assertion is required because if that were not so then anyone could merely say it did not owe a debt ..."

See *John Holland Construction & Engineering Pty. Ltd.* v. *Kilpatrick Green Pty Ltd.* [1994] 12 ACLC 716 at 718, followed by Northrop J in *Aquatown Pty. Ltd*. v. *Holder Stroud Pty. Ltd.* (Federal Court of Australia, 25 June 1996, unreported).

In *Re Morris Catering (Australia) Pty. Ltd* (1993) 11 ACSR 601 at 605, Thomas J said :

"There is little doubt that Div 3 is intended to be a complete code which prescribes a formula that requires the court to assess the position between the parties, and preserve demands where it can be seen that there is no genuine dispute and no sufficient genuine offsetting claim. That is not to say that the court will examine the merits or settle the dispute. The specified limits of the court's examination are the ascertainment of whether there is a 'genuine dispute' and whether there is a 'genuine claim'.

It is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond a perception of genuineness (or the lack of it) the court has no function. It is not helpful to perceive that one party is more likely than the other to succeed, or that the eventual state of the account between the parties is more likely to be one result than another.

The essential task is relatively simple – to identify the genuine level of a claim (not the likely result of it) and to identify the genuine level of an offsetting claim (not the likely result of it)."

In *Scanhill Pty. Ltd.* v. *Century 21 Australasia Pty Ltd* [1993] 12 ACSR 341 at 357 Beazley J said :

"... the test to be applied for the purposes of s 459H is whether the court is satisfied that there is a serious question to be tried that the applicant has an offsetting claim".

In *Chadwick Industries (South Coast) Pty. Ltd.* v. *Condensing Vaporisers Pty. Ltd.* [1994] 13 ACSR 37 at 39, Lockhart J said :

"... what appears clearly enough from all the judgments is that a standard of satisfaction which a court requires is not a particularly high one. I am for present purposes content to adopt any of the standards that are referred to in the cases ... The highest of the thresholds is probably the test enunciated by Beazley J, though for myself I discern no inconsistency between that test and the statements in the other cases to which I have referred. However, the application of Beazley J's test will vary according to the circumstances of the case.

Certainly the court will not examine the merits of the dispute other than to see if there is in fact a genuine dispute. The notion of a 'genuine dispute' in this context suggests to me that the court must be satisfied that there is a dispute that is not plainly vexatious or frivolous. It must be satisfied that there is a claim that may have some substance".

In *Greenwood Manor Pty. Ltd.* v. *Woodlock* [1994] 48 FCR 229 Northrop J referred to the formulations of Thomas J in *Re Morris Catering (Australia) Pty Ltd*

(1993) 11 ACLC 919, 922 and Hayne J in *Mibor Investments Pty. Ltd.* v. *Commonwealth Bank of Australia* (*supra*), where he noted the dictionary definition of "genuine" as being in this context "not spurious ... real or true" and concluded (at 234) :

"Although it is true that the Court, on an application under ss 459G and 459H is not entitled to decide a question as to whether a claim will succeed or not, it must be satisfied that there is a genuine dispute between the company and the respondent about the existence of the debt. If it can be shown that the argument in support of the existence of a genuine dispute can have no possible basis whatsoever, in my view, it cannot be said that there is a genuine dispute. This does not involve, in itself, a determination of whether the claim will succeed or not, but it does go to the reality of the dispute, to show that it is real or true and not merely spurious".

In our view a "genuine" dispute requires that :

- the dispute be bona fide and truly exist in fact ;
- the grounds for alleging the existence of a dispute are real and not spurious, hypothetical, illusory or misconceived.

We consider that the various formulations referred to above can be helpful in determining whether there is a genuine dispute in a particular case, so long as the formulation used does not become a substitute for the words of the statute."

38. To similar effect is the judgment of the Chancery Division in *Hayes* v. *Hayes* [2014] EWHC 2694 (Ch) under the U.K. Insolvency Rules. The Chancery Division held :

'I do not think it necessary, for the purposes of this appeal, to embark on a survey of the authorities as to precisely what is involved in a genuine and substantial cross-claim. It is clear that on the one hand, the court does not need to be satisfied that there is a good claim or even that it is a claim which is prima facie likely to succeed. In In re Bayoil SA [1999] 1 WLR 147 itself, Nourse LJ referred, at p 153, to what Harman LJ had said in *LHF Wools Ltd., In re.* [1970] Ch 27, 36 where Harman LJ, having referred to a previous case, said :

"The majority decided in that case that, shadowy as the cross-claim was and improbable as the events said to support it seemed to be, there was just enough to make the principle work, namely, that it was right to have the matter tried out before the axe fell."

On the other hand, the court should be alert to detect wholly spurious claims merely being put forward by an unwilling debtor to raise what has been called "a cloud of objections" as I referred to earlier.'

39. Interestingly enough in *Portman Provincial Cinemas Ltd., In re.*[1999] 1 WLR 157, a sharply divided Court of Appeal had to decide whether a winding up petition should be dismissed on the ground that a cross-claim had to be tried. Lord Denning, the minority Judge put it thus :

"It comes to this : Mr. Hymanson has put forward a most astonishing claim for an indemnity against losses in perpetuity–based on an oral agreement eight years ago–in a railway carriage or a solicitor's office–with nothing to support it at all : against a man now dead. If there was substance in it fit for the court to consider, he should have condescended to a great deal more particularity. At all events, he should have done so if he wished to convince me. I do not think this cross-claim has any substance at all. I would reject it as an answer to this creditor's debt and I would allow the appeal accordingly."

On the other hand, Justice Harman in agreeing with the Chancery Division judgment, held :

"I do not think that on this proceeding we are entitled to adjudicate upon that matter. I do not think we ought to reject out of hand statements on oath by Mr. Hymanson and Mr. Waller which, unsatisfactory as they may be, do yet set up affirmatively this story. There is nobody, of course, to contradict them. I think we must take it that there is at least a chance that the judge will believe that story and will agree that there was such a bargain made, and, moreover, that it was an inherent part of the sale agreement....

Therefore, I have had grave doubts about this matter but I have come to the conclusion on the whole that it cannot be said that the story was so vague and the likelihood of success so slight that we can say there was no substance in the cross-claim. I think the judge was right to say that the matter ought to

go to trial, and therefore according to the modern practice the petition should be dismissed, and I would so hold."

Similarly, Russell, LJ, held :

"Lord Denning MR has taken the view that the deponents of the company really have made up this story, so strong are the circumstances which seem to point in the opposite direction. As I have said, I agree it is a most extraordinary story, but I am not prepared, merely on the basis of affidavits and circumstances appearing in the Companies Court, to hold that really not only is their story strange, but palpably untrue."

40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under section 9(5)(2)(*d*) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.

41. Coming to the facts of the present case, it is clear that the argument of Shri Mohta that the requisite certificate by IDBI was not given in time will have to be rejected, inasmuch as neither the appellant nor the Tribunal raised any objection to the application on this score. The confirmation from a financial institution that there is no payment of an unpaid operational debt by the corporate debtor is an important piece of information that needs to be placed before the adjudicating authority, under section 9 of the Code, but given the fact that the adjudicating authority has not dismissed the application on this ground and that the appellant has raised this ground only at the appellate stage, we are of the view that the application cannot be dismissed at the threshold for want of this certificate alone.

42. On the other hand, Shri Mohta is on firmer ground when he argues that a dispute certainly exists on the facts of the present case and that, therefore, the application ought to have been dismissed on this ground.

43. According to learned counsel for the respondent, the definition of "dispute" would indicate that since the NDA does not fall within any of the three sub-clauses of section 5(6), no "dispute" is there on the facts of this case. We are afraid that we cannot accede to such a contention. First and foremost, the definition is an inclusive one, and we have seen that the word "includes" substituted the word "means" which occurred in the first Insolvency and Bankruptcy Bill. Secondly, the present is not a case of a suit or arbitration proceeding filed before receipt of notice – section 5(6) only deals with suits or arbitration proceedings which must "relate to" one of the three sub-clauses, either directly or indirectly. We have seen that a "dispute" is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in section 5(6). The correspondence between the parties would show that on 30th January, 2015, the appellant clearly informed the respondent that they had displayed the appellant's confidential client information and client campaign information on a public platform which constituted a breach of trust and a breach of the NDA between the parties. They were further told that all amounts that were due to them were withheld till the time the matter is resolved. On 10th February, 2015, the respondent referred to the NDA of 26th December, 2014 and denied that there was a breach of the NDA. The respondent went on to state that the appellant's claim is unfounded and untenable, and that the appellant is trying to avoid its financial obligations, and that a sum of Rs.19,08,202.57 should be paid within one week, failing which the respondent would be forced to explore legal options and initiate legal process for recovery of

the said amount. This e mail was refuted by the appellant by an e-mail dated 26th February, 2015 and the appellant went on to state that it had lost business from various clients as a result of the respondent's breaches. Curiously, after this date, the respondent remained silent, and thereafter, by an e-mail dated 20th June, 2016, the respondent wished to revive business relations and stated that it would like to follow up for payments which are long stuck up. This was followed by an e-mail dated 25th June, 2016 to finalise the time and place for a meeting. On 28th June, 2016, the appellant wrote to the respondent again to finalise the time and place. Apparently, nothing came of the aforesaid e-mails and the appellant then fired the last shot on 19th September, 2016, reiterating that no payments are due as the NDA was breached.

44. The demand notice sent by the respondent was disputed in detail by the appellant in its reply dated 27th December, 2016, which set out the e-mail of 30th January, 2015. The appellant then went on to state :

> "Sometime during June and September 2016, an officer of your Client, one Mr. Jasmeet Singh wrote to our Client that he wanted to meet and revive business relationship and exploring common interest points to work together. In fact, in his email, he admits that there should be resolution to the impending payments thereby implying that there was (*a*) a dispute (as defined under the Code) and (*b*) there was a breach of the NDA which needed to be resolved. Mr. Singh's emails to our client were sent after 1 year and 6 months had elapsed from the date of our Client's email of 30th January, 2015. This clearly shows that your Client was silent during this period and had not bothered to answer the questions raised by our Client. Hence, once again in September, our Client called upon your Client to explain its breach of the NDA. Your Client instead of explaining its breach of the NDA remained silent for about 3 months and thereafter chooses to issue the Notice as a form of pressure tactic and extort monies from our Client for your Client's breach of the NDA. All the conduct of your Client explicitly shows laches on its part.
>
> Your Clients should note that under the NDA, it has agreed that a breach of the NDA will cause irreparable damage to our Client and our Client is entitled to all remedies under law or equity against your Client for the enforcement of the NDA. Accordingly, given the severity of the breaches of the NDA committed by your Client, the delay and laches committed by your Client and the conduct of your Client, our Client is not liable to make payments to your Client against the breaches of the NDA and the delay and laches committed by your Client. In fact, at this stage, our Client is contemplating initiating necessary legal actions against your Client and its parent company for the breach of the NDA to seek further compensations and damages and other legal and equitable remedies against your Client and its parent company."

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

46. Learned counsel for the respondent, however, argued that the breach of the NDA is a claim for unliquidated damages which does not become crystallised until legal proceedings are filed, and none have been filed so far. The period of limitation for filing such proceedings has admittedly not yet elapsed. Further, the appellant has withheld amounts that were due to the respondent under the NDA till the matter is resolved. Admittedly, the matter has never been resolved. Also, the respondent itself has not commenced any legal proceedings after the e-mail dated 30th January, 2015 except for the present insolvency application, which was filed almost 2 years after the said e-mail. All these circumstances go to show that it is right to have the matter tried out in the present case before the axe falls.

47. We, therefore, allow the present appeal and set aside the judgment of the Appellate Tribunal. There shall, however, be no order as to costs.

■■■

[2017] 1 IBJ (JP) 31

SUPREME COURT OF INDIA

Innoventive Industries Ltd.

v.

ICICI Bank and Anr.

CA Nos. 8337-8338 of 2017

R F Nariman & Sanjay Kishan Kaul, JJ

31st August 2017

Later non-obstante clause of the Parliamentary enactment contained in section 238 of the Code will also prevail over the limited non-obstante clause contained in section 4 of the Maharashtra Act.

[*Insolvency and Bankruptcy Code, 2016 – Section 7 read with section 4 of Maharashtra Relief Undertakings (Special Provisions) Act, 1958 (Maharashtra Act) – Corporate insolvency resolution process – Non-obstante clause*].

❖ **Whether the Code will prevail over the Maharashtra Act?**

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

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. **[Para 55]**

Once an insolvency professional is appointed under the Code to manage the company, the erstwhile directors cannot maintain an appeal on behalf of the company.

[*Insolvency and Bankruptcy Code, 2016 – Section 7 – Corporate insolvency resolution process – Initiation by financial creditor – Application for*]

❖ **Whether erstwhile directors can maintain an appeal on behalf of the company?**

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. **[Para 11]**

JUDGMENT

Nariman, J

1. The present case raises interesting questions which arise under the Insolvency and Bankruptcy Code, 2016 ('the Code'), which received the Presidential assent on 28th May, 2016, but which provisions were brought into force only in November-December 2016.

2. The appellant before us is a multi-product company catering to applications in diverse sectors. From August 2012, owing to labour problems, the appellant began to suffer losses. Since the appellant was not able to service the financial assistance given to it by 19 banking entities, which had extended credit to the appellant, the appellant itself proposed corporate debt restructuring. The 19 entities formed a consortium, led by the Central Bank of India, and by a joint meeting dated 22nd February, 2014, it was decided that a CDR resolution plan would be approved. The details of this plan are not immediately relevant to the issues to be decided in the present case. The lenders, upon perusing the terms of the CDR proposal given by the appellant and a techno-economic viability study, (which was done at the instance of the lenders), a CDR empowered group admitted the restructuring proposal *vide* minutes of a meeting dated 23rd May, 2014. The joint lenders forum at a meeting of 24th June, 2014 finally approved the restructuring plan.

3. In terms of the restructuring plan, a master restructuring agreement was entered into on 9th September, 2014 ('the MRA'), by which funds were to be infused by the creditors, and certain obligations were to be met by the debtors. The aforesaid restructuring plan was implementable over a period of 2 years.

4. Suffice it to say that both sides have copiously referred to various letters which passed between the parties and various minutes of meetings. Ultimately, an application was made on 7th December, 2016 by ICICI Bank Ltd., in which it was stated that the appellant being a defaulter within the meaning of the Code, the insolvency resolution process ought to be set in motion. To this application, a reply was filed by means of an interim application on behalf of the appellant dated 17th December, 2016, in which the appellant claimed that there was no debt legally due inasmuch as *vide* two notifications dated 22nd July, 2015 and 18th July, 2016, both under the Maharashtra Relief Undertakings (Special Provisions) Act, 1958 ('the Maharashtra Act'), all liabilities of the appellant, except certain liabilities with which we are not concerned, and remedies for enforcement thereof were temporarily suspended for a period of one year in the first instance under the first notification of 22nd July, 2015 and another period of one year under the second notification of 18th July, 2016. It may be added that this was the only point raised on behalf of the appellant in order to stave off the admission of the ICICI Bank application made before the NCLT. We are informed that hearings took place in the matter on 22nd and 23rd December, 2016, after which the NCLT adjourned the case to 16th January, 2017.

5. On this date, a second application was filed by the appellant in which a different plea was taken. This time, the appellant pleaded that owing to non-release of funds under the MRA, the appellant was unable to pay back its debts as envisaged. Further, it repaid only some amounts to five lenders, who, according to the appellant, complied with their obligations under the MRA. In the aforesaid circumstances, it was pleaded that no default was committed by it.

6. By an order dated 17th January, 2017, the NCLT held that the Code would prevail against the Maharashtra Act in view of the non-obstante clause in section 238 of the Code. It, therefore, held that the Parliamentary statute would prevail over the State statute and this being so, it is obvious that the corporate debtor had defaulted in making payments, as per the evidence placed by the financial creditors. Hence, the application was admitted and a moratorium was declared.

7. By a separate order dated 23rd January, 2017 passed by the NCLT, in which a clarification application was dismissed, it was held that the second application of 16th January, 2017 was raised belatedly and would not be maintainable for two reasons – (*1*) because no audience has been given to the corporate debtor in the Tribunal by the Code ; and (*2*) the corporate debtor has not taken the plea contained in the second application in the earlier application.

This was because a limited timeframe of only 14 days was available under the Code from the date of filing

of the creditors' petition, to decide the application.

