

PRACTICAL ASPECTS OF INSOLVENCY LAW

(Second Edition)



INSTITUTE OF INSOLVENCY PROFESSIONALS

A Wholly Owned Subsidiary of ICSI and Registered with IBBI

(Formerly known as ICSI Insolvency Professionals Agency)

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 **INSTITUTE OF INSOLVENCY PROFESSIONALS**

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PREFACE

Insolvency Resolution, the term, its relevance in the Indian context and the activity in its entirety, holds significance for reasons more than one. While on one hand, the process guides the Indian corporates on the verge of insolvency and bankruptcy to find ground and a befitting future; on the other, it finds place in the World Bank's Doing Business Index. The fact that India has risen up the ladder of this Index is a result of a long list of multifarious functions is evident but the role played by the eased out corporate resolution mechanism is inevitable.

The entire process of resolution of corporate insolvency has not only just undergone a facial makeover but a turnaround of sorts. From forming part of the Companies Act to being given a dedicated legislation under the garb of the Insolvency and Bankruptcy Code in 2016, the journey over the past five decades or so has been quite enthralling.

However, alike various other legislations, and furthermore, courtesy the nascent stage of the law and the process entailing, the entire corporate insolvency resolution mechanism has witnessed plethora of challenges in the practical application of the law, ranging from the initiation of the process to the hurdles facing insolvency professionals in taking over the business of corporate debtors, conducting meetings of committee of creditors, drafting and presenting documents before adjudicating authorities, the list seems to run long.

The book has been developed with the objective to cover all practical aspects of the legislation including but not limited to regulatory interpretations, landmark judgements, duties and liabilities of insolvency professionals, etc. It would surely be of assistance to the resolution professionals as regards the manner of applying to the National Company Law Tribunal for pursuing the process of resolution and also in identification of significant aspects, documents involved, critical issues of resolution process settled through landmark judgements, etc.

I would like to commend the dedicated efforts of the Team - ICSI Institute of Insolvency Professionals led by CS Lakshmi Arun, Head (Education & Training) (Designate) and Company Secretary, consisting of Mr. Vinay Kumar Sanduja, Senior Consultant, Ms. Anchal Jindal, Consultant, Mr. Amarjeet Singh, ex-senior consultant, Ms. Mehreen Rahman, ex-consultant, ICSI-IIP in revising this book under the overall supervision of CS Alka Kapoor, Chief Executive Officer (Designate), ICSI Institute of Insolvency Professionals.

I am sure that this publication will prove to be extremely helpful to the insolvency professionals.

CS MAKARAND LELE
President

May 11, 2018

Institute of Company Secretaries of India

ABOUT THE BOOK

The Insolvency and Bankruptcy Code, 2016 (Code) and the regulations framed there under have undergone various changes in the recent past including the passing of Insolvency and Bankruptcy Code (Amendment) Act, 2018, Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018, various circulars issued by Insolvency and Bankruptcy Board of India (IBBI), Reserve Bank of India (RBI) etc. Besides a number of landmark cases pronounced by National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) and Supreme Court have contributed towards development of jurisprudence on the Code.

First edition of the publication "*Practical aspects of Insolvency Law*" was very well received and on popular demand ICSI Institute of Insolvency Professionals (ICSI IIP, formerly known as ICSI Insolvency Professionals Agency) has come out with this updated second edition of publication "*Practical aspects of Insolvency Law*" which covers practical nuances during a resolution process including various procedural and drafting aspects.

Present thoroughly revised second edition contains formats of minutes/ agenda for the meeting of Committee of Creditors, Model Information Memorandum, Model Resolution Plan, format of Expression of Interest etc. Besides, this second edition contains updated judgements that would help Insolvency Professionals get an insight into the interpretation of provisions of the Code by NCLT, NCLAT, High Courts and Supreme Court.

I am certain that this publication will serve as a guide for Insolvency Professionals when taking up assignments and during the corporate insolvency resolution process (CIRP) and performing role of Interim Resolution Professional (IRP), Resolution Professional (RP) or Liquidator.

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

May 11, 2018

**CS ALKA KAPOOR
Chief Executive Officer
ICSI Institute of Insolvency Professionals (ICSI IIP)**

CONTENTS

Chapter No.	Topic	Page No.
I.	Applicability of the Insolvency and Bankruptcy Code, 2016	1
II	Understanding the basic definitions under the Code & their interpretation through various judgments	3
III	Eligibility, Qualifications, Duties and Liabilities of Insolvency Professionals	9
IV	Model Application for initiating CIRP by Financial Creditor, Operational Creditor and Corporate Applicant	29
V	Check list by NCLT for scrutiny of an Application and Dress Code	71
VI	Territorial jurisdiction of various benches of NCLT, their Location and Addresses	76
VII	Role of Interim Resolution Professional	78
	• Public announcement and regulatory intimations	79
	• Claims and constitution of Committee of Creditors	81
	• Committee of Creditors	90
	• Conduct of CIRP during the tenure of Interim Resolution Professional	93
	• First Meeting of Committee of Creditors	97
	• Voting by the Committee	102
VIII	Information Memorandum	140
IX	Contents of Resolution Plan and Model Resolution Plan	157
X	Critical Issues Settled Through Landmark Judgments	192

CHAPTER - I

**APPLICABILITY OF THE INSOLVENCY AND
BANKRUPTCY CODE, 2016**

Applicability of the Insolvency and Bankruptcy Code, 2016, as on date of notification i.e. 1st December, 2016

Section 2 of the Insolvency and Bankruptcy Code, 2016 (“**Code**”), provides that the provisions of the Code shall apply to:

- (a) any company incorporated under the Companies Act, 2013 or under any previous company law;
- (b) any other company governed by any Special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such Special Act;
- (c) any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008;
- (d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf; and
- (e) partnership firms and individuals, in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be.

Applicability of the Code vide the Insolvency and Bankruptcy Code (Amendment) Act, 2017

In view of the amendments brought out in the Code, vide the Insolvency and Bankruptcy Code (Amendment) Act, 2017 (“**Amendment Act**”) dated 18th January, 2018, clause (e) of section 2 of the Code has been substituted with the following :

- (e) personal guarantors to corporate debtors;
- (f) partnership firms and proprietorship firms; and
- (g) individuals, other than persons referred to in clause (e).

Thus, the Code is applicable to following :

- “(a) any company incorporated under the Companies Act, 2013 or under any previous company law;
- (b) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act;
- (c) any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008;
- (d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf;
- e) personal guarantors to corporate debtors;
- (f) partnership firms and proprietorship firms; and
- (g) individuals, other than persons referred to in clause (e),”

CHAPTER - II

UNDERSTANDING THE BASIC DEFINITIONS UNDER THE CODE & THEIR INTERPRETATION THROUGH VARIOUS JUDGEMENTS

A. “DEBT”

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.*

B. DEFAULT

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.*

In **Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustees Ltd.** [SEE ANNEXURE TO CHAPTER X], a question arose before the National Company Law Appellate Tribunal (“**NCLAT**”) that in absence of record of default as recorded with information utility or ‘any other record or evidence of default’ specified by Insolvency and Bankruptcy Board of India (“**IBBI**” or “**Board**”), whether application under section 7 of the Code is maintainable? It was held by NCLAT that:

- (i) Under section 239 of the Code, the Central Government has framed rules known as Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (“**Adjudicating Authority Rules**”). As per Rule 41 of Adjudicating Authority Rules, Financial Creditor filing application under section 7 of the Code is required to apply under Form I. Part V of Form I deals with Financial Debts, which includes documents, record and evidence of default.
- (ii) IBBI has framed Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons)

Regulations, 2016 (“**CIRP Regulations**”) which, under Regulation 8, provide for filing of claim by Financial Creditor under Form C.

- (iii) The rules framed by Central Government having prescribed the documents, record and evidence of default, the NCLAT rejected the contention that in absence of Regulations being framed by Board, the application deserved to be dismissed.

C. “ADJUDICATING AUTHORITY”

SECTION 5(1) “*Adjudicating Authority*”, for the purposes of this Part, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013.

In **J K Jute Mills Company Limited vs. M/s Surendra Trading Company** [SEE ANNEXURE TO CHAPTER X], decided by NCLAT, it was observed that the Code empowers the ‘Adjudicating Authority’ to pass orders under section 7, 9 and 10 of the Code and not the National Company Law Tribunal (“**NCLT**”). It is by virtue of definition under sub-section (1) of section 5 of the Code the NCLT plays its role as ‘Adjudicating Authority’ and not that of a Company Law Tribunal. Therefore, in strict sense, mandate under section 420 of the Companies Act cannot be transpose in Code by reading ‘orders of Tribunal’ as ‘orders of Adjudicating Authority’. The NCLAT thus held that Adjudicating Authority under the Code plays different roles as compared to NCLT under the Companies Act.

D. “DISPUTE”

Section 5(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.

Different opinions have been expressed by different benches of NCLT with regard to meaning of the term ‘dispute’.

In a judgment delivered in **Mobilox Innovations Private Limited vs. Kirusa Software Pvt. Ltd.** [SEE ANNEXURE TO CHAPTER X] by Hon’ble Supreme Court of India, the issue has been settled and it has been held that the term ‘dispute’ cannot be limited to a pending suit or arbitral proceeding and the word ‘and’ has to be read as ‘or’. Thus, the definition of word ‘dispute’ is inclusive one and not exclusive one.

E. “FINANCIAL DEBT”

Section 5(8) *“financial debt” means a debt alongwith 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 nonrecourse 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.*

F. “OPERATIONAL DEBT”

Section 5(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.*

In Renish Petrochem FZE vs. Ardor Global Pvt. Ltd. [SEE ANNEXURE-II.1] Renish Petrochem FZE supplied various goods to Ardor International Limited and the outstanding of Ardor International Limited was Rs. 15,35,40,909. The goods were supplied on the condition that payment of all and any sums of monies due and payable by Ardor International Limited shall at all times be guaranteed by Ardor Global Pvt. Ltd. - Corporate Debtor in this case. In this regard, Deed of Guarantee dated 01.09.2014 was also entered into between Renish Petrochem FZE and Ardor Global Pvt. Ltd. It was contended that Ardor Global Pvt. Ltd was a Principal Borrower from a different bank i.e. Central Bank of India whereas, it was only a guarantor to Ardor International Limited, therefore, insolvency proceedings insolvency could not be initiated by Renish Petrochem FZE, against Ardor Global Pvt. Ltd. The Adjudicating Authority noted that the provisions of Contract Act clearly show that liability of Principal Borrower and that of Guarantor is co-extensive to that of Principal Debtor and thus, it is wrong to contend that Operational Creditor i.e. Renish Petrochem FZE could not proceed against Ardor Global Pvt. Ltd.

It was further contended that amount due under a contract of guarantee from Corporate Debtor is not an 'operational debt'. The Adjudicating Authority noted the definition of word 'claim', as defined in section 3(6) and observed that when the definition of 'claim' is inserted into the definition of 'operational debt' in section 5(21), it includes 'amount payable under Guarantee Agreement' also and thus an 'operational debt'. It was further observed that perusal of Deed of Guarantee dated 01.09.2014 executed by Corporate Debtor in favour of applicant showed that Corporate Debtor undertook to pay entire amount due by Ardor International Limited towards supply of goods to it not only as a guarantor but also as sole principal obligor.

In M/s Wanbury Ltd. vs. M/s Panacea Biotech Ltd. [SEE ANNEXURE-II.2], question before the NCLT, Chandigarh Bench was whether the claim for interest falls within the term 'debt' which the corporate debtor (in that case) was liable to pay, failing which the operational creditor is entitled to an order of admission in terms of section 9 of the Code. The Bench observed that "there is a marked difference between the definite of term 'financial debt' and 'operational debt'. Under section 5(8) of the Code, the term 'financial debt' means a debt along with interest, if any, which is disbursed against the consideration for time value of money and that is an inclusive definition. In the definition of the term 'operational debt' under section 5 (21) the word 'interest' is

not mentioned.” Accordingly, it was held that the term ‘operational debt’ does not include ‘interest’.

In appeal before the NCLAT however, since the matter was settled, there is no authoritative pronouncement by NCLAT on this aspect.

G. “FINANCIAL INSTITUTION”

Section 5(14) “*financial institution*” means —

- (a) a scheduled bank;
- (b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934;
- (c) public financial institution as defined in clause (72) of section 2 of the Companies Act, 2013; and
- (d) such other institution as the Central Government may by notification specify as a financial institution.

In **Smart Timing Steel Ltd. vs. National Seed and Agro Industries Ltd.** [SEE ANNEXURE TO CHAPTER X], NCLAT interpreted the term financial institution and held that filing of certificate from such financial institution is mandatory.

In **Macquarie Bank Limited vs. Shilpi Cable Technologies Ltd.**, [SEE ANNEXURE TO CHAPTER X], a question arose whether filing of certificate from a financial institution maintaining accounts of operational creditor confirming that there is no payment of unpaid operational debt is mandatory or directory? The question arose in the backdrop of an operational creditor maintaining accounts with a foreign banker who failed to file certificate from a financial institution under section 9(3) (c) of the Code.

Hon’ble Supreme Court observed that there may be situations where a foreign supplier may have a foreign banker who is not within the meaning of ‘financial institution’ under section 3(14) of the Code. However, such foreign supplier would be an operational creditor as established from reading of definition of ‘person’ contained in section 3(23), as including person resident outside India, together with definition of ‘operational creditor’ in section 5(20). Thus, the Code cannot be construed in a discriminatory fashion so as to include only those operational creditors who are residents outside India who happen to bank with financial institutions which may be included under section 3(14) of the Code.

Thus, Hon'ble Supreme Court held that filing of certificate from a financial institution maintaining accounts of operational creditor confirming that there is no payment of unpaid operational debt is not mandatory but only directory.

H. **"FINANCIAL CREDITOR"**

Section 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.*

In **Nikhil Mehta & Sons vs. AMR Infrastructure Ltd.** [SEE ANNEXURE TO CHAPTER X], NCLAT interpreted the term 'financial creditor' and held that the buyers (in that case) were "investors" who had chosen the "committed return plan". NCLAT noted from the Annual Return and Form 16-A of the Builder that they had treated the buyers as "investors" and borrowed amount pursuant to sale purchase agreement for their commercial purpose treating at par with loan in their return. The amount disbursed by buyers was thus 'against the consideration of time value of money' and the buyers were 'financial creditors'.

In **Neelkanth Township and Construction Pvt. Ltd. (supra)**, NCLAT, while considering the question whether the appellant, in that case, was financial creditor or not, considered the definition of 'financial creditor' and 'financial debt' and observed that 'debentures' come within the meaning of 'financial debt'. Since the appellant in the present case was a debenture holder, the appellant was held to be financial creditor.

I. **RESOLUTION APPLICANT**

Section 5(25)¹ *"resolution applicant" means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25.*

¹ Substituted by section 3(a) of the Insolvency and Bankruptcy Code (Amendment) Act, 2017 (w.e.f. 23-11-2017).

CHAPTER - III

**ELIGIBILITY, QUALIFICATIONS, DUTIES AND
LIABILITIES OF INSOLVENCY PROFESSIONALS**

Insolvency Professionals

Section 206 of the Code provides that no person shall render his services as insolvency professional under this Code without being enrolled as a member of an insolvency professional agency and registered with the Board.

Section 207 of the Code provides that every insolvency professional shall, after obtaining the membership of any insolvency professional agency, register himself with the Board within such time, in such manner and on payment of such fee, as may be specified by regulations.

Eligibility for Enrolment as an Insolvency Professional

In order to enroll as an Insolvency Professional, a professional needs to comply with the eligibility criteria as provided under Regulation 4 of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 (“**IP Regulations**”). The stated Regulations provide that, that no individual shall be eligible to be registered as an insolvency professional if he-

- (a) is a minor;
- (b) is not a person resident in India;
- (c) does not have the qualification and experience criteria specified in regulation 5;
- (d) has been convicted by any competent court for an offence punishable with imprisonment for a term exceeding six months or for an offence involving moral turpitude and a period of five years has not elapsed from the date of expiry of the sentence;

Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be registered;

- (e) he is an undischarged insolvent or has applied to be adjudicated as an insolvent;
- (f) has been declared to be of unsound mind; or
- (g) he is not a fit and proper person.

For determining, whether an individual is fit and proper under IP Regulations, 2016, IBBI may take account of any consideration as it deems fit, including but not limited to the following criteria:

- (a) Integrity, reputation and character,
- (b) Absence of convictions and restraint orders, and
- (c) Competence, including financial solvency and net worth.

Further, in addition to the above stated Regulations, professionals also need to take in consideration Bye-Law 9 of Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 (“**Model Bye-Laws Regulations**”) which provides that no individual shall be enrolled as a professional member if he is not eligible to be registered as an insolvency professional with the Board.

Proviso to Bye-Law 9 of Model Bye-Laws further provides that the Governing Board may provide additional eligibility requirements for enrolment.

Second Proviso to Bye-Law 9 of Model Bye-Laws further provides that such additional requirements shall not discriminate on the grounds of religion, race, caste, gender, place of birth or professional affiliation.

Qualifications for registration as an Insolvency Professional

In order to enroll as an Insolvency Professional, besides eligibility criteria, a professional also needs to fulfill the qualification criteria also as specified under Regulation 5 of IP Regulations which provides that:

An individual shall be eligible for registration, if he –

- (a) has passed the National Insolvency Examination (not yet in force);
- (b) has passed the Limited Insolvency Examination and has fifteen years of experience in management after receiving a Bachelor’s degree from a university established or recognized by law; or
- (c) has passed the Limited Insolvency Examination and has ten years of experience as –

- A Chartered Accountant enrolled as a member of the Institute of Chartered Accountants of India,
- A Company Secretary enrolled as a member of the Institute of Company Secretaries of India,
- A Cost Accountant enrolled as a member of the Institute of Cost Accountants of India,
- An advocate enrolled with a Bar Council.

Duties of an Insolvency Professional

While practicing as an insolvency professional, the professional member has to perform certain sets of duties as illustrated under Regulation 13 of Model Bye-Laws Regulations which provides that every Insolvency Professional is mandatorily required :

- (a) To act in good faith in discharge of his duties as an Insolvency Professional.
- (b) To maximize the value of assets of the debtor.
- (c) To discharge functions with utmost integrity and objectivity.
- (d) To act independently and impartially.
- (e) To discharge functions with the highest standards of professional competence and professional ethics.
- (f) To continuously upgrade the professional expertise.
- (g) To perform duties as quickly and efficiently as reasonable, subject to the timelines under the Code.
- (h) To comply with applicable laws in the performance of his functions.
- (i) To maintain confidentiality of information obtained in the course of his professional activities unless required to disclose such information by law.

Further, in addition to the above mentioned duties, every insolvency professional shall also take in consideration the following duties as prescribed by IBBI vide its various circulars:

- (l) **Disclosures by Insolvency Professionals and other Professionals appointed by Insolvency Professionals conducting Resolution Processes**

Circular No. IP/005/2018 dated 16th January, 2018 provides that an Insolvency Professional shall disclose his relationship, if any, with (i) the Corporate Debtor, (ii) other Professional(s) engaged by him, (iii) Financial Creditor(s), (iv) Interim Finance Provider(s), and (v) Prospective Resolution Applicant(s) to the Insolvency Professional Agency (“IPA”) of which he is a member, within the time specified as under

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

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

<i>Relationship of the other Professional(s) with</i>	<i>Disclosure to be made within three days of</i>
The Insolvency Professional	the appointment of the other Professional.
Corporate Debtor	the appointment of the other Professional.

Financial Creditor(s)	constitution of Committee of Creditors.
Interim Finance Provider(s)	the agreement with the Interim Finance Provider or three days of the appointment of the other Professional, whichever is later.
Prospective Resolution Applicant(s)	the supply of information memorandum to the Prospective Resolution Applicant or three days of the appointment of the other Professional, whichever is later.
If relationship with any of the above comes to notice or arises subsequently	of such notice or arising.

Under this circular, the IPAs have also been cast with a responsibility to disseminate such disclosures on its website within three working days of receipt of the disclosure. The circular is annexed as **Annexure III.1**.

(II) Fees payable to an Insolvency Professional and to other professionals appointed by an Insolvency Professional

Circular No. IP/004/2018 dated 16th January, 2018 provides that an Insolvency Professional shall render services for a fee which is a reasonable reflection of his work, raise bills / invoices in his name towards such fees, and such fees shall be paid to his bank account. Any payment of fees for the services of an insolvency professional to any person other than the insolvency professional shall not form part of the insolvency resolution process cost. The circular is annexed as **Annexure III.2**.

(III) Insolvency Professional to ensure compliance with provisions of the applicable laws

Circular No. IP/002/2018 dated 3rd January, 2018 provides that a corporate person undergoing insolvency resolution process, fast track insolvency resolution process, liquidation process or voluntary liquidation process under the Code needs to comply with provisions of the applicable laws during such process. It directs that while acting as an Interim Resolution Professional (“**IRP**”), Resolution Professional

(“RP”) or a Liquidator, an Insolvency Professional shall exercise reasonable care and diligence and take all necessary steps to ensure that the corporate person undergoing any process under the Code complies with the applicable laws.

Further, the circular provides that if a corporate person during any of the aforesaid processes under the Code suffers any loss, including penalty, if any, on account of non-compliance of any provision of the applicable laws, such loss shall not form part of insolvency resolution process cost or liquidation process cost under the Code and states that in such a scenario, the Insolvency Professional will be responsible for the non-compliance of the provisions of the applicable laws if it is on account of his conduct. The circular is annexed as **Annexure III.3**.

(IV) Insolvency Professional not to outsource his responsibilities

This Circular No. IP/003/2018 dated 3rd January, 2018 provides that an IRP shall not outsource any of his duties and responsibilities under the Code and that he shall not require any certificate from another person certifying eligibility of a resolution applicant. The circular is annexed as **Annexure III.4**.

(V) Insolvency professional to use Registration Number and Registered Address in all his communications

This Circular No. IP/001/2018 dated 3rd January, 2018 provides that an Insolvency Professional shall prominently state: (i) his name, address and email, as registered with the IBBI, (ii) his Registration Number as an insolvency professional granted by the IBBI, and (iii) the capacity in which he is communicating in all his communications, whether by way of public announcement or otherwise to a stakeholder or to an authority. The circular is annexed as **Annexure III.5**.

Obligations of an Insolvency Professional

While undertaking any assignment under the Code, an Insolvency Professional shall abide by Code of Conduct as provided under Section 208(2)(d) of the Code, which requires an Insolvency Professional:

- (a) to take reasonable care and diligence while performing his duties;
- (b) to comply with all requirements, terms and conditions specified in the bye-laws of the insolvency professional agency of which he is member;

- (c) to allow the insolvency professional agency to inspect his records;
- (d) to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the Insolvency Professional Agency of which he is a member; and
- (e) to perform his functions in such manner and subject to such conditions as may be specified.

In addition to above, an Insolvency Professional is also under a mandate to abide by the First Schedule of the Code of Conduct prescribed under IP Regulations. The key central areas of Code of Conduct are:

- (a) Integrity and Objectivity
- (b) Independence and Impartiality
- (c) Professional Competence
- (d) Representation of correct facts and correcting misapprehensions
- (e) Observance of timeliness
- (f) Competence to manage information
- (g) Maintenance of confidentiality
- (h) To always take in consideration occupation, employability and restrictions
- (i) To charge remuneration and costs in a fair and transparent manner
- (j) Not to accept gifts and hospitality

Annexure III.1

Insolvency and Bankruptcy Board of India
7th Floor, Mayur Bhawan, Connaught Place, New Delhi-110001

CIRCULAR

No. IP/005/2018

16th January, 2018

To

All Registered Insolvency Professionals

All Registered Insolvency Professional Agencies

(By mail to registered email addresses and on web site of the IBBI)

Dear Madam / Sir,

Sub: Disclosures by Insolvency Professionals and other Professionals appointed by Insolvency Professionals conducting Resolution Processes.

The Insolvency and Bankruptcy Code, 2016 read with regulations made thereunder provide for appointment of an insolvency professional [(Interim Resolution Professional (IRP) / Resolution Professional (RP)] to conduct the resolution process (Corporate Insolvency Resolution Process and the Fast Track Process) and discharge other duties. These authorise the Insolvency Professional to appoint registered valuers, accountants, legal and other professionals to assist him in discharge of his duties in resolution process.

2. In the interest of transparency, it has been decided that an insolvency professional and every other professional appointed by the insolvency professional for a resolution process shall make disclosures as specified in Para 3 to 5 hereunder.

3. An insolvency professional shall disclose his relationship, if any, with (i) the Corporate Debtor, (ii) other Professional(s) engaged by him, (iii) Financial Creditor(s), (iv) Interim Finance Provider(s), and (v) Prospective Resolution Applicant(s) to the Insolvency Professional Agency of which he is a member, within the time specified as under:

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

4. An insolvency professional shall ensure disclosure of the relationship, if any, of the other professional(s) engaged by him with (i) himself, (ii) the Corporate Debtor, (iii) Financial Creditor(s), (iv) Interim Finance Provider(s), and (v) Prospective Resolution Applicant(s) to the Insolvency Professional Agency of which he is a member, within the time specified as under:

Relationship of the other Professional(s) with	Disclosure to be made within three days of
The Insolvency Professional	the appointment of the other Professional.
Corporate Debtor	the appointment of the other Professional.
Financial Creditor(s)	constitution of Committee of Creditors.
Interim Finance Provider(s)	the agreement with the Interim Finance Provider or three days of the appointment of the other Professional, whichever is later.
Prospective Resolution Applicant(s)	the supply of information memorandum to the Prospective Resolution Applicant or three days of the appointment of the other Professional, whichever is later.
If relationship with any of the above comes to notice or arises subsequently	of such notice or arising.

5. For the purpose of Para 3 and 4 above, 'relationship' shall mean any one or more of the four kinds of relationships at any time or during the three years preceding the appointment:

Kind of Relationship	Nature of Relationship
A	Where the Insolvency Professional or the Other Professional, as the case may be, has derived 5% or more of his / its gross revenue in a year from professional services to the related party.
B	Where the Insolvency Professional or the Other Professional, as the case may be, is a Shareholder, Director, Key Managerial Personnel or Partner of the related party.
C	Where a relative (Spouse, Parents, Parents of Spouse, Sibling of Self and Spouse, and Children) of the Insolvency Professional or the Other Professional, as the case may be, has a relationship of kind A or B with the related party.
<u>D</u>	Where the Insolvency Professional or the Other Professional, as the case may be, is a partner or director of a company, firm or LLP, such as, an Insolvency Professional Entity or Registered Valuer, the relationship of kind A, B or C of every partner or director of such company, firm or LLP with the related party.

6. An Insolvency Professional Agency shall facilitate receipt of disclosures as required above. It shall disseminate such disclosures on its web site within three working days of receipt of the disclosure. A model schematic presentation of disclosures for guidance of Insolvency Professional Agencies and Insolvency Professionals is enclosed at Annexure A.

7. The Insolvency Professional shall provide a confirmation to the Insolvency Professional Agency to the effect that the appointment of every other professional has been made at arms' length relationship.

8. The disclosures shall be made in respect of ongoing resolution processes as on date and all subsequent resolution processes. The disclosures due on date in respect of the ongoing processes shall be made to the respective Insolvency Professional Agency by 31st January, 2018.

9. The Insolvency Professional shall ensure timely and correct disclosures by him and the other Professionals appointed by him. Any wrong disclosure and delayed disclosure shall attract action against the Insolvency Professional and the other Professional as per the provisions of the law.

10. This circular is issued in exercise of powers under section 196 read with sections 204 and 208 of the Insolvency and Bankruptcy Code, 2016, in consultation with the Insolvency Professional Agencies.

Yours faithfully,
-Sd-

(I. Sreekara Rao)
Deputy General Manager
Email: sreekararao@ibbi.gov.in

Annexure A

Disclosures by the Insolvency Professionals and other Professionals appointed by the Insolvency Professionals conducting Resolution Processes of (Corporate Debtor)

IP/Other Professional engaged by the IP	Name of Professional	Professional Membership No.	PAN	Relationship with					
				IRP/ RP	Other Professional (Registered Valuer/ Accountant/ Advocate/ Any other Professional)	Corporate Debtor	Name of Financial Creditor(s)	Interim Finance Provider(s)	Name of Prospective Resolution Applicant (s)
IRP/RP				NA					
Registered Valuer				NA					
Accountant				NA		A			
Advocate				NA					
Any other Professional (Write kind of Profession)				NA					

Notes:

- i. NA: Not Applicable.
- ii. Additional rows and columns to be inserted, as required, where there are more than one professional, financial creditor, interim finance provider or prospective resolution applicant.
- iii. Where an Accountant has relationship of kind A with a Financial Creditor, relevant cell will display 'A', as indicated in the above table. One may click on 'A' to find details of relationship.

Annexure III.2

Insolvency and Bankruptcy Board of India

7th Floor, Mayur Bhawan,
Connaught Place, New Delhi-110001

CIRCULAR

No. IP/004/2018

16th January, 2018

To

All Registered Insolvency Professionals

All Registered Insolvency Professional Agencies

(By mail to registered email addresses and on web site of the IBBI)

Dear Madam / Sir,

Sub: Fees payable to an insolvency professional and to other professionals appointed by an insolvency professional.

Section 206 of the Insolvency and Bankruptcy Code, 2016 (Code) provides that only a person registered as an insolvency professional with the Insolvency and Bankruptcy Board of India (IBBI) can render services as an insolvency professional under the Code. Section 23 read with section 5(27) of the Code requires that an insolvency professional, who is appointed as an interim resolution professional or a resolution professional, shall conduct the entire corporate insolvency resolution process, including fast track process. In terms of section 5(13) of the Code, 'the fees payable to any person acting as a resolution professional' is included in 'insolvency resolution process cost', which needs to be paid in priority.

2. The Code of Conduct for Insolvency Professionals under the IBBI (Insolvency Professionals) Regulations, 2016 require that an insolvency professional must provide services for remuneration which is charged in a transparent manner, and is a reasonable reflection of the work necessarily and properly undertaken. He shall not accept any fees or charges other than those which are disclosed to and approved by the persons fixing his remuneration.

3. In view of the above, it is clarified that an insolvency professional shall render services for a fee which is a reasonable reflection of his work, raise bills / invoices in his name towards such fees, and such fees shall be paid to his bank account. Any payment of fees for the services of an insolvency

professional to any person other than the insolvency professional shall not form part of the insolvency resolution process cost.

4. Similarly, any other professional appointed by an insolvency professional shall raise bills / invoices in his / its (such as registered valuer) name towards such fees, and such fees shall be paid to his / its bank account.

5. This circular is issued in exercise of powers under section 196 read with section 208 of the Insolvency and Bankruptcy Code, 2016.

Yours faithfully,

-Sd-

(I. Sreekara Rao)

Deputy General Manager

Email: sreekararao@ibbi.gov.in

Annexure III.3

Insolvency and Bankruptcy Board of India

7th Floor, Mayur Bhawan
Connaught Place, New Delhi-110001

CIRCULAR

No. IP/002/2018

3rd January, 2018

To

All Registered Insolvency Professionals

All Registered Insolvency Professional Agencies

(By mail to registered email addresses and on the web site of the IBBI)

Dear Madam / Sir,

Sub: Insolvency professional to ensure compliance with provisions of the applicable laws.

A corporate person undergoing insolvency resolution process, fast track insolvency resolution process, liquidation process or voluntary liquidation process under the Insolvency and Bankruptcy Code, 2016 (Code) needs to comply with provisions of the applicable laws (Acts, Rules and Regulations, Circulars, Guidelines, Orders, Directions, etc.) during such process. For example, a corporate person undergoing insolvency resolution process, if listed on a stock exchange, needs to comply with every provision of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, unless the provision is specifically exempted by the competent authority or becomes inapplicable by operation of law for the corporate person.

2. It is hereby directed that while acting as an Interim Resolution Professional, a Resolution Professional, or a Liquidator for a corporate person under the Code, an insolvency professional shall exercise reasonable care and diligence and take all necessary steps to ensure that the corporate person undergoing any process under the Code complies with the applicable laws.

3. It is clarified that if a corporate person during any of the aforesaid processes under the Code suffers any loss, including penalty, if any, on account of non-compliance of any provision of the applicable laws, such loss shall not form part of insolvency resolution process cost or liquidation process cost under the Code. It is also clarified that the insolvency professional will be

responsible for the non-compliance of the provisions of the applicable laws if it is on account of his conduct.

4. This circular is issued in exercise of powers under section 196 read with section 208 of the Insolvency and Bankruptcy Code, 2016.

Yours faithfully,

-Sd-

(I. Sreekara Rao)

Deputy General Manager

Email: sreekararao@ibbi.gov.in

Annexure III.4

Insolvency and Bankruptcy Board of India

7th Floor, Mayur Bhawan
Connaught Place, New Delhi-110001

CIRCULAR

No. IP/003/2018

3rd January, 2018

To

All Registered Insolvency Professionals

All Registered Insolvency Professional Agencies

(By mail to registered email addresses and on web site of the IBBI)

Dear Madam / Sir,

Sub: Insolvency professional not to outsource his responsibilities.

The Insolvency and Bankruptcy Code, 2016 (Code) read with regulations made thereunder cast specific duties and responsibilities on an insolvency professional. An insolvency professional is required to perform certain tasks under the Code while acting as an Interim Resolution Professional, a Resolution Professional, a Liquidator or a Bankruptcy Trustee for various processes. For example, an insolvency professional is required to manage the operations of the corporate debtor as a going concern. He is also required to invite resolution plans, examine them and present to the committee of creditors for its approval such resolution plans which comply with the provisions of the Code. To assist him in carrying out his responsibilities, the Code read with regulations allow an insolvency professional to appoint accountants, legal or other professionals, as may be necessary.

2. It has been observed that a few insolvency professionals are advising the prospective resolution applicants to submit a certificate from another person to the effect that they are eligible to be resolution applicants. This requirement amounts to outsourcing responsibilities of an insolvency professional to another person. Further, this adds to cost of the resolution applicant and delays submission of resolution plans. The Code read with regulations do not envisage such a certification from a third person.

3. It is hereby directed that an insolvency resolution professional shall not outsource any of his duties and responsibilities under the Code. He shall

not require any certificate from another person certifying eligibility of a resolution applicant.

4. This circular is issued in exercise of powers under section 196 read with section 208 of the Insolvency and Bankruptcy Code, 2016.

Yours faithfully,

-Sd-

(I. Sreekara Rao)

Deputy General Manager

Email: sreekararao@ibbi.gov.in

Annexure III.5

Insolvency and Bankruptcy Board of India

7th Floor, Mayur Bhawan
Connaught Place, New Delhi-110001

CIRCULAR

No. IP/001/2018

3rd January, 2018

To

All Registered Insolvency Professionals

All Registered Insolvency Professional Agencies

(By mail to registered email addresses and on web site of the IBBI)

Dear Madam / Sir,

Sub: Insolvency professional to use Registration Number and Registered Address in all his communications.

It has been observed that a few insolvency professionals are using different addresses and emails while communicating with the stakeholders, despite repeated advice from the Insolvency Bankruptcy Board of India (IBBI) to use the addressees and emails registered with the IBBI in all their communications.

2. It is hereby directed that in all his communications, whether by way of public announcement or otherwise to a stakeholder or to an authority, an insolvency professional shall prominently state: (i) his name, address and email, as registered with the IBBI, (ii) his Registration Number as an insolvency professional granted by the IBBI, and (iii) the capacity in which he is communicating (Example: As Interim Resolution Professional of XYZ Limited, As Resolution Professional of ABC Limited, etc.).

3. Additionally, an insolvency professional may use a process (Example: CIRP, Liquidation, etc.) specific address and email in its communications, if he considers it necessary subject to the conditions that: (i) the process specific address and email are in addition to the details required in Para 2 above, and (ii) the insolvency professional continues to service the process specific address and email for at least six months from conclusion of his role in the process.

4. This circular is issued in exercise of powers under section 196 read with section 208 of the Insolvency and Bankruptcy Code, 2016.

Yours faithfully,

-Sd-

(I. Sreekara Rao)

Deputy General Manager

Email: sreekararao@ibbi.gov.in

CHAPTER IV

**MODEL APPLICATION FOR INITIATING CIRP BY
FINANCIAL CREDITOR, OPERATIONAL CREDITOR
AND CORPORATE APPLICANT**

I. APPLICATION BY FINANCIAL CREDITOR

Regulatory Framework For Initiating Corporate Insolvency Resolution Process By Financial Creditor

Financial Creditor to File Application Either Singly or Jointly

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

“(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”.

Section 4 of the Code provides that Part II (Insolvency Resolution and Liquidation For Corporate Persons) of the Code shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees.

Explanation to sub-section (1) of section 7 of the Code further provides that 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.

Application To Be Accompanied With Requisite Fee and Documents

Sub-Section (2) to Section 7 of the Code states that 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.

Schedule I to the Adjudicating Authorities Rules provides that an application by financial creditor to initiate corporate insolvency resolution process shall be accompanied with a fee of Rs. 25,000/-.

Further, Rule 4 of the Adjudicating Authority Rules provides that a financial

creditor making application for initiating corporate insolvency resolution process shall make the application in **Form 1** and shall be accompanied with documents and records as specified in CIRP Regulations.

Regulation 8 to CIRP Regulations provides that a financial creditor may prove the existence of a financial debt on the basis of following records:

- (a) the records available with an information utility, if any; or
- (b) other relevant documents, including –
 - (i) a financial contract supported by financial statements as evidence of the debt;
 - (ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;
 - (iii) financial statements showing that the debt has not been repaid; or
 - (iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.

Sub-rule 2 of Rule 4 of the Adjudicating Authority Rules states as under:

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

Sub-rule 3 of Rule 4 of the Adjudicating Authority Rules further reads as under:

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

Documents to be furnished along with the application

Sub-Section (3) of Section 7 of the Code provides as under:

- “(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.”*

Adjudicating Authority to ascertain default within 14 days of receipt of application

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

(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).

Adjudicating Authority to admit or reject the application

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

“(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.”

Date of Commencement of Corporate Insolvency Resolution Process

Sub-Section (6) of Section 7 of the Code provides as under

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

Communication of Decision by Adjudicating Authority

Sub-Section (7) of Section 7 of the Code provides as under

“(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.”*

MODEL APPLICATION FOR INITIATING CORPORATE INSOLVENCY RESOLUTION PROCESS BY FINANCIAL CREDITOR

FORM 1

(See sub-rule (1) of Rule 4)

**APPLICATION BY FINANCIAL CREDITOR(S) TO INITIATE
CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER THE
CODE**

*[Under section 7 of the Insolvency and Bankruptcy Code, 2016 read with
Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating
Authority) Rules, 2016]*

To,

September 14, 2017

The National Company Law Tribunal
Principal Bench
Block 3, CGO Complex,
Pragati Vihar, New Delhi
Delhi -110014

From,

ABC Bank of India
1st Floor, XYZ Complex
Delhi-110081

In the matter of XYZ Limited

**Subject: Application to initiate corporate insolvency resolution process
in respect of XYZ Limited under the Insolvency and Bankruptcy Code,
2016**

Madam/Sir,

ABC Bank of India, hereby submits this application to initiate a corporate insolvency resolution process in the matter of XYZ Limited. The details for the purpose of this application are set out below:

Part-I
PARTICULARS OF APPLICANT
(FOR EACH FINANCIAL CREDITOR MAKING THE APPLICATION)

1. NAME OF FINANCIAL CREDITOR	ABC Bank of India
2. DATE OF INCORPORATION OF FINANCIAL CREDITOR	01.01.1978
3. IDENTIFICATION NUMBER OF FINANCIAL CREDITOR	U00000MA1836PTC009552
4. ADDRESS OF THE REGISTERED OFFICE OF FINANCIAL CREDITOR	1 st Floor, XYZ Complex Delhi-110081
5. NAME AND ADDRESS OF THE PERSON AUTHORISED TO SUBMIT APPLICATION ON ITS BEHALF (ENCLOSE AUTHORISATION)	Mr. ABC X-999, XXX Road, New Delhi-110056
6. NAME AND ADDRESS OF THE PERSON RESIDENT IN INDIA AUTHORISED TO ACCEPT THE SERVICE OF PROCESS ON ITS BEHALF (ENCLOSE AUTHORISATION)	Mr. ABC X-999, XXX Road, New Delhi-110056

Part II
PARTICULARS OF CORPORATE DEBTOR

1. NAME OF THE CORPORATE DEBTOR	XYZ LIMITED
2. IDENTIFICATION NUMBER OF CORPORATE DEBTOR	V2929GF2001PTC0024152
3. DATE OF INCORPORATION OF CORPORATE DEBTOR	JANUARY 01, 2001
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)	NOMINAL SHARE CAPITAL:- Rs. 10,00,000 PAID UP SHARE CAPITAL:- Rs. 10,00,000
5. ADDRESS OF THE REGISTERED OFFICE OF THE CORPORATE DEBTOR	4 th FLOOR, PMM BUILDING, STREET NO.1, DELHI- 110044

PART-III
PARTICULARS OF THE PROPOSED
INTERIM RESOLUTION PROFESSIONAL

<p>1. NAME, ADDRESS, E-MAIL ADDRESS AND THE REGISTRATION NUMBER OF THE PROPOSED INSOLVENCY PROFESSIONAL</p>	<p>NAME:-Mr. PQR ADDRESS FOR CORRESPONDENCE: - OFFICE NO. 3, ABC COMPLEX, DELHI E-MAIL:-info@abc.com IP REGISTRATION NUMBER: -IBBI/IPA-004/IP-09054/2017-18/5151</p>
--	--

Part-IV
PARTICULARS OF FINANCIAL DEBT

<p>1. TOTAL AMOUNT OF DEBT GRANTED DATE OF DISBURSEMENT</p>	<p>TOTAL AMOUNT OF DEBT:- Term loan of Rs. 1,00,53,000 was given for a period of 5 years.</p> <p>The aforesaid loan was disbursed in three trenches in the following manner:</p> <ol style="list-style-type: none"> 1. Rs 33,51,000 was disbursed vide sanction letter dated 15 January 2011 2. Rs 33,51,000 was further disbursed vide sanction letter dated 15 July 2011 3. Rs 33,51,000 was further disbursed vide sanction letter dated 15 December 2011
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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)	TOTAL AMOUNT OF DEFAULT:- Rs. 1,15,60,950/- DATE ON WHICH DEFAULT OCCURRED January 15, 2017
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Part-V

PARTICULARS OF FINANCIAL DEBT

[DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]

1. PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER CREDITOR ATTACH A COPY OF CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)	Security Held: 1. Deed of Hypothecation of movables dated 15.01.2011 for a value of Rs. 50 crores. (EXHIBIT-1) 2. Equitable Mortgage of immovable property vide mortgage deed dated 15.01.2011 for a value of Rs. 50,53,000 (EXHIBIT-2) 3. Term Loan Agreement dated 15 January, 2011 4. Term Loan Agreement dated 15 July, 2011 5. Term Loan Agreement dated 15 December, 2011 (EXHIBIT-3)
2. PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)	NA
3. RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)	NA

4. 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)	NA
5. THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE (ATTACH A COPY)	EXHIBIT-3
6. A RECORD OF DEFAULT AS AVAILABLE WITH ANY CREDIT INFORMATION COMPANY (ATTACH A COPY)	EXHIBIT-4
7. COPIES OF ENTRIES IN A BANKERS BOOK IN ACCORDANCE WITH THE BANKERS BOOKS EVIDENCE ACT, 1891 (18 OF 1891) (ATTACH A COPY)	EXHIBIT-5
8. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF FINANCIAL DEBT, THE AMOUNT AND DATE OF DEFAULT.	NA

I, hereby certify that, to the best of my knowledge, Mr. PQR is fully qualified and permitted to act as an insolvency professional in accordance with the Insolvency and Bankruptcy Code, 2016 and the associated rules and regulations.

ABC Bank of India has paid the requisite fee of Rs. 25000 for this application through a Demand Draft issued in favour of "Pay & Accounts Officer, Ministry of Corporate Affairs, New Delhi" on September 14, 2017.

Yours sincerely,

Signature of person authorised to act on behalf of the financial creditor
Name in block letters: ABC
Position with or in relation to the financial creditor:
Address of person signing: X-999, XXX Road, New Delhi-110056

Annexure I (Documents to be attached with the application)

EXHIBIT-1: Deed of Hypothecation of movables dated January 15, 2011

EXHIBIT-2: Equitable Mortgage deed dated January 15, 2011

EXHIBIT-3: Copy of the term loan agreements dated January 15, 2011, 15 July, 2011 & 15 December, 2011

EXHIBIT-4: Copy of CRILC Report

EXHIBIT-5: Copy of certificate in accordance with Bankers Books Evidence Act, 1891

Annexure II**FORM 2**

[See sub-rule (1) of rule 9]

[Under rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

WRITTEN COMMUNICATION BY
PROPOSED INTERIM RESOLUTION PROFESSIONAL

September 14, 2017

To,

The National Company Law Tribunal
Principal Bench
Block 3, CGO Complex,
Pragati Vihar, New Delhi
Delhi -110014

From,

Mr. PQR
Office No.3, ABC Complex,
Delhi

In the matter of XYZ Limited

Subject : Written communication in connection with an application to initiate corporate insolvency resolution process in respect of XYZ Limited

Madam/Sir,

I, Mr. PQR, an insolvency professional registered with ICSI Insolvency Professionals Agency having registration number IBBI/IPA-004/IP-09054/2017-18/5151 have been proposed as the interim resolution professional by Mr. XXX in connection with the proposed corporate insolvency resolution process of XYZ Limited.

In accordance with rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, I hereby:

- (i) agree to accept appointment as the interim resolution professional if an order admitting the present application is passed;
- (ii) state that the registration number allotted to me by the Board is IBBI/IPA-004/IP-09054/2017-18/5151 and that I am currently qualified to practice as an insolvency professional;
- (iii) disclose that I am currently serving as an interim resolution professional/resolution professional/liquidator in 1 proceeding;
- (iv) certify that there are no disciplinary proceedings pending against me with the Board or ICSI Insolvency professionals agency;
- (v) affirm that I am eligible to be appointed as a resolution professional in respect of the corporate debtor in accordance with the provisions of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016 ;
- (vi) make the following disclosures in accordance with the code of conduct for insolvency professionals as set out in the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

(Signature of insolvency professional)

PQR

(Name of insolvency professional entity, if applicable)

[Optional certification, if required by the applicant making an application under these Rules]

I, hereby, certify that the facts averred by the applicant in the present application are true, accurate and complete and a default has occurred in respect of the relevant corporate debtor. I have reached this conclusion based on the following facts and/or opinion:-

[please give details]

(Signature of insolvency professional)

PQR

(Name of insolvency professional entity, if applicable)

Annexure III: Copy of demand draft as a proof that the specified fee has been paid

Annexure IV: Affidavit in respect of the application which is filed by one Financial Creditor only

Verifying affidavit in Form No. NCLT-6

Form No. NCLT-6

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
PRINCIPAL BENCH

IN THE MATTER OF INSOLVENCY AND BANKRUPTCY CODE, 2016

AND

IN THE MATTER OF XYZ LIMITED

FINANCIAL CREDITOR APPLICATION NO _____ OF 2017

GENERAL AFFIDAVIT VERIFYING PETITION

1. I, ABC, son of XXXXX, aged 55 years, authorised representative of ABC Bank of India, residing at X-999, XXX Road, New Delhi-110056, do solemnly affirm and state as follows:
 - (i) I am an employee of ABC Bank of India working in the capacity of General Manager;
 - (ii) The statements made in the application filed by the applicant in the above matter are true to my knowledge and are based on the information received by me.

VERIFICATION

Verified at New Delhi on September 14, 2017 that the contents of the above affidavit are true to best of my knowledge and belief and nothing material has been concealed therefrom.

Place: New Delhi

Date: 14.09.2017

Deponent identified by _____

Signature of identifier _____

SWORN BEFORE

II. APPLICATION BY OPERATIONAL CREDITOR

Regulatory Framework For Initiating Corporate Insolvency Resolution Process By Operational Creditor

Operational Creditor to Deliver Demand Notice/Copy of Invoice

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

“(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.”

Explanation to Section 8 of the Code provides that for the purposes of section 8, a “demand notice” means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.

Rule 5 of the Adjudicating Authority Rules provides that an operational creditor shall deliver a demand notice to the corporate debtor in Form 3 or a copy of an invoice attached with a notice in Form 4 as provided in the Adjudicating Authority Rules.

Further, Rule 5 states that the demand notice or the copy of the invoice demanding payment may be delivered to the corporate debtor,

- (1) at the registered office by hand, registered post or speed post with acknowledgement due; or
- (2) by electronic mail service to a whole-time director or designated partner or key managerial personnel if any, of the corporate debtor.

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.

In **Macquarie Bank Limited vs. Shilpi Cable Technologies Ltd.**, [SEE ANNEXURE TO CHAPTER X], one of the issue raised before Hon’ble Supreme Court was whether a demand notice of an unpaid operational debt can be issued by a lawyer on behalf of the operational creditor in terms of section 8 of the Code read with Adjudicating Authority Rules.

Hon’ble Supreme Court observed that demand notice as provided under section 8 of the Code can be sent by a lawyer on behalf of operational creditor. In this regard, Supreme Court noted that Section 8 of the Code speaks of an operational creditor “delivering” the demand notice and not “issuing” it and in this sense, delivery, therefore, would postulate that such

notice could be made by an authorized agent. Further, Supreme Court also took note of Form 3 and Form 5 of Adjudicating Authority Rules, which require the person serving demand notice to “state position with or in relation to the operational creditor”.

Hon’ble Supreme Court observed that in “relation to” is a very wide expression which specifically includes a position which is outside or indirectly related to the operational creditor, including a lawyer. In view of aforesaid, Hon’ble Supreme Court observed that expression “an operational creditor may on the occurrence of a default deliver a demand notice...” under section 8 of the Code must be read as including an operational creditor’s authorized agent and lawyer, as has been stated in Forms 3 and 5 appended to the Adjudicatory Authority Rules.

Operational Creditor to raise existence of Dispute or Repayment of unpaid Operational Debt in reply to Demand Notice/Copy of Invoice by Operational Creditor

Sub-Section (2) of Section 8 of the Code reads as under:

- “(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.”*

Operational Creditor to File Application in case there is no existence of dispute or no repayment of unpaid operational debt by corporate debtor

Sub-Section (1) and (2) of Section 9 of the Code read as under:

- “9. (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section*

8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

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

Application to be accompanied with Requisite Fee and Form

Rule 6 of Adjudicating Authority Rules provides that an operational creditor shall make an application in Form 5 as prescribed in Adjudicating Authority Rules for initiating the corporate insolvency resolution process against a corporate debtor under section 9 of the Code.

Schedule to the Adjudicating Authority Rules provides that the application by operational creditor shall be accompanied by a fee of Rs. 2,000/-.

Sub-Rule 4 of Rule 10 of the Adjudicating Authority Rules provides that the application and accompanying documents shall be filed in electronic form, as and when such facility is made available and as prescribed by the Adjudicating Authority. However, till the time such facility is made available, the applicant may submit the accompanying documents, and wherever they are bulky, in electronic form, in scanned, legible portable document format in a data storage device such as a compact disc or a USB flash drive acceptable to the Adjudicating Authority.

Documents to be furnished with the application

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

“(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.”*

As per Regulation 7 of the CIRP Regulations the following documents should be submitted by an operational creditor:

- (a) the records available with an information utility, if any; or
- (b) other relevant documents, including -
 - (i) a proof of employment such as contract of employment for the period for which such workman or employee is claiming dues;

- (ii) evidence of notice demanding payment of unpaid dues and any documentary or other proof that payment has not been made; or
- (iii) an order of a court or tribunal that has adjudicated upon the non-payment of a dues, if any.
- (iv) Financial Accounts

Operational Creditor May Recommend the Name of a Resolution professional To Act as an Interim Resolution Professional

As per Sub-Section (4) to Section 9 of the Code, an operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

Regulation 3 of CIRP Regulations provides that an Insolvency Professional shall be eligible to be appointed as a resolution professional for a corporate insolvency resolution process of a corporate debtor if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, are independent of the corporate debtor.

Explanation to Regulation 3 of the above Regulations provide that a person shall be considered independent of the corporate debtor, if he:

- (a) is eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013 (18 of 2013), where the corporate debtor is a company;
- (b) is not a related party of the corporate debtor; or
- (c) is not an employee or proprietor or a partner:
 - (i) of a firm of auditors or secretarial auditors in practice or cost auditors of the corporate debtor; or
 - (ii) of a legal or a consulting firm, that has or had any transaction with the corporate debtor amounting to ten per cent or more of the gross turnover of such firm, in the last three financial years.
- (d) A Resolution Professional shall make disclosures at the time of his appointment and thereafter in accordance with the Code of Conduct.
- (e) A Resolution Professional, who is a director or a partner of an insolvency professional entity, shall not continue as a resolution professional in a corporate insolvency resolution process if the insolvency professional entity or any other partner or director of such insolvency professional entity represents any of the other stakeholders in the same corporate insolvency resolution process.

Adjudicating Authority May Admit or Reject The Application

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

“(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.”

Commencement of Insolvency Resolution Process

Sub-Section (6) of Section 9 of the Code provides that the corporate insolvency resolution process shall commence from the date of admission of the application by the Adjudicating Authority.

**MODEL APPLICATION FOR INITIATING CORPORATE INSOLVENCY
RESOLUTION PROCESS BY OPERATIONAL CREDITOR**

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]**

September 11, 2017

To,

The National Company Law Tribunal
Principal Bench
Block 3, CGO Complex,
Pragati Vihar, New Delhi
Delhi -110014

From,

Mr. ABC
1st Floor, XYZ Apartments
Delhi-110081

In the matter of XYZ Limited

**Subject: Application to initiate corporate insolvency resolution process
in respect of XYZ Limited under the Insolvency and Bankruptcy Code,
2016**

Madam/Sir,

Mr. ABC, hereby submits this application to initiate a corporate insolvency resolution process in the case of XYZ Limited. The details for the purpose of the application are set out below:

Part-I
PARTICULARS OF APPLICANT

1. NAME OF OPERATIONAL CREDITOR	Mr. ABC
2. IDENTIFICATION NUMBER OF OPERATIONAL CREDITOR, (IF ANY)	NA
3. ADDRESS FOR THE CORRESPONDENCE OF OPERATIONAL CREDITOR	1 st Floor, XYZ Apartments Delhi-110081

Part II
PARTICULARS OF CORPORATE DEBTOR

1. NAME OF THE CORPORATE DEBTOR	XYZ LIMITED
2. IDENTIFICATION NUMBER OF CORPORATE DEBTOR	V2929GF2001PTC0024152
3. DATE OF INCORPORATION OF CORPORATE DEBTOR	JANUARY 01, 2001
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)	NOMINAL SHARE CAPITAL:- Rs. 10,00,000 PAID UP SHARE CAPITAL:- Rs. 10,00,000
5. ADDRESS OF THE REGISTERED OFFICE OF THE CORPORATE DEBTOR	4th FLOOR, PMM BUILDING, STREET NO.1, DELHI- 110044

Part-III
PARTICULARS OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL [IF PROPOSED]

1. NAME, ADDRESS, E-MAIL ADDRESS AND THE REGISTRATION NUMBER OF THE PROPOSED INSOLVENCY PROFESSIONAL	NAME:- Mr. PQR ADDRESS FOR CORRESPONDENCE: - OFFICE NO. 3, ABC COMPLEX, DELHI E-MAIL:- info@abc.com
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	IP REGISTRATION NUMBER: -IBBI/IPA-004/IP- 09054/2017-18/5151
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**Part-IV
PARTICULARS OF OPERATIONAL DEBT**

<p>1. TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE AND THE DATE FROM WHICH SUCH DEBT FELL DUE</p>	<p>TOTAL AMOUNT OF DEBT:- Rs. 1,57,596/-</p> <p>DETAILS OF TRANSACTIONS : The amount fell due on account of unpaid salary for the month of April 2017, May 2017 and June, 2017.</p> <p>DATE ON WHICH SUCH DEBT FELL DUE:-</p> <ol style="list-style-type: none"> 1. Rs. 52,532 fell due on May 01, 2017 2. Rs. 52,532 fell due on June 01, 2017 3. Rs. 52,532 fell due on July 01, 2017
<p>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)</p>	<p>TOTAL AMOUNT OF DEFAULT:- Rs. 1,57,596/-</p> <p>DATE ON WHICH DEFAULT OCCURRED</p> <ol style="list-style-type: none"> 1. Default in respect of Rs. 52,532 occurred on May 07, 2017 2. Default in respect of Rs. 52,532 occurred on June 07, 2017 3. Default in respect of Rs. 52,532 occurred on July 07, 2017

Part-V**PARTICULARS OF OPERATIONAL DEBT [DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]**

<p>1. PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER CREDITOR (ATTACH A COPY OF CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY))</p>	NA
<p>2. DETAILS OF RESERVATION/ RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS</p>	NA
<p>3. PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)</p>	NA
<p>4. RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)</p>	NA
<p>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)</p>	NA
<p>6. PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH OPERATIONAL DEBT HAS BECOME DUE</p>	<p>“Contract of Employment with XYZ Limited dated January 15, 2001” Copy of the said contract has been enclosed herewith and marked as exhibit 1</p>

<p>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)</p>	<p>Bank certificate in original has been enclosed herewith and marked as exhibit 2</p>
<p>8. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT.</p>	<ol style="list-style-type: none"> 1. E-mail dated May 07, 2017 from Mr. ABC to Mr. DEF, Chief Financial Officer of XYZ Limited. 2. E-mail dated June 07, 2017 from Mr. ABC to Mr. DEF, Chief Financial Officer of XYZ Limited 3. E-mail dated July 07, 2017 from Mr. ABC to Mr. DEF, Chief Financial Officer of XYZ Limited 4. Copy of financial statements for the year ended March 31, 2017, March 31, 2016 and March 31, 2015 showing the mounting losses having been incurred by the corporate debtor 5. Reply of Mr. DEF to the demand notice expressing their inability to make the payment

I, ABC, operational creditor hereby certify that, to the best of my knowledge, Mr. PQR is fully qualified and permitted to act as an insolvency professional in accordance with the Code and the rules and regulations made thereunder.

ABC has paid the requisite fee of Rs. 2000 for this application through a Demand Draft issued in favour of "Pay & Accounts Officer, Ministry of Corporate affairs, New Delhi" on September 12, 2017.

Yours sincerely,

Signature of person authorised to act on behalf of the operational creditor
Name in block letters: ABC
Position with or in relation to the operational creditor: Operational Creditor
Address of person signing: 1 st Floor, XYZ Apartments, Delhi-110081

Annex. I**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]**

September 01, 2017

To,

XYZ Limited
4th FLOOR, PMM Building,
Street NO.1,
Delhi-110044

From,

Mr. ABC
1st Floor, XYZ Apartments
Delhi-110081

Subject: Demand notice demanding payment of an unpaid operational debt due from XYZ Limited under the Code.

Madam/Sir,

1. This letter is a demand notice demanding payment of an unpaid operational debt due from XYZ Limited.
2. Please find particulars of the unpaid operational debt below:

PARTICULARS OF OPERATIONAL DEBT**AMOUNT IN DEFAULT.**

1. TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE AND THE DATE FROM WHICH SUCH DEBT FELL DUE	TOTAL AMOUNT OF DEBT:- Rs. 1,57,596/- DETAILS OF TRANSACTIONS:- The amount fell due on account of unpaid salary for the month of April 2017, May 2017 and June, 2017.
	DATE ON WHICH SUCH DEBT FELL DUE:- 1. Rs. 52,532 fell due on May 01, 2017 2. Rs. 52,532 fell due on June 01, 2017 3. Rs. 52,532 fell due on July 01, 2017
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)	TOTAL AMOUNT OF DEFAULT:- Rs. 1,57,596/- DATE ON WHICH DEFAULT OCCURRED 1. Default in respect of Rs. 52,532 occurred on May 07, 2017 2. Default in respect of Rs. 52,532 occurred on June 07, 2017 3. Default in respect of Rs. 52,532 occurred on July 07, 2017
3. PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER CREDIT OR ATTACH A COPY OF CERTIFICATE OF REGISTRATION OF CHARGE	NA

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	NA
5. RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)	NA
6. PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH OPERATIONAL DEBT HAS BECOME DUE	<p>“Contract of Employment with XYZ Limited dated January 15, 2001”</p> <p>Copy of the said contract has been enclosed herewith and marked as exhibit 1</p>
7. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT	<ol style="list-style-type: none"> 1. Copy of e-mail dated May 07, 2017 from Mr. ABC to Mr. DEF, Chief Financial Officer of XYZ Limited demanding the unpaid salary for the month of April 2017. 2. Copy of e-mail dated June 07, 2017 from Mr. ABC to Mr. DEF, Chief Financial Officer of XYZ Limited demanding the unpaid salary for the month of April and May 2017 3. Copy of e-mail dated July 07, 2017 from Mr. ABC to Mr. DEF, Chief Financial Officer of XYZ Limited demanding the unpaid salary for the month of April, May and June 2017

	4. Copy of financial statements for the year ended March 31, 2017, March 31, 2016 and March 31, 2015 showing the mounting losses having been incurred by the company.
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3. If you dispute the existence or 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 Mr. ABC has received the payment.
5. 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 XYZ Limited.

Yours sincerely,

Signature of person authorised to act on behalf of the operational creditor
Name in block letters: ABC
Position with or in relation to the operational creditor: Operational Creditor
Address of person signing: 1 st Floor, XYZ Apartments, Delhi-110081

Annexure II (Documents to be attached with the application)

1. **Exhibit 1: Copy** of contract of Employment with XYZ Limited dated January 15, 2001
2. **Exhibit 2:** Copy of e-mail communications
3. **Exhibit 3:** Copy of financial statements for the year ending March 31, 2017 , March 31, 2016 and March 31, 2015

Annexure-III (Certificate from the banker that the operational creditor has not received any payment towards the operational debt)

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

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
PRINCIPAL BENCH

IN THE MATTER OF INSOLVENCY AND BANKRUPTCY CODE, 2016

AND

IN THE MATTER OF

Section 9 of the Insolvency and Bankruptcy Code, 2016

AND

IN THE MATTER OF

Mr. ABC
1st Floor, XYZ Apartments
Delhi-110081

..... Applicant

Versus

XYZ Limited
4th FLOOR, PMM Building,
Street NO.1, Delhi-110044

..... Respondent

Company Application No. _____ of 2017

AFFIDAVIT

I, ABC, son of XXXXX, aged 55 years, employee of XYZ Limited, residing at 1st Floor, XYZ Apartments, Delhi-110081, do solemnly affirm and state as follows:-

1. I am an employee of XYZ Limited working in the capacity of Executive (Purchase); operational creditor in the above matter. XYZ Limited is the corporate debtor on the 12th day of September of 2017. The corporate debtor, justly and truly indebted to me in the sum of Rs. 1,57,596/- (Rs. One Lac Fifty Seven Thousand Five Hundred and Ninety Six Only) which is an operational debt.

2. In respect of my claim I have relied on:
 - a) Contract of Employment according to which I am entitled to a salary of Rs. 52,532 per month on 1st day of next month.
 - b) E-mail reminders sent to Chief Financial Officer, Mr. DEF of XYZ Limited.
 - c) Form-3 duly acknowledged by the corporate debtor.
 - d) Certificate from banks along with the bank statements.
3. I have gone through the captioned application and signed the same after verifying its contents and supporting documents. I submit that the same are true and correct to my knowledge and I believe them to be true.
4. I have not received any notice from the corporate debtor disputing the unpaid operational debt.
5. The said documents are true, valid and genuine to the best of my knowledge, information and belief.
6. In respect of the said sum or any part thereof, I have not nor has any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever.

Solemnly affirmed at New Delhi on 12th day, the Tuesday of September 2017

ABC
Executive (Purchase)
XYZ Limited

Annexure V: Written Communication by proposed Interim Resolution Professional in Form 2**FORM 2**

[See sub-rule (1) of rule 9]

[Under rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

WRITTEN COMMUNICATION BY PROPOSED INTERIM RESOLUTION PROFESSIONAL

September 12, 2017

To,

The National Company Law Tribunal
Principal Bench
Block 3, CGO Complex,
Pragati Vihar, New Delhi
Delhi -110014

From,

Mr. PQR
Office No.. 3, ABC Complex, Delhi

In the matter of XYZ Limited

Subject: Written communication in connection with an application to initiate corporate insolvency resolution process in respect of XYZ Limited

Madam/Sir,

I, Mr. XXXXXXX, an insolvency professional registered with ICSI Insolvency Professionals Agency having registration number IBBI/IPA-004/IP-09054/2017-18/5151 have been proposed as the interim resolution professional by Mr. ABC in connection with the proposed corporate insolvency resolution process of XYZ Limited.

In accordance with rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, I hereby:

- (i) agree to accept appointment as the interim resolution professional if an order admitting the present application is passed;
- (ii) state that the registration number allotted to me by the Board is

IBBI/PA-004/IP-09054/2017-18/5151 and that I am currently qualified to practice as an insolvency professional;

- (iii) disclose that I am currently serving as an interim resolution professional/resolution professional/liquidator in 1 proceeding;
- (iv) certify that there are no disciplinary proceedings pending against me with the Board or ICSI Insolvency Professionals Agency;
- (v) affirm that I am eligible to be appointed as a resolution professional in respect of the corporate debtor in accordance with the provisions of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016;
- (vi) make the following disclosures in accordance with the code of conduct for insolvency professionals as set out in the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

(Signature of insolvency professional)

ABC

(Name of insolvency professional entity, if applicable)

[Optional certification, if required by the applicant making an application under these Rules]

I, hereby, certify that the facts averred by the applicant in the present application are true, accurate and complete and a default has occurred in respect of the relevant corporate debtor. I have reached this conclusion based on the following facts and/or opinion:-

[please give details]

(Signature of insolvency professional)

ABC

(Name of insolvency professional entity, if applicable)

Annexure VI: Copy of the demand draft as proof of payment of court fees

Annexure VII: Affidavit in respect of the application filed by the operation creditor

**Verifying affidavit in Form No. NCLT-6
Form No. NCLT-6**

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
PRINCIPAL BENCH

IN THE MATTER OF INSOLVENCY AND BANKRUPTCY CODE, 2016

AND

IN THE MATTER OF XYZ LIMITED

OPERATIONAL CREDITOR APPLICATION NO _____ OF 2017

GENERAL AFFIDAVIT VERIFYING PETITION

1. I, ABC, son of XXXXX, aged 55 years, employee of XYZ Limited, residing at 1st Floor, XYZ Apartments, Delhi-110081, do solemnly affirm and state as follows:

- (i) I am an employee of XYZ Limited working in the capacity of Executive (Purchase);
- (ii) I am duly authorised by the XYZ Limited by way of Board resolution dated to file the present application.
- (iii) The statements made in the application filed by the applicant in the above matter are true to my knowledge and are based on the information received by me.

VERIFICATION

Verified at New Delhi on September 12, 2017 that the contents of the above affidavit are true to best of my knowledge and belief and nothing material has been concealed therefrom.

Place: New Delhi

Date: 12.09.2017

Deponent identified by _____

Signature of identifier _____

SWORN BEFORE

III. APPLICATION BY CORPORATE APPLICANT

Regulatory Framework for Initiating Corporate Insolvency Resolution Process by Corporate Applicant

Corporate Applicant to File Application to Adjudicating Authority on behalf of Corporate Debtor

Sub-Section (1) & (2) of Section 10 of the Code read as under:

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

(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.”

Application to be Accompanied with Requisite Fee and Documents

Sub-Section (3) of Section 10 of the Code provides that 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.

Schedule to the Adjudicating Authority Rules provides that an application by Corporate Debtor to initiate corporate insolvency resolution process shall be accompanied with a fee of Rs. 25,000/-.

Further Rule 7 of the Adjudicating Authority Rules reads as under:

“(1) A corporate applicant shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 10 of the Code in Form 6, 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 dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.”

Adjudicating Authority to Admit or Reject the Application Within 14 Days of Receipt of Application

Sub-Section (4) and (5) of Section 10 of the Code reads as under:

- (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 his section.”*

**MODEL APPLICATION FOR INITIATING CORPORATE INSOLVENCY
RESOLUTION PROCESS BY CORPORATE APPLICANT**
FORM 6
[see Sub-rule (1) of rule 7]
**APPLICATION BY CORPORATE APPLICANT TO INITIATE CORPORATE
INSOLVENCY RESOLUTION PROCESS UNDER THE CODE**
*[Under Rule 7 of the Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016]*

14.06.2017

To,

 The National Company Law Tribunal
 6TH Floor, Fountain Telecom,
 Building 1, Mahatma Gandhi Road,
 Fort, Mumbai, Maharashtra 400001

From,

 M/s ABC Pvt. Ltd., House No. ..., Building 7th floor, Ashok Nagar,
 Mumbai, Maharashtra.

IN THE MATTER OF M/s ABC PVT. LTD.
Subject: Application to initiate corporate insolvency resolution process in
 respect of M/s ABC Pvt. Ltd.

Madam/Sir,

 We, hereby submit this application to initiate a corporate insolvency resolution
 process in respect of ABC Pvt. Ltd. The details for the purpose of this
 application are set out below:

PART-I
PARTICULARS OF THE CORPORATE APPLICANT

1.	NAME, ADDRESS, EMAIL ADDRESS, IDENTIFICATION Ltd.	M/s ABC Pvt. Ltd. Uxxxxxxxxx220122 House no. --, Building --- 7th floor, Ashok Nagar, Mumbai, Maharashtra.
2.	NAME ADDRESS, EMAIL ADDRESS, IDENTIFICATION NUMBER AND ADDRESS OF	M/s ABC Pvt. Ltd. Uxxxxxxxxx220122 House no. --, Building ---

	THE REGISTERED OFFICE OF CORPORATE DEBTOR.	7th floor, Ashok Nagar, Mumbai, Maharashtra.
3.	NAMES AND ADDRESSES OF ALL DIRECTORS, PROMOTERS, DESIGNATED PARTNERS OF THE CORPORATE DEBTOR.	1. Mr. A, House no. --, Building -- -7th floor, Ashok Nagar, Mumbai, Maharashtra. 2. Mr. B, House no. --, Building -- -7th floor, Ashok Nagar, Mumbai, Maharashtra.
4.	DATE OF INCORPORATION OF CORPORATE DEBTOR.	05.02.2xxx
5.	NOMINAL SHARE CAPITAL AND THE PAID-UP SHARE CAPITAL OF THE CORPORATE DEBTOR AND/OR DETAILS OF GUARANTEE CLAUSE AS PER MEMORANDUM OF ASSOCIATION.	Authorised Capital- Rs. 2.00 crores Paid up Capital- Rs. 10.00 Lacs
6.	NAME, ADDRESS AND AUTHORITY OF PERSON SUBMITTING APPLICATION ON BEHALF OF CORPORATE APPLICANT.	Mr. A, House no. --, Building -- -7th floor, Ashok Nagar, Mumbai, Maharashtra.
7.	NAME AND ADDRESS OF PERSON RESIDENT IN INDIA AUTHORISED TO ACCEPT THE SERVICE OF PROCESS ON ITS BEHALF	Same as above.
8.	DOCUMENTATION TO SHOW THAT THE CORPORATE APPLICANT IS AUTHORISED TO INITIATE THE CORPORATE INSOLVENCY RESOLUTION PROCESS	Annexed

PART-II
PARTICULARS OF PROPOSED INTERIM
RESOLUTION PROFESSIONAL

1.	NAME, ADDRESS, EMAIL ADDRESS AND THE REGISTRATION NUMBER OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL	Mr. P p@gmail.com IBBI/IPA-XX/Nxxx/2016-17/ 100xx
----	--	--

PART-III
PARTICULARS OF FINANCIAL / OPERATIONAL DEBT

1.	NAME OF FINANCIAL / OPERATIONAL CREDITOR	Bank of Maharashtra, Lower Parel Branch, Mumbai Bank of India, Thane, Mumbai
2.	ADDRESS OF CORRESPONDENCE OF THE FINANCIAL / OPERATIONAL CREDITOR	1. 80, Solatire, SV Road, Lower Parel Mumbai. 2. 26, Thane west, Mumbai.
3.	TOTAL DEBT RAISED AND AMOUNT IN DEFAULT	Rs. 15,85,60,000
4.	DATE WHEN THE FINANCIAL / OPERATIONAL DEBT WAS INCURRED	01.04.2008
5.	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	1. 501, Building- 12B, 1 st Floor, SV Road, Thane, Maharashtra, 421302. Equitable Mortgage created vide Deed of Mortgage dated 01.04.2009, Estimated value Rs. 30,25,000. 2. 101, Building- 25B, 1 st Floor, SV Road, Thane, Maharashtra, 421302. Equitable Mortgage created vide Deed of Mortgage dated 01.06.2009, Estimated Value Rs. 25,50,000.

		3. S.No. 22/11, Village Churu, Taluka Balesar. Equitable Mortgage created vide Deed of Mortgage dated 01.04.2010, Estimated value Rs. 2,55,00,000
6.	DETAILS OF RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS	N.A.
7.	RECORD OF DEFAULT WITH THE INFORMATION UTILITY	
8.	LIST OF DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF FINANCIAL / OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT	Demand Notice by Bank of India

I, certify that, to the best of my knowledge, Mr. P is fully qualified and permitted to act as an insolvency professional in accordance with the Code and the associated rules and regulations.

Mr. A on behalf of M/s ABC Pvt. Ltd. has paid the requisite fee for this application through demand draft on date.

Sincerely

(Signature)

Mr. A

Director of ABC Pvt. Ltd.

Mr. A, House no. --, Building -- --7th floor,
Ashok Nagar, Mumbai, Maharashtra.

ANNEXURE I: DEMAND NOTICE BY BANK OF INDIA BY REGISTERED POST A.D.

To

1. M/s ABC Pvt. Ltd.
2. Mr. A
3. Mr. B

4. Mr. C

All having Address at:

House no. xx, Building xxx, 7th floor, Ashok Nagar, Mumbai, Maharashtra.

And also at:

House no. xx, Building xxx, 7th floor, Ashok Nagar, Mumbai, Maharashtra.

And also at:

House no. xx, Building xxx, 7th floor, Ashok Nagar, Mumbai, Maharashtra.

Dear Sir/Madam

Subject: Legal Notice for recall of outstanding dues Under credit facilities granted to you by Bank of India, Malad (west) Branch, Mumbai 4000xx.

Under instructions from my Clients, bank of India, having address at xx, SV Road, Malad (West). I have to address you as under:

1. This Notice is served upon You No.1 in your capacity as the principal borrowers of my Clients and as such liable to repay the dues to my Clients, under the various credit facilities granted to you No. 1.
2. This Notice is served upon You No. 2, 3, & 4 in you capacity as Guarantors, having personally guaranteed the repayment of all the debts and liabilities of You No. 1 to my Clients.
3. The liability of You No. 2, 3 and 4 is co-extensive with that of You No. 1 and is joint and several along with You No. 1 and You No. 2, 3 & 4 are jointly and severally liable to repay the entire outstanding dues of my Client.
4. That on your request, on or about July, 2xx5, my clients sanctioned to You No. 1 the various credit facilities which were lastly reviewed on xx.xx.xxxx on the terms and conditions incorporated in bank's sanction Letter No. xxxxxxxxxx dated xx/xx/xxxx.
5. That the above credit facilities are secured inter alia by the charge created by you on your assets as under:
 - i) Hypothecation of Stocks and Book debts belonging to you No. 1
 - ii) Hypothecation of all Plant & Machinery belonging to you No. 1
 - iii) Pledge on term deposits of present value NIL.
 - iv) Pledge of recurring deposits (monthly deposit of Rs. *****) present value is Rs. *****

- v) Equitable Mortgage over the following properties:
- a) On Land & Building on S. No. xx/xx at village xxxx admeasuring xx sq. fts. in the name of Mr. A (Guarantor)
 - b) On Flat No. xx/xx, A Wing, Building xx, admeasuring xx sq. ft. In the name of Mr. B (Guarantor)
6. To secure the above facilities You Nos. 1, 2, 3 & 4 have executed the required documents in favour of my clients from time to time. You No. 2, 3 & 4 have executed valid and subsisting Deed of Guarantee in favour of my Clients guaranteeing due repayments of the dues and the liabilities of You No. 1 to my Client.
7. My Clients state that as you failed to honour the commitment of repayment of dues as per the terms of sanction, your account has been classified as Non-Performing Asset in books of my Client with effect from xx/xx/xxxx
8. My clients state that as on xx/xx/xxxx a sum of Rs. xx,xx,xxx is due and payable by you to my Clients in respect of the said Cash Credit Facility plus further interest on the above outstanding dues at contractual rate, presently @ xx.xx% p.a. plus penal interest at x% p.a. with monthly rests w.e.f xx/xx/xxxx with monthly rests.
9. Under the aforesaid circumstances as instructed by my Clients, I do hereby call upon You No. 1 your capacity as the principal borrowers and You Nos. 2, 3 & 4 as the guarantors to the said credit facilities, whose valid and subsisting guarantees are here by invoked, to pay to my Clients the outstanding amount of Rs. xx,xx,xxxx which is due and payable by you to my Clients in respect of the said cash credit facility plus further interest on the above outstanding dues on contractual rate, presently @ xx.xx% p.a. plus penal interest @ x.xx% p.a. with monthly rest w.e.f. xx/xx/xxxx with monthly rests within 7 days of the receipt of this Notice, failing which my Clients will be constrained to take such legal action and proceedings against each of you, as my Clients may be advised, including proceeding for recovery, injunction, attachment, seizure and sale of your assets, encumbered or otherwise, as to the cost and consequences thereof, which you may please note.

Yours Faithfully

(Advocate Mr. P)

Advocates for Bank of India

ANNEXURE II: No operational Debt

ANNEXURE III: WRITTEN COMMUNICATION DATED **//**** BY
PROPOSED INTERIM RESOLUTION PROFESSIONAL**

FORM 2

[See sub-rule (1) of rule 9]

*[Under rule 9 of the Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016]*

**WRITTEN COMMUNICATION BY PROPOSED INTERIM RESOLUTION
PROFESSIONAL**

Dated: xx/xx/xxxx

To

The National Company Law Tribunal
6TH Floor, Fountain Telecom,
Building 1, Mahatma Gandhi Road,
Fort, Mumbai, Maharashtra 400001.

From,

Mr. P
Office No. xx, ABC Complex,
Mumbai, 400002

In the matter of M/s ABC Pvt. Ltd.

**Subject : Written communication in connection with an application to
initiate corporate insolvency resolution process in respect of M/s ABC
Pvt. Ltd.**

Madam/Sir,

I, Mr. P, an insolvency professional registered with ICSI Insolvency
Professionals Agency having registration number IBBI/IPA-00x/IP-0xxxx/
2017-18/xxxx have been proposed as the interim resolution professional by
Mr. A in connection with the proposed corporate insolvency resolution process
of M/s ABC Pvt. Ltd.

In accordance with rule 9 of the Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016, I hereby:

- (i) agree to accept appointment as the interim resolution professional if an order admitting the present application is passed;
- (ii) state that the registration number allotted to me by the Board is IBBI/PA-xxx/IP-xxxxx/2017-18/xxxx and that I am currently qualified to practice as an insolvency professional;
- (iii) disclose that I am currently serving as an interim resolution professional/resolution professional/liquidator in 1 proceeding;
- (iv) certify that there are no disciplinary proceedings pending against me with the Board or ICSI Insolvency Professionals Agency;
- (v) affirm that I am eligible to be appointed as a resolution professional in respect of the corporate debtor in accordance with the provisions of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016 ;
- (vi) make the following disclosures in accordance with the code of conduct for insolvency professionals as set out in the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

(Signature of insolvency professional)

MR. P

(Name of insolvency professional entity, if applicable)

[Optional certification, if required by the applicant making an application under these Rules]

I, hereby, certify that the facts averred by the applicant in the present application are true, accurate and complete and a default has occurred in respect of the relevant corporate debtor. I have reached this conclusion based on the following facts and/or opinion:-

[please give details]

(Signature of insolvency professional)

PQR

(Name of insolvency professional entity, if applicable)

Copy of the relevant books of account of the corporate debtor evidencing the default to creditor

ANNEXURE V: Audited financial statements for the last two financial years and provisional financial statements for the current financial year is attached

Annexure VI:

- (a) List of Assets and Liabilities of Corporate Applicant is attached
- (b) The details of the property on which charge was created is detailed below
- (c) List of financial Creditors of the Corporate Applicant is mentioned below

Annexure VII: Certified Copy of the Resolution of the Board of Directors authorizing Mr. A, Director, to initiate Corporate Insolvency Resolution Process against the company and to take further actions necessary to effect the same.

[ON LETTER HEAD OF THE CORPORATE APPLICANT]

CERTIFIED TRUE COPY OF THE RESOLUTIONS PASSED BY THE GOVERNING BOARD OF XYZ LIMITED IN THEIR 10TH MEETING HELD ON FRIDAY, THE 30TH JUNE, 2017 AT ITS REGISTERED OFFICE

Ref No. 25

Dated 10.06.2017

Resolved that during the board meeting of XYZ Limited held on 10th June, 2017, it has been decided that the company shall approach the National Company Law Tribunal for initiating corporate insolvency resolution process against itself under the Insolvency and Bankruptcy Code, 2016.

In pursuance thereof, Mr. ABC, in his capacity as the Director is being authorized to file an affidavit under the law before the National Company Law Tribunal.

Mr. ABC is duly authorized to swear on the Affidavit supporting the application that is to be submitted before the National Company Law Tribunal.

(stamp of XYZ Limited)

Sd/-

Director

(ABC)

ANNEXURE VIII: AFFIDAVIT OF THE AUTHORISED PERSON OF THE CORPORATE DEBTOR

IN THE NATIONAL COMPANY LAW TRIBUNAL

APPLICATION No. XX/XXX OF 2017

IN THE MATTER OF

M/s ABC Pvt. Ltd.

**AFFIDAVIT IN SUPPORT OF APPLICATION UNDER SECTION 10 OF
INSOLVENCY AND BANKRUPTCY CODE, 2016.**

I, Mr. A, Director of ABC Pvt. Ltd. having my office at (insert complete address) do hereby solemnly affirm and states as under:

1. I say that I am working as director and being well conversant with the facts of the Application and also duly authorized by the Board resolution dated xx/xx/xxxx, I am competent to make this Affidavit for the Applicant mentioned above.
2. I state that I have gone through the Application No. ** of 2017 and all the documents attached with the same. I have also perused the records, files and documents pertaining to the above matter available in my office and on the information derived there from, I am making this affidavit to support the initiation of corporate insolvency resolution by this corporate applicant.
3. It is stated on solemn affirmation that in the knowledge of the corporate Applicant:
 - (a) There is no circumstances which would give rise to possibility of any offence being committed by the Corporate Applicant or any officer of the Corporate Applicant under section 68, 71, 77 of the Insolvency and Bankruptcy Code, 2016.
 - (b) Further it is stated that no order section 44 or section 51 of the Insolvency and Bankruptcy Code, 2016 has been made by the adjudicating authority against the Corporate Applicant.
4. It is further stated that on solemn affirmation that the corporate applicant is fully competent to file this application under section 10 of the Insolvency and Bankruptcy Code, 2016 and in no manner whatsoever is disentitled under section 11 of the Insolvency and Bankruptcy Code, 2016.
5. In the circumstances it is prayed that the Application be allowed.

Mr. A

(Deponent)

Mr. X

Advocate for the Corporate Applicant.

CHAPTER V
**CHECKLIST FOR SCRUTINY OF PETITION/
APPEAL/REPLY**

**No. 25/2/2016-NCLT
Government of India
National Company**

Reference NCLT Rules, 2016 notified on 21st July, 2016 by the Ministry of Corporate Affairs.

2. A uniform check list for scrutiny of the petition/application/appeal to be filed before all Benches of the National Company Law Tribunal as per the NCLT Rules, 2016 is attached (Annexure 'A') for necessary action.

ANNEXURE 'A'
(Order No. 25/2/2016-NCLT dated 28th July, 2016)

National Company Law Tribunal New Delhi

Diary No....

Check List for Scrutiny of Petition, Application, Appeal/Reply

Sl. No.	To be Ascertained	Yes/No	Reference Page No.
1.	Whether the petition/application appeal falls under the territorial jurisdiction of New Delhi Bench of NCLT?		
2.	Whether petition/application/appeal/reply)- and all enclosures are legible and in English language?		
3.	Whether petition/application/appeal/reply has been printed in double spacing on one side of standard petition paper with an inner margin of about four centimetre width on top and with a right margin of 2.5 cm. left margin of 5 cm and duly paginated, indexed and stitched together in paper book form?		

4.	Whether the relevant provisions of the Companies Act, 2013/NCLT Rules, 2016 have been clearly mentioned in the petition/application/appeal?		
5.	Whether petitioner/applicant/appellant is entitled to and have the requisite qualification to file the petition, e.g., under sections 241 and 242 of the Companies Act, 2013 in accordance with section 244 of the Act & attached documentary proof of entitlement?		
6.	Whether the petition/application/appeal/reply has been signed at the foot of each page by all the petitioners/applicants/appellants/respondents and their name(s) has also been mentioned?		
7.	Whether name of the petitioner/applicant appellant/respondent, complete address, viz., the name of the road street lane and municipal division or ward, municipal door and other number of the house; the name of the town or village ; the post office, postal district and PIN Code has been mentioned in the petition/application/appeal reply?		
8.	Whether fax number, mobile number, valid email address of the petitioner/applicant/appellant/respondent have been mentioned?		
9.	Whether in every interlineations, eraser or correction or deletion in petition/application/ appeal/ document/ reply has been initiated by the party or his authorised representative?		
10.	Whether affidavits (Form NCLT-6) verifying the petition/application/appeal/reply from all the petitioner/applicant/appellant/respondent drawn on non-judicial/stamp paper of		

	requisite value duly attested by Notary Public/Oath Commissioner have been filed?		
11.	Whether full name, parentage, age, description of each part, date, address and in case a party sues or being sued in a representative character, has been set out in accordance to rule 20(5) of NCLT Rules, 2016?		
12.	Whether petition /application/appeal reply has been drawn in prescribed form as per Annexure 'A' of NCLT, Rules, 2016 with stipulated fee given in the Schedule of these rules'? The fee is to be paid by way of demand draft/IPO drawn in favour of "The Pay & Accounts Officer, Ministry of Corporate Affairs, New Delhi".		
13.	Whether documents accompanied to petition/application/appeal reply have been duly certified by the authorised representative or advocate filing the petition or application or appeal?		
14.	Whether the accompanied documents to the petition/application/appeal/reply has been verified from the originals and are in line with the provisions of rule 23 NCLT, Rules, 2016? The original should be brought before the Deputy Registrar for verification?		
15.	Whether petition application/appeal/reply has been filed in three authenticated copies and delivered to the opposite party?		
16.	Whether all relevant enclosures to the petition/application/appeal/reply have been attached as per the Annexure 'B' of NCLT Rules, 2016?		

17.	Whether Annexures to the petition/application/appeal/reply has been numbered serially?		
18.	Whether Vakalatnama (with enrolment No.) filed, is bearing court fee stamp of Rs. 2.75 and in accordance with the Circular No.13/ Rules DHC/ dated 26th October, 2009 issued by the Registrar General, Delhi High Court?		
19.	Whether documents with regard to shareholding/paid-up capital/balance sheet of the petitioner/applicant/appellant have been attached?		
20.	Whether notice to be given to the Central Government along with copy of petition/application/appeal under the relevant provisions of the Companies Act, 2013?		
21.	Whether proof of service of the petition/application/appeal/ reply on the concerned Registrar of Companies and Regional Director, Ministry of Corporate Affairs has been filed?		
22.	Whether proof of service of the petition/application/appeal/reply on all the respondents as well as caveat or(s), if any has been filed?		
23.	Whether brief of synopsis within two or three pages has been filed?		
24.	Whether date of events within two or three pages has been filed?		

DRESS CODE FOR NCLT**File 25/2/2016-NCLT dated 2nd August 2016, issued by NCLT**

In exercise of the powers conferred on Tribunal by rule 51 of National Company Law Tribunal Rules, 2016. It has been decided to issue following dress code for President, Members, Authorized Representatives and for the parties in person to be followed during the proceeding of the Tribunal.

- (i) *For President and Member*: The dress of the President and Members shall be white or striped or black trouser with black coat over white shirt and band or buttoned- up black coat and band. In the case of a female President or Member, the dress shall be black coat over a white saree.
- (ii) *For Authorised Representatives*: Every authorized Representative as provided in section 432 of the Act shall appear before the Tribunal in his-her professional dress if any, and if there is no such dress, a male in a suit buttoned-up coat over a trouser or national dress that is a long buttoned-up coat and a female in a coat over white or any other sober coloured saree or in any other sober and decent dress.
- (iii) *For Parties in Person*: Parties appearing in person before the Tribunal shall be properly dressed.

2. The dress code shall be followed with immediate effect.

CHAPTER VI

**LOCATION AND POSTAL ADDRESS OF NCLT AND ITS
BENCHES AND NCLAT**

**No. A-45011/14/2016-Ad IV
Government of India
Ministry of Corporate Affairs**

The National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) have been constituted w.e.f. 1st June, 2016. The location and postal address of NCLT/NCLAT Benches are as under

<i>Sl. No.</i>	<i>Title of the Bench</i>	<i>Location and Postal Address</i>
1.	National Company Law Appellate Tribunal New Delhi.	“B” Wing, 3rd Floor, Paryavaran Bhawan, CGO Complex, Lodhi Road, New Delhi-110003

<i>Sl. No.</i>	<i>Title of the Bench</i>	<i>Location and Postal Address</i>
(1)	(2)	(3)
1.	(a) National Company Law Tribunal, Principal Bench. (b) National Company Law Tribunal, New Delhi Bench.	Block No.3, GF, 5th, 6th 7th & 8th Floors, CGO Complex, Lodhi Road, New Delhi 110003
2.	National Company Law Tribunal, Ahmedabad Bench.	Anand House, Ground, 1st and 2nd Floors, SG Highway, Thaltej, Ahmedabad 380054
3.	National Company Law Tribunal, Allahabad Bench.	9th Floor, Sangam Place, Civil Lines, Allahabad - 211001
4.	National Company Law Tribunal, Bengaluru Bench.	Corporate Bhawan, 12th Floor, Raheja Towers, M G Road, Bengaluru - 560001
5.	National Company Law Tribunal, Chandigarh Bench	Ground Floor, Corporate Bhawan, Sector - 27-B, Madhya Marg, Chandigarh - 160019.

6.	National Company Law Tribunal, Chennai Bench.	Corporate Bhawan (UTI Building), 3rd Floor, No. 29 Rajaji Salai, Chennai - 600001
7.	National Company Law Tribunal, Guwahati Bench.	4th Floor, Prithvi Planet, Behind Hanuman Mandir, G S Road, Guwahati - 781007.
8.	National Company Law Tribunal, Hyderabad Bench	Corporate Bhawan, Bandlaguda, Lattiannaram Village, Hayatnagar Mandal, Rangareddy District, Hyderabad 500068
9.	National Company Law Tribunal, Kolkata Bench	5, Esplanade Row (West), Town Hall Ground and First Floor, Kolkata - 700001.
10.	National Company Law Tribunal, Mumbai Bench	6th Floor, Fountain Telecom Building No.1, Near Central Telegraph, M G Road, Mumbai - 400001

CHAPTER VII

**ROLE OF INTERIM RESOLUTION
PROFESSIONAL**

The IRP has a very important role under the Insolvency and Bankruptcy Code. The role of an IRP commences from the day he/she is appointed as such by an order of the Adjudicating Authority. During his tenure, the IRP has to deal with tasks of great responsibility and that has the potential to impact the entire Corporate Insolvency Resolution Process.

The IRP has been empowered to manage the affairs of corporate debtor and is required to take control of the assets of the corporate debtor. Code casts a duty on IRP to ensure that during corporate insolvency resolution process corporate debtor, every endeavour is made to protect and preserve the value of property of corporate debtor and manage the operations of corporate debtor as a going concern. Code provides that during the corporate insolvency resolution process powers of the Board of Directors of corporate debtor shall stand suspended and be exercised by IRP. In this regard, it is pertinent to note that only powers of the Board are suspended and not their duties. As regards conducting the process of corporate insolvency resolution process, the IRP shall make a public announcement pertaining to his appointment and invites creditors for submission of proof of claims. On receipt of claims from various creditors, he is also entrusted with the task of verification of the claims, on the basis of which, he prepares the list of creditors. Once the list of creditors is prepared, the IRP shall constitute the Committee of Creditors (“**Committee**”) and file a report in this behalf with the Adjudicating Authority. Subsequently, the first meeting of the Committee is to be convened.

With the conclusion of the first meeting of the Committee, the role of the IRP also comes to an end. At the first meeting of the Committee, the role of the IRP comes to an end either by change of his role into a resolution professional, subject to approval of his appointment by a majority of seventy five percent of the voting share of the financial creditors in the Committee or by termination of his role as an IRP and appointment of another resolution professional, where his appointment is not approved by the Committee.

The role of an IRP under the Code read with Rules and Regulations made thereunder is as follows:

I. PUBLIC ANNOUNCEMENT AND REGULATORY INTIMATIONS

One of the key aspects of the Corporate Insolvency Resolution Process ('CIRP') under the Code is the provision relating to Public Announcement contained in Section 13 and Section 15 of the Code and in Chapter III of the CIRP Regulations.

Action to be taken by IRP on initiation of CIRP

Section 13(1) of the Code lists the actions that the Adjudicating Authority i.e. the NCLT shall take once an application for initiating the CIRP has been initiated. The Adjudicating Authority shall:

- (a) declare a moratorium in accordance with Section 14 of the Code;
- (b) cause a public announcement of the initiation of the CIRP with respect to the corporate debtor to be made and call for claims in the manner laid down in Section 15 of the Code; and
- (c) appoint the interim resolution professional for the corporate debtor in accordance with Section 16 of the Code.

Section 13(2) of the Code mandates that the public announcement shall be made "immediately" after the appointment of the interim resolution professional. The term "immediately" has been explained under Chapter III, Regulation 6 of the CIRP Regulations whereby "immediately" means not later than three days from the date of appointment of the interim resolution professional.

Information to be contained in a Public Announcement

Section 15 of the Code lists the particulars that a public announcement of the CIRP for the corporate debtor shall contain. In particular, the public announcement shall include information relevant to the creditors such as the last date for the submission of claims and details of the interim resolution professional responsible for receiving claims. The details of the information to be contained in the Public Announcement referred to in Section 13 of the Code are elaborated herein below:

- (a) name and address of the corporate debtor under the CIRP;
- (b) name of the authority with which the corporate debtor is incorporated or registered;
- (c) the last date for submission of claims;
- (d) details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving the claims;

- (e) penalties for false or misleading claims; and
- (f) the date* on which the CIRP shall close.

*the date on which the CIRP shall close shall be the 180th day from the date of the admission of the application u/s 7, 9 or 10 of the Code, as the case may be.

Time limit of making Public Announcement by IRP

Regulation 6 of the CIRP Regulations stipulates that public announcement by an IRP pertaining to his/her appointment shall be made within three (3) days of such appointment.

Modes for making Public Announcement

Regulation 6 of the CIRP Regulations provides that Public Announcement shall be made:

- (i) in one English newspaper and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the interim resolution professional, the corporate debtor conducts material business operations;
- (ii) on the website, if any, of the corporate debtor; and
- (iii) on the website, if any, designated by Insolvency and Bankruptcy Board of India for the purpose.

IBBI has, vide circular dated 23.02.2018, prescribed www.ibbi.gov.in as the designated website for publishing forms on the designated website. As per the circular, the IRP, RP or the liquidator, as the case may be, shall send the forms to the Board for publishing the same on the designated website, namely, www.ibbi.gov.in in the manner specified. For example, for making public announcement the pdf format of same shall be sent by mail to the Board at public.ann@ibbi.gov.in

The Public Announcement shall invite creditors for submission of proof of claims and give them fourteen (14) days to submit the same from the date of appointment of the interim resolution professional.

IBBI Circular relating to use of Registration Number and Registered Address by Insolvency Professional in all his communications including Public Announcement

Pursuant to the IBBI Circular dated 3rd January, 2018, every insolvency

professional is under obligation to use the addressees and emails registered with the IBBI. The circular provides that in all their communications whether by way of public announcement or otherwise to a stakeholder or to an authority, an insolvency professional shall prominently state: (i) his name, address and email, as registered with the IBBI, (ii) his Registration Number as an insolvency professional granted by the IBBI, and (iii) the capacity in which he is communicating (Example: As Interim Resolution Professional of XYZ Limited, As Resolution Professional of ABC Limited, etc.).

Expenses of Public Announcement

The expenses of the public announcement shall be borne by applicant and the same may be reimbursed by the Committee of creditors to the extent it ratifies them. It is pertinent to mention that the expenses of the public announcement shall not form part of the insolvency resolution process costs.

Format of Public Announcement

The public announcement shall be made in the manner specified in Form A of the Schedule to the CIRP Regulations. The prescribed format is enclosed as **Annexure VII.1**.

Intimation of initiation of CIRP and appointment of IRP to concerned authorities

The Interim Resolution Professional may intimate to all the concerned authorities such as banks dealing with the corporate debtor; stock exchange, if any; registrar of companies; depositories of securities; etc., that the CIRP has been initiated against a corporate person and an IRP has been appointed.

The sample format of such intimation for reference is enclosed as **Annexure VII.2**.

II. CLAIMS AND CONSTITUTION OF COMMITTEE OF CREDITORS

After Public Announcement by IRP inviting claim following steps are taken by IRP.

1. Collation of Claims
2. Verification of Claims
3. Preparation of List of Creditors
4. Constitution of Creditors Committee

5. Calling of first Meeting of Creditors Committee
6. Appointment of two Registered Valuers

In the aforesaid context, CIRP Regulations prescribe for:-

1. Manner of submission of claims
2. Classification of Claims
3. Proof of Claims
4. Last Date for submission of claims
5. Reporting requirements of Interim Resolution Professionals with respect to verification of claims

For the purposes of collation, verification of claims, etc., following definitions may be noted.

The definition of term ‘Claim’

As per section 3(6) of the Code, “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.

The definition of the term ‘Financial Creditor’

As per section 5(7) of the Code, “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;

The definition of the term ‘Operational Creditor’

As per section 5(20) of the Code “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.

The definition of the term ‘Workman’

As per section 3(36) of the Code ‘workman’ shall have the same meaning as assigned to it in clause(s) of section 2 of the Industrial Disputes Act, 1947 (14 of 1947).

The definition of the term 'Financial Debt'

As per section 5(8) of the Code "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes –

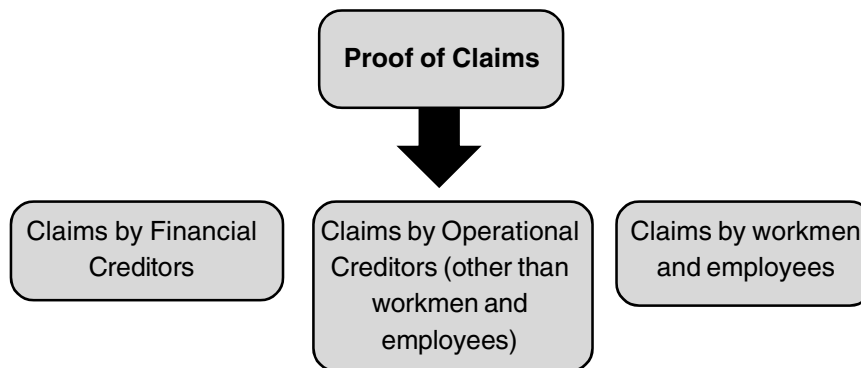
- (a) money borrowed against the payment of interest;
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- (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 nonrecourse 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;

The definition of the term 'Operational Debt'

As per section 5(21) of the Code "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.

Proof of Claims

(Chapter IV of CIRP Regulations)



Claims by Operational Creditors

(i) Mode and manner of submission of proof of claims

Regulation 7(1) of CIRP Regulations states that 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.

Format Enclosed as **Annexure VII.3**

(ii) All supplementary documents in support of claims to be submitted before constitution of Committee of Creditors

Person claiming to be an operational creditor may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.

(iii) Basis of proof of claims

As per Regulation 7(2) of the CIRP Regulations, 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.

Claims by Financial Creditors

(i) Mode and manner of submission of proof of claims

As per Regulation 8(1) of CIRP Regulations person claiming to be a financial creditor of the corporate debtor shall submit proof of claim to the interim resolution professional in electronic form in Form C of the Schedule.

Format enclosed as **Annexure VII.4**

(ii) All supplementary documents in support of claims to be submitted before constitution of Committee of Creditors

The Financial Creditor may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.

(iii) Basis of Proof of claims

As per Regulation 8(2) of CIRP Regulations the existence of debt due to the financial creditor 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 financial contract supported by financial statements as evidence of the debt;
 - (ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;
 - (iii) financial statements showing that the debt has not been repaid; or
 - (iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.

Claims by workmen and employees

(i) Mode and manner of submission of proof of claims

As per Regulation 9(1) of the CIRP Regulations, a person claiming to be a

workman or an 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 D of the Schedule.

As per Regulation 9(2) of CIRP Regulations where there are dues to numerous workmen or employees of the corporate debtor, an authorised representative may submit one proof of claim for all such dues on their behalf in Form E of the Schedule.

Formats of the claim are enclosed as **Annexure VII.5** and **Annexure VII.6**.

(ii) All supplementary documents in support of claims to be submitted before constitution of Committee of Creditors

Workman or an employee may submit supplementary documents or clarifications in support of the claim, on his own or if required by the interim resolution professional, before the constitution of the committee.

(iii) Basis of Proof of claims

As per Regulation 9(3) of the CIRP Regulations, the existence of dues to workmen or employees may be proved by them, individually or collectively on the basis of –

- (a) records available with an information utility, if any; or
- (b) other relevant documents, including –
 - (i) a proof of employment such as contract of employment for the period for which such workman or employee is claiming dues;
 - (ii) evidence of notice demanding payment of unpaid dues and any documentary or other proof that payment has not been made; or
 - (iii) an order of a court or tribunal that has adjudicated upon the non-payment of a dues, if any.

Claims by other creditors

IBBI vide notification dated 16th August, 2017 had amended the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 to include claims by creditors, other than financial and operational creditor.

(i) Mode and manner of submission of proof of claims

As per Regulation 9A(1) of the CIRP Regulations, a person claiming to be a creditor, other than those covered under regulations 7, 8, or 9, shall submit

proof of its claim to the interim resolution professional or resolution professional in person, by post or by electronic means in Form F of the Schedule.

Such creditors may submit the proof of claims in person, by post or by electronic means.

Formats of the claim are enclosed as **Annexure VII.7**

(ii) Basis of Proof of claims

As per Regulation 9A(2) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2016, the existence of the claim of such creditor may be proved on the basis of –

- (a) the records available in an information utility, if any, or
- (b) other relevant documents sufficient to establish the claim, including any or all of the following: -
 - (i) documentary evidence demanding satisfaction of the claim;
 - (ii) bank statements of the creditor showing non-satisfaction of claim;
 - (iii) an order of court or tribunal that has adjudicated upon non-satisfaction of claim, if any.

Interim Resolution Professional may seek further evidence for substantiation of claims

As per regulation 10 of the CIRP Regulations, the interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim.

Creditor shall bear the cost of proving the claims

As per Regulation 11 of the CIRP Regulations, a creditor shall bear the cost of proving the debt due to such creditor.

Submission of proof of claims before the last date mentioned in the public announcement

As per Regulation 12(1) of the CIRP Regulations, a creditor shall submit proof of claim on or before the last date mentioned in the public announcement.

Submission of claims by Creditors till the approval of Resolution Plan

Regulation 12(2) of the CIRP Regulations states that a creditor, who failed to submit proof of claim within the time stipulated in the public announcement, may submit such proof to the interim resolution professional or the resolution professional, as the case may be, till the approval of a resolution plan by the committee.

Financial creditor who has submitted claims after public announcement and before approval of resolution plan shall form part of Committee of Creditors

Regulation 12(3) of the CIRP Regulations states that where the creditor in sub-regulation (2) is a financial creditor, it shall be included in the committee from the date of admission of such claim. However, such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.

Verification of claims by Interim Resolution Professional

As per Regulation 13(1) of the CIRP Regulations the interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date (i.e. date on which the application for Insolvency Resolution is admitted by NCLT), within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

Points to be noted:

- Date for the purposes of verification of Claims – Verification of Claims to be made as on the insolvency commencement date i.e. date on which the CIRP application is admitted by NCLT.
- Last date of receipt of Claims - Not later than 14 days from the date of appointment of Interim Resolution Professional (NCLT to appoint interim professional within 14 days from insolvency commencement date. However, in general NCLT, especially when application is made by financial creditor or corporate debtor, appoints interim professional along with the order admitting CIRP Application.
- Interim professional to verify claims within seven days from the last date of receipt of claims.

Disclosure and filing requirements with respect to list of creditors

As per Regulation 13(2) of the CIRP Regulations, the list of creditors shall be –

- (a) available for inspection by the persons who submitted proofs of claim;
- (b) available for inspection by members, partners, directors and guarantors of the corporate debtor;
- (c) displayed on the website, if any, of the corporate debtor;
- (d) filed with the Adjudicating Authority (i.e. NCLT); and
- (e) presented at the first meeting of the committee.

A suggested format of list of creditors in compliance with Regulation 13 of the CIRP Regulations is enclosed as **Annexure VII.8**.

Determination of amount of claim

Regulation 14(1) of the CIRP Regulations, states that when the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him.

Regulation 14(2) of the CIRP Regulations, states that the interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1), as soon as may be practicable, when he comes across additional information warranting such revision.

Claims denominated in foreign currency

Regulation 15 of the CIRP Regulations, states that the claims denominated in foreign currency shall be valued in Indian currency at the official exchange rate as on the insolvency commencement date.

Explanation- “official exchange rate” is the reference rate published by the Reserve Bank of India or derived from such reference rates.

III. COMMITTEE OF CREDITORS

Constitution of Committee of Creditors*Committee of Creditors to contain financial Creditors*

Section 21(1) of the code states that the IRP 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. Section 21(2) of the code states that the committee of creditors shall comprise all financial creditors of the corporate debtor:

Related party shall not be representing the committee of creditors

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.

Related Party is defined under Section 5(24) of the Code as under : “related party”, in relation to a corporate debtor, means –

- (a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;
- (b) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;
- (c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;
- (d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent of its share capital;
- (e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent of its paid-up share capital;
- (f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
- (g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

- (h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;
- (i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;
- (j) any person who controls more than twenty percent of voting rights in the corporate debtor on account of ownership or a voting agreement;
- (k) any person in whom the corporate debtor controls more than twenty per cent of voting rights on account of ownership or a voting agreement;
- (l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;
- (m) any person who is associated with the corporate debtor on account of –
 - (i) participation in policy making processes of the corporate debtor; or
 - (ii) having more than two directors in common between the corporate debtor and such person; or
 - (iii) interchange of managerial personnel between the corporate debtor and such person; or
 - (ii) provision of essential technical information to, or from, the corporate debtor.

Committee with only Operational Creditors

Regulation 16(1) of the CIRP Regulations states that where the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor, the committee shall be set up in accordance with CIRP Regulations.

(2) The committee formed under this Regulation shall consist of members as under –

- (a) eighteen largest operational creditors by value :
Provided that if the number of operational creditors is less than eighteen, the committee shall include all such operational creditors;
- (b) one representative elected by all workmen other than those workmen included under sub-clause (a); and

(c) one representative elected by all employees other than those employees included under sub-clause (a).

(3) A member of the committee formed under this Regulation shall have voting rights in proportion of the debt due to such creditor or debt represented by such representative, as the case may be, to the total debt.

Explanation- For the purposes of this sub-regulation, 'total debt' is the sum of –

- (a) the amount of debt due to the creditors listed in sub-regulation 2(a);
- (b) the amount of the aggregate debt due to workmen under sub-regulation 2(b); and
- (c) the amount of the aggregate debt due to employees under sub-regulation 2(c).

(4) A committee formed under this Regulation and its members shall have the same rights, powers, duties and obligations as a committee comprising financial creditors and its members, as the case may be.

First meeting of the committee

Regulations 17 (1) of the CIRP Regulations states that the interim resolution professional shall file a report certifying constitution of the committee to the Adjudicating Authority on or before the expiry of thirty days from the date of his appointment. Regulation 17(2) of the CIRP Regulations, states that the IRP shall convene the first meeting of the committee within seven days of filing the report under this Regulation.

However, it is pertinent to note here that, as per section 16(5) of the Code, the term of the IRP shall not exceed thirty days from date of his appointment and whereas Regulation 17(1) of the CIRP Regulations provides thirty days time for filing report certifying constitution of Committee and thereafter convening the meeting of Committee within seven days thereafter.

Thus, the report certifying constitution of committee shall be submitted with Adjudicating Authority in such a manner that the first meeting of committee shall be convened within the period of thirty days from the date of appointment of interim resolution professional i.e. before the expiry of the office of interim resolution professional.

Points to be noted

- IRP to file a report with NCLT certifying the Constitution of Committee of Creditors.

- The First meeting of the Committee of Creditors is to be convened within 7 days of filing the report with NCLT certifying the constitution of Committee of Creditors.
- Both 1 and 2 above shall be completed within 30 days of the appointment of Interim Resolution Professional.

Specimen Report Certifying the Constitution of Committee of Creditors is enclosed as **Annexure VII.9**

IV. CONDUCT OF CIRP DURING THE TENURE OF INTERIM RESOLUTION PROFESSIONAL

The various provisions pertaining to the conduct of the CIRP during the tenure of the IRP are covered under Sections 17, 18, 19, 20 of the Code read with Chapter VIII of the CIRP Regulations.

Management of Affairs of Corporate Debtor

Section 17 of the Code provides that once the Interim resolution Professional has been appointed:

- (a) The management of the affairs of the corporate debtor is to be taken over by him/her;
- (b) The powers of the Board of Directors or the partners of the Corporate Debtor, as the case may be, are suspended and be exercised by the IRP;
- (c) The officers and managers of the corporate debtor shall report to the IRP and co-operate with him/her in providing access to documents and records of the corporate debtor;
- (d) The financial institutions maintaining accounts of the corporate debtor shall furnish all information relating to the corporate debtor available with them to the IRP.

Section 17(2) of the Code lists out the various powers that an IRP shall have, including the power to:

- (a) do all acts and execute documents in the name of and on behalf of corporate debtor;
- (b) take such actions, in the manner and subject to such restrictions, as may be specified by the Board;

- (c) access the electronic records of the corporate debtor from the Information Utility;
- (d) access the books of account, records and other relevant documents of corporate debtor available with the Government authorities, statutory auditors, accountants and such other persons as may be specified.

The above powers vested with the IRP are important for effectively discharging his/her responsibilities. A sample of the intimation to be sent by the IRP to the employees of the corporate debtor is enclosed as **Annexure VII.10**

Duties of Interim Resolution Professional

Section 18 of the Code lists out the various duties bestowed on an IRP.

These include:

- (a) collection of all the financial information relating to the corporate debtor;
- (b) receipt and collation of debt claims submitted by creditors to the IRP;
- (c) constitution of the committee of creditors;
- (d) taking over control and monitoring the assets of the corporate debtor;
- (e) filing the information collected with an information utility;
- (f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with the information utility or the depository of securities or any other registry that records the ownership of assets.

The below table enlists the assets which can or cannot be taken over by an IRP as contemplated under section 18 of the Code:

<i>Assets which can be taken over</i>	<i>Assets which cannot be taken over</i>
<ul style="list-style-type: none"> • Assets over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor including <ul style="list-style-type: none"> (i) Assets over which the corporate debtor has ownership rights which may be located in a foreign country; 	<ul style="list-style-type: none"> • Assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment; • Assets of any Indian or foreign subsidiary of the corporate debtor; Such other assets as may be notified by the Central Government in

(ii) Assets that may or may not be in possession of the corporate debtor;	consultation with any financial sector regulator.
(iii) Tangible assets, whether movable or immovable	
(iv) Intangible assets including intellectual property	
(v) Securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;	
(vi) Assets subject to the determination of ownership by a court or authority	

Obligations of the Personnel and Promoters of the Corporate Debtor

Section 19 of the Code imposes an obligation on the personnel and promoters of the corporate debtor to extend all assistance and co-operation required by the IRP in the management of the affairs of the corporate debtor. The said provision is to help IRP discharge his duties effectively.

Personnel is defined under section 5 (23) of the Code to mean:

- (a) employee;
- (b) directors;
- (c) managers;
- (d) key managerial personnel and
- (e) designated partners, if any of the corporate debtor.

Where the personnel of the corporate debtor or any other person required to cooperate with the IRP (such other person may include a contractual counter party, supplier, service provider and auditor) do not extend co-operation or assistance to the IRP, the IRP may apply to the Adjudicating Authority for an order. A sample application is enclosed as **Annexure VII.11**.

The Adjudicating Authority may by an order, direct the person to comply with the instructions of the IRP or to provide information to the IRP.

Powers of an IRP

Section 20 of the Code lays down that the IRP has to manage the operations

of the corporate debtor as a going concern to enable him to protect and preserve the value of the property of the corporate debtor. These include the power to:

- (a) appoint accountants, legal counsel or such other professionals who may provide specialist advice to the IRP. Such professionals may include turnaround specialists and management experts.
- (b) Enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of the CIRP;
- (c) Raise interim finance. However, any interim finance raised by providing security of an encumbered property of the corporate debtor will require prior permission of the concerned creditor;
- (d) Issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern;
- (e) Take all such actions as are necessary to keep the corporate debtors as a going concern.

Sale of Assets outside the ordinary course of business

Regulation 29 of CIRP Regulations stipulates that the IRP may sell unencumbered assets of the corporate debtor, other than in the ordinary course of business, if he is of the opinion that such a sale is necessary for a better realisation of value under the facts and circumstances of the case. However, the book value of all the assets sold under this sub-regulation shall not exceed 10% of the total claims admitted by the IRP. Further, such a sale shall require the approval of the committee.

Notwithstanding the terms of the constitutional documents of the corporate debtor, shareholders' agreement, joint venture agreement or other document of a similar nature, the title of a bonafide purchaser under this regulation shall be free and marketable.

Assistance of local district administration

Regulation 30 of the Chapter VIII of CIRP Regulations enables the IRP to seek the assistance of the local administration in discharging his duties under the Code or the Regulations by making an application to the Adjudicating Authority for an order seeking such assistance. A sample application is enclosed as **Annexure VII.12**.

V. FIRST MEETING OF COMMITTEE OF CREDITORS

Calling of first meeting of Committee of Creditors is one of the primary and vital role of IRP on collation and verification of claims. It involves secretarial and regulatory aspects including preparation and despatch of notice to the required notices, mode of service of notice, identifying necessary agenda items, providing video conferencing facility, voting through electronic means and so on.

First meeting to be held within seven days of the constitution of committee of creditors.

- Section 22(1) of the Code states that the first meeting of the Committee of Creditors shall be held within seven days from the constitution of committee of creditors.
- Regulation 17(2) of CIRP Regulations the interim resolution professional shall convene the first meeting of Committee of creditors within 7 days of filing the report of constitution of committee of creditors with National Company Law Tribunal.

Notice Period and mode of delivery

Regulation 19 (1) of CIRP Regulations states that a meeting of the committee shall be called by giving not less than seven days' notice in writing to every participant, at the address provided to the RP and such notice may be sent by hand delivery, or by post but in any event, be served on every participant by electronic means in accordance with Regulation 20. Regulation 19(2) further states that the committee may reduce the notice period from seven days to such other period of not less than twenty four hours, as it deems fit.

To whom notice is to be served

As per section 24(3) of the Code, the RP shall give notice of each meeting of the committee of creditors to -

- (a) members of Committee of Creditors;
- (b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;
- (c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent. of the debt.

Service of notice by electronic means

Regulation 20 of CIRP Regulations stipulates the following with respect to service of notice by electronic means:

- (1) A notice by electronic means may be sent to the participants through email as a text or as an attachment to email or as a notification providing electronic link or Uniform Resource Locator for accessing such notice.
- (2) The subject line in e-mail shall state the name of the corporate debtor, the place, if any, the time and the date on which the meeting is scheduled.
- (3) If notice is sent in the form of a non-editable attachment to an e-mail, such attachment shall be in the Portable Document Format or in a non-editable format together with a 'link or instructions' for recipient for downloading relevant version of the software.
- (4) When notice or notifications of availability of notice are sent by an e-mail, the resolution professional shall ensure that it uses a system which produces confirmation of the total number of recipients e-mailed and a record of each recipient to whom the notice has been sent and copy of such record and any notices of any failed transmissions and subsequent re-sending shall be retained as "proof of sending".
- (5) The obligation of the resolution professional shall be satisfied when he transmits the e-mail and he shall not be held responsible for a failure in transmission beyond its control.
- (6) The notice made available on the electronic link or Uniform Resource Locator shall be readable, and the recipient should be able to obtain and retain copies and the resolution professional shall give the complete Uniform Resource Locator or address of the website and full details of how to access the document or information.
- (7) If a participant, other than a member of the committee, fails to provide or update the relevant e-mail address to the resolution professional, the non-receipt of such notice by such participant of any meeting shall not invalidate the decisions taken at such meeting.

Contents of the notice for meeting

Regulation 21 of CIRP Regulations stipulates the following conditions with respect to contents of the Notice.

- (1) The notice shall inform the participants about
 - the venue,
 - the time,
 - date of the meeting,
 - the option available to them to participate through video conferencing or other audio and visual means, and
 - all the necessary information to enable participation through video conferencing or other audio and visual means.
- (2) The notice of the meeting shall provide that a participant may attend and vote in the meeting either in person or through an authorised representative: Provided that such participant shall inform the resolution professional, in advance of the meeting, of the identity of the authorised representative who will attend and vote at the meeting on its behalf.
- (3) The notice of the meeting shall-
 - (a) contain an agenda of the meeting with the following-
 - (i) a list of the matters to be discussed at the meeting;
 - (ii) a list of the issues to be voted upon at the meeting; and
 - (iii) copies of all documents relevant to the matters to be discussed and the issues to be voted upon at the meeting; and
 - (b) state that a vote of the members of the committee shall not be taken at the meeting unless all members are present at such meeting.
- (4) The notice of the meeting shall-
 - (a) state the process and manner for voting by electronic means and the time schedule, including the time period during which the votes may be cast;
 - (b) provide the login ID and the details of a facility for generating password and for keeping security and casting of vote in a secure manner; and
 - (c) provide contact details of the person who will address the queries connected with the electronic voting.

(A specimen format of the Notice of meeting along with suggested agenda items for the meeting is enclosed as **Annexure VII.13**)

Quorum at the meeting

As per Regulation 22 of CIRP Regulations:

- (1) A meeting of the committee shall be quorate if members of the committee representing at least thirty three percent of the voting rights are present either in person or by video conferencing or other audio and visual means:

Provided that the committee may modify the percentage of voting rights required for quorum in respect of any future meetings of the committee.

- (2) Where a meeting of the committee could not be held for want of quorum, unless the committee has previously decided otherwise, the meeting shall automatically stand adjourned at the same time and place on the next day.
- (3) In the event a meeting of the committee is adjourned in accordance with sub-regulation (2), the adjourned meeting shall be quorate with the members of the committee attending the meeting.

Participation through video conferencing

As per Regulation 23 of CIRP Regulations:

- (1) The notice convening the meetings of the committee shall provide the participants an option to attend the meeting through video conferencing or other audio and visual means in accordance with this Regulation.
- (2) The resolution professional shall make necessary arrangements to ensure uninterrupted and clear video or audio and visual connection.
- (3) The resolution professional shall take due and reasonable care-
 - (a) to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;
 - (b) to ensure availability of proper video conferencing or other audio and visual equipment or facilities for providing transmission of the communications for effective participation of the participants at the meeting;
 - (c) to record proceedings and prepare the minutes of the meeting;

- (d) to store for safekeeping and marking the physical recording(s) or other electronic recording mechanism as part of the records of the corporate debtor;
- (e) to ensure that no person other than the intended participants attends or has access to the proceedings of the meeting through video conferencing or other audio and visual means; and
- (f) to ensure that participants attending the meeting through audio and visual means are able to hear and see, if applicable, the other participants clearly during the course of the meeting:

Provided that the persons, who are differently abled, may make request to the resolution professional to allow a person to accompany him at the meeting.

- (4) Where a meeting is conducted through video conferencing or other audio and visual means, the scheduled venue of the meeting as set forth in the notice convening the meeting, which shall be in India, shall be deemed to be the place of the said meeting and all recordings of the proceedings at the meeting shall be deemed to be made at such place.

Conduct of meeting

As per Regulation 24 of CIRP Regulations:

- (1) The resolution professional shall act as the chairperson of the meeting of the committee.
- (2) At the commencement of a meeting, the resolution professional shall take a roll call when every participant attending through video conferencing or other audio and visual means shall state, for the record, the following, -
 - (a) his name;
 - (b) whether he is attending in the capacity of a member of the committee or any other participant;
 - (c) whether he is representing a member or group of members;
 - (d) the location from where he is participating;
 - (e) that he has received the agenda and all the relevant material for the meeting; and
 - (f) that no one other than him is attending or has access to the proceedings of the meeting at the location of that person.

- (3) After the roll call, the resolution professional shall inform the participants of the names of all persons who are present for the meeting and confirm if the required quorum is complete.
- (4) The resolution professional shall ensure that the required quorum is present throughout the meeting.
- (5) From the commencement of the meeting till its conclusion, no person other than the participants and any other person whose presence is required by the resolution professional shall be allowed access to the place where meeting is held or to the video conferencing or other audio and visual facility, without the permission of the resolution professional.
- (6) The resolution professional shall ensure that minutes are made in relation to each meeting of the committee and such minutes shall disclose the particulars of the participants who attended the meeting in person, through video conferencing, or other audio and visual means.
- (7) The resolution professional shall circulate the minutes of the meeting to all participants by electronic means within forty eight hours of the said meeting.

V. VOTING BY THE COMMITTEE

Voting by the committee

As per Regulation 25 of CIRP Regulations:

- (1) The actions listed in section 28(1) of the Code shall be considered in meetings of the committee.
- (2) Any action other than those listed in section 28(1) of the Code requiring approval of the committee may be considered in meetings of the committee.
- (3) Where all members are present in a meeting, the resolution professional shall take a vote of the members of the committee on any item listed for voting after discussion on the same.
- (4) At the conclusion of a vote at the meeting, the resolution professional shall announce the decision taken on items along with the names of the members of the committee who voted for or against the decision, or abstained from voting.
- (5) If all members are not present at a meeting, a vote shall not be taken at such meeting and the resolution professional shall -

- (a) circulate the minutes of the meeting by electronic means to all members of the committee within forty eight hours of the conclusion of the meeting; and
- (b) seek a vote on the matters listed for voting in the meeting, by electronic voting system where the voting shall be kept open for twenty four hours from the circulation of the minutes.

Voting through electronic means

As per Regulation 26 of CIRP Regulations:

(1) The resolution professional shall provide each member of the committee the means to exercise its vote by either electronic means or through electronic voting system in accordance with the provisions of this Regulation.

Explanation- For the purposes of these Regulations -

- (a) the expressions “voting by electronic means” or “electronic voting system” means a “secured system” based process of display of electronic ballots, recording of votes of the members of the committee and the number of votes polled in favour or against, such that the voting exercised by way of electronic means gets registered and counted in an electronic registry in a centralized server with adequate cyber security;
- (b) the expression “secured system” means computer hardware, software, and procedure that -
 - (i) are reasonably secure from unauthorized access and misuse;
 - (ii) provide a reasonable level of reliability and correct operation;
 - (iii) are reasonably suited to perform the intended functions; and
 - (iv) adhere to generally accepted security procedures.

(2) Once a vote on a resolution is cast by a member of the committee, such member shall not be allowed to change it subsequently.

(3) At the end of the voting period, the voting portal shall forthwith be blocked.

(4) At the conclusion of a vote held under this Regulation, the resolution professional shall announce and make a written record of the summary of the decision taken on a relevant agenda item along with the names of the members of the committee who voted for or against the decision, or abstained from voting.

(5) The resolution professional shall circulate a copy of the record made under sub-regulation (4) to all participants by electronic means within twenty four hours of the conclusion of the voting.

ANNEXURE VII.1

SCHEDULE

FORM A

PUBLIC ANNOUNCEMENT

*(Under Regulation 6 of the Insolvency and Bankruptcy Board of India
(Insolvency Resolution Process for Corporate Persons) Regulations,
2016)*

**FOR THE ATTENTION OF THE CREDITORS OF
[Name of Corporate Debtor]**

	RELEVANT PARTICULARS	
1.	NAME OF CORPORATE DEBTOR	
2.	DATE OF INCORPORATION OF CORPORATE DEBTOR	
3.	AUTHORITY UNDER WHICH CORPORATE DEBTOR IS INCORPORATED / REGISTERED	
4.	CORPORATE IDENTITY NUMBER / LIMITED LIABILITY IDENTIFICATION NUMBER OF CORPORATE DEBTOR	
5.	ADDRESS OF THE REGISTERED OFFICE AND PRINCIPAL OFFICE (IF ANY) OF CORPORATE DEBTOR	
6.	INSOLVENCY COMMENCEMENT DATE IN RESPECT OF CORPORATE DEBTOR	
7.	ESTIMATED DATE OF CLOSURE OF INSOLVENCY RESOLUTION PROCESS	
¹ [8]	NAME AND REGISTRATION NUMBER OF THE INSOLVENCY	

1. Substituted by Notification No. IBBI/2017-18/GN/REG030, dated 27th March, 2018 (w.e.f. 01-04-2018) for entries 8 & 9.

	PROFESSIONAL ACTING AS INTERIM RESOLUTION PROFESSIONAL	
9	ADDRESS AND E-EMAIL OF THE INTERIM RESOLUTION PROFESSIONAL, AS REGISTERED WITH THE BOARD	
10	ADDRESS AND E-MAIL TO BE USED FOR CORRESPONDENCE WITH THE INTERIM RESOLUTION PROFESSIONAL, IF DIFFERENT FROM THOSE GIVEN AT SL. NO.9.	
11	LAST DATE FOR SUBMISSION OF CLAIMS]	

Notice is hereby given that the National Company Law Tribunal has ordered the commencement of a corporate insolvency resolution process against the [name of the corporate debtor] on [insolvency commencement date].