8. From the aforesaid order, an appeal was carried to the NCLAT, which met with the same fate. The NCLAT, however, held that the Code and the Maharashtra Act operate in different fields and, therefore, are not repugnant to each other. Having recorded this, however, the NCLAT went on to hold that the appellant cannot derive any advantage from the Maharashtra Act to stall the insolvency resolution process under section 7 of the Code. It was further held as under :

> "80. Insofar as master restructuring agreement dated 8th September, 2014 is concerned ; the appellant cannot take advantage of the same. Even if it is presumed that fresh agreement came into existence, it does not absolve the Appellant from paying the previous debts which are due to the financial creditor.
>
> 81. The Tribunal has noticed that there is a failure on the part of appellant to pay debts. The financial creditor has attached different records in support of default of payment. Apart from that it is not supposed to go beyond the question to see whether there is a failure on fulfilment of obligation by the financial creditor under one or other agreement, including the master restructuring agreement. In that view of the matter, the appellant cannot derive any advantage of the master restructuring agreement dated 8th September, 2014."

9. Dr. A M Singhvi, learned senior advocate, who appeared on behalf of the appellants, has argued before us that the Appellate Tribunal, in fact, decided in his favour by holding the two Acts to be not repugnant to each other, but then went on to say that the Maharashtra Act will not apply. According to him, the Maharashtra Act would apply for the reason that the moratorium imposed by the two notifications under the Maharashtra Act continued in force at the time when the insolvency application was made by ICICI and that, therefore, the Code would not apply. According to him, the debt was kept in temporary abeyance, after which the Code would apply. He argued that he had a vested right under the Maharashtra Act and that the debt was only suspended temporarily. According to him, no repugnancy exists between the two statutes under article 254 of the Constitution and each operates in its own field. The Maharashtra Act provides for relief against unemployment, whereas the Code is a liquidation process. Further, the Code is made under Entry 9, List III of the Seventh Schedule to the Constitution, whereas the Maharashtra Act, which is a measure for unemployment relief, is made under Entry 23, List III of the Seventh Schedule. This being so, as correctly held by the appellate Tribunal, the two Acts operated in different spheres and, therefore, do not clash. Dr. Singhvi mounted a severe attack on the Appellate Tribunal by stating that the Tribunal ought to have gone into the MRA, in which case it would have discovered that there was no debt due by the appellant, inasmuch as the funds that were to be disbursed by the creditors to the appellant were never disbursed, as a result of which the corporate restructuring package never took off from the ground. He further argued that amounts due under the MRA had not yet fructified and for that reason also the application was premature.

10. Shri H N Salve, learned senior advocate, appearing on behalf of the respondents, took us through the Code in some detail and argued before us that the object of this Code is that the interests of all stakeholders, namely, shareholders, creditors and workmen, are to be balanced and the old notion of a sick management which cannot pay its financial debts continuing nevertheless in the management seat has been debunked by the Code. The entire object of the Code would be stultified if we were to heed Dr. Singhvi's submission, as according to Shri Salve, when an application is made under section 7 of the Code, the only limited scope of argument before the NCLT by a corporate debtor is that the debt is not due for any reason. According to Shri Salve, the first application in reply to the corporate debtor was, in fact, the only arguable point in the case which has been concurrently turned down.

According to Shri Salve, after an interim resolution professional has been appointed and a moratorium declared, the directors of the company are no longer in management and could not, therefore, maintain the appeal before us. Also, according to Shri Salve, the NCLT and NCLAT were both right in refusing to go into the plea that, since the financial creditors had not pumped in funds, the corporate debtor could not pay back its debts in accordance with the MRA, as this plea was an after-thought which could easily have been

taken in the first reply. Further, in order to satisfy our conscience, he has taken us through the MRA to some detail to show us that the appellant would emerge as a defaulter under the MRA in any case.

He has also argued that it is obvious that the two Acts are repugnant to each other, inasmuch as they cannot stand together. Under the Maharashtra Act, a limited moratorium is imposed after which the State Government may take over management of the company.

Under the Code, however, a full moratorium is to automatically attach the moment an application is admitted by the NCLT, and management of the company is then taken over by an interim resolution professional. Obviously, the moratorium under the Maharashtra Act and the management taken over by the State Government cannot stand together with the moratorium imposed under the Central Act and takeover of the management by the interim resolution professional. According to him, therefore, no case whatsoever is made out and the appeal should be dismissed, both on grounds of maintainability and on merits.

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.

Having heard both the learned counsel at some length, and because this is the very first application that has been moved under the Code, we thought it necessary to deliver a detailed judgment so that all Courts and Tribunals may take notice of a paradigm shift in the law.

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

12. The Insolvency and Bankruptcy Code, 2016 has been passed after great deliberation and pursuant to various committee reports, the most important of which is the report of the Bankruptcy Law Reforms Committee of November 2015. The Statement of Objects and Reasons of the Code reads as under :

> *"STATEMENT OF OBJECTS AND REASONS*
>
> There is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provide for creation of multiple fora such as Board for Industrial and Financial Reconstruction ('BIFR'), Debts Recovery Tribunal ('DRT') and National Company Law Tribunal ('NCLT') and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the courts. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.
>
> 2. The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely

resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

3. The Code seeks to provide for designating the NCLT and DRT as the Adjudicating Authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy. The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India ('Board') for regulation of insolvency professionals, insolvency professional agencies and information utilities. Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code. Information Utilities would collect, collate, authenticate and disseminate financial information to facilitate such proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code.

4. The Code seeks to provide for amendments in the Indian Partnership Act, 1932, the Central Excise Act, 1944, Customs Act, 1962, Income-tax Act, 1961, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Finance Act, 1994, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, the Payment and Settlement Systems Act, 2007, the Limited Liability Partnership Act, 2008, and the Companies Act, 2013.

5. The Code seeks to achieve the above objectives." [emphasis supplied]

13. One of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. As per the data available with the World Bank in 2016, insolvency resolution in India took 4.3 years on an average, which was much higher when compared with the United Kingdom (1 year), USA (1.5 years) and South Africa (2 years). The World Bank's Ease of Doing Business Index, 2015, ranked India as country number 135 out of 190 countries on the ease of resolving insolvency based on various indicia.

14. Other nations are have marched ahead much before us. For example, the USA has adopted the Bankruptcy Reform Act of 1978, which has since been codified in Title XI of the United States Code.

The US Code continues to favour the debtor. In a reorganisation case under Chapter 11, the debtor and its existing management ordinarily continue to operate the business as a "debtor in possession" – See USC 11, section 1107-1108. The Court can appoint a trustee to take over management of the debtor's affairs only for "cause" which includes fraud, dishonesty or gross mismanagement of the affairs of the debtor – See USC 11, section 1104. Having regard to the aforesaid grounds, such appointments are rare. Creditors are not permitted a direct role in operating the on-going business operations of the debtor. However, the United States Trustee is to appoint a committee of creditors to monitor the debtor's ongoing operations. A moratorium is provided, which gives the debtor a breathing spell in which he is to seek to reorganise his business.

While a Chapter 11 case is pending, the debtor only needs to pay post-petition wages, expenses, etc. In the meanwhile, the debtor can work on permanent financial resolution of its pre-petition debts. It is only when this does not work that the bankruptcy process is then put into effect.

15. The UK law, on the other hand, is governed by the Insolvency Act of 1986 which has served as a model for the present Code.

While piloting the Code in Parliament, Shri Arun Jaitley, learned Finance Minister, stated on the floor of the House :

"*SHRI ARUN JAITLEY* : One of the differences between your Chapter 11 and this is that in Chapter 11, the debtor continues to be in possession. Here the creditors will be in possession. Now, the SICA is being phased out, and I will tell you one of the

reasons why SICA didn't function. Under SICA, the predominant experience has been this, and that is why a decision was taken way back in 2002 to repeal SICA when the original Company Law amendments were passed. Now since they were challenged before the Supreme Court, it didn't come into operation. Now, the object behind SICA was revival of sick companies. But not too many revivals took place.

But what happened in the process was that a protective wall was created under SICA that once you enter the BIFR, nobody can recover money from you. So, that non-performing investment became more non-performing because the companies were not being revived and the banks were also unable to pursue any demand as far as those sick companies were concerned, and, therefore, SICA runs contrary to this whole concept of exit that if a particular management is not in a position to run a company, *then instead of the company closing down under this management, a more liquid and a professional management must come and then save this company*. That is the whole object. And if nobody can save it, rather than allowing it to be squandered, the assets must be distributed — as the Joint Committee has decided — in accordance with the waterfall mechanism which they have created." [emphasis supplied]

16. At this stage, it is important to set out the important paragraphs contained in the report of the Bankruptcy Law Reforms Committee of November 2015, as these excerpts give us a good insight into why the Code was enacted and the purpose for which it was enacted :

"As Chairman of the Committee on bankruptcy law reforms, I have had the privilege of overseeing the design and drafting of a new legal framework for resolving matters of insolvency and bankruptcy. This is a matter of critical importance : India is one of the youngest republics in the world, with a high concentration of the most dynamic entrepreneurs. Yet these game changers and growth drivers are crippled by an environment that takes some of the longest times and highest costs by world standards to resolve any problems that arise while repaying dues on debt. This problem leads to grave consequences : India has some of the lowest credit compared to the size of the economy. This is a troublesome state to be in, particularly for a young emerging economy with the entrepreneurial dynamism of India. Such dynamism not only needs reforms, but reforms done urgently."....

"*The limited liability company is a contract between equity and debt. As long as debt obligations are met, equity owners have complete control, and creditors have no say in how the business is run. When default takes place, control is supposed to transfer to the creditors ; equity owners have no say*.

This is not how companies in India work today. For many decades, creditors have had low power when faced with default. Promoters stay in control of the company even after default. Only one element of a bankruptcy framework has been put into place : to a limited extent, banks are able to repossess fixed assets which were pledged with them.

While the existing framework for secured credit has given rights to banks, some of the most important lenders in society are not banks. They are the dispersed mass of households and financial firms who buy corporate bonds. The lack of power in the hands of a bondholder has been one (though not the only) reason why the corporate bond market has not worked. This, in turn, has far reaching ramifications such as the difficulties of infrastructure financing.

Under these conditions, the recovery rates obtained in India are among the lowest in the world. When default takes place, broadly speaking, lenders seem to recover 20 per cent of the value of debt, on an NPV basis.

When creditors know that they have weak rights resulting in a low recovery rate, they are averse to lend. Hence, lending in India is concentrated in a few large companies that have a low probability of failure. Further, secured credit dominates, as creditors rights are partially present only in this case. Lenders have an emphasis on secured credit. In this case, credit analysis is relatively easy : It only requires taking a view on the market value of the collateral. As a consequence, credit analysis as a sophisticated analysis of the business prospects of a firm has shriveled.

Both these phenomena are unsatisfactory. In many settings, debt is an efficient tool for corporate

finance ; there needs to be much more debt in the financing of Indian firms. *E.g*. long-dated corporate bonds are essential for most infrastructure projects. The lack of lending without collateral, and the lack of lending based on the prospects of the firm, has emphasised debt financing of asset-heavy industries. However, some of the most important industries for India's rapid growth are those which are more labour intensive. These industries have been starved of credit."....

"*The key economic question in the bankruptcy process*

When a firm (referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned.

The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision : a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the government (Legislature, Executive or Judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it."....

"*Speed is of essence*

Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the "calm period" can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.

From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay."....

"*The role that insolvency and bankruptcy plays in debt financing*

Creditors put money into debt investments today in return for the promise of fixed future cash flows. But the returns expected on these investments are still uncertain because at the time of repayment, the seller (debtor) may make repayments as promised, or he may default and does not make the payment. When this happens, the debtor is considered insolvent. Other than cases of outright fraud, the debtor may be insolvent because of

- Financial failure – a persistent mismatch between payments by the enterprise and receivables into the enterprise, even though the business model is generating revenues, or
- Business failure – which is a breakdown in the business model of the enterprise, and it is unable to generate sufficient revenues to meet payments.

Often, an enterprise may be a successful business model while still failing to repay its creditors. A sound bankruptcy process is one that helps creditors and debtors realise and agree on whether the entity is facing financial failure and business failure. This is important to allow both parties to realise the maximum value of the business in the insolvency."....

"Control of a company is not divine right. When a firm defaults on its debt, control of the company should shift to the creditors. In the absence of swift and decisive mechanisms for achieving this, management teams and shareholders retain control after default. Bankruptcy law must address this."....

"*Objectives*

The Committee set the following as objectives

desired from implementing a new Code to resolve insolvency and bankruptcy :

1. Low time to resolution.
2. Low loss in recovery.
3. Higher levels of debt financing across a wide variety of debt instruments.

The performance of the new Code in implementation will be based on measures of the above outcomes.

Principles driving the design : The Committee chose the following principles to design the new insolvency and bankruptcy resolution framework :

I. The Code will facilitate the assessment of viability of the enterprise at a very early stage.

1. The law must explicitly state that the viability of the enterprise is a matter of business, and that matters of business can only be negotiated between creditors and debtor. While viability is assessed as a negotiation between creditors and debtor, the final decision has to be an agreement among creditors who are the financiers willing to bear the loss in the insolvency.
2. The Legislature and the courts must control the process of resolution, but not be burdened to make business decisions.
3. The law must set up a calm period for insolvency resolution where the debtor can negotiate in the assessment of viability without fear of debt recovery enforcement by creditors.
4. The law must appoint a resolution professional as the manager of the resolution period, so that the creditors can negotiate the assessment of viability with the confidence that the debtors will not take any action to erode the value of the enterprise. The professional will have the power and responsibility to monitor and manage the operations and assets of the enterprise. The professional will manage the resolution process of negotiation to ensure balance of power between the creditors and debtor, and protect the rights of all creditors. The professional will ensure the reduction of asymmetry of information between creditors and debtor in the resolution process.

II. The Code will enable symmetry of information between creditors and debtors.

5. The law must ensure that information that is essential for the insolvency and the bankruptcy resolution process is created and available when it is required.
6. The law must ensure that access to this information is made available to all creditors to the enterprise, either directly or through the regulated professional.
7. The law must enable access to this information to third parties who can participate in the resolution process, through the regulated professional.

III. The Code will ensure a time-bound process to better preserve economic value.

8. The law must ensure that time value of money is preserved, and that delaying tactics in these negotiations will not extend the time set for negotiations at the start.

IV. The Code will ensure a collective process.

9. The law must ensure that all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.

V. The Code will respect the rights of all creditors equally.

10. The law must be impartial to the type of creditor in counting their weight in the vote on the final solution in resolving insolvency.

VI. The Code must ensure that, when the negotiations fail to establish viability, the outcome of bankruptcy must be binding.

11. The law must order the liquidation of an enterprise which has been found unviable. This outcome of the negotiations should be protected against all appeals other than for very exceptional cases.

VII. The Code must ensure clarity of priority, and that the rights of all stakeholders are upheld in resolving bankruptcy.

12. The law must clearly lay out the priority of distributions in bankruptcy to all stakeholders. The priority must be designed so as to incentivise all stakeholders to participate in the cycle of building enterprises with confidence.

13. While the law must incentivise collective action in resolving bankruptcy, there must be a greater flexibility to allow individual action in resolution and recovery during bankruptcy compared with the phase of insolvency resolution."....

"An application from a creditor must have a record of the liability and evidence of the entity having defaulted on payments. The Committee recommends different documentation requirements depending upon the type of creditor, either financial or operational. A financial creditor must submit a record of default by the entity as recorded in a registered Information Utility (referred to as the IU) as described in section 4.3 (or on the basis of other evidence). The default can be to any financial creditor to the entity, and not restricted to the creditor who triggers the IRP. The Code requires that the financial creditor propose a registered insolvency professional to manage the IRP. Operational creditors must present an "undisputed bill" which may be filed at a registered information utility as requirement to trigger the IRP. The Code does not require the operational creditor to propose a registered insolvency professional to manage the IRP. If a professional is not proposed by the operational creditor, and the IRP is successfully triggered, the Code requires the Adjudicator to approach the Regulator for a registered insolvency professional for the case.

In case the financial creditor triggers the IRP, the Adjudicator verifies the default from the information utility (if the default has been filed with an information utility, tit such be incontrovertible evidence of the existence of a default) or otherwise confirms the existence of default through the additional evidence adduced by the financial creditor, and puts forward the proposal for the RP to the Regulator for validation. In case the operational creditor triggers the IRP, the Adjudicator verifies the documentation. Simultaneously, the Adjudicator requests the Regulator for an RP. If either step cannot be verified, or the process verification exceeds the specified amount of time, then the Adjudicator rejects the application, with a reasoned order for the rejection. The order rejecting the application cannot be appealed against. Instead, application has to be made afresh. Once the documents are verified within a specified amount of time, the Adjudicator will trigger the IRP and register the IRP by issuing an order. The order will contain a unique ID that will be issued for the case by which all reports and records that are generated during the IRP will be stored, and accessed."....