The creditors of [name of the corporate debtor], are hereby called upon to submit a proof of their claims on or before [insert the date falling fourteen days from the appointment of the interim resolution professional] to the interim resolution professional at the address mentioned against item 8.

²[The financial creditors shall submit their proof of claims by electronic means only. All other creditors may submit the proof of claims in person, by post or by electronic means.]

Submission of false or misleading proofs of claim shall attract penalties.

Name and Signature of Interim Resolution Professional :

Date and Place :

2. Substituted by Notification No. IBBI/ 2017-18/ GN/ REG013, dated 16th August, 2017 (w.e.f. 16-8-2017). Prior to its substitution, it stood as under :

“The financial creditors shall submit their proof of claims by electronic means only. The operational creditors, including workmen and employees, may submit the proof of claims by in person, by post or electronic means.”

ANNEXURE VII.2

**SAMPLE FORMAT FOR INTIMATION OF INITIATION OF CIRP TO
REGULATORY AUTHORITIES**

[On the letterhead of the Corporate Debtor]

Date: _____

To,

(a) National Stock Exchange of India and/or (b) Bombay Stock Exchange Limited and/or (c) NSDL/CDSL and/or (d) MCX/NCDEX and/or (e) Registrar of Companies and/or (f) Reserve Bank of India and/or (g) Regional Directors-Ministry of Corporate Affairs and/or (h) Banks where the account of the corporate debtor is maintained [as applicable in the particular case]

Dear Sir/Madam,

Subject: Intimation of initiation of Corporate Insolvency Resolution Process (CIRP) and appointment of Interim Resolution Professional (IRP)

I/We hereby intimate your good office that CIRP has been initiated in respect of [name of the corporate debtor] under the provisions of Insolvency and Bankruptcy Code, 2016 ("Code") by an order of National Company Law Tribunal ("NCLT") with effect from [*insolvency commencement date*].

As per section 17 of the Code, the powers of the [*Board of Directors*] or [*Partners*] of [*name of the corporate debtor*] stands suspended and such powers shall be vested with me, [*name of the Insolvency Resolution Professional*], having IP Registration no. [*IP Registration no.*], appointed as the Insolvency Resolution Professional.

It may further be noted that in consonance with the stipulations contained in Section 14 of the Code, a moratorium has been declared vide the aforesaid order passed by NCLT, whereby, inter alia, the following shall be prohibited:-

- (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.

The instant intimation w.r.t initiation of CIRP and appointment of Interim Resolution Professional is for your information and record. I/We shall keep the statutory authorities posted on further developments in this regard.

Kindly acknowledge the receipt of this document.

Thanking you,

Yours faithfully,

[name of the Insolvency Resolution Professional]

[IP Registration no.]

Enclosed :

- (a) A copy of the NCLT order dated [date of order]
- (b) A copy of the Public Announcement made under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

ANNEXURE VII.13

SCHEDULE

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 NON-PAYMENT 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

¹[DECLARATION

I, [*Name of claimant*], currently residing at [*insert address*], hereby declare and state as follows :

1. [*Name of corporate debtor*], the corporate debtor was, at the insolvency commencement date, being the.....day of.....20....., actually indebted to me in the sum of Rs. [*insert amount of claim*].
2. In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below: [*Please list the documents relied on as evidence of claim*].
3. The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed therefrom.
4. In respect of the said sum or any part thereof, neither I nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:

[*Please state 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*].

Date:

Place:

(*Signature of the claimant*)

VERIFICATION

I, [*Name*] the claimant hereinabove, do hereby verify that the contents of this proof of claim are true and correct to my knowledge and belief and no material fact has been concealed therefrom.

Verified at ... on this day of, 20...

(*Signature of the claimant*)

[*Note: In the case of company or limited liability partnership, the declaration and verification shall be made by the director/manager/secretary and in the case of other entities, an officer authorised for the purpose by the entity*].]

1. Substituted by Notification No. IBBI/2017-18/GN/REG030, dated 27th March, 2018 (w.e.f. 01-04-2018) for Affidavit and Verification.

ANNEXURE VII.4

SCHEDULE

FORM C

PROOF OF CLAIM BY FINANCIAL CREDITORS

*[Under Regulation 8 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 registered office and principal office of the financial
creditor]*

Subject: Submission of proof of claim.

Madam/Sir,

[Name of the financial 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 FINANCIAL CREDITOR	
2.	IDENTIFICATION NUMBER OF FINANCIAL 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	

	FINANCIAL 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 HOW AND WHEN DEBT INCURRED	
7.	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	
8.	DETAILS OF ANY SECURITY HELD, THE VALUE OF THE SECURITY, AND THE DATE IT WAS GIVEN	
9.	DETAILS OF THE BANK ACCOUNT TO WHICH THE AMOUNT OF THE CLAIM OR ANY PART THEREOF CAN BE TRANSFERRED PURSUANT TO A RESOLUTION PLAN	
10.	LIST OF DOCUMENTS ATTACHED TO THIS PROOF OF CLAIM IN ORDER TO PROVE THE EXISTENCE AND NON-PAYMENT OF CLAIM DUE TO THE [FINANCIAL CREDITOR] ¹	
Signature of financial creditor or person authorised to act on his behalf <i>[Please enclose the authority if this is being submitted on behalf of an operational creditor]</i>		
Name in BLOCK LETTERS		
Position with or in relation to creditor		
Address of person signing		

1. Substituted by Notification No. IBBI/ 2017-18/ GN/ REG030, dated 27th March, 2018 (w.e.f. 01-04-2018). Item 10, before substitution, stood as under :

“OPERATIONAL CREDITOR”

*PAN number, passport, AADHAAR Card or the identity card issued by the Election Commission of India.

¹[DECLARATION

I, [*Name of claimant*], currently residing at [*insert address*], do hereby declare and state as follows :

1. [*Name of corporate debtor*], the corporate debtor was, at the insolvency commencement date, being the.....day of.....20....., actually indebted to me in the sum of Rs. [*insert amount of claim*].
2. In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below: [*Please list the documents relied on as evidence of claim*].
3. The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed therefrom.
4. In respect of the said sum or any part thereof, neither I, nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:

[*Please state 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*].
5. I am / I am not a related party in relation to the corporate debtor, as defined under section 5(24) of the Code.

Date:

Place:

(*Signature of the claimant*)

VERIFICATION

I, [*Name*] the claimant hereinabove, do hereby verify that the contents of this proof of claim are true and correct to my knowledge and belief and no material fact has been concealed therefrom.

1. Substituted by Notification No. IBBI/ 2017-18/ GN/ REG030, dated 27th March 2018 (w.e.f. 01-04-2018) for Affidavit and Verification.

Verified at ... on this day of, 20...

(Signature of claimant)

[Note: In the case of company or limited liability partnership, the declaration and verification shall be made by the director/manager/secretary and in the case of other entities, an officer authorised for the purpose by the entity].

ANNEXURE VII.5

SCHEDULE

FORM D

PROOF OF CLAIM BY A WORKMAN OR AN EMPLOYEE

[Under Regulation 9 of the Insolvency and Bankruptcy (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 workman / employee]

Subject: Submission of proof of claim.

Madam/Sir,

[Name of the workman / employee], 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 WORKMAN / EMPLOYEE	
2.	PAN NUMBER, PASSPORT, THE IDENTITY CARD ISSUED BY THE ELECTION COMMISSION OF INDIA OR AADHAAR CARD OF WORKMAN / EMPLOYEE	
3.	ADDRESS AND EMAIL ADDRESS (IF ANY) OF WORKMAN/EMPLOYEE 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 CLAIM 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 CLAIM AROSE	
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 THE BANK ACCOUNT TO WHICH THE AMOUNT OF THE CLAIM OR ANY PART THEREOF CAN BE TRANSFERRED PURSUANT TO A RESOLUTION PLAN	
10.	LIST OF DOCUMENTS ATTACHED TO THIS PROOF OF CLAIM IN ORDER TO PROVE THE EXISTENCE AND NON-PAYMENT OF CLAIM DUE TO THE OPERATIONAL CREDITOR	

Signature of workman / employee 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

1. Substituted by Notification No. IBBI/ 2017-18/ GN/ REG030, dated 27th March 2018 (w.e.f. 01-04-2018) for Affidavit and Verification.

¹[DECLARATION

I, *[Name of claimant]*, currently residing at *[insert address]*, do hereby declare and state as follows: -

1. *[Name of corporate debtor]*, the corporate debtor was, at the insolvency commencement date, being the.....day of.....20....., actually indebted to me in the sum of Rs. *[insert amount of claim]*.
2. In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below: *[Please list the documents relied on as evidence of claim]*.
3. The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed therefrom.
4. In respect of the said sum or any part thereof, neither I, nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:

[Please state 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].

Date:

Place:

(Signature of the claimant)

VERIFICATION

I, *[Name]* the claimant hereinabove, do hereby verify that the contents of this proof of claim are true and correct to my knowledge and belief and no material fact has been concealed therefrom.

Verified at ... on this day of, 20...

(Signature of claimant).]

1. Substituted by Notification No. IBBI/ 2017-18/ GN/ REG030, dated 27th March 2018 (w.e.f. 01-04-2018) for Affidavit and Verification.

ANNEXURE VII.6

SCHEDULE

FORM E

**PROOF OF CLAIM SUBMITTED BY AUTHORISED REPRESENTATIVE
OF WORKMEN AND EMPLOYEES**

*(Under Regulation 9 of the Insolvency and Bankruptcy (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 duly authorised representative of the workmen /
employees]

Subject : Submission of proofs of claim.

Madam/Sir,

I, [name of authorised representative of the workmen / employees], currently
residing at [address of authorised representative of the workmen / employees],
on behalf of the workmen and employees employed by the above named
corporate debtor and listed in Annexure A, solemnly affirm and say:

1. That the above named corporate debtor was, at the insolvency
commencement date, being the _____ day of _____ 20 ____,
justly truly indebted to the several persons whose names, addresses,
and descriptions appear in the Annexure A below in amounts severally
set against their names in such Annexure A for wages, remuneration
and other amounts due to them respectively as workmen or/ and
employees in the employment of the corporate debtor in respect of
services rendered by them respectively to the corporate debtor during
such periods as are set out against their respective names in the
said Annexure A.
2. That for which said sums or any part thereof, they have not, nor has

any of them, had or received any manner of satisfaction or security whatsoever, save and except the following:

[Please state 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.]

Deponent

ANNEXURE

1. Details of Employees/Workmen

Sl. No.	Name of Employee/workman	Identification number (pan number, passport or aadhaar card)	Total amount due (Rs.)	Period over which amount due
1.				
2.				
3.				
4.				

2. Particulars of how debt was incurred by the corporate debtor, including particulars of any dispute as well as the record of pendency of suit or arbitration proceedings (if any).
3. Particulars 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.

Attachments:

¹[Documents relied as evidence as proof of debt and as proofs of non-payment of debt.]

1. Substituted by Notification No. IBBI/ 2017-18/ GN/ REG030, dated 27th March, 2018 (w.e.f. 01-04-2018).

²[DECLARATION

I, [*Name of claimant*], currently residing at [*insert address*], do hereby declare and state as follows: -

1. [*Name of corporate debtor*], the corporate debtor was, at the insolvency commencement date, being the.....day of.....20....., actually indebted to me in the sum of Rs. [*insert amount of claim*].
2. In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below: [*Please list the documents relied on as evidence of claim*].
3. The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed therefrom.
4. In respect of the said sum or any part thereof, neither I, nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:

[*Please state 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*].

Date:

Place:

(*Signature of the claimant*)

VERIFICATION

I, [*Name*] the claimant hereinabove, do hereby verify that the contents of this proof of claim are true and correct to my knowledge and belief and no material fact has been concealed therefrom.

Verified at ... on this day of, 20...

(*Signature of the claimant*)

2. Substituted by Notification No. IBBI/ 2017-18/ GN/ REG030, dated 27th March, 2018 (w.e.f. 01-04-2018) for Affidavit and Verification.

ANNEXURE VII.7

¹[FORM F]**PROOF OF CLAIM BY CREDITORS (OTHER THAN FINANCIAL CREDITORS AND OPERATIONAL CREDITORS)**

[Under Regulation 9A 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 creditor]

Subject : Submission of proof of claim.

Madam / Sir,

I, [Name of the creditor], hereby submit the following proof of claim in respect of the corporate insolvency resolution process in the case of [name of corporate debtor]. The details of the same are set out below:

	PARTICULARS	
1.	NAME OF THE CREDITOR	
2.	IDENTIFICATION NUMBER OF THE CREDITOR (IF AN INCORPORATED BODY CORPORATE, PROVIDE IDENTIFICATION NUMBER AND PROOF OF INCORPORATION. IF A PARTNERSHIP OR INDIVIDUAL, PROVIDE IDENTIFICATION RECORD* OF ALL PARTNERS OR THE INDIVIDUALS)	
3.	ADDRESS AND EMAIL ADDRESS OF THE CREDITOR FOR CORRESPONDENCE	
4.	DESCRIPTION OF THE CLAIM (INCLUDING THE	

1. Inserted by Notification No. IBBI/2017-18/ GN/REG013, dated 16th August, 2017 (w.e.f. 16-8-2017).

	AMOUNT OF THE CLAIM AS AT THE INSOLVENCY COMMENCEMENT DATE)	
5.	DETAILS OF DOCUMENTS BY REFERENCE TO WHICH CLAIM CAN BE SUBSTANTIATED	
6.	DETAILS OF HOW AND WHEN THE CLAIM AROSE	
7.	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	
8.	DETAILS OF : A. ANY SECURITY HELD, THE VALUE OF SECURITY AND ITS DATE, OR B. RETENTION TITLE ARRANGEMENT IN RESPECT OF GOODS OR PROPERTIES TO WHICH THE CLAIM REFERS	
9.	DETAILS OF BANK ACCOUNT TO WHICH THE AMOUNT OF THE CLAIM OR ANY PART THEREOF CAN BE TRANSFERRED PURSUANT TO A RESOLUTION PLAN	
10.	LIST OF DOCUMENTS ATTACHED TO THIS CLAIM IN ORDER TO PROVE THE EXISTENCE AND NON-SATISFACTION OF CLAIM DUE TO THE CREDITOR	

Signature of the creditor or any person authorised to act on his behalf
<i>(Please enclose the authority if this is being submitted signed on behalf of the creditor)</i>
Name in BLOCK LETTERS
Position with or in relation to the creditor
Address of the person signing

* PAN, Passport, AADHAAR or the identity card issued by the Election Commission of India.

¹[DECLARATION

I, [*Name of claimant*], currently residing at [*insert address*], do hereby declare and state as follows: -

1. [*Name of corporate debtor*], the corporate debtor was, at the insolvency commencement date, being the day of.....20....., actually indebted to me in the sum of Rs. [*insert amount of claim*].
2. In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below: [*Please list the documents relied on as evidence of claim*].
3. The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed therefrom.
4. In respect of the said sum or any part thereof, neither I, nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:

[*Please state 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*].

Date:

Place:

(*Signature of the claimant*)

VERIFICATION

I, [*Name*] the claimant hereinabove, do hereby verify that the contents of this proof of claim are true and correct to my knowledge and belief and no material fact has been concealed therefrom.

Verified at ... on this day of, 20...

(*Signature of the claimant*)

[*Note: In the case of company or limited liability partnership, the declaration and verification shall be made by the director/manager/secretary and in the case of other entities, an officer authorised for the purpose by the entity.*]

1. Substituted by Notification No. IBBI/ 2017-18/ GN/ REG030, dated 27th March, 2018 (w.e.f. 01-04-2018) for Affidavit and Verification.

ANNEXURE VII.8**SUGGESTED FORMAT OF LIST OF CREDITORS**

BEFORE THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL

.....BENCH

Case No.....

In the Matter of

M/s.....Limited (name of Corporate Debtor)

...Financial Creditor/Operational Creditor or the Corporate Debtor (to fill the name of applicant of CIRP)

List of Creditors under Regulation 13(2)(d) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations by (name of interim Professional) under the Insolvency and Bankruptcy Code 2016.

1. The application for Corporate Insolvency Resolution Process filed by (please fill the name of applicant) (Corporate Debtor/Financial Creditor or operational debtor as the case may be) under (Section 7, section 9 or section 10 as the case may be) of the Insolvency and Bankruptcy Code read with (please fill Rule 4, Rule 6 or Rule 7 as the case may be) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 was admitted by (please fill the details of NCLT Bench) vide order no..... dated wherein, the undersigned (Please fill in the name of the Interim Professional) was appointed as Interim Resolution Professional who is directed to take necessary actions in accordance with the relevant provisions of the Insolvency and Bankruptcy Board of India.
2. In Compliance with Regulation 13(2)(d) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation 2016, a list of creditors along with amount claimed, claims admitted, security interest in respect of claims is enclosed at Annexure A in quadruplicate

INTERIM RESOLUTION PROFESSIONAL

In the matter of(Name of the Corporate Debtor)

(Name of Interim Professional)

Registration Number

Place

Date

ANNEXURE A**(Name of the debtor)**

List of creditors

as on _____ (date of Insolvency Commencement Date)

S. No.	Name of Creditors	Address	Amount claimed by the Creditors (in Rs. Crore)	Amount admitted (in Rs. Crore)	Security interest, if any, in respect of such claim (in Rupees)
1.					
2.					
3.					
	TOTAL				

Note :

Specific details relating to assignment of debt may be specified.

ANNEXURE VII.9**SUGGESTED FORMAT OF REPORT CONSTITUTING
COMMITTEE OF CREDITORS**

BEFORE THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL

.....BENCH

Case No.....

In the Matter of

M/s.....Limited (name of Corporate Debtor)

...Financial Creditor/Operational Creditor or
the Corporate Debtor (to fill the name of applicant of CIRP)List of Creditors under Regulation 13(2)(d) of IBBI (Insolvency Resolution
Process for Corporate Persons) Regulations by(name of
interim Professional) under the Insolvency and Bankruptcy Code 2016

The application for Corporate Insolvency Resolution Process filed by
..... (please fill the name of applicant)(Corporate
Debtor/Financial Creditor or operational debtor as the case may be) under
..... (Section 7, section 9 or section 10 as the case may be) of the
Insolvency and Bankruptcy Code read with(please fill Rule 4,
Rule 6 or Rule 7 as the case may be) of Insolvency and Bankruptcy
(Application to Adjudicating Authority) Rules 2016 was admitted by
.....(please fill the details of NCLT Bench) vide order
no.....dated.....wherein....., the undersigned
(Please fill in the name of the Interim Professional) was appointed as Interim
Resolution Professional who is directed to take necessary actions in
accordance with the relevant provisions of the Insolvency and Bankruptcy
Board of India.

In Compliance with Regulation 17(1) of Insolvency and Bankruptcy Board
of India (Insolvency Resolution Process for Corporate Persons) Regulations
2016 a report certifying the Constitution of Creditors is enclosed at Annexure
A in quadruplicate.

INTERIM RESOLUTION PROFESSIONAL

In the matter of (Name of the Corporate Debtor)

(Name of Interim Professional)

Registration Number

Place :

Date :

ANNEXURE A**REPORT CERTIFYING THE CONSTITUTION OF
COMMITTEE OF CREDITORS**

1. The application for Corporate Insolvency Resolution Process filed by..... (please fill the name of applicant)..... (Corporate Debtor/Financial Creditor or operational debtor as the case may be) under (Section 7, section 9 or section 10 as the case may be) of the Insolvency and Bankruptcy Code read with(please fill Rule 4, Rule 6 or Rule 7 as the case may be) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 was admitted by(please fill the details of NCLT Bench) vide order no.....dated.....wherein....., the undersigned (Please fill in the name of the Interim Professional) was appointed as Interim Resolution Professional who is directed to take necessary actions in accordance with the relevant provisions of the Insolvency and Bankruptcy Board of India.
2. The registered office of the(corporate Debtor) is situated at (address of the Registered Office)
3. In Compliance with Section 13, Section 15 and other applicable sections of the Code read with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (here in after called 'Regulations'), a public announcement
 - a. intimating the commencement of Corporate insolvency Resolution Process against..... (insert the name of Corporate Debtor) and
 - b. calling the creditors to submit the proof of claims was made on(date) in..... (name of the national and details of edition...) and on(name of the vernacular newspaper where the registered office of the corporate Debtor is situated).
4. The last date of submission of claims was.....(fill in the last date of submission of claims as stated in the public announcement and should not be later than 14 days from the date of insolvency commencement date)
5. The public notice sought proof of claims from financial creditors in form C as stipulated in Regulation 8. Till the last date of claim (i.e.....) the undersigned interim professional has received claims from the following financial creditors

<i>Sl No.</i>	<i>Name of the Creditor</i>	<i>Amount of claim</i>	<i>Details of Security interest</i>

6. The public notice sought proof of claims from operational creditors in form B as stipulated in Regulation 7. Till the last date of claim (i.e.....) the undersigned interim professional has received claims from the following operational creditors

<i>Sl. No.</i>	<i>Name of the Creditor</i>	<i>Amount of claim</i>

7. The public notice sought proof of claims from operational creditors in form D/Form E as stipulated in Regulation 9. Till the last date of claim (i.e.....) the undersigned interim professional has received claims from the following workman /employee/Authorised representative of workmen and employees

<i>Sl. No.</i>	<i>Name of the Creditor</i>	<i>Amount of claim</i>

8. The undersigned interim Resolution professional has duly verified the claims of the aforesaid creditors.

9. The list of creditors was filed with Hon'ble National Company Law Tribunal (Bench) in compliance with Regulation 13 (2)(d)

10. In compliance with Section 21(1) of the Code the undersigned interim resolution professional certifies the constitution of the Committee of Creditors which consists of the following creditors.

- a
- b
- c

ANNEXURE VII.10

Intimation to the Employees of the Corporate Debtor

Date: _____

To,

The employees of [*name of the corporate debtor*]

Dear Sir/Madam,

Subject: Intimation to the Employee(s)/ Officer(s)/ Manager(s) of initiation of Corporate Insolvency Resolution Process (CIRP) against [name of the corporate debtor] and appointment of Interim Resolution Professional

I/We hereby intimate you that CIRP has been initiated in respect of [*name of the corporate debtor*] under the provisions of Insolvency and Bankruptcy Code, 2016 (“Code”) by an order of National Company Law Tribunal (“NCLT”) with effect from [*insolvency commencement date*].

As per section 17 of the Code, the powers of the [*Board of Directors*] or [*Partners*] of [*name of the corporate debtor*] stands suspended, and such powers shall be vested with me/us, [*name of the Interim Resolution Professional*], having IP Registration no. [*IP Registration no.*], appointed as the Insolvency Resolution Professional.

It may further be noted that as per the stipulations contained in Section 17 of the Code, once the Interim resolution Professional has been appointed:

- (a) The management of the affairs of the corporate debtor is taken over by him/her;
- (b) The powers of the Board of Directors or the partners of the Corporate Debtor, as the case may be, are suspended and be exercised by the IRP;
- (c) The officers and managers of the corporate debtor shall report to the IRP and co-operate with him/her in providing access to documents and records of the corporate debtor;
- (d) The financial institutions maintaining accounts of the corporate debtor shall furnish all information relating to the corporate debtor available with them to the IRP.

In accordance with the above mentioned provision you are advised to co-operate with me/us in providing access to documents and records pertaining

to [*corporate debtor*] as and when requisitioned by me/us for the smooth conduct of the corporate insolvency resolution process.

The instant intimation w.r.t initiation of CIRP and appointment of Interim Resolution Professional is for your information.

Thanking you,

Yours faithfully,

[*name of the Insolvency Resolution Professional*]

[*IP Registration no.*]

Enclosed:

- (a) A copy of the NCLT order dated [date of the order]
- (b) A copy of the Public Announcement made under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

ANNEXURE VII.11

**Application to the Adjudicating Authority for non-cooperation by
Personnel**

Before the National Company Law Tribunal

Bench

IN THE MATTER OF:

[Name of the Financial Creditor/Operational Creditor/Corporate Applicant]

.....Petitioner

AND

[Name of the Interim Resolution Professional]

.....Applicant

VERSUS

[Name of the Corporate Debtor]

.....Respondent

**APPLICATION U/S 19(2) AND 19(3) OF THE INSOLVENCY AND
BANKRUPTCY CODE, 2016 (“CODE”) FOR ISSUANCE OF NECESSARY
DIRECTIONS TO THE PERSONNEL OF THE RESPONDENT TO COMPLY
WITH THE INSTRUCTIONS OF THE APPLICANT AND/OR TO PROVIDE
THE REQUISITE INFORMATION TO THE APPLICANT IN DISCHARGING
HIS DUTIES AS AN INTERIM RESOLUTION PROFESSIONAL UNDER
THE CODE**

Most Respectfully Showeth:

1. That the instant petition has been filed by [name of the Financial Creditor/
Operational Creditor/Corporate Applicant] hereinafter referred to as the
[“Financial Creditor/Operational Creditor/Corporate Applicant”, as the case
may be] u/s [7 of the Code read with rule 4 of the Insolvency and Bankruptcy
Board of India (Application to Adjudicating Authority) Rules, 2016 / 8 of the
Code read with rule 6 of the Insolvency and Bankruptcy Board of India
(Application to Adjudicating Authority) Rules, 2016 / 9 of the Code read with
rule 7 of the Insolvency and Bankruptcy Board of India (Application to
Adjudicating Authority) Rules, 2016, as the case may be] for initiating
Corporate Insolvency resolution Process (“CIRP”) against [name of the
Corporate Debtor] hereinafter referred to as the “Corporate Debtor”, claiming

the dues amounting to Rs. *[amount of financial debt/operational debt, as the case may be]*- owed to *[Name of the Financial Creditor/ Operational Creditor/Corporate Applicant, as the case may be]* by the *[Name of the Corporate Debtor]*.

2. That the aforesaid petition was heard on *[date of hearing]* by the Hon'ble National Company Law Tribunal, *[name of the relevant Bench]* Bench (hereinafter referred to as the "Hon'ble Bench") and upon the said hearing, the Hon'ble Bench was pleased to pass an order on *[date of order]* appointing the Applicant as the Interim Resolution professional to carry out the functions mentioned under the Code. A copy of the order dated *[date of order]* is enclosed herewith as Annexure-1.

3. That pursuant to the receipt of the aforesaid order on *[date of receipt of order]*, the Applicant made a Public Announcement in accordance with Section 15 of the Code read with Regulation 6 of Chapter III of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 in the newspapers viz. *[name of the newspapers]* and also on the website of the Corporate Debtor and the Insolvency and Bankruptcy Board of India. A copy of the aforesaid Public Announcement is enclosed herewith as Annexure-2.

4. That the Applicant also intimated the Employee(s)/ Officer(s)/ Manager(s) of the *[name of the corporate debtor]* about the initiation of Corporate Insolvency Resolution Process (CIRP) against *[name of the corporate debtor]* and appointment of the Applicant as the Interim Resolution Professional. The copy of the aforesaid intimation is enclosed herewith as Annexure-3.

5. That the Applicant submits that the Personnel of the *[name of the corporate debtor]* are not extending assistance and co-operation to the Applicant which is imperative for the Applicant to manage the affairs of the Corporate Debtor. The Applicant further submits that under the circumstances the Applicant is not able to carry out his duties and responsibilities as Interim Insolvency Professional as mandated under the law.

6. The Applicant further submits that the present application is made bonafide and in the ends of justice.

PRAYER

In the aforesaid facts and circumstances, it is most humbly and respectfully prayed that this Hon'ble Bench may graciously be pleased to:

- (a) issue necessary directions to the Personnel of the Corporate Debtor *[name of the corporate debtor]* to extend assistance and co-operation

to the Applicant which is imperative for the Applicant to manage the affairs of the Corporate Debtor and to carry out his duties and responsibilities as Interim Insolvency Professional as mandated under the law;

- (b) pass such other order/directions as this Hon'ble Bench may deem fit and proper in the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS, THE APPLICANT AS IN DUTY BOUND, SHALL EVER PRAY.

APPLICANT

[Name of the Interim Resolution Professional]

[Address of the Applicant]

Place:

Date:

ANNEXURE VII.12

**APPLICATION FOR TO THE ADJUDICATING AUTHORITY FOR
SEEKING ASSISTANCE OF LOCAL DISTRICT ADMINISTRATION**

Before the National Company Law Tribunal

Bench

IN THE MATTER OF:

[Name of the Financial Creditor/Operational Creditor/Corporate Applicant]

.....Petitioner

AND

[Name of the Interim Resolution Professional]

.....Applicant

VERSUS

[Name of the Corporate Debtor]

.....Respondent

***APPLICATION UNDER REGULATION 30 OF THE INSOLVENCY AND
BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION
PROCESS FOR CORPORATE PERSONS) REGULATIONS, 2016 FOR
ISSUANCE OF NECESSARY DIRECTIONS TO THE LOCAL DISTRICT
ADMINISTRATION TO EXTEND ASSISTANCE TO THE APPLICANT IN
DISCHARGING HIS DUTIES AS AN INTERIM RESOLUTION
PROFESSIONAL UNDER THE INSOLVENCY AND BANKRUPTCY CODE,
2016 (“CODE”)***

Most Respectfully Showeth:

1. That the instant petition has been filed by *[name of the Financial Creditor/Operational Creditor/Corporate Applicant]* hereinafter referred to as the *[“Financial Creditor/Operational Creditor/Corporate Applicant”, as the case may be]* u/s *[7 of the Code read with rule 4 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 / 8 of the Code read with rule 6 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 / 9 of the Code read with rule 7 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016, as the case may be]* for initiating Corporate Insolvency resolution Process (“CIRP”) against *[name of the*

Corporate Debtor] hereinafter referred to as the “Corporate Debtor”, claiming the dues amounting to Rs. [amount of financial debt/operational debt, as the case may be]/- owed to [Name of the Financial Creditor/ Operational Creditor/Corporate Applicant, as the case may be] by the [Name of the Corporate Debtor].

2. That the aforesaid petition was heard on [date of hearing] by the Hon’ble National Company Law Tribunal, [name of the relevant Bench] Bench (hereinafter referred to as the “Hon’ble Bench”) and upon the said hearing, the Hon’ble Bench was pleased to pass an order on [date of order] appointing the Applicant as the Interim Resolution professional to carry out the functions mentioned under the Code. A copy of the order dated [date of order] is enclosed herewith as Annexure-1.

3. That pursuant to the receipt of the aforesaid order on [date of receipt of order], the Applicant made a Public Announcement in accordance with Section 15 of the Code read with Regulation 6 of Chapter III of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 in the newspapers viz. [name of the newspapers] and also on the website of the Corporate Debtor and the Insolvency and Bankruptcy Board of India. A copy of the aforesaid Public Announcement is enclosed herewith as Annexure-2.

4. That the Applicant submits that the Local District Administration is not extending assistance and co-operation to the Applicant in discharging his duties as an Interim Resolution Professional under the Code. The Applicant further submits that under the circumstances the Applicant is not able to carry out his duties and responsibilities as Interim Insolvency Professional as mandated under the law.

5. The Applicant further submits that the present application is made bonafide and in the ends of justice.

PRAYER

In the aforesaid facts and circumstances, it is most humbly and respectfully prayed that this Hon’ble Bench may graciously be pleased to:

- (a) issue necessary directions to the local district administration to extend assistance and co-operation to the Applicant which is imperative for the Applicant to carry out its duties and responsibilities as Interim Insolvency Professional as mandated under the law;
- (b) pass such other order/directions as this Hon’ble Bench may deem fit and proper in the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS, THE APPLICANT AS IN DUTY BOUND, SHALL EVER PRAY.

APPLICANT

[Name of the Interim Resolution Professional]

[Address of the Applicant]

Place:

Date:

ANNEXURE VII.13**SPECIMEN NOTICE OF FIRST MEETING OF THE COMMITTEE OF CREDITORS Notice**

Notice is hereby given that the 1st Meeting of the Committee of Creditors of (Name of the Corporate Debtor) will be held on at at to transact the following business:

1. Chairman (Interim Professional) to preside over the Meeting.
2. To ascertain quorum for the meeting.
3. To consider and take note of the list of Creditors.
4. To discuss and deliberate on the statement of claim submitted by interim Resolution Professional.
5. To discuss and deliberate on the Information Memorandum.
6. To ratify the expenses incurred by the interim professional.
7. To ratify the expenses incurred by Applicant of CIRP.
8. To ratify the remuneration paid to interim professional.
9. To appoint Resolution Professional (either interim professional or other resolution professional as the case may be).
10. To approve any following agenda (as applicable)
 - (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.

11. To discuss on the Information Memorandum.

12. To discuss such other matters with the permission of majority of Members of the Committee of Creditors as may be deemed necessary for the smooth functioning of the corporate insolvency resolution process.

A statement of claim as on (please insert insolvency commencement date) (the day of NCLT order) is enclosed for your reference.

Notes:

1. A Member of the Committee of Creditors entitled to attend and vote at the Meeting is entitled to appoint its/his authorised representative to attend and vote instead of itself / himself. Such member shall inform IRP hours in advance of the meeting along with identity of authorized representative and such authorized representative shall carry is valid identity card.
2. The Members of suspended Board of Directors of Corporate Debtor and operational creditors or their representatives if any are not entitled to vote at the meeting.
3. The vote of members of the Committee shall not be taken at the meeting unless all members are present at the meeting and are ready for voting

4. If all the members are not present at a meeting, a vote shall not be taken at such meeting and the resolution professional shall circulate the minutes of the meeting by electronic means to all members of the committee within forty eight hours of the conclusion of the meeting; and seek a vote on the matters listed for voting in the meeting, by electronic voting system where the voting shall be kept open for twenty four hours from the circulation of minutes.
5. Members of the Committee of Creditors can participate through video conferencing and audio visual means. If so, the same may be intimated to the interim resolution professional hours before the meeting at the (e-mail address).

The details of electronic voting system is as under (please provide the time duration, log in and other e-voting process).

CHAPTER - VIII
INFORMATION MEMORANDUM

When an application for initiation of Corporate Insolvency Resolution Process ('CIRP') is admitted by the NCLT and an IRP is appointed, his role starts with issue of Public Announcement inviting claims. The major functions of IRP include, amongst others :

- (1) Collection and verification of claims
- (2) Appointment of Registered Valuer
- (3) Preparation of Information Memorandum
- (4) Conducting first meeting of Committee of Creditors

'Information Memorandum' is the basis for preparing the resolution plan and consists of information including list of creditors and the amount of claims admitted, debt due from related parties, number of workers and employees and liabilities due to them, latest audited financial statements and audited financial statements for the last two years, provisional financial statements upto a date which is not earlier than fourteen days from the date of application, liquidation value etc.

The objectives of Information Memorandum

Excerpts from the Report of Bankruptcy Legislative Reforms Committee in the context of Information Memorandum in para 5.3.2.

"2. The information collected on the entity is used to compile an information memorandum, which is signed off by the debtor and the creditors committee, based on which solutions can be offered to resolve the insolvency. In order for the market to provide solutions to keep the entity as a going concern, the information memorandum must be made available to potential financiers within a reasonable period of time from her appointment to the IRP. If the information is not comprehensive, the RP

must put out the information memorandum with a degree of completeness of the information that she is willing to certify.

For example, as part of the information memorandum, the RP must clearly state the expected shortfall in the coverage of the liabilities and assets of the entity presented in the information memorandum. Here, the asset and liabilities include those that the RP can ascertain and verify from the accounts of the entity, the records in the information system, the liabilities submitted at the start of the IRP, or any other source as may be specified by the Regulator.

3. Once the information memorandum is created, the RP must make sure that it is readily available to whoever is interested to bid a solution for the IRP. She has to inform the market

(a) that she is the RP in charge of this case, (b) about a transparent mechanism through which interested third parties can access the information memorandum, (c) about the time frame within which possible solutions must be presented and (d) with a channel through which solutions can be submitted for evaluation.

The Code does not specify details of the manner or the mechanism in which this should be done but rather emphasises that it must be done in a time-bound manner and that it is accessible to all possible interest parties.”

Information Memorandum - Definition

Section 5(10) “information memorandum” means a memorandum prepared by resolution professional under sub-section (1) of section 29;

Resolution Professional to prepare Information Memorandum (Section 29)

Information Memorandum to contain certain mandatory information

(1) RP shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan. The mandatory contents of information memorandum are stated in Regulation 36 of CIRP Regulations.

Sub-regulation (1) of Regulation 36 of the CIRP Regulations has been substituted by CIRP Amendment Regulations, 2018 and the same reads that:

“(1) Subject to sub-regulation (4), the resolution professional shall submit the information memorandum in electronic form to (a) each member of the committee within two weeks of his appointment as resolution professional; and (b) to each prospective resolution applicant latest by the date of invitation of resolution plan under clause (h) of sub-section (2) of section 25 of the Code.”

It is also mandated now that the information memorandum shall contain, *inter alia*, description of the assets and liabilities of corporate debtor. In the CIRP regulations, for clause (a) of sub-regulation (2) of regulation 36, the following clause has been substituted, namely: -

“(a) assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values.

Explanation: “Description” includes the details such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details.”

Sub-regulation (4) of Regulation 36 of the CIRP Regulations has been substituted as under:

“(4) The resolution professional shall share the information memorandum after receiving an undertaking from a member of the committee or a prospective resolution applicant to the effect that such member or resolution applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29.”

Resolution Applicant is to be provided with information subject to confidentiality agreement

(2) RP shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes –

- (a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;
- (b) to protect any intellectual property of the corporate debtor it may have access to; and

- (c) not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with.

Explanation.— For the purposes of this section, “relevant information” means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified.

Resolution applicant to submit Resolution Plan on the basis of information Memorandum

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

Section 5(25) “resolution applicant”¹ means a person who, individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of Section 25;

Section 5(26) “resolution plan” means a plan proposed by *resolution applicant*² for insolvency resolution of the corporate debtor as a going concern in accordance with Part II of the Code.

Contents of Information Memorandum (Regulation 36 of CIRP Regulations)

(1) Subject to sub-regulation (4), the resolution professional shall submit the information memorandum in electronic form to-

- (a) each member of the committee within two weeks of his appointment as resolution professional; and
- (b) to each prospective resolution applicant latest by the date of invitation of resolution plan under clause (h) of sub-section (2) of section 25 of the Code.³

1. Substituted by section 3(a) of the Insolvency and Bankruptcy Code (Amendment) Act, 2017 (w.e.f. 23-11-2017) for the definition of ‘resolution applicant’ under section 5(25) of the Code.

2. Substituted by section 3(a) of the Insolvency and Bankruptcy Code (Amendment) Act, 2017 (w.e.f. 23-11-2017) for the words “any person”.

3. Substituted vide Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018

(2) The information memorandum shall contain the following details of the corporate debtor-

- (a) assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values.

Explanation: "Description" includes the details such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details.⁴

- (b) the latest annual financial statements;
- (c) audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;
- (d) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;
- (e) particulars of a debt due from or to the corporate debtor with respect to related parties;
- (f) details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;
- (g) the names and addresses of the members or partners holding at least one per cent stake in the corporate debtor along with the size of stake;
- (h) details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;
- (i) the number of workers and employees and liabilities of the corporate debtor towards them; and

4. Substituted vide Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018

(j) other information, which the resolution professional deems relevant to the committee.⁵

(3) A member of the committee may request the resolution professional for further information of the nature described in this Regulation and the resolution professional shall provide such information to all members within reasonable time if such information has a bearing on the resolution plan.

(4) The resolution professional shall share the information memorandum after receiving an undertaking from a member of the committee or a prospective resolution applicant to the effect that such member or resolution applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29.⁶

Sources of information for preparation of information memorandum

1. Publicly available sources such as Ministry of Corporate Affairs, Stock exchanges where the securities of the Company if any listed.
2. Companies Financial Statements and internal Sources

5. Information regarding the liquidation value and the liquidation value due to operation creditors have been omitted by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2017, Regulation 4 (w.e.f. 31-12-2017). Prior to its omission, it read as follows:

“(j) the liquidation value;

(k) the liquidation value due to operational creditors;

6. Substituted vide Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018

UNDERTAKING

I/We , resident of/having principal place of business at/having registered office at hereby solemnly declare that the information provided herein is true and correct to the best of my knowledge. I/we have read and understood all the terms and conditions relating to information memorandum under the provisions of the Insolvency and Bankruptcy Code, 2016 read with regulations there under and hereby express our interest in the receiving the information memorandum for the said Company.

I/We also hereby solemnly affirm, declare and undertake that I/we shall maintain the confidentiality of the information of the Corporate Debtor and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under Section 29(2) of the Insolvency and Bankruptcy Code, 2016, viz.,

- (a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;
- (b) to protect any intellectual property of the corporate debtor it may have access to; and
- (c) not to share relevant information with third parties unless clauses (a) to (b) of this sub-section are complied with.

.....

(Signature of the person)

(Name & address of the person)

Date:

Place:

MODEL INFORMATION MEMORANDUM

[Pursuant to Section 29 of Insolvency and Bankruptcy Code, 2016 read with Regulation 36(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016]

IN THE MATTER OF..... (NAME OF THE CORPORATE DEBTOR)

Vide Case No:

.....
 (ADDRESS OF THE CORPORATE DEBTOR)
 (PHONE NO. OF THE CORPORATE DEBTOR)
 (CONTACT DETAILS OF THE INSOLVENCY RESOLUTION PROFESSIONAL/RESOLUTION PROFESSIONAL)

INDEX

S. No.	Particulars	Annexure No.
1.	About the Corporate Debtor	A
2.	About the Promoters & Board of Directors	B
3.	Shareholding Pattern	C
4.	Assets and liabilities Statement as on (insolvency commencement date)	D
5.	Latest annual financial statements	E
6.	Audited financial statements of the Corporate Debtor for the last two financial years & provisional financial statements for the current financial year made up to (date not earlier than fourteen days from the date of application)	F
7.	List of creditors	G
8.	Particulars of debt due from or due to corporate debtor with respect to related parties	H
9.	Details of guarantees that have been given in	I

	relation to debts of the corporate debtor by other persons	
10.	Names and addresses of members or partners holding at least one per cent stake in the corporate debtor	J
11.	Details of all material litigations and ongoing investigations or proceedings initiated by Government and statutory authorities	K
12.	Details of number of workers and employees and liabilities of the corporate debtor towards them	L
13.	Copy of the Order passed by National Company Law Tribunal (NCLT) admitting the application of the Corporate Debtor	M
14.	Any other information relevant to the Committee of Creditors	N

IN THE MATTER OF (NAME OF THE CORPORATE DEBTOR)

(ADDRESS OF THE CORPORATE DEBTOR)

(PHONE NO. OF THE CORPORATE DEBTOR)

(CONTACT DETAILS OF THE INSOLVENCY RESOLUTION PROFESSIONAL/RESOLUTION PROFESSIONAL)

ANNEXURE–A

1. About the Corporate Debtor

- 1.1 Incorporation details
- 1.2 Detail about the business and activities of the corporate debtor
- 1.3 Detail of its past performance and recent developments
- 1.4 Detail of any change in the status of the company (e.g.- from private to public, merger, demerger etc.)
- 1.5 Details of its products/services and the aspects of competitiveness therein
- 1.6 Details of all offices, branches and factories along with the names,

addresses and contact numbers of Directors, Principal Officers and Key Management Personnel of the Organisation

- 1.7 Detail of its key suppliers
- 1.8 Detail of its key customers
- 1.9 Details of its marketing strategy
- 1.10 Comparison of information collected from the officers of the Corporate Debtor with the information collected from public sources. Also state the reasons of deviation, if any.

ANNEXURE–B

2. About the Promoters & Board of Directors

- 2.1 Details of promoters (specify detail of each promoter on an individual basis)
- 2.2 Details of directors/partners

S. No.	Name & address of the Directors/ Designated Partners/ Partners	Designation	Director Identification Number (DIN)	Date of appointment
1.				
2.				

- 2.3 Details of Key Managerial Personnel (please specify details of each KMP on an individual basis)
- 2.4 Details of transfer of shares from/to the promoters or KMPs (during the current financial year and last two financial years)

ANNEXURE–C

3. Shareholding Pattern

- 3.1 Shareholding pattern as on 31st March, 20_____

S. No.	Name of the shareholder	Type of shares held	Number of shares held	Amount of share capital held (Rs.)	Percentage of share-holding

3.2 Details of companies or firms in which the Corporate Debtor is a member

S. No.	Name of the company/firm	No. of shares	Percentage of shareholding

ANNEXURE - D

4. Assets and Liabilities Statement as on (insolvency commencement date)

LIABILITIES	Notes	As on
		(Rs.)
Shareholders' funds:		
(a) Share Capital		
(b) Reserve and surplus		
(c) Money received against warrants		
Share application money pending allotment		
Non-current liabilities:		
(a) Long term borrowings		
(b) Deferred tax liabilities (net)		
(c) Other Long term liabilities		
(d) Long-term provisions		
Current Liabilities:		
(a) Short-term borrowings		
(b) Trade payables		
(c) Other current liabilities		
(d) Short-term provisions		
TOTAL		

ASSETS	Notes	As on
		----- (Rs.)
Non-current assets: (a) Fixed assets: (i) Tangible assets (ii) Intangible assets (iii) Capital work-in-progress (iv) Intangible assets under development (b) Non-current investments (c) Deferred tax assets (net) (d) Long term loans and advances (e) Other non-current assets		
Current Assets: (a) Current Investments (b) Inventories (c) Trade receivables (d) Cash and cash equivalents (e) Short term loans and advances (f) Other current assets		
TOTAL		

*Kindly specify description of each asset such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details.

ANNEXURE-E**5. Latest Annual Financial Statements**

Annual Financial Statements for the year ended 31st March,

(Please attach the latest annual financial statement of the Corporate Debtor)

ANNEXURE - F

6. Audited financial statements of the Corporate Debtor for the last two financial years and provisional financial statements for the current financial year made up to (date not earlier than fourteen days from the date of application)

6.1. Audited financial statements of the Corporate Debtor for the year ended &

6.2 Provisional financial statements for the current financial year made up to (date not earlier than fourteen days from the date of application)

(Please attach the audited financial statements of the Corporate Debtor for the last two financial years and Provisional financial statements for the current financial year up to a date not earlier than fourteen days from the date of application, either jointly or individually)

ANNEXURE-G**7. List of creditors**

S. No.	Name of the Creditor	Nature of creditor (Financial/ Operational/ Other)	Amount of claim (Rs.)	Amount admitted (Rs.)	Particulars of security interest, if any
1.					
2.					

ANNEXURE - H

8. Particulars of debt due from or due to corporate debtor with respect to related parties

S. No.	Name and address of the related party	Nature of relationship	Detail of transaction	Amount of debt involved (Rs.)			Amount due to/due from Corporate Debtor
				Principal	Interest	Total	
1.							
2.							

ANNEXURE - I

9. Details of guarantees that have been given in relation to debts of the corporate debtor by other persons

S. No.	Name of the financial creditor to whom guarantee has been issued	Nature and detail relating to transaction of the debt in respect of which guarantee has been given	Name of the party extending guarantee	Amount guaranteed by the party (Rs.)
1.				
2.				

ANNEXURE - J

10. Names and addresses of members or partners holding at least one per cent stake in the corporate debtor

Sl. No.	Name of the member/ partner	Address of the member/ partner	Number of shares held	Amount of share capital held (Rs.)	Percentage of shareholding (%)

ANNEXURE-K**11. Details of all material litigations and ongoing investigations or proceedings initiated by Government and statutory authorities**

S. No.	Name of the Government or statutory authority which has initiated the material litigation/ investigation/ proceedings	Period involved	Amount involved (Rs.)			Details of the material litigation/ investigation/ proceeding
			Penalty	Interest	Total	
1.						
2.						

ANNEXURE-L**12. Details on number of workers and employees and liabilities of the corporate debtor towards them**

S. No.	Name of the worker/ employee	Designation of the worker/ employee	Address of the worker/ employee	Amount of dues subsisting as on _____(Rs.)	Amount admitted (Rs.)
1.					
2.					

ANNEXURE-M**13. Copy of the Order passed by National Company Law Tribunal (NCLT) admitting the application of the Corporate Debtor**

The copy of Order passed by NCLT admitting the application of the Corporate Debtor must be attached.

ANNEXURE - N

14. Any other information relevant to the Committee of Creditors

Any other information that is considered relevant by the interim resolution professional/resolution professional to be furnished to the Committee of Creditors to facilitate them in the preparation and better understanding of the resolution plan must be provided herein.

.....

(Signature of the IRP/RP)

(Name & address of the IRP/RP)

(IP Registration No. with IBBI:)

Date:

Place:

CHAPTER - IX

**CONTENTS OF RESOLUTION PLAN AND MODEL
RESOLUTION PLAN**

Introduction

The entire paradigm of CIRP rests on the foundation of an effective resolution plan. Resolution plan form an integral part of an insolvency resolution process which lists down detailed strategies for quick and efficient resolution of corporate debtor.

Section 5(26) of the Code defines 'Resolution Plan' as a plan proposed by *resolution applicant*¹ for insolvency resolution of the corporate debtor as a going concern in accordance with Part II of the Code. Part II of the Code, in turn, lays down the provisions relating to CIRP of companies and limited liability partnership firms. In the absence or non-approval of a workable resolution plan, the entire CIRP crumbles and liquidation process sets in for the corporate debtor.

Deemed Resolution Plans

The Ministry of Corporate Affairs vide Order dated 24th May, 2017 provided that any Scheme sanctioned under sub-section (4) or any Scheme under implementation under sub-section (12) of Section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall be deemed to be an approved resolution plan under Section 31(1) of the Code and the same shall be dealt with, in accordance with the provisions of Part II of the Code.

In brevity, the schemes sanctioned or implemented under the Sick Industrial Companies (Special Provisions) Act, 1985 shall be deemed as resolution plans under the Code and be dealt with accordingly under the provisions of the Code.

1. Substituted by section 3(b) of the Insolvency and Bankruptcy Code (Amendment) Act, 2017 (w.e.f. 23-11-2017)

Who can submit a Resolution Plan?

Section 5(25)² of the Code defines 'resolution applicant' as a person who, individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of Section 25.

Thereby, a resolution plan may be submitted by any member(s) of the Committee of Creditors, prospective lender(s), investor(s) or any other person pursuant to the invitation made by the RP.

Identification of Resolution Applicant

Newly inserted Regulation 35A of the CIRP regulations provides that the Resolution Professional shall identify the prospective resolution applicants on or before the 105th day from the insolvency commencement date.

Regulation 36A has been inserted in the CIRP Regulations which provides for invitation of resolution plans. This regulation mandates, *inter alia*, that the RP shall issue an invitation, including evaluation matrix to the prospective resolution applicants, to submit resolution plan at least thirty days before the last date of submission of resolution plans.

Regulation 36A of the CIRP Regulations states as under:

"36A. *Invitation of resolution plans.* – (1) The resolution professional shall issue an invitation, including evaluation matrix, to the prospective resolution applicants in accordance with clause (h) of sub-section (2) of section 25, to submit resolution plans at least thirty days before the last date of submission of resolution plans.

(2) Where the invitation does not contain the evaluation matrix, the resolution professional shall issue, with the approval of the committee, the evaluation matrix to the prospective resolution applicants at least fifteen days before the last date for submission of resolution plans.

(3) The resolution professional may modify the invitation, the evaluation matrix or both with the approval of the committee within the timelines given under sub-regulation (1) or sub-regulation (2), as the case may be.

(4) The timelines specified under this regulation shall not apply to an ongoing corporate insolvency resolution process-

(a) where a period of less than thirty-seven days is left for submission of resolution plans under sub-regulation (1);

(b) where a period of less than eighteen days is left for submission of resolution plans under sub-regulation (2).

2. Substituted by section 3(a) of the Insolvency and Bankruptcy Code (Amendment) Act, 2017 (w.e.f. 23-11-2017)

(5) The resolution professional shall publish brief particulars of the invitation in Form G of the Schedule:

- (a) on the website, if any, of the corporate debtor; and
- (b) on the website, if any, designated by the Board for the purpose.”

‘Evaluation matrix’ has been inserted as clause (ga) in sub-regulation (1) of regulation 2 of CIRP Regulations, 2018 to mean as *‘such parameters to be applied and the manner of applying such parameters, as approved by the committee, for consideration of resolution plans for its approval.’*

Similar to the amendments made in CIRP Regulations, 2016, IBBI has also amended the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“**Fast Track Regulations**”) by way of Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018 (“**Fast Track Amendment Regulations**”) dated 7th February, 2018. The amendments introduced by way of Fast Track Amendment Regulations are in line with the amendments brought out by CIRP Amendment Regulations, 2018.

Mandatory contents of the Resolution Plan

Regulation 38 of the CIRP Regulations lists down the mandatory contents of the resolution plan as follows :

(1) A resolution plan shall identify specific sources of funds that will be used to pay the –

- (a) insolvency resolution process costs and provide that the insolvency resolution process costs will be paid in priority to any other creditor;
- (b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority; and
- (c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.

(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.³

(2) A resolution plan shall provide:

³ Inserted by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2017, Regulation 2 (w.e.f. 5-10-2017)

- (a) the term of the plan and its implementation schedule;
- (b) the management and control of the business of the corporate debtor during its term; and
- (c) adequate means for supervising its implementation.

[(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).]⁴

4. Inserted by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2017, Regulation 2 (w.e.f. 7.11.2017)

Measures required for the implementation of the Resolution Plan

Regulation 37(1) of CIRP Regulations provides that a resolution plan may also provide for measures required for its implementation.

The measures required for implementing a resolution plan may include but not limited to the following –

- (a) transfer of all or part of the assets of the corporate debtor to one or more persons;
- (b) sale of all or part of the assets whether subject to any security interest or not;
- (c) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;
- (d) satisfaction or modification of any security interest;
- (e) curing or waiving of any breach of the terms of any debt due from the corporate debtor;
- (f) reduction in the amount payable to the creditors;
- (g) extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor;
- (h) amendment of the constitutional documents of the corporate debtor;
- (i) issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose; and
- (j) obtaining necessary approvals from the Central and State Governments and other authorities.

Marketability of Resolution Plans

Asset is more valuable when taken over on going concern basis and generates adequate cash flow as compared to an asset under liquidation. Essence of the Code is to prevent liquidation of assets that are capable of generating economies of scale. IBBI has come out with request for proposal (RFP) in relation to invitation of Resolution Plans from prospective resolution applicants who wish to bid for business of a corporate debtor undergoing CIRP. RFP provides relevant information, excluding those prescribed in law, to help market participant make informed bids and clearly articulate the process evaluation criteria and timelines to bring transparency and efficiency to the process.

In this context, it is relevant to quote the following paragraphs from the Report of Bankruptcy Legislative Reforms Committee (BLRC Report).

Assessing viability Para 3.2.1 of the BLRC Report relating to “Assessing viability” states that an enterprise that is facing financial failure is considered a viable enterprise: there is a possible financial rearrangement that can earn the creditors a higher economic value than shutting down the enterprise. On the other hand, where the cost of the financial arrangement required to keep the enterprise going will be higher than the NPV of future expected cash flows. In this case, the enterprise is considered unviable or bankrupt and is better shut down as soon as possible. However, the assessment of viability is difficult. There is no fixed or unique approach to answer this question. In an ideal environment, the assessment will be the outcome of a collective decision. Here, creditors and debtor will negotiate a potential new financial arrangement. Each of them will balance all available information, including all future possibilities of the economic environment under which the enterprise will operate, as well as all alternative investment opportunities available to the creditors as well as the debtor.”

Para 3.2.3 of the BLRC Report relating to “what can a sound bankruptcy law achieve” provides “Avoid destruction of Value” which states that a sound legal process also provides flexibility for parties to arrive at the most efficient solution to maximize value during negotiations. If the enterprise is insolvent, the payment failure implies a loss which must be borne by some of the parties involved. From the viewpoint of the economy, some firms undoubtedly need to be closed down. But many firms possess useful organizational capital. Across a restructuring of liabilities, and in the hands of a new management team and a new set of owners, some of this organizational capital can be protected. The objective of the bankruptcy process is to create a platform for negotiation between creditors and external financiers which can create the possibility of such rearrangements.

That said, it may be noted that during the negotiations, the debtor is likely to request that creditors restructure their liabilities so as to ease the liquidity stress of future repayments. The proposal may contain the need for fresh financing, either from existing creditors or from new financiers. In exchange, the debtor may offer to reorganize the operations of the enterprise by giving up some rights in management or to change the size of operations. Creditors will evaluate the proposal and offer modifications on their own. If both sides see the possibility of value in the enterprise, these negotiations will settle on a new financial arrangement. On the other hand, if they cannot agree on a solution, it will be optimal for the creditors to sell the assets available and shut down the enterprise.

Resolution plans must be made with an aim to run the business prudently, proactively manage risks and must strive to exceed the standards regulators have set for the industry.

Strategies that may be adopted as a part of Resolution Plan

RP invites resolution plan from resolution applicant which may have the following as part of resolution plan.

1. Compromise/arrangement
2. Financial Restructuring
3. Takeover
4. Merger
5. Demerger
6. Sale of an Undertaking
7. Issue of Corporate Bonds
8. Sale of Brands
9. Government Subsidies

The formal procedure for restructuring encompasses, within its ambit, schemes of reconstruction, takeovers, mergers, demergers, transfer of undertakings and restructuring of debts as provided in Section 230–240 of the Companies Act, 2013 by way of which the liabilities of the distressed companies can be restructured.

The resolution plan is subject to the compliance of the conditions as laid down under Section 30(2) of the Code read with Regulation 38 of CIRP Regulations. The indicative strategies for resolution plan are also listed in Regulation 37 of CIRP Regulations which includes transfer/sale of part of assets, satisfaction/modification of security interest, extension of maturity dates, issue of securities etc.,

Debt-for-equity swaps as a tool for restructuring in Resolution Plan

Debt-for-equity swaps can be used as a tool for restructuring and the same is duly recognised/provided for in restructurings undertaken under sections 230–231 of the Companies Act, 2013 as well as the resolution plans that may be submitted by the Resolution Applicants to the RP for approval by Committee of Creditors and thereafter the approval of the Adjudicating Authority. Debt for equity swaps is done to bring the debt to a sustainable

level either by waiver of excess debt or conversion into equity, or a combination of both.

As per BLRC Report “*the natural financing strategy in all countries is for large companies (e.g. the top 500 firms) to obtain all their debt financing from the bond market. This channel has been choked off in India, partly owing to the fact that corporate bond holders obtain particularly bad recovery rates under the present arrangements. Bankruptcy reform would yield higher recovery rates for corporate bond holders, and remove one barrier that impedes the corporate bond market. It is important to emphasise, however, that this is not the only barrier which holds back the corporate bond market.*”

Role of Asset Reconstruction Companies (ARCs)

Apart from the above, the ARCs set up under the statutory provisions of SARFAESI Act, may also acquire the debts of the corporate debtor from the lending Banks/Financial Institutions (FIs) and subsequently restructure the same in post discussions and arrangement with the debtor. ARCs have been allowed to use a part of their funds raised from Qualified Institutional Buyers (‘QIBs’) to restructure financial assets. The provisions of SARFAESI Act also empower the lenders/ARCs to effect a change in management as a restructuring mechanism.

Facilitations by Regulators supporting the Code

To create a market for stressed assets, the market regulator (SEBI) has made the following relaxations.

- SEBI has directed listed companies to inform stock exchanges about loan default, if any, within one working day (the implantation of this order was deferred by SEBI until further order).
- Open offer being part of Resolution plan has relaxation norms under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
- Relaxations from preferential issue requirements under SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009
- Banking Regulation (Amendment) Act, 2017 facilitates RBI to direct banks to initiate action under the Code in case of larger defaults as specified.
- SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 has made relaxations for acquisitions pursuant to resolution plans approved by NCLT under the Insolvency and Bankruptcy Code, 2016.

Duties and responsibilities of a Resolution Professional under the Code with respect to Resolution Plans

The Code has enshrined the following duties and responsibilities upon a RP with respect to resolution plans:

- appointing two registered valuers to determine the fair value and liquidation value of corporate debtor
- inviting prospective resolution applicants, who fulfill such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans. [Section 25(2)(h)]
- preparing an Information Memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan [Section 29(1)]
- providing information of the nature described in Regulation 36 with regard to Information Memorandum as sought by the members of the Committee of Creditors within reasonable time if such information has bearing on the resolution plan [Regulation 36(3) of CIRP Regulations]
- sharing Information Memorandum after receiving undertaking from a member of the committee or a prospective resolution applicant to the effect that such member or resolution applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself [Regulation 36(4) of the CIRP Regulations]
- issue invitation including evaluation matrix, to the prospective resolution applicants to submit resolution plan at least thirty days before the last date of submission of resolution plans [Regulation 36A(1) of CIRP Regulations]
- examination of each resolution plan received by him to confirm that the resolution plan:
 - (a) provides for the payment of insolvency resolution process costs in priority to the repayment of other debts of the corporate debtor;
 - (b) provides for the repayment of the debts of operational creditors 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. [Section 30(2)]
- submitting to the committee of creditors all resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of following, 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
 - (e) the orders, if any, of the Adjudicating Authority in respect of such transactions [Section 25(2)(i) and 30(3) of the Code read with Regulation 39(2) of the CIRP Regulations, 2017]⁵
 - submission of the resolution plan as approved by the Committee of Creditors to the Adjudicating Authority atleast 15 days before the expiry of the maximum period permitted under section 12 of the Code⁶, with the certification that :
 - (a) The contents of the resolution plan meet all the requirements of the Code and the Regulations; and
 - (b) The resolution plan has been approved by the Committee of Creditors. [Section 30(6) of the Code read with Regulation 39(4) of the CIRP Regulations]
 - sending a copy of the order of the Adjudicating Authority approving

5. Substituted by the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2017, Regulation 3 (w.e.f. 7-11-2017). Prior to this substitution, Regulation 39(2) read as under: -

“39(2) The resolution professional shall present all resolution plans that meet the requirements of the Code and these Regulations to the committee for its consideration”

6. Inserted by Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018, Regulation 11 (w.e.f 06.02.2018)

or rejecting a resolution plan to the participants and the resolution applicant. [Regulation 39(5) of the CIRP Regulations]

- forwarding all records relating to the conduct of the corporate insolvency resolution process and the resolution plan, after the order of approval, to the Board to be recorded on its database [Section 31(3)(b)]
- complying with IBBI circulars from time to time such as, an Insolvency Professional shall not outsource any of his duties and responsibilities under the Code. Further, an Insolvency Professional shall not require any certificate from another person certifying eligibility of a resolution applicant [Clarification by IBBI dated January 3, 2018]

Eligibility of resolution applicants

Section 29A⁷ of the Code prescribes the eligibility criteria of resolution applicants. As per the provision, a person shall not be eligible to submit a resolution plan, if such person or any other person acting jointly or in concert with such person –

- (a) is an undischarged insolvent;
- (b) is a willful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;
- (c) has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan;

- (d) has been convicted for any offence punishable with imprisonment for two years or more;
- (e) is disqualified to act as a director under the Companies Act, 2013;

7. Inserted by section 5 of the Insolvency and Bankruptcy Code (Amendment) Act, 2017 (w.e.f. 23-11-2017).

- (f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;
- (g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code;
- (h) has executed an enforceable guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code;
- (i) has been subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or
- (j) has a connected person not eligible under clauses (a) to (i).