"Steps at the start of the IRP : In order to ensure that the resolution can proceed in an orderly manner, it is important for the Adjudicator to put in place an environment of a "calm period" with a definite time of closure, that will assure both the debtor and creditors of a time-bound and level field in their negotiations to assess viability. The first steps that the Adjudicator takes is put in place an order for a moratorium on debt recovery actions and any existing or new law suits being filed in other courts, a public announcement to collect claims of liabilities, the appointment of an interim RP and the creation of a creditor committee." [emphasis supplied]

17. The stage is now set for an in-depth examination of Part II of the Code, with which we are immediately concerned in this case.

18. There are two sets of definition sections. They are rather involved, the dovetailing of one definition going into another. Section 3 defines various terms as follows :

"Section 3(6) "claim" means –

(*a*) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured ;

(*b*) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured ;

Section 3(10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder ;

Section 3(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt ;

Section 3(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be ;

Section 3(13) "financial information", in relation to a person, means one or more of the following categories of information, namely :

(*a*) records of the debt of the person ;

(*b*) records of liabilities when the person is solvent ;

(*c*) records of assets of person over which security interest has been created ;

(*d*) records, if any, of instances of default by the person against any debt ;

(*e*) records of the balance sheet and cash-flow statements of the person ; and

(*f*) such other information as may be specified.

Section 3(19) "insolvency professional" means a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207 ;' [emphasis supplied]

19. Certain definitions contained in section 5 are also important from our point of view. Section 5(7), (8), (12), (14), (20) and (27) read as under :

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

(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes –

(*a*) money borrowed against the payment of interest ;

(*b*) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent ;

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

(*d*) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed ;

(*e*) receivables sold or discounted other than any receivables sold on non-recourse basis ;

(*f*) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing ;

(*g*) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account ;

(*h*) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution ;

(*i*) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (*a*) to (*h*) of this clause ;....

(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 ;....

(14) "insolvency resolution process period" means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day ;....

(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred ;....

(27) "resolution professional", for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional ;"

20. Under section 4 of the Code, Part II applies to matters relating to the insolvency and liquidation of corporate debtors, where the minimum amount of default is rupees one lakh. Sections 6, 7 and 8 form part of one scheme and are very important for the decision in the present case. They read as follows :

'6. *Persons who may initiate corporate insolvency resolution process*. – Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter.

7. *Initiation of corporate insolvency resolution process by financial creditor.* – (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.

8. *Insolvency resolution by operational creditor*. – (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.'

21. Section 12 provides for a time limit for completion of the insolvency resolution process and reads as follows :

"12. *Time-limit for completion of insolvency resolution process.* – (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."

22. Sections 13 and 14 deal with the declaration of moratorium and public announcements and read as under :

"13. *Declaration of moratorium and public announcement*. – (1) The adjudicating authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order –

(*a*) declare a moratorium for the purposes referred to in section 14 ;

(*b*) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15 ; and

(*c*) appoint an interim resolution professional in the manner as laid down in section 16.

(2) The public announcement referred to in clause (*b*) of sub-section (1) shall be made immediately after the appointment of the interim resolution professional.

14 *Moratorium*. – (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 ;

(*b*) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein ;

(*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 ;

(*d*) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process :

Provided that where at any time during the corporate insolvency resolution process period, if the adjudicating authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

23. Under section 17, from the date of appointment of the interim resolution professional, the management of the affairs of the corporate debtor vests with interim resolution professional. Section 17(1)(*a*) reads as under :

"17. *Management of affairs of corporate debtor by interim resolution professional.* – (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 ;"

24. Under section 20 of the Act, the interim resolution professional shall manage the operations of the corporate debtor as a going concern. Section 21 is extremely important and provides for appointment of a committee of creditors. Section 21 reads as follows :

"21. *Committee of creditors.* – (1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

(2) The committee of creditors shall comprise all financial creditors of the corporate debtor :

Provided that a related party to whom a corporate debtor owes a financial debt shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

(3) Where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

(4) Where any person is a financial creditor as well as an operational creditor, –

(*a*) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor ;

(*b*) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

(5) Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

(6) Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility or issued as securities provide for a single trustee or agent to act for all financial creditors, each financial creditor may –

(*a*) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share ;

(*b*) represent himself in the committee of creditors to the extent of his voting share ;

(*c*) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share ; or

(*d*) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

(7) The Board may specify the manner of determining the voting share in respect of financial debts issued as securities under sub-section (6).

(8) All decisions of the committee of creditors shall be taken by a vote of not less than seventy-five per cent of voting share of the financial creditors :

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and comprise of such persons to exercise such functions in such manner as may be specified by the Board.

(9) The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process.

(10) The resolution professional shall make available any financial information so required by the committee of creditors under sub-section (9) within a period of seven days of such requisition."

25. Under section 24, members of the committee of creditors may conduct meetings in order to protect their interests. Under section 28, a resolution professional appointed under section 25 cannot take certain actions without the prior approval of the committee of creditors. Section 28 reads as under :

"28. *Approval of committee of creditors for certain actions.* – (1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely :

(*a*) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting ;

(*b*) create any security interest over the assets of the corporate debtor ;

(*c*) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company ;

(*d*) record any change in the ownership interest of the corporate debtor ;

(*e*) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting ;

(*f*) undertake any related party transaction ;

(*g*) amend any constitutional documents of the corporate debtor ;

(*h*) delegate its authority to any other person ;

(*i*) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties ;

(*j*) make any change in the management of the corporate debtor or its subsidiary ;

(*k*) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business ;

(*l*) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors ; or

(*m*) make changes in the appointment or terms of

contract of statutory auditors or internal auditors of the corporate debtor.

(2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1).

(3) No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of seventy-five per cent of the voting shares.

(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.

(5) The committee of creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this Code."

26. The most important sections dealing with the restructuring of the corporate debtor are sections 30 and 31, which read as under :

"30. *Submission of resolution plan*. – (1) A resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –

(*a*) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor ;

(*b*) provides for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53 ;

(*c*) provides for the management of the affairs of the corporate debtor after approval of the resolution plan ;

(*d*) the implementation and supervision of the resolution plan ;

(*e*) does not contravene any of the provisions of the law for the time being in force ;

(*f*) conforms to such other requirements as may be specified by the Board.

(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

(4) The committee of creditors may approve a resolution plan by a vote of not less than seventy-five per cent of voting share of the financial creditors.

(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered :

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the adjudicating authority.

31. *Approval of resolution plan*. – (1) If the adjudicating authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

(2) Where the adjudicating authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1), –

(*a*) the moratorium order passed by the adjudicating authority under section 14 shall cease to have effect ; and

(*b*) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database."

27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of 'debt', we have to go to section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a 'claim' and for the meaning of 'claim', we have to go back to section 3(6) which defines 'claim' to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under section 5(21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, section 7 becomes relevant. Under the *Explanation* to section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the applicant financial creditor. Under section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under rule 4(3), the applicant is to despatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor.

The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important.

This it must do within 14 days of the receipt of the application. It is at the stage of section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the 'debt', which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority.

Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

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

30. On the other hand, as we have seen, in the case of

a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is 'due', *i.e.,* payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.

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

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

33. Under section 30, any person who is interested in putting the corporate body back on its feet may submit a resolution plan to the resolution professional, which is prepared on the basis of an information memorandum. This plan must provide for payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the plan, and implementation and supervision of the plan. It is only when such plan is approved by a vote of not less than 75 per cent of the voting share of the financial creditors and the adjudicating authority is satisfied that the plan, as approved, meets the statutory requirements mentioned in section 30, that it ultimately approves such plan, which is then binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders. Importantly, and this is a major departure from previous legislation on the subject, the moment the adjudicating authority approves the resolution plan, the moratorium order passed by the authority under section 14 shall cease to have effect. The scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up, in which event the management is handed over under the plan so that the corporate body is able to pay back its debts and get back on its feet.

All this is to be done within a period of 6 months with a maximum extension of another 90 days or else the chopper comes down and the liquidation process begins.

34. On the facts of the present case, we find that in answer to the application made under section 7 of the Code, the appellant only raised the plea of suspension of its debt under the Maharashtra Act, which, therefore, was that no debt was due in law. The adjudicating authority correctly referred to the non-obstante clause in section 238 and arrived at a conclusion that a notification under the Maharashtra Act would not stand in the way of the corporate insolvency resolution process under the Code. However, the Appellate Tribunal by the impugned judgment held, thus :

> "78. Following the law laid down by hon'ble Supreme Court in *Yogendra Krishnan Jaiswal* and *Madras Petrochem Ltd*. we hold that there is no repugnancy between I&B Code, 2016 and the MRU Act as they

both operate in different fields. The Parliament has expressly stated that the provisions of the I&B Code, 2016 (which is a later enactment to the MRU Act) shall have effect notwithstanding the provisions of any other law for the time being in force. This stipulation does not mean that the provisions of MRU Act or for that matter any other law are repugnant to the provisions of the Code.

79. In view of the finding as recorded above, we hold that the appellant is not entitled to derive any advantage from MRU Act, 1956 to stall the insolvency resolution process under section 7 of the Insolvency and Bankruptcy Code, 2016."

This statement by the Appellate Tribunal has to be tested with reference to the constitutional position on repugnancy.

35. Article 254 of the Constitution of India is substantially modeled on section 107 of the Government of India Act, 1935. Article 254 reads as under :

"254. *Inconsistency between laws made by Parliament and laws made by the Legislatures of States.* – (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State :

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

Section 107 reads as follows :

"*Inconsistency between Federal Laws and Provincial or State Laws.* – (1) If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.

(2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General has received the assent of the Governor-General or for the signification of His Majesty's pleasure has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter :

Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

(3) If any provision of a law of a Federated State is repugnant to a Federal law which extends to that State, the Federal law, whether passed before or after the law of the State, shall prevail and the law of the State shall, to the extent of the repugnancy be void."

36. The British North America Act, which is the oldest among the Constitutions framed by the British Parliament for its colonies, had under sections 91 and 92 exclusive law making power for the different subjects

set out therein which is distributed between Parliament and the Provincial Legislatures. The only concurrent subject was stated in section 95 of the said Act, which reads as follows :

> "In each Province the Legislature may make laws in relation to agriculture in the Province, and to immigration into the Province ; and it is hereby declared that the Parliament of Canada may from time-to-time make laws in relation to agriculture in all or any of the Provinces, and to immigration into all or any of the Provinces ; and any law of the Legislature of a Province relative to agriculture or to immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada."

It is for this reason that the Canadian cases on repugnancy were said to be somewhat restricted and have rarely been applied in construing article 254.

37. Insofar as the US Constitution is concerned, there again legislative powers are reserved completely to the States and Congress is given the power to legislate only on enumerated subjects that are set out in article 1, section 8 of the US Constitution. In this context, no questions of repugnancy can arise as the States can legislate even with respect to matters laid down in article 1 section 8 so long as they do not exceed the territorial boundary of the State. It is only when Congress actually enacts legislation under article 1, section 8 that State legislation, if any, on the same subject-matter can be said to be ousted. However, when Congress passed the Eighteenth Amendment to the US Constitution, by which it imposed prohibition, section 2 thereof stated that Congress and the several States shall have concurrent powers to enforce this article by appropriate legislation. The question that arose in *State of Rhode Island* v. *Palmer* 253 US 350, was as to the meaning of the expression "concurrent power". It was argued that, unless both Congress and the State Legislatures concurrently enact laws, laws under section 2 of the Eighteenth Amendment could not be made. This argument was turned down by the majority judgment of Van Devanter, J which, strangely enough, merely announced conclusions on the questions involved without any reasoning 1. Van Devanter, J.'s majority judgment held (at 387) :

> '8. The words "concurrent power" in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them ; nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and inter-State commerce from intra-State affairs.
>
> 9. The power confided to Congress by that section, while not exclusive, is territorially co-extensive with the prohibition of the first section, embraces manufacture and other intra-State transactions as well as importation, exportation and inter-State traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them.'

Two dissents, on the other hand, held that unless the Congress and the States concurrently legislate, section 2 does not give them the power to enforce prohibition. The US cases also do not, therefore, assist in this context.

38. On the other hand, the Commonwealth of Australia Constitution Act of 1900, also enacted by the British Parliament, has a scheme by which Parliament, in section 51, has power to make laws with respect to 39 stated matters. Under section 52, Parliament, subject to the Constitution, has exclusive power to make laws only *qua* three subjects set out therein. Section 109 of the Australian Constitution reads as under :

> "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

39. Since the Australian cases deal with repugnancy in great detail, they have been referred to by the early judgments of this court.

40. In *Zaverbhai Amaidas* v. *State of Bombay* [1955] 1 SCR 799, a question arose as to the efficacy of a Bombay Act of 1947 *vis-a-vis* the Essential Supplies (Temporary Powers) Act of 1946, as amended in 1950. This court, after referring to section 107 of the Government of India Act and article 254 of the Constitution, stated that article 254, is in substance, a reproduction of section 107 with one difference – that the power of Parliament under article 254(2) goes even to the extent of repealing a State law. This court

then examined the subject-matters of the two Acts and found that the Parliamentary enactment as amended in 1950 prevailed over the Bombay Act in as much as the higher punishment given for the same offence under the Bombay Act was repugnant to the lesser punishment given by section 7 of the Parliamentary enactment.

41. In *Tika Ramji* v. *State of UP* [1956] SCR 393, this court, after setting out article 254 of the Constitution, referred in detail to a treatise on the Australian Constitution and to various Australian judgments as follows :

> "*Nicholas in his Australian Constitution, 2nd ed., p. 303, refers to three tests of inconsistency or repugnancy*. – (1) There may be inconsistency in the actual terms of the competing statutes – *R* v. *Brisbane Licensing Court* [1920] 28 CLR 23.
>
> (2) Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code – *Clyde Engineering Co. Ltd*. v. *Cowburn* [1926] 37 CLR 466.
>
> (3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject-matter – *Victoria* v. *Commonwealth* [1937] 58 CLR 618 ; *Wenn* v. *Attorney-General (Vict.)* [1948] 77 CLR 84 Isaacs, J, in *Clyde Engineering Co., Ltd.* v. *Cowburn* [1926] 37 CLR 466, 489 laid down one test of inconsistency as conclusive : "If, however, a competent Legislature expressly or implicitly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another Legislature assumes to enter to any extent upon the same field".

Dixon, J, elaborated this theme in *Ex parte McLean* [1930] 43 CLR 472, 483 :

> "When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and section 109 applies. That this is so is settled, at least when the sanctions they impose are diverse. But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject-matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter."

To the same effect are the observations of Evatt, J in *Stock Motor Plough Ltd.* v. *Forsyth* [1932] 48 CLR 128, 147 :

> 'It is now established, therefore, that State and Federal laws may be inconsistent, although obedience to both laws is possible. There may even be inconsistency although each law imposes the very same duty of obedience. These conclusions have, in the main, been reached, by ascribing "inconsistency" to a State law, not because the Federal law directly invalidates or conflicts with it, but because the Federal law is said to "cover the field". This is a very ambiguous phrase, because subject-matters of legislation bear little resemblance to geographical areas. It is no more than a cliche for expressing the fact that, by reason of the subject-matter dealt with, and the method of dealing with it, and the nature and multiplicity of the regulations prescribed, the Federal authority has adopted a plan or scheme which will be hindered and obstructed if any additional regulations whatever are prescribed upon the subject by any other authority ; if, in other words, the subject is either touched or trenched upon by State authority.'

The Calcutta High Court in *G P Stewart* v. *B K Roy Chaudhury* AIR 1939 Cal. 628 had occasion to consider the meaning of repugnancy and B N Rau, J, who delivered the judgment of the court observed at p. 632 :

> "It is sometimes said that two laws cannot be said to be properly repugnant unless there is a direct conflict between them, as when one says "do" and the other "don't", there is no true repugnancy, according to this view, if it is possible to obey both the laws. For reasons which we shall set forth presently, we think that this is too narrow a test : there may well be cases of repugnancy where both laws say "don't" but in different ways. For example, one law may say, "No person shall sell liquor by retail, that is, in quantities of less than five gallons at a time" and another law may say, "No person shall sell liquor by retail, that is, in quantities of less than ten gallons at a time". Here, it is obviously possible to obey both laws, by obeying the more stringent of the two, namely, the second one ; yet it is equally obvious that the two laws are repugnant, for to the extent to which a citizen is compelled to obey one of them, the other, though not actually disobeyed, is nullified."

The learned Judge then discussed the various authorities which laid down the test of repugnancy in Australia, Canada, and England and concluded at p. 634 :

> "The principle deducible from the English cases, as from the Canadian cases, seems, therefore, to be the same as that enunciated by Isaacs, J, in the *Australian 44 hour* case (37 CLR 466) if the dominant law has expressly or impliedly evinced its intention to cover the whole field, then a subordinate law in the same field is repugnant and, therefore, inoperative. Whether and to what extent in a given case, the dominant law evinces such an intention must necessarily depend on the language of the particular law".

Sulaiman, J in *Shyamakant Lal* v. *Rambhajan Singh* [1939] FCR 188, 212, thus, laid down the principle of construction in regard to repugnancy :

> "When the question is whether a Provincial legislation is repugnant to an existing Indian law, the onus of showing its repugnancy and the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption in favour of its validity, and every effort should be made to reconcile them and construe both so as to avoid their being repugnant to each other ; and care should be taken to see whether the two do not really operate in different fields without encroachment. Further, repugnancy must exist in fact, and not depend merely on a possibility. Their lordships can discover no adequate grounds for holding that there exists repugnancy between the two laws in districts of the Province of Ontario where the prohibitions of the Canadian Act are not and may never be in force : *Attorney-General for Ontario* v. *Attorney-General for the Dominion* [1896] AC 348, 369-70." (at pp. 424-427) (emphasis supplied)

This court expressly held that the pith and substance doctrine has no application to repugnancy principles for the reason that :

> "The pith and substance argument also cannot be imported here for the simple reason that, when both the Centre as well as the State Legislatures were operating in the concurrent field, there was no question of any trespass upon the exclusive jurisdiction vested in the Centre under Entry 52 of List I, the only question which survived being whether, putting both the pieces of legislation enacted by the Centre and the State Legislature together, there was any repugnancy, a contention which will be dealt with hereafter." (at pp. 420-421)

42. In *Deep Chand* v. *State of UP* [1959] Supp (2) SCR 8, this court referred to its earlier judgments in *Zaverbhai* (*supra*) and *Tika Ramji* (*supra*) and held :

"Repugnancy between two statutes may, thus, be ascertained on the basis of the following three principles :

(1) Whether there is direct conflict between the two provisions ;

(2) Whether Parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature ; and

(3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field." (at page 43)

43. In *Pandit Ukha Kolhe* v. *State of Maharashtra* [1964] 1 SCR 926, this court found that sections 129A and 129B did not repeal in its entirety an existing law contained in section 510 of the Code of Criminal

Procedure in its application to offences under section 66 of the Bombay Prohibition Act. It was held that sections 129A and 129B must be regarded as enacted in exercise of power conferred by Entries 2 and 12 in the Concurrent List. It was then held :

> "It is, difficult to regard section 129B of the Act as so repugnant to section 510 of the Code as to make the latter provision wholly inapplicable to trials for offences under the Bombay Prohibition Act. Section 510 is a general provision dealing with proof of reports of the Chemical Examiner in respect of matters or things duly submitted to him for examination or analysis and report.
>
> Section 129B deals with a special class of reports and certificates. In the investigation of an offence under the Bombay Prohibition Act, examination of a person suspected by a Police Officer or Prohibition Officer of having consumed an intoxicant, or of his blood may be carried out only in the manner prescribed by section 129A : and the evidence to prove the facts disclosed thereby will be the certificate or the examination viva voce of the registered Medical Practitioner, or the Chemical Examiner, for examination in the course of an investigation of an offence under the Act of the person so suspected or of his blood has by the clearest implication of the law to be carried out in the manner laid down or not at all. Report of the Chemical Examiner in respect of blood collected in the course of investigation of an offence under the Bombay Prohibition Act, otherwise than in the manner set out in section 129A cannot therefore, be used as evidence in the case. To that extent section 510 of the Code is superseded by section 129B. But the report of the Chemical Examiner relating to the examination of blood of an accused person collected at a time when no investigation was pending, or at the instance not of a Police Officer or a Prohibition Officer remains admissible under section 510 of the Code." (at pages 953-954)

44. In *M Karunanidhi* v. *Union of India* [1979] 3 SCR 254, this court referred to a number of Australian judgments and judgments of this court and held :

> 'It is well settled that the presumption is always in favour of the constitutionality of a statute and the onus lies on the person assailing the Act to prove that it is unconstitutional. Prima facie, there does not appear to us to be any inconsistency between the State Act and the Central Acts. Before any repugnancy can arise, the following conditions must be satisfied :
>
> 1. That there is a clear and direct inconsistency between the Central Act and the State Act.
> 2. That such an inconsistency is absolutely irreconcilable.
> 3. That the inconsistency between the provisions of the two Acts is of such a nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other.

In *Colin Howard's Australian Federal Constitutional Law*, 2nd edn. the author while describing the nature of inconsistency between the two enactments observed as follows :

> "An obvious inconsistency arises when the two enactments produce different legal results when applied to the same facts."

In the case of *Hume* v. *Palmer* 38 CLR 441 Knox, CJ observed as follows :

> "The rules prescribed by the Commonwealth law and the State law respectively are for present purposes substantially identical, but the penalties imposed for the contravention differ... In these circumstances, it is I think, clear that the reasons given by my brothers Issacs and Starke for the decisions of this court in *Union Steamship Co. of New Zealand* v. *Commonwealth* 36 CLR 130 and *Clyde Engineering Co*. v. *Cowburn* 37 CLR 466 establish that the provisions of the law of the State for the breach of which the appellant was convicted are inconsistent with the law of the Commonwealth within the meaning of section 109 of the Constitution and are, therefore, invalid."

Issacs, J observed as follows :

> "There can be no question that the Commonwealth Navigation Act, by its own direct provisions and the Regulations made under its authority, applies upon construction to the circumstances of the case. It is inconsistent with the State Act in various ways,

including (*1*) general supersession of the regulations of conduct, and so displacing the State Regulations, whatever those may be ; (*2*) the jurisdiction to convict, the State law empowering the Court to convict summarily, the Commonwealth law making the contravention an indictable offence, and, therefore, bringing into operation section 80 of the Constitution, requiring a jury ; (*3*) the penalty, the State providing a maximum of £50 the Commonwealth Act prescribing a maximum of £100, or imprisonment, or both ; (*4*) the tribunal itself."

Starke, J observed as follows :

"It is not difficult to see that the Federal Code would be "disturbed or deranged" if the State Code applied a different sanction in respect of the same act. Consequently the State regulations are, in my opinion, inconsistent with the law of the Commonwealth and rendered invalid by force of section 109 of the Constitution."

In a later case of the Australian High Court in *Ex. Parte Mclean* 43 CLR 472 Issacs and Starke, JJ, while dwelling on the question of repugnancy made the following observation :

"In *Cowburn's* case (*supra*) is stated the reasoning for that conclusion and we will now refer to those statements without repeating them. In short, the very same conduct by the same persons is dealt with in conflicting terms by the Commonwealth and State Acts. A Court, seeing that, has no authority to inquire further, or to seek to ascertain the scope or bearing of the State Act. It must simply apply section 109 of the Constitution, which declares the invalidity *pro tanto* of the State Act."

Similarly Dixon, J observed, thus :

"When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and section 109 applies. That this is so is settled, at least when the sanctions they impose are diverse *Hume* v. *Palmer* (*supra*)."

In the case of *Zaverbhai Amaidas* v. *State of Bombay* [1955] 1 SCR 799 this court laid down the various tests to determine the inconsistency between two enactments and observed as follows –

"The important thing to consider with reference to this provision is whether the legislation is "in respect of the same matter". If the later legislation deals not with the matters which formed the subject of the earlier legislation but with other and distinct matters though of a cognate and allied character, then article 254(2) will have no application. The principle embodied in section 107(2) and article 254(2) is that when there is legislation covering the same ground both by the Centre and by the Province, both of them being competent to enact the same, the law of the Centre should prevail over that of the State."

"It is true, as already pointed out, that on a question under article 254(1) whether an Act of Parliament prevails against a law of the State, no question of repeal arises ; but the principle on which the rule of implied repeal rests, namely, that if subject-matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment, will be equally applicable to a question under article 254(2) whether the further legislation by Parliament is in respect of the same matter as that of the State law."

In the case of *Ch. Tika Ramji* v. *State of Uttar Pradesh* [1956] SCR 393 while dealing with the question of repugnancy between a Central and a State enactment, this court relied on the observations of *Nicholas in his Australian Constitution*, 2nd Ed. p.303, where three tests of inconsistency or repugnancy have been laid down and which are as follows :

"(1) There may be inconsistency in the actual terms of the competing statutes – *R* v. *Brisbane Licensing Court* [1920] 28 CLR 23.

(2) Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code – *Clyde Engineering Co. Ltd*. v. *Cowburn* [1926] 37 CLR 466.

(3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject-matter – *Victoria* v. *Commonwealth* [1937] 58 CLR 618 ;

Wenn v. *Attorney-General (Vict.)* [1948] 77 CLR 84. This court also relied on the decisions in the case of *Hume* v. *Palmer* as also the case of *Ex. Parte Mclean* (*supra*) referred to above. This Court also endorsed the observations of Sulaiman, J, in the case of *Shyamakant Lal* v. *Rambhajan Singh* [1939] FCR 188 where Sulaiman, J, observed as follows :

"When the question is whether a Provincial legislation is repugnant to an existing Indian law, the onus of showing its repugnancy and the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption in favour of its validity, and every effort should be made to reconcile them and construe both so as to avoid their being repugnant to each other, and care should be taken to see whether the two do not really operate in different fields without encroachment. Further, repugnancy must exist in fact, and not depend merely on a possibility."

In the case of *Om Prakash Gupta* v. *State of UP* [1957] SCR 423 where this court was considering the question of the inconsistency between the two Central enactments, namely, the Indian Penal Code and the Prevention of Corruption Act held that there was no inconsistency and observed as follows :

"It seems to us, therefore, that the two offences are distinct and separate. This is the view taken in *Amarendra Nath Roy* v. *State* AIR 1955 Cal. 236 and we endorse the opinion of the learned Judges, expressed therein. Our conclusion, therefore, is that the offence created under section 5(1)(*c*) of the Corruption Act is distinct and separate from the one under section 405 of the Indian Penal Code and, therefore, there can be no question of section 5(1)(*c*) repealing section 405 of the Indian Penal Code. If that is so, then, article 14 of the Constitution can be no bar."

Similarly in the case of *Deep Chand* v. *State of Uttar Pradesh* [1959] Supp 2 SCR 8 this court indicated the various tests to ascertain the question of repugnancy between the two statutes and observed as follows :

"Repugnancy between two statutes may, thus, be ascertained on the basis of the following three principles :

(1) Whether there is direct conflict between the two provisions ;

(2) Whether Parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature ; and

(3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field."

In the case of *Megh Raj* v. *Allah Rakha* AIR 1942 FC 27 where Varadachariar, J, speaking for the court pointed out that where as in Australia a provision similar to section 107 of the Government of India Act, 1935 existed in the shape of section 109 of the Australian Constitution, there was no corresponding provision in the American Constitution. Similarly, the Canadian cases have laid down a principle too narrow for application to Indian cases. According to the learned Judge, the safe rule to follow was that where the paramount legislation does not purport to be exhaustive or unqualified there is no inconsistency and in this connection observed as follows :

"The principle of that decision is that where the paramount legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying the general provision made in it, it cannot be said that any qualification or restriction introduced by another law is repugnant to the provision in the main or paramount law."

"The position will be even more obvious, if another test of repugnancy which has been suggested in some cases is applied, namely, whether there is such an inconsistency between the two provisions that one must be taken to repeal the other by necessary implication."

In the case of *State of Orissa* v. *M A Tulloch & Co*. [1964] 4 SCR 461 Ayyangar, J, speaking for the court observed as follows :

"Repugnancy arises when two enactments both within the competence of the two Legislatures collide and when the Constitution expressly or by necessary implication provides that the enactment of one Legislature has superiority over the other then to the extent of the repugnancy the one supersedes

the other. But two enactments may be repugnant to each other even though obedience to each of them is possible without disobeying the other. The test of two legislations containing contradictory provisions is not, however, the only criterion of repugnancy, for if a competent Legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field, the enactments of the other Legislature whether passed before or after would be overborne on the ground of repugnance. Where such is the position, the inconsistency is demonstrated not by a detailed comparison of provisions of the two statutes but by the mere existence of the two pieces of legislation."

In the case of *T S Balliah* v. *T S Rangachari* [1969] 3 SCR 65 it was pointed out by this court that before coming to the conclusion that there is a repeal by implication, the court must be satisfied that the two enactments are so inconsistent that it becomes impossible for them to stand together. In other words, this court held that when there is a direct collision between the two enactments which is irreconcilable then only repugnancy results. In this connection, the court made the following observations :

"Before coming to the conclusion that there is a repeal by implication, the court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together and the repeal of the express prior enactment must flow from necessary implication of the language of the later enactment. It is, therefore, necessary in this connection to scrutinise the terms and consider the true meaning and effect of the two enactments."

"The provisions enacted in section 52 of the 1922 Act do not alter the nature or quality of the offence enacted in section 177, Indian Penal Code but it merely provides a new course of procedure for what was already an offence. In a case of this description the new statute is regarded not as superseding, nor repealing by implication the previous law, but as cumulative."

"A plain reading of the section shows that there is no bar to the trial or conviction of the offender under both enactments but there is only a bar to the punishment of the offender twice for the same offence. In other words, the section provides that where an act or omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both the enactments but shall not be liable to be punished twice for the same offence."

On a careful consideration, therefore, of the authorities referred to above, the following propositions emerge :

1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.
2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.
3. That where the two statutes occupy a particular field, there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.
4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field.' (at pages 272-278) [emphasis supplied]

45. In *Hoechst Pharmaceuticals Ltd.* v. *State of Bihar* [1983] 3 SCR 130, this court after referring to the earlier judgments held :

'Article 254 of the Constitution makes provision first, as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Article 254(1) enunciates the normal rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. Clause (1) lays down that if a State law relating to a concurrent subject is "repugnant" to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general rule laid down in clause (1), clause (2) engrafts an exception, *viz*.,

that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject. In such a case, the Central Act will give way to the State Act only to the extent of inconsistency between the two, and no more. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only. The predominance of the State law may, however, be taken away if Parliament legislates under the proviso to clause (2). The proviso to article 254(2) empowers the Union Parliament to repeal or amend a repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the "same matter". Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together – see *Zaverbhai Amaidas* v. *State of Bombay* [1955] 1 SCR 799, *M Karunanidhi* v. *Union of India* [1979] 3 SCR 254 and *T Barai* v. *Henry Ah Hoe* [1983] 1 SCC 177.

We may briefly refer to the three Australian decisions relied upon. As stated above, the decision in *Clyde Engineering Co.'s* case (*supra*), lays down that inconsistency is also created when one statute takes away rights conferred by the other. In *Ex Parte McLean's* case (*supra*), Dixon, J, laid down another test, *viz.,* two statutes could be said to be inconsistent if they, in respect of an identical subject-matter, imposed identical duty upon the subject, but provided for different sanctions for enforcing those duties. In *Stock Motor Ploughs Ltd.'s* case (*supra*), Evatt, J held that even in respect of cases where two laws impose one and the same duty of obedience there may be inconsistency. As already stated the controversy in these appeals falls to be determined by the true nature and character of the impugned enactment, its pith and substance, as to whether it falls within the legislative competence of the State Legislature under article 246(3) and does not involve any question of repugnancy under article 254(1).

We fail to comprehend the basis for the submission put forward on behalf of the appellants that there is repugnancy between sub-section (3) of section 5 of the Act which is relatable to Entry 54 of List II of the Seventh Schedule and paragraph 21 of the Control order issued by the Central Government under sub-section (1) of section 3 of the Essential Commodities Act relatable to Entry 33 of List III and, therefore, sub-section (3) of section 5 of the Act which is a law made by the State Legislature is void under article 254(1). The question of repugnancy under article 254(1) between a law made by Parliament and a law made by the State Legislature arises only in case both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List, and there is direct conflict between the two laws. It is only when both these requirements are fulfilled that the State law will, to the extent of repugnancy become void. Article 254(1) has no application to cases of repugnancy due to overlapping found between List II on the one hand and List I and List III on the other. If such overlapping exists in any particular case, the State law will be ultra vires because of the non-obstante clause in article 246(1) read with the opening words "Subject to" in article 246(3). In such a case, the State law will fail not because of repugnance to the Union law but due to want of legislative competence. It is no doubt true that the expression "a law made by Parliament which Parliament is competent to enact" in article 254(1) is susceptible of a construction that repugnance between a State law and a law made by Parliament may take place outside the concurrent sphere because Parliament is competent to enact law with respect to subjects included in List III as well as "List I". But if article 254(1) is read as a whole, it will be seen that it is expressly made subject to clause (2) which makes reference to repugnancy in the field of Concurrent List – in other words, if clause (2) is to be the guide in the determination of scope of clause (1), the repugnancy between Union and State law must be taken to refer only to the Concurrent field. Article 254(1) speaks of a State law being repugnant to (*a*) a law made by Parliament, or (*b*) an existing law.