Explanation – For the purposes of this clause, the expression “connected person” means:

- (i) any person who is the promoter or in the management or control of the resolution applicant; or
- (ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or
- (iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii) :

Provided that nothing in clause (iii) of this Explanation shall apply to –

- (A) a scheduled bank; or
- (B) an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; or
- (C) an Alternate Investment Fund registered with the Securities and Exchange Board of India.”

Expression of interest (EOI) issued by Resolution Professionals

Pursuant to Section 25(1)(h) of the Code, RP shall invite prospective lenders, investors and any other persons to put forward resolution plans by issuing Expression Of Interest (EOI) to invite prospective resolution applicants to submit viable resolution plans for the insolvency resolution of the Corporate Debtor.

In common parlance, EOI is a document describing requirements or specifications and seeking information from potential investors/bidders that demonstrate their ability to meet those requirements. In the field of insolvency and bankruptcy, EOIs are invited from investors or consortium of investors (also known as bidders) meeting the specified eligibility criteria in terms of financial and technical capabilities to submit resolution plans for the Corporate Debtor undergoing corporate insolvency resolution process or fast track insolvency resolution process under the provisions of the Code.

The EOI is issued by the RP on behalf of the Committee of Creditors in the form of a public advertisement. The document prescribes the last date for receipt of EOI from potential investors or bidders. Subsequently, the Committee of Creditors shall discuss and finalize the best resolution plan that shall lead to a favourable outcome for all the stakeholders of the Corporate Debtor.

A specimen EOI has been annexed as **Annexure IX.1**

Time-frame for submission of Resolution Plan by an applicant

A prospective resolution applicant shall submit resolution plan(s) prepared in accordance with the Code and regulations there under to the resolution professional atleast 30 days before the last date of submission of resolution plan.⁸

Disclosure of fair value and liquidation value

The newly inserted Regulation 35 of the CIRP Regulations, reads as under:

“35. Fair value and Liquidation value. –(1) Fair value and liquidation value shall be determined in the following manner:-

- (a) the two registered valuers appointed under regulation 27 shall submit to the resolution professional an estimate of the fair value and of the liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor;
- (b) if in the opinion of the resolution professional, the two estimates of a value are significantly different, he may appoint another registered valuer who shall submit an estimate of the value computed in the

8. Inserted by Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2018, Regulation 8 (w.e.f 06.02.2018)

same manner; and (c) the average of the two closest estimates of a value shall be considered the fair value or the liquidation value, as the case may be.

(2) After the receipt of resolution plans in accordance with the Code and these regulations, the resolution professional shall provide the fair value and the liquidation value to every member of the committee in electronic form, on receiving an undertaking from the member to the effect that such member shall maintain confidentiality of the fair value and the liquidation value and shall not use such values to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29:

(3) The resolution professional and registered valuers shall maintain confidentiality of the fair value and the liquidation value.”

Approval of Resolution Plan by Committee of Creditors

Section 30(4) of the Code stipulates that 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, after considering its feasibility and viability, and such other requirements as may be specified by the Board:

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it :

Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A:

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section.⁹

9. Substituted by the Insolvency and Bankruptcy Code (Amendment) Act, 2017 (w.e.f. 23-11-2017).

Effect of any provision in the Resolution Plan requiring the consent of the members or partners of corporate debtor

A resolution plan may contain a provision requiring the consent of the members or partner of the corporate debtor under the terms of the constitutional documents of the corporate debtor, shareholders' agreement, joint venture agreement or any other document of similar nature. In such a case, such provisions shall take effect notwithstanding that such consent has not been obtained.

A clarification was also sought by stakeholders regarding approval of resolution plans under Section 30 and 31 of the Code that whether approval of shareholders/members of the corporate debtor is required for a resolution plan at any stage during the process for its consideration, approval and implementation. It was clarified vide general Circular No. IBC/01/2017 by the Ministry of Corporate Affairs that there is no requirement for obtaining approval of shareholders/members of the corporate debtor during this process. Further, it was also clarified that the approval of shareholders/members of the corporate debtor 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.

Assistance of local district administration in implementing the terms of a Resolution Plan

As per Regulation 39(8) of the CIRP Regulations, a person in charge of the management or control of the business and operations of the corporate debtor may make an application to the Adjudicating Authority for an order seeking the assistance of the local district administration in implementing the terms of a resolution plan post its approval.

Appeal against an order approving a Resolution Plan

Forum for appeal: The forum for filing of appeals, in case of corporate insolvency resolution process, is NCLAT.

Grounds of appeal: An appeal may be filed against an order by the Adjudicating Authority approving a resolution plan on the following grounds:

- (i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;

- (ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;
- (iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;
- (iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or
- (v) the resolution plan does not comply with any other criteria specified by the Board.

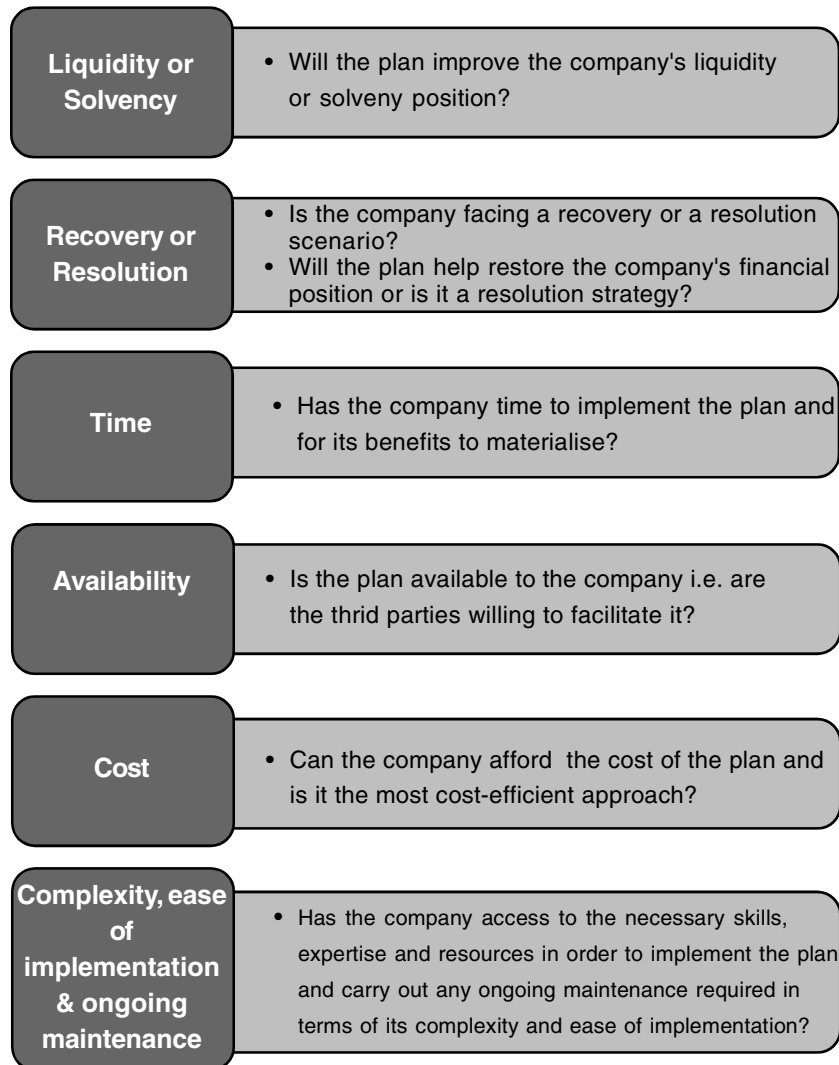
Provisions relating to contravention of any terms of Resolution Plan

Where the corporate debtor, any of its officers or creditors or any person on whom the approved resolution plan is binding under section 31, knowingly and wilfully contravenes any of the terms of such resolution plan or abets such contravention, such corporate debtor, officer, creditor or person shall be punishable with imprisonment of not less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.

International practices with respect to Resolution Plans

There are number of different strategies that companies may consider while formulating resolution plans. The resolution strategies may range from relatively simple to more complex mechanisms.

The Milliman Research Report on 'Recover and Resolution Plans: Dealing with financial distress' provides various factors that must be considered when deciding on the most appropriate course of action that would be taken in a resolution situation. The key considerations are as follows:



The above considerations must be kept in mind while preparing a robust resolution plan and to ensure that all necessary aspects have been analyzed to revive the insolvent organizations.

However, preparation and approval of a resolution plan is just half the battle won in the corporate insolvency resolution process. The main hurdle comes in the implementation of the resolution plan which is critical for the absolute success of the resolution process. Thus, proper measures must be taken by the related stakeholders to ensure that all requirements under the resolution plan are complied with.

Applying FSB's Key Attributes Paper in the Indian context, resolution plans should strive to include the following for its faster and effective implementation:

- a resolution strategy and operational plan that is agreed by top officials of the Corporate Debtor
- the strategic analysis that underlies the resolution strategies
- details of any potential material impediments to an effective and timely implementation of the plan
- responsibilities for executing and implementing the plan and actual measures.

A well drafted and thought-out resolution plan helps in maximizing the value of all stakeholders and eventually results in the success of the insolvency resolution process.

Specimen application form for submission of resolution plan along with a model resolution plan has been annexed as **Annexure IX.2**

ANNEXURE IX.1

Form G
Invitation of Resolution Plans

(Under sub-regulation (5) of regulation 36A of the Insolvency and
Bankruptcy Board of India (Insolvency Resolution Process for Corporate
Persons) Regulations, 2016)

**FOR THE ATTENTION OF THE PROSPECTIVE RESOLUTION
APPLICANTS OF (Name of Corporate Debtor)**

Sl. No.	Particulars
1	NAME OF CORPORATE DEBTOR
2	DATE OF INCORPORATION OF CORPORATE DEBTOR
3	AUTHORITY UNDER WHICH CORPORATE DEBTOR IS INCORPORATED / REGISTERED
5	CORPORATE IDENTITY NUMBER / LIMITED LIABILITY IDENTIFICATION NUMBER OF CORPORATE DEBTOR
5	ADDRESS OF THE REGISTERED OFFICE AND PRINCIPAL OFFICE (IF ANY) OF CORPORATE DEBTOR
6	INSOLVENCY COMMENCEMENT DATE IN RESPECT OF CORPORATE DEBTOR
7	ESTIMATED DATE OF CLOSURE OF INSOLVENCY RESOLUTION PROCESS
8	DATE OF ISSUE OF INFORMATION MEMORANDUM
9	MANNER OF OBTAINING THE INFORMATION MEMORANDUM BY THE PROSPECTIVE RESOLUTION APPLICANTS
10	DATE OF ISSUE OF INVITATION FOR RESOLUTION PLANS
11	MANNER OF OBTAINING THE INVITATION BY THE PROSPECTIVE RESOLUTION APPLICANTS
12	DATE OF ISSUE OF EVALUATION MATRIX
13	MANNER OF OBTAINING THE EVALUATION MATRIX BY THE PROSPECTIVE RESOLUTION APPLICANTS
14	LAST DATE FOR SUBMISSION OF RESOLUTION PLANS

15	MANNER OF SUBMITTING RESOLUTION PLANS BY A PROSPECTIVE RESOLUTION APPLICANT
16	NAME, ADDRESS AND EMAIL OF THE RESOLUTION PROFESSIONAL, AS REGISTERED WITH THE BOARD
17	ADDRESS AND EMAIL, IF ANY, OTHER THAN GIVEN AT SL. NO. 16 TO BE USED FOR CORRESPONDENCE WITH THE RESOLUTION PROFESSIONAL
18	REGISTRATION NUMBER OF RESOLUTION PROFESSIONAL, AS GRANTED BY THE BOARD

Signature of Resolution Professional
For(Name of Corporate Debtor)
Date and Place.....

Specimen Request for Proposal for inviting resolution plans

INVITATION FOR SUBMISSION OF RESOLUTION PLANS FOR _____
_____ (Name of the Corporate Debtor undergoing CIRP)

Issued on behalf of _____ (Name of the Corporate Debtor undergoing CIRP) and the Committee of Creditors of _____ (Name of the Corporate Debtor undergoing CIRP) by _____, Resolution Professional

Dated:

Table of contents

Sl. No.	Details	Page No.
1.	Details of the Corporate Debtor	
2.	Details of ongoing Corporate Insolvency Resolution Process	
3.	Bid process	
4.	Compliance requirements	
5.	Information dissemination	
6.	Apportioning of cost	
7.	Credentials of Resolution Applicant	
8.	Evaluation Matrix	
9.	Miscellaneous	

1. DETAILS OF THE CORPORATE DEBTOR

(If Information Memorandum is not provided with RFP or does not capture such information, then the following information may be provided)

- i. Name of legal entity (CD)
- ii. Office address – Corporate office, Registered Office – (if different, primary location for correspondence)
- iii. Key locations (with segregation of geographic locations/ activities/ no. of employees/ subsidiary operations)
- iv. Group structure with ownership (Shareholding) – Holding Company, Operating Company, Subsidiaries etc.
- v. Promoters – Names, Board Positions – (Any relevant detail to help ascertain related party relationships)
- vi. Details of principal business activities
- vii. Details of its main products/services and aspects of its competitiveness
- viii. Last publicly available financial details if any (with comments that current and other non-public financial position will be provided through data room after confidentiality undertaking)

A. Details of ongoing CIRP

(If Information Memorandum is not provided with RFP or does not capture such information, then the following information may be provided)

- i. Date of Admission of CIRP Application in NCLT
- ii. Amount & number of Claims (Segregated by categories of claims)
- iii. Details of material litigation by or against the Corporate Debtor
- iv. Last Date (180th/ 270th Day)
- v. Name of RP, Address of RP, Email of RP
- vi. Members of CoC (Represented Institutions/ Key Individuals)
- vii. Tentative Location (City) for due-diligence/ meetings/ presentations

B. Bid Process

- i. Last date for receipt of proposals with cut-off time in IST
- ii. Communication protocol in case of revised timelines/ RFP with reference to regulation 36A

- iii. Communication protocol for evaluation matrix (if to be issued separately)
- iv. Process for responding to queries raised by CoC
- v. Process, if any, for revising bids/ reverse bidding/ open bidding
- vi. Process for opening of bids & due-diligence by CoC
- vii. Protocol for sharing bid details, including amounts among bidders – if at all.
- viii. Process for raising query by CoC to potential bidders
- ix. Communication modus operandi to selected bidders with reference to regulation 36A
- x. Statement on right to revise RFP with reference to regulation 36A, if intended

C. Compliance Requirements

- i. Confidentiality undertakings for non-disclosure of information
- ii. Legally binding undertaking from authorised person/s to ascertain mandate to participate in the bidding process. For example – Board Resolution, PoA, authorized signatories.
- iii. Credentials of individuals/ entities representing RAs such as – PAN/ TAN/ DIN
- iv. Earnest money deposit/ guarantee for protection against withdrawal during and after the process
- v. Bank guarantee for payment obligations, if required

D. Information Dissemination

- i. Access to data room – conditions precedent
- ii. Process for raising queries/ asking for additional information from RP/ CoC/ CD
- iii. Response timelines/ process to respond to queries raised by RAs
- iv. Process for 101 between Management of CD & RAs
- v. Schedule and modus-operandi of any pre-bid conference
- vi. Protocol for scheduling and conduct of site visits, if proposed
- vii. Obligations of the RP towards requests of RAs with/ without consent of CoC

E. Apportioning of Cost

- i. Cost to be apportioned to resolution cost
- ii. Cost to be borne by Resolution Applicant

F. Credentials of Resolution Applicant

- i. Financial health of the RA - Last 3 Years Annual Report, TTM financials, Auditors Report
- ii. Promoters'/ significant stakeholders' credentials (Individuals) – Directorship/ Ownership in other companies to ascertain fit and proper and credibility
- iii. Promoters' Credentials (Group Companies – Hold Co. OpCos. Subsidiaries), Last 3 Year Annual Reports of HoldCo, TTM Financials, Auditor Reports
- iv. Debt of the Group - Guarantees and crossobligations relevant to assess group's financial leverage and obligations
- v. Relevant Experience –A brief description on industry knowhow, investing credentials, turnaround/ M&A experience, if any
- vi. Key Management Personnel
- vii. Synergies from Product, geography, technology, supply chain, cross-selling, diversification, integration etc.
- viii. Details of material litigations against the resolution applicant with respect to payment of debts, if any

G. Evaluation Matrix

The CoC may use the following criteria to specify suitable matrix for evaluation of resolution plan:

- i. Confirmation with IBC and CIRP regulations (Mandatory):
 - a. IBC Section 29A
 - b. IBC Section 30(2)
 - c. IBBI Regulation 36(4)
 - d. IBBI Regulation 38
- ii. Projections for sources of cash:
 - a. Internal business operations –cash generation from continuing business of resolved entity
 - b. Upfront cash infusion proposed by the prospective RA

- c. Future/ periodic cash infusion proposed by the prospective RA
- d. Asset sale/ Business divestiture of the resolved entity envisaged as part of resolution plan and amount of cash generated
- e. PV of cash infusion @ x% discount rate

CoC may prescribe differentiated discount factors to incentivize upfront cash infusion. For example, cash pay-out in year 2 can be discounted @ 10% or PLR+x%, while pay-out in year 5 can be discounted @ 18% or PLR + Y%.

- iii. Credibility of projection for business operations of resolved entity:
 - a. Show drivers for revenues and costs for x years (assumptions behind projections). *For example – a telecom operator will show revenue growth driven by addition to subscribers' base and average revenue per user (ARPU).*
 - b. Show projected cash flows and balance sheet for x years
 - c. Projection of capital structure leading to target capital structure and sustainable debt

For example: A resolution plan may peg sustainable leverage of 2:1 and sustainable coverage of 1.5x for the resolved entity after completion of resolution plan period, say 5 years.
 - d. Planned sources and usage of cash for x years

For example: A resolution plan should segregate future usage of cash for agreed repayments to claimants, ongoing financial and operational obligations, capex with segregation for maintenance capex. This information is important to protect potential diversion of cash during resolution period.
- iv. Projected pay-out to claimants:
 - a. Distinguish pay-out in cash & through financial instruments (e.g. equity/ debt instruments)
 - b. Distinguish upfront and deferred cash payments
 - c. Disclose PV of deferred cash payments with x% discount factor
 - d. Disclose intrinsic value/ PV of financial instruments issued in lieu of cash/ claims on maturity/ conversion date along with underlying assumptions
 - e. Present PV of pay-out as % of admitted claims across categories @ x% discount rate

Annexure – A

Expression of Interest

Date:

To,

.....
.....
.....

(Name of the Resolution Professional & address of the Corporate Debtor)

**Subject: Expression of Interest for submission of Resolution Plan for
..... (Name of the Corporate Debtor)**

Dear Sir,

This is in regard to the advertisement published in
(Name of the newspaper or website) dated inviting
Expression of Interest (EOI) for submission of resolution plan for
.....

..... (Name of the Corporate Debtor)
undergoing corporate insolvency resolution process under the provisions of
the Insolvency and Bankruptcy Code, 2016 including the rules and regulations
made thereunder.

We set out the following details ascertaining our eligibility for the submission
of resolution plan:

1.
.....
.....
2.
.....
.....
3.
.....
.....

(provide affirmation to the eligibility conditions as mentioned in the
advertisement)

We also provide the following additional information that may be necessary to evaluate and determine our bid for the purpose of short listing:

1. Name of the Company/Firm/Any other corporate body:
.....
.....

2. Address of the Registered Office/principal place of business:
.....
.....

3. CIN/LLPIN:
PAN:

4. E-mail ID:
.....

5. Date of incorporation/establishment:

6. Details of contact person:
.....
.....

7. Background of the Company/Firm/any other Corporation (in terms of its status – whether private, public, listed etc., persons who have incorporated it, history and its present standing):

8. Details of activities undertaken along with its core competencies:

9. Details of its key suppliers and lenders:

10. Financial Statements of preceding 3 financial years to be attached.

11. Any other details as may be relevant to evaluate and determine the bid for the purpose of shortlisting by the Resolution Professional.

Place:

Sd/-

Date:

(Name of the person making the bid on behalf of
the company/firm)

(Designation of such person)

9. 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).

Annexure IX.2**Specimen application form for submission of Resolution Plan**

(Name and address of the Corporate Debtor)

(Phone No. of the Corporate Debtor)

(Contact details of the resolution professional)

1. Name of the resolution applicant :

2. Status of the applicant:

 Individual Company Partnership firms/LLP Any other entity

3. Correspondence address of the resolution applicant:

.....

.....

.....

4. PAN of the resolution applicant (please enclose a copy) :

.....

5. E-mail ID of the resolution applicant:

.....

6. Phone No.:

.....

7. Relationship of the resolution applicant with the Corporate Debtor, if any:

.....

8. Details of connected persons⁹

--

9. Details of conviction for any offence , if any, during the preceding five years:

--

10. Details of criminal proceedings pending, if any:

--

11. Details of disqualification, if any, under Companies Act, 2013, to act as a director:

--

12. 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:

--

13. Details of debarment, if any, from accessing to, or trading in, securities markets under any order or directions of the Securities and Exchange Board of India:

--

14. Details of transactions, if any, with the corporate debtor in the preceding two years:

--

15. Date of submission of Resolution Plan :

DECLARATION

I/We hereby declare that we have read and understood all the terms and conditions relating to the formulation of resolution plan and hereby express our interest in the submission of resolution plan for the said Company. We further declare that we do not fall under the category of persons listed under Section 29A of the Code and thereby eligible to provide a resolution plan.

We also hereby declare that any confidential information of the Corporate Debtor that has come to our knowledge or might come to our knowledge during the insolvency resolution process shall not be divulged by us.

.....

(Signature of the resolution applicant)

Model Resolution Plan

(Pursuant to Section 31 of the Insolvency and Bankruptcy Code, 2016 read with Regulation 37, 38 & 39 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)

IN THE MATTER OF (name of the Corporate Debtor)

Pursuant to an advertisement/letter/notice issued by (name of the issuing person/agency) on (date of issue) inviting resolution plan from potential resolution applicants for (name of the Corporate Debtor), I/we, (name of the resolution applicant), hereby present a resolution plan based on the information memorandum and documents available in the public domain. The resolution plan complies with the provisions of Section 31 of the Insolvency and Bankruptcy Code, 2016 read with Regulation 37, 38 & 39 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

The Resolution Plan broadly covers the following aspects:

1. Specify the main strategy proposed: compromise or arrangement/ financial restructuring/takeover/merger/demerger/sale of an undertaking/issue of corporate bonds/sale of brands/government subsidies etc.
2. Specify the procedure of payment with respect to:

- Insolvency resolution process costs in priority to all other debts
- Payment to financial creditors
- Payment to operational creditors
- Payment of Statutory dues

3. Any other material provision that is covered in the Resolution Plan.

Details of the resolution plan:

1. Background of the Resolution Applicant

(Brief background of the resolution applicant must be provided)

- 1.1 Incorporation details (in case of Company/LLP/any other entity)
- 1.2 Details of directors/ partners (in case of Company/LLP/any other entity)

S. No.	Name of the directors/partners	Designation

- 1.3 Details of Key Managerial Personnel (in case of Company)
- 1.4 Details of companies or firms in which the applicant is a director or KMP (in case of individuals):

S. No.	Name of the company/firm	Designation

- 1.5 Details of relationship with the Corporate Debtor, if any
- 1.6 Shareholding Pattern as on 31st March, 20..... (in case of Company/LLP/any other entity)

Sl. No.	Name of the shareholder	Type of shares held	Number of shares held	Amount of share capital held (Rs.)	Percentage of shareholding

- 1.7 Details of its main activity and recent developments (in case of Companies/LLPs/any other entities)

- 1.8 Details of its key suppliers (in case of Companies/LLPs/any other entities)
- 1.9 Details of its key customers (in case of Companies/LLPs/any other entities)
- 1.10 Details of its marketing strategy (in case of Companies/LLPs/any other entities)
- 1.11 Details of its products/services and the aspects of competitiveness therein (in case of Companies/LLPs/any other entities)
- 1.12 Details of its manufacturing facilities and operating plants (in case of Companies/LLPs/any other entities)
- 1.13 Past Performance (in case of Companies/LLPs/any other entities)

Performance of the company in the last three financial years must be provided (including the balance sheet and profit and loss statements of the company)

2. Background of the Corporate Debtor

(Brief background of the Corporate Debtor must be provided)

- 2.1 Brief facts of the Corporate Debtor
- 2.2 Details of litigations (prior to commencement of IBC) by or against the Corporate Debtor with respect to payment of debts
- 2.3 Details of application filed with National Company Law Tribunal for insolvency resolution process
- 2.4 Details of the creditors and the amount of credit therein

3. Details of past performance of the Corporate Debtor

Performance of the Corporate Debtor in the last three financial years must be provided (including the balance sheet and profit and loss statements of the company). Any remarks by the resolution applicant on the same may also be provided.

4. Resolution Plan

On the basis of information memorandum, documents available in the public domain and additional information provided by the resolution professional, I/we hereby submit the following resolution plan.

- Proposal for capital and financial restructuring such as recapitalization, reorganization, leveraged buyout etc.
 - Proposal for operational restructuring such as joint venture, divestiture, merger etc.
 - Proposal for payment of insolvency resolution process
 - Proposal for payment of financial creditors
 - Proposal for payment of operational creditors after all the financial creditors are paid off
 - Proposal for payment of statutory dues
 - Proposal relating to infusion of capital by promoters, management, employees, subsidiaries etc.
 - Proposal relating to concessional payment
 - Any other proposal
- 4.1 Proposal for capital and financial restructuring
- 4.1.1. Details of the creditors along with details of such debt and amount of debt.
 - 4.1.2. The strategy that may be adopted to restructure the financial and capital requirements of the Corporate Debtor.
 - 4.1.3. The structure and method of payment to each of the creditor.
 - 4.1.4. Provision, if any, for making repayment to dissenting minority creditors.
- 4.2 Proposal for operating restructuring
- 4.2.1 The operating restructuring strategy that may be adopted by the Corporate Debtor.
 - 4.2.2 The benefits of adoption of such strategy to various stakeholders.
- 4.3 Proposal for payment of insolvency resolution process
- 4.3.1 The amount of insolvency resolution process cost along with the means of financing such costs and identification of sources of funds.

- 4.4 Proposal for payment of financial creditors
 - 4.4.1 The sources of financing the financial creditors.
 - 4.4.2 Provisions relating to payment of dues equivalent to the liquidation value of dissenting financial creditors in priority to consenting financial creditors.
 - 4.4.3 Waiver, if any, to be sought from the financial creditors.
 - 4.4.4 Payment schedule of the financial creditors.
- 4.5 Proposal for payment of operational creditors after all the financial creditors are paid off
 - 4.5.1 The sources of financing the operational creditors.
 - 4.5.2 Provisions relating to payment of dues equivalent to the liquidation value of operational creditors in priority to any financial creditor.
 - 4.5.3 Waiver, if any, to be sought from the operational creditors.
 - 4.5.4 Payment schedule of the operational creditors.
- 4.6 Proposal for payment of statutory dues
 - 4.6.1 The amount of outstanding statutory dues.
 - 4.6.2 The sources of financing the statutory dues.
 - 4.6.3 Waiver, if any, to be sought from the statutory dues.
 - 4.6.4 Payment schedule of statutory dues.
- 4.7 Proposal relating to infusion of capital by promoters, management, employees, subsidiaries etc.
 - 4.7.1 Details of parties that have infused the capital
 - 4.7.2 Details of the amount of capital infused
 - 4.7.3 Utilization of such capital
- 4.8 Proposal relating to concessional payment
 - 4.8.1 Details of concessions or reliefs to be sought by the Corporate Debtor from various parties
 - 4.8.2 Obligation of parties
 - 4.8.3 Any other terms

4.9 Statement as to how the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor have been dealt:

Stakeholders	Name of the party	Amount (Rs.) involved	Resolution provided	Outcome of the resolution
Financial Creditors	1. XYZ			
	2. ABC			
	3. TUV Ltd.			
Operational Creditors	1. XYZ			
	2. ABC			
	3. TUV Ltd.			
Other creditors	1. XYZ (Deposit holder)			
	2. ABC (Home buyer)			
Equity shareholders	1. Mr. A			
	2. XYZ Ltd.			
Preference shareholders	1. Mr. A			
	2. XYZ Ltd.			

4.10 Proposal relating to term of the resolution plan and its implementation schedule

4.11 Proposal relating to the management and control of the business of the corporate debtor during its term

4.12 Proposal relating to adequate means for supervising its implementation

4.13 Any other proposal

4.14 Conclusion

*Annexures to the Resolution Plan may be attached separately.

** The Model Resolution Plan provided herein is illustrative and indicative in nature and not exhaustive.

CHAPTER – X

**CRITICAL ISSUES SETTLED THROUGH LANDMARK
JUDGEMENTS**

A. MEANING OF ‘DISPUTE’

(I) **M/s One Coat Plaster vs. M/s Ambience Private Limited[01.03.2017]**, NCLT, Principal Bench held that:

- i. Use of the expression ‘includes’ in section 5(6) of the Code which defines the term ‘dispute’ shows that the definition of term ‘dispute’ is an inclusive one.
- ii. In this case, the debtor, in reply to a notice issued under section 8 of the Code, had disputed the satisfactory execution of the work.

[Annexure – X.1]

(II) **Philips India Ltd vs. Goodwill Hospital & Research Centre Ltd. [02.03.2017]**, NCLT, Principal Bench held that:

- i. Use of the expression ‘includes’ in section 5(6) of the Code which defines the term ‘dispute’ shows that the definition of term ‘dispute’ is an inclusive one.
- ii. In this case, the debtor, in reply to a notice issued under section 8 of the Code, had disputed the satisfactory execution of the work.

(III) **M/s DF Deutsche Forfait AG and Anr. vs. M/s Uttam Galva [10.04.2017]**, NCLT, Mumbai Bench held that:

- i. The definition of the term ‘dispute’ is exclusive and the term ‘includes’ should be read as ‘means’.
- ii. If reply is given denying the claim despite default occurrence is clear, does it mean that no application can be filed by any operational creditor even though the operational creditor makes the case of default occurrence?

If that is so, it will virtually ousting operation creditor filing any case under section 9

- iii. 'Existence of dispute' would mean pendency of either suit or arbitration proceedings before receipt of section 8 notice from the operational creditor

[Annexure - X.2]

(IV) Kirusu Software Private Ltd. vs. Mobilox Innovations Private Ltd. [24.05.2017], NCLAT held that:

- i. The word 'dispute', as defined in section 5(6) of the Code cannot be limited to a pending proceeding or 'lis', within the limited ambit of suit or arbitration proceedings
- ii. The word 'includes' ought to be read as 'means and includes' including proceedings initiated or pending before consumer court, tribunal, labour court or mediation, conciliation etc.
- iii. However, merely raising a dispute for the sake of raising it, unrelated or related to clause (a) to (c) of section 5(6) i.e. relating to existence of amount of debt, quality of goods or service, breach of representation or warranty, if not raised prior to application and not pending before any competent court of law or authority cannot be relied upon to hold that there is a 'dispute' raised by corporate debtor.

[Annexure - X.3]

(V) Philips India Ltd. vs. Goodwill Hospital & Research Centre Ltd. [31.05.2017]

- i. NCLAT noted that the question as to what constitutes 'dispute' fell for consideration before it in the case of "Kirusa Software (P) Ltd. versus Mobilox Innovations Pvt. Ltd. – Company Appeal (AT)(Insol.) 06/2017.
- ii. It was observed that the corporate debtor in the present case, much prior to issuance of notice under section 8 of I & B Code, 2016 had raised disputes relating to quality of service/maintenance pursuant to notice under section 433(e) and section 434(1)(a) of Companies Act, 2013 issued by Philips.
- iii. NCLAT was of the opinion that the objection raised by corporate debtor, which was not raised for the first time

while replying to notice issued under section 8 by Philips, cannot be termed to be mere objection raised for sake of 'dispute' and/or unrelated to clause (a) or (b) or (c) of sub-section (6) of section 5 of I & B Code, 2016.

- iv. Accordingly, the Appellate Authority dismissed the appeal and upheld the order of the Adjudicating Authority.

[Annexure - X.4]

(VI) M/s MCL Global Steel Pvt. Ltd. vs. M/s Essar Projects India Ltd. & Anr. [31.05.2017]

- i. In this case, corporate debtor had appointed the operational creditor to carry out civil work, structural fabrication and erection of building and sheds as well as the erection of technological equipment as part of construction of 0.2 MTPA Steel Melt Shop Complex at Pithampur, Madhya Pradesh.
- ii. Operational creditor raised invoices for the work successfully completed, however, the corporate debtor failed to make the payment. Operational creditor issued statutory notice under the Code to which the corporate debtor disputed satisfactory completion of the work regarding quality of construction, timeline of construction etc. NCLT admitted the application.
- iii. The appeal before NCLAT was preferred on two grounds viz.,
 - a. violation of principles of natural justice and
 - b. existence of dispute raised by debtor

First Issue (would be dealt at appropriate place)

Second Issue

- a. NCLAT, relying upon its judgment in *Kirusa Software Pvt. Ltd. vs. Mobilox Innovations Pvt. Ltd.* observed that the corporate debtor had in fact disputed the claim filed by operational creditor by raising disputed claims by way of various emails and reply to section 8 notice. These documents proved that there was 'a dispute in existence' in terms of section 8 of the Code.

- b. The second issue was also decided in favour of the corporate debtor
- iv. Accordingly, NCLAT allowed the appeal, set aside the order of the NCLT. The order of Moratorium, freezing bank accounts, appointment of IRP was also set aside.

[Annexure –X.5]

(VII) M/s Annapurna Infrastructure Pvt. Ltd. & Anrs. vs. M/s SORIL Infa Resources Ltd. [29.08.2017]

- i. The NCLAT was considering a question, *inter alia*, that, in case where award has been passed by Arbitrator/Arbitral Tribunal and even application under section 34 of the Arbitration and Conciliation Act, 1996 had been disposed of, whether a dispute could be said to be existing between the parties?
- ii. It was held that Section 36 of the Arbitration Act makes arbitral award executable as decree but it can be enforced only after the time for filing application under section 34 of the Act has expired and no application has been made or such application having been made, has been rejected. Thus, arbitral award reaches finality after expiry of enforceable time under section 34 and/or if application under section 34 is filed and rejected. Accordingly, for the purpose of 'dispute' as 'existence of dispute', only pendency of arbitral proceedings has been accepted as one of the ground of dispute whereas, as can be seen from Form 5 of the Rules, Arbitral Award has been held to be a document of debt and non-payment of awarded amount amounts to 'default' debt. Thus, NCLAT held that dispute was not pending and the decision of Adjudicating Authority holding that dispute was existing was against the provisions of law as well as against the decision in *Kirusa Software Pvt. Ltd.*

[Annexure - X.6]

(VIII) Mobilox Innovations Private Limited vs. Kirusa Software Private Limited [21.09.2017]

- i. The Hon'ble Supreme Court, after going into the history of the Code and the evolution of the provisions therein, noted

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 the present avatar, section 5(6) excludes the expression 'bona fide' which is of significance. It held that the definition of dispute has thus become an inclusive one, after the phrase "bona fide" has been deleted after the phrase "suit or arbitration proceedings".

- ii. Further, the Bench held that, keeping in mind the legislative intent, the word "and" in Section 8(2) must be read as "or". It was observed that *"...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..."*
- iii. Coming to its interpretation of the term "existence of dispute", the Court held that once the same has been brought to the notice of the operational creditor, *"...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... 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."*
- iv. Applying this to the facts of the present case, the Supreme Court agreed with the submissions of appellant i.e., the corporate debtor that a dispute between the parties clearly

existed, and that the application ought to have been dismissed by the NCLT.

- v. Thus, the Hon'ble Supreme Court allowed the appeal and set aside the ruling of the NCLAT.

[Annexure - X. 7]

B. PRINCIPLES OF NATURAL JUSTICE

(I) Sree Metaliks Ltd. vs. UOI[07.04.2017], Hon'ble High Court of Calcutta held that:

- i. NCLT is obliged to afford a reasonable opportunity of hearing to the corporate debtor prior to admitting the application under section 7 of the Code'.
- ii. However, at the same time, the High Court held that NCLT is not required to hear the debtor every time

[Annexure - X.8]

(II) M/s Innoventive Industries vs. ICICI Bank & Anr. [15.05.2017], NCLAT held that:

- i. NCLT is bound to issue a limited notice to the corporate debtor before admitting a case for ascertainment of existence of default based on material submitted by corporate debtor and to find out whether the application is complete or there is any other defect required to be removed.
- ii. However, adherence to principles of natural justice would not mean that in every situation NCLT is required to afford reasonable opportunity of hearing to the corporate debtor before passing its order.
- iii. In the present case, since the debtor had already appeared before the admission of the application and was heard at length, there was no violation of the principles of natural justice.

[Annexure - X.9]

(III) M/s Starlog Enterprises Limited vs. ICICI Bank Limited[24.05.2017], NCLAT held that

- i. Before admitting an application under section 9 of the Code, it is mandatory for the NCLT to issue notice to the corporate debtor.

[Annexure - X.10]**(IV) MCL Global Steel Pvt. Ltd. (supra)**

Of the two issues raised in this Case, one pertained to non-observance of Principles of Natural Justice. NCLAT held that

- i. The operational creditor contended that corporate debtor has no right to be heard before the stage of admission of application under the Code.
- ii. NCLAT noticed that the issue whether prior notice before admission of an application for corporate insolvency resolution process is required or not was considered in *M/s Innoventive Industries Ltd.* wherein it was held that NCLT is bound to issue limited notice before admission of application.
- iii. NCLAT accordingly decided the first issue in favour of the corporate debtor holding that there was violation of principles of natural justice as no notice was issued to corporate debtor before admission of application.

C. MANDATORY OR DIRECTORY TIME PERIOD UNDER CODE**(I) J K Jute Mills Company Limited vs. M/s Surendra Trading Company [01.05.2017], NCLAT held that:**

- i. The time period of 14 days under section 7, 9 and 10 of the Code which is to be counted from the 'date of receipt of application' means 'date on which the application is listed for admission / order'
- ii. The nature of provisions, contained in section 7, 9 and 10 with regard to time limit for admission/rejection of an application by NCLT, being procedural in nature, cannot be treated to be a mandate of law and the object behind these provisions is only to prevent delay in hearing and disposal of cases.
- iii. However, the period of 7 days granted to an applicant to remove defects is mandatory and on failure to observe this, application is fitted to be rejected.
- iv. The time limit of 180 days + 90 days (extension) for completion of insolvency resolution process under section 12 is mandatory.

- v. Since a regular Insolvency Professional starts functioning on completion of period of interim resolution professional, the performance of duties of IRP cannot be held to be mandatory though the period is required to be counted for completion of resolution process i.e. 180 days + 90 days (extension)
- vi. It is not mandatory for 'operational creditors' to propose the resolution professional to act as an interim resolution professional.

[Annexure - X.11]

(II) M/s Surendra Trading Company vs. M/s Juggilal Kamlapat Jute Mills Company Limited & Ors. [19.09.2017], the issue before the Hon'ble Supreme Court was whether the time period of 7 days, as held by NCLAT above, is mandatory? The Hon'ble Supreme Court observed as under:

- i. Time is the essence of the Code. Despite that, NCLAT held that fourteen days time period is not mandatory. Even though\ said part of the order (i.e. with regard to fourteen days period) was not under challenge, the Hon'ble Supreme Court observed that it was apposite to see the reasoning for holding such by NCLAT.
- ii. It was observed that right after analysing the provisions of fourteen days time within which NCLT is to pass the order, NCLAT jumped to another conclusion viz., the period of seven days and there was no discussion on this aspect. Hon'ble Supreme Court observed that there was no valid reason given by NCLAT to come to such conclusion. The period of 180 days starts from admission of application. Period prior to that is not to be counted. Thus, no purpose is served by treating the period of seven days as mandatory.
- iii. Looked at from another angle, Hon'ble Supreme Court observed that it has to be seen whether the rejection would be treated as rejection of application on merits thereby debarring filing of fresh application or the same is merely an administrative order. In the former case, it would lead to travesty of justice as even though the case may have merits, the applicant would be shown the door without

adjudication. If it is the latter case, then rejection of application in the first instance is not going to serve any purpose as applicant would be entitled to file fresh application which would have to be entertained. Thus, in either case, no purpose is served by treating the aforesaid provision as mandatory.

- iv. However, Hon'ble Supreme Court also put a rider. It noted that many frivolous applicants would file the application but would not cure the defects. In such case, a caveat has been put and that is, that if objections are not removed within seven days, the applicant, while refilling the application after removing objections, would be required to file an application in writing showing sufficient case as to why the applicant could not remove the objections within seven days. When such an application comes, Adjudicating Authority is to decide whether sufficient cause is shown or not.

[Annexure - X.12]

D. Certificate from Financial Institution – whether Mandatory or Directory

(i) Smart Timing Steel Ltd. vs. National Seed and Agro Industries Ltd. [19.05.2017], NCLAT held that:

- i. The word 'shall' used in sub-section (3) of section 9 of Code is mandatory. To determine whether a provision is mandatory or directory, one must look into the subject matter and consider the importance of the provision, the relation of that provision to the general object intended to be secured. The determination of the question whether a provision is mandatory or directory would, in the ultimate analysis, depend upon the intent of the law-maker and that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.
- ii. In this case, NCLT, Mumbai Bench had dismissed an application because the appellant, a foreign company of Hong-Kong having no office or bank account in India, did not file any certificate from a financial institution, certifying

that no payment of unpaid operational debt had been made.

[Annexure - X.13]

- (II) In **Uttam Galva Steels Limited vs. DF Deutsche Forfait AG & Anr.**, [28.07.2017], NCLAT, while relying upon *Smart Timing* (supra) reaffirmed that certificate from Financial Institution is mandatory. In Uttam Galva, the certificate was issued by a foreign bank and is not recognised as a 'financial institution'. The said Certificate has been issued by 'collecting agency' as distinct from 'Financial Institution' and genuity of the same cannot be verified by the Adjudicating Authority.

[Annexure - X.14]

- (III) In **Macquarie Bank Limited vs. Shilpi Cable Technologies Ltd.** [15.12.2017], Hon'ble Supreme Court has settled the law and held that a certificate under 9(3)(c) of the Code is certainly **not** a "condition precedent" and the expression "confirming" in section 9(3)(c) makes it clear that it is only a piece of evidence, which "confirms" that there is no payment of an unpaid operational debt. It was held that the words "if available" shows that filing of certificate is not a pre-condition. It was observed that there may be situations where a foreign supplier may have a foreign banker who is not within section 3(14) of the Code. The fact that such foreign supplier is an operational creditor is established from reading of definition of "person" contained in section 3 (23), as including person resident outside India, together with definition of 'operational creditor' in section 5(20). The Code cannot be construed in a discriminatory fashion so as to include only those operational creditors who are residents outside India who happen to bank with financial institutions which may be included under section 3(14) of the Code.

[Annexure - X.15]

E. Prior consent of Joint Lender Forum by Financial Creditor – whether required before filing application

- (I) **Innoventive Industries (supra)**, NCLAT held that:
- i. Beyond the fact regarding existence of dispute and ensuring that the application is complete, the adjudicating authority was not required to look into any other factor, including the

question whether permission or consent has been obtained from one or other authority, including JLF.

- ii. Therefore, the contention that prior to filing of an application under the Code, an applicant is required to obtain permission or consent of JLF as it will adversely affect loan of other members was rejected.

F. Applicability Of Limitation Act To Proceedings Under Code

- (I) **Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustees Ltd., [11.08.2017]**, NCLAT has observed that *“there is nothing on the record that Limitation Act, 2013 is applicable to the Code. Moreover, the Code is not an Act for recovery of money claim, it relates to initiation of corporate insolvency resolution process hence default in payment of debt with continuous course of action cannot be barred by limitation.”*

[Annexure - X.16]

Neelkanth Township and Construction Pvt. Ltd. challenged the above judgment of Appellate Authority before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court dismissed the appeal filed by corporate debtor. However, it observed that the question of law viz. whether limitation act is applicable to Insolvency proceedings is left open.

- (II) **M/s Speculum Plast Pvt. Ltd. vs. PTC Techno Pvt. Ltd., [07.11.2017]**, NCLAT looked at the legislative intent of the Code and noted that that a completely different time frame has been provided under the Code for various stages and held that Limitation Act was not applicable for initiation of corporate insolvency resolution process. However, at the same time, NCLAT held that the Doctrine of Limitation and Prescription is necessary to be looked into for determining the question whether the application under section 7 or section 9 can be entertained after long delay, amounting to laches, and thereby the person forfeited his claim. The NCLAT accordingly, remanded the case back to NCLT. In the above case, two more appeals were clubbed and heard together including an appeal filed against one *B. K. Educational Services Pvt. Ltd.*

[Annexure – X.17]

Subsequent Development

(III) *B. K. International Services Pvt. Ltd.* filed an appeal before the Hon'ble Supreme Court and the Hon'ble Supreme Court, in an interim order dated 10.01.2018 has stayed the above judgment passed by NCLAT.

[Annexure – X.18]

G. Whether Notice under section 8 of the Code is mandatory to be given

(I) **Era Infra Engineering Ltd.** [03.05.2017], NCLAT held that:

- i. Issuance of notice under section 8 of the Code is mandatory and the contention that earlier notice issued to the debtor under section 271 of the Companies Act, 2013 for winding up should be treated to be a notice for purpose of section 8 of the Code was rejected.
- ii. The issuance of notice under section 8 of the code is mandatory and is not a curable defect.

[Annexure - X.19]

H. Whether Buyers can approach NCLT in case of default in “assured returns”

(I) **Nikhil Mehta and Sons V/s AMR Infrastructure Ltd.** [21.07.2017],

- i. NCLAT was considering an issue “Whether the buyers who entered into agreements/Memorandum of Understandings with Builder for the purchase of three units being a residential flat, shop and office space in the projects developed, promoted and marketed by the Builder come within the meaning of ‘Financial Creditor’ as defined under the provisions of sub-section (5) of Section 7 of the Code?”
- ii. NCLAT held that the buyers (in that case) were “investors” and had chosen the “committed return plan”. The Builder in their turn agreed upon to pay monthly committed return to the investors. Thus, the amount due to the buyers came within the meaning of “debt” defined under section 3(11) of the Code. Furthermore, NCLAT noted from the Annual Return and Form 16-A of the Builder that they had treated the buyers as “investors” and borrowed amount pursuant to sale purchase agreement for their commercial purpose

treating at par with loan in their return. Thus, NCLAT held that the amount invested by buyers came within the meaning of 'Financial Debt' as defined under section 5(8)(f) of the Code, subject to satisfaction of as to whether such disbursement against consideration is for "time value of money".

[Annexure - X.20]

I. Whether a joint application by two or more 'operational creditors' under Section 9 of the IBC is maintainable

- (I) In **Uttam Galva Steels Limited (supra)**, NCLAT held that filing of joint application by two or more operational creditors under section 9 is not permissible. The language of section 7 of IBC provides that application for initiation of insolvency resolution process may be filed by Financial Creditor either by itself or jointly with other Financial Creditors, whereas, such language is not used in section 9 of IBC. Otherwise also, it is not practical for more than one 'operational creditor' to file a joint petition. Individual 'operational creditors' will have to issue their individual claim notice under section 8. The claim will vary which will be different in each case. The notice under section 8 will have to be issued in format. Separate Form-3 or Form-4 will be filed.

J. Whether the demand notice with invoice under Section 8 of IBC can be issued by any lawyer on behalf of an Operational Creditor?

- (I) In **Uttam Galva Steels Limited (supra)**, NCLAT held that notice under section 8 of the Code cannot be given by an Advocate/CA/CS.
- i. From a plain reading of sub-section (1) of Section 8, it is clear that on occurrence of default, the operational creditor is required to deliver the demand notice of unpaid Operational Debt and copy of the invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as is prescribed.
 - ii. Sub-Rule (1) of Rule 5 of Adjudicating Authority Rules mandates 'operational creditor' to deliver to the 'corporate debtor' the demand notice in Form-3 or invoice attached with notice in Form-4.
 - iii. Rule 5(1) (a) & (b) lists out person (s) who are authorised

to act on behalf of operational creditor. From bare perusal of Form-3 and Form-4, read with sub-rule (1) of Rule 5 and Section 8 of the I&B Code, it is clear that an operational creditor can apply himself or through a person authorised to act on behalf of operational creditor. **The person who is authorised to act on behalf of operational creditor is also required to state “his position with or in relation to the operational creditor”, meaning thereby the person authorised by operational creditor must hold position with or in relation to the operational creditor and only such person can apply.**

- (II) However, the Hon’ble Supreme Court, in **Macquarie Bank Limited (supra)**, settled the law and held that a lawyer can issue a demand notice under section 8 of the Code on behalf of the operational creditor. It was observed that the language used in section 8 of the Code speaks of an operational creditor “delivering” the demand notice and not “issuing” it. Delivery, therefore, would postulate that such notice could be made by an authorized agent. It was observed that the word “practice” in Section 30 of the Advocates Act is an expression of extremely wide import that would include all preparatory steps leading to the filing of an application before a Tribunal, including NCLT and NCLAT. To remove any doubts, the Hon’ble Supreme Court ruled that the *non-obstante* provision in Section 238 of the Code will not override the Advocates Act since there is no inconsistency between the Adjudicating Authority Rules and Advocates Act. The Supreme Court therefore observed that *“Therefore, a conjoint reading of Section 30 of the Advocates Act and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order.”*

K. Whether NCLAT has power to order withdrawal of an application that has been admitted, upon settlement between the parties?

- (I) **Lokhandwala Kataria Construction Private Limited vs. Nisus Finance & Investment Manager LLP [13.07.2017]**, a prayer was made before the NCLAT to order withdrawal of application as the matter was settled between the parties.
- i. The NCLAT noted the provisions of Rule 8 of IBBI (Application

to Adjudicating Authority) Rules, 2016 (“Adjudicating Authority Rules”) which empowers the Adjudicating Authority to permit withdrawal of the application on a request of the applicant before its admission. Thus, it was held that an application made under Section 7 can be withdrawn only before its admission by the Adjudicating Authority but once the application is admitted, it cannot be withdrawn and the procedures laid down under Sections 13 to 17 of the Code need to be followed.

- ii. A submission was made that NCLAT can exercise inherent power under Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 (“NCLAT Rules”) which empowers the NCLAT to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of law.
- iii. NCLAT noted that Rule 11 of the NCLAT Rules, which talk of inherent powers of NCLAT, have not been adopted for the purposes of Insolvency and Bankruptcy Code and only Rule 20 to 26 of the National Company Law Tribunal Rules, 2016 have been adopted. In absence of any specific inherent power and where there is not merit the question of exercising inherent power does not arise.

[Annexure – X.21]

- iv. The appellant filed statutory appeal before the Hon’ble Supreme Court of India vide Civil Appeal No. 9279/2017 **[Annexure - X.22]** wherein, the Hon’ble Supreme Court, even though observed that prima facie it seems that NCLAT does not have inherent powers (while exercising powers under the Code), however, since both the parties were before the Hon’ble Supreme Court, the Apex Court, exercising its power to do complete justice under Article 142 of the Constitution of India, recorded the consent terms and put a quietus to the matter.

- (II) Recently, the Hon’ble Supreme Court in **Uttara Foods and Feeds Private Limited vs. Mona Pharmachem (13.11.2017)** observed that in view of Rule 8 of the Adjudicating Authority Rules, NCLAT prima facie could not avail of the inherent powers recognised by Rule 11 of the National Law Appellate Tribunal Rules, 2016 to allow a compromise to take effect after admission

of the insolvency petition. Accordingly, the Hon'ble Supreme Court was of the view that instead of all such orders coming to the Supreme Court as only the Supreme Court may utilise its powers under Article 142 of the Constitution of India, the relevant Rules be amended by the competent authority so as to include such inherent powers. The court was of the view that this would obviate unnecessary appeals being filed before the Supreme Court in matters where such agreement has been reached.

[Annexure - X. 23]

L. Whether the Insolvency and Bankruptcy Code, 2016 would prevail over the State Laws

- (I) In a landmark judgment delivered by Hon'ble Supreme Court in **M/s Innoventive Industries Ltd. vs. ICICI Bank & Anr.** [31.08.2017], Hon'ble Supreme Court held that the Code would prevail over the Maharashtra Relief Undertakings (Special Provisions) Act, 1958.

The Hon'ble Supreme Court observed that once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, cannot maintain an appeal on behalf of the company.

On the issue of repugnancy between the State law and the subsequently enacted Central Act i.e. the Code, observed that the earlier State Law is repugnant to the Code as, under the State Law, the State Government may take over the management of the relief undertaking, after which a temporary moratorium comes into effect in much the same manner as contained in section 13 and 14 of the Code. Thus, by giving effect to the State law, the plan or scheme which is adopted under the Code, will directly be hindered and/or obstructed to that extent in that the management of relief undertaking, which, if taken over by the State Government, would directly impede or come in way of taking over the management of corporate body by IRP. Further, the moratorium declared under the State Act would directly clash with the moratorium under the Code.

Thus, it was held that the Central Act would prevail over State Act.

[Annexure – X. 24]

M. Whether a ‘Corporate Debtor’ can prefer an appeal under section 61 of the Code through the Board of Directors, which stands suspended after admission of an application by Adjudicating Authority?

NCLAT in **Steel Konnect (India) Pvt. Ltd. vs. M/s Hero Fincorp Limited (29.08.2017)** held that

- i. A perusal of section 17(1) (a) of the Code, makes it clear that the Management of affairs of the ‘corporate debtor’ stands vested with the ‘Interim Resolution Professional’ & such vesting is limited and restricted to the extent of power vested under section 17(1) of the Code which empowers the IRP to act and execute in the name of corporate debtor all deeds, receipts and other documents, if any, to take such action in the manner and subject to such restrictions, as may be specified by Board. However, the IRP has not been vested with any specific power to sue any person on behalf of the corporate debtor.
- ii. When an application under section 7 or 9 of the Code is admitted, corporate debtor is a party to such proceedings. It is only after hearing the corporate debtor, the Adjudicating Authority can pass an order under section 7 or 9, admitting or rejecting an application.
- iii. Once the application under section 7 or 9 is admitted, CIRP starts. In such case, one of the aggrieved party, being corporate debtor, has a right to prefer an appeal under section 61 of the Code, apart from any other aggrieved person like Director(s) of the company or members, who do not cease to be Director(s) or member(s), as they are not suspended but their function as ‘Board of Director(s)’ is suspended. They continue to remain as Directors and members of the Board of Directors for all purpose in the records of Registrar of Companies under the Companies Act, 2013.

[Annexure - X.25]

N. Whether resolution plan can be approved for a particular unit of a Corporate Debtor?

- (I) In the matter of **Roofit Industries Limited (22.01.2018)**, NCLT, Mumbai Bench, an application was filed by Resolution Professional for liquidation of the Roofit Industries Ltd. (Corporate Debtor). The Corporate Debtor had filed an application under

section 10 of the Code for initiating CIRP against itself which was admitted on 28.06.2017. The period of 180 days expired on 26.12.2017 and no expansion of CIRP period was sought for. Corporate Debtor had nine (9) immovable properties. No resolution plan was received except for one of the units of Corporate Debtor viz., B-42 Gummidipoondi Factory, which was submitted by Gummidipoondi Roofit Employees' Association on the last day of completion of CIRP.

Since the CIRP period of 180 days ended on 26.12.2017 and no resolution plan for Corporate Debtor was received except for one property, resolution professional filed application for liquidation under section 33 of the Code.

Considering the fact that resolution plan was submitted only in respect of one property, NCLT was of the view that the resolution plan could not be considered as a resolution plan under the Code and accordingly, NCLT ordered liquidation of Corporate Debtor.

[Annexure - X.26]

ANNEXURE X.1

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
PRINCIPAL BENCH NEW DELHI****Company Application No. (I.B.)07/PB/2017****Company Application No (I.B.)08/PB/2017****Present: CHIEF JUSTICE (Retd.) SHRI M.M. KUMAR, HON'BLE
PRESIDENT & SHRI R.VARADHARAJAN, MEMBER (JUDICIAL)****In the matter of:**

Section 9 and other applicable provisions of the Insolvency and Bankruptcy Code, 2016 read with the Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

1. **M/s.One Coat Plaster**
182/183, Indra Bhawan,
V.P.O. Sikhrali, Sector-17a,
Gurgaon-122 001 **Operational Creditor/Applicant**
2. **M/s.Ambience Private Limited**
Company registered under the Companies Act, 1956
Having Registered Office at:
L-4, Green Park Extension,
New Delhi-110016
CIN: U51503DL1986PTC023886 **Corporate Debtor**

AND**In the matter of:**

1. **M/s.Shivam Construction Company**
Plot No.SO-110, Khasra No.1965
Iqbal Colony, Garima Garden,
Ghaziabad-201 005 **Operational Creditor/Applicant**
2. **M/s.Ambience Private Limited**
Company registered under the Companies Act, 1956
Having Registered Office at:
L-4, Green Park Extension,
New Delhi-110016
CIN: U51503DL1986PTC023886 **Corporate Debtor**

Counsel for the Petitioners: (i) Shri Dushyant K. Mahant, Advocate
(ii) Shri Gaurav Dubey, Advocate

Counsel for the Respondent: Shri Sushant Kumar, Advocate

COMMON ORDER

The above petitions have been filed by the petitioners seeking to set in motion the corporate insolvency resolution process ('IRP') as contemplated under section 9 of the Insolvency and Bankruptcy Code, 2016 in relation to one M/s. Ambience (P.) Ltd. (for brevity herein referred to as the 'company') however described in the petition as "corporate debtor". Brief facts as can be discerned from the petition filed by the petitioners describing themselves as an "operational creditor" against the company giving rise to the filing of the petition are as follows :

In relation to CA No. (IB)07(PB)/2017.

- (a) That the company is engaged in real estate business including real estate development and in pursuance of its business had initially issued a work order dated 1st October, 2015 bearing No. Ambience/15-16/363 for a specified sum of Rs.204,000 in favour of the operational creditor which happens to be a partnership firm carrying its business under the name and style of One Coat Plaster. Subsequently it is averred that two more work orders dated 13th October, 2015 and 13th November, 2015 were also placed on the operational creditor by the company as works contract for Gypsum Plaster for the Walls/Ceiling at their site at Noida and the payment in relation to the same was to be made as per actual work measurement at site. Further, the payments to be released against bills. All the work orders placed by the company on the operational creditor, have been annexed. (Annexure B, colly).
- (b) It is claimed that the operational creditor pursuant to the work orders had executed the work subsequent to which bills were raised. It is contended that in relation to the work carried out at a site named 'Pushpanjali' out of the total billing of Rs.2,69,507.44 a sum of Rs. 1,00,085 has been paid thereby leaving a balance of Rs. 1,69,422.44 and that in relation to the site at Noida where the work had been carried out and as against the billed amount of Rs.55,60,242.74 the company has paid only Rs.24,68,832 leaving a balance of Rs.30,91,410.74. Thus, in aggregate the company owes the operational creditor a sum of Rs.32,60,833.18 it is claimed and despite reminders have failed to pay the balance outstanding.

- (c) That the non-payment of the balance outstanding since July 2016 forced the operational creditor to serve a notice of demand as contemplated under section 8 of the Code through its counsel on 25th January, 2017 at the registered office of the company as well as through e-mail and till the date of filing of the above petition on 8th February, 2017, no reply has been received despite service nor any payment has been made. This has given rise to the above petition being filed under the Code for unleashing the corporate insolvency resolution process as against the company.

In relation to Company Application No. (IB)08/PB/2017, the following fact emerges :

- (d) That the company engaged in real estate business including real estate development and in pursuance of its business had initially issued a work order dated 25th November, 2015 bearing No. Ambience/15-16/480-A for a specified sum in favour of the operational creditor which happens to be a sole proprietary concern carrying business under the name and style M/s. Shivam Construction Company. Subsequently, it is averred that one more work order dated 25th November, 2015 bearing No. Ambience/15-16/480-B was also placed on the operational creditor by the company as work contract for Gypsum Plaster for the Walls/Ceiling without supply of material at their site at Noida and the payment in relation to the same to be made as per actual work measurement at site and payments to be released against bills. All the work orders placed by the company on the operational creditor it is averred by the counsel for the operational creditor has been annexed as Annexure B (colly).
- (e) That the operational creditor pursuant to the work orders had executed the work subsequent to which bills were raised. It is contended that in relation to the work carried out at Noida, out of the total billing of Rs.16,79,646.66 a sum of Rs.7,83,746 has been paid thereby leaving a balance of Rs.8,95,900. Thus, in aggregate the company owes the operational creditor a sum of Rs.8,95,900. It is claimed that despite reminders the company has failed to pay the balance outstanding.
- (f) That the non-payment of the balance outstanding since 10th June, 2016 forced the operational creditor to serve a notice of demand as contemplated under section 8 of the Code through its counsel on 25th January, 2017 at the registered office of the company as well as through e-mail and till the date of filing of the above petition on 9th February, 2017, despite service no reply has been received nor any

payment has been made. This has given rise to the above petition being filed under the Code for unleashing the corporate insolvency resolution process against the company.

The above petitions came to be listed before us on 17th February, 2017 on which date the counsel for the company entered appearance and sought time for response and the hearing was deferred to 20th February, 2017. On 20th February, 2017 when the petitions were taken up, the counsel for the company submitted that the company had sent a reply to the notice of demand sent by the counsel for the operational creditor dated 4th February, 2017. The company has taken the stand that due to defective and poor quality of work on the part of the petitioners no payment has been made and have completely denied the claim of the operational creditor. In view of the representation of the counsel for the company that a reply had been sent to the legal notice of the operational creditor, the parties were directed to file the reply as sent by the company through its counsel and the petitions were fixed for hearing on 22nd February, 2017 for compliance.