There was a controversy at one time as to whether the succeeding words "with respect to one of the matters enumerated in the Concurrent List" govern both (*a*) and (*b*) or (*b*) alone. It is now settled that the words "with respect to" qualify both the clauses in article 254(1), *viz.*, a law made by Parliament which Parliament is competent to enact as well as any provision of an existing law. The underlying principle is that the question of repugnancy arises only when both the Legislatures are competent to legislate in the same field, *i.e.,* with respect to one of the matters enumerated in the Concurrent List. Hence, article 254(1) can not apply unless both the Union and the State laws relate to a subject specified in the Concurrent List, and they occupy the same field.

This construction of ours is supported by the observations of Venkatarama Ayyar, J, speaking for the Court in *A S Krishna's* case (*supra*), while dealing with section 107(1) of the Government of India Act, 1935 to the effect :

> "For this section to apply, two conditions must be fulfilled : (*1*) The provisions of the Provincial law and those of the Central legislation must both be in respect of a matter which is enumerated in the Concurrent List, and (*2*) they must be repugnant to each other. It is only when both these requirements are satisfied that the Provincial law will, to the extent of the repugnancy, become void." In *Ch. Tika Ramji's* case (*supra*), the court observed that no question of repugnancy under article 254 of the Constitution could arise where parliamentary legislation and State legislation occupy different fields and deal with separate and distinct matters even though of a cognate and allied character and that where, as in that case, there was no inconsistency in the actual terms of the Acts enacted by Parliament and the State Legislature relatable to Entry 33 of List III, the test of repugnancy would be whether Parliament and State Legislature, in legislating on an entry in the Concurrent List, exercised their powers over the same subject-matter or whether the laws enacted by Parliament were intended to be exhausted as to cover the entire field, and added :
>
> "The pith and substance argument cannot be imported here for the simple reason that, when both the Centre as well as the State Legislatures were operating in the concurrent field, there was no question of any trespass upon the exclusive jurisdiction of the Centre under Entry 52 of List I, the only question which survived being whether put in both the pieces of legislation enacted by the Centre and the State Legislature, there was any such repugnancy." This observation lends support to the view that in cases of overlapping between List II on the one hand and Lists I and III on the other, there is no question of repugnancy under article 254(1). Subba Rao, J, speaking for the court in *Deep Chand's* case (*supra*), interpreted article 254(1) in these terms :
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> "Article 254(1) lays down a general rule. Clause (2) is an exception to that article and the proviso qualified the said exception. If there is repugnancy between the law made by the State and that made by the Parliament with respect to one of the matters enumerated in the Concurrent List, the law made by Parliament shall prevail to the extent of the repugnancy and law made by the State shall, to the extent of such repugnancy, be void."' (at pages 179-183) [emphasis supplied]

46. In *Vijay Kumar Sharma* v. *State of Karnataka* [1990] 2 SCC 562, this court held that the Karnataka Contract Carriages (Acquisition) Act, 1976 enacted under Entry 42 of List III was not repugnant to the Motor Vehicles Act, 1988 enacted under Entry 35 of the same List. In so holding, Sawant, J, laid down :

> "32. Thus, the Karnataka Act and the MV Act, 1988 deal with two different subject-matters. As stated earlier the Karnataka Act is enacted by the State Legislature for acquisition of contract carriages under Entry 42 of the Concurrent List read with Article 31 of the Constitution to give effect to the provisions of articles 39(*b*) and (*c*) thereof. The MV Act 1988 on the other hand is enacted by the Parliament under Entry 35 of the Concurrent List to regulate the operation of the motor vehicles. The objects and the subject-matters of the two enactments are materially different. Hence, the provisions of article 254 do not come into play in the present case and, hence, there is no question of repugnancy between the two legislations." (at page 581)

47. Ranganath Misra, J, in a concurring judgment,

posed the question as to whether when the State law is under one head of legislation in the Concurrent List and the Parliamentary legislation is under another head in the same list, can there be repugnancy at all?

The question was answered, thus :

> "13. In clause (1) of article 254 it has been clearly indicated that the competing legislations must be in respect of one of the matters enumerated in the Concurrent List. The seven-Judge Bench examining the vires of the Karnataka Act did hold that the State Act was an Act for acquisition and came within Entry 42 of the Concurrent List. That position is not disputed before us. There is unanimity at the bar that the Motor Vehicles Act is a legislation coming within Entry 35 of the Concurrent List. Therefore, the Acquisition Act and the 1988 Act as such do not relate to one common head of legislation enumerated in the Concurrent List and the State Act and the parliamentary statute deal with different matters of legislation."
>
> "19. A number of precedents have been cited at the hearing and those have been examined and even some which were not referred to at the bar. There is no clear authority in support of the stand of the petitioners – where the State law is under one head of legislation in the Concurrent List, the subsequent Parliamentary legislation is under another head of legislation in the same list and in the working of the two it is said to give rise to a question of repugnancy." (at pages 575 and 577)

48. In *Rajiv Sarin* v. *State of Uttarakhand* [2011] 8 SCC 708, this court examined the Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 *vis-a-vis* the Forest Act, 1927 and found that there was no repugnancy between the two. This court held :

> '52. The aforesaid position makes it quite clear that even if both the legislations are relatable to List III of the Seventh Schedule of the Constitution, the test for repugnancy is whether the two legislations "exercise their power over the same subject-matter..." and secondly, whether the law of Parliament was intended "to be exhaustive to cover the entire field". The answer to both these questions in the instant case is in the negative, as the Indian Forest Act, 1927 deals with the law relating to forest transit, forest levy and forest produce, whereas the KUZALR Act deals with the land and agrarian reforms.
>
> 53. In respect of the Concurrent List under Seventh Schedule to the Constitution, by definition both the Legislatures, *viz*., the Parliament and the State Legislatures are competent to enact a law. Thus, the only way in which the doctrine of pith and substance can and is utilised in determining the question of repugnancy is to find out whether in pith and substance the two laws operate and relate to the same matter or not. This can be either in the context of the same Entry in List III or different Entries in List III of the Seventh Schedule of the Constitution. In other words, what has to be examined is whether the two Acts deal with the same field in the sense of the same subject-matter or deal with different matters." (at page 727) [emphasis supplied]

49. It will be noticed that the Constitution Bench judgment in *Rajiv Sarin* (*supra*) does not at all refer to *Tika Ramji* (*supra*). *Tika Ramji* (*supra*) had clearly held that the doctrine of pith and substance cannot be referred to in determining questions of repugnancy, once it is found that both the Parliamentary law and State law are referable to the Concurrent List. Therefore, the statement in paragraph 53 in *Rajiv Sarin* (*supra*), that the doctrine of pith and substance has utility in finding out whether, in substance, the two laws operate and relate to the same matter, may not be a correct statement of the law in view of the unequivocal statement made in *Tika Ramji* (*supra*) by an earlier Constitution Bench decision. However, the following sentence is of great importance, which is, that the two laws, namely, the Parliamentary and the State legislation, do not need to find their origin in the same Entry in List III so long as they deal, either as a whole or in part, with the same subject-matter. This clarification of the law is important in that Ranganath Misra, J.'s separate concurring opinion in *Vijay Kumar Sharma* (*supra*) seems to point to a different direction. However, *Hoechst Pharmaceuticals* (*supra*), also does not agree with this view and indicates that so long as the two laws are traceable to a matter in the Concurrent List and there is repugnancy, the State law will have to be yield to the Central law except if the State law is covered by article 254(2).

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

(*i*) Repugnancy under article 254 arises only if both the Parliamentary (or existing law) and the State law are referable to List III in the 7th Schedule to the Constitution of India.

(*ii*) In order to determine whether the Parliamentary (or existing law) is referable to the Concurrent List and whether the State law is also referable to the Concurrent List, the doctrine of pith and substance must be applied in order to find out as to where in pith and substance the competing statutes as a whole fall. It is only if both fall, as a whole, within the Concurrent List, that repugnancy can be applied to determine as to whether one particular statute or part thereof has to give way to the other.

(*iii*) The question is what is the subject-matter of the statutes in question and not as to which entry in List III the competing statutes are traceable, as the entries in List III are only fields of legislation ; also, the language of article 254 speaks of repugnancy not merely of a statute as a whole but also "any provision" thereof.

(*iv*) Since there is a presumption in favour of the validity of statutes generally, the onus of showing that a statute is repugnant to another has to be on the party attacking its validity. It must not be forgotten that that every effort should be made to reconcile the competing statutes and construe them both so as to avoid repugnancy – care should be taken to see whether the two do not really operate in different fields *qua* different subject-matters.

(*v*) Repugnancy must exist in fact and not depend upon a mere possibility.

(*vi*) Repugnancy may be direct in the sense that there is inconsistency in the actual terms of the competing statutes and there is, therefore, a direct conflict between two or more provisions of the competing statutes. In this sense, the inconsistency must be clear and direct and be of such a nature as to bring the two Acts or parts thereof into direct collision with each other, reaching a situation where it is impossible to obey the one without disobeying the other.

This happens when two enactments produce different legal results when applied to the same facts.

(*vii*) Though there may be no direct conflict, a State law may be inoperative because the Parliamentary law is intended to be a complete, exhaustive or exclusive code. In such a case, the State law is inconsistent and repugnant, even though obedience to both laws is possible, because so long as the State law is referable to the same subject-matter as the Parliamentary law to any extent, it must give way. One test of seeing whether the subject-matter of the Parliamentary law is encroached upon is to find out whether the Parliamentary statute has adopted a plan or scheme which will be hindered and/or obstructed by giving effect to the State law. It can then be said that the State law trenches upon the Parliamentary statute. Negatively put, where Parliamentary legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying the general provisions made in it, there can be said to be no repugnancy.

(*viii*) A conflict may arise when Parliamentary law and State law seek to exercise their powers over the same subject-matter. This need not be in the form of a direct conflict, where one says "do" and the other says "don't". Laws under this head are repugnant even if the rule of conduct prescribed by both laws is identical. The test that has been applied in such cases is based on the principle on which the rule of implied repeal rests, namely, that if the subject-matter of the State legislation or part thereof is identical with that of the Parliamentary legislation, so that they cannot both stand together, then the State legislation will be said to be repugnant to the Parliamentary legislation. However, if the State legislation or part thereof deals not with the matters which

formed the subject-matter of Parliamentary legislation but with other and distinct matters though of a cognate and allied nature, there is no repugnancy.

(*ix*) Repugnant legislation by the State is void only to the extent of the repugnancy. In other words, only that portion of the State's statute which is found to be repugnant is to be declared void.

(*x*) The only exception to the above is when it is found that a State legislation is repugnant to Parliamentary legislation or an existing law if the case falls within article 254(2), and Presidential assent is received for State legislation, in which case State legislation prevails over Parliamentary legislation or an existing law within that State.

Here again, the State law must give way to any subsequent Parliamentary law which adds to, amends, varies or repeals the law made by the Legislature of the State, by virtue of the operation of article 254(2) proviso.

51. Applying the aforesaid rules to the facts of the present case, we find that the State statute in question is the Maharashtra Act.

The Statement of Objects and Reasons for the aforesaid Act reads, thus :

'In order to mitigate the hardship that may be caused to the workers who may be thrown out of employment by the closure of an undertaking, Government may take over such undertaking either on lease or on such conditions as may be deemed suitable and run it as a measure of unemployment relief. In such cases Government may have to fix revised terms of employment of the workers or to make other changes which may not be in consonance with the existing labour laws or any agreements or awards applicable to the undertaking. It may become necessary even to exempt the undertaking from certain legal provisions. For these reasons it is proposed to obtain power to exclude an undertaking, run by or under the authority of Government as a measure of unemployment relief, from the operation of certain labour laws or any specified provisions thereof subject to such conditions and for such periods as may be specified. It is also proposed to make a provision to secure that while the rights and liabilities of the original employer and workmen may remain suspended during the period the undertaking is run by Government, they would revive and become enforceable as soon as the undertaking ceases to be under the control of Government." There is no doubt that this Maharashtra Act is referable to Entry 23, List III in the 7th Schedule to the Constitution, which reads as under :

"23. Social security and social insurance ; employment and unemployment." Sections 3 and 4 of the Maharashtra Act are material and are set out herein :

"3. *Declaration of relief undertaking.* – (1) If at any time it appears to the State Government necessary to do so, the State Government may, by notification in the Official Gazette, declare that an industrial undertaking specified in the notification, whether started, acquired or otherwise taken over by the State Government, and carried on or proposed to be carried on by itself or under its authority, or to which any loan, guarantee or financial assistance has been provided by the State Government shall, with effect from the date specified for the purpose in the notification, be conducted to serve as a measure of preventing unemployment or of unemployment relief and the undertaking shall accordingly be deemed to be a relief undertaking for the purposes of this Act.

(2) A notification under sub-section (1) shall have effect for such period not exceeding twelve months as may be specified in the notification ; but it shall be renewable by like notifications from time-to-time for further periods not exceeding twelve months at a time, so, however, that all the periods in the aggregate do not exceed fifteen years.

4. *Power to prescribe industrial relations and other facilities temporarily for relief undertakings.* – (1) Notwithstanding any law, usage, custom, contract, instrument, decree, order, award, submission, settlement, standing order or other provision whatsoever, the State Government may, by notification in the Official Gazette, direct that –

(*a*) in relation to any relief undertaking and in respect of the period for which the relief

undertaking continues as such under sub-section (2) of section 3 –

(*i*) all or any of the laws in the Schedule to this Act or any provisions thereof shall not apply (and such relief undertaking shall be exempt therefrom), or shall, if so directed by the State Government, be applied with such modifications (which do not, however, affect the policy of the said laws) as may be specified in the notification ;

(*ii*) all or any of the agreements, settlements, awards or standing orders made under any of the laws in the Schedule to this Act, which may be applicable to the undertaking immediately before it was acquired or taken over by the State Government or before any loan, guarantee or other financial assistance was provided to it by, or with the approval of the State Government, for being run as a relief undertaking, shall be suspended in operation or shall, if so directed by the State Government, be applied with such modifications as may be specified in the notification ;

(*iii*) rights, privileges, obligations and liabilities shall be determined and be enforceable in accordance with clauses (*i*) and (*ii*) and the notification ;

(*iv*) any right, privilege, obligation on liability accrued or incurred before the undertaking was declared a relief undertaking and any remedy for the enforcement thereof shall be suspended and all proceedings relative thereto pending before any court, tribunal, officer or authority shall be stayed ;

(*b*) the right, privilege, obligation and liability referred to in clause (*a*)(*iv*) shall, on the notification ceasing to have force, revive and be enforceable and the proceedings referred to therein shall be continued :

Provided that in computing the period of limitation for the enforcement of such right, privilege, obligation or liability, the period during which it was suspended under clause (*a*)(*iv*) shall be excluded notwithstanding anything contained in any law for the time being in force.

(2) A notification under sub-section (1) shall have effect from such date, not being earlier than the date referred to in sub-section (1) of section 3, as may be specified therein, and the provisions of section 21 of the Bombay General Clauses Act, 1904, shall apply to the power to issue such notification.'

52. On the other hand, the Insolvency and Bankruptcy Code, 2016 is an Act to consolidate and amend the laws relating to reorganisation and insolvency resolution, inter alia, of corporate persons. Insofar as corporate persons are concerned, amendments are made to the following enactments by sections 249 to 252 and 255 :

"249. *Amendments of Act 51 of 1993.* – The Recovery of Debts due to Banks and Financial Institutions Act, 1993 shall be amended in the manner specified in the Fifth Schedule.

250. *Amendments of Act 32 of 1994.* – The Finance Act, 1994 shall be amended in the manner specified in the Sixth Schedule.

251. *Amendments of Act 54 of 2002.* – The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 shall be amended in the manner specified in the Seventh Schedule.

252. *Amendments of Act 1 of 2004.* – The Sick Industrial Companies (Special Provisions) Repeal Act, 2003 shall be amended in the manner specified in the Eighth Schedule....

255. *Amendments of Act 18 of 2013.* – The Companies Act, 2013 shall be amended in the manner specified in the Eleventh Schedule."

53. It is settled law that a consolidating and amending Act like the present Central enactment forms a code complete in itself and is exhaustive of the matters dealt with therein. In *Ravula Subba Rao* v. *Commissioner of Income-tax* [1956] SCR 577, this court held :

'The Act is, as stated in the preamble, one to consolidate and amend the law relating to income-tax. The rule of construction to be applied to such a

statute is, thus, stated by Lord Herschell in *Bank of England* v. *Vagliano* [1891] AC 107, 141 :

"I think the proper course is in the first instance to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably "intended to leave it unaltered..." We must, therefore, construe the provisions of the Indian Income-tax Act as forming a code complete in itself and exhaustive of the matters dealt with therein, and ascertain what their true scope is." (at page 585) Similarly in *Union of India* v. *Mohindra Supply Co.* [1962] 3 SCR 497, this court held :

"The Arbitration Act, 1940 is a consolidating and amending statute and is for all purposes a code relating to arbitration. In dealing with the interpretation of the Indian Succession Act, 1865, the Privy Council in *Narendra Nath Sircar* v. *Kamlabasini Desai* [1896] LR 23, IA 18 observed that a code must be construed according to the natural meaning of the language used and not on the presumption that it was intended to leave the existing law unaltered. The Judicial Committee approved of the observations of Lord Herschell in *Bank of England* v. *Vagliano Brothers* [1891] AC 107, 144-145] to the following effect :

"I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions...." The court in interpreting a statute must, therefore, proceed without seeking to add words which are not to be found in the statute, nor is it permissible in interpreting a statute which codifies a branch of the law to start with the assumption that it was not intended to alter the pre-existing law ; nor to add words which are not to be found in the statute, or "for which authority is not found in the statute"." (at pages 506-508) In *Joseph Peter* v. *State of Goa, Daman and Diu* [1977] 3 SCC 280, this court dealt with a Goa regulation *vis-a-vis* the Code of Criminal Procedure. In that context, this court observed :

"A Code is complete and that marks the distinction between a Code and an ordinary enactment. The Criminal Procedure Code, by that canon, is self-contained and complete." (at page 282) There can be no doubt, therefore, that the Code is a Parliamentary law that is an exhaustive code on the subject-matter of insolvency in relation to corporate entities, and is made under Entry 9, List III in the 7th Schedule which reads as under :

"9. Bankruptcy and insolvency"

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

55. It is clear, therefore, that the earlier State law is repugnant to the later Parliamentary enactment as under the said State law, the State Government may take over the management of the relief undertaking, after which a temporary moratorium in much the same manner as that contained in sections 13 and 14 of the Code takes place under section 4 of the Maharashtra Act. There is no doubt that by giving effect to the State law, the aforesaid plan or scheme which may be adopted under the Parliamentary statute will directly be hindered and/or obstructed to that extent in that the management of the relief undertaking, which, if taken over by the State Government, would directly impede or come in the way of the taking over of the management of the corporate body by the interim resolution professional. Also, the moratorium

imposed under section 4 of the Maharashtra Act would directly clash with the moratorium to be issued under sections 13 and 14 of the Code. It will be noticed that whereas the moratorium imposed under the Maharashtra Act is discretionary and may relate to one or more of the matters contained in section 4(1), the moratorium imposed under the Code relates to all matters listed in section 14 and follows as a matter of course. In the present case it is clear, therefore, that unless the Maharashtra Act is out of the way, the Parliamentary enactment will be hindered and obstructed in such a manner that it will not be possible to go ahead with the insolvency resolution process outlined in the Code. Further, the non-obstante clause contained in Section 4 of the Maharashtra Act cannot possibly be held to apply to the Central enactment, inasmuch as a matter of constitutional law, the later Central enactment being repugnant to the earlier State enactment by virtue of article 254 (1), would operate to render the Maharashtra Act void *vis-a-vis* action taken under the later Central enactment. Also, section 238 of the Code reads as under :

> "238. *Provisions of this Code to override other laws*. – 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."

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.

56. Dr. Singhvi, however, argued that the notification under the Maharashtra Act only kept in temporary abeyance the debt which would become due the moment the notification under the said Act ceases to have effect. We are afraid that we cannot accede to this contention. The notification under the Maharashtra Act continues for one year at a time and can go upto 15 years. Given the fact that the timeframe within which the company is either to be put back on its feet or is to go into liquidation is only 6 months, it is obvious that the period of one year or more of suspension of liability would completely unsettle the scheme of the Code and the object with which it was enacted, namely, to bring defaulter companies back to the commercial fold or otherwise face liquidation. If the moratorium imposed by the Maharashtra Act were to continue from one year up to 15 years, the whole scheme and object of the Code would be set at naught. Undeterred by this, Dr. Singhvi, however, argued that since the suspension of the debt took place from July 2015 onwards, the appellant had a vested right which could not be interfered with by the Code. It is precisely for this reason that the non-obstante clause, in the widest terms possible, is contained in section 238 of the Code, so that any right of the corporate debtor under any other law cannot come in the way of the Code. For all these reasons, we are of the view that the Tribunal was correct in appreciating that there would be repugnancy between the provisions of the two enactments. The judgment of the Appellate Tribunal is not correct on this score because repugnancy does exist in fact.

57. Both the Tribunal and the Appellate Tribunal refused to go into the other contentions of Dr. Singhvi, *viz.*, that under the MRA, it was because the creditors did not disburse the amounts thereunder that the appellant was not able to pay its dues. We are of the view that the Tribunal and the Appellate Tribunal were right in not going into this contention for the very good reason that the period of 14 days within which the application is to be decided was long over by the time the second application was made before the Tribunal. Also, the second application clearly appears to be an after-thought for the reason that the corporate debtor was fully aware of the fact that the MRA had failed and could easily have pointed out these facts in the first application itself. However, for reasons best known to it, the appellant chose to take up only a law point before the Tribunal. The law point before the Tribunal was argued on 22nd and 23rd December, 2016, presumably with little success. It is only as an after-thought that the second application was then filed to add an additional string to a bow which appeared to the appellants to have already been broken.

58. Even otherwise, Shri Salve took us through the MRA in great detail. Dr. Singhvi did likewise to buttress his point of view that having promised to infuse funds into the appellant, not a single naya paisa was ever disbursed. According to us, one particular clause in the MRA is determinative on the merits of this case, even if we were to go into the same. Under Article V

entitled "Representations and Warranties", clause 20(*t*) states as follows :

> "(t) *Nature of obligations.*
>
> The obligations under this agreement and the other Restructuring Documents constitute direct, unconditional and general obligations of the Borrower and the Reconstituted Facilities, rank at least pari passu as to priority of payment to all other unsubordinated indebtedness of the Borrower other than any priority established under applicable law."

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

60. The appeals, accordingly, stand dismissed. There shall, however, be no order as to costs.

■■■

[2017] 1 IBJ (JP) 64

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

JK Jute Mills Co. Ltd.

v.

Surendra Trading Co.

Company Appeal (AT) No. 09 of 2017

S J Mukhopadhaya, J, Chairperson & Balvinder Singh, Member (Judicial)

1st May 2017

Time period prescribed under sub-section (5) of section 7, sub-section (5) of section 9 and sub-section (4) of section 10 of the Code being procedural in nature cannot be treated to be a mandate of law. However, 7 days to remove defects allowed to corporate debtor and 270 days for completion of resolution are mandatory requirement of the Code.

[*Insolvency and Bankruptcy Code, 2016 – Sections 7, 9, 10, 12, 16 and 33 – Corporate insolvency resolution process – Time limits for adjudication/rejection/initiation of process*]

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

Time is the essence of the Code, but it is to be seen whether on failure to do so, the adjudicating authority is competent to pass appropriate order. Further, in case resolution process is not completed within the time prescribed as per section 33 it will lead to initiation of liquidation proceedings, which may affect the corporate debtor, which otherwise was not required to be initiated. **[Para 31]**

The adjudicating authority has different roles to play at different stages. The one of such role is somewhat administrative in nature when under sub-section (4) of section 7 or sub-section (5) of section 9 and sub-section (4) of section 10, the adjudicating authority is required to find out whether (i) the case is complete in terms of the provisions of sub-section (2) of section 7 or sub-section (2) of section 9 or sub-section (2) of section 10, as the case may be, or (ii) whether there is a defect, i.e., application is not in order and incomplete. Otherwise role of adjudicating authority is judicial in nature particularly when it decides as to whether the "insolvency resolution process" to be initiated by admitting of the application or to reject the application. As a judicial authority, in case the application is incomplete, it is also empowered to decide whether to grant 7 days' time to rectify the defects. In case the applications are admitted and resolution process starts, the adjudicating authority is required to pass judicial order under sections 13 and 14 of the Code and may order for public announcement in terms section 15 and then to oversee the resolution process and finally, if so required, to pass order for liquidation. **[Para 38]**

The Code does not bar or render the adjudicating authority powerless to admit an application or rejecting the application. **[Para 40]**

Nature of the provisions contained in subsection (5) of section 7 or sub-section (5) of section 9 and sub-section (4) of section 10 of the Code like order VIII, rule 1 being procedural in nature cannot be treated to be a mandate of law. **[Para 41]**

The object behind the time period prescribed under sub-section (5) of section 7, sub-section (5) of section 9 and sub-section (4) of section 10, like order VIII, rule 1 of CPC is to prevent the delay in hearing the disposal of the cases. The adjudicating authority cannot ignore the provisions. But in appropriate cases, for the reasons to be recorded in writing, it can admit or reject the petition after the period prescribed under section 7 or section 9 or section 10. **[Para 42]**

The mandate of sub-section (5) of section 7 or sub-section (5) of section 9 or sub-section (4) of section 10 procedural in nature, a tool of aid in expeditious dispensation of justice and is directory. **[Para 43]**

However, the 7 days' period for the rectification of defects as stipulated under proviso to the relevant provisions as noticed above is required to be complied with by the corporate debtor whose application, otherwise, being incomplete is fit to be rejected. In this background, we hold that the proviso to sub-section (5) of section 7 or proviso to sub-section (5) of section 9 or proviso to sub-section (4) of section 10 to remove the defect within 7 days are mandatory, and on failure applications are fit to be rejected. **[Para 44]**

JUDGMENT

Mukhopadhaya, J

1. This appeal has been preferred by appellant-J K Jute Mills Co. Ltd. against Order dated 9th March, 2017 passed by Adjudicating Authority (National Company Law Tribunal), Allahabad Bench in CP No. 10/All/2017.

2. By the impugned order the adjudicating authority overruled the objection of the appellant-corporate Debtor and directed the appellant to maintain *status quo* on immovable properties.

3. The question involved in this case is :

Whether the time limit prescribed in Insolvency and Bankruptcy Code, 2016 ('Code 2016') for admitting or rejecting a petition or initiation of insolvency resolution process is mandatory ?

4. The brief fact of the case are as follows :

The respondent/'operational creditor' - Surendra Trading Co. issued a demand notice under section 8 of the 'Code' on 6th January, 2017 to the appellant/ 'corporate debtor' raising claim of dues pertaining to the year 2001-02.

5. The appellant/'corporate debtor' by letter dated 25th January, 2017 objected the claim as 'time barred'. Thereafter, the respondent/'operational creditor' filed a petition under section 9 of the 'Code', before the adjudicating authority, Allahabad on 10th February, 2017. In the said application the adjudicating authority passed the interim order.

6. According to appellant, the petition under section 9 was filed without following the mandatory provision of sub-rule (2) of rule 6 of "Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016" ('Adjudicating Authority Rules').

7. The case was listed before adjudicating authority on 16th February, 2016 but there being defects, learned counsel for the operational creditor sought time to rectify the defects as also to receive instructions about the stage of proceedings pending before Board for Industrial and Financial Reconstruction ('BIFR') though such proceeding stood abated by virtue of Companies Act, 2013.

8. The 'adjudicating authority' noticed that the debt due for payment was defaulted in the year 2004. The 'operational creditor' was asked to clarify whether the claim is barred by law of limitation and whether any recovery proceedings were earlier initiated by the operational creditor before any competent court of law or was deferred or stayed under the provisions of 'Sick Companies Rehabilitation Act, 1985'. The matter was ordered to be listed on 28th February, 2017 for removal of objection and procedural defects.

9. On 28th February, 2017, counsel for the operational creditor sought more time for filing formal memo by

providing/furnishing of the latest order passed by BIFR. The appellant-corporate debtor was instructed to clarify about the position of prescribed limitation for making recovery of his debt through its memo. The case was ordered to be listed for further hearing on 3rd March, 2017.

10. On 9th March, 2017, a third party, J K Jute Mill Majdur Sabha filed a miscellaneous application for intervention. The adjudicating authority after going through the petition for intervention observed that its '*locus standi*' is to be decided first. Therefore, parties were granted time to file reply on maintainability of the third party application/claims. Further, the operational creditor was also granted liberty to file rejoinder to objection of the corporate debtor. Leaned counsel for the "operational creditor" as also the workers union requested the adjudicating authority to grant order of *status quo*, as the corporate debtor may alienate its assets. When it was objected by learned counsel for the appellant/ corporate debtor, the adjudicating authority held that under rule 11 of NCLT Rules, 2016, it is conferred with the powers to provide substantial justice to the party concerned.

11. Learned counsel for the appellant submitted that the adjudicating authority became "*functus officio*" after the time period specified under section 9 of the 'Code' and, therefore, it has no power to grant stay of sale of assets or "*status quo*" in regard to any assets.

12. It was further contended that no prayer having been made by the "operational creditor" to grant stay, it was not open to the adjudicating authority to pass interim order of *status quo*.

13. It was further contended that the adjudicating authority has no inherent jurisdiction under the Code to pass any ad interim order.

14. Learned counsel for the appellant highlighted the defects in the demand notice dated 6th January, 2017 as was sent by respondent/'operational creditor'. It was also contended that the petition under section 9 is barred by law of limitation.

15. On the other hand according to learned counsel for the respondent/'operational creditor' 14 days' time limit prescribed under section 9 of the 'Code' for passing orders of admission or rejection of application is directory ; it is not mandatory. It was also contended that the court should avoid any construction of an enactment which will lead to an unworkable, inconsistent or impracticable results. Reliance was placed on hon'ble Supreme Court's decision in *H S Vankani* v. *State of Gujarat* AIR 2010 SC 1714.

16. Referring to different situation, learned counsel for the respondent/'operational creditor' further submitted that if 14 days' period prescribed under section sub-section (5) of section 9 is considered as mandatory, it will result in numerous anomalous situations which is not the intention of the Legislature in drafting the Code.

17. Further, according to learned counsel for respondent/'operational creditor' 7 days' period for curing of defects is independent of the 14 days' period for prescribed under sub-section (5) of section 9 before admission or rejection of the application.

18. The case was heard on merit and judgment was reserved on 28th March, 2017. The adjudicating authority in the meantime was given liberty to decide the question of maintainability of the petition and the contentions as raised in this appeal.

19. In the written submissions, it has been brought to the notice of this court that the adjudicating authority fixed 5th April, 2017 as the date for hearing the petition on the question of maintainability as raised in this appeal. Therefore, the respondent requested the Appellate Tribunal to allow the adjudicating authority to pass the order of maintainability as raised in this appeal with further prayer "not to deny" the right of appeal after final decision rendered by the adjudicating authority. It is informed that subsequently the Tribunal taken up the matter on 10th April, 2017, but on certain ground adjourned the case.

20. We have also noticed that the adjudicating authority, Mumbai Bench in other cases under section 9 of the Code rejected some of the applications in view of mandatory time limit prescribed under section 9 of the Code.

21. As important question of law is involved and even after three weeks of reserved judgment, adjudicating authority has but passed any final order of admission or rejection on the petition under section 9 and now more than 60 days have passed after filing of the petition and as important question of law are involved, we decided to proceed with the matter.

22. To decide the question whether the time limit prescribed for initiation and completion of insolvency resolution process is mandatory, it is desirable to notice different time limits prescribed under the Insolvency and Bankruptcy Code, 2016.

23. "Corporate insolvency resolution process" can be initiated under different provisions of the Code, such as under section 7 by "financial creditor", under section 9 by "operational creditor" and under section 10 by the "corporate applicant". Though procedures after 'admission' of insolvency resolution process is almost common, the legislature prescribed different time limit for admission or rejection of the petitions.

24. For initiation of insolvency resolution process by "financial creditors" under section 7, the adjudicating authority is allowed 14 days of the receipt of the application to ascertain the existence of a default from the records with information utility or on the basis of other evidence furnished by the financial creditors ; under sub-section (5) of section 7 before or after 14 days, if adjudicating authority is satisfied that a default has occurred and the application under sub-section (2) of section 7 is complete and there is no disciplinary proceedings pending against the proposed resolution professional, the adjudicating authority is required to admit the application. On the contrary, if the default has not occurred or the application is not complete then the adjudicating authority is required to dismiss the petition.

However, in case of incomplete application the adjudicating authority is required to grant seven days' time to the applicant/financial creditor to rectify the defect. The section 7 reads as follows :

> "7. *Initiation of corporate insolvency resolution process by financial creditor*. – (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."

25. On the contrary in the case of "operational creditors" under sub-section (5) of section 9, within 14 days of the receipt of the application the "adjudicating authority" is required to either admit the application, if complete or reject the application, if not complete or may grant 7 days' time from the date of receipt of notice to the operational creditor to rectify the defect, as evident from section 9 and reads as follows :

"9. *Application for initiation of corporate insolvency resolution process by operational creditor.* – (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.