Since the issues involved in both the company petitions are similar and concerning the company named as "Corporate Debtor", the matter is taken up together and disposed off as follows :

On 22nd February, 2017 we heard learned counsel for both the parties. The counsel for the operational creditors/petitioners took us through the typed set of documents filed along with the petitions. A perusal of the record shows that the work order placed by the company primarily relates to works contract predominantly concerning labour contract and the rate for the execution of the works contract seems to be fixed on square feet basis. Further it is seen that the bills/invoices raised by the petitioners annexed as Annexure C 'Colly' is computed on sq. ft. basis for ascertaining the quantum of work done and the amount payable for carrying out the work. However, when the counsel for the petitioners was asked as to whether the company or its authorized representative or architect had certified the quantum of work done by the petitioners in relation to the works contract awarded to them, no such document was produced wherein the quantum of work might have been certified or in relation to quality. This is the norm adopted in building contracts of considerable value which ordinarily constitute the basis for raising the bills. The engagement of the petitioners to execute the work cannot be denied in view of the work order placed by the company which is further reinforced by payment in a sum of **Rs.25,68,917** to the petitioner in CA No.07/PB/2017 and Rs. 7,83,746. However, in relation to the balance amount claimed by the petitioners as due from the company,

we are unable to agree in view of lack of materials submitted before us by the petitioners and also taking into consideration the fact that the debt sought to be fastened on the company has been vehemently disputed as is evident from the reply to the notice sent by the company, which is dated 4th February, 2017 but dispatched on 8th February, 2017 to the counsel for the petitioners.

Reference to the provisions of the Code, more particularly section 9 thereof clearly discloses that this Tribunal has the power, inter alia, also to reject the application of the operational creditor under section 9(5)(d) in case of notice of dispute has been received by the operational creditors or there is record of dispute with the information utility. In the absence of information utility, we are perforce to rely on the notice of dispute as sent by the company to the petitioners denying the liability based on which the entire edifice of the petitioner's claim crumbles which constitutes basis of the present application. It is pertinent to note that the expression 'dispute' has been defined and it seems to be an inclusive definition as seen from section 5(6) of the Code which reads as follows :

“dispute” includes a suit or arbitration proceedings relating to –

- (a) The existence of the amount of debt;
- (b) The quality of goods or services; or
- (c) The breach of a representation or warranty;

A bare perusal of section 5(6) of the Code show that a dispute could be proved by showing that a suit has been filed or arbitration are pending. It further elaborates that suit or arbitration should be in respect of the existence of the amount debt, quality of goods or services; or a breach of a representation or a warranty. It is not an exhaustive definition but an illustrative one. It becomes evident from the expression 'includes' which immediately succeeds the word 'dispute'. Moreover, under section 8(1) of the Code adequate room has been provided for the 'NCLT' to ascertain the existence of a dispute. A demand notice by an "operational creditor" to an "operational debtor" must be sent who has not paid operational dues and has committed default. Section 8(2) further clarifies that the corporate debtor is obliged to bring to the notice of the "operational creditor" within 10 days of the receipt of notice, the existence of a dispute and record of the pendency of the suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute. The other option is to pay the demanded amount. In the instant case the petitioner sent a demand notice which was duly received by the 'company' but the reply was also filed which has been delayed by

four days where dispute has been raised. As such on a perusal of documents submitted before us by the petitioners, we are unable to fathom any material on record to dislodge the same as already discussed in paragraph supra. Hence we are inclined to reject the above petitions.

Hence, the remedy of the petitioners above named lies elsewhere and not under the provisions of the Code. Before parting we make it clear that any observations made in this order shall not be construed as an expression of opinion on the merit of controversy as we have refrained from entertaining the application at the initial stage itself. Therefore, the right of the applicants before any other forum shall not be prejudiced on account of dismissal of instant applications.

For the reasons afore stated we reject the applications/petitions filed by the petitioners/operational creditors without any costs.

Sd/-

(CHIEF JUSTICE M.M.KUMAR)
PRESIDENT

Sd/-

(R.VARADHARAJAN)
MEMBER (JUDICIAL)

March 1st, 2017

ANNEXURE X.2**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI****C.P. NO. 45/I&BP/NCLT/MAH/2017****Coram:** B. S.V. Prakash Kumar, Member (Judicial) &
V. Nallasenapathy, Member (Technical)

In the matter of under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules 2016.

Between

M/s. DF Deutsche Forfait AG and Anr. ... Applicant/ Operational
Creditor

V/s.

M/s. Uttam Galva Steel Ltd. ... Corporate Debtor

For Applicants: Mr. Shyam Kapadia i/b. Mr. Sonu Tandon, Advocates for the Applicant/operational Creditor.

For Corporate Debtor: Shri. Janak Dwarkadas, Sr. Counsel, Shri. Ravi Kadam, Sr. Counsel, a/w. Mr. Dhiraj Mhetre, Ms. Smiti Tewari, Advocates for the Respondent/ Corporate Debtor.

ORDER

(Pronounced on 10.04.2017)

Per B.S.V. Prakash Kumar

It is a company petition filed u/s 9 of Insolvency and Bankruptcy Code 2016 (IB Code) by operational creditors viz. DF Deutsche Forfait AG (called as Deutsche) & Misr Bank Europe GmbH (called as Misr Bank) against a corporate debtor company viz. Uttam Galva Steels Limited (referred as Uttam - whose financial statements have already slipped into brackets) stating that Uttam defaulted in making payment of USD 16,542,886.33 (inclusive of interest till 28-02-2017) equivalent to Rs. 110,40,30,876.44 towards 20,000 tons of prime steel billets supplied by a Germany Company namely AIC Handels GmbH (called as AIC). This debt was initially assigned to Deutsche by entering into a discount agreement by AIC, thereafter Deutsche, in turn,

subsequently assigned part of this debt to Misr Bank by Deutsche. When Uttam failed to pay off the amount despite statutory notice u/s 8 of IB Code has been received by it on 03.03.2017, after completion of 10 days from the date of receipt of notice by Uttam, Deutsche and Misr Bank, on 14th March 2017, filed this company petition u/s 9 of IB Code for initiation of Insolvency Resolution Process by declaring Moratorium with consequential directions as set out under sections 13, 14, 15 and 16 of IB Code.

Brief background of this litigation:

2. The corporate debtor (Uttam) is in steel rolls manufacturing dealing with export and import business in relation to steel, in furtherance of it, on 16th August 2013, Uttam entered into a Sales Contract (Annexure-4) with AIC for purchase of 20,000 metric tons of Prime Steel Billets at the rate of \$540 per MT, which would come to \$10,800,000 (+/- 10% depending on the exact quantity supplied) agreeing that shipment of the goods be in the month of September 2013 and the agreed money should be payable in 180 days from the Bill of Lading(Annexure-6) date. It is further agreed that payment to be made in effective USD by two Bills of Exchange each with face value of USD 5,400,000 (+/- 10%) to the order of seller i.e., AIC drawn on and accepted by Uttam, maturing on the payment date, payable at a payment domicile acceptable to AIC in Mumbai, it is also said that it would be governed and construed in accordance with English Law and if any dispute in between, it is by arbitration in accordance with Swiss Rules of International Arbitration of the Swiss chambers of commerce by further saying that AIC is entitled to pursue payment obligation of Uttam in the form of inter alia bills of exchange before any competent court where a specially abbreviated form of legal procedure exists.

3. As per the sale contract, AIC on 16th September 2013 shipped 19,976 MT of Prime Steel Billets. A Bill of Lading dated 16th September 2013 came to be issued, then on 18th September 2013, AIC issued an invoice (Annexure-5) for a sum of USD 10,787,040 for the billets in quantity of 19,976, 40 MT supplied to Uttam at a rate of USD 540 per MT. A reference was made to two Bills of Exchange dated 18.9.2013 drawn by AIC on Uttam, one (Annexure-7) for USD 5,387,040 and another (Annexure-8) for USD 5,400,000 to pay on 15th March 2014 (maturity date after 180 days) against these two Bills of Exchange and Uttam unconditionally accepted the Bills.

4. Besides this, Uttam sent confirmation (Annexure-13) stating that the shipment to Chittagong Port Bangladesh has been duly executed by AIC under the sale contract dated 16.8.2013 and received all documents under the contract, therefore buyer (Uttam referred to itself as buyer) accepted

AIC (seller) faultless performance without any reservation by confirming that there exists no further obligation or liabilities of seller (AIC), Uttam further confirmed that the amount set out in the invoice represents 100% of the purchase price, therefore buyer (Uttam) irrevocably and unconditionally has undertaken to pay AIC as set out in the invoice waiving all rights of objection and defence and buyer would effect the payment at maturity without any deduction for and free of any taxes, charges, impost, levies or duties present or future of any nature whatsoever in effective USD. It further stated that this confirmation should form an integral part of the contract governed by English Law and Arbitration as mentioned in the sale contract.

5. In the process of risk management, AIC entered into a discount (*forfaiting*) agreement which means, financing used by exporters that enables them to receive cash immediately by selling their receivables (the amount an importer owes the exporter) at a discount, and eliminate risk by making the sale without recourse, meaning the exporter has no liability regarding possible default by the importer on paying the receivables. The *forfaiter* is the individual or entity that purchases the receivables, so the importer is then obligated to pay the receivables amount to the *forfaiter*. A *forfaiter* is typically a bank or a financial firm that specializes in export financing.

6. On 7th October 2013, AIC issued a letter of notification (Annexure -11) to Uttam informing that AIC had entered into forfeiting agreement (Annexure-10 dated 9/10th of October 2013) with Deutsche stating that it had assigned the entire debt with present and future rights, claims and demands to it by endorsing the bills of Exchanges, as against that notification, Uttam acknowledged and confirmed the agreement between AIC and Operational Creditor.

7. On 27th December 2013, Deutsche sent a notification (Annexure 14) to Uttam notifying that part of receivables due to it under the sales Contract and Bills of Exchange which were to mature on 15th March 2014 has been unconditionally assigned to Misr Bank through another Forfating Agreement (Annexure - 12) dated 27.12.2013. It is pertinent to say that this further forfeiting to Misr Bank has not been confirmed by Uttam.

8. When Uttam failed to make payment even after maturity date 15.3.2014 had been passed by, a protest was recorded on 19.4.2014 as required under law.

9. As Uttam failed to make payment of the above debt even after maturity date, Deutsche and Misr Bank were constrained to issue notice dated 8th December 2016 u/s 433 and 434 of the Companies Act, 1956, to which, Uttam replied raising various allegations such as goods delivered to third

party i.e., Aartee Commodities Ltd, subsequent assignment to Misr Bank by Deutsch is not valid, but this Uttam had not raised any law suit on any of the issues until statutory notice u/s 8 of the Code issued by them.

10. In the meanwhile, having IB Code come into force, Deutsch and Misr Bank issued statutory notice (Annexure - 2) of demand u/s 8 of IB Code on 28th February 2017 calling upon Uttam to pay a sum of USD 16,542,886.33 i.e., a principal sum of USD 10,787,040 and interest of USD 5,755,846.33. On 3rd March 2017, a reply (Annexure - 3) came from Uttam denying all claims with a caveat that advocates were in the process of obtaining detailed instructions from the corporate debtor and would reply in due course. Another reply notice dated 11th March has been sent by Uttam to the Deutsch and Misr Bank through e-mail (Annexure - A1 in additional affidavit) stating that its obligations under the sales contract were dependent on payment by Aartee Commodities Ltd. and Uttam already filed a suit before Hon'ble High Court of Bombay on 10th March 2017. But this Bench has not noticed any such averment of payment by Uttam is dependent upon payment by Aartee in any of the correspondence with either AIC or Deutsch or Misr Bank until Uttam wrote reply to the notice given by present operational creditors.

11. Since Deutsche & Misr Bank, on receipt of reply from Uttam on 3.3.2017 and second reply on 11.3.2017 informing the operational creditors that Uttam filed suit in respect of this claim against the creditors before Hon'ble Bombay High Court subsequent to receipt of the notice u/s 8 of the Code, noticed that no suit or Arbitration proceedings filed before receipt of notice u/s 8, they have filed this company petition u/s 9 of IB Code for initiation of insolvency resolution process by declaring Moratorium with consequential directions as set out under sections 13, 14, 15 and 16 of IB Code.

Objections of Uttam:

12. On the date of hearing, Senior Counsel Sri Janak Dwarak Das appearing on behalf of Uttam raised objection to admitting this petition arguing, one - this petition is not maintainable for the debtor company timely raised notice of dispute within 10 days after receipt of the notice u/s 8, two - an affidavit has not been filed as enunciated u/s 9(3)(b) stating that there is no notice has been given by Corporate debtor (Uttam) relating to the dispute of unpaid operational debt, hence petition is incomplete (when reply has been given there could not be any occasion to the operational Creditor to file an affidavit saying that no reply has been given), three - that Deutsche & Misr Bank are not operational creditors of Uttam, four - the petition is bound to be rejected u/s 9(5)(ii)(d) once notice of dispute has been received by Deutsche & Misr Bank, here notice was received by the petitioners within 10 days from the

date of receipt of notice u/s 8, five - since Deutsche & Misr Bank never initiated any recovery proceedings though the alleged debt is payable since March 15, 2014 until this petition u/s 9 has been filed, six - since disputed questions on fact are involved in respect to Deutsche further assigning to Misr Bank has not been confirmed by Uttam and it has to be tried by Trial Court not as summary proceeding u/s 9, moreover since sales contract is governed by English Law, it has to be tried before court of law, if any modification is made to the contract, under clause 18 of the Sales Contract, it has to be with the consent of Uttam only, seven - interest on the principal amount is not admitted by Uttam, therefore claim including 18% interest is arbitrary figure which is not substantiated by any document, eight - the counsel argued that since Power of Attorney given to file this case has not specifically authorized to initiate proceedings under IB Code, it has to be dismissed basing on the order dated 30.3.2017 passed by special Bench on reference; lastly - the counsel says Uttam is listed company providing employment to 1,400 people and it has impeccable track record, hence this Insolvency Resolution Process cannot be thrust upon a company like this.

Discussion:

13. As to 14 days' time, we must say that this case has come for hearing within 14 days but whereas the corporate debtor itself argued several times, of course petitioners side also argued and filed written submissions, not once, twice, indeed first time written submissions from Uttam came before this Bench on 1st April 2017, second time submissions came on 5th April 2017, later, for there being several issues to be addressed, this Bench also took three four days' time for passing orders. This Bench cannot simply pass it on to some other forum saying there are many issues to be addressed when answers to all factual aspects are available in the material placed by the petitioners and as to legal issues, when no evidence is required to decide those issues, we firmly believe that onus lies upon this Bench to decide all these issues.

14. Before going into merits of the petition, two three issues one must bear in mind, one - as such there cannot be any pleadings part in the Forms to be filed to initiate action u/ss 7, 9 & 10, except giving information column wise; two - no pleading or defending party, the terminology like petitioner/respondent or plaintiff/defendant is not present under this Code, most of the procedure is inbuilt in the Code itself, therefore this has been named as Code, not as Act; three - by reading the Code, it will not give an impression that it is an adversarial proceeding and no such law is existing in India saying that court proceedings in India shall be adversarial only, therefore

we have to go by what law says, we can't read into something that is not present; four - we cannot hang on to conventional approach which has become inherent in us that a legal proceeding shall be adversarial only, we are governed by a democratic system, henceforth we have to go by the mandate given by legislature. There are countries where legal system is inquisitorial. Of course a system can be something different from the existing systems like adversarial or inquisitorial, may be, if something other than these two systems is good, then if legislature says it is good for the country, then we have to follow. We have to grow along with changing times to come out of bottlenecks suffocating the system.

Owing to the time constraint, since issues are overlapping, instead of point wise, we have dealt with them together, which is as follows:

By now everybody is by heart with the provisions of sections 7, 8, 9 and 10 of the Code, therefore it is needless to say that reply has to be given to the notice under section 8 of the code within 10 days of receipt of the notice, no doubt Uttam gave reply on the very next day of receipt of the notice denying the averments of the notice u/s 8, but without any averment of any suit or arbitration pending since before receipt of notice u/s 8.

15. According to the definition of "dispute" in section 5(6) of the Code, which is as follows:

'Section 2: In this Part 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

(c) the breach of representation or warranty;'

16. On perusal of this definition, it is evident dispute includes a suit or arbitration proceeding, now the point for determination is as to whether the word "includes" is extensive as generally understood or in any other way. If we go through sections 7, 8, 9 and 10 of this code, this word "dispute" nowhere appears except in sections 8 and 9, therefore this definition primarily meant for application when notice is issued by the operational creditor u/s 8 and when case is filed by an operational creditor u/s 9 of the Code, therefore the definition has to be understood in a meaningful way to cater the intent and purpose behind sections 8 & 9, not otherwise.

17. To know how it is to be understood, we must also read part of section 8 and section 9, which goes 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 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;*

....."

"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.....

3.....

4.....

5.....

6....."

18. The corporate debtor counsel says the word dispute has to be understood as mere denial to the claim as dispute. The definition to dispute is inclusive definition enlarging the scope to the extent it can travel, therefore inclusion of pendency of suit or arbitration will not curtail the inclusivity of the definition.

19. Now the test is how to understand this definition, is it to be said that wherever denial to assertion is present in the reply within ten days, it is to be construed as dispute? Or, is it to be understood that dispute is qualified and restricted as dispute only when suit or arbitration is pending since before receipt of notice u/s 8?

20. In the definition, at the beginning of section 2 itself, it is mentioned that

definition has to be taken in the way it is defined as long as the context otherwise does not require, suppose context demands to take it otherwise, this definition will become sub-silentio in the said context, of course this definition, it is nowhere explicitly looking that this definition is exhaustive. The word 'etc' is also not added to apply ejusdem generis rule.

21. If we see section 8, which is precursor to invoke section 9, it is evident that upon notice u/s 8 from the operational creditor to the debtor on the ground of default occurrence, if the debtor fails to reply to the notice within 10 days stating dispute is in existence on the footing of suit or arbitration pending or if the debtor fails to repay the unpaid debt within 10 days, then if the notice of the dispute as stated under sub-section (2) of section 8 of the code is given to the creditor and other compliances, the operational creditor gets cause of action to file application u/s 9.

22. The argument of the debtor counsel is since the debtor disputed the debt within 10 days by giving reply within 10 days to the creditors, it has to be construed as dispute on two grounds, one - the definition for dispute is inclusive, two - the word "and" in sub-section 2 (a) of section 8, has to be read as "or" so as to harmonize with the inclusive definition to the word "dispute".

23. We respectfully disagree with this view; definition has always to be harmonized with the context in which it is said in the substantive section, not otherwise. This caution is very much implicit in section 2 itself saying it has to be understood as defined unless context otherwise, therefore two things are clear, one - defining section will not govern the substantive section, two - definition has to be construed in the context of substantive section, not otherwise. When a word is defined, it has to be understood meaningfully, if definition is only to say dispute includes suit or arbitration, no definition needs to be given, because pendency of suit or arbitration always connotes dispute, this need not be said separately, indeed dispute is genesis, pendency of suit or arbitration is species. No doubt it is true that word "includes" is normally considered as extensive, but there are situations to read "includes" as "means" to enable the courts to achieve the purpose of legislation. If reply is given **denying the claim despite default occurrence is clear, does it mean that no application can be filed by any operational creditor even though the operational creditor makes the case of default occurrence? If that is so, it will be virtually ousting operational creditor filing any case under section 9.** If this scenario emerges, then it will be nothing but throwing this law into dust bin. We all know how much time is taking for logical end to winding up proceedings, by the time company

liquidation happens, not even bones remain to creditors. All this exercise under new Code is to maximization of value of assets in a time bound manner to promote entrepreneurship and availability of credit, to balance the interests of all the stake holders.

24. If we start looking at this as draconian law gobbling the companies and branding orders under this law as harsh, then we remain where we are, perhaps will go down further, yes, one can understand to get conversed to new law and to see fruits of it, it will take time, but just for the sake of this reason, we cannot wish away the mandate of this nation come through Parliament.

25. In this situation, we cannot resist ourselves from giving an illustration that is aptly similar to the present controversy. It is like a snake charmer playing out a cobra without fangs for entertaining people, tomorrow, if a claim under section 8 is considered as "dispute" by looking at bare denial, sections 8 and 9 will become exactly like a cobra without fangs in the basket of a snake charmer. But I strongly believe, it is not the idea of Parliament to make this law to mere show up, had it been so, the Parliament would not have wasted its valuable time in including sections 2 (6), 8 and 9 in the statute book.

26. Though there are many decisions of the Hon'ble Supreme Court holding that the word "includes" is extensive in nature, there are equally many number of cases saying that this word has to be understood in the context it is applied.

27. In this line, in ***South Gujarat Roofing Tiles Manufacturers Association v. State of Gujarat [1976] 4 SCC 601***, it has been held that there could not be any inflexible rule that the word "includes" should be read always as a word of extension without reference to the context, in the said case the word includes has been used in the sense of "means", this is only construction that the word can bear in the context. In that sense, "include" is not a word of extension, but limitation, it is exhaustive of the meaning which must be given to potteries industry for the purpose of Entry.

28. The use of word "includes" in the restrictive sense is not unknown. So, the manufacturer of Mangalore Pattern Roofing Tiles is outside the purview of Entry 22.

29. Likewise, in ***N.D.P. Namboodripad v. Union of India [2007] 4 SCC 502***, it has been held that the word "includes" has different meanings in different contexts. It can be used in interpretation clauses either generally in order to enlarge the meaning of any word or phrase occurring in the body

of a Statute, or in the normal stand sense to mean "comprises" or "consists of" or "means and includes depending on the context".

30. In another case in between *Karnataka Power Transmission Corporation v. Ashok Iron Works (P.) Ltd.* [2009] 3 SCC 240 in para 17, it has been held as follows: —

'It goes without saying that interpretation of a word expression must depend on the text and the context. The resort to the word "includes" by the legislature often shows the intention of the legislature that it wanted to give extensive and enlarged meaning to such expression. Sometimes, however, the context may suggest that the word "includes" may have been designed to mean "means". The setting context and object of an enactment may provide sufficient guidance for interpretation of word "includes" for the purpose of such enactment.'

31. If we see definition to "a person" in General Clauses Act, it says "person" shall include any company or association or body of individuals whether incorporated or not.

32. The normal meaning of a "person" is a living person, whereas if the statute feels necessary to include some other categories which on their own do not fall under a particular category, then an inclusive definition will be given to include other categories, the same is the thing happened to the definition of "a person". Likewise, if any dispute that normally does not fall within the definition of "dispute", then such items not falling within the definition dispute will be shown as included so as to enlarge the meaning of dispute. A dispute pending in a suit or arbitration can never be said as different from the general word "dispute". The dispute in a suit or arbitration is inherently included in the definition of the word "dispute". Therefore, if at all the suits and arbitration proceedings pending to be said as included in a dispute, it need not be shown as included, because the category of the dispute in a suit and arbitration will automatically fall within the ambit of dispute. Henceforth, the only meaning that could be drawn out from the word "includes" is that the dispute means the dispute pending in a suit or arbitration proceeding, whereby in the light of the ratio given by Hon'ble Supreme Court, here the word "includes" in the definition of "dispute" has to be read as "means" not as "includes". So, the word dispute is qualified as the dispute in a suit or arbitration pending not otherwise.

33. In the above discussion we have noticed what is meant by a dispute, now let us see what is meant by the existence of dispute in sub-section (2) of section 8 of the Code. In section 8 it has been said when notice is given u/s 8(1) of the Code, the corporate debtor shall, within a period of 10 days of

the receipt of demand notice, bring it to the notice of the operational creditor that dispute is in existence by way of suit or arbitration proceeding before the receipt of notice under sub-section (1) of Section 8 of the Code. If we go by this section, existence of dispute means pendency of either suit or arbitration proceeding before the receipt of section 8 notice from the operational creditor, it has to be understood that pending of suit or arbitration proceeding alone will amount to existence of dispute. In Clause (a) of Sub-Section (2) of Section 8, it has been said that the corporate debtor must bring two things to the notice of the operational creditor, one -existence of dispute "and" record of pendency of the suit or arbitration proceeding before receipt of section 8 notice. In point no. 1 "existence of dispute" has to be understood as dispute pending in a suit or arbitration proceeding as mentioned in definition to "dispute", in point No.2 "it has been said what dispute will become considered as "existence of dispute". It can be "existence of dispute" only when pendency of suit or arbitration proceeding in existence before receipt of notice, it does not matter to invoke section 9 if the suit or arbitration proceeding filed subsequent to receipt of section 8 notice. Indeed, section 8 is a cause of action section to section 9, if cause of action does not arise under section 8, no grievance could be invoked under section 9, section 9 is an application to file a case if at all the information that is required under section 9 is given, thereby any provision in section 9 of the Code cannot be considered as a governing provision to find out as to any cause of action arose for filing a case under section 9. For that reason only, in sub-section (1) of section 9, a provision is made to file an application, in sub-section (2) a provision is made to file an application in such form and manner as prescribed, in sub-section (3), a provision is made to guide as to what documentation is to be filed along with the form under sub-section (1) of section 9, when it comes to sub-section (4), it is a provision enunciating to propose a resolution professional, it has been further said when an application is to be admitted and when an application is to be rejected, lastly in sub-section (6) it has been said that insolvency resolution process will be commenced once application is admitted under sub-section (5) of section 9. Thereby whether case is made out to file application u/s 8 is to be seen going back to section 8 but not under section 9, whereby if at all any provision appears inconsistent with cause of action section that is section 8, that provision has to be read in harmony with cause of action section. Cause of action section will never be harmonized to a procedural aspect mentioned in section 9.

34. In the given situation, this debtor company figures have gone into minus, P & L statement as on 31st March 2016 of the company reflects profit after

tax has gone down to -1551.51 crores. This company has not paid single rupee to these creditors in the last three years, it is admitted on record millions of dollars' worth goods purchased from them in the year 2013 by this company showing itself up as purchaser giving all kinds of undertakings waiving right of defence. Now, it says that these goods were delivered to some third party, not to it. It is in between the debtor and that third party, what business these creditors have with that third party, it does not appear in any documentation and that third party is privy to any transaction.

35. These are the figures showing on the website of Uttam signed by Managing Director of the company on 9th February 2017.

<i>Reconciliation of profit between Ind-AS and previous IGAAP for earlier periods and as at 31.03.2016</i>	<i>Quarter Ended</i>	<i>9 months Ended</i>	<i>Year Ended</i>
Name of Adjustments	31.12.2015	31.12.2015	31.03.2016
Net Profit as per IGAAP	(424.50)	(418.56)	(1551.51)
Capital Incentive from Government of Maharashtra	12.63	42.91	58.61
Other Comprehensive Income	(2.33)	(73.64)	489.40
Total Comprehensive Income as per Ind-AS	(414.20)	(449.29)	(1003.50)

36. Nowadays, corporate world is running on credit facility, if we ask to ourselves, how many companies are doing business with their own money, then surely it will be negligible in number, daily many startups coming, some doing, some failing, the reasons may be myriad. If companies are funded by creditors and mostly run on their money, can it be said that shareholders of the company are real owners, or creditors? Don't creditors have a right at least to realize their money before company is fully sunk into? It is not that, every case coming to NCLT has been allowed or every case dismissed; NCLT has been applying its judicial discretion to find as to whether company is solvent enough to discharge its obligations towards creditors, some admitted, some dismissed, because every situation is fact sensitive, therefore adjudication is subject to the facts of the case.

37. In view of this, the principles and doctrines relevant in service jurisprudence and courts dealing purely with law in issue cannot be bulldozed upon fact finding courts, every decision turns on its facts. In Service Tribunals,

mostly cases are dealt with basing on flouting some government order of memorandum, therefore cases filed on a particular order will logically end in the same manner, there, this rule of following coordinate Bench order is applicable. Here it can't be seen as strait-jacket formula to pass same order which other coordinate Bench has passed, may be facts looking alike, but when gone into those facts some difference will be there which changes the fate of the case. As to court of record, mostly they decide cases either at second appellate stage or on writ side, where facts will not have any role to play in such situations, law can't be changed from case to case, obviously outcome may be the same.

38. The objection of the corporate debtor is that so many complexities are existing in this dispute, for which since they have filed a suit before Hon'ble High Court of Bombay after receipt of notice, therefore taking pendency of the suit filed subsequent to receipt of section 8 notice, this IB petition is to be dismissed. But the argument of the corporate debtor counsel not being in consonance with the mandate of the statute u/s 8, this petition can't be dismissed going by the argument of the counsel of Uttam because filing of a suit or arbitration proceedings subsequent to receipt of notice u/s 8 will not amount to existence of dispute as stated u/s 8 of IB Code.

39. Under any stretch of imagination, the argument of the corporate debtor counsel does not make out any case to construe the corporate debtor filing a suit over this claim subsequent to receipt of notice as dispute in existence, henceforth this point is decided against the corporate debtor.

40. The corporate debtor counsel made a thumping argument saying that since this very Bench dismissed an operational creditor case *Kirusa Software (P.) Ltd v. Mobilox Innovations (P.) Ltd* dated 27, January 2017) on the ground the claim is disputed in the reply, it is right, it happened in the formative days when this Code has come into existence, moreover this point that dispute means pendency of suit or arbitration, to our remembrance, had not been argued by the counsel of operational creditor, frankly speaking that was not noticed by us. It does not mean a miss out in one case can become a ratio to repeat the same mistake again and defeat the object of enactment. For this reason, is it that this case has to be sent to Larger Bench? In corporate cases, time is money; this Tribunal must render justice one way or other as expeditiously as possible so that money stuck in unyielding asset can be released to fund it meaningfully. To effectuate the objects of this code, larger picture is to be visualized.

41. The corporate debtor counsel referred an order dated March 1st 2017 passed by NCLT Principal Bench, New Delhi in *One Coat Plaster v.*

Ambience (P.) Ltd. and Shivam Construction Company v. Ambience Pvt. Ltd. and Philips India Limited v. Goodwill Hospital & Research Centre Limited to say that if at all notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility the petition shall be rejected by reading the definition of dispute as inclusive and the word "and" in clause (a) of sub-section (2) of section 8 as "or" in the light of section 9(5)(ii)(d).

42. With all humility, we cannot agree with the submission of the corporate debtor counsel to rely on the Coordinate Bench order because the reasoning given in this case is based on the ratio legis enunciated in sections 8 and 9.

43. Moreover, we have noticed that enough material is there to say that purchase order is present, invoices are present, bill of lading is present, bill of exchanges are present, on the top of all these, confirmation of forfeiting in favour of Deutsche is present, and acknowledging further assignment of part of the debt to Misr Bank is also present. Moreover, the debtor has not denied any of these documents except saying English law alone is applicable. The alarming situation in this case is, this company is consistently in losses, in fact profit after tax is showing to the loss of 1557 crores by 31st March 2016. If any delay is made in passing this order, it will become nothing but defeating the purpose and object of this Code.

44. The corporate debtor counsel argued that Special Bench at Guwahati passed order dated 30.3.2017 stating that attorney holder exceeded his power by filing case under section 7 of the Code basing on a power of attorney given two years before, by the time Insolvency and Bankruptcy Code was not even contemplated.

45. At eleventh hour, the corporate debtor counsel placed an order dated 30-03-2017 passed by Special Bench of NCLT at Guwahati on a direction given by the Hon'ble President of NCLT to decide the matter regarding passing of different orders in a CP 37/2017 u/s of Insolvency and Bankruptcy Code 2016 by Division Bench, NCLT at Kolkata in relation to an issue as to whether Power of Attorney in question had specifically empowered Shri Srinjoy Bhattacharjeet to do variety of acts which included the power to initiate resolution process under IB Code, 2016 as well.

46. Since this point goes to the root of maintainability, this point has also been elaborately discussed.

47. Before going into the above decision of NCLT Guwahati, we mention that Deutsche & Misr Bank, separately and independently have given power of attorney to one Pankaj Sachdeva and Vandana S. Saxena on 20th

September, 2016 and 11th October, 2016 to ask or demand the outstanding amount from the present corporate debtor i.e. **Uttam Galva Steels Limited along with overdue interest** and costs thereon and also to file and/or defend suits, to sign and verify all the plaints **including winding up petitions**, pleadings, written statements, affidavits, petitions, objections to file execution applications to undertake proceedings, appeals, review, revisions, writ petitions and to furnish evidence and to make statements and to file all sorts of applications and to prosecute all legal proceedings, memorandums of appeal, petitions and to do all other legal matters in all the **courts/tribunals** including the board for Industrial and Financial Reconstructions (BIFR) and the Appellate Authority for Industrial and Financial Reconstruction (AAIFR), from the lowest to the highest concerning any matter in respect of the said outstanding amount and the said petitions/appeals, to engage advocates and technical counsel for the conduct of the proceedings for recovery, except to settle compromise, compound or withdraw the said petition, suits, appeals, reviews, revisions, petitions without obtaining a written consent from the operational creditors, and to appeal in the courts, file civil or criminal review or revisions or appeals or originals.

48. Since the corporate debtor counsel raised an objection that power of attorney is invalid since the power of attorney has not been reflecting to initiate this insolvency proceeding under IB Code. To find out as to whether such argument stands in the light of the coordinate bench, the purport of the power of attorney has been depicted to look into as to whether the power of attorney falling within the definition given in Section 1-A of The Powers of Attorney Act, 1882 and also the ratio laid down in the order given by the coordinate Bench. The discussion below is purely to consider as to whether the power of attorney in the present case is valid or not.

49. By looking at the aforesaid order passed by our learned brother sitting at Guwahati, it appears that in Kolkata Bench, one Member has stated that General Power of Attorney was given on 20-10-2014 to initiate proceedings before any court of law including NCLT, but this power of attorney cannot be treated as a specific power of attorney to initiate corporate insolvency resolution process under IB Code 2016. Since the power of attorney must be strictly construed, the rationale behind the principle being that the powers given are not abused by the agent and its actions are restricted within and only to the extent the power indicated or given.

50. As against the aforesaid observation, another member of the same Bench held that the power of attorney mentioned above clearly mentions that the legal manager is empowered to initiate proceedings under NCLT

which automatically includes its role as an adjudicating authority under IBC. In case, this is insistent upon in every petition under IBC, involving a financial creditor that the petition be filed on the basis of a specific power of attorney on a board's resolution, it will defeat the very purpose of IBC, which is for speedy resolution of insolvency cases. He also further held that the facts of the outstanding loan and the defaults have been established by the operational creditor and the same has not been denied by the corporate debtor henceforth the same deserved to be admitted.

51. To say that the power of attorney in the case supra cannot be said to have authorized the attorney to initiate a corporate insolvency resolution proceeding u/s 7 of the Code, Guwahati Bench holds that since it is a new act coming to existence in the year 2016 with enormous changes with a complete new regime, therefore it can't be said that the power of attorney holder can go beyond the covenants under power of attorney by relying upon ***PM Dasappa Nayanim Varu v. Ramabhaktulal Ramaiah AIR 1952 Mad. 559 and Coramandel International Ltd. v. Cheamcel Biotech Ltd. [2011] 110 SCL 580 (AP.)***.

52. When this Bench has gone through PM Dasappa supra it is evident that the donors themselves filed OS 314/1943 on the file of District Munsif of Tirupati against Ramabhaktula, thereafter due to their inconvenience, the donors had appointed a donee to conduct on their behalf the entire proceedings which had to be taken in the said suit on the file of the court of the District Munsif of Tirupati, to give effect the special power of attorney executed and delivered by them as of consent. When District Munsif returned the plaint on the ground said suit was beyond the pecuniary jurisdiction of that court, the plaint so returned was represented in the subordinate judge's court, then on the contention raised by the defendants that no power was conferred on the donee to engage an advocate or conduct a suit in the subordinate judge's court, the said subordinate judge dismissed the suit on which an appeal was filed wherein Hon'ble High Court dismissed his plea stating that the document having conferred on the donee to conduct a particular suit in a particular court, because it does not expressly engage the attorney for the purpose of conducting the litigation generally in respect of the plaint schedule. As there was no either explicit or implicit power to the attorney to file before the subordinate court, if the contention raised by the appellant was accepted, it would be nothing but court introducing new words into the power of attorney and confer a new power upon him. Since the plaintiff expressly authorized the attorney to conduct particular suit in a particular court, the Hon'ble High Court held that it could not hold that it intended

to empower the attorney to conduct that suit in any other court. In view of this reason, the appeal was dismissed.

53. As to other judgment passed by the Hon'ble High Court of Andhra Pradesh in **Coramandel International Ltd. (supra)** the reasoning given for not considering power of attorney to file winding of proceedings is that the power of attorney was authorized to sign and verify plaints written statements petitions, vakalats, claims and objections and the memorandums of all kind in any court in India but not included to file winding-up proceedings, thereby the Hon'ble High Court has not allowed that power of attorney to use for filing winding up proceedings on the ground that the proceedings under section 433 of the Act 1956 cannot be equated to suits or for that matter suits for recovery of money because lis in winding up proceedings is not merely between the petitioning party and the company sought to be wound up, once the winding petition is admitted the creditors contributories, shareholders etc. to seek redress in the proceedings and even oppose the winding up. It was further held that the proceedings under Companies Act for winding up are entirely different, a special remedy and a proceeding not to the parties alone, their range is wide and all steps taken on winding up proceedings are in public interest.

54. The rationale behind the finding by Guwahati is, power of attorney must be strictly construed and that the powers given are not to be abused by the agent and his actions are restricted within and only to the extent the power is indicated are given.

55. In the two cases relied on by Guwahati Bench, as to Madras case, the principals had given power to the attorney to proceed with the suit already initiated by them, they had not said to him to proceed any further beyond the said suit already filed by them. It is purely a special power limited to a special action, therefore, that special power could not be equated or generalized to say that the person authorized is also empowered to file before another court of law where proceedings would be different, therefore the special power cannot be construed as a generalized power. It is an exclusive power given not to include any other power. The ratio to the facts of it is correct, because the power given to the attorney was to continue with suit initiated by the principals, not beyond it, henceforth, the governing ratio where anybody transgresses the special power given to them, it will be undoubtedly abuse of power. If we come to the ratio decided in Coramandel International Ltd. (supra) there the principle endowed upon the attorney is the power to institute suits but not to winding proceedings, since the winding up proceedings are by nature different with far implications, the Hon'ble High Court has held that the power given to file suits cannot be elongated to

initiate winding up proceedings because it is not a lis between two parties, it involves other creditors, contributors and many other stake holders including public interest.

56. In the case given to us, the creditors authorized the attorney to ask or demand the outstanding amount from Uttam and also to initiate proceedings including winding up proceedings before the courts/tribunals, the only power that is kept to themselves is in the event of compromise, it has to happen with the written consent of the creditors.

57. Now let us come to see what the definition given in The Powers of Attorney Act says: —

“In this Act, “power-of-attorney” includes any instrument empowering a specified person to act for and in the name of the person executing it.”

58. On reading this section, it appears that four elements are important in a power of attorney to know as to whether any action of attorney is in excess to the power given to him or not.

1. There shall be an instrument.
2. There shall be an empowerment to the attorney to do an act or acts.
3. Attorney shall be a specified person.
4. Such action must be for and in the name of the person executing it.

59. All these elements are present in the two powers of attorney, the only rationale to be seen is any excess power has been exercised in moving a case under section 9 of this code, which we have not seen anywhere.

60. Here the creditor companies, simultaneously on 20th September 2016 and 11th October 2016, empowered Mr. Pankaj & Mrs. Vandana to demand the dues outstanding from the corporate debtor i.e. Uttam Galva Steels Limited and to initiate legal proceedings including winding up proceedings before the courts/tribunals, therefore the intention of the creditors is clear and their authorization is very clear that the attorneys can initiate winding up proceedings as well. The point for consideration is to see whether the attorneys proceeding beyond the power given to him or not. When power was given to the attorneys to initiate proceedings for liquidation by filing winding up petition in the months of September and October 2016, an action under 1956 Act for winding up proceedings was very much available, for that reason alone notice was given under section 434 of the Act 1956, but by the time the attorneys to initiate proceedings of winding up, winding up

jurisdiction in respect to section 433(e) of the Act 1956 were metamorphosed into insolvency proceedings under IB Code. In a situation like this, can the application filed under section 8 be simply rejected on the ground since winding up proceedings have become insolvency proceeding and the authority given to winding up proceedings cannot be considered as authority to initiate insolvency proceedings? In fact, this insolvency proceeding against companies had originated from 271-(l)(a) of 2013, therefore, when company is unable to pay, the party has either to proceed under sections 433 & 439 of the old Act, or under new provision come in the place of section 433(e) of the Act 1956. It is not said in the power of attorney that the attorney holders shall proceed under the Companies Act, 2013 alone or under 1956 Act, in fact the creditors categorically mentioned to initiate winding up proceedings when the parties unable to repay the debts. It is not said by the creditors that the attorneys shall directly file winding up proceedings, before filing winding up proceedings, the creditors authorized the attorneys to ask or/ demand the repayment of the outstanding amount by Corporate debtor, if the corporate debtor fails to repay, then only the creditors can initiate proceedings under winding up. It is not that power of attorney was given years before. It is hardly given two months before initiating this proceeding, since it is a foreign company it will take its own time to reach this power of attorney to the attorney holders thereafter to ask the debtor for repayment, if the debtor has failed to repay, then to make a demand and then to give a statutory notice as envisaged u/s 8 thereafter to initiate proceedings u/s 9 of the IB Code. All these steps will take about 1 to 2 months to initiate proceedings under this Code. By navigating through all these documentation, we have not seen anywhere that the attorneys transgressed their power to initiate insolvency proceedings. A change of name will not become change of game. This relief under section 9 of the Code was available to the operational creditors under section 433(e) of the Act 1956. Indeed, the proceedings pending under section 433 (e) of the Act 1956 have been transferred to NCLT to treat them as IB petitions. Therefore, it is not pragmatic, especially in commercial proceedings to go back to square one and then again initiate proceedings from the beginning. Here the debtor company is already in losses and if at all any further delay happens, if the creditors are not in a position to realize their dues or at least to make out something from the residue, this process of restarting the proceedings in the name of want of authority will become hindrance forever in realizing its debt.

61. In winding up proceedings once enquiry is done liquidator will directly be appointed for liquidation, the better part in IB Code is there will be a resolution process to find out as to whether a distressed company can survive if

further funds are infused, if at that juncture also, the company fails, then only the action for liquidation will trigger. Therefore, the nature of insolvency proceedings under IB Code cannot be seen as something different from the winding up proceedings. Maybe it is looking new to us but the outcome is one and the same, the main object behind insolvency proceedings for reorganization and insolvency resolution of the companies and individuals in a time bound manner for maximization of value of the assets of the said companies or said persons to promote entrepreneurship availability of credit and balance of interest of all the stakeholders. In a scenario like this, if we narrow down our perception that company will be closed, business will go down if at all insolvency proceedings are initiated, then it will become nothing but diluting the force of the Code. Assuming that workers will suffer if it goes to IRP, what ultimately happens is the company will die on its own, by that time nothing will come even to workers also, therefore we have not seen any logic in the argument that company shall not go to IRP.

62. When we read either the statute or a covenant between the parties, courts will normally discover what the law or covenant is rather than to make the law or to make the covenant, the courts will only read what a statute actually states and will not read into the words which are not in the statute. One must not be lost sight of that ratio legis is as important as ratio decidendi, ratio legis is rather more important than ratio decidendi. When sovereign law was not in existence, common law was prevalent, in those timings, destiny and direction to English Country was the ratio decided by the courts to give certainty and predictability to the society to run, but when law is promulgated, the bottom line for certainty and predictability is ratio legis, when any ambiguity is there in law, if law is interpreted in such a way so as to carry the object of the litigation, then it will become purposive interpretation. The purposive approach is to promote the general legislative purpose underlying the provision, but not to crucify the statutory provision by labelling reliefs in the Code as harsh remedy.

63. In *Haryana Financial Corporation v. Jagadamba Oil Mills [2002] 3 SCC 496*, it has been held as follows:

"Courts should not place reliance on decisions without discussing as to how the factual situation fits into with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclid Theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statues. To interpret words, phrases and provisions of statute, it may become necessary for judges to embark

*upon lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In **London Graving Dock Co. Ltd. vs. Horton (1951) to All ER 1(HL)**, Lord MacDermot observed:*

"The matter cannot, of course, be settled merely by treating ipsissimaverba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge".

64. All that is said in the above finding is the words in a judgment is not to be treated as if it were a statutory definition, it will require qualification in new circumstances. There is always a peril in treating the words of a speech or a judgment as if they were words in a legislative enactment and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, if any deviation to the statute is *ex facie* apparent in any judgment, law governing a particular situation is to be taken abreast. A ratio in a judgment cannot be torn out of context and apply it in a situation where it is not fitting.

65. Here in the present case, the power of attorney was given only two months before filing this case mentioning what are the actions the attorney holders to take up, against whom it is to be taken up, therefore it can't be said that since it is not a winding up proceeding, this power of attorney cannot be used to file insolvency proceeding IB Code. The nature of proceedings under winding up as well as insolvency is more or less same. The procedure is slightly different; the object is to liquidate the assets that are owed to the creditors, as we said earlier; in insolvency proceedings one more step taken into consideration is restructuring which was earlier considered by SICA. If Debtor Company is unable to make payment, what is wrong in notifying it to the public? Here the corporate debtor has not come forward making any payment to the creditors in 180 days 'maturity time given. Thereafter, almost three years are over. Still this company has not made any payment to the creditors, now has come forward making allegations that power of attorney is not valid, bill of exchange is not valid, forfeiting to the second creditor is not valid but it is nowhere said that the AIC has not sent the goods to the destination ordered by this debtor in the purchase order. It is also not the case of the debtor that goods were not reached to the destination; in fact, he accepted bill of exchanges and thereafter confirmed the forfeiting agreement in between the first creditor and the AIC.

66. The Counsel for the Corporate Debtor relied upon **S. I. Rooplal v. Lt.**

Governor through Chief Secretary Delhi [2000] 1 SCC 644 that if the earlier judgment of another coordinate bench of the same tribunal is to be held as incorrect by subsequent Bench of the same tribunal, then it ought to have been referred to a larger bench so that the difference of opinion between the two coordinate benches on the same point could have been avoided. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This point has already been answered in the above paras.

67. The Corporate Debtor Counsel submits that Deutsche and Misr Bank do not have any locus to maintain this petition as claim purportedly payable by the Debtor separately is based on two separate claims by two separate claimants, thereby this claim is defective in so much as it seems to claim two complete distinct unconnected debts, and there is no privity of contract between Uttam and Deutsche as much as in between Uttam and Misr Bank, besides this, the assignment by Deutsche to Misr Bank has not been confirmed by Uttam therefore, these two petitioners cannot be recognized as Operational Creditors within the meaning of the Code.

68. The argument of the Corporate Debtor counsel does not stand good for two reasons (1) the debt has been properly assigned to Deutsche and thereafter Deutsche assigned part of the debt to Misr Bank, since the assignment of debt in our country need not be confirmed by the Corporate Debtor, it cannot be said that this Petition is defective, it is two Operational Creditors, who shared debt in between, filed this Company Petition against the debt raised out of one transaction, apart from that since it is only to initiate the insolvency resolutions process, for no prejudice being caused to the Corporate Debtor, this Petition in any sense cannot be treated as defective. As to doctrine of privity of contract, there need not be any separate contract in between the Petitioners and Corporate Debtor, once that debt is assigned to somebody else, then that third party will automatically come into the shoes of the original operational creditor as stated in the definition to operational creditor. Therefore, this argument of absence privity of contract between Deutsche, Misr Bank and Uttam has no merit.

69. The Corporate Debtor Counsel has developed an argument saying that a Petition under section 9(5)(i) of the Code could be admitted only when, inter alia, no notice of dispute has been received by the Operational Creditor or there is no record of dispute in the information was received. He further says Corporate Debtor having sent a notice of dispute on 3.3.2017 itself

that is within 10 days from the date of receipt of notice, as envisaged under section 9(5)(ii)(d), the Company Petition by an order shall be rejected.

70. This argument will remain looking plausible, if the word "dispute" is meant as a dispute arising out of assertion and denial, but if the definition of the word "dispute" is taken as pendency of suit or arbitration proceeding in respect to the debt claim mentioned in the Petition, then there would not be any argument to the Debtor Counsel to justify his arguments.

71. If we read the sections 5(6), 8 and 9 together, we can visualize the consistency. When the word "dispute" means pendency of suit or arbitration, then "dispute in existence" in section 8 means suit or arbitration proceedings pending since before the receipt of notice under section 8, on this logic, the receipt of notice of dispute under section 9(5)(ii)(d) will obviously become a notice of dispute reflecting pending of suit or arbitration proceedings in respect to the debt claim since before receipt of notice under section 8 of the code. Then next point to be seen is as to whether this understanding is advancing the purpose and object of the Code or not. A provision has been envisaged for an Operational Creditor to initiate Insolvency Resolution process. If section 8 mandate is understood by reading dispute as mere assertion and denial, then no Operational Creditor can file a petition once the Corporate Debtor sends a reply notice saying that he is denying the claim raised by the Operational Creditor. The outcome of such situation is the doors of IB Code will remain closed for ever to any Operational Creditor. It is quite natural as and when operational creditor sends notice, the Corporate Debtor, whether he is in a position to pay or not, unless colluded, will simply send a reply saying that it is disputing the claim raised by the operational creditor. This eventuality raises a dispute without any support of pending suit or arbitration proceedings, which will become detrimental for enforcing the mandate of this Code. As we already said, one should not start looking at the IB proceedings as harsh. Here in this case, the Debtor company failed to pay for three years since now, after three years, it is saying that Operational Creditor cannot file this case as it remained silent from March 15, 2014. Can it be an argument to say that since the Operational Creditors did not initiate any proceedings until before filing this Insolvency Petition, they are not supposed to pursue the remedies available to them before the case is hit by limitation? It can't be like that. Therefore, this Bench has not found any reason in the argument of the Corporate Debtor Counsel.

72. The Corporate Debtor Counsel raises another argument saying that since this sales contract in between the Seller (AIC) and the Corporate debtor is governed by English Law, the Petitioner cannot proceed without dealing

with English law, to which he relied upon *Hari Shanker Jain v. Sonia Gandhi AIR 2001 SC 3689*, which is not relevant to the present case.

73. In a reply to the same, the Counsel for the Operational Creditors has relied upon *Malaysian International Trading Corpn. v. Megha Safe Deposit Vault (P.) Ltd. [2006] 68 SCL 52 (Bom.)*; *Aksh Optifibre Ltd. v. Evonik Degussa GmbH [MANU/MH/1361/2014]*; *The Bank of New York Mellon v. Zenith Infotech Ltd.* to say that if any party says that English Law is differing from Indian Law, it is their bounden duty to prove foreign law is contrary to Indian Law, if they failed to prove it, it has to be presumed that Indian Law is applicable. Therefore, it is not open to the Corporate Debtor to say that as to confirmation in relation to assignment requires the acknowledgement of the Corporate Debtor cannot be construed as law governing this case. Henceforth we have not noticed any merit in the argument of Corporate Debtor. However, since Deutsche Bank is party to the proceeding, and confirmation in respect to that assignment has been agreed upon by Uttam, without prejudice, Deutsche can very well proceed, but this case need not go to that extent, because the counsel of the debtor has not shown that confirmation of assignment is a requisite under Indian law.

74. The Corporate Debtor Counsel vehemently argued that these petitioners cannot claim interest over the operational debt by showing two Bills of Exchange given as collaterals, he says, if it is claimed basing on Bills of Exchange along with interest, then it would become a financial debt, not an operational debt.

75. If we go through the definition of "financial debt", it means that a debt along with interest is disbursed against the consideration for the time value of money and with an inclusive list specifying as to what category of debts will become financial debt. When it comes to operational debt, it is a claim made against the goods supplied or services rendered. There are two types of debts, one operational debt another financial debt, so debt has to fall either under financial debt or operational debt, there cannot be a debt other than these two types. If it is a debt against the company, it has to invariably fall either under financial debt or operational debt and it has to be read as either financial debt or operational debt, it can't be said that a debt against company for a, b, c reasons can't be either financial debt or operational debt. The bottom line in respect to obligation is, a man should repay the value, either in cash or kind, to what he has taken, for this; we have to apply law in such a way that claimant is provided remedy. The premise for claim is whether "A" has taken something from "B" with a promise to pay back the value or not, if it is prima facie evident that claim has to be paid, then to see

what law is applicable to ensure that it is repaid, but not to dismiss the claim on the ground it is not in accordance with law. Legal proposition is to be searched and applied to promote the cause not to negate the cause. We need not say that procedural justice is always subservient to substantial justice.

76. When we see the basic difference to financial debt and operational debt, it is clear that financial debt is money borrowed to repay on future date along with interest, here the money is lent for value addition to the money as agreed between the parties, whereas operational debt is normally based on an agreement to pay to goods or services, it does not mean that interest cannot be claimed in the times to come, it is a normal practice that trade payables are payments deferred for a fixed time, if the party fails to repay within the fixed time, then interest will be claimed over operational debt as well, the same happened over here as well. The corporate debtor himself said in the written submissions that there is email dated April 10, 2014 from the corporate debtor in respect to payment of interest, since collaterals are Bills of exchange, even otherwise also, basing on collaterals entitled to interest at the rate of 18% u/s 80 of the Negotiable Instruments Act. The difference in these two transactions is one given to get interest over the money; second transaction happens in business operations, in both the cases money is involved, as days go by after transaction, the time value of money will be there. For that reason, it is nowhere said that the operational creditor is barred from claiming interest. Suppose goods are supplied three years before, the debtor is supposed to return in 6 months, if it is not paid in 6 months maturity period, does it mean that since it is operational debt, the creditor cannot claim interest when the payment is delayed beyond the time given to him? On commercial side, the creditor claiming interest is quite normal and justifying, after all, business always runs keeping in mind the time value of money, transaction will be operation if payment is to goods or services, transaction is financial if money is lent in contemplation of returns in the form of interest. Therefore, goods or services supplied can't be seen as not valued in terms of money, one is in kind another is in cash, that does not mean only cash has value of money and kind has no value of money.

77. Time value of money definition relates to the value of money in time. How much will a rupee owned today be worth one year from now, i.e. If Rs.100 affords a person to purchase say X amount of goods today, how many goods will he be able to purchase with the same ?100, one year from now. Historically it has been found that the value of money has depreciated over the years, i.e. in one year from now he will be able to purchase less number of goods than X - that he was able to purchase a year back. So this

is the proposition that has to be taken into consideration for claiming interest on the value of goods supplied. In this case, credit has been given free of interest for 180 days, the debtor has not paid, from the date of maturity, almost three years over, still no payment has come to the operational creditors.

78. Let us test how far this argument is right, one - it is admittedly true Uttam accepted two bills of exchange promising to pay the value of goods within 180 days, thereafter Uttam has not made any payment, by now more than three years and six months are over.

79. For the reasons above and the material available on record showing compliance under section 9 of the code, this petition is hereby admitted and Registry is hereby directed to refer it to the Insolvency and Bankruptcy Board to recommend the name of an IRP to appoint him in this case.

V. NALLASENAPATHY
Member (Technical)

B. S.V. PRAKASH KUMAR
Member (Judicial)

ANNEXURE X.3

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION****Company Appeal (AT) (Insolvency) 6 of 2017**

(arising out of order dated 27.01.2017 passed by the National Company Law Tribunal, Mumbai Bench in Company Petition 02/I&BP/NCLT/MAHI2017)

IN THE MATTER OF:**Kirusa Software Private Ltd.****Appellant****Vs****Mobilox Innovations Private Ltd.****Respondent**

Present: Mr Amar Gupta, Mr. Sanjeev Jam, Ms Apoorva Agrawal, Mr Alok Dhir, Ms Varsha Banerjee, Mr. Milan Negi and Mr. Kunal Godhwani, Advocates for the appellant.

Mr. Devansh Mohta, Mr. Shyam Pandya, Mr. Puneet Singh Bindra and Mr. Rohan Kaushal, Advocates for the respondent.

JUDGEMENT**SUDHANSU JYOTI MUKHOPADHAYA, J.**

1. The appellant-operational creditor filed petition under section 9 of the Insolvency and Bankruptcy Code 2016 (hereinafter referred to as 'I&B Code') which was rejected by the "Adjudicating Authority". Mumbai Bench by the impugned order dated 27th January 2017, with following observations :

"When this Bench has directed the petitioner to furnish the requisite documents as described under section 9 of the Insolvency and Bankruptcy Code, the petitioner filed the Notice of dispute raised by the corporate debtor disclosing the corporate debtor disputing the claim made by the petitioner.

Though the petitioner filed all the invoices raised on the debtor company aggregating debt to Rs. 20,08,202, details of transaction on account of which debt fell due, default thereof and demand notice served upon the debtor, for this Bench having noticed that notice of dispute raised by respondent side has not been annexed to the CP, this Bench hereby

directed to furnish the documents as prescribed under section 9 of the I&B Code. In compliance of it, the petitioner filed the notice of dispute issued by the corporate debtor disclosing the corporate debtor disputing the claim made by the petitioner. On perusal of this sub-section (5) of section 9 of this Code, it is evident that notice of dispute has been received by the operational creditor.

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.”

3. The plea taken by the appellant is that mere disputing a claim of default of debt cannot be a ground to reject the application under section 9 of I&B Code, till the corporate debtor refer any dispute pending.

4. The only question arises for consideration in this appeal is what does “dispute” and “existence of dispute” means for the purpose of determination of a petition under section 9 of the I&B Code?

5. Unlike section 7 of the Code, before making an application to the Adjudicating Authority under section 9 of the Code, the requirements under section 8 of the Code are required to be complied with, which reads as under :

‘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 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.’

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

7. Under sub-section (2) of section 8 of the I&B Code, once the demand notice is served on the corporate debtor by the “operational creditor”, the corporate debtor has to bring to the notice of the operational creditor the payment of debt or dispute if any, with respect to such operational debt within 10 days of the receipt of demand notice/invoice.

8. Under section 9 of the Code, as quoted below, a right to file an application accrues after expiry of ten days from the date of delivery of the demand notice or copy of invoice as the case may be, demanding payment under sub-section (1) of section 8 of the I&B Code. The “operational creditor” would receive either the payment or a ‘notice of dispute’ in terms of sub-section (2) of section 8 of the I&B Code :

“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.”

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

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

12. On the other hand, sub-section (5)(ii) of section 9 mandates the Adjudicating Authority to reject the application if the operational creditor has received notice of dispute from the corporate debtor. Section 9, thus, makes it distinct from section 7. While in section 7, occurrence of default has to be ascertained and satisfaction recorded by the Adjudicating Authority, there no similar provision under section 9. The use of language in sub-section (2) of section 8 of the I&B Code provides that 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... the existence of a dispute...”*

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

14. It may be helpful to interpret sections 8 and 9 and the jurisdiction of the Adjudicating Authority being akin to that of a judicial authority under section 8 of the Arbitration and Conciliation Act, 1996 amended up to date, which mandates that the judicial authority must refer the parties to arbitration if the matter before it is subject to an arbitration agreement section 8 as amended in 2015 contemplates the judicial authority to form a prima facie view in relation to existence of a valid arbitration agreement, thereby conferring limited jurisdiction.

15. Though the words “prima facie” are missing in sections 8 and 9 of the

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

The role of Adjudicating Authority may become easier once the information utility starts functioning for it is a record of dispute that would then be sufficient to reject the application of the operational creditor.

16. The terms ‘claim’, ‘debt’ and ‘default’ are defined under Part I of the Code.

Section 3(6) of the Code defines “claim” to mean a right to payment and included within its ambit disputed and undisputed, legal, equitable, secured, including arising out of breach of contract. Therefore, “right to payment” is the foundation for making a claim under the Code.

Section 3(11) defines ‘debt’ to mean, the liability or obligation in respect of a claim which is due from any person. Thus, claim transforms into a debt, financial and operational, once liability or obligation to pay gets attached to the claim.

Section 3(12) defines ‘default’ to mean “non-payment of the debt” once it has become due and payable and the same is not repaid by the debtor. ‘Default’ occurs on fulfilment of twin conditions :

- (a) debt becoming due and payable, and
- (b) non-payment thereof.

17. For the purposes of Part II only of the Code, some terms/words have been defined.

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

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

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

18. Once the term 'dispute' is given its natural and ordinary meaning, upon reading of the Code as a whole, the width of 'dispute' should cover all disputes on debt, default, etc., and not be limited to only two ways of disputing a demand made by the operational creditor, i.e., either by showing a record of pending suit or by showing a record of a pending arbitration.

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

20. The hon'ble Supreme Court in P Kasilingam v. PSB College of Technology 1995 Supp (2) SCC 348 was dealing with the question what expression 'College' includes as used in the relevant rule. The hon'ble Supreme Court observed what is the intent of the of the Legislature when the expression used in the definition is 'means' and when the expression used is 'includes'. At page 356 para 19 it observed as under :

'a particular expression is often defined by the Legislature by using the word "means", or the word "includes". Sometimes the words "means and includes" are used. The use of the word "means" indicates that "definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition [see Gough v. Gough : Punjab Land Development & Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court]. The word "includes" when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include.'

21. Admittedly in sub-section (6) of section 5 of the I&B Code, the Legislature used the words "*dispute includes a suit or arbitration proceedings*". If this is harmoniously read with sub-section (2) of section 8 of the I&B Code, where words used are "*existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings,*" the result is disputes, if any, applies to all kinds of disputes, in relation to debt and default. The expression used in sub-section (2) of section 8 of the I&B Code "*existence of a dispute, if any,*" is disjunctive from the expression "*record of the pendency of the suit*

or arbitration proceedings". Otherwise, the words "dispute, if any", in sub-section (2) of section 8 would become surplus usage.

22. Sub-section (2) of section 8 of the I&B Code cannot be read to mean that a dispute must be pending between the parties prior to the notice of demand and that too in arbitration or a civil court. Once parties are already before any judicial forum/authority for adjudication of disputes, notice becomes irrelevant and such an interpretation renders the expression 'existence of a dispute, if any,' in sub-section (2) of section 8 itiose.

23. The Hon'ble Supreme Court in *Mithlesh Singh Vs. Union of India* (2003) 3 SCC 309 observed that the Legislature is deemed not to waste its words or to say anything in vain. If the intent of the Legislature was to limit the dispute to only a pending suit or arbitration proceedings, sub-section (2) of section 8(a) would have required a notice of dispute to only refer to a record of pendency of the suit or arbitration proceedings and not to "existence of a dispute, if any". In the said case, the hon'ble Supreme Court at page 316 para 8 observed as under :

"It is not a sound principle of construction to brush aside word(s) in a statute as being inapposite surplusage : if they can have appropriate application in circumstances conceivably within the contemplation of the statute. In the interpretation of statutes the courts always presume that the Legislature inserted every part of the statute for a purpose and the legislative intention is that every part of the statute should have effect. The Legislature is deemed not to waste its words or to say anything in vain."