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

(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.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The adjudicating authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order –

(*i*) admit the application and communicate such decision to the operational creditor and the corporate debtor if, –

(*a*) the application made under sub-section (2) is complete ;

(*b*) there is no repayment of the unpaid operational debt ;

(*c*) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor ;

(*d*) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility ; and

(*e*) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any ;

(*ii*) reject the application and communicate such decision to the operational creditor and the corporate debtor, if –

(*a*) the application made under sub-section (2) is incomplete ;

(*b*) there has been repayment of the unpaid operational debt ;

(*c*) the creditor has not delivered the invoice or notice for payment to the corporate debtor ;

(*d*) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility ; or

(*e*) any disciplinary proceeding is pending against any proposed resolution professional :

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.

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

26. Similarly, in the case of initiation of corporate insolvency resolution process by "corporate applicant", like sub-section (5) of section 9, the adjudicating authority, within a period of 14 days of the receipt of the application, by an order required to admit the application, if it is complete or reject the application if it is incomplete.

However, before rejecting the application it is required to give notice and "corporate applicant" can be allowed 7 days' period to rectify the defects. This is evident from sub-section (4) of section 10, as quoted below :

"10. *Initiation of corporate insolvency resolution process by corporate applicant.* – (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.

(2) The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.

(3) The corporate applicant shall, along with the application furnish the information relating to –

(*a*) its books of account and such other documents relating to such period as may be specified ; and

(*b*) the resolution professional proposed to be appointed as an interim resolution professional.

(4) The adjudicating authority shall, within a period of fourteen days of the receipt of the application, by an order –

(*a*) admit the application, if it is complete ; or

(*b*) reject the application, if it is incomplete :

Provided that adjudicating authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the adjudicating authority.

(5) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section."

27. Where an application is not disposed of or an order is not passed within a period specified in the Code, in such case the adjudicating authority may record the reasons for not doing so within the period so specified and may request the hon'ble President of National Company Law Tribunal for extension of time, who may after taking into account the reasons so recorded can extend the period specified in the Act but not exceeding 10 days, as apparent from sub-section (1) of section 64, as quoted below :

"64. (1) Where an application is not disposed of or an order is not passed within the period specified in this Code, the National Company Law Tribunal or the National Company Law Appellate Tribunal, as the case may be, shall record the reasons for not doing so within the period so sopecified ; and the

President of the National Company Law Tribunal or the Chairperson of the National Company Law Appellate Tribunal, as the case may be, may, after taking into account the reasons so recorded, extend the period specified in the Act but not exceeding ten days."

28. There are other time limit prescribed under the Code such as section 16(1) in terms of which the adjudicating authority is required to appoint an interim resolution professional within 14 days from the insolvency commencement date (admission of the case). Under sub-section (5) of section 16, the term of the interim resolution professional cannot exceed 30 days from the date of appointment, as evident from relevant provisions, which reads as follows :

"16. *Appointment and tenure of interim resolution professional.* – (1) The adjudicating authority shall appoint an interim resolution professional within fourteen days from the insolvency commencement date.

(2) Where the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, as the case may be, the resolution professional, as proposed respectively in the application under section 7 or section 10, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

(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.

(4) The Board shall, within ten days of the receipt of a reference from the adjudicating authority under sub-section (3), recommend the name of an insolvency professional to the adjudicating authority against whom no disciplinary proceedings are pending.

(5) The term of the interim resolution professional shall not exceed thirty days from date of his appointment."

29. Time limit for completion of insolvency resolution process is prescribed under section 12 as per which the corporate insolvency resolution process required to be completed within a period of 180 days from the date of admission of the application. If resolution professional for any reason not in a position to complete this job within 180 days may file an application under sub-section (2) of section 12 before the adjudicating authority to extend the period. Under sub-section (3) of section 12, the adjudicating authority may extend the period, but not exceeding 90 days, *i.e.,* total 270 days has been allowed for insolvency resolution process. This is evidence from section 12 as quoted below :

"12. *Time-limit for completion of insolvency resolution process.* – (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."

30. Before expiry of the insolvency resolution process of the maximum period permitted for completion under section 12 if the adjudicating authority does not receive a resolution plan, under section 33 the adjudicating authority is required to pass an order requiring the corporate debtor to be liquidated in the manner as laid down in the said chapter. For proper appreciation, section 33 of the Code is quoted below :

"33. *Initiation of liquidation.* – (1) Where the adjudicating authority, –

(*a*) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30 ; or

(*b*) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, it shall –

(*i*) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter ;

(*ii*) issue a public announcement stating that the corporate debtor is in liquidation ; and

(*iii*) require such order to be sent to the authority with which the corporate debtor is registered."

31. From the aforesaid provisions we find that time is the essence of the Insolvency and Bankruptcy Code, 2016, but it is to be seen whether on failure to do so, the adjudicating authority is competent to pass appropriate order. Further in case resolution process is not completed within the time prescribed as per section 33 it will lead to initiation of liquidation proceedings, which may affect the corporate debtor, which otherwise was not required to be initiated.

32. In *P T Rajan* v. *T P M Sahir* [2003] 8 SCC 498, the hon'ble Supreme Court observed that where adjudicating authority has to perform a statutory function like admitting or rejecting an application within a time period prescribed, the time period would have to held to be directory and not mandatory. In the said case, hon'ble Apex Court observed :

'48. It is well-settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory – see *Shiveshwar Prasad Sinha* v. *District Magistrate of Monghur* AIR 1966 Patna 144 ; *Nomita Chowdhury* v. *State of West Bengal* [1999] Comp LJ 21 and *Garbari Union Co-operative Agricultural Credit Society Ltd.* v. *Swapan Kumar Jana* [1997] 1 CHN 189.

49. Furthermore, a provision in a statute which is procedural in nature although employs the word "shall" may not be held to be mandatory if thereby no prejudice is caused.'

33. That the hon'ble Apex Court has on numerous occasions interpreted the word 'shall' to mean 'may'. An analogous position can be found in the context of the time period prescribed for filing written statements by defendants to a suit, wherein, the hon'ble Apex Court was faced with the question of a court's power to take on record Written Statements that were filed beyond the period of 90 days, as prescribed under order VIII, rule 1 of the Code of Civil Procedure, 1908. In this regard, the hon'ble Supreme Court in *Kailash* v. *Nanhku* [2005] 4 SCC 480 held as under :

"27. Three things are clear. Firstly, a careful reading of the language in which order 8, rule 1 has been drafted, shows that it casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for.

Secondly, the nature of the provision contained in order 8, rule 1 is procedural. It is not a part of the substantive law. Thirdly, the object behind substituting order 8, rule 1 in the present shape is to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases much to the chagrin of the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried."

34. Further, Supreme Court in the matter of *Smt. Rani Kusum* v. *Smt. Kanchan Dexn* [2005] 6 SCC 705, concurring with the ratio laid down in *Kailash* (*supra*) held that :

"10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.

11. The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.

12. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in the judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence, *processual*, as much as substantive – see *Sushil Kumar Sen* v. *State of Bihar* [1975] 1 SCC 774.

13. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode – see *Blyth* v. *Blyth* [1966] 1 All ER 524/1966 AC 643/[1966] 2 WLR 634 (HL). A procedural law should not ordinarily be construed as mandatory ; the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed – see *Shreenath* v. *Rajesh* [1998] 4 SCC 543/AIR 1998 SC 1827.

14. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

35. Sub-section (2) of section 7, sub-section (2) of section 9 and sub-section (2) of section 10 deals with the form and manner in which respective applications under sections 7, 9 and 10 ought to be filed along with such process fee as may be prescribed. This is a procedural matter to be verified by the Registry of the NCLT.

36. Sub-section (1) of section 5 defines "adjudicating authority" for the purpose of that part means "National Company Law Tribunal", (NCLT) constituted under section 408 of the Companies Act, 2013.

37. We have noticed that Code, empowers "adjudicating authority" to pass orders under sections 7, 9 and 10 of the Code, 2016 and not the NCLT. It is by virtue of the definition under sub-section (1) of section 5 of the Code, the NCLT plays its role as "adjudicating authority" and not that a Company Law Tribunal. Therefore, in strict sense, mandate under section 420 of the Companies Act, 2013 cannot be transpose in Code, 2016 by reading "orders of Tribunal", as "Order of Adjudicating Authority".

38. The adjudicating authority has different roles to play at different stages. The one of such role is somewhat administrative in nature when under sub-section (4) of section 7 or sub-section (5) of section 9 and sub-section (4) of section 10, the adjudicating authority is required to find out whether (*i*) the case is complete in terms of the provisions of sub-section (2) of section 7 or sub-section (2) of section 9 or sub-section (2) of section 10, as the case may be, or (*ii*) whether there is a defect, *i.e.,* application is nor in order and incomplete. Otherwise role of adjudicating authority is judicial in nature particularly when it decides as to whether the "insolvency resolution process" to be initiated by admitting of the application or to reject the application. As a judicial authority, in case the application is incomplete, it is also empowered to decide whether to grant 7 days' time to rectify the defects. In case the applications are admitted and resolution process starts, the adjudicating authority is required to pass judicial order under sections 13 and 14 of the Code and may order for public announcement in terms section 15 and then to oversee the resolution process and finally, if so required, to pass order for liquidation.

39. The time period of 14 days prescribed under sub-section (4) of 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".

40. In the present scenario, the Insolvency Bankruptcy Code do not bar or render the adjudicating authority powerless to admit an application or rejecting the application.

41. Further, nature of the provisions contained in sub-section (5) of section 7 or sub-section (5) of section 9 and sub-section (4) of section 10 of the Code like order VIII, rule 1 being procedural in nature cannot be treated to be a mandate of law.

42. The object behind the time period prescribed under sub-section (5) of section 7, sub-section (5) of section 9 and sub-section (4) of section 10, like order VIII, rule 1 of CPC is to prevent the delay in hearing the disposal of the cases. The adjudicating authority cannot ignore the provisions. But in appropriate cases, for the reasons to be recorded in writing, it can admit or reject the petition after the period prescribed under section 7 or section 9 or section 10.

43. Thus, in view of the aforementioned unambiguous position of law laid down by the hon'ble Apex Court and discussion as made above, we hold that the mandate of sub-section (5) of section 7 or sub-section (5) of section 9 or sub-section (4) of section 10 procedural in nature, a tool of aid in expeditious dispensation of justice and is directory.

44. However, the 7 days' period for the rectification of defects as stipulated under proviso to the relevant provisions as noticed above is required to be complied with by the corporate debtor whose application, otherwise, being incomplete is fit to be rejected. In this background we hold that the proviso to sub-section (5) of section 7 or proviso to sub-section (5) of section 9 or proviso to sub-section (4) of section 10 to remove the defect within 7 days are mandatory, and on failure applications are fit to be rejected.

45. Section 12 is a "time limit for completion of insolvency resolution process" which is to be completed within 180 days from the date of admission of the application. An extension of the period of corporate insolvency resolution process can be granted by the adjudicating authority but it cannot exceed 90 days and cannot be granted more than once.

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 of proceedings, we hold the time granted under section 12 of the Code is mandatory.

Similarly, term allowed to "Interim resolution professional" is 30 days. Thereby "Interim resolution professional" cannot exceed 30 days from the date of his appointment as per sub-section (5) of section 16. However, as the regular resolution professional starts functioning on completion of period of interim resolution professional the performance of the duties of Interim resolution professional cannot be held to be mandatory though the period is required to be counted for completion of the interim resolution process, *i.e.*, 180 days and in appropriate case another 90 days can be granted, *i.e.,* maximum 270 days which is mandatory.

47. It is not mandatory for "operational creditors" to propose the resolution professional to act as an interim resolution professional. It may or may not propose. In such case, the adjudicating authority will nominate insolvency resolution professional as recommended by the Board on reference from the adjudicating authority. This process also may take some time after admission of the case and, therefore, it is clear that the procedural part of section 7 or section 9 or section 10 are directory in nature.

48. We have noticed the decision of hon'ble Supreme Court in *Union of India* v. *Popular Construction Co*. [2001] 8 SCC 470. In the said case, hon'ble Supreme Court was deciding the question regarding extension of time period beyond the time prescribed in the statutes and held when the legislatures prescribed a special limitation for the purpose of the appeal, the court cannot entertain an application beyond the extended period, if prescribed therein.

49. The aforesaid decision of the hon'ble Supreme Court in *Popular Construction Co.* (*supra*) cannot be said to be applicable to procedural part of section 7 or section 9 or section 10, though it is applicable to section 64 which mandates extension of period not beyond 10 days as also to sub-sections (3) and (4) of section 12 which relates to time limit prescribed for completion of insolvency resolution process.

50. In these cases, we are not happy with the manner by the adjudicating authority has passed one or other order. The adjudicating authority, in spite of time frame scheme has taken the matter very leisurely and lightly. The time is the essence of the Code and all the stakeholders, including the adjudicating authority are required to perform its job within time prescribed under the Code except in exceptional circumstances if the adjudicating authority for one or other good reason fail to do so. In the case in hand we find that the adjudicating authority has unnecessarily adjourned the case from time-to-time which is against the essence of the Code.

51. Further, we find that the application was defective, and for the said reason the application was not admitted within the specified time. Even if it is presumed that 7 days additional days time was to be granted to the operational creditor, the defects having pointed out on 16th February, 2017 and having not taken care within time, we hold that the petition under section 9 filed by respondent/ operational creditor being incomplete was fit to be rejected.

52. For the reasons aforesaid, we direct the adjudicating authority to reject and close the petition preferred by respondents. After we reserved the judgment if any order has been passed by the adjudicating authority, except order of dismissal, if any, are also declared illegal.

53. The appeal is allowed. However, there shall be no order as to cost.

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Policy Updates

- Amendments to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017
- Clarification regarding approval of resolution plans under Sections 30 and 31 of Insolvency and Bankruptcy Code, 2016
- Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2017
- Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2017
- Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2017
- Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2017

[2017] 1 IBJ (PU) 2

Amendments to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017

Press Release dated 7th November 2017

IBBI has amended the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, and the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017.

2. A key objective of the Insolvency and Bankruptcy Code, 2016 is insolvency resolution of corporate persons in a time bound manner for maximization of value of their assets. This objective would be achieved only if a resolution process ends up with a credible resolution plan that maximises the value of assets of the corporate debtor, that is, the plan has been drawn up realistically and would be implemented successfully. Though there is no restriction on as to who can submit a resolution plan, it should come from any person, who can really rescue the insolvent business and the Committee of Creditors is expected to approve the best of them.

3. The Committee of Creditors is expected to carry out due diligence of every resolution plan to satisfy itself that (*a*) the plan is viable, and (*b*) the persons who have submitted the plan and who would implement the plan are credible, to avoid the plans which may lead to liquidation, post resolution, and to select the most suitable plan under the circumstances. The amendments to regulations empower the Committee of Creditors to carry out the due diligence by making provision for the required disclosures in the resolution plan.

4. According to the amendments, a resolution plan shall disclose details of the resolution applicant and other connected persons to enable the Committee of Creditors to assess credibility of such applicant and other connected persons to take a prudent decision while considering the resolution plan for its approval. The resolution plan shall disclose the details in respect of the resolution applicant, persons who are promoters or in management or control of the resolution applicant; persons who will be promoters or in management or control of the business of the corporate debtor during the implementation of the resolution plan; and their holding companies, subsidiary companies, associate companies and related parties, if any. It shall disclose details of convictions, pending criminal proceedings, disqualifications under the Companies Act, 2013, orders or directions issued by SEBI, categorization as a willful defaulter, etc.

5. Further, the resolution professional shall submit to the Committee of Creditors all resolution plans which comply with the requirements of the Code and regulations made thereunder, along with details of preferential transactions under section 43, undervalued transactions under section 45, extortionate credit transactions under section 50, and fraudulent transactions under section 66 of the Insolvency and Bankruptcy Code, 2016 noticed by him.

■■■

[2017] 1 IBJ (PU) 2

Clarification regarding approval of resolution plans under Sections 30 and 31 of Insolvency and Bankruptcy Code, 2016

General Circular No. IBC/01/2017
dated 25th October 2017

Clarification has been sought by stakeholders as to

whether approval of shareholders/members of the corporate debtor/company is required for a resolution plan at any stage during the process for its consideration and approval as laid down under sections 30 and 31 of the Insolvency and Bankruptcy Code, 2016 (the Code) and after approval during its implementation, for any actions contained in the resolution plan which would normally require specific approval of shareholders/members under provisions of Companies Act, 2013 or any other law. The clarification is sought in view of the requirement under section 30(2)(e) of the Code for the resolution professional to confirm that each resolution plan received by him does not contravene any of the provisions of the law for the time being in force.