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

25. The true meaning of sub-section (2)(a) of section 8 read with sub-section (6) of section 5 of the I&B Code clearly brings out the intent of the Code, namely the corporate debtor must raise a dispute with sufficient particulars.

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

26. It is a fundamental principle of law that multiplicity of proceedings is required to be avoided. Therefore, if disputes under sub-section (2)(a) of section 8 read with sub-section (6) of section 5 of the I&B Code are confined to a dispute in a pending suit and arbitration in relation to the three classes under sub-section (6) of section 5 of the I&B Code, it would violate the definition of operational debt under sub-section (21) of section 3 of the I&B Code and would become inconsistent thereto, and would bar operational creditor from invoking sections 8 and 9 of the Code.

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

28. Therefore, as per sub-section (2) of the I&B Code, there are two ways in which a demand of an operational creditor can be disputed :

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

29. The definition of 'dispute' for the purpose of section 9 must be read along with expression operational debt as defined in section 5(21) of I&B Code, 2016 means :

'(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;'

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

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

31. The dispute under I&B Code, 2016 must relate to specified nature in clause (a), (b) or (c), i.e., existence of amount of debt or quality of goods or service or breach of representation or warranty. However, it is capable of being discerned not only from in a suit or arbitration from any document related to it. For example, the "operational creditor" has issued notice under Code of Civil Procedure, 1908 prior to initiation of the suit against the operational creditor which is disputed by "corporate debtor". Similarly notice under section 59 of the Sales and Goods Act if issued by one of the party, a labourer/employee who may claim to be operational creditor for the purpose of section 9 of I&B Code, 2016 may have raised the dispute with the State Government concerning the subject-matter, i.e., existence of amount of debit and pending consideration before the competent Government. Similarly, a dispute may be pending in a Labour Court about existence of amount of debt. A party can move before a High Court under writ jurisdictions against Government, corporate debtor (public sector undertaking). There may be cases where one of the party has moved before the High Court under section 433 of the Companies Act, 1956 for initiation of liquidation proceedings against the corporate debtor and dispute is pending. Similarly, with regard to quality of goods, if the "corporate debtor" has raised a dispute, and brought to the notice of the "operational creditor" to take appropriate step, prior to receipt of notice under sub-section (1) of section 8 of the I&B Code, one can say that a dispute is pending about the debt. Mere raising a dispute for the sake of dispute, unrelated or related to clause (a) or (b) or (c) of sub-section (6) of section 5, if not raised prior to application and not pending before any

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

32. There may be other cases such as a suit relating to existence of amount of debt stands decided and decree is pending for execution. Similarly, existence of amount of debt or quality of goods or service for which a suit have been filed and decreed; an award has been passed by Arbitral Panel, though petition under section 34 of Arbitration and Reconciliation Act, 1996 may be pending. In such case the question will arise whether a petition under section 9 will be maintainable particularly when it was a suit or arbitration proceeding is not pending, but stand decided? Though one may argue that insolvency resolution process cannot be misused for execution of a judgment and decree passed in a suit or award passed by an arbitral tribunal, but such submission cannot be accepted in view of Form 5 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 wherein a decree in suit and award has been shown to be a debt for the purpose of default on non-payment.

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

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

35. In view of the aforesaid discussions we hold that the dispute as defined in sub-section (6) of section 5 cannot be limited to a pending proceedings or

lis, within the limited ambit of suit or arbitration proceedings, the word 'includes' ought to be read as "means and includes" including the proceedings initiated or pending before consumer court, tribunal, labour court or mediation, conciliation, etc. If any action is taken by corporate debtor under any act or law including while replying to a notice under section 80 of Code of Civil Procedure, 1908 or to a notice issued under section 433 of the Companies Act or section 59 of the Sales and Goods Act or regarding quality of goods or services provided by "operational creditor" will come within the ambit of dispute, raised and pending within the meaning of sub-section (6) of section 5 read with sub-section (2) of section 8 of I&B Code.

36. In the present case we find that the notice in Form 'D' under the I&B (Application to Adjudicating Authority) Rules, 2016, was given by appellant-operational creditor on 23rd December, 2016 under the said rules was also forwarded. One Desai & Diwanji, Advocates, Solicitors and Notaries vide letter dated 27th December, 2016 replied to the same on behalf of respondent-corporate debtor – M/s. Mobilox Innovations (P.) Ltd., relevant of which reads as follows :

- 1. At the outset, we say that you on behalf of your client have engaged yourselves into a protracted correspondence with our client on the issues raised in the notices. Our client disputes and denies each of the statements and allegations made in the said Notices as being absolutely false, frivolous, misconceived, devoid of merits and erroneous. Nothing stated in the said Notices should be deemed to have been admitted by our Client, unless specifically admitted herein, and the same be treated as specifically set out herein and denied. Each of the contentions hereinafter contained, are in the alternative and/or without prejudice to one another.*
- 2. At the further outset, it is respectfully submitted that the Notices are liable to be disregarded at the threshold and does not deserve to be entertained as the same are not maintainable in law.*
- 3. It is stated that the claim on behalf of your client as stated in the Notices are not contractually due and payable to your client, as there exist serious and bona fide dispute between your client and our client; and neither a winding up notice is maintainable nor any application before the Adjudicating Authority (as defined in the Code) for initiating a corporate insolvency resolution process under the Code.*
- 4. The Notices are not only misconceived but also mala fide in nature and has been colourable issued as a "pressure-inducing tactic" to*

realise a purported debt which is not due and payable to your client by our client. The purported debt is seriously and bona fide disputed by our client and the same is not liable to be paid for reasons more specifically mentioned herein. It is well settled that neither winding up notice nor any insolvency resolution process is a legitimate means of seeking to enforce payment of an amount that is bona fide disputed by a party. A disputed sum can neither be termed as “inability to pay” the same so as to incur the liability under section 271(2)(e) read with section 271(1)(a) of the Companies Act, 2013 nor can it be termed as a “default” as defined under section 3(12) of the Code read with other applicable provisions of the Code.

Xxx

- (e) *In and around 30th January, 2015, it had come to the knowledge of our client that your client in flagrant breach of the terms and conditions of the NDA, had divulged our client’s Confidential Information and approached certain clients of our client; further, your client had indulged in breach of trust and breach of the NDA by displaying our client’s confidential client information and client campaign information on a public platform, i.e., at http://kirusal.pairserver.com/?page_id=34 and <https://in.linkedin.com/pub/vikram-agarwal/7/3al/83b>.*

Your client should note that any client information of any party carries intrinsic confidentiality obligations (including under the NDA) and your client’s breach of the NDA violated the basic keystone of a business relationship.”

Xxx

- (g) *With respect to paragraph 8 of the 12th December, 2016 Notice, it is denied that an amount of Rs.20,08,202.55 is an admitted debt on the part of our client based on the contracts in the form of POs placed by our Client and the corresponding Invoices raised by your client for effecting the required services for the campaign under the POs. Our client deny that it had failed to discharge its admitted liability; therefore, it is evident that it is not unable to pay its debt. It is pertinent to highlight that our client has, at no point of time, confirmed or admitted its liability towards your client to pay an amount of Rs.20,08,202.55. In this regard, our client repeats and reiterates the contents of paragraph number 6 of this reply.’*

37. Apart from the quoted portion, if reply dated 27th December, 2016 is read in totality, we find that the respondent-corporate debtor has not raised any dispute within the meaning of sub-section (6) of section 5 or sub-section (2) of section 8 of I&B Code, 2016 and in that view of the matter, merely on some or other account the respondent has disputed to pay the amount, cannot be termed to be dispute to reject the application under section 9 of the I&B Code as was preferred by appellant-operational creditor.

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

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 constitute and as to what constitute 'dispute' in relation to services provided by operational creditor then would have come to a conclusion that condition of demand notice under 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.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

New Delhi

24th May, 2017

ANNEXURE X.4

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

COMPANY APPELLATE JURISDICTION

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

(arising out of Order dated 02.03.2017 passed by the National Company Law Tribunal, Principal Bench, New Delhi in CP (IB) No. 03(PB)/2017)

IN THE MATTER OF:

Philips India Limited Appellant

Vs

Goodwill Hospital & Research Centre Ltd. Respondent

Along with Company Appeal (AT) (Insolvency) No. 15 of 2017

Philips India Limited Appellant

Vs.

Karma Healthcare Private Limited Respondent

Present: For Appellant: - Mr. N.Mahabir and Mr. P.C.Arya, Advocates
For Respondent: - Mr. S.N.Jha, Sr. Counsel, Mr. Atul T.N.
and Mr. Harsh Raghuvanshi, Advocates.

JUDGEMENT

SUDHANSU JYOTI MUKHOPADHAYA, J

1. As both the appeals have been preferred against common order dated 2nd March, 2017 passed by “Adjudicating Authority” (National Company Law Tribunal), Principal Bench, New Delhi, the appellant is common and common question of law is involved, they were heard together and disposed of by this common judgment.

2. Appellant, Philips India Ltd. (‘operational creditor’) had preferred two separate applications for initiation of Corporate Insolvency Resolution Process invoking provisions of section 9 of Insolvency and Bankruptcy Code, 2016 (‘I&B Code’) against one respondent-corporate debtor “Goodwill Hospital & Research Centre Ltd.” and another corporate debtor, “Karina Healthcare (P.) Ltd.”. Both the applications under section 9 were rejected by

impugned common judgment passed by “Adjudicating Authority” with observations that the remedy of the appellant/applicant lies elsewhere and not under the provisions of ‘I&B Code’.

3. The brief fact of the case are as follows :

The appellant entered into a Comprehensive Annual Maintenance Contract with respondent “Goodwill Hospitals & Research Centre” on 2nd August, 2011 and 11th May, 2012 for the period from 1st September, 2011 to 31st August, 2012 and 1st September, 2012 to 31st August, 2013, respectively in respect of maintenance of Allum FD 20C.

4. Another Comprehensive Annual Maintenance Contract was reached between appellant and the respondent ‘Karina Healthcare (P.) Ltd.’ on 14th March, 2010 for maintenance of installed machine Brilliance 64 without MRC tube coverage but with UPS, battery, injector for the period from 15th March, 2010 to 14th March, 2013.

5. In both the cases the grievance of the appellant is that the respondent-corporate debtor defaulted to make payment of debts giving rise to filing of the petitions under section 9 of ‘I&B Code’.

6. A perusal of the impugned order would show that the “Adjudicating Authority” noticed the work order placed by the “corporate debtor” primarily related to maintenance of equipments. A bare perusal of invoices would show that it has included the charges of material and labour apart from CST, service tax, operational cess, small and secondary and higher education cess. The learned Adjudicating Authority also noticed that there was no document placed on record certified by the “corporate debtor” or its authorised representative or a medical technician that the work has been done satisfactorily in accordance with the standard of norms/quality stipulated in the agreement. The Adjudicating Authority noticed the aforesaid factors and in view of the objections raised by both the “corporate debtors”, pursuant to a notice issued by appellant – “financial creditor” under sections 433 and 434 of the Companies Act, 1956, rejected the applications with following observations :

‘The reliance of the applicant on the provisions of section 9 of IBC is not meritorious. The applicant has claimed and has classified itself as “operational creditor” and has prayed for triggering of the Insolvency Process. A bare perusal of section 9 of IBC would, inter alia, reveal that this Tribunal is vested with the powers to reject the application of the operational creditor under section 9(5)(d) of IBC in case it is found that notice of dispute has been received by such an operational creditor, or

there is a record of dispute with the information utility. We have been informed that no "Information Utility" has so far been set up and we are per force to rely on the notice of dispute as sent by the respondent-operational debtor to the applicant in the notice of dispute, the liability to pay has been completely denied.'

7. The "corporate debtors" have taken plea that there was an existence of dispute which they brought to the notice of the "operational creditor" in reply to notice under section 8 of the 'I&B Code' read with section 9 of 'I&B Code'.

8. At this stage it is desirable to state that the appellant-operational creditor issues a notice under section 433(e) read with section 434(1)(a) of the Companies Act on 9th March, 2016 to the respondent-"Goodwill Hospital & Research Centre Ltd.". Referring to earlier notice it was pointed out that "operational creditor" will be left with no alternative but to call upon the said "corporate debtor" to forthwith and without any further delay make the outstanding payment or otherwise the "operational creditor" have been constrained to initiate appropriate proceedings, both under civil and criminal law, including winding up. Similar notice under section 433(e) read with section 434(1)(a) dated 9th March, 2016 was issued on respondent-Karina Healthcare (P.) Ltd.

9. Learned Adjudicating Authority to appreciate the nature of the dispute while noticed the aforesaid facts, also noticed the reply dated 30th March, 2016 filed by both "corporate debtors" with similar plea, as apparent from impugned order and quoted below :

"To appreciate the nature of dispute, it would be profitable to read the following part of the reply dated 30th March, 2016 :

At the outset the allegations levelled under your notice dated 9th March, 2016 are being denied in its entirety for being false and concocted. It appears from the tone and tenor of your notice that your client had not apprised you with the correct facts and circumstances of the matter at hand, leading to the issuance of the misconceived and ill-founded notice dated 9th March, 2016. It is brought to your kind notice that dues as claimed by your notice were never outstanding against my clients and the demand notice for the same is hopelessly barred by laws of limitation and, hence, untenable under law.

It is brought to your notice that our clients entered into a Comprehensive Annual Maintenance Contract with your client for the maintenance of installed Allura Xper FD 20C at its hospital to keep the same in a good and proper working condition. It was agreed under the clause 2 of the

contract that the service will be provided by your clients for the upkeep of the above mentioned medical equipment at the site of my client but your client in the most unprofessional manner failed to keep up with the contractual obligation taken by it vide contract dated 11th May, 2012. It is further important to mention herein that the officials of your client had failed to visit the premises of my client in a periodic manner for the upkeep of the medical equipment due to which the functioning of the equipment was majorly effected.

It is further important to mention herein that the Allura Xper FD 20C installed at the hospital of my client was left unattended at the hospital of my client for several days due to minor problems which were to be repaired by your client but were never repaired in time causing severe financial loss due to non-activity of the machine of my client. The unprofessional approach by the officials of your client has caused major loss of reputation for my client and caused severe inconvenience to the patient awaiting their treatment at the Hospital of my client due to which the payment was deducted by my client and the same was informed to the officials of your client.”

10. The Adjudicating Authority then proceeded to discuss the provisions of law including the expression ‘dispute’ as defined and inclusive definition as could be seen from sub-section (6) of section 5 of the I&B Code and observed :

“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.*

A bare perusal of the above provision of the IBC shows that a dispute could be proved by showing that a suit has been filed or arbitration proceedings are pending. It further elaborates that the suit or arbitration should be in respect of the existence of the amount of debt, quality of goods or services, or for a breach of a representation or a warranty. Obviously, it is not an exhaustive definition but an illustrative one. It becomes evident from the expression “includes” which immediately succeeds the word ‘dispute’. Moreover, under section 8(1) of the Code adequate room has been provided for the “NCLT” to ascertain the existence of a dispute. A demand notice by “operational creditor” to an “operational debtor” must be sent who has not paid operational dues and has committed default. Sub-section (2) of section 8 further clarifies that the corporate

debtor is obliged to bring to the notice of the “operational creditor, within 10 days of the receipt of notice, the existence of a dispute and show the record of the pendency of the suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute. The other option is to pay the demanded amount. In the instant case, the applicant sent a demand notice which was duly received by the respondent. A reply has also been duly filed where serious dispute has been raised.’

11. On perusal of the documents submitted before the Adjudicating Authority and in view of the discussions, part of which were noticed above, the Adjudicating Authority held that it was unable to fathom any material on record to dislodge the stand of the respondents that there is existence of dispute between the parties.

12. Learned counsel for the appellant – operational creditor referred to sub-section (6) of section 5 and sub-section (2) of section 8 of I&B Code made the following submissions :

Section 5(6)

- 12.1 Dispute under section 5(6) is limited to a ‘proceeding’ or ‘lis’. The word proceeding has been qualified to be a suit or arbitration proceeding.
- 12.2 The word ‘dispute’ has to be read in conjunction with suit or arbitration. The word ‘include’ is a limitation to ‘dispute’. The word ‘include’ connotes ‘comprise’ or ‘consist’. The word ‘includes’ ought to be read as ‘means and includes’.
- 12.3 The word ‘include’ is used because the proceedings could be of various other nomenclature and cannot be listed by an exhaustive definition. Proceedings could include a writ petition, consumer court, rent tribunal, labour court, mediation, conciliation, etc.
- 12.4 ‘Dispute’, connotes a claim made and denied by the other party. A suit or arbitration would ordinarily be covered by ‘dispute’. Therefore, construing ‘dispute’ to situations other than a proceedings/lis would render the words ‘suit’ or ‘arbitration’ in section 5(6) otiose.

Section 8(2);

- 12.5 Use of the word ‘and’ envisages a lis/proceeding regarding the dispute.
- 12.6 It would not be an appropriate construction that there are two parts in section 8(2) with the first part bring “existence of a dispute” and the second part being “record of the pendency of suit or arbitration...” by

reading the conjunctive 'and' as disjunctive 'or'. Such a reading would render the second part otiose for the following reasons :

- (i) There is no limitation of time for the first part, i.e., to notify "existence of a dispute". Whereas a limitation is prescribed for the second part, i.e., to notify "record of suit or arbitration", by the words "filed before the receipt of notice".
- (ii) The second part "suit or arbitration" is ordinarily covered by the first part 'dispute' rendering the second part surplus age.
- (iii) It creates this discrimination without any reasonable basis.

13. Reliance was also placed on meaning of 'dispute' as per Oxford English Dictionary means a disagreement or argument.

14. Learned counsel for the appellant made much stress on the word 'includes' and placed reliance on decision of hon'ble Supreme Court in N D P Namboodripad v. Union of India [2007] 4 SCC 502; Godfray Phillips Ltd. v. State of UP [2005] 2 SCC 515; South Gujarat Roofing Tiles Manufacturers Association v. State of Gujarat [1976] 4 SCC 601 wherein the hon'ble Supreme Court held that there could not be inflexible rule that the word 'include' should be read always as a word of extension without reference to the context.

15. It was further contended that general word 'dispute' has to be restricted to a lis/proceedings by applying the principles of noscuntur a sociis and ejusdem generis. When a general word is qualified by specific words of narrower construction, the legislative intent is clear that the general word should be read and limited to characteristics of the specific words. Therefore, according to learned counsel for the appellant the specific words "suit or arbitration" is ordinarily understood and covered by the general word 'dispute'.

16. Per contra, according to learned senior counsel for the respondents the definition provided under sub-section (6) of section 5 of the I&B Code is illustrative in nature and it enumerates three types of disputes that the operational creditor can have with the corporate debtor but it does not rest here. It was submitted that there could be various other types of disputes which have not been mentioned in the present definition so as such the list in the body of the definition is not exhaustive and the term '**includes**' used by the Legislature cannot be read down to include only these three types of dispute and has to be assigned a wider meaning by this hon'ble Tribunal. The conjoint meaning of the definition with the section 8(2)(a) of the I&B Code enlarges the scope of the definition as provided in the section 5(6) of the I&B Code and gives illustration of a pending suit or arbitration. It was submitted that after the rendering of defective services by operational

creditor, to avoid the rigors of section 9 of the Code, the corporate debtor would, if the term dispute has to give a narrow meaning of a suit or arbitration proceeding be constraint to approach the court seeking a negative declaration of non-payment which is prohibited under the Specific Relief Act. Hence, as per the submission of the respondent herein, a dispute would mean communication of a denial or repudiation of the claim of the operational creditor at first instance either when the invoice has been raised and duly communicated to the corporate debtor, a recovery notice has been received by a corporate debtor or a statutory notice under section 8(2)(a) has been received by a corporate debtor. Further as per submission of the respondent, no negative burden of filing a suit or arbitration could be casted upon operational creditor in view of the above submission. The word 'includes' is a very wide term and creates extensive meaning to the word and covers within its ambit all other aspects as well apart from the ones mentioned in the section 5(6) of the I&B Code 2016.

17. The question as to what does 'dispute' and "existence of dispute" means for the purpose of determination of an application under section 9 of the I&B Code fell for consideration before this Appellate Tribunal in *Kirusa Software (P.) Ltd. v. Mobilox Innovations (P.) Ltd. Company Appeal (AT) (Insol.) 06/2017*". By judgment dated 24th May 2017, the Appellate Tribunal observed and held as follows :

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

26. It is a fundamental principle of law that multiplicity of proceedings is required to be avoided. Therefore, if disputes under sub-section (2)(a) of section 8 read with sub-section (6) of section 5 of the I&B Code are confined to a dispute in a pending suit and arbitration in relation to the

three classes under sub-section (6) of section 5 of the I&B Code, it would violate the definition of operational debt under sub-section (21) of section 3 of the "I&B Code" and would become inconsistent thereto, and would bar operational creditor from invoking sections 8 and 9 of the Code.

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

28. Therefore, as per sub-section (2) of the "I&B Code", there are two ways in which a demand of an operational creditor can be disputed :

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

29. The definition of "dispute" for the purpose of section 9 must be read along with expression operational debt as defined in section 5(21) of I&B Code means :

(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."

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

30. Therefore, it is clear that for the purpose of sub-section (2) of section

8 and section 9 a “dispute” must be capable of being discerned from notice of corporate debtor and the meaning of “existence” a “dispute, if any”, must be understood in the context.

31. The dispute under I&B Code, 2016 must relate to specified nature in clause (a), (b) or (c), i.e., existence of amount of debt or quality of goods or service or breach of representation or warranty. However, it is capable of being discerned not only from in a suit or arbitration from any document related to it. For example, the “operational creditor” has issued notice under Code of Civil Procedure Code, 1908 prior to initiation of the suit against the operational creditor which is disputed by corporate debtor. Similarly notice under section 59 of the Sales and Goods Act if issued by one of the party, a labourer/employee who may claim to be operation creditor for the purpose of section 9 of I&B Code may have raised the dispute with the State Government concerning the subject matter, i.e., existence of amount of debt and pending consideration before the competent Government. Similarly, a dispute may be pending in a Labour Court about existence of amount of debt. A party can move before a High Court under writ jurisdictions against Government, corporate debtor (public sector undertaking). There may be cases where one of the parties has moved before the High Court under section 433 of the Companies Act, 1956 for initiation of liquidation proceedings against the corporate debtor and dispute is pending. Similarly, with regard to quality of foods, if the “corporate debtor” has raised a dispute, and brought to the notice of the “operational creditor” to take appropriate step, prior to receipt of notice under sub-section (1) of section 8 of the I&B Code, one can say that a dispute is pending about the debt. Mere raising a dispute for the sake of dispute, unrelated or related to clause (a) or (b) or (c) of sub-section (6) of section 5, if not raised prior to application and not pending before any competent court of law or authority cannot be relied upon to hold that there is a “dispute” raised by the corporate debtor. The scope of existence of “dispute”, if any, which includes pending suits and arbitration proceedings cannot be limited and confined to suit and arbitration proceedings only. It includes any other dispute raised prior to section 8 in this in relation to clause (a) or (b) or (c) of sub-section (6) of section 5. It must be raised in a court of law or authority and proposed to be moved before the court of law or authority and not any got up or mala fide dispute just to stall the insolvency resolution process.’

18. In the present case the respondent-corporate debtor much prior to issuance of notice under section 8 of I&B Code, raised a dispute relating to quality of service/maintenance pursuant to notice under section 433(e) and

434(1)(a) of the Companies Act, 2013 to the notice of the “operational creditor”. In that view of the matter, it can be safely being stated that there is “existence of dispute” about the claim of debt.

19. Objection raised by respondent-corporate debtor, not raised for the first time while replying to the notice issued by “operational creditor” under section 8 of the I&B Code. The objection cannot be called to be mere objection raising a dispute for the sake of ‘dispute’ and/or unrelated to clause (a) or (b) or (c) of sub-section (6) of section 5 of I&B Code. For the said reason if the Adjudicating Authority has refused to entertain the application under section 9 of I&B Code, no ground is made out to interfere with such orders.

20. We find no merit in both the appeals. They are accordingly dismissed. However, there shall be no order as to cost.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

31st May, 2017

ANNEXURE X.5**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION****Company Appeal (AT) (Insolvency) No. 29 of 2017**

(arising out of Order dated 6th March 2017 passed by NCLT, Mumbai Bench in C.P.No. 20/I & BP/NCLT/MAH/2017)

M/s MCL Global Steel Pvt. Ltd. & Anr. Appellants

Vs.

M/s Essar Projects India Ltd. & Anr. Respondents

Present: For Appellants: Mr. Alok Dhir, Ms. Versha Banerjee, Mr. Milan Singh Negi with Mr. Kunal G. Advocates for the appellants

For Respondents: Mr. Ankoosh Mehta with Mr. V. Tandon and Mr. Karan Khanna, Advocates

JUDGEMENT**SUDHANSU JYOTI MUKHOPADHAYA, J**

1. This appeal has been preferred by appellant-MCL Global Steel (P.) Ltd. and Another (hereinafter referred to as 'corporate debtor') against order dated 6th March, 2017 passed by "Adjudicating Authority" (National Company Law Tribunal), Mumbai Bench in CP No. 20/I&BP/NCLT/MAH/2017, whereby the application preferred by respondents-M/s. Essar Projects India Ltd. and Another (hereinafter referred to as 'operational creditor') under sections 8 and 9 of the Insolvency and Bankruptcy Code, 2016 ('I&B Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('hereinafter referred to as 'Adjudicating Authority') for initiation of corporate insolvency resolution process has been admitted. The Adjudicating Authority while declaring moratorium also passed certain directions, ordered to issue public announcement of the corporate insolvency resolution process and appointed an Interim Resolution Professional to carry the function of the company in terms of I&B Code.

2. Learned counsel for the appellant while assailing the impugned order taken following plea and grounds :

- (i) The impugned ex parte order was passed by Adjudicating Authority

without prior notice or intimation of hearing to the appellant-corporate debtors against the principles of rules of natural justice.

- (ii) Learned Adjudicating Authority has failed to notice that existence of dispute between the parties which operational creditor did not brought to the notice of the Adjudicating Authority while getting an ex parte order. If notice would have been served on corporate debtor this fact would have been highlighted.
- (iii) The respondent-operational creditors concealed the material fact that it issued a winding up notice under section 433 of Companies Act, 1956 which was duly replied by appellant-corporate debtor vide reply dated 21st November, 2016 disputing the entire claim. Even before issuance of notice under section 8 of I&B Code, the appellant-corporate debtor by its email dated 5th March, 2014, 20th August, 2013, 27th October, 2014, 29th October, 2014, 15th November, 2014, 16th November, 2014 and 30th November, 2014 had specifically raised its concern with regard to quality of construction work and non-completion of the work within time frame. The aforesaid correspondences clearly demonstrate the existence of dispute between the parties.

3. Learned counsel appearing on behalf of the appellant submitted that the word 'includes' as mentioned in sub-section (6) of section 5 of I&B Code though is not exhaustive but an illustrative one. The word "includes" connote other dispute, if any, raised apart from the dispute mentioned in section 8 of the I&B Code.

4. It was further contended that under sub-section 5(2)(d) of section 9, the Adjudicating Authority is independent to reject an application if notice of dispute has been replied by the corporate debtor and the same is not brought to the notice of the Adjudicating Authority. The Adjudicating Authority on wrong assumption of non-pendency of suit for arbitration proceedings accepted the plea taken by the operational creditor.

It was also contended that the dispute raised by appellant is bona fide and fall within the meaning of 'dispute' under sub-section (6) of section 5 of I&B Code.

5. Learned counsel appearing on behalf of the respondent-operational creditor while contended that the appeal is not maintainable at the instance of 1st appellant and that the 2nd appellant has no legal authority whatsoever to initiate a proceeding on behalf of the corporate debtor after appointment of interim resolution professional, further contended that the appellants themselves have concealed material facts by making false and baseless submissions. It was submitted that the e-mails as referred to above, were

addressed in the year 2014, however, based on the instructions of the directors, one Mr. Arvind Pujari an officer working in the accounts department of corporate debtor by e-mail dated 21st November, 2015 intimated the “operational creditor” that he will be paid its dues for its services. Moreover, no such payment was made. The corporate debtor had agreed to make part payment by 1st December, 2015 which again it failed to pay and all the time the corporate debtor neglected to repay the unpaid amount to the “operational creditor”.

6. Learned counsel for the respondent while submitted that demand notice under sub-section (1) of section 8 was sent in Form 3/Form 4 of the Rules on 28th December, 2016, as per the rule, the corporate debtor failed to provide a record of the pendency of legal proceedings with regard to alleged dispute. On the other hand, upon receipt of demand notice, the corporate debtor addressed a letter dated 3rd January, 2017 and, inter alia, admitted that the corporate debtor is presently under distress and seeking its rehabilitation and restructuring of loans given by the banks and financial institutions.

7. It was contended that as per the scheme of the Code particularly sub-section (2) of section 8, there should be an “existence of a dispute, if any,” and a record of pendency of the suit or arbitration proceedings filed before receipt of such notice or invoice in relation to such dispute the corporate debtor has to meet the dual threshold of :

- (a) identifying the existence of a dispute; and
- (b) providing a record of the pendency of a suit or arbitration proceedings in relation to such dispute.

It was further submitted that the aforesaid scheme of the Code and Rules are reinforced twice, i.e., at the time of sending the demand notice and at the time of receipt of the reply from a corporate debtor. The notice of dispute has to disclose pendency of the proceedings which the appellant-corporate debtor failed to bring on record. Learned counsel referred to the “notice of dispute” as mentioned in section 9 and submitted that the same necessarily be read as a notice under sub-section (1) of section 8.

8. It was contended that as per rule 24 of the National Company Law Tribunal Rules, a copy of the application was provided to the corporate debtor and a copy of the same was served by letters dated 16th February, 2017 and 28th February, 2017, respectively. The Code does not envisage any other notice to be provided to the corporate debtor except for service of the application at the time of filing. Therefore, it was contended that under the I&B Code the corporate debtor has no right of hearing at the stage of admission of an

application filed under the Code. The detailed arguments were advanced on the question but as such issues have already been decided by this Appellate Tribunal, we are not reproducing the detailed arguments.

9. It was further contended that there is no adverse civil consequences for the corporate debtor at the stage of admission which may attract the principles of natural justice.

10. From the impugned order passed by the Adjudicating Authority it is clear that the corporate debtor was not heard before the admission of the application. The respondent-operational creditor has also not disputed the aforesaid facts.

11. The Adjudicating Authority in impugned order, noticed the submission made on behalf of the respondent-operational creditor and observed as follows :

'6. The petitioner counsel submits, to say that dispute is in existence, mere mentioning in the notice that dispute is in existence in relation to impugned debt is not sufficient, the corporate debtor has to prove that the company already raised such dispute either in court proceeding or arbitration before receipt of notice under section 8 of the Code, here no such proceeding being pending before any court of law or in arbitration proceeding before receipt of the notice supra, the debtor company merely mentioning dispute in the reply to the notice under section 8 will not amount to dispute in existence, hence, the counsel for the petitioner prays this Bench to admit the petition by construing no dispute is in existence against the debtor as on the date of receipt of notice under section 8 of the Code.

7. Since the corporate debtor, as stated by the petitioner, admitted issuing invoices in relation to the amount mentioned, the grievance remained in the reply would be regarding quality of construction, the timeline of construction, loss due to delay in construction, etc. Since the same is not disputed before any court of law before receipt of notice issued under section. 8 of the Code, the dispute raised in the corporate debtor reply to the notice under section 8 of the Code cannot be treated as dispute in existence at the time of receipt of the notice under section 8 for two reasons, one – due to admission of raising invoices and two – due to raising it as dispute in the reply only after notice under section 8 has been issued.

8. On perusal of definition of dispute under section 5(6) and on perusal of section 8(2)(a), it is evident that “dispute in existence” means and includes

raising dispute in court of law or arbitral tribunal before receipt of notice under section 8 of the Code.'

12. The question as to whether a prior notice before admission of an application for corporate insolvency resolution process is required or not was considered by this Appellate Tribunal in “Innoventive Industries Ltd., Company Appeal (AT) (Insolvency) Nos. 1 and 2 of 2017” decided on 15th May, 2017.

13. In the said case the Appellate Tribunal after detailed deliberations with regard to the provisions of the Act particularly amended section 424 of the Companies Act, as amended vide XIth Schedule of article 32 of section 255 of the I&B Code and held as follows :

“49. As amended section 424 of the Companies Act, 2013 is applicable to the proceeding under the I&B Code, 2016, it is mandatory for the adjudicating authority to follow the principles of rules of natural justice while passing an order under I&B Code, 2016. Further, as section 424 mandates the Tribunal and Appellate Tribunal, to dispose of cases or appeal before it subject to other provisions of the Companies Act, 2013 or I&B Code, 2016 such as, section 420 of the Companies Act, 2013 was applicable and to be followed by the Adjudicating Authority.

50. One Sree Metaliks Ltd. and Anr. moved before the hon'ble Calcutta High Court in WP No.7144(W) of 2017 assailing the vires of section 7 of the Code, 2016 and the relevant rules under the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 ('I&B Rules, 2016'). The challenge was premise upon the contention that the Code, 2016 does not afford any opportunity of hearing to a corporate debtor in a petition under section 7 of I&B Code, 2016. The Hon'ble High Court noticed relevant provision of section 7 of the I&B Code, 2016, the definition of Adjudicating Authority as defined under section 5(1), section 61 of the I&B Code, 2016 relating to appeal and amended section 424 of the Companies Act, 2013 and by judgment dated 7th April, 2017 held as follows :

“..... However, it is to apply the principles of natural justice in the proceedings before it. It can regulate its own procedure, however, subject to the other provisions of the Act of 2013 or the Insolvency and Bankruptcy Code of 2016 and any Rules made thereunder. The Code of 2016 read with the Rules 2016 is silent on the procedure to be adopted at the hearing of an application under section 7 presented before the NCLT, that is to say, it is silent whether a party respondent has a right of hearing before the adjudicating authority or not.

Section 424 of the Companies Act, 2013 requires the NCLT and NCLAT to

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

The requirement of NCLT and NCLAT to adhere to the principles of natural justice and the fact that, the principles of natural justice are not ousted by the Code of 2016 can be found from section 7(4) of the Code of 2016 and rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Rule 4 deals with an application made by a financial creditor under section 7 of the Code of 2016. Sub-rule (3) of rule 4 requires such financial creditor to despatch a copy of the application filed with the adjudicating authority, by registered post or speed post to the registered office of the corporate debtor.

Rule 10 of the Rules of 2016 states that, till such time the rules of procedure for conduct of proceedings under the Code of 2016 are notified, an

application made under sub-section (1) of section 7 of the Code of 2017 is required to be filed before the adjudicating authority in accordance with rules 20, 21, 22, 23, 24 and 26 or Part-III of the National Company Law Tribunal Rules, 2016.

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

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

In the facts of the present case, the learned senior advocate for the petitioner submits that, orders have been passed by the NCLT without adherence to the principles of natural justice. The respondent was not heard by the NCLT before passing the order.

It would be open to the parties to agitate their respective grievances with regard to any order of NCLT or NCLAT as the case may be in accordance with law. It is also open to the parties to point out that the NCLT and the NCLAT are bound to follow the principles of natural justice while disposing of proceedings before them.

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

14. The Appellate Tribunal in the said case of M/s. Innoventive Industries Ltd. also noticed sub-rule (3) of rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016 and observed :

‘51. As per sub-rule (3) of rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the financial creditor is required to despatch forthwith a copy of the application filed with the Adjudicating Authority to the corporate debtor as quoted below :

“4. (3) The applicant 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.”

Thus, it is clear that sub-rule (3) of rule 4 of I&B (Application to Adjudicating Authority) Rules, 2016, mandates the applicant to despatch forthwith, a copy of the application “filed with the Adjudicating Authority”. Thereby a post-filing notice required to be issued and not as notice before filing of application. The purpose for the same being to put corporate debtor to adequate impound notice so that the corporate debtor may bring to the notice of Adjudicating Officer “mitigating factor/ records before the application is accepted even before formal notice is received”.

52. The insolvency resolution process under section 7 or section 9 of I&B Code, 2016 have serious civil consequences not only on the corporate debtor – company but also on its directors and shareholders in view of the fact that once the application under section 7 or 9 of the I&B Code, 2016 is admitted it is followed by appointment of an “interim resolution professional” to manage the affairs of the corporate debtor, instant removal of the Board of directors and moratorium for a period of 180 days. For the said reason also the Adjudicating Authority is bound to issue limited notice to the corporate debtor before admitting a case under sections 7 and 9 of the I&B Code, 2016.

53. In view of the discussion above, we are of the view and hold that the Adjudicating Authority is bound to issue a limited notice to the corporate debtor before admitting a case for ascertainment of existence of default based on material submitted by the financial creditor and to find out whether the application is complete and or there is any other defect required to be removed. Adherence to principles of natural justice would not mean that in every situation the adjudicating authority is required to afford reasonable opportunity of hearing to the corporate debtor before passing its order.’

15. In the aforesaid case of M/s. Innoventive Industries Ltd., the Appellate Tribunal also noticed the purpose of issuance of notice and held :

‘55. Process of initiation of insolvency resolution process by a financial creditor is provided in section 7 of the I&B Code. As per sub-section (1) of section 7 of the I&B Code, the trigger for filing of an application by a financial creditor before the Adjudicating Authority is when a default in respect of any financial debt has occurred. Sub-section (2) of section 7 provides that the financial creditor shall make an application in prescribed form and manner and with prescribed documents, including :

- (i) “record of the default” recorded with the information utility or such other record or evidence of default as may be specified;*

(ii) *the name of the resolution professional proposed to act as an interim resolution professional; and*

(iii) *any other information as may be specified by the Board.'*

16. In view of the decision of Appellate Tribunal in M/s. Innoventive Industries Ltd., while we accept the submissions made on behalf of the appellant that the principle of rules of natural justice was violated, also reject the contention made by learned counsel for the respondents that no such notice is required or that there is no civil consequences, if any such application for initiation of corporate insolvency resolution process is initiated.

17. The next question arises for consideration is what does “dispute” and “existence of dispute” means for the purpose of initiation of insolvency resolution process pursuant to application under section 9 of the I&B Code. The aforesaid issue was considered by this Appellate Tribunal in “Kirusa Software (P.) Ltd. v. Mobilox Innovations (P.) Ltd. Company Appeal (AT) (Insolvency) No. 06 of 2017”. Having noticed different provisions of the I&B Code including meaning of “dispute” as defined under sub-section (6) of section 5, the expression “existence of dispute, if any”, used in sub-section (2) of section 8 of I&B Code. This Appellate Tribunal observed and held as follows :

‘17. For the purposes of Part II only of the Code, some terms/words have been defined.

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

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

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

18. Once the term “dispute” is given its natural and ordinary meaning, upon reading of the Code as a whole, the width of “dispute” should cover all disputes on debt, default, etc., and not be limited to only two ways of disputing a demand made by the operational creditor, i.e., either by showing a record of pending suit or by showing a record of a pending arbitration.

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

21. Admittedly in sub-section (6) of section 5 of the I&B Code, the Legislature used the words “dispute includes a suit or arbitration proceedings”. If this is harmoniously read with sub-section (2) of section 8 of the I&B Code, where words used are “existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings,” the result is disputes, if any, applies to all kinds of disputes, in relation to debt and default. The expression used in sub-section (2) of section 8 of the I&B Code “existence of a dispute, if any,” is disjunctive from the expression “record of the pendency of the suit or arbitration proceedings”. Otherwise, the words “dispute, if any”, in sub-section (2) of section 8 would become surplus usage.

22. Sub-section (2) of section 8 of the I&B Code cannot be read to mean that a dispute must be pending between the parties prior to the notice of demand and that too in arbitration or a civil court. Once parties are already before any judicial forum/authority for adjudication of disputes, notice becomes irrelevant and such an interpretation renders the expression “existence of a dispute, if any,” in sub-section (2) of section 8 itiose.

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

26. It is a fundamental principle of law that multiplicity of proceedings is required to be avoided. Therefore, if disputes under sub-section (2)(a) of

section 8 read with sub-section (6) of section 5 of the I&B Code are confined to a dispute in a pending suit and arbitration in relation to the three classes under sub-section (6) of section 5 of the I&B Code, it would violate the definition of operational debt under sub-section (21) of section 3 of the I&B Code and would become inconsistent thereto, and would bar operational creditor from invoking sections 8 and 9 of the Code.

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

18. The Appellate Tribunal also noticed various natures of "existence of dispute in Kirusa Software Private Limited Vs. Mobilox Innovations Private Limited and held :

'31. The dispute under I&B Code, 2016 must relate to specified nature in clauses (a), (b) or (c), i.e., existence of amount of debt or quality of goods or service or breach of representation or warranty. However, it is capable of being discerned not only from in a suit or arbitration from any document related to it. For example, the "operational creditor" has issued notice under Code of Civil Procedure, 1908 prior to initiation of the suit against the operational creditor which is disputed by "corporate debtor". Similarly notice under section 59 of the Sales and Goods Act if issued by one of the party, a labourer/employee who may claim to be operational creditor for the purpose of section 9 of I&B Code, 2016 may have raised the dispute with the State Government concerning the subject-matter, i.e., existence of amount of debt and pending consideration before the competent Government. Similarly, a dispute may be pending in a Labour Court about existence of amount of debt. A party can move before a High Court under writ jurisdictions against Government, corporate debtor (public sector undertaking). There may be cases where one of the party has moved before the High Court under section 433 of the Companies Act, 1956 for initiation of liquidation proceedings against the corporate debtor and dispute is pending. Similarly, with regard to quality of goods, if the "corporate debtor" has raised a dispute, and brought to the notice of the "operational creditor" to take appropriate step, prior to receipt of notice under sub-section (1) of section 8 of the I&B Code one can say that a dispute is pending about the debt. Mere raising a dispute for the sake of dispute, unrelated or related to clause (a) or (b) or (c) of sub-section (6) of section 5, if not raised prior to application and not pending before any

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

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

19. What appears from the present case is that much before enactment of the Insolvency and Bankruptcy Code, 2016, in or around 2013, the appellant-corporate debtor entered with respondent Essar Projects India Ltd. and another memorandum of understanding for construction of work at 0.2MTPA Steel Melt Shop Complex at Pithampur, Dist. Dhar, Madhya Pradesh. For one or other reason the outstanding dues in connection with construction work were alleged to have not been paid by appellant to the respondent-operational creditor. The respondent by a notice dated 26th October, 2016 while referred to a memorandum of understanding dated 27th June, 2013 mentioned :

‘7. We state that the work orders issue by MCL in connection with the Project were duly completed by our client as per the work set out in each of such Work Orders. It is extremely pertinent to note that our client has successfully completed the project within the contractual period, i.e., on 30th November, 2014 as per the terms of the Work Orders and has handed over possession of the plant to MCL by 31st December, 2014. As MCL is aware, after the completion of certain additional work, i.e., by January 2015, the plant has been in operation. We further state that our client has also removed its machinery and other objects from the project premises in furtherance of the completion of the project as per the work orders.

8. *The aforesaid clearly evinces that our client has performed its entire obligation in accordance with the terms and conditions agreed upon with MCL and completed the project within the defined time period.*

9. *As per the terms of the MoU and the work order, our client regularly raised the requisite invoices with respect to work carried out and the invoices were received and accepted by MCL (the "invoices"). We state that a substantial portion of the invoices currently remain outstanding (the "unpaid invoices"). We further state that an amount aggregating to INR 6,83,06,077 along with interest at the rate of 18 (eighteen) percent per annum is due and payable to our client under such unpaid invoice (collectively referred to as, the "Debt").'*

20. In the light of the above, the appellants were called upon by respondent-operational creditor to repay the dues of Rs. 6,83,06,077 along with interest at the rate 18 per cent. It was mentioned that the said notice issue under section 433(e) read with section 434 of the Companies Act 1956.

21. Referring to the aforesaid notice dated 26th October, 2016 (received on 29th October, 2016) by letter dated 21st December, 2016 the corporate debtor opposed the contentions and disputed the claim, relevant to which are quoted below :

"1. At the outset contents of notice under reply are incorrect, misleading, therefore denied. Contents of notice are not to be deemed to have been admitted unless admitted specifically.

2. Provisions contained in section 434 of Companies Act, 1956 are not available to your client to institute a proceeding for winding up of company for the following reasons :

- (i) My client seriously dispute the amount sought to be recovered by your client under the terms of MoU dated 27th June, 2013.*
- (ii) There are very serious disputes between your client and my client about the outstanding amount sought to be recovered by your client.*
- (iii) There are serious disputes between your client and my client regarding quality of construction and timeline within which construction was to be completed.*
- (iv) My client has made huge payments in-between 30th October, 2012 to 3rd November, 2014. Accounts of your client have not been reconciled with my client.*

- (v) *Due to delayed construction, my client has suffered losses. No completion certificate is issued. Outstanding bills are not verified and certified.*
 - (vi) *There are very serious disputes about enforceability of the contract between my client and your client.*
 - (vii) *Amount sought to be recovered is not admitted by my client as alleged by you.*
3. *In addition to above issues there are various other issues which are involved in the matter which are seriously opposed by my client. My client opposes the endeavour/effort on the part of your client to recover money from my client.*
4. *It is submitted that the issue-area of dispute between your client and my client is of recovery of contract amount and those issues and area of disputes are yet to be finally settled.*
5. *It is submitted that by issuing the notice under reply your client is misusing the provisions contained in Companies Act, 1956. Winding up notice in the aforementioned back ground of the facts and circumstances is nothing but arms twisting which is not permissible in law.*
8. *Without prejudice to above, please note that recovery of contract amount sought by your client is under dispute and said dispute cannot be resolved by the company court. The dispute between your client and my client can be resolved by alternative dispute resolution mechanism.*
10. *Please note that dispute raised by your client is in persona and is covered by arbitration clause. Dispute raised by your client is not in rem, therefore, not required to be adjudicated by courts and public tribunals."*

22. From the aforesaid notice dated 26th October, 2016 issued by respondent-operational creditor under sections 433(e) and 434 of the Companies Act, 1956 and the reply thereto given by appellant-corporate debtor by this letter dated 21st November, 2016 it is clear that there is an "existence of a dispute" between the parties regarding :

- (i) Quality of construction
- (ii) Tying timeline within its construction was to be completed, but not completed

- (iii) a huge amount has been paid by corporate debtor to the operational creditor in between 30th December, 2012 to 3rd November, 2014.

23. This fact was also highlighted by the appellant-corporate debtor while it filed a reply to the notice issued by the operational creditor under sub-section (2) of section 8 of the I&B Code.

24. The e-mail issued by appellant-corporate debtor as referred to above and not disputed by the respondent-operational creditor also relates to the quality of work and non-completion of work within time.

25. In *Kirusa Software (P.) Ltd.*, this Appellate Tribunal held that for the purpose of sub-section (2) of section 8 and section 9 “dispute” can be of being discerned from notice of corporate debtor and meaning of “existence of a dispute”, if any, must be understood in the context of the dispute of I&B Code must relate to satisfy nature of clause (a), (b) or (c) of sub-section (6) of section 5, i.e., existence of amount of debt or quality of goods or services or breach of representation or warranty. It can be of being discerned not only from a suit or arbitration from documents related to it but from other factors like notice issued under section 8 of Code of Civil Procedure, 1908 prior to initiation of suit against “operational creditor” which is disputed by corporate creditor, etc.

26. In the present case as admittedly a notice was issued by respondent-operational creditor under sections 433(e) and 434 of the Companies Act, 1956 in 28th October, 2016 which was disputed by appellant-corporate debtor objecting quality of service and non-completion of the work within time which is much prior to enactment of I&B Code, 2016, and notice under section 8 of the I&B Code, we hold that there is an “existence of dispute” for which the petition under section 9 preferred by respondent-operational creditor was not maintainable.

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

28. We, accordingly, set aside the impugned order dated 6th March 2017 passed by the Adjudicating Authority, Mumbai Bench in CP No. 20(1)I&BP/NCLT/MAH/2017 and make the appellant-corporate debtor free from all rigour of corporate insolvency resolution process.

29. In the result the order of moratorium, freezing of bank accounts, appointment of interim resolution professional, advertisement issued notice to the persons about initiation of “corporate insolvency resolution process”, etc., all stand set aside.

30. It will be open to the Board of directors to take over the possession and function of the appellant-company with immediate effect. The Tribunal is directed to close the proceedings and dismiss the application in view of the order passed by Appellate Tribunal and determine the fees of interim resolution professional to which he will be entitled for the period he has performed the duty to be borne by the respondent-operational creditor.

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

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

New Delhi

31st May, 2017

arising out of Lease Deed dated 23rd November, 2005 between the appellants and the respondent.

4. The Arbitrator passed an award on 9th September, 2016 in favour of the appellants granting the following relief:-

- a. *Rs.2,67,52,283/- on account of rent from 1.4.2008 upto 22.3.2010 along with interest @ 12% per annum w.e.f. 23.3.2010 upto the date of the Award.*
- b. *Rs. 1,11,56,145/- on account of damages equivalent to rent for a period of 6 months from 22.3.2010*
- c. *Future interest @12% per annum on the amounts, as calculated above, from the date of the award till the date of realization."*

5. The respondent then challenged the award under Sec. 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Arbitration Act') with the prayer to set aside the award. The application preferred by respondent under Sec. 34 was dismissed on 19th December, 2016 affirming the award.

6. As a consequence, the appellants issued a demand notice dated 13th January, 2017 under Sec. 8 of the I & B Code. In response to the demand notice, respondent filed a reply on 27th January, 2017 raising objection on the ground that there is an existence of dispute about 'Operational Debt'. It was also stated that the appeal bearing No. FA(OS)(COMM) 20 of 2017 has been filed under section 37 of the Arbitration Act against the order dated 19th December, 2016 before the Ld. Single Judge. It was also pointed out that an execution proceedings to recover the amount due under the award dated 9th September, 2016 have also been initiated and are pending consideration before the Hon'ble Delhi High Court.

7. Learned counsel for the appellants submitted that the 1st appellant is to be regarded as an "operational creditor" within the meaning of Sec. 9 r/w sub-sections (20) and (21) of Section 5 of the I&B Code. A reference has also been invited to the definition of the words 'debt' and 'default' as defined in Section 3(11) and Section 3(12) of the I&B Code. .

8. According to learned counsel for the appellants the award passed by the learned Arbitrator had attained finality as the application under Section 34 of the Arbitration Act has been dismissed on 19th December, 2016. It was further contended that expression "arbitration proceedings" used in Sec. 8(2)(a) of the I&B Code cannot be deemed to be pending because under Sec. 21 of the Arbitration Act, arbitration proceedings commenced on the date on which request for referring such a dispute to arbitration was received

by the respondent. The said proceeding came to an end in terms of Sec. 32 on the date of announcing the final award or by an order of the Arbitral Tribunal in accordance with sub-section (2) of Sec. 32 of the Arbitration Act. According to the learned counsel for the appellants, there is no arbitral proceeding pending and it reached finality and come to an end on 9th September, 2016.

9. Similar argument was advanced by the learned counsel for the appellant before the learned Adjudicating Authority wherein reliance was placed on decision of one or other High Court's order.

10. According to the learned counsel for the respondent the petition under Sec. 9 of the I&B Code is not maintainable because the appellants do not owe any 'operational debts' to the Corporate Debtor and thereby the 1st appellant is not an 'operational creditor'. Referring to the definition of 'operational debts' as defined under Section 5(21) of the I&B Code, learned counsel for the respondent contended that *ipsofacto* claim arising out of 'supply of goods' and providing 'services', which may include employment will not amount to operation debt.

Therefore, *ipsofacto* the 1st appellant does not and cannot qualify to be an 'operational creditors', as there is no 'operational debt'. "Debt" is not arising under the law for the time being inforce as is mandate of sub-section (21) of Sec. 5 of the I&B Code and it would be attracted only when the said debt is payable as per said provision.

11. It was further contended that Sections 8, 9, 5(20) and 5(21) must be construed in accordance with the object of the court as outlined in the long title.

12. Similar arguments was advanced by the learned counsel for the respondent before the learned Adjudicating Authority wherein a number of decisions of other Courts and Tribunal were also relied upon.

13. Learned Tribunal at the beginning before deciding the dispute observed that ***"it is a classical case where a dispute between the parties has already been subjected to the arbitration proceedings which are yet to attain finality"***. Thereby, we find that learned Adjudicating Authority before deciding the issue made up their mind that 'a dispute is pending and not attained finality'.

We do not appreciate such observation, as before discussing the case and claim of the parties and the provision of law, the Adjudicating Authority cannot express and open its mind. Learned Adjudicating Authority while decided the question as to whether the appellants come within the meaning

of 'operational creditor', rejected the submission that the 'arbitration proceedings' stand concluded by virtue of Section 32 of the Arbitration Act.

14. Learned Adjudicating Authority while held that the application is not maintainable, observed as follows:

"27. We are further of the view that already proceedings for execution of the award have been initiated. An effective remedy has been availed by the applicant. We have not been able to accept that a party can invoke more than one remedy simultaneously. It is in fact against the fundamental principles of Judicial administration to allow a party to avail more than one remedies. Ordinarily only one remedy at one time could be availed as is evident from the fundamental principles laid down in section 10 CPC. It would promote forum shopping which is wholly impermissible in law....."

15. We have heard learned counsel for the parties and perused the record.

16. The questions arise for determination in this appeal are:-

- (i) Whether there is an 'existence of dispute' between the parties, the award passed by Arbitral Tribunal having affirmed by the Court under Sec. 34 of the Arbitration Act?
- (ii) Whether pendency of a proceeding for execution of an award or a judgment and decree bar an operational creditor to prefer any petition under the I & B Code?
- (iii) Whether the 1st appellant is an 'operational creditor' within the meaning of Sec. 5(20) r/w Sec. 5(21) of the I & B Code?

17. Before deciding the first and second issue, it is desirable to refer the observations of the Adjudicating Authority to understand the reasons for not entertaining the application under Sec. 9- The Tribunal proceeded on presumption that a dispute is pending in view of the pendency of a case under Sec. 37 of the Arbitration Act as is apparent from the observation and finding quoted below:

"22. In the instant case an arbitral award has been announced on 9.9.2016 and the application for setting aside the award filed under section 34 of the Arbitration Act has been rejected on 19.12.2016. It has been mentioned by the respondent in its reply dated 27.01.2017 sent under section 8(2) of the Code to the notice issued under section 8(1) of the Code by the applicant that the debt is disputed and appeal under section 37 of the Arbitration Act is pending. The reply dated 27.1.2017 reads as under:-

"1. At the outset, kindly note that our client is disputing the existence of

the 'operational debt' allegedly payable to you by our client. Our client is vigorously contesting the Award dated 9.9.2016 (Award) passed by Mr. Justice Mukundakam Sharma (Retd.), Sole Arbitrator, in Arbitration Case No.3 of 2013, before the Hon'ble Delhi High Court.

2. *As you are aware, our client had filed a petition under section 34 of the Arbitration and Conciliation Act, 1996 (Act) bearing No. % OMP (Comm.) No.570 of 2016, before the Hon'ble Delhi High Court vide order dated 19.12.2016. Please note that our client has filed an appeal against the said order under section 37 of the Act, bearing No. FAO(OS)(COMM) 20 of 2017, for setting aside the order dated 19.12.2016, and the same is presently pending adjudication before the Hon'ble Court.*
3. *In view of the above, please note that no default has occurred in terms of section 8(1) of the Code and, therefore, no process for Corporate Insolvency Resolution can be initiated at this stage. Any action in this regard would be at your own cost, risk and consequences.*

Kindly note that this reply is without prejudice to any other rights or remedies available to our client under contract and in law. "

23. *A close examination of the aforesaid reply would show that the respondents have disputed the existence of 'Operational Debt' by disclosing that its application under section 34 of the Arbitration Act was dismissed and the appeal under section 37 of the Arbitration Act bearing No. FAO (OS)(COMM) 20 of 2017 was pending adjudication. It is also pertinent to mention that the applicant has filed a caveat for issuance of notice to it before passing any order. Therefore the applicants are contesting the litigation tooth nail before this forum. In this backdrop respondent has claimed no default within the meaning section 8(1) read with section 3(12) of the Code is deemed to have occurred. It is also pertinent to notice that execution proceedings for enforcement of the award have also been initiated and are pending for consideration of the Hon'ble Delhi High Court on 12.5.2017.*

24. *In the face of the aforesaid facts we find that there is complete answer to the claim made by the applicant in terms of section 8(2)(a) read with section 9(1) of the 'Code' which bars initiation of insolvency process. It cannot be said that arbitration proceedings have come to an end merely on the dismissal of application under section 34 of the Arbitration Act as sought to be canvassed on behalf of the applicant. The proceedings are yet to attain finality as appeal under section 37 of the Arbitration Act is*

pending. On behalf of the respondents reliance has rightly been placed on the judgement of the Bombay High Court rendered in the cases of DSL Enterprises Private Ltd. (DB) and Rajendra (SB) (Supra).

25. We have not been able to persuade ourselves to accept the submission advanced on behalf of the applicant that 'arbitration proceedings' stand concluded by virtue of section 32 of the Arbitration Act. The argument is wholly unsustainable once we take into account the provisions of section 33 of the Arbitration Act itself. It provides for corrections and interpretation of award and even for additional award after the award has been announced. As already observed section 34 and section 37 of the Arbitration Act provide for setting aside of the award and the remedy of appeal. The appeal under section 37 of the Arbitration Act is still pending. The judgements of Bombay High Court has been rightly relied upon by the learned counsel for respondents."

18. The Adjudicating Authority further proceeded to observe :

"27. We are further of the view that already proceedings for execution of the award have been initiated. An effective remedy has been availed by the applicant. We have not been able to accept that a party can invoke more than one remedy simultaneously. It is in fact against the fundamental principles of judicial administration to allow a party to avail more than one remedies. Ordinarily only one remedy at one time could be availed as is evident from the fundamental principles laid down in section 10 CPC. It would promote forum shopping which is wholly impermissible in law. "

19. To decide the question as to whether the pendency of case under Section 37 of the Arbitration Act amounts to pendency of a dispute before a court of law, it is desirable to refer the relevant provisions of the I & B Code.

20. Sub-section (6) of Section 5 of the I & B Code defines 'dispute' as follows:

"5. 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;"

21. Clause (a) of sub-section (2) of Sec. 8 relates to an existence of dispute, as quoted herein:

“8. (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.”

22. From clause (a) of sub-section (2) of Sec. 8, we find that **pendency of an arbitration proceedings** has been termed to be an ‘existence of dispute’ and not the pendency of an application under Sec. 34 or Sec. 37 of the Arbitration Act.

23. Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as the ‘Rules, 2016’) is the form required to be filled to apply under Sec. 9 of the I&B Code, wherein the order passed by **Arbitral Panel** has been cited as one of the document, record and evidence of default. This is apparent from Part V of Form 5, as quoted below:

“FORM 5

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
24. The aforesaid provisions and format of application makes it clear that while pendency of the suit or arbitration proceeding has been termed as existence of dispute, apart from other disputes decree and award of Tribunal has been shown as record of default.

25. In ***Kirusa Software Private Ltd. Vs. Mobilox Innovations Private Limited - Company Appeal (AT) (Insolvency) 6 of 2017***, this Appellate Tribunal by judgment dated 24th May, 2017 while deciding the meaning of 'dispute' and "existence of dispute" held: .

"32. There may be other cases such as a suit relating to existence of amount of debt stands decided and decree is pending for execution. Similarly, existence of amount of debt or quality of goods or service for which a suit have been filed and decreed;

an award has been passed by Arbitral Panel, though petition under Section 34 of Arbitration and Reconciliation Act, 1996 may be pending. In such case the question will arise whether a petition under Section 9 will be maintainable particularly when it was a suit or arbitration proceeding is not pending, but stand decided?

Though one may argue that Insolvency resolution process cannot be misused for execution of a judgement and decree passed in a suit or award passed by an arbitration Tribunal, but such submission cannot be accepted in view of Form 5 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules 2016 wherein a decree in suit and award has been shown to be a debt for the purpose of default on non-payment.”

26. Under Sec. 36 of the Arbitration Act, an arbitral award is executable as decree but it can be enforced only after the time for filing the application under Sec. 34 has expired and no application is made or such application having been made has been rejected. That means, the arbitral award reaches finality after expiry of enforceable time under Sec. 34 and/or if application under Section 34 is filed and rejected.

27. In *Vipul Agarwal vs. Atul Kanodia & Co. and anr.* - [AIR 2004 All 205], the Hon'ble Allahabad High Court observed :

“4. The language of the section clearly indicates that the award can be executed in two situations - one when the time for filing an application for setting aside the award has expired and no application % has been filed or where the application has been filed and it has been refused. It is not in dispute that an award can be executed as a decree in view of the provisions of Section 36 of the Act. The only question for consideration in this case is whether the word %refused' used in Section 36 of the Act means a final refusal after all the proceedings of appeal etc. up to the Supreme Court are over or a refusal by the District Judge is sufficient to make the award executable. If the legislature intended that it is only after the application under Section 34 has been rejected at the appellate stage would the award be enforceable it could have used such words as 'finally refused' in the section. As stated above the first situation referred to in the section when an award becomes executable is where the limitation for filing an application under Section 34 has run out and no application has been filed. The application for setting aside the award in the context necessarily means the application filed before the District Judge as it is the running out of the limitation for such an application which would make the award executable. It is clear, that the opening part of the section does not refer to the running out of the period of limitation of filing an appeal. Now the second situation when the award becomes executable is when 'such application having been made' has been refused. The words "such application having been made" are significant. The words 'such application' refer to the application contemplated in the first situation which is clear from the use of the expression 'such' which in the context is used to

describe something which has been referred to earlier. On the plain language the refusal contemplated in the section is the refusal by the Court where the application is filed and not by the appellate Court. Section 37(l)(b) of the Act provides for appeal against an order 'setting aside or refusing to set aside an arbitral award under Section 34'. The reference in the expression 'refusing to set aside an arbitral award' is obviously to the order of refusal of the application under Section 34 by the Court of first instance because Section 34 refers to an application made before the Court of first instance. From the scheme of Sections 34, 36 and 37 it is clear that the refusal of the application referred to in Section 36 for setting aside the award is the application filed under Section 34. An interpretation that Section 36 refers to the refusal of the application at the stage of the appeal is not possible without straining the language of Section 36 and adding the word 'finally' as qualifying 'refused'. Such an interpretation also does not promote any purpose, which the legislature may have had in mind. The purpose of arbitration is to provide a speedy remedy. If the award cannot be executed until it has successfully borne all challenges even up to the Apex Court it cannot be conceived of as a speedy remedy. While the legislature has used the word 'final' in respect of an award in Section 35 the finality being subject to an appeal under Section 37, no such expression of finality to the decision of an application under Section 34 has been used in Section 36. "

28. Russell on Arbitration (22nd edition) paragraph 6.001 defines an award to mean: **"in principle an award is a final determination of a particular issue or claim in the arbitration....."**

29. The Hon'ble Supreme Court in **Centrotrade Minerals & Metals Inc. vs. Hindustan Copper Limited [(2017) 2 SCC 228]** while dealing with the finality of award under Arbitration and Conciliation Act, 1996 observed and held :

"9. The general principle that we have accepted is supported by two passages in Comparative International Commercial Arbitration. In Para 24-3 thereof reference is made to Article 31(1) of the United Nations Commission on International Trade Law (or UNCITRAL) Rules to suggest that while all awards are decisions of the Arbitral Tribunal, all decisions of the Arbitral Tribunal are not awards. Similarly, while a decision is generic, an award is a more specific decision that affects the rights of the parties, has important consequences and can be enforced. The distinction between an award and a decision of an Arbitral Tribunal is summarised in Para 24-13. It is observed that an award: .

- (i) concludes the dispute as to the specific issue determined in the award so that it has *res judicata* effect between the parties; if it is a final award, it terminates the tribunal's jurisdiction;
- (ii) disposes of parties' respective claims;
- (iii) may be confirmed by recognition and enforcement;
- (iv) may be challenged in the courts of the place of arbitration.

10. In International Arbitration a similar distinction is drawn between an award and decisions such as procedural orders and directions. It is observed that an award has finality attached to a decision on a substantive issue. Para 9.08 in this context reads as follows:

"9.08. The term "award" should generally be reserved for decisions that finally determine the substantive issues with which they deal. This involves distinguishing between awards, which are concerned with substantive issues, and procedural orders and directions, which are concerned with the conduct of the arbitration. Procedural orders and directions help to move the arbitration forward; they deal with such matters as the exchange of written evidence, the production of documents, and the arrangements for the conduct of the hearing. They do not have the status of awards and they may perhaps be called into question after the final award has been made (for example as evidence of 'bias', or 'lack of due process')."

11. In International Commercial Arbitration the general characteristics of an award are stated. In Para 1353 it is stated as follows:

"1353.—An arbitral award can be defined as a final decision by the arbitrators on all or part of the dispute submitted to them, whether it concerns the merits of the dispute, jurisdiction, or a procedural issue leading them to end the proceedings. "

This is subsequently elucidated through four aspects of an award, namely:

- (i) an award is made by the arbitrators;
- (ii) an award resolves a dispute;
- (iii) an award is a binding decision; and
- (iv) an award may be partial.

12. The arbitration result in the present case has all the elements and ingredients of an arbitration award. Taking also into consideration the view expressed by the above authors, we have no hesitation in concluding

that the “arbitration result” in the first part of Clause 14 of the contract must mean an arbitration award given by the arbitral panel of the Indian Council of Arbitration. To this extent we disagree with the learned counsel for Centrotrade but agree with the learned counsel for Hindustan Copper Ltd. (hereafter referred to as “HCL”).”

30. Learned counsel appearing on behalf of the respondent referred to the decision of the Hon’ble Supreme Court in **Paramjeet Singh Patheja Vs. ICDS Limited - [2006 (13) SCC 322]** wherein interpreting Section 9(2)(a) and (b) of the Presidency Towns Insolvency Act, 1909, the Apex Court held an arbitral award is “decree” or “order” for the purpose of insolvency notice under Section 9(2) of the Presidency Towns Insolvency Act, 1909.

31. The aforesaid decision is not applicable in the present context, the Presidency Town Insolvency Act, 1909 having superseded by Insolvency and Bankruptcy Code, 2016 and for the purpose of ‘dispute’ as ‘existence of dispute’, only the pendency of arbitral proceeding has been accepted as one of the ground of dispute. On the other hand, as apparent from Form 5 of Rules, 2016 for the purpose of I&B Code, and Arbitral Award has been held to be a document of debt and non-payment of awarded amount amounts to ‘default’ debt. Therefore, the aforesaid decision referred by learned counsel for the respondent is of no help to the respondent.

32. What has been held by the learned Adjudicating Authority that a dispute has been pending is not only against the provision of law and rules framed thereunder, as noticed above, but is also against the decision of this Appellate Tribunal in **Kirusa Software Pvt. Ltd.** as noticed above. In this background, the finding of the Adjudicating Authority that a dispute pending is being against the law cannot be upheld.

33. ‘Insolvency and Bankruptcy is an act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons in a time bound manner for maximisation of the value of assets of such person and to promote the entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of the Government dues.’ Insolvency resolution process is not a money suit for recovery nor a suit for execution for any decree or award as distinct from Section 35 of the Arbitration Act, which relates to execution of an award. For the reasons aforesaid, while we hold that Corporate Insolvency Resolution Process can be initiated for default of debt, as awarded under the Arbitration Act, we further hold that the finding of the learned Adjudicating Authority that it is an executable matter is against the essence of the I & B Code. The question of availing any effective remedy or alternative remedy,

in case of default of debt for an 'operational creditor', as held by the learned Adjudicatory Authority, is not based on any sound principle of law. For the reasons aforesaid, the impugned order passed by the learned Adjudicating Authority cannot be sustained.

34. The issues Nos. 1 and 2 as framed and noticed above are, thereby answered in the negative in favour of the appellant - 'Operational Creditor' and against the respondent - 'Corporate Debtor'.

35. Sub-section (20) of Sec. 5 defines 'Operational Creditor', as follows :

"5. In this Part, unless the context otherwise requires,—

xxx

xxx

xxx

(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;"

36. Operational Debt is defined in sub-section (21) of Sec. 5 as follows:

"(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;"

37. From the record, it appears that the 1st appellant claimed to be an 'operational creditor' on the basis of lease deed. The respondent in its reply has taken a plea that the Adjudicating Authority has confined its finding to point as dealt with in the impugned order and all other points, though urged and argued, have not been considered.

38. From the impugned order dated 24th March, 2017, we find that the learned Adjudicating Authority noticed the aforesaid plea at paragraph 6 of the impugned judgment, as quoted below:

"6. In order to buttress his stand that applicant is an 'Operational Creditor' learned counsel has placed reliance on a portion of para 3.2.2 of the report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design and has argued that the report clearly brings out that the obligation to pay rent is certainly cover by the definition of expression 'Operational Creditors'. According to the learned counsel the expression 'Operational Creditor' used in section 5(20) and 5(21) of the Code must be construed to include the obligation to pay rent to the applicant as an 'Operational Creditor'. According to the learned counsel the definition of 'Operational Creditor' as adopted in section 5(20) of the Code is not

exhaustive but it is illustrative as it is evident from the use of word 'include'. Mr. Nair has submitted that it is well settled principle of law that wherever the expression 'include' is used to define an expression then it has room to imply many other things as the definition is not exclusive. “

39. However, we find that the aforesaid issue has not been decided by the learned Adjudicating Authority, having not entertained the application under Sec. 9, on other ground of 'existence of dispute'.

40. For the reason aforesaid, while we hold that the finding of the learned Adjudicating Authority insofar as it relates to 'award', 'default of debt' and the 'alternative remedy', are not based on sound principle and against the provisions of law, we refrain to decide the question as to whether the 1st appellant is an 'operational creditor' or not which is first required to be decided by learned Adjudicating Authority.

41. For the aforesaid reasons, we set aside the impugned order dated 24th March, 2017 and remit the case to the learned Adjudicating Authority, Principal Bench, New Delhi to decide as to whether the 1st appellant is an 'operational creditor' and if so, whether the application under Sec. 9 preferred by the appellants is complete for admitting and initiation of corporate insolvency resolution process. If the first question relating to status of appellant as 'operational creditor' is decided in affirmative, in favour of the appellant, then learned Adjudicating Authority will decide the issue whether the application is 'complete or not' and if not complete may grant seven days' time to the appellants to complete the record as per the proviso to Sec. 9 of the I&B Code.

42. The appeal is allowed with aforesaid observations. We make it clear that we have not expressed any opinion in regard to other questions such as whether the 1st appellant is an operational creditor and whether the application preferred under Sec. 9 is complete or not, which is to be decided by the Adjudicating Authority after notice to the parties uninfluenced by any observation made in the impugned order.

43. In the facts and circumstances, however, there shall be no order as to costs.

[Balvinder Singh]
Member (Technical)

[Justice S.J. Mukhopadhaya]
Chairperson

NEW DELHI
29th August, 2017

ANNEXURE X.7**IN THE SUPREME COURT OF INDIA****CIVIL APPELLATE JURISDICTION**

CIVIL APPEAL NO. 9405 OF 2017

Mobilox Innovations (P.) Ltd.**Appellant****Versus****Kirusa Software (P.) Ltd.****Respondent****JUDGMENT****R.F. 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 customized 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 (hereinafter referred to as 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 (hereinafter referred to as 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 27.12.2016 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 27.1.2017 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 defense 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 crystallized 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,

Recognizing the importance to all countries of strong, effective and efficient insolvency regimes as a means of encouraging economic development and investment,

Noting the growing realization that reorganization 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 25 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 harmonized 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 modernization of their insolvency regimes,

Recognizing the need for cooperation and coordination between international organizations 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 intergovernmental and non-governmental organizations 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 recognized 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 reorganization, 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.

XXX

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 (reorganization 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 reorganization. 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 reorganization to avoid further diminution of the value of assets and to improve the chances of a successful reorganization. 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 emphasizes the advantages of quick decision-making and provides guidance as to what is reasonable, but at the same time also recognizes 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 reorganization 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.^{1"}

11. The legislative history of legislation relating to indebtedness goes back

¹ A determination that the commencement standard has been met may involve consideration of whether the debt is subject to a legitimate dispute or offset in an amount equal to or greater than the amount of the debt. The existence of such a set-off may be a ground for dismissal of the application (see above, paras. 61-63).application (see above, paras. 61-63).

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 liberalization 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 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, maximization 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 Pvt. 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 defense 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 Zwieteren 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:

- 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 Sections 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.

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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.

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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 or 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 or 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,—

xxxx

(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;

xxxx

(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 dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

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 or 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 Sections 9(1) and 9(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 31.8.2017 in **Innoventive Industries Ltd. v. ICICI Bank & Anr.** (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 U.P.* [AIR 1968 SC 1450 : 1969 Cri 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 G.P. 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 U.P.*, 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 and 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:

"(1)

- (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;
- (b)

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 s 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 and 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 *In re LHF Wools Ltd* [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 **In Re: Portman Provincial Cinemas Ltd.**[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.

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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 L.J. held:

"Lord Denning M.R. 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 finalize the time and place for a meeting. On 28th June, 2016, the appellant wrote to the respondent again to finalize the time and place. Apparently, nothing came of the aforesaid e-mails and the appellant then fired the last shot on 19th September, 2016, reiterating that no payments are due as the NDA was breached.

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 30 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 defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense 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 crystallized 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.

.....J.

(R.F. Nariman)

.....J.

(Sanjay Kishan Kaul)

New Delhi;

September 21, 2017.

ANNEXURE X.8

W.P 7144 (W) of 2017

Metaliks Limited v. Union of India

2017 SCC OnLine Cal 2749

In the High Court of Calcutta Constitutional
Writ Jurisdiction Appellate Side

(BEFORE DEBANGSU BASAK, J.)

Sree Metaliks Limited and another

v.

Union of India and anr.

W.P 7144 (W) of 2017

Decided on April 7, 2017

For the Petitioners: Mr. P.C Sen, Sr. Advocate

Mr. Anirban Roy, Advocate

Mr. Sanjib Dawn, Advocate

Mr. Nupur Jalan, Advocate

For the Respondent No. 2: Mr. A. Malhotra, Advocate

Mr. Soumya Majumder, Advocate

Ms. Neelina Chatterjee, Advocate

Ms. Mukta Rani Singha, Advocate

For the Union of India A.S.G: Mr. Kausik Chandra, Ld.

Mr. Asit Kumar De, Advocate

The Judgment of the Court was delivered by

Debangsu Basak, J. : The petitioner assails the vires of section 7 of the Insolvency and Bankruptcy Code, 2016 ('Code of 2016') and the relevant rules under the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 ('Rules of 2016'). The challenge is premised upon and revolves around the contention that the Code of 2016 does not afford any opportunity of hearing to a corporate debtor in a petition filed under section 7 of the Code of 2016.

2. The learned senior advocate appearing for the petitioner submits that, the first petitioner had received a notice from a firm of company secretaries

dated 21st January, 2017 intimating that, an application under section 7 of the Code of 2016 read with rule 4 of the Rules of 2016 had been filed before the National Company Law Tribunal ('NCLT'), Kolkata Bench. He submits that, the letter does not inform the petitioners about the date when such application would be taken up for consideration by the NCLT. He submits that, the NCLT had registered such application as Company Petition No. 16 of 2017. An order dated 30th January, 2017 was passed on a hearing conducted on such company petition on 25th January, 2017. The order was passed ex parte. The petitioner was not informed of the date of hearing. The petitioner was not afforded an opportunity of hearing by the NCLT prior to the passing of such order of administration of the petitioner and appointment of interim resolution professional. The petitioner had preferred an appeal from such order. Such appeal being Company Appeals (AT) (Insolvency) No. 3 of 2017 was disposed of by an order dated 21st February, 2017. He submits that, pursuant to the disposal of the appeal, proceedings have taken place in the company petition. At no stage has the petitioner been heard by the NCLT. He submits that, the petitioner is entitled to a right of hearing under the principles of natural justice. He submits that, the Code of 2016 is silent as to the grant of hearing by the NCLT. In such circumstances, the right of hearing, on the principles of natural justice, has to be read into such statute. He submits that, the claim of the respondent under the company petition is not such that the Bankruptcy Code of 2016 can be invoked. The NCLT has assumed jurisdiction under the Code of 2016 where none exists.

3. The learned advocate appearing for the respondent No. 2 submits that, the respondent No.2 is an award holder. The award remains unsatisfied. The respondent No. 2 was advised to invoke the provisions of Code of 2016. The respondent No. 2 had filed a petition being Company Petition No. 16/2017 under the provisions of section 7 of the Code of 2016 read with rule 4 of the Rules of 2016. An order dated 30th January, 2017 was passed by the NCLT. The petitioner being aggrieved had preferred an appeal therefrom before the National Company Law Appellate Tribunal ('NCLAT'). In such appeal the first petitioner had submitted that, the first petitioner had no objection to the admission of the insolvency petition but objects to the appointment of the interim resolution professional ('IRP') under the Code of 2016. The first petitioner, therefore, cannot canvass, breach of principles of natural justice by NCLT. Such appeal was disposed of by replacing the IRP appointed by the order dated 30th January, 2017. He submits that, the challenge to the vires of the Code of 2016 and the Rules of 2016 are misplaced as the application under section 7 of the Code of 2016 is required to be heard by the NCLT established under the provisions of the Companies Act, 2013

(‘Act of 2013’). He refers to section 424 of the Act of 2013 and submits that, NCLT is required to follow the principles of natural justice in deciding an application taken up for consideration by it. Therefore, the challenge to the vires must fail. In the factual matrix of the present case, in spite of notice, the first petitioner did not appear before the NCLT. The first petitioner had preferred an appeal against the order dated 30th January, 2017 before the NCLAT. Such appeal has since been disposed of. It did not press such point in the appeal. Therefore, it cannot be said that there is a breach of principles of natural justice.

4. The learned Additional Solicitor General appears in terms of the notice issued to the learned Attorney General in view of the challenge to the vires to the Code of 2016 and the Rules, 2016. He refers to the Rules, 2016, particularly rule 4 thereof which contemplates a service of notice of the application by the financial creditor on the financial debtor. He refers to rule 10 of the Rules of 2016 and submits that, such Rules contemplate that, the provisions of rules 20 to 24 and 26 of Part III of the National Company Law Tribunal Rules, 2016 will be applicable. He refers to rule 24 of the National Company Law Tribunal Rules, 2016 which contemplates service of notice of the application upon the respondent. He submits that, the proceedings before the NCLT are to be conducted keeping in view the provisions of section 424 of the Act of 2013. Section 424 of the Act of 2013 contemplates the NCLT applying the principles of natural justice in the proceedings. He submits that, the NCLT is not bound by the Code of Civil Procedure, 1908 and that, it can regulate its own procedure subject to the provisions of the Act of 2013 and the Code of 2016. He submits that, the Code of 2016 does not debar the applicability of the principles of natural justice in proceedings under consideration by the NCLT when it is considering an application under section 7 of the Code of 2016. Therefore, the challenge to the vires to the provisions of section 7 of the Code of 2016 and rule 4 of the Rules 2016 should fail.

5. I have considered the rival contentions of the petitioner and the materials made available on record.

6. The respondent No. 2 had filed an application under section 7 of the Code of 2016 against the first petitioner, before the NCLT, Kolkata Bench, which was registered as Company Petition No. 16 of 2017. The first petitioner is the respondent therein. The first petitioner claims to have received a notice from a firm of practising company secretaries with regard to the filing of such company petition by the second respondent before the NCLT against the first petitioner. Such notice does not contain any information as to the date of hearing of the company petition.

7. NCLT had passed an order dated 30th January, 2017 in such company petition filed by the respondent No. 2. The first petitioner was not heard by the NCLT before passing such order. NCLT had proceeded to admit the company petition. It had done so without affording any opportunity of hearing to the first petitioner. It had acted in breach of the principles of natural justice in do so. NCLT had proceeded to appoint an IRP by such order. Such order was assailed by the first petitioner before the NCLAT. In such appeal, the first petitioner did not press the point of breach of the principles of natural justice. Rather, it had stated that, it had no objection to the admission of the company petition. The NCLAT records in its order that, the first petitioner has no objection to the admission of the insolvency petition. Such appeal was disposed of by the order dated 21st February, 2017. The personnel of the IRP appointed by the order dated 30th January, 2017 was replaced.

8. In the facts of the present case, section 7 of the Code of 2016 is relevant. Section 7 is 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.”

9. Section 7 of the Code of 2016 contemplates filing of an application by a financial creditor before an adjudicating authority. An adjudicating authority is defined in section 5(1) of the Code of 2016. It is as follows :

5. Definitions

In this Part, unless the context otherwise requires, –

- (1) “Adjudicating Authority”, for the purpose of this Part, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013.

10. Section 7 of the Code of 2016 allows a financial creditor either by itself or jointly with other financial creditors to file an application to initiate corporate insolvency resolution process against a corporate debtor before the adjudicating authority when a default has occurred. Sub-section (2) of section 7 states that, an application under sub-section (1) will be made in such form and manner and accompanied with such fee as may be prescribed. Sub-section (3) of section 7

requires the financial creditor to furnish the details as specified therein. Sub-section (4) of section 7 mandates the adjudicating authority to ascertain an 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) within 14 days from the receipt of the application under sub-section (2). Sub-section (5) of section 7 allows the adjudicating authority to admit an application under sub-section (2) where a default has occurred and the application is complete and there is no disciplinary proceedings pending against the proposed resolution professional. It also allows the adjudicating authority to reject such an application if no default has occurred or the application under sub-section (2) is incomplete or where any disciplinary proceedings is pending against the proposed resolution professional. However, if the adjudicating authority is proceeding to dismiss an application, on the ground of defect in the application, then the adjudicating authority will give a notice of such defect to the applicant to rectify such defect within 7 days from the date of receipt of the notice. Sub-section (6) of section 7 stipulates that, the corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5). Sub-section (7) of section 7 mandates the adjudicating authority to communicate its orders within 7 days of admission or rejection of the application, as the case may be, to the financial creditor and the corporate debtor.

11. Section 61 of the Code of 2016 allows an appeal to be filed before the Appellate Authority. It is as follows :

“61. Appeals and Appellate Authority

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

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

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

(3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely :

(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;

- (ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;
 - (iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;
 - (iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or
 - (v) the resolution plan does not comply with any other criteria specified by the Board.
- (4) An appeal against a liquidation order passed under section 33 may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order.”

12. Any person aggrieved by an order passed by the adjudicating authority under the Code of 2016 in respect of an application under section 7 of the Code of 2016 is entitled to prefer an appeal to the NCLAT. Sub-section (2) of section 61 allows such an appeal to be filed within 30 days with the provision that, an appeal may be filed later, if the appellants show sufficient cause for not filing the appeal but such period of extension shall not exceed 15 days. Sub-section (3) of section 61 recognises some of the grounds on which an appeal may be filed. Sub-section (4) of section 61 recognises that, an appeal against an order of liquidation passed under section 33 may be filed on the grounds of material irregularity or fraud committed in relation to an order of liquidation.

13. In the scheme of the Code of 2016, therefore, an application under section 7 of the Code of 2016 is to be first made before the NCLT. An appeal of the order of NCLT will lie before the NCLAT. NCLT and NCLAT are constituted under the provisions of the Companies Act, 2013. The procedure before the NCLT and the NCLAT is guided by section 424 of the Companies Act, 2013. It is as follows :

“424. Procedure before Tribunal and Appellate Tribunal. – (1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice, and, subject to the other provisions of the Act or of the Insolvency and Bankruptcy Code, 2016 and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act or under the Insolvency and Bankruptcy Code, 2016 the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely :

- (a) summoning and enforcing the attendance of any person examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or a copy of such record or document from any office;
- (e) issuing commissions for the examination of witnesses or documents;
- (f) dismissing a representation for default or deciding it ex parte;
- (g) setting aside any order of dismissal of any representation for default or any other passed by it ex parte; and
- (h) any other matter which may be prescribed.

(3) Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction, –

- (a) in the case of an order against a company, the registered office of the company is situate; or
- (b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

(4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code (45 of 1860), and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).”

14. NCLT acting under the provisions of the Act of 2013 while disposing of any proceedings before it, is not to bound by the procedure laid down under

the Code of Civil Procedure, 1908. However, it is to apply the principles of natural justice in the proceedings before it. It can regulate its own procedure, however, subject to the other provisions of the Act of 2013 or the Code of 2016 and any Rules made thereunder. The Code of 2016 read with the Rules 2016 is silent on the procedure to be adopted at the hearing of an application under section 7 presented before the NCLT, that is to say, it is silent whether a party respondent has a right of hearing before the adjudicating authority or not.

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

16. The requirement of NCLT and NCLAT to adhere to the principles of natural justice and the fact that, the principles of natural justice are not ousted by the Code of 2016 can be found from section 7(4) of the Code of 2016 and

rule 4 of the Rules of 2016. Rule 4 deals with an application made by a financial creditor under section 7 of the Code of 2016. Sub-rule (3) of rule 4 requires such financial creditor to despatch a copy of the application filed with the adjudicating authority, by registered post or speed post to the registered office of the corporate debtor. Rule 10 of the Rules of 2016 states that, till such time the Rules of procedure for conduct of proceedings under the Code of 2016 are notified, an application made under sub-section (1) of section 7 of the Code of 2016 is required to be filed before the adjudicating authority in accordance with rules 20, 21, 22, 23, 24 and 26 or Part-III of the National Company Law Tribunal Rules, 2016.

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

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

19. In the facts of the present case, the learned senior advocate for the petitioner submits that, orders have been passed by the NCLT without adherence to the principles of natural justice. The respondent was not heard by the NCLT before passing the order.

20. It would be open to the parties to agitate their respective grievances with regard to any order of NCLT or NCLAT as the case may be in accordance with law. It is also open to the parties to point out that the NCLT and the NCLAT are bound to follow the principles of natural justice while disposing of proceedings before them.

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

22. WP 7144 (W) of 2017 is disposed of without any order as to costs.

23. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance of the requisite formalities.

ANNEXURE X.9

IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION

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

(arising out of Order dated 17th January, 2017 and Order dated 23rd January, 2017 passed by National Company Law Tribunal, Mumbai Bench, Mumbai in C.P. No. 1/I&BP/NCLT/MB/MAH/2016)

IN THE MATTER OF:

M/s. Innoventive Industries Ltd. ...Appellant

Vs

ICICI Bank & Anr. ...Respondents

Present: For the Appellants:- Mr. Amarendra Saran, Senior Advocate, Mr. Makarand D. Adkar, Mr. Braj K. Mishra, Mr. Vijay Kumar, Mr. Amit Tamhankar, Ms Resham Sayyad, Advocates.

For Respondent No.1:- Mr. Ramji Srinivasan, Sr. Advocate, Mr. L. Vishwanathan, Mr. Indranil Deshmukh, Mr. Animesh Bsht, Mr. Karan Khanna, Ms Aditi Tambi, and Mr. Vivek O'riel, Advocates.

For Respondent No.2:- Mr. Jaswinder Singh and Ms Shipra Shukia, Advocates.

JUDGEMENT**SUDHANSU JYOTI MUKHOPADHAYA, J.**

1. These appeals have been preferred by the appellant-corporate debtor-Innoventive Industries Ltd. against order(s) dated 17th January, 2017 and 23rd January, 2017 passed by the 'Adjudicating Authority' (National Company Law Tribunal), Mumbai Bench, Mumbai ('Adjudicating Authority') under section 7 of the Insolvency and Bankruptcy Code, 2016 ('I&B Code, 2016') in CP No. 1/I&BP/NCLT/MB/MAH/2016.

2. By the impugned order dated 17th January, 2017, the adjudicating authority rejected all the contentions raised by the appellant/corporate debtor and held that the application preferred by the financial creditor-ICICI Bank-(respondent herein) is complete under sub-section (2) of section 7 of the

I&B Code, 2016 and admitted the application declaring 'moratorium' in regard to the affairs of the company; appointed "interim resolution professional" and passed interim order(s) in terms of section 7 of the I&B Code, 2016.

3. In the other impugned order dated 23rd January, 2017 the adjudicating authority while admitted that there was a rush of work, in deciding the IA No. 6/2017 which inadvertently based on the argument of the learned counsel for the corporate debtor, observed that delay in passing the order owing to the application filed by the corporate debtor in raising plea of no default, having raised in earlier CA, the matter stands adjudicated.

4. The impugned judgment has been challenged by appellant on the following grounds.

First contention raised on behalf of the appellant is that the impugned order has been passed by the Tribunal without notice to the appellant against the principle of rules of natural justice, as stipulated under section 424 of the Companies Act, 2013.

5. Mr. Amarendra Saran, learned senior counsel for the appellant submitted that serious civil consequences ensue due to public announcement of the initiation of corporate insolvency resolution process and appointment of an interim resolution professional to manage the affairs of the corporate debtor removing the Board of directors. In such a case, notice prior to admission of a petition under section 7 of I&B Code, 2016 is required to be given. If notice is given prior to admission of a petition, it will be open to the corporate debtor to bring to the notice of the Tribunal that there is no default or that the application filed by the financial creditor is incomplete and deserves to be dismissed.

Reliance was placed on hon'ble Supreme Court's decision in S L Kapoor v. Jagmohan (1980) 4 SCC 379 and Sahara India (Firm) v. CIT (2008) 4 SCC 151.

6. It was also contended that the Tribunal being a creation of the Companies Act, 2013 ('Act 2013') is bound by section 420 of the Act 2013 which stipulates "reasonable opportunity of being heard" to be given to the 'parties' before passing an order. Further, section 424 of the Act 2013, which grants liberty to the Tribunal to regulate its own procedure mandate to follow the principles of natural justice. Therefore, the aforesaid sections cast duty upon the Tribunal to issue notice to and hear a party before passing any order affecting the rights of the party.

7. The next contention was that (Maharashtra Relief Undertaking (Special Provisions) Act (Bombay Act XCVI of 1958) ('MRU Act, 1958'), being a

piece of legislation intended to give relief to industrial undertakings will prevail over I&B Code, 2016.

8. Learned senior counsel submitted that MRU Act, 1958 being a legislation referable to Entry 24 of List II of Schedule 7 of the Constitution of India operates in different fields overriding the provisions of I&B Code, 2016.

9. It was also submitted that MRU Act being a beneficial piece of legislation and the State Legislature having competent to enact it and the field being exclusively reserved for State Legislature, will prevail over the I&B Code, 2016, even if it may incidentally encroach upon field occupied by some other enactment.

He placed reliance on hon'ble Supreme Court decision in Vishal N Kalsaria v. Bank of India (2016) 134 SCL 268; Gram Panchayat v. Maiwinder Singh (1985) 3 SCC 661; Ishwari Khetan Sugar Mills (P.) Ltd. v. State of UP (1980) 4 SCC 136.

10. It was further contended that there was complete non-application of mind by the learned Tribunal. According to him, sub-sections (4) and (5) of section 7 of I&B Code, 2016 casts duty on the Tribunal to first ascertain default and satisfy itself of default. The ascertaining of the fact that whether there is default or not can be satisfactorily reached only on perusal of documents produced by both the parties. A bare perusal of the impugned orders shows no such exercise has been undertaken by the learned Tribunal based on documents, materials, etc.

11. It was further contended that though so-called default on the part of the appellant has been dealt with by Tribunal holding that the respondent No. 1 has placed the information utility, however, a perusal of the application filed by respondent No. 1 would show that the respondent has not produced any such material. In the column prescribed for details of Information Utility, only 'Not applicable' has been mentioned by respondent No. 1. Without any further discussion the Tribunal has held that the default has occurred. Thus, there is no ascertainment of default by the learned Tribunal as per sub-section (3)(a) of section 7 of the I&B Code, 2016 which requires consideration of the record of default recorded with information utility or only such other record or evidence "as may be prescribed". No such 'specified' evidence was produced by the respondent No. 1 before the learned Tribunal.

12. Subsequently, upon mentioning, another order dated 23rd January, 2017 was passed by the learned Tribunal purporting to clarify its earlier order. By this impugned order the Tribunal, quite contrary to its earlier order, held that there was no requirement of hearing the opposite party under the I&B Code,

2016. Further, the impugned order refers to the record of Credit Information Bureau of India Ltd. ('CIBIL'), not "information utility" which was relied upon though earlier order clearly spoke about record of "information utility".

13. It was further contended that all the parties are bound by the master restructuring agreement ('MRA') dated 8th September, 2014. After MRA a fresh agreement came into existence and the previous debts came to an end. Under MRA both creditors and debtors had reciprocal obligations. Respondent No. 1 failed to fulfil its obligation under MRA. On the other hand appellant has performed his obligations under MRA. This would be evident from the certificate issued by the auditor appointed by the bank consortium itself. The fact that respondent No. 1 has not performed any of its obligation would also be evident from the reply of R2 (the lead consortium bank) at para 7(g), (k), (l), (m) and (o) of the reply filed by respondent No. 2 before the Tribunal.

14. According to appellant, respondent No. 1 has attempted to manufacture a default by its own conduct/default. A party which has defaulted its obligation cannot complain about other's alleged default. Respondent No. 1 has not performed its obligation on the one hand and on the other hand has wrongly adjusted the amounts due to the appellant, in other accounts.

15. learned senior counsel for the appellant further contended that respondent No. 1 has not obtained permission/consent from joint lender forum ('JLF') to initiate the present proceedings even though their application would adversely affect the loans of other members of JLF. In fact, respondent No. 1 had applied for such permission but it was not granted. Against the total loan of Rs. 90 crore given by other members to JLF, respondent No. 1 has not given anything and the appellant has already paid about thrice the amount. The other members of JLF have, therefore, no such grievance against the appellant.

16. Mr. Ramji Srinivasan, learned senior counsel for the 1st respondent submitted that there was no provision for 'hearing' specified under the I&B Code, 2016. According to him the law prescribe that the adjudicating authority is only required to ascertain the existence of default and pass necessary orders for admission only on the basis of these specified documents. The time bound process for ascertaining the existence of default is recognised as key object of the I&B Code, 2016 in order to ensure maximisation of value of assets of such persons.

17. However, it was accepted by the learned senior counsel for the financial creditor that in view of the application of section 424 of the Act 2013 read with section 60(5) of the I&B Code, 2016 and rule 4(3) of the Insolvency and

Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, the adjudicating authority is within its powers to issue the limited notice for a hearing, should the “adjudicating authority” consider that a hearing is required to be given to the corporate debtor for ascertainment of existence of default based on the material submitted by the corporate debtor.

18. Learned senior counsel for the financial creditor further submitted that there was no adverse civil consequences for the corporate debtor at the stage of admission which may attract the principles of natural justice. According to him, the application of section 424 of the Companies Act to proceedings under the Code does not necessarily require or call for a hearing at the admission stage or for that matter at any subsequent stage. It was submitted that the consequences of the admission of the resolution process are in no manner prejudicial or against the interest of the corporate debtor. On the contrary, the aforementioned provisions only seek to (i) preserve and protect the value of the corporate debtor; (ii) ensure the corporate debtor’s smooth functioning as a going concern under professional management; and (iii) facilitate insolvency resolution. Thus, upon the admission of the application, the corporate debtor and its assets are in fact protected by the operation of the Code against, inter alia, any action for recovery or claims by any third party, including the financial creditors themselves. He referred to sections 13, 14, 15, 16 and 17 of the I&B Code, 2016 to highlight the scheme of resolution process.

19. It was further contended that only notice of filing of application is required to be provided as specified under sub-rule (3) of rule 4 of the Rules. No other notice is required to be provided by the adjudicating authority. Further, according to learned senior counsel for the financial creditor, section 424 of the Act 2013 does not extend to create an absolute right of hearing under the scheme of the Code. Reliance was placed on different Supreme Court decisions, which will be discussed at appropriate stage.

20. According to learned senior counsel for the respondent, the protection granted under the Notification issued under section 4 of the MRU Act is limited to the enactments as specified in the Schedule to the MRU Act. The MRU Act specifies only certain acts to which the restriction applies and the same cannot be extended to any other legislation. Further, according to him, the I&B Code, 2016 has a clear non-obstante clause (section 238) which overrides operation of MRU Act. He placed reliance on certain other Supreme Court decisions.

21. He further submitted that the order of the adjudicating authority considers the submissions made by the appellant and provide reasoned grounds for

rejection of the First Interim Application as well as the Second Interim Application. He further submitted that the admission of the respondent No. 1's application was done with due application of mind by the adjudicating authority after ascertaining the clear and unambiguous existence of default from the records placed by the respondent No. 1, including the records of the credit information company.

22. The question(s) involved in this appeal are :

- (i) Whether a notice is required to be given to the corporate debtor for initiation of corporate insolvency resolution process under I&B Code, 2016 and if so, at what stage and for what purpose ?
- (ii) Whether Maharashtra Relief Undertaking (Special Provisions) Act (Bombay Act XCVI of 1958) ('MRU Act 1958') shall prevail over I&B Code, 2016. In other words, whether a corporate debtor who is enjoying the benefit of MRU Act, can be subjected to I&B Code, 2016 ? and
- (iii) Whether in a case where joint lender forum ('JLF') have reached agreement and granted permission to the corporate debtor prior consent of JLF is required by financial creditor, before filing of an application under section 7 of the I&B Code, 2016 ?

23. For determination of first issue, it is desirable to notice different decisions of hon'ble Apex Court on the question as to how far rules of natural justice is an essential element.

24. In *Maneka Gandhi v. UOI* (1978) 1 SCC 248, the Apex Court while posing the question as to how far natural justice is an essential element of "procedure established by law" held as follows :

.... There are certain well recognised exceptions to the audi alteram partem rule established by judicial decisions and they are summarised by S A de Smith in Judicial Review of Administrative Action, 2nd ed., at p. 168 to 179. If we analyse these exceptions a little closely, it will be apparent that they do not in any way militate against the principle which requires fair play in administrative action. The word "exception" is really a misnomer because in these exclusionary cases the audi alteram partem rule is held inapplicable not by way of an exception to "fair play in action", but because nothing unfair can be inferred by not affording an opportunity to present or meet a case. The audi alteram partem rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law "lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation". Since the life of the law is not logic but experience and every legal proposition must, in the ultimate

analysis, be tested on the touchstone of pragmatic realism, the audi alteram partem rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands.

It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case. True rue it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the audi alteram partem should be wholly excluded. The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances". The audi alteram partem rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. That is why Tucker, LJ, emphasised in Russel v. Duke of Norfolk (1949) 1 All ER 109 that "whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case".

25. In the said case, Kailasam, J, while dealing with the concept of applicability of natural justice referred to the decision of hon'ble Supreme Court in Union of India v. J N Sinha (1970) 2 SCC 458 and held as follows :

"Rules of natural justice cannot be equated with the fundamental rights". As held by the Supreme Court in Union of India v. J N Sinha (1970) 1 SCR 791, that "Rules of natural justice are not embodied rules nor can they be elevated to the position of Fundamental Rights. Their aim is to secure justice and to prevent miscarriage of justice. They do not supplant the law but supplement it. If a statutory provision can be read consistently with the principles of natural justice the court should do so but if a statutory provision that specifically or by necessary implication excludes the application of any rules of natural justice this court cannot ignore the

mandate of the Legislature or the statutory authority and read into the concerned provision the principles of natural justice". So also the right to be heard cannot be presumed when in the circumstances of the case, there is paramount need for secrecy or when a decision will have to be taken in emergency or when promptness of action is called for where delay would defeat the very purpose or where it is expected that the person affected would take an obstructive attitude. To a limited extent it may be necessary to revoke or to impound a passport without notice if there is real apprehension that the holder of the passport may leave the country if he becomes aware of any intention on the part of the Passport Authority or the Government to revoke or impound the passport. But that itself would not justify denial of an opportunity to the holder of the passport to state his case before the final order is passed. It cannot be disputed that the Legislature has not by express provision excluded the right to be heard...'

26. In *Swadeshi Cotton Mills v. Union of India* (1981) 1 SCC 664, Sarkaria, J, speaking for the majority noticed the concept of basic facets of natural justice, the twin principles, namely, *audi alteram partem* and *nemo iudex in re sua*, the decisions rendered in *Maneka Gandhi* (supra), *State of Orissa v. Dr. Bina Pani Dei* AIR 1967 SC 1269 and *A K Kraipak v. Union of India* (1969) 2 SCC 262 and held –

*"31. The rules of natural justice can operate only in areas not covered by any law validly made. They can supplement the law but cannot supplant it (Per Hegde, J, in A K Kraipak, 2 SCC 262). If a statutory provision either specifically or by inevitable implication excludes the application of the rules of natural justice, then the court cannot ignore the mandate of the Legislature. Whether or not the application of the principles of natural justice in a given case has been excluded, wholly or in part, in the exercise of statutory power, depends upon the language and basic scheme of the provision conferring the power, the nature of the power, the purpose for which it is conferred and the effect of the exercise of that power – see *Union of India v. Col. J N Sinha* (1970) 2 SCC 458.*

*33. The next general aspect to be considered is : Are there any exceptions to the application of the principles of natural justice, particularly the *audi alteram partem* rule ? We have already noticed that the statute conferring the power, can by express language exclude its application. Such cases do not present any difficulty. However, difficulties arise when the statute conferring the power does not expressly exclude this rule but its exclusion is sought by implication due to the presence of certain factors : such as, urgency, where the obligation*

to give notice and opportunity to be heard would obstruct the taking of prompt action of a preventive or remedial nature....”

27. In *Liberty Oil Mills v. Union of India* (1984) 3 SCC 465, larger Bench of the Apex Court has held ^a.... *We do not think that it is permissible to interpret any statutory instruments so as to exclude natural justice, unless the language of the instrument leaves no option to the court.*

28. In *Union of India v. Tulsiram Patel* (1985) 3 SCC 398 the Apex Court has expressed, thus :

“100. In Swadeshi Cotton Mills v. UoI, (1981) 1 SCC 664 Chinnappa Reddy, J, in his dissenting judgment summarised the position in law on this point as follows (at page 591): (SCC p. 712, para 106).

The principles of natural justice have taken deep root in the judicial conscience of our people, nurtured by Binapani, Kraipak, Mohinder Singh Gill, Maneka Gandhi, etc., etc. They are now considered as fundamental to the “implicit in the concept of ordered liberty” and, therefore, implicit in every decision-making function, call it judicial, quasi-judicial or administrative. Where authority functions under a statute and the statute provides for the observance of the principles of natural justice in a particular manner, natural justice will have to be observed in that manner and in no other. No wider right than that provided by statute can be claimed nor can the right be narrowed. Where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken to imply compliance with the principles of natural justice. The implication of natural justice being presumptive it may be excluded by express words of statute or by necessary intendment. Where the conflict is between the public interest and the private interest, the presumption must necessarily be weak and may, therefore, be readily displaced.”

29. In *Union of India v. W N Chadha* (1993) Supp (4) SCC 260 their lordships, while adverting to the issue of applicability of the doctrine of natural justice, have ruled as follows :

‘79. The rule of audi alteram partem is a rule of justice and its application is excluded where the rule will itself lead to injustice. In A S de Smith’s Judicial Review of Administrative Action, 4th Ed. at page 184, it is stated that in administrative law, a prima facie right to prior notice and opportunity to be heard may be held to be excluded by implication in the presence of some factors, singly or in combination with another. Those special factors are mentioned under items (1) to (10) under the heading “Exclusion of the audi alteram partem rule”.

80. Thus, there is exclusion of the application of audi alteram partem rule to cases where nothing unfair can be inferred by not affording an opportunity to present and meet a case. This rule cannot be applied to defeat the ends of justice or to make the law "lifeless, absurd, stultifying and self-defeating or plainly contrary to the common sense of the situation" and this rule may be jettisoned in very exceptional circumstances where compulsive necessity so demands.

81. Bhagwati, J, (as the learned Chief Justice then was) in *Maneka Gandhi* speaking for himself, *Untawalia and Murtaza Fazal Ali, JJ*, has stated, thus :

.... Now, it is true that since the right to prior notice and opportunity of hearing arises only by implication from the duty to act fairly, or to use the words of Lord Morris of *Borth-y-Gest*, from fair play in action, it may equally be excluded where, having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provision, fairness in action does not demand its implication and even warrants its exclusion....

82. Thus, it is seen from the decision in *Maneka Gandhi* that there are certain exceptional circumstances and situations where under the application of the rule of audi alteram partem is not attracted...."

After so stating, their lordships referred to a passage from Paul Jackson in *Natural Justice* and various other decisions.

88. Applying the above principle, it may be held that when the investigating officer is not deciding any matter except collecting the materials for ascertaining whether a prima facie case is made out or not and a full enquiry in case of filing a report under section 173(2) follows in a trial before the Court or Tribunal pursuant to the filing of the report, it cannot be said that at that stage rule of audi alteram partem superimposes an obligation to issue a prior notice and hear the accused which the statute does not expressly recognise. The question is not whether audi alteram partem is implicit, but whether the occasion for its attraction exists at all.'

30. In *D K Yadav v. J M A Industries Ltd.* (1993) 3 SCC 259, the hon'ble Supreme Court has held as follows :

"7.... Particular statute or statutory rules or orders having statutory flavour may also exclude the application of the principles of natural justice expressly or by necessary implication. In other respects the principles of natural justice would apply unless the employer should justify its exclusion on given special and exceptional exigencies."

31. In *Dr. Rash Lal Yadav v. State of Bihar* (1994) 5 SCC 267, the Apex Court, after referring to the decisions in *A K Kraipak* (supra), *Dr. Bina Pani Dei* (supra), *J N Sinha* (supra), *Swadeshi Cotton Mills* (supra) and *Mohinder Singh Gill v. Chief Election Commissioner* (1978) 1 SCC 405, held as follows :

“9. What emerges from the above discussion is that unless the law expressly or by necessary implication excludes the application of the rule of natural justice, courts will read the said requirement in enactments that are silent and insist on its application even in cases of administrative action having civil consequences. However, in this case, the High Court has, having regard to the legislative history, concluded that the deliberate omission of the proviso that existed in sub-section (7) of section 10 of the Ordinance (1980) while re-enacting the said sub-section in the Act, unmistakably reveals the Legislature’s intendment to exclude the rule of giving an opportunity to be heard before the exercise of power of removal. The legislative history leaves nothing to doubt that the Legislature did not expect the State Government to seek the incumbent’s explanation before exercising the power of removal under the said provision. We are in complete agreement with the High Court’s view in this behalf....”

32. In *Mangilal v. State of M P* (2004) 2 SCC 447, while dealing with the principle of applicability of natural justice in awarding compensation under section 357(4) of the Code of Criminal Procedure, 1973, their lordships have observed, thus :

“10.... It has always been a cherished principle. Where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken to imply compliance with the principles of natural justice where substantial rights of parties are considerably affected. The application of natural justice becomes presumptive, unless found excluded by express words of statute or necessary intendment.”

33. In *Union of India v. Tulsiram Patel* AIR 1985 SC 1416, hon’ble Supreme court observed :

“The right of opportunity to be heard can be excluded where the nature of action taken, its objects and purpose and the scheme of the relevant statutory provision warrant its exclusion....”

34. In *Dharampal Satyapal v. Dy. CCE* (2015) 8 SCC 519, hon’ble Apex Court was of the view :

- *If it is felt that a hearing would not change the ultimate conclusion reached by the decision maker, then no legal duty to supply a hearing arises.*

35. In *W N Chaddha* (supra), hon'ble Apex Court observed that :

The question is not whether audi alteram partem is implicit, but whether the occasion for its attraction exists at all...

36. In *State of Maharashtra v. Jalgaon Municipal Council* (2003) 9 SCC 731, the hon'ble Supreme Court observed as :

"Some of the relevant factors which enter the judicial process of thinking for determining the extent of moulding the nature and scope of fair hearing and may reach to the extent of right to hearing being excluded are : (i) the nature of the subject-matter, and (ii) exceptional situations. Such exceptionality may be spelled out by (i) need to take urgent action for safeguarding public health or safety or public interest, (ii) the absence of legitimate exceptions, (iii) by refusal of remedies in discretion, (iv) doctrine of pleasure such as the power to dismiss an employee at pleasure, (v) express legislation."

37. In *A K Kraipak* (supra), hon'ble Supreme Court observed that :

.... The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it....

38. In *C B Gautam v. Union of India* (1993) 1 SCC 78, hon'ble Apex Court was of the view :

"It is true that if a statutory provision can be read consistently with the principles of natural justice, the courts should do so because it must be presumed that the Legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But If, on the other hand, a statutory provision either specifically or by necessary implication excludes the application of any or all the principles of natural justice then the court cannot ignore the mandate of the Legislature or the statutory authority and read into the concerned provision the principles of natural justice...."

39. In *M P Industries Ltd. v. Union of India* AIR 1966 SC 671, it was observed by hon'ble Supreme Court that :

"The said opportunity need not necessarily be by personal hearing. It can be by written representation. Whether the said opportunity should be by written representation or by personal hearing depends upon the facts of each case and ordinarily it is in the discretion of the tribunal. The facts of the present case disclose that a written representation would effectively meet the requirements of the principles of natural justice."

40. In *S L Kapoor* (supra) the hon'ble Supreme Court was of the view :

“Where on the admitted or undisputed facts only one conclusion is possible and under the law only one penalty is permissible, the court may not insist on the observance of the principles of natural justice.”

41. The aforesaid observation has been highlighted by hon'ble Supreme Court, in a different way, observing that “useless formality” is another exception to the ratio of natural justice. Where on the admitted or undisputed facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not insist on the observance of the principles of natural justice because it would be futile to order its observance. Therefore, where the result would not be different, and it is demonstrable beyond doubt, order of compliance with the principles of natural justice will not be justified.

42. From the aforesaid decisions of hon'ble Supreme Court, the exception on the principle of rules of natural justice can be summarised as follows :

- (i) Exclusion in case of emergency,
- (ii) Express statutory exclusion
- (iii) Where disclosure would be prejudicial to public interests
- (iv) Where prompt action is needed
- (v) Where it is impracticable to hold hearing or appeal
- (vi) Exclusion in case of purely administrative matters
- (vii) Where no right of person is infringed
- (viii) The procedural defect would have made no difference to the outcome
- (ix) Exclusion on the ground of “no fault” decision maker, etc.
- (x) Where on the admitted or undisputed fact only one conclusion is possible – it will be useless formality.

43. There is no specific provision under the I&B Code, 2016 to provide hearing to corporate debtor in a petition under section 7 or 9 of the I&B Code, 2016.

44. 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 (18 of 2013).

45. Section 420 of the Companies Act, 2013 relate to “orders of Tribunal”. Sub-section (1) of section 420 mandates the Tribunal to provide the parties before it, the reasonable opportunity of being heard before passing orders

as it thinks fit, as quoted below :

“420. Orders of Tribunal. – (1) The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.”

46. I&B Code, 2016 empowers adjudicating authority to pass orders under sections 7, 9 and 10 of the I&B Code, 2016 and not the National Company Law Tribunal. It is by virtue of the definition under sub-section (1) of section 5 read with section 60 of the I&B Code, 2016, the National Company Law Tribunal plays role of an adjudicating authority.

47. Section 60 of the I&B Code, 2016 which relate to adjudicating authority for corporate persons which empowers the National Company Law Tribunal to entertain and dispose of the petition as stipulated under sub-section (5) of section 60 reads as follows : –

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

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of – (a) any application or proceeding by or against the corporate debtor or corporate person; (b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and (c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.”

48. By section 255 of the I&B Code, 2016 certain provisions of the Companies Act, 2013 has been amended in the manner as specified in the XIth Schedule. By virtue of article 32 of XIth Schedule, the section 424 of the Companies Act, 2013 stands amended as follows :

’32. In section 424, - Commencement of winding up by Tribunal. (i) in sub-section (1), after the words, “other provisions of this Act”, the words “or of the Insolvency and Bankruptcy Code, 2016” shall be inserted; (ii) in sub-section (2), after the words, “under this Act”, the words “or under the Insolvency and Bankruptcy Code, 2016” shall be inserted.’

On such amendment, section 424 of the Companies Act, 2013 reads as follows :

“424. Procedure before Tribunal and Appellate Tribunal. – (1) The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act [or of Insolvency and Bankruptcy Code, 2016] and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act [or under the Insolvency and Bankruptcy Code, 2016,] the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely :

- (a) summoning and enforcing the attendance of any person and examining him on oath;*
- (b) requiring the discovery and production of documents;*
- (c) receiving evidence on affidavits;*
- (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office;*
- (e) issuing commissions for the examination of witnesses or documents;*
- (f) dismissing a representation for default or deciding it ex parte;*
- (g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and*
- (h) any other matter which may be prescribed.*

(3) Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction, –

- (a) in the case of an order against a company, the registered office of the company is situate; or*
- (b) in the case of an order against any other person, the person concerned*

voluntarily resides or carries on business or personally works for gain.

(4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code, and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.”

49. As amended section 424 of the Act 2013 is applicable to the proceeding under the I&B Code, 2016, it is mandatory for the adjudicating authority to follow the Principles of rules of natural justice while passing an order under I&B Code, 2016. Further, as section 424 mandates the ‘Tribunal’ and Appellate Tribunal, to dispose of cases or/appeal before it subject to other provisions of the Act 2013 or I&B Code, 2016 such as, section 420 of the Act 2013 was applicable and to be followed by the Adjudicating Authority.

50. One “Sree Metaliks Ltd. and Anr.” moved before the hon’ble Calcutta High Court in WP No. 7144(W) of 2017 assailing the vires of section 7 of the I&B Code, 2016 and the relevant rules under the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 (‘I&B Rules, 2016’). The challenge was premise upon the contention that the I&B Code, 2016 does not afford any opportunity of hearing to a corporate debtor in a petition under section 7 of I&B Code, 2016. The hon’ble High Court noticed relevant provision of section 7 of the I&B Code, 2016, the definition of “adjudicating authority” as defined under section 5(1), section 61 of the I&B Code, 2016 relating to appeal and amended section 424 of the Companies Act, 2013 and by judgment dated 7th April, 2017 held as follows :

..... However, it is to apply the principles of natural justice in the proceedings before it. It can regulate its own procedure, however, subject to the other provisions of the Act of 2013 or the Insolvency and Bankruptcy Code of 2016 and any Rules made thereunder. The Code of 2016 read with the Rules, 2016 is silent on the procedure to be adopted at the hearing of an application under section 7 presented before the NCLT, that is to say, it is silent whether a party respondent has a right of hearing before the adjudicating authority or not.

Section 424 of the Companies Act, 2013 requires the NCLT and NCLAT to adhere to the principles of the natural justice above anything else. It also allows the NCLT and NCLAT the power to regulate their own procedure. Fetters of the Code of Civil Procedure, 1908 does not bind it. However, it is required to apply its principles. Principles of natural justice require an

authority to hear the other party. In an application under section 7 of the Code of 2016, the financial creditor is the applicant while the corporate debtor is the respondent. A proceeding for declaration of insolvency of a company has drastic consequences for a company. Such proceeding may end up in its liquidation. A person cannot be condemned unheard. Where a statute is silent on the right of hearing and it does not in express terms, oust the principles of natural justice, the same can and should be read into in. When the NCLT receives an application under section 7 of the Code of 2016, therefore, it must afford a reasonable opportunity of hearing to the corporate debtor as section 424 of the Companies Act, 2013 mandates it to ascertain the existence of default as claimed by the financial creditor in the application. The NCLT is, therefore, obliged to afford a reasonable opportunity to the financial debtor to contest such claim of default by filing a written objection or any other written document as the NCLT may direct and provide a reasonable opportunity of hearing to the corporate debtor prior to admitting the petition filed under section 7 of the Code of 2016. Section 7(4) of the Code of 2016 requires the NCLT to ascertain the default of the corporate debtor. Such ascertainment of default must necessarily involve the consideration of the documentary claim of the financial creditor. This statutory requirement of ascertainment of default brings within its wake the extension of a reasonable opportunity to the corporate debtor to substantiate by document or otherwise, that there does not exist a default as claimed against it. The proceedings before the NCLT are adversarial in nature. Both the sides are, therefore, entitled to a reasonable opportunity of hearing.

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

Adherence to the principles of natural justice by NCLT or NCLAT would

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

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

In the facts of the present case, the learned senior advocate for the petitioner submits that, orders have been passed by the NCLT without adherence to the principles of natural justice. The respondent was not heard by the NCLT before passing the order.

It would be open to the parties to agitate their respective grievances with regard to any order of NCLT or NCLAT as the case may be in accordance with law. It is also open to the parties to point out that the NCLT and the NCLAT are bound to follow the principles of natural justice while disposing of proceedings before them.

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

51. As per sub-rule (3) of rule 4 of Rules of 2016, the financial creditor is required to despatch forthwith a copy of the application filed with the adjudicating authority to the corporate debtor as quoted below :

“4. (3) The applicant 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.”

Thus it is clear that sub-rule (3) of rule 4 of I&B (Application to Adjudicating Authority) Rules, 2016, mandates the applicant to dispatch forthwith, a copy of the application “filed with the Adjudicating Authority”. Thereby a post-filing notice required to be issued and not as notice before filing of an application. The purpose for the same being to put corporate debtor to adequate impound notice so that the corporate debtor may bring to the notice of Adjudicating Officer “mitigating factor/records before the application is accepted even before formal notice is received”.

52. The insolvency resolution process under section 7 or section 9 of I&B Code, 2016 have serious civil consequences not only on the corporate debtor-

company but also on its directors and shareholders in view of the fact that once the application under section 7 or 9 of the I&B Code, 2016 is admitted it is followed by appointment of an interim resolution professional to manage the affairs of the corporate debtor, instant removal of the Board of directors and moratorium for a period of 180 days. For the said reason also the Adjudicating Authority is bound to issue limited notice to the corporate debtor before admitting a case under sections 7 and 9 of the I&B Code, 2016.

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

Purpose of issuance of notice

54. Section 7 of the Code provides for process of initiation of corporate insolvency resolution process by a financial creditor, section 8 and 9 provide for process of initiation of insolvency resolution process by an operational creditor and section 10 of the Code provides for process of initiation of insolvency resolution process by the corporate debtor itself.

55. Process of initiation of insolvency resolution process by a financial creditor is provided in section 7 of the I&B Code, 2016. As per sub-section (1) of section 7 of the I&B Code, 2016, the trigger for filing of an application by a financial creditor before the Adjudicating Authority is when a default in respect of any financial debt has occurred. Sub-section (2) of section 7 provides that the financial creditor shall make an application in prescribed form and manner and with prescribed documents, including :

- (i) "record of the default" recorded with the information utility or such other record or evidence of default as may be specified;
- (ii) the name of the resolution professional proposed to act as an interim resolution professional; and
- (iii) any other information as may be specified by the Board

56. The procedure once an application is filed by the financial creditor with the Adjudicating Authority is specified in sub-section (4) of section 7 to sub-section (7) of section 7 of the Code. As per sub-section (4) of section 7 of the I&B Code, 2016 :

“(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).”

57. Sub-section (5) of section 7 of the I&B Code provides for admission or rejection of application of a financial creditor. Where the adjudicating authority is satisfied that – ...“ the documents are complete or incomplete”.

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

59. Unlike section 7 of the I&B Code, 2016 before making an application to the Adjudicating Authority under section 9 of the I&B Code, 2016 the requirements under section 8 of the I&B Code, 2016 are required to be complied with.

60. Under sub-section (1) of section 8 of the Code, 2016 an operational creditor, on occurrence of a default, is required to deliver a notice of demand of unpaid debt or get copy of the invoice demanding payment of the defaulted amount served on the corporate debtor. This is the condition precedent under sections 8 and 9 of the I&B Code, 2016 unlike in section 7, before making an application to the adjudicating authority.

61. Under section 9 of the I&B Code, 2016 a right to file an application accrues after expiry of ten days from the date of delivery of the demand notice or copy of invoice as the case may be, demanding payment under sub-section (1) of section 8 of the I&B Code, 2016. The operational creditor would receive either the payment or a notice of dispute in terms of sub-section (2) of section 8 of the I&B Code, 2016.

62. Thus, it is evident from section 9 of the I&B Code, 2016 that the Adjudicating Authority has to, within fourteen days of the receipt of the application under sub-section (2), either admit or reject the application. Section 9 has two-fold situations insofar as notice of dispute is concerned. As per sub-section (5)(1) of section 9, the Adjudicating Authority can admit the application in case no notice raising the dispute is received by the operational creditor (as verified by the operational creditor on affidavit) and there is no record of a dispute is with the information utility.

On the other hand, sub-section (5) of section 9 mandates the Adjudicating Authority to reject the application if the operational creditor has received notice of dispute from the corporate debtor. Section 9, thus, makes it distinct from section 7. While in section 7, occurrence of default has to be ascertained and satisfaction recorded by the Adjudicating Authority, there no similar provision under section 9. The use of language in sub-section (2) of section 8 of the I&B Code, 2016 provides that 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... the existence of a dispute“. Under section 7 neither notice of demand nor a notice of dispute is relevant whereas under sections 8 and 9 notice of demand and notice of dispute become relevant both for the purposes of admission as well as for and rejection.

63. While ascertaining the ‘Adjudicating Authority’ to comes to a conclusion whether there is an existence of default for the purpose of section 7 or there is a dispute raised by the corporate debtor and all other purpose whether an application is complete or incomplete, it is not only necessary to hear the financial creditor/operational creditor but also the corporate debtor.

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

65. In the present case though no notice was given to the appellant before admission of the case but we find that the appellant intervened before the admission of the case and all the objections raised by appellant has been noticed, discussed and considered by the adjudicating authority while passing the impugned order dated 17th January, 2017. Thereby, merely on the ground that the appellant was not given any notice before admission of the case cannot render the impugned order illegal as the appellant has already been heard. If the impugned order is set aside and the case is remitted back to the adjudicating authority, it would be “useless formality” and would be futile

to order its observance as the result would not be different. Therefore, order to follow the principles of natural justice in the present case does not arise.

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

67. The next question is whether the appellant can claim any protection having granted benefit under MRU Act.

The protection granted by notification issued under section 4 of the MRU Act is limited to the enactments as specified in the Schedule to the MRU Act, as apparent from section 4(1)(a) (1) of the MRU Act and provides as follows :

“4. (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; it 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 or 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” (emphasis supplied”)*

68. The Schedule to the MRU Act specifies only certain acts to which the restriction applies. Accordingly, the application of the MRU Act can only be extended to such acts as specified in the schedule and no other legislation. The legislations referred to in the ‘schedule’ to the MRU Act are employment welfare related which is in consonance with the objects and purpose of the MRU Act, i.e., “employment and unemployment”. The protection under the MRU Act, therefore, cannot be extended to other legislations especially to union legislation which is subsequent to the MRU Act and related to insolvency resolution i.e. I&B Code, 2016

69. Section 4 of the MRU Act, including section 4(iv), therefore, is limited in scope to the acts listed in the schedule thereto.

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

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

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

72. It was submitted on behalf of the appellant that by virtue of the provisions of sections 3 and 4 of the MRU Act read with the notification issued thereunder, a creditor is restrained from exercising its statutory rights under the provisions of the Code. But such submission cannot be accepted as section 238 of the I&B Code, 2016 clearly mandates that the provisions of the I&B Code, 2016 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. This being the position

and considering the mandate laid down in section 238, which is a subsequent law enacted by Parliament, the provisions of the section 238 would have effect notwithstanding the provisions of the MRU Act and any notification issued thereunder, insofar as it restrains the creditor from enforcing its security interest against the relief undertaking in whose favour a notification has been issued.

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

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

75. In view of the aforesaid objects of the two enactments it is apparent that the two enactments operate in entirely different fields. This is further made clear by the fact that the MRU Act is enacted under Entry 23 of List III while the Code has been enacted under Entry 9 of the List III. The stand taken by the learned counsel for the appellant that the MRU Act has been enacted under Entry 24 of List II cannot be accepted as the MRU Act has received Presidential assent under article 254(2) of the Constitution of India, which is only required for statutes enacted by the State Government in exercise of its legislative competence under the Concurrent List.

76. In *Yogender Kumar Jaiswal v. State of Bihar* (2016) 3 SCC 183, the hon'ble Supreme Court, while dealing with article 254, noticed the decision in *Hoechst Pharmaceuticals Ltd. v. State of Bihar* (1983) 4 SCC 45 and observed as follows : –

'55. Thereafter, the court proceeded to state that {Hoechst Pharmaceuticals Ltd. case Hoechst Pharmaceuticals Ltd. v. State of Bihar (1983) 4 SCC 45/1983 SCC (Tax) 248/AIR 1983 SC 1019}, SCC pp. 89-90, para 69) :

"69.... 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 U 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 I as well as List F. 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."....

62. Having stated the proposition where and in which circumstances the principle of repugnancy would be attracted and the legislation can be saved or not saved, it is necessary to focus on clause (2) of article 254 of the Constitution. In Hindustan Times v. State of UP {Hindustan Times v. State of UP (2003) 1 SCC 591}, after referring to the earlier judgments, it has been held that article 254(2) carves out an exception and, that is, if the Presidential assent to a State law which has been reserved for his consideration is obtained under article 200, it will prevail notwithstanding the repugnancy to an earlier law of the Union. The relevant passage of the said authority is extracted below : (SCC pp. 599-600, para 19)

"19. As noticed hereinbefore, the State of Uttar Pradesh intended to make a legislation covering the same field but even if the same was to be made, it would have been subject to the parliamentary legislation unless assent of the President of India was obtained in that behalf. The State executive was, thus, denuded of any power in respect of a matter with respect where to Parliament has power to make laws, as its competence was limited only to the matters with respect to which the Legislature of the State has the requisite legislative competence. Even assuming that

the matter relating to the welfare of the working journalists is a field which falls within Entry 24 of the Concurrent List, unless and until a legislation is made and assent of the President is obtained, the provisions of the 1955 Act and the Working Journalists (Fixation of Rates and Wages) Act, 1958 would have prevailed over the State enactment.”