2. The matter has been examined in the Ministry in the light of provisions of sections 30 and 31 of the Code which provide a detailed procedure from the time of receipt of resolution plan by the resolution professional to its approval by the Adjudicating Authority and there is no requirement for obtaining approval of shareholders/members of the corporate debtor during this process.

3. It is understood that the requirement of section 30(2)(e) of the Code is to ensure that the resolution plan(s) considered and approved by the Committee of Creditors and the Adjudicating Authority is compliant with the provisions of the applicable laws and therefore is legally implementable. For example, a resolution plan must not contemplate 100% foreign investment in a corporate debtor if the FDI policy/relevant foreign exchange laws permit foreign investment only up to 75% in the relevant sector of the industry; it should be compliant with requirements such as restrictions on an Indian entity to issue securities to a person resident outside India under Foreign Exchange Management Act, 1999, etc. The purpose is to prevent approval of resolution plans, which are not legally implementable.

4. Section 31(1) of the Code further provides that a resolution plan approved by the Adjudicating Authority shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The notes to clauses appended to the Insolvency and Bankruptcy Code, 2015 (Bill) in respect of such clause explains : "Therefore, if a plan requires stakeholders to do or not do certain actions for the successful implementation of a plan, it shall be binding on all the affected parties who shall be bound to undertake the actions set out in the plan".

5. In view of above, it is also clarified that the approval of shareholders/members of the corporate debtor/company for a particular action required in the resolution plan for its implementation, which would have been required under the Companies Act, 2013 or any other law if the resolution plan of the company was not being considered under the Code, is deemed to have been given on its approval by the Adjudicating Authority.

6. This issues with the approval of competent authority.

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[2017] 1 IBJ (PU) 3

Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2017

IBBI/2017-18/GN/REG017 5th October, 2017

In exercise of the powers conferred by clause (t) of sub-section (1) of section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 0f 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations to amend the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017, namely:–

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Fast Track Insolvency

Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2017.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017, –

(i) before the opening paragraph, for the words "INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION FOR CORPORATE PERSONS) REGULATIONS, 2017", the following shall be substituted, namely:–

"INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (FAST TRACK INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS, 2017";

(ii) in regulation 37, after sub-regulation (1), the following sub-regulation shall be inserted, namely:—

"(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor."

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[2017] 1 IBJ (PU) 4

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2017

IBBI/2017-18/GN/REG018 dated 5th October 2017

In exercise of the powers conferred by clause (t) of sub-section (1) of section 196 read with section 240 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, namely :

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2017.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, in regulation 38, after sub-regulation (1), the following sub-regulation shall be inserted, namely :–

"(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor."

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[2017] 1 IBJ (PU) 4

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2017

IBBI/2017-18/GN/REG019 dated 7th November 2017

In exercise of the powers conferred by clause (*t*) of sub-section (1) of section 196 read with section 240 of the Insolvency and Bankruptcy, Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, namely :

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2017.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as the principal regulations), in regulation 38, after sub-regulation (2), the following sub-regulation shall be inserted, namely :

"(3) A resolution plan shall contain details of the resolution applicant and other connected persons to enable the committee to assess the credibility of such applicant and other connected persons to take a prudent decision while considering the resolution plan for its approval.

Explanation : For the purposes of this sub-regulation, –

(*i*) 'details' shall include the following in respect of the resolution applicant and other connected person, namely :

(*a*) identity ;

(*b*) conviction for any offence , if any, during the preceding five years ;

(*c*) criminal proceedings pending, if any ;

(*d*) disqualification, if any, under Companies Act, 2013, to act as a director ;

(*e*) identification as a willful defaulter, if any, by any bank or financial institution or consortium thereof in accordance with the guidelines of the Reserve Bank of India ;

(*f*) debarment, if any, from accessing to, or trading in, securities markets under any order or directions of the Securities and Exchange Board of India ; and

(*g*) transactions, if any, with the corporate debtor in the preceding two years." ;

(*ii*) the expression 'connected persons' means –

(*a*) persons who are promoters or in the management or control of the resolution applicant ;

(*b*) persons who will be promoters or in management or control of the business the corporate debtor during the implementation of the resolution plan ;

(*c*) holding company, subsidiary company, associate company and related party of the persons referred to in items (*a*) and (*b*) .".

3. In the principal regulations, in regulation 39, for sub-regulation (2) ,the following sub-regulation shall be substituted, namely :

"(2) The resolution professional shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him :

(*a*) preferential transactions under section 43 ;

(*b*) undervalued transactions under section 45 ;

(*c*) extortionate credit transactions under section 50 ; and

(*d*) fraudulent transactions under section 66,

and the orders, if any, of the adjudicating authority in respect of such transactions.".

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[2017] 1 IBJ (PU) 5

Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2017

IBBI/2017-18/GN/REG020 dated 7th November 2017

In exercise of the powers conferred by clause (t) of sub-section (1) of section 196 read with section 240 of the Insolvency and Bankruptcy, Code, 2016 (31 of 2016), the Insolvency and Bankruptcy Board of India hereby makes the following regulations to amend the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017, namely :

1. (1) These regulations may be called the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2017.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 (hereinafter referred to as the principal regulations), in regulation 37, after sub-regulation (2), the following sub-regulation shall be inserted, namely :

"(3) A resolution plan shall contain details of the resolution applicant and other connected persons to enable the committee to assess the credibility of such applicant and other connected persons to take a prudent decision while considering the resolution plan for its approval.

Explanation: For the purposes of this sub-regulation,–

(*i*) 'details' shall include the following in respect of the resolution applicant and other connected persons, namely :

(*a*) identity ;

(*b*) conviction for any offence , if any, during the preceding five years ;

(*c*) criminal proceedings pending, if any ;

(*d*) disqualification, if any, under Companies Act, 2013, to act as a director ;

(*e*) identification as a willful defaulter, if any, by any bank or financial institution or consortium thereof in accordance with the guidelines of the Reserve Bank of India ;

(*f*) debarment, if any, from accessing to, or trading in, securities markets under any order or directions of the Securities and Exchange Board of India, ; and

(*g*) transactions, if any, with the corporate debtor in the preceding two years.

(*ii*) the expression 'connected persons' means –

(*a*) persons who are promoters or in the management or control of the resolution applicant ;

(*b*) persons who will be promoters or in management or control of the business of the corporate debtor during the implementation of the resolution plan ;

(*c*) holding company, subsidiary company, associate company and related party of the persons referred to in items (*a*) and (*b*).".

3. In the principal regulations, in regulation 38, for sub-regulation (2), the following sub-regulation shall be substituted, namely :

"(2) The resolution professional shall submit to the committee all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him : –

(*a*) preferential transactions under section 43 ;

(*b*) undervalued transactions under section 45 ;

(*c*) extortionate credit transactions under section 50 ; and

(*d*) fraudulent transactions under section 66,

and the orders, if any, of the adjudicating authority in respect of such transactions.".

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Global Arena

- Recent developments in International Insolvency Laws

[2017] 1 IBJ (GA) 2

Recent developments in International Insolvency Laws

Germany

Germany amended its Insolvency Code in December 2016 to provide clarity on the status of "netting" arrangements in financial transactions, while the country's Federal Fiscal Court tore up the rule book on tax relief for distressed companies in February.

The said new law is the result of the ruling of its Federal Court last year on June, 2016 wherein the Federal Court considered the netting provisions used in Germany's financial industries. The Federal Court of Justice in its decision held that the contractual provisions on netting arrangements in a financial contract are invalid if they deviate from the mandatory provisions set out in Section 104 of the German Insolvency Code.

The core of the reform is in revised Paragraph 4 of Section 104. This provides that counterparties may contractually agree on netting provisions which deviate from the statutory provisions governing termination and settlement of regulated contracts as long as the deviations are compatible with the essential principles of Section 104, thereby in principle upholding existing standard industry netting arrangements.

Further, reforms to clawback provisions were also enacted in February, reducing the period for clawback actions for wilful disadvantage from 10 years to 4 years. Clawback is an actionwhereby an employer or benefactor takes back money that has already been disbursed, sometimes with an added penalty.

Singapore

Singapore Incorporates UNCITRAL Model Law on Cross Border Insolvency

Singapore on enacting its Companies (Amendment) Act, 2017 on 23 May, 2017 finally implemented within its legal system UNCITRAL Model Law on Cross Border Insolvency. The basis of the incorporation of the Model Law by Singapore is the recommendation of its Insolvency Law Review Committee in 2013. It took almost three years for Singapore to finally adopt and implement these Model Laws. With the said implementation, it has become 42nd country to have legislation on the basis of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross Border Insolvency.

The UNCITRAL Model Law on Cross Border is a model law issued by secretariat of Unicitral on 30 May 1997 to assist states in relation to the regulation of corporate insolvency and financial distress involving companies which have assets or creditors in more than one state[1].The Model law aimed at providing systematic and efficient settlement of the financial distress cropping up in the dealings at the international sphere with the cooperation of the nations.

The Model Law provides for four elements[2] to resolve the cross border insolvency disputes and they are 'access[3]'to the to the courts of the enacting states, 'recognition'[4] of orders of foreign courts and simplified procedures for recognition of qualifying foreign proceedings[5], 'relief' (assistance) that is an interim relief on the discretion of the courts on the account of remedy available in the enacting state, and 'cooperation' among the courts of states where the debtor's assets are located[6].

The impact of incorporating said Model Law would be that now a foreign representative can apply to the Courts of Singapore for recognition of foreign insolvency proceedings making Singapore an international forum to resolve international insolvency. This is going to strengthen its role at the world forum, by building confidence of global entities on Singapore.

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[1] *https://en.wikipedia.org/wiki/UNCITRAL_Model_Law_on_Cross-Border_Insolvency, visited on 11 September, 2017*

[2] *http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html*

[3] *http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html*

[4] *http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html*

[5] *http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html*

[6] *http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html*

Introduction of Chapter 11

It has also introduced Chapter 11-inspired refinements to its scheme of arrangement mechanism in March 2017. It has also pledged to increase the availability of rescue financing, and (along with Delaware) was the first country to adopt the Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters in February 2017.

Changes to Singapore's insolvency regime include the following:

(a) Super priority rescue financing for companies in distress.

(b) Enhanced extra-territorial "moratorium" provisions against creditor action in schemes of arrangement and judicial management applications.

(c) Enhanced "cram-down" provisions which empower the court to cram down a group of dissenting creditors and approve a scheme of arrangement which has majority support.

(d) "Pre-packaged" schemes, which is an expedited scheme approval procedure for schemes of arrangement that have been pre-negotiated.

(e) Provisions to facilitate cross-border insolvency and restructuring - adoption of the UNCITRAL Model Law on Cross Border Insolvency, extension of the judicial management regime to foreign companies that meet certain criteria and abolition of the ring-fencing rule in the winding up of foreign companies.

New UAE Insolvency Law

A new law on insolvency was brought into force in December 2016 in UAE as Federal Bankruptcy Law under the Federal Decree No 9 of 2016. This new law is expected to be a boon for the UAE market. The main aim to bring this law is to keep up with the international standards and modernise the present legal system in relation to the insolvency.

Earlier insolvency law in UAE was more creditor-driven and focused more on the protecting creditors and had tiring and time consuming bankruptcy proceedings along with criminal penalties. In contrast to this, new law focused on determining the insolvency proceedings fast with extending its protection to companies as well as creditors.

This new law applies to the companies only and not to the individuals. The insolvency under new law is determined in a systematic manner wherein 'balance sheet' test is made the criteria to evaluate the company's capacity to pay its debts. It also provides for the formation of 'Financial Restructuring Committee' to maintain an approved list of insolvency experts and a register of insolvencies. It has wider application as compared to the earlier law and covers Companies governed by the commercial companies law (CCL), most free zone companies, sole establishments, Civil companies conducting professional business, Government-owned companies not established under the CCL, such as companies formed by decree etc. It also removes bankruptcy by default as a criminal offence.

The procedure under the new law is divided into three process i.e. protective composition, insolvency with restructuring and insolvency and liquidation thus not being so different from old law for not providing any provision as to out of court restructuring procedure.

However, this new law substantially meets the needs of the present and will be of great benefit for the business practices in UAE.

Key reforms :

1. *Determining insolvency* : Criteria for evaluating when a company is insolvent has been put into action. This 'balance sheet' test determines if the assets of a business are sufficient to cover its liabilities. This will be favourable in encouraging debtors facing difficulties to reach out for help to restructure at an early stage.
2. *A new regulatory body* : The Committee of Financial Restructuring (CFR) will maintain an approved list of experts in the field of financial restructuring. It will also administrate a register of insolvencies.
3. *Disqualification* : A disqualification system – similar to that found in English insolvency law – has been introduced. Directors found guilty of bankruptcy-connected offences may be

disqualified from playing any role connected with the administration of a company for up to five years and may also be subject to fines.

4. *Filing bankruptcy* : This must be made if a company is in a state of 'cessation of payments' of due and payable debts, or in a state of 'over-indebtedness' – in either case for 30 consecutive business days. A creditor may also petition for a company's bankruptcy if a statutory demand of Dhs100,000 (minimum) has been served, and has remained unpaid for 30 consecutive business days. Finally, the court or a regulator may also initiate bankruptcy proceedings.

European Commission aids the sale of the Novo Banco

The European Commission in earlier October this year, through its press release approved the Portuguese restructuring plan and support for the sale of Novo Banco. The measures to be taken are going to ensure its new private owner to launch its ambitious restructuring plan aimed at ensuring the long term viability of the bank, while limiting distortions to competition.

Earlier in this year Novo banco's, a Private Banking Company in Portugal, efforts to manage its liability failed when only nine of 36 investors of targeted notes accepted its offer. The offer was managed by Deutsche Bank, JP Morgan and Mediobanca. The deal was necessary for its sale to US investor Lone Star. The bank needed the acceptance of the offer by investors representing 75% of the 8.37n bn which will create 500m[7] of capital.

Mozambique's Debt Crises

Mozambique one of the fastest growing economies in the world is going through a rough time since last year, when it formally announced its debt levels being unsustainable and that it needs to restructure its repayment plan in order to get further aid from International Monetary Fund (IMF).

The Government of Mozambique is finding it difficult yet again to repay its debts to international creditors after being granted debt relief two decades ago from international market. The Mozambique's state owned companies borrowed a loan in 2013 from Swiss multinational financial services firm- Credit Suisse, and the Russian VTB bank[8], which were supposed to be invested into the fishing industry but however directed to buy arms. The Government hired an IMF expert last year as its central bank governor but still was unable to find recourse to repay its debts accounting 80% of its GDP.

And therefore, now World Bank got itself involved to aid this East African Country. The World Bank on its recent report suggested that debt restructuring dialogues are much needed for the Country's financial stability and to keep in check its debts.

It was reported that even though 2017 has been a better year for the Mozambique on the account of currency and inflation with gross domestic product growing 2.9%[9] in the first quarter, swing in its commodity prices are big threat to its economy. World Bank reported that interest rate being relatively highest in sub-Saharan Africa are causing restrictions to private sector and to support the private sector, it is required that microeconomic stability is restored through a balance of monetary and fiscal policies[10].

■■■

[7] *https://qz.com/895387/mozambique-may-have-a-way-out-of-its-billion-dollar-secret-debt-but-it-probably-wont-use-it/, visited on 17 September, 2017*

[8] *https://qz.com/895387/mozambique-may-have-a-way-out-of-its-billion-dollar-secret-debt-but-it-probably-wont-use-it/, visited on 17 September, 2017*

[9] *http://clubofmozambique.com/news/world-bank-says-mozambique-must-restructure-public-debt/, visited 17 September, 2017*

[10] *http://clubofmozambique.com/news/world-bank-says-mozambique-must-restructure-public-debt/, visited 17 September, 2017*

INVITATION FOR CONTRIBUTING AN ARTICLE

Readers are invited to contribute article/s for the Journal. The article should be on a topic of current relevance on Insolvency and Bankruptcy Law. The article should be original and of around 7-8 pages in word file (approx. 3000-4000 words). Send your articles at email id : gaganpreet.kaur@icsi.edu along with your complete details. The shortlisted articles shall be published in the Journal.

The Guidelines for submission of an article are as follows:

- Articles should be of current relevance on Insolvency and Bankruptcy Law.
- Articles must be in original form and must be sent exclusively for the Journal.
- Articles must neither have been published anywhere nor have been sent anywhere else for publication.
- Brief synopsis, not exceeding 150 words highlighting the main theme, to be provided.
- Articles should not be unduly long, ideal limit is 3000-4000 words.
- Divide discussion into convenient paras and sub-paras giving suitable captions to them.
- Lengthy excerpts from the judgments to be avoided.
- Avoid stating facts of the case; ratio of the judgment is enough.
- Reproduction of section/sub-section and lengthy extract from the source material in the foot notes is not necessary as the same does not help understanding the subject.
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