77. In *Madras Petrochem Ltd. v. BIFR* (2016) 34 SCL 193 (SC), the hon'ble Supreme Court was considering the question whether pendency of reference before BIFR bar enforcement of secured assets under SARFAESI Act, 2002. In the said case, the hon'ble Supreme Court having noticed the earlier decisions observed :

*'29. On the other hand, in *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd.* {*Solidaire India Ltd. v. Fairgrowth Financial Services Ltd.* (2001) 3 SCC 71}, it was the *Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992* which came up for consideration vis-a-vis the *Sick Industrial Companies (Special Provisions) Act, 1985*. In paras 9 and 10 of this court's judgment, this court noted that both Acts were special Acts. In a significant extract from a special court judgment, which was approved by this court, it was stated that the *Special Courts Act, 1992*, being a later enactment and also containing a non-obstante clause, would prevail over the *Sick Industrial Companies (Special Provisions) Act, 1985*. Had the Legislature wanted to exclude the provisions of the *Sick Industrial Companies (Special Provisions) Act, 1985*, from the ambit of the said Act, the Legislature would specifically have so provided. The fact that the Legislature did not specifically so provide necessarily means that the Legislature intended that the provisions of the said Act were to prevail over the provisions of the *Sick Industrial Companies (Special Provisions) Act, 1985*. In short, when property of notified persons under the *Special Courts Act, 1992* stands attached, it is only the special court which can give directions to the custodian under the said Act as to disposal of such property of a notified party. The Legislature expressly overrode section 22 of the *Sick Industrial Companies (Special Provisions) Act, 1985* and permitted the custodian to give directions under section 11 of the *Special Courts Act, 1992*, notwithstanding section 22 of the *Sick Industrial Companies (Special Provisions) Act, 1985*.*

36. A conspectus of the aforesaid decisions shows that the *Sick Industrial Companies (Special Provisions) Act, 1985* prevails in all situations where there are earlier enactments with non-obstante clauses similar to the *Sick Industrial Companies (Special Provisions) Act, 1985*. Where there are

later enactments with similar non-obstante clauses, the Sick Industrial Companies (Special Provisions) Act, 1985 has been held to prevail only in a situation where the reach of the non-obstante clause in the later Act is limited – such as in the case of the Arbitration and Conciliation Act, 1996 – or in the case of the later Act expressly yielding to the Sick Industrial Companies (Special Provisions) Act, 1985, as in the case of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Where such is not the case, as in the case of Special Courts Act, 1992, it is the Special Courts Act, 1992 which was held to prevail over the Sick Industrial Companies (Special Provisions) Act, 1985.

39. This is what then brings us to the doctrine of harmonious construction, which is one of the paramount doctrines that is applied in interpreting all statutes. Since neither section 35 nor section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is subject to the other, we think it is necessary to interpret the expression “or any other law for the time being in force” in section 37. If a literal meaning is given to the said expression, section 35 will become completely otiose as all other laws will then be in addition to and not in derogation of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Obviously this could not have been the parliamentary intendment, after providing in section 35 that the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 will prevail over all other laws that are inconsistent therewith. A middle ground has, therefore, necessarily to be taken. According to us, the two apparently conflicting sections can best be harmonised by giving meaning to both. This can only be done by limiting the scope of the expression “or any other law for the time being in force” contained in section 37. This expression will, therefore, have to be held to mean other laws having relation to the securities market only, as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is the only other special law, apart from the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, dealing with recovery of debts due to banks and financial institutions. On this interpretation also, the Sick Industrial Companies (Special Provisions) Act, 1985 will not be included for the obvious reason that its primary objective is to rehabilitate sick industrial companies and not to deal with the securities market.’

78. Following the law laid down by hon'ble Supreme Court in *Yogendra Krishnan Jaiswal and Madras Petrochem Ltd.* (supra) 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 I&B Code, 2016.

80. Insofar as MRA 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 MRA. In that view of the matter, the appellant cannot derive any advantage of the MRA dated 8th September, 2014.

82. As discussed in the previous paragraphs, for initiation of corporate resolution process by financial creditor under sub-section (4) of section 7 of the I&B Code, 2016, the adjudicating authority on receipt of application under sub-section (2) is required to ascertain existence of default from the records of Information Utility or on the basis of other evidence furnished by the financial creditor under sub-section (3). Under section 5 of section 7, the adjudicating authority is required to satisfy –

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

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

84. Beyond the aforesaid practice, the adjudicating authority is not required

to look into any other factor, including the question whether permission or consent has been obtained from one or other authority, including the JLF. Therefore, the contention of the petitioner that the respondent has not obtained permission or consent of JLF to the present proceeding which will be adversely affect loan of other members cannot be accepted and is to be rejected.

85. In the aforesaid circumstances the adjudicating authority having satisfied on all counts, including default and that the application is complete and that there is no disciplinary proceeding pending against the insolvency resolution professional, no interference is called for against the impugned judgment.

86. We find no merit in this appeal. It is accordingly dismissed. However, in the facts and circumstances, there shall be no order as to cost.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

15 May, 2017

ANNEXURE X.10

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION****Company Appeal (AT) (Insolvency) No. 5 of 2017**

(arising out of Order dated 17th February, 2017 passed by National Company Law Tribunal, Mumbai Bench, in C.P. No. 12/I&B/NCLT/MAH/2017)

IN THE MATTER OF:

M/s. Starlog Enterprises Limited ... Appellant

Vs

ICICI Bank Limited ... Respondent

Present:

For Appellant : Mr R.S. Majumdar, Senior Advocate
alongwith Mr Darshan Mehta, Mr Raghav Dwivedi,
Ms Nirali Sanghavi and Mr Vaibhav Modi,
Advocates

For Respondents: Mr Ramji Srinivasan, Senior Advocate with
Mr Aslam Ahmed, Mr Sharad Kharra,
Ms Srivardhani and Mr Babit Singh Jamwal,
Advocates.

JUDGMENT**SUDHANSU JYOTI MUKHOPADHAYA, J**

1. This application under section 61 of Insolvency and Bankruptcy Code, 2016 ('I&B Code') has been preferred by appellant-corporate debtor against ex parte order dated 17th February, 2017 passed by Adjudicating Authority, Mumbai Bench, under section 7 of the I&B Code whereby the "adjudicating authority" was pleased to admit the petition preferred by respondent-financial creditor.

2. The appellant has challenged the impugned order on one of the grounds that in absence of notice given to the appellant before admitting the case under section 7 of the I&B Code, the impugned order is violative of rules of natural justice.

3. The other ground taken by the appellant is that the application preferred by respondent/financial creditor under section 7 is incomplete, misleading and being not bona fide was fit to be rejected.

4. Learned counsel for the appellant submitted that the appellant could have brought the aforesaid facts to the notice of the “adjudicating authority” had it been given notice prior to admission. Detailed argument has been made by learned senior counsel for the appellant on the question of issuance of notice prior to admission, in adherence to principle of rules of natural justice.

5. The aforesaid issue now stands decided by decision of the Appellate Tribunal in *Innoventive Industries Ltd. v. ICICI Bank in CA (AT) (Insolvency) Nos. 1 and 2 of 2017* wherein the Appellate Tribunal observed and held :

“43. There is no specific provision under the I&B Code, 2016 to provide hearing to corporate debtor in a petition under section 7 or 9 of the I&B Code, 2016.”

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

In this connection we may state that the vires of section 7 of I&B Code was considered by hon’ble Calcutta High Court in “*Sree Metaliks Ltd. and Anr.*” in Writ Petition 7144(W) of 2017, wherein hon’ble High Court by its judgment dated 7th April, 2017 held as follows :

“.... However, it is to apply the principles of natural justice in the proceedings before it. It can regulate its own procedure, however, subject to the other provisions of the Act of 2013 or the Insolvency and Bankruptcy Code of 2016 and any rules made thereunder. The Code of 2016 read with the Rules, 2016 is silent on the procedure to be adopted at the hearing of an application under section 7 presented before the NCLT, that is to say, it is silent whether a party respondent has a right of hearing before the adjudicating authority or not.

Section 424 of the Companies Act, 2013 requires the NCLT and NCLAT to adhere to the principles of the natural justice above anything else. It also allows the NCLT and NCLAT the power to regulate their own procedure. Fetters of the Code of Civil Procedure, 1908 does not bind it. However, it

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

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

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

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

In the facts of the present case, the learned senior advocate for the petitioner submits that, orders have been passed by the NCLT without adherence to the principles of natural justice. The respondent was not heard by the NCLT before passing the order.

It would be open to the parties to agitate their respective grievances with regard to any order of NCLT or NCLAT as the case may be in accordance with law. It is also open to the parties to point out that the NCLT and the NCLAT are bound to follow the principles of natural justice while disposing of proceedings before them.

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

6. Therefore, it is clear that before admitting an application under section 9 of the I&B Code it is mandatory duty of the adjudicating authority to issue notice.

7. In the present case admittedly no notice was issued by the adjudicating authority to the corporate debtor, before admitting the application filed under section 9 of the I&B Code. For the said reason the judgment order cannot be upheld having passed in violation of principle of natural justice.

8. Next contention of learned senior counsel for the appellant was that the financial creditor misrepresented material facts before the adjudicating authority in order to obtain order of admission of the application. He highlighted the conduct of the financial creditor by highlighting the following facts.

9. On 6th February, 2017, the financial creditor addressed a notice to the appellant calling upon to pay a sum of Rs. 10,02,28,271.60 which was overdue as on 6th February, 2017. The notice dated 6th February, 2017 was received by the appellant only on 8th February, 2017.

10. Before the appellant could have replied or taken any necessary action in respect of the said notice on 8th February, 2017 the appellant received a letter from the counsel for the financial creditor serving a copy of the present application, relevant portion of which reads as follows :

“We send herewith a copy of the captioned company application on behalf of our client under section 7 of the I&B Code, as and by way of service upon you,”

without directly or indirectly specifying whether the said application has been filed or clarifying whether the said application would be mentioned or heard on any particular date/time, as is the prevalent practice.

11. Learned senior counsel for the appellant also submitted that the application filed by the financial creditor before the adjudicating authority they inflated the default amount to be Rs.29,81,02,395.62. Even Annexure 2 to the said application reflected “principal unmatured” arrived in the computing the “default amount”.

12. Learned senior counsel for the appellant further submits that as per the repayment schedule under the loan agreements, the entire aforementioned amount had not become due and payable as on 6th February, 2017. Neither the financial creditor, by his own admission, recalled the entire loan amount.

13. In view of the same, it was submitted that the computation of the default amount of Rs.29,81,02,395.62 is grossly incorrect and contrary to the provisions of law.

14. It was further submitted that for the said misstatement, the financial creditor ought to be adequately penalised under the provisions of the I&B Code particularly under section 75.

15. The learned counsel also highlighted the conduct of the respondent-ICICI Bank – and pleaded as follows :

- (a) The respondent herein is a part of the joint lenders' forum ('JLF') constituted by the appellant pursuant to the guidelines of the Reserve Bank of India ('RBI'). The JLF for the appellant was formed at the instance of the respondent vide the meeting held on 14th June, 2014. Thereafter, from 14th June 2014 till 2nd February, 2017, the respondent along with the other lenders of the appellant and the appellant itself, have been participating in the periodically held meetings of the JLF, in all of which meetings the JLF had unanimously agreed to adopt 'rectification' as the corrective action plan ('CAP') for the appellant. It is pertinent to note that the respondent itself had requested the lead

lender of the appellant (L&T Infrastructure Finance Co.) to convene the JLF meetings as the lead lender from February 2016 onwards.

- (b) As per the minutes of the meeting held on 2nd February, 2017 circulated by the lead lender, the effect of the JLF meeting is that the JLF has decided to continue with rectification as CAP for the appellant and members of JLF have been requested “not to proceed with any individual asset level action”. The respondent, however, chose to dispute these minutes vide their email dated 16th February, 2017 as circulated by respondent No. 33. As per the purported minutes of the meeting, the JLF lenders had resolved that rectification as the CAP has failed and the JLF members have decided to explore their options for regularising the account.
- (c) By the time the correct minutes of the meeting dated 2nd February, 2017 were circulated by the lead lender on 16th February, 2017, the respondent had already filed its application on 8th February, 2017 itself with the adjudicating authority against the appellant without the knowledge/consent of the other members of the JLF. It is pertinent to note that the respondent while disputing the said minutes does not even mention about the said application filed by the respondent against the appellant before the adjudicating authority and their reliance on the purported minutes of meeting in the said application.
- (d) *Arguendo* the purported minutes of the meeting are correct, that still does not justify the filing of the said application by the respondent before the adjudicating authority *de hors* the structure of JLF. The JLF members as per respondent’s own version had agreed to “*explore their action for resolving...*” And not to resort to filing of application under section 7 of the I&B Code. Possibly the notice of demand served by the respondent to the appellant on 6th February, 2017 was in furtherance of “*exploration of its action for resolving...*”. However, the filing of the application under section 7 of the I&B Code independently by the respondent, totally disregarding the other members of the Forum was a mischief played by the respondent upon the appellant for reasons best known to them, which mischief is apparent from the aforesaid conduct of the respondent.
- (e) The respondent has acted contrary to the guidelines of the RBI in relating to JLF, particularly the guideline issued on 24th September, 2015 which at para 5.2 of the guidelines stipulates that in case of disagreement between the members of the JLF on deciding the CAP for borrower, the dissenting lender shall have an option to exit their

exposure by completely selling their exposure to a new or existing lender. Therefore, clearly the object of the RBI is clearly that the lenders act through the JLF structure and do not go beyond the JLF structure or in other words lenders do not act independent of JLF especially when an exit option exists for an individual lender. In this regard, it is pertinent to refer to the recent judgment of the hon'ble Bombay High Court in the cases of IDFC Bank Ltd. v. Ruchi Soya Industries Ltd., inter alia, laying down two propositions – firstly, circulars issued by the RBI pertaining to JLF are statutory in nature and binding upon the banks and secondly, that member of JLF cannot independently resort to/adopt any proceedings during the on-going process of rectification through the JLF.

16. Similar argument was raised in Innoventive Industries Ltd. v. ICICI Bank. Having noticed such argument, the Appellate Tribunal in Innoventive Industries Ltd. v. ICICI Bank held that :

“82. As discussed in the previous paragraphs, for initiation of corporate resolution process by financial creditor under sub-section (4) of section 7 of the Code, 2016, the Adjudicating Authority on receipt of application under sub-section (2) is required to ascertain existence of default from the records of information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3). Under section 5 of section 7, the Adjudicating Authority is required to satisfy –

- (a) Whether a default has occurred;*
- (b) Whether an application is complete; and*
- (c) Whether any disciplinary proceeding is against the proposed insolvency resolution professional.*

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

84. Beyond the aforesaid practice, the adjudicating authority is not required to look into any other factor, including the question whether permission or consent has been obtained from one or other authority, including the JLF. Therefore, the contention of the petitioner that the respondent has not obtained permission or consent of JLF to the present proceeding which will be adversely affect loan of other members cannot be accepted and fit to be rejected.”

17. The impact of the insolvency resolution professional ('IRP') on the business and management of the appellant, alleged to be as follows :

The interim IRP has been appointed by the adjudicating authority by the impugned order. On 1st March, 2017 the IRP issued a public notice in Economic Times therein calling upon the creditors of the company to submit their claims. From 2nd March, 2017 onwards the IRP has been attending office from the appellant's premises and has taken over the management of affairs of the appellant.

18. Learned counsel highlighted the events that occurred pursuant to IRP taking over the management of the affairs of the appellant.

- 18.1 G.E Industrial India (P.) Ltd. ('GE') has been a crucial and important client of the appellant. GE had placed several orders in October 2016 and January 2017 for commission of the appellant's cranes at its project sites at Lalpur, Kadapa, Jamnagar, etc. The nature of appellant's contracts with its clients are such that the appellant is required to regularly and in a very prompt, timely manner, meet the requirements raised by its clients such as release of funds for the day-to-day functioning of the cranes as well as management of the staff handling the cranes, hiring and dispatching the necessary contractors, engineers to the project sites as may be required, etc.
- 18.2 GE addressed several e-mails dated 6th March and 7th March 2017 and so on to the appellant in respect of the appellant's cranes commissioned at GE's Kadappa site. GE, inter alia, required the appellant to urgently release funds for the crane's diesel, send a safety engineer at the project site and take necessary action in respect of replacement of cotter pin in one of the ancillary equipments.
- 18.3 The appellant's project manager forwarded each of these e-mails to the IRP along with an explanation regarding the nature of the service and the timelines for the same, wherever required.
- 18.4 Despite the lengthy trail of correspondence and constant service requests, IRP failed to do much as satisfactorily reply to GE's concerns, much less release the necessary funds and take actions. As a result of IRP's failure to release necessary funds and act on the service requests in a timely manner, the appellant was unable to perform its contractual obligations qua GE.
- 18.5 Ultimately vide an email dated 18th March, 2017, GE has terminated the contract with the appellant resulting in a financial loss of at least

Rs.2,70,00,000 as well as loss of goodwill that the appellant has painstakingly built in this business over the last 30 years.

18.6 It came to the knowledge of one of appellant's director Mr. Saket Agarwal that the IRP had contrary to the powers granted to him under the I&B Code, instruct some of the employees of the respondent to disclose the bank account details of the following companies which are subsidiaries of the appellant –

- (i) Starport Logistics Ltd.;
- (ii) ABG Turnkey (P.) Ltd.;
- (iii) Kandla Container Terminal (P.) Ltd.; and
- (iv) ABG Projects & Services Ltd., UK.

18.7 It appears that the IRP had directed employees of the appellant to change the mandate of authorised signatories in the bank accounts of the aforesaid subsidiaries and had also addressed correspondence to the banks requesting a change in the authorised signatories.

18.8 The I&B Code does not in any manner empower an IRP to interfere with the affairs of the subsidiaries of the corporate debtor. In fact, the Explanation to section 18 of the I&B Code explicitly provides that the assets of the corporate debtor shall not include the assets of its Indian or foreign subsidiaries. In that view of the matter, the aforesaid act of the IRP is ex facie illegal and unsustainable in law.

18.9 As a result of the absolute mismanagement and dis-interest in the management of the affairs of the appellant, the appellant has suffered loss of several valuable human resources, namely, Mr. R C Swamy, project manager who has been with the employment of the appellant since 26 years, submitted his resignation therein citing "the working atmosphere" at the appellant's office as "severe stress" as the reasons for his resignation. Mr. Meet Shay, deputy manager e-mailed his resignation on 28th March, 2017. Mr. Arup Kumar Ghosh, who was directed by the IRP to take charge of the head office activities of the appellant e-mailed his resignation on 29th March, 2017 citing inability to "bear the stress to do so". Mr. Varun Kaka, Legal Associate of the appellant also resigned on 29th March, 2017.

19. Sub-section (12) of section 3 of I&B Code defined "default" to mean "a liability or obligation in respect of claim which is due from an person...." The principal (unmatured) amount, never having become due and payable to the financial creditor could not have been claimed as the default amount.

20. Impugned order herein suffers from the vice of non-application of mind by the adjudicating authority on the following counts :

- 20.1 The ascertainment of existence of default by the adjudicating authority which under the provisions of sub-section (4) of section 7 of the I&B Code has to be based on the application/other evidence submitted by the financial creditor, suffers from non-application of mind given the apparent and conspicuous mismatch between the amount demanded by the respondent from the appellant in its demand notice dated 6th February, 2017 and the amount stated to be in default in the said application.
- 20.2 Secondly, the Adjudicating Authority in paragraph 8 of the impugned order has recorded that proof of service showing service of notice upon the corporate debtor before filing the petition has been filed by the financial creditor, without considering the true nature and purport of the so-called notice dated 8th February, 2017 which did not even mention the essential details which were to be mentioned, such as :
 - (a) whether the application has been filed;
 - (b) if the application is filed, what is the filing number; and
 - (c) date of listing, if notified.
- 20.3 The notice has been given without considering the provisions of sub-rule (3) of rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which mandates that an application shall “dispatch forthwith”, a copy of the application “**filed with the Adjudicating Authority**”. Thereby meaning a post-filing notice and not “before filing”, the obvious purpose for the same being to put the corporate debtor to adequate and informed notice. The adjudicating authority ought to have realised these deviations from the prescribed procedure and either rejected the application or directed the respondent to follow the provisions of sub-rule (3) of rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and rule 21 of the National Company Law Tribunal Rules.
- 20.4 Lastly, the adjudicating authority has reached a conclusion at paragraph 9 of the impugned order that it is satisfied that the appellant has committed a default of Rs.27.77 crore, which finding is not only perverse, but also is contrary to the very application of the financial creditor itself in complete disregard to the apparent and conspicuous mismatch between the amount demanded by the financial creditor from the appellant-corporate debtor in its demand notice dated 6th

February, 2017 and the amount stated to be in default in the said application.

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

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

23. Admittedly the impugned order is ex facie illegal and ought to be set aside by the Appellate Tribunal. For the reasons aforesaid, we set aside the ex parte impugned order dated 17th February, 2017 passed by adjudicating authority, Mumbai Bench in CP No. 12/I&BP/NCLT/MAH/2017 and allow the appeal.

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

25. In the facts and circumstances, we impose a cost of Rs. 50,000 on respondent-financial creditor, ICICI Bank – to be paid in favour of Registrar, National Company Law Appellate Tribunal, New Delhi by demand draft within one month towards development of its Library. The appeal is allowed with aforesaid observations and directions.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J.Mukhopadhaya)
Chairperson

NEW DELHI

24th May, 2017

ANNEXURE X.11

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION****Company Appeal (AT) No. 09 of 2017****(arising out of Order dated 9th March 2017 passed by NCLT, Allahabad Bench in C.P.No. 19/Ald/2017)****JK Jute Mills Company Limited****Appellant****Vs.****M/s Surendra Trading Company****Respondent****Present: For Appellants: Mr. Virendra Ganda, Senior Advocate with Mr. Arvind Kumar and Mr. Abhijeet Sinha, Advocates****For Respondent: Mr. Krishnendu Dutta with Ms. Bhawna Chopra Rustogi, Ms. Prachi Ohri, Advocates for R-1****Mr. Ashok Kumar Jain with Mr. Sahil Dhawan, Advocates for R-2****For other Respondents: Mr. Shakti Ahmed and Mr. Atanu Mukherjee, Advocates.****JUDGEMENT****SUDHANSU JYOTI MUKHOPADHAYA.J.**

1. This appeal has been preferred by appellant-J K Jute Mills Company Limited against Order dated 9th March, 2017 passed by Adjudicating Authority (National Company Law Tribunal), Allahabad Bench in CP No. 10/Ald/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 (hereinafter referred to as '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" (hereinafter referred to as '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 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 limit 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 :

“Section 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 :

“Section 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 :

“Section 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 specified; 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 :

“Section 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 :

“Section 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 be 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 Devi and Others (2005) 6 SCC 705**, concurring with the ratio laid down in **Kailash V. Nanhku (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 and 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.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J.Mukhopadhaya)
Chairperson

NEW DELHI

1st May, 2017

ANNEXURE X.12

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8400 of 2017

M/S. SURENDRA TRADING COMPANYAPPELLANT(S)

VERSUS

**M/S. JUGGILAL KAMLAPAT JUTE MILLS COMPANY
LIMITED AND OTHERSRESPONDENT(S)**

WITH

**CIVIL APPEAL NOS.15091-15091 OF 2017
(ARISING OUT OF DIARY NO. 22835 OF 2017)**

JUDGMENT

A.K. SIKRI, J.

Permission to file the appeal is granted and delay condoned in Diary No. 22835 of 2017.

2. Though this case has a past history as well, in the instant appeal, we are concerned with the correctness of the order dated May 01, 2017 passed by the National Company Law Appellate Tribunal (hereinafter referred to as, the 'NCLAT') whereby it is held that the time of seven days prescribed in proviso to sub-section (5) of Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short, the 'Code') is mandatory in nature and if the defects contained in the application filed by the 'operational creditor' for initiating corporate insolvency resolution against a corporate debtor are not removed within seven days of the receipt of notice given by the adjudicating authority for removal of such objections, then such an application filed under Section 9 of the Code is liable to be rejected. The precise question of law which was framed by the NCLAT for its decision is to the following effect:

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

3. Chapter II of Part II of the Code deals with corporate insolvency resolution process. Under Section 7 of the Code, financial creditor (as per the definition contained in Section 5(7)) can initiate corporate insolvency resolution process. Section 8, on the other hand, deals with insolvency resolution by operational creditor. Operational creditor is defined in Section 5(2) of the Code to mean a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. This Section provides that if 'default' has occurred in payment of the said debt within the meaning of Section 2(12), such an operational creditor may send a demand notice to the corporate debtor demanding payment of the amount involved in the default, in the prescribed manner, giving ten days notice in this behalf. The corporate debtor is given ten days time to bring to the notice of the operational creditor about the existence of a dispute, if any, however, send requisite proof for repayment of unpaid operational debt. However, in case the payment is not received or notice of dispute is not received, operational creditor can file an application under Section 9 for initiation of corporate insolvency resolution process. Since we are concerned with this provision, the same is reproduced below in its entirety:

“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.”

4. A reading of the aforesaid provision would reflect that time limits for taking certain actions by either the operational creditor or adjudicating

authority are mentioned therein. As per sub-section (1) of Section 9, application can be filed after the expiry of period of ten days from the delivery of notice or invoice demanding payment, which is in tune with the provisions contained in Section 8 that gives ten days time to the corporate debtor to take any of the steps mentioned in sub-section (2) of Section 8. As per sub-section (2) of Section 9, the operational creditor is supposed to file an application in the prescribed form and manner which needs to be accompanied by requisite/prescribed fee as well. Sub-section (3) puts an obligation on the part of the operational creditor to furnish the information stipulated therein. Once such an application is filed and received by the adjudicating authority, fourteen days time is granted to the adjudicating authority to ascertain from the records of an information utility or on the basis of other evidence furnished by the operational creditor, whether default on the part of corporate debtor exists or not. This exercise, as per sub-section (5), is to be accomplished by the adjudicating authority within fourteen days. Sub-section (5) provides two alternatives to the adjudicating authority while dealing with such an application. In case it is satisfied that conditions mentioned in clause (i) of Section 9(5) are satisfied, the adjudicating authority may pass an order admitting such an application. On the other hand, if the adjudicating authority finds existence of any eventuality stated in sub-section (2), it may order rejection of such an application.

5. One of the conditions, with which we are concerned, is that application under sub-section (2) has to be complete in all respects. In other words, the adjudicating authority has to satisfy that it is not defective. In case the adjudicating authority, after the scrutiny of the application, finds that there are certain defects therein and it is not complete as per the provisions of sub-section (2), in that eventuality, the proviso to sub-section (5) mandates that before rejecting the application, the adjudicating authority has to give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice.

6. Sub-section (5) of Section 9, thus, stipulates two time periods. Insofar as the adjudicating authority is concerned, it has to take a decision to either admit or reject the application with the period of fourteen days. Insofar as defects in the application are concerned, the adjudicating authority has to give a notice to the applicant to rectify the defects before rejecting the application on that ground and seven days period is given to the applicant to remove the defects.

7. The question before the NCLAT was as to whether time of fourteen days given to the adjudicating authority for ascertaining the existence of default

and admitting or rejecting the application is mandatory or directory. Further question (with which this Court is concerned) was as to whether the period of seven days for rectifying the defects is mandatory or directory.

8. The NCLAT has held that period of fourteen days prescribed for the adjudicating authority to pass such an order is directory in nature, whereas period of seven days given to the applicant/operational creditor for rectifying the defects is mandatory in nature. Conclusion in this behalf is stated in paragraphs 43 and 4 of the impugned order and these paragraphs read as under:

“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 is 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.”

On the basis of the aforesaid findings, the NCLAT directed rejection of the application filed by the operational creditor in the following manner:

“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 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.”

9. Before we pronounce as to whether the aforesaid rendition by the NCLAT is justified or not, it would be apposite to take stock of certain essential facts.

10. Before the enactment of the Code, the relevant legislation dealing with such subject matters was the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as 'SICA'). Under this Act, an industrial undertaking, on becoming sick (i.e. where its net worth got eroded), could file a reference under Section 15(1) of SICA, before the Board for Industrial and Financial Reconstruction (for short, 'BIFR') constituted under SICA. BIFR, on admitting such a reference, was supposed to undertake the exercise whether such a sick company can be revived or not. For this purpose, BIFR would appoint an Operating Agency (OA) which was supposed to explore the possibility of revival plan in consultation with the other stakeholders, particularly the creditors. If such reconstruction/revival scheme prepared by the OA was found to be feasible by the BIFR, after ascertaining the views/objections of the concerned parties, BIFR would sanction such a scheme. If that was not possible, BIFR would recommend winding up of sick company by making reference in this behalf to the jurisdictional High Court. There was a provision of appeal before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR). This scheme is stated in brief for the purposes of clarity of the matter though we are not concerned with any of the provisions of SICA. Another aspect which needs to be mentioned is that on admitting the reference, all other legal proceedings by creditors or other persons initiated against the said sick industrial company had to be put on hold by virtue of the protection granted under Section 22(1) of SICA.

11. Respondent No.1 herein, namely, Juggilal Kamlapat Jute Mills Company Limited, became a sick industrial company in the year 1994 and because of this reason it filed its reference under Section 15(1) of SICA. It was declared as a sick industrial company by the BIFR on December 16, 1994 as a result whereof it came under the protective umbrella of Section 22(1) of SICA. According to the appellant (who is the operational creditor in this case), which is a jute trader, it had supplied raw jute to respondent No.1 (the corporate debtor) in the years 2001, 2002 and 2003 in respect of which the corporate debtor owned a sum of Rs.17,06,766.95 p. Further, according to the operational creditor, the corporate debtor had issued Certificate dated October 24, 2004 acknowledging the aforesaid debt. However, it was not in a position to recover this debt because of the pendency of proceedings which resulted in stay of proceedings in view of Section 22(1) of SICA. In the year 2007, one Kolkata based company, known as Rainey Park Suppliers Private Limited (hereinafter referred to as 'Rainey Park'), invested in corporate debtor and took over its management from its erstwhile promoters, i.e. J.K. Singhania Group. The operational creditor had sent notices to Rainey Park to pay the

aforesaid amount. However, it was not paid. Legal notices were also sent and applications were also filed before the BIFR in this behalf. It led to various events which are not required to be mentioned for the sake of brevity. Fact remains that the aforesaid debt was not honoured or liquidated by the corporate debtor or Rainey Park. While the matter was pending with BIFR, Sick Industrial Companies Repeal Act was passed on the enactment of the Code with effect from May 28, 2016. Resultantly, all proceedings before BIFR and AAIFR stood abated. With this embargo, Section 22(1) of SICA also vanished.

12. In these changed circumstances, the operational creditor served another demand notice dated January 06, 2017, in the statutory format prescribed under the Code, upon the corporate debtor calling up it to pay the outstanding dues. As it was not paid, the operational creditor filed application for initiation of corporate insolvency resolution process under Section 9 of the Act. The chronology of events which took place from the date of filing of the said application till the passing of the impugned order by the NCLAT are mentioned herein below:

- 10.02.2017 → The appellant filed the application under Section 9(2) of the Code, being CP No. 10/ALD/2017, before the adjudicating authority under the Code.
- 14.02.2017 → The registry of the adjudicating authority pointed out some procedural defects on the basis of the check list prepared for scrutiny of the petition/application/appeal/reply as per Order No. 25/2/2016-NCLT dated 28.07.2016 and listed the application for hearing before the adjudicating authority on 16.02.2017.
- 16.02.2017 → The adjudicating authority granted time to the appellant for removal of the said procedural defects on 28.02.2017 and also wanted to know about the stage of the proceedings before BIFR when the proceedings stood abated.
- 28.02.2017 → The appellant removed the procedural defects. As inquired by the adjudicating authority, the appellant's counsel sought for some more time for filing formal memo by providing/furnishing the latest order passed by BIFR before the Code came into force.
- 03.03.2017 → The appellant filed its formal memo/additional documents/orders arising in/out of the pending BIFR's

proceedings which stood abated. On 03.03.2017, the respondent No. 1 debtor appeared before the Adjudicating Authority and sought liberty to raise its objections qua the maintainability of the application.

- 09.03.2017 → The Corporate debtor/respondent No.1 company filed its written objections before the Adjudicating Authority disputing the maintainability of the application filed on various grounds like time barred debt; the defective demand notice; civil suit filed against the appellant being Civil Suit No. 225 of 2017 before the District Court and embargo created by Section 252 of the IB Code, 2016 the proceedings cannot be initiated for a period of six months after abatement of SICA.

One JK Jute Mill Mazdoor Morcha, Kanpur i.e. respondent No.2 herein moved an application seeking intervention in the mater and brought on record various orders including the judgment dated 13.11.2014 passed by this Court in the matter of **Ghanshyam Sarda v. Shiv Shankar Trading Company & Ors.**, reported in (2015) 1 SCC 298 wherein this Court has found that the sale of assets without BIFR's permission as questionable before the BIFR and also an order dated 18.11.2016 passed by this Court in the case of **Ghanshyam Sarda v. Sashikant Jha** (i.e. contempt petition (civil) No. 338 of 2014), wherein the Director(s) of the corporate debtor i.e. respondent No. 1 have been held guilty of contempt. It is also said that the corporate debtor i.e. respondent No. 1 also failed to clear the legitimate dues of the workmen of jute mill which are worth more than 100 crores in rupees.

- 09.03.2017 → In light of the foregoing scenario, the Adjudicating Authority for providing substantial justice inter alia directed the respondent No. 1/Corporate Debtor to maintain status quo in respect of its immovable property until further orders.

- 21.03.2017 → The interim order passed by the Adjudicating Authority, Allahabad Bench on 09.03.2017 was challenged by the respondent No. 1/Corporate Debtor under Section 61 of the IB Code, 2016 before the

National Company Law Appellate Tribunal (NCLAT) being Company Appeal No.9 of 2017. The NCLAT on 21.03.2017 issued notice in the said appeal inter alia observing that question of law is involved in this case and directing the Adjudicating Authority not to admit the application filed under the IB Code, 2016 by the appellant.

01.05.2017 → The NCLAT has allowed the AT No. 09/2017 on the ground that the application and Section 9 petition filed by appellant herein was incomplete, defected and was fit to be rejected. Hence, the NCLAT was pleased to direct NCLT to reject and close the application filed by the appellant under Section 9 of the IB Code, 2016 passed in the impugned order inter alia rejecting the application filed by the appellant under Section 9 of the IB Code, 2016 read with IB (Application to Adjudicating Authority) Rules, 2016 being CP No. (IB)10/ALD/ 2017.

13. We may point out at the outset that the learned senior counsel appearing for the appellant had submitted that in the instant case the defects which were pointed out were not of the nature mentioned in the Code but were in terms of the Companies Act, 2013. For this purpose, he had referred to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as 'Rules 2016') and on that basis it was argued that Section 9(5) of the Code did not apply in the instant case inasmuch as there has to be difference between 'defective' application and 'incomplete' application. He also submitted that the respondent had been violating interim orders passed by BIFR in the proceedings pending before it under SICA. However, we make it clear at the outset that since we are dealing with the substantial issue as to whether seven days period provided for removing the defects is mandatory or not, it is not necessary to touch upon these mundane aspects. Instead, it would be better to concentrate on the substance of the matter.

14. As mentioned above, insofar as prescription of fourteen days within which the adjudicating authority has to pass an order under sub-section (5) of Section 9 for admitting or rejecting the application is concerned, the NCLAT has held that the same cannot be treated as mandatory. Though this view is not under challenge (and rightly so), discussion in the impugned order on this aspect has definite bearing on the other question, with which

this Court is concerned. Therefore, we deem it apposite to discuss the rationale which is provided by the NCLAT itself in arriving at the aforesaid conclusion insofar as first aspect is concerned.

15. It is pointed out by the NCLAT that where an application is not disposed of or an order is not passed within a period specified in the Code, in such cases the adjudicating authority may record the reasons for not doing so within the period so specified and may request the President of the NCLAT for extension of time, who may, after taking into account the reasons so recorded, extend the period specified in the Code, but not exceeding ten days, as provided in Section 64(1) of the Code. The NCLAT has thereafter scanned through the scheme of the Code by pointing out various steps of the insolvency resolution process and the time limits prescribed therefor. It is of relevance to mention here that the corporate insolvency resolution process can be initiated by the financial creditor under Section 7 of the Code, by the operational creditor under Section 9 of the Code and by a corporate applicant under Section 10 of the Code. There is a slight difference in these provisions insofar as criteria for admission or rejection of the applications filed under respective provisions is concerned. However, it is pertinent to note that after the admission of the insolvency resolution process, the procedure to deal with these applications, whether filed by the financial creditor or operational creditor or corporate applicant, is the same. It would be relevant to glance through this procedure.

16. On admission of the application, the adjudicating authority is required to appoint an Interim Resolution Professional (for short, 'IRP') in terms of Section 16(1) of the Code. This exercise is to be done by the adjudicating authority within fourteen days from the commencement of the insolvency date. This commencement date is to reckon from the date of the admission of the application. Under sub-section (5) of Section 16, the term of IRP cannot exceed thirty days. Certain functions which are to be performed by the IRP are mentioned in subsequent provisions of the Code, including management of affairs of corporate debtor by IRP as well as duties of IRP so appointed. One of the important functions of the IRP is to invite all claims against the corporate debtor, collate all those claims and determine the financial position of the corporate debtor. After doing that, IRP is to constitute a committee of creditors which shall comprise of financial creditors of the corporate debtor. The first meeting of such a committee of creditors is to be held within seven days of the constitution of the said committee, as provided in Section 22 of the Code. In the said first meeting, the committee of creditors has to take a decision to either appoint IRP as Resolution Professional (RP) or to replace the IRP by another RP. Since term of IRP is

thirty days, all the aforesaid steps are to be accomplished within this thirty days period. Thereafter, when RP is appointed, he is to conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the said period. It is not necessary to state the further steps which are to be taken by the RP in this behalf. What is important is that the entire corporate insolvency resolution process is to be completed within the period of 180 days from the date of admission of the applicant. This time limit is provided in Section 12 of the Act. This period of 180 days can be extended, but such extension is capped as extension cannot exceed 90 days. Even such an extension would be given by the adjudicating authority only after recording a satisfaction that the corporate insolvency resolution process cannot be completed within the original stipulated period of 180 days. If the resolution process does not get completed within the aforesaid time limit, serious consequences thereof are provided under Section 33 of the Code. As per that provision, in such a situation, 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.

17. The aforesaid statutory scheme laying down time limits sends a clear message, as rightly held by the NCLAT also, that time is the essence of the Code. Notwithstanding this salutary theme and spirit behind the Code, the NCLAT has concluded that as far as fourteen days time provided to the adjudicating authority for admitting or rejecting the application for initiation of insolvency resolution process is concerned, this period is not mandatory.

For arriving at such a conclusion, the NCLAT has discussed the law laid down by this Court in some judgments. Therefore, we deem it proper to reproduce the discussion of the NCLAT itself in this behalf:

“32. In *P.T. Rajan v. T.P.M. Sahir and Ors.* [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 be 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. The District Magistrate of Monghur & Anr.* AIR (1966) Patna 144, *Nomita Chowdhury v. The State of West Bengal & Ors.* [1999] CLJ 21 and *Garbari Union Co-operative Agricultural Credit Society Limited & Anr. v. Swapan Kumar Jana & Ors.* [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 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 and Ors [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, Hon’ble Supreme Court in the matter of ***Smt. Rani Kusum v. Smt. Kanchan Devi [2005] 6 SCC 705***, concurring with the ratio laid down in *Kailash v. Nanhku* (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.”

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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 is procedural in nature, a tool of aid in expeditious dispensation of justice and is directory.”

18. The NCLAT has also held that fourteen days period is to be calculated ‘from the date of receipt of application’. The NCLAT has clarified that date of receipt of application cannot be treated to be the date of filing of the application. Since the Registry is required to find out whether the application is in proper form and accompanied with such fee as may be prescribed, it will take some time in examining the application and, therefore, fourteen days period granted to the adjudicating authority under the aforesaid provisions would be from the date when such an application is presented before the adjudicating authority, i.e. the date on which it is listed for admission/order.

19. After analysing the provision of fourteen days time within which the adjudicating authority is to pass the order, the NCLAT immediately jumped to another conclusion, viz. the period of seven days mentioned in proviso to sub-section (5) of Section 9 for removing the defect is mandatory, with the following discussion:

“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.”

There is no further discussion on this aspect.

20. We are not able to decipher any valid reason given while coming to the conclusion that the period mentioned in proviso is mandatory. The order of the NCLAT, thereafter, proceeds to take note of the provisions of Section 12 of the Code and points out the time limit for completion of insolvency resolution process is 180 days, which period can be extended by another 90 days. However, that can hardly provide any justification to construe the provisions of proviso to sub-section (5) of Section 9 in the manner in which it is done. It is to be borne in mind that limit of 180 days mentioned in Section 12 also starts from the date of admission of the application. Period prior thereto which is consumed, after the filing of the application under Section 9 (or for that matter under Section 7 or Section 10), whether by the Registry of the adjudicating authority in scrutinising the application or by

the applicant in removing the defects or by the adjudicating authority in admitting the application is not to be taken into account. In fact, till the objections are removed it is not to be treated as application validly filed inasmuch as only after the application is complete in every respect it is required to be entertained. In this scenario, making the period of seven days contained in the proviso as mandatory does not commend to us. No purpose is going to be served by treating this period as mandatory. In a given case there may be weighty, valid and justifiable reasons for not able to remove the defects within seven days. Notwithstanding the same, the effect would be to reject the application.

21. Let us examine the question from another lens. The moot question would be as to whether such a rejection would be treated as rejecting the application on merits thereby debarring the application from filing fresh application or it is to be treated as an administrative order since the rejection was because of the reason that defects were not removed and application was not examined on merits. In the former case it would be travesty of justice that even if the case of the applicant on merits is very strong, the applicant is shown the door without adjudication of his application on merits. If the latter alternative is accepted, then rejection of the application in the first instance is not going to serve any purpose as the applicant would be permitted to file fresh application, complete in all aspects, which would have to be entertained. Thus, in either case, no purpose is served by treating the aforesaid provision as mandatory.

22. Various provisions of the Code would indicate that there are three stages:

- (i) First stage is the filing of the application. When the application is filed, the Registry of the adjudicating authority is supposed to scrutinise the same to find out as to whether it is complete in all respects or there are certain defects. If it is complete, the same shall be posted for preliminary hearing before the adjudicating authority. If there are defects, the applicant would be notified about those defects so that these are removed. For this purpose, seven days time is given. Once the defects are removed then the application would be posted before the adjudicating authority.
- (ii) When the application is listed before the adjudicating authority, it has to take a decision to either admit or reject the application. For this purpose, fourteen days time is granted to the adjudicating authority. If the application is rejected, the matter is given a quietus at that level itself. However, if it is admitted, we enter the third stage.

- (iii) After admission of the application, insolvency resolution process commences. Relevant provisions thereof have been mentioned above. This resolution process is to be completed within 180 days, which is extendable, in certain cases, up to 90 days. Insofar as the first stage is concerned, it has no bearing on the insolvency resolution process at all, inasmuch as, unless the application is complete in every respect, the adjudicating authority is not supposed to deal with the same. It is at the second stage that the adjudicating authority is to apply its mind and decide as to whether the application should be admitted or rejected. Here adjudication process starts. However, in spite thereof, when this period of fourteen days given by the statute to the adjudicating authority to take a decision to admit or reject the application is directory, there is no reason to make it mandatory in respect of the first stage, which is pre-adjudication stage.

23. Further, we are of the view that the judgments cited by the NCLAT and the principle contained therein applied while deciding that period of fourteen days within which the adjudicating authority has to pass the order is not mandatory but directory in nature would equally apply while interpreting proviso to sub-section (5) of Section 7, Section 9 or sub-section (4) of Section 10 as well. After all, the applicant does not gain anything by not removing the objections inasmuch as till the objections are removed, such an application would not be entertained. Therefore, it is in the interest of the applicant to remove the defects as early as possible.

24. Thus, we hold that the aforesaid provision of removing the defects within seven days is directory and not mandatory in nature. However, we would like to enter a caveat.

25. We are also conscious of the fact that sometimes applicants or their counsel may show laxity by not removing the objections within the time given and make take it for granted that they would be given unlimited time for such a purpose. There may also be cases where such applications are frivolous in nature which would be filed for some oblique motives and the applicants may want those applications to remain pending and, therefore, would not remove the defects. In order to take care of such cases, a balanced approach is needed. Thus, while interpreting the provisions to be directory in nature, at the same time, it can be laid down that if the objections are not removed within seven days, the applicant while refilling the application after removing the objections, file an application in writing showing sufficient case as to why the applicant could not remove the objections within seven days. When such an application comes up for admission/order before the

adjudicating authority, it would be for the adjudicating authority to decide as to whether sufficient cause is shown in not removing the defects beyond the period of seven days. Once the adjudicating authority is satisfied that such a case is shown, only then it would entertain the application on merits, otherwise it will have right to dismiss the application. The aforesaid process indicated by us can find support from the judgment of this Court in ***Kailash v. Nanhku & Ors.***, [2005] 4 SCC 480, wherein the Court held as under:

“46. (iv) The purpose of providing the time schedule for filing the written statement under Order 8 Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. Though the language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order 8 Rule 1 CPC is not completely taken away.

(v) Though Order 8 Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for the asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the court on its being satisfied. Extension of time may be allowed if it is needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case.”

26. In fine, these appeals are allowed and that part of the impugned judgment of NCLAT which holds proviso to sub-section (5) of Section 7 or proviso to sub-section (5) of Section 9 or proviso to sub-section (4) of Section 10 to remove the defects within seven days as mandatory and on failure applications to be rejected, is set aside. No costs.

Hon'ble Mr. Justice A.K. Sikri pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice A.K. Sikri.

The appeals are allowed in terms of the signed reportable judgment.

.....J.

(A.K. SIKRI)

.....J.

(ASHOK BHUSHAN)

NEW DELHI;

SEPTEMBER 19, 2017.

ITEM NO.1501

COURT NO.6

SECTION XVII

SUPREME COURT OF INDIA RECORD OF PROCEEDINGS

Civil Appeal No(s).8400/2017

SURENDRA TRADING COMPANY

Appellant(s)

VERSUS

JUGGILAL KAMLAPAT JUTE MILLS COMPANY LTD & ORS.

Respondent(s)

WITH

Diary No(s). 22835/2017 (XVII)

Date : 19-09-2017 These appeals were called on for pronouncement of judgment today.

For Appellant(s) Mr. Sunil Fernandes, AOR
Mr. Gaurav Kejriwal, AOR
Mr. Sujit Keshri, Adv.

For Respondent(s) Mr. Kailash Chand, AOR
Mr. Satish Vig, AOR
Ms. Kanika Singh, Adv.
Ms. R.K. Mohit Gupta, Adv.
Ms. Sangram Singh Hooda, Adv.
M/s. Coac, AOR
Mr. Akshat Kumar, AOR

Hon'ble Mr. Justice A.K. Sikri pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice A.K. Sikri.

The appeals are allowed in terms of the signed reportable judgment.

(B. PARVATHI)
COURT MASTER

(MALA KUMARI SHARMA)
COURT MASTER

(Signed reportable judgment is placed on the file)

ANNEXURE X.13

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
COMPANY APPELLATE JURISDICTION**

Company Appeal (AT) (Insolvency) No. 28 of 2017

(arising out of Order dated 31st January 2017 passed by NCLT, Mumbai Bench in C.P.No. 06/1 & BP/NCLT/MAH/2017)

Smart Timing Steel Ltd.

**...Operational
Creditor**

Vs.

National Steel and Agro Industries Ltd.

....Corporate Debtor

Present: For Appellants: Mr. Sanjay Grover, Advocate

For Respondents: Mr. Sandeep S. Deshmukha, Advocate

JUDGEMENT

SUDHANSU JYOTI MUKHOPADHAYA, J

1. This appeal under section 61 of Insolvency and Bankruptcy Code ('I&B Code') has been preferred by appellant against order dated 31st January, 2017 passed by "Adjudicating Authority" in Mumbai Bench in CP No. 06/1 & BP/NCLT/MAH/2017, which reads as follows :

"The petitioner/operational creditor filed this creditor petition under section 9 of Insolvency and Bankruptcy Code without filing certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of this unpaid operational debt by the corporate debtor as set out in (c) of sub-section (2) of section 9 of this Code 2016.

Looking at non-filing of the certificate that is required to be filed along with this petition, this Bench had already given time to furnish the said document, but the counsel failed to furnish the said certificate. When this Bench has put it to the petitioner counsel how this Bench could pass this order without furnishing the certificate mandatorily to be filed along with the petition, the counsel appearing on behalf of the operational creditor submits that it is impossible to file copy of such certificate from the financial institution for the bank of the operational creditor is situated

outside India, therefore, the compliances with such requirements shall be exempted.

On perusal of section 9 of Insolvency and Bankruptcy Code, it is evident, that it is mandatory to file copy of the certificate from the financial institutions reflecting non-payment of the operational debt impugned, for the operational creditor has failed to annex copy of the said certificate as required under section 9(3)(c) of the Code, this petition is liable to be rejected.

Accordingly, the same is hereby rejected.”

2. The question for determination in this appeal is whether filing of “a copy of certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of unpaid operational debt by the corporate debtor as prescribed under clause (c) of sub-section (3) of section 9 of the I&B Code is mandatory or directory.

3. The appellant who claimed to be operational creditor filed an application under section 9 of I&B Code for initiation of corporate insolvency resolution process, enclosing some of the relevant documents. However, no copy of the certificate from the financial institution maintaining account of the operational creditor as prescribed under clause (c) of sub-section (3) of section 9 was enclosed. For the said reason the adjudicating authority rejected the application.

4. For deciding the issue it is desirable to notice relevant provisions of I&B Code and Rules framed thereunder. Sub-section (14) of section 3 defines “Financial Institution” means –

- (a) a scheduled bank;
- (b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934); and
- (c) public financial institution as defined in clause (72) of section 2 of the Companies Act, 2013 (18 of 2013); and
- (d) such other institution as the Central Government may by notification specify as a financial institution.

5. The appellant is a foreign company of Hong–Kong having no office or bank account in India.

6. As the appellant has no account in any scheduled bank or financial institution as defined in section 45-I of the RBI Act 1934 nor having such

account with “public financial institution” as defined in clause (72) of section 2 of the Companies Act, 2013 or with any other institution notified by Central Government as “financial institution”, it failed to enclose any certificate from “financial institution” maintaining account of the operational creditor.

7. Learned counsel appearing on behalf of the appellant submitted that the foreign companies and multi-national companies having no office or having no account in India with any of the “financial institution” will suffer to recover the debt as due from “corporate debtors” of India. The appellant being a foreign based “operational creditor”, the “Adjudicating Authority” was required to interpret the provisions of I&B Code in such a manner that section 9 would have taken in its fold all the “operational creditors” who are entitled to recover the debt defaulted by “corporate creditors” of India. Learned counsel for the appellant further submitted that the word ‘shall’ used in sub-section (3) of section 9 for furnishing documents, etc., should be read as ‘may’, and hold that sub-section (3) of section 9 is directory. Reliance was placed on hon’ble Supreme Court decision in ***Kailash v. Nanhku [2005] 4 SCC 480***.

8. In the said case the hon’ble Supreme Court while deciding the question whether time limit of 90 days as prescribed by the proviso appended to rule 1 of order VIII of CPC is mandatory or directory in nature? The hon’ble Supreme Court held that ordinarily the time prescribed by order VIII, rule 1 has to be honoured but it held that the provision being part of the procedural code is directory.

9. With due respect we are of the view that aforesaid decision of hon’ble Supreme Court in *Kailash* (supra) is not applicable in the present case, as clause (c) of sub-section (3) of section 7 does not relate to prescription of time.

10. Section 9 deals with application for initiation of corporate insolvency resolution process by “operational creditor” which reads as follows :

“9. Application for initiation of corporate insolvency resolution process by operational creditor. – (1) After the expiry of the period often 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*
 - (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.”

11. On perusal of entire section (3) along with sub-sections and clauses, inclusive of proviso, it would be crystal clear that, the entire provision of sub-section (3) of section 9 required to be mandatorily followed and it is not empty statutory formality.

12. Sub-section (2) stipulates filing of an application under section (1) only in the form and manner and accompanied with such fees as may be prescribed. The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (“Adjudicating Authority Rules, 2016”) are also enacted in exercise of the power conferred by clauses (c), (d), (e), (f), of sub-section 239 read with sections 7, 8, 9 and 10 of the I&B Code. The rules provide the procedure required to be followed by filing an application by corporate insolvency resolution process. As per rule 6 of the Adjudicating Authority Rules, 2016, an operational creditor shall make an application for initiating the corporate insolvency process under section 9, in Form 5 accompanied with documents and records required therein. As per sub-rule (2) of rule 6 it is mandatory again to despatch a copy of application filed with the adjudicating authority, by registered post or speed post to the registered office of the corporate debtor.

13. The provisions of sub-section (3) mandates the operational creditor to furnish copy of invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor, an affidavit to the effect that, there is no notice given by the corporate debtor relating to dispute of unpaid operational debt, 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 such other information as may be stipulated. Sub-section (5) of section 9 is procedure required to be followed by Adjudicating Authority. One can say that procedural part is not mandatory but is directory.

14. The provision being “directory” or “mandatory” has fallen for consideration

before hon'ble Supreme Court on numerous occasions. In *Manilal Shah v. Sardar Sayed Ahmed* [1955] 1 SCR 108, the hon'ble Apex Court held that where statute itself provide consequences of breach or non-compliance, normally the provision has to be regarded as having mandatory in nature.

15. One of the cardinal principles of interpretation of statute is that, the words of statute must prima facie be given their ordinary meaning, unless of course, such construction leads to absurdity or unless there is something in the context or in the object of the statute to the contrary. When the words of statute are clear, plain and unambiguous, then, the courts are bound to give effect to that meaning, irrespective of the consequences involved. Normally, the words used by the Legislature themselves declare the legislative intent particularly where the words of the statute are clear, plain and unambiguous. In such case, effort must be to give a meaning to each and every word used by the Legislature and it is not sound principle of construction to brush aside words in statute as being redundant or surplus, and particularly when such words can have proper application in circumstances conceivable within the contemplation of the statute.

16. For determination of the issue whether a provision is mandatory or not, it will be desirable to refer to decision of hon'ble Supreme Court in *State of Mysore v. V K Kangan* [1976] 2 SCC 895. In the said case, the hon'ble Supreme Court specifically held :

“10. In determining the question whether a provision is mandatory or directory, one must look into the subject-matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured. No doubt, all laws are mandatory in the sense they impose the duty to obey on those who come within its purview. But it does not follow that every departure from it shall taint the proceedings with a fatal blemish. The determination of the question whether a provision is mandatory or directory would, in the ultimate analysis, depend upon the intent of the law-maker. And that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.”

16. Therefore, it is clear that the word 'shall' used in sub-section (3) of section 9 of I&B Code is mandatory, including clause 3 therein.

17. The appellant has enclosed a Final Award given by sole arbitrator, Hong Kong Special Administrative Region, People's Republic of China dated 18th August, 2014 to suggest that the respondent-corporate debtor is liable to

pay the amount determined by arbitrator but defaulted to pay the amount. Even if such submission is accepted, the Adjudicating Authority cannot assume that the amount has not been paid pursuant to the award till on the basis of evidence on record, i.e., copy of certificate from the “financial institution” maintaining accounts of the appellant confirming that there is no payment of an unpaid operational debt by the corporate debtor.

18. From the record we find that the appellant was given opportunity to complete the record by enclosing the certificate of “financial institution” and thereby to remove the defects within 7 days but failed to do so.

19. In *J K Jute Mills Co. Ltd. v. Surendra Trading Company Company Appeal (AT) No. 09 of 2017*, the Appellate Tribunal was considering whether the time limit prescribed in I&B Code for admitting or rejecting the petition or initiation of insolvency resolution process is mandatory? The Appellate Tribunal, by judgment dated 1st May, 2017 held that proviso to sub-section (5) of section 7 and proviso to sub-section (5) of section 9 granting “financial creditor/operational creditor” to complete the documents, if incomplete is mandatory.

20. In view of the aforesaid findings of this Appellate Tribunal in *J K Jute Mills Co. Ltd.*, the appellant having failed to complete the documents within 7 days, the Tribunal was right in dismissing the application preferred by the appellant.

21. The argument that the foreign companies having no office in India or no account in India with any financial institution will suffer in recovering the debt from corporate debtor cannot be accepted as apart from the I&B Code, there are other provisions of recovery like suit which can be preferred by any person.

22. We find no merit in this appeal. It is accordingly dismissed. However, in the facts and circumstances, there shall be no order as to cost.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

19th May, 2017

ANNEXURE X.14

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
COMPANY APPELLATE JURISDICTION****Company Appeal (AT) (Insolvency) 39 of 2017**

(arising out of order dated 10th April, 2017 passed by National Company Law Tribunal, Mumbai Bench in CP No. 5/Mah/2017 of 2017)

IN THE MATTER OF:

Uttam Galva Steels Limited

Appellant

V.

DF Deutsche Forfait AG & Anr.

Respondents

Present: For Appellant : - Mr Sudip to Sarkar and Mr Virendra Ganda, Sr. Advocates, Mr Arvind Kumar Gupta, Mr Sumesh Dhawan, Ms Purti Marwaha Gupta, Mr Mahesh Agarwal, Mr Anuj Kumar, Ms Vatsala Kak and Mr Rajeev Kumar, Advocate.

For Respondents: - Mr Vivek Sibal, Senior Advocate, Ms Pooja M Saigal, Mr Akshay Gupta, Advocates and Mr Sahil Bhatia, POA for the Respondent.

JUDGEMENT**SUDHANSU JYOTI MUKHOPADHAYA, J.**

1. The respondents – both of whom claim to be operational creditor(s) filed a joint application under section 9 of the Insolvency and Bankruptcy Code, 2016 ('I&B Code') for initiation of corporate insolvency resolution process against appellant-corporate debtor. By impugned order dated 10th April, 2017, Learned Adjudicating Authority (National Company Law Tribunal) Mumbai Bench while rejected the objection as were raised by the appellant, admitted the application and directed to refer the matter to the Insolvency and Bankruptcy Board of India to recommend name of interim resolution professional for his appointment.

2. Learned counsel for the appellant-corporate debtor challenged the impugned order on different count. It was submitted that there is a pre-existing bona fide dispute between the parties and, therefore, the insolvency application under section 9 of the I&B Code is not maintainable. In support of aforesaid

submission, it was contended that :

- (i) there is no privity of contract with the respondents;
- (ii) respondents violated the contractual terms;
- (iii) appellant disputed execution of contract;
- (iv) there is dispute about quantum of default;
- (v) there is a dispute as to who is the defaulter (whether the default can at all be attributed to Uttam Steels in view of actual liability being that of a 3rd party);
- (vi) there is a dispute as to whether the respondents are operational creditors of the appellant, etc.

3. It was pointed out that the respondents had issued a winding up notice on 8th December, 2016 much prior to the issuance of so-called notice under section 8 of the I&B Code. Pursuant to which, the appellant disputed the claim by a detailed reply dated 3rd January, 2017. Apart from that, the respondents are relying on a document dated 27th December, 2013 to fix liability on the appellant, which has not been signed by appellant and was brought to the notice of the respondents in the year 2013 itself.

The learned counsel for the appellant referred to an e-mail dated 10th April, 2014 forwarded by one of the respondent to demonstrate existence of bona fide dispute between the parties and submitted that in view of bona fide pre-existing dispute, in terms of sub-section (6) of section 5 of the I&B Code, the joint insolvency application is not maintainable.

4. It was further pointed out that the notice under section 8 of I&B Code dated 28th February, 2017 was issued jointly by two respondents, both of whom claimed to be “operational creditors” but not by respondents themselves but through their advocate, Ms Sonu Tandon. According to appellant the joint petition under section 9 by two separate operational creditors is not permissible and Demand Notice under section 8 in Form-3 or Form 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (‘Adjudicating Authority Rules’) was not issued by the “authorised persons” in accordance with law.

5. It was further submitted that the certificate of “financial institution” as prescribed and mandatory under clause (c) of sub-section (3) of section 9 of the I&B Code was not filed by respondents in support of their claim that there is no payment of the unpaid operational debt. Further, according to appellant, the bank certificate dated 6th March, 2017 submitted by

respondents is defective on multiple counts as it was not issued by a notified “financial institution”, but has been issued by “**Misr Bank**” which is not recognised as a “financial institution” in India as per sub-section (14) of section 3 read with clause (c) of sub-section (3) of section 9 of the I&B Code. It was further contended that the affidavit in the insolvency application was also defective and incomplete. According to the learned counsel for the appellant, the affidavit in support of insolvency application should have been filed, as prescribed in Form-5 of the Adjudicating Authority Rules.

6. On the other hand according to learned counsel for the respondents a joint petition by “operational creditors” is maintainable. Joint petition per se would indicate or suggest the joinder of more than one cause of action to enable the parties/litigants to institute a proceeding jointly in the court of law by pleading, inter alia, a commonality of interest of reliefs. He further submitted that “AIC Handles GmbH” (supplier) who entered into sales contract with the appellant (Uttam Galva Steels Ltd.) for sale of steel billets for a value of US\$ 10,800,000 and raised an invoice for US\$ 10,787,040. According to respondents, no disputes were raised by the appellant with regard to delivery of the goods, either in terms of the quality or quantity. The debt, which was secured by a collateral security in the form of a Bill of Exchange for US\$ 5,387,040 and US\$ 5,400,000 was thereafter, assigned to 1st respondent by forfeiting agreement by supplier.

7. He also highlighted facts relating to sale of goods through sale contracts. It was submitted that transaction was single had the same has not been split in two cause of actions as is erroneously contended by the appellant. It is only the right to receive payment under the bills of exchange that has now been vested in the two entities i.e., 1st respondent and 2nd respondent. Therefore, in essence, there is no joinder of cause of action but only right to receive the payment under the bills of exchange having been vested in two entities and, therefore, a joint petition has been filed by two entities with respect to single cause of action and the same is maintainable under section 9 of the I&B Code.

8. Learned counsel for the respondents submitted that in terms of rule 10 of the “Adjudicating Authority Rules, 2016”, rules 20, 21, 22, 23, 24 and 25 of the “NCLT Rules 2016” stands adopted. Reliance was also placed on notification dated 20th December, 2016 whereby NCLT Rules, 2016 was amended and rule 23A was inserted, which is as follows :

“23A. Presentation of joint petition. – (1) *The Bench may permit more than one person to join together and present a single petition if it is*

satisfied, having regard to the cause of action and the nature of relief prayed for, that they have a common interest in the matter.

(2) Such permission shall be granted where the joining of the petitioners by a single petition is specifically permitted by the Act.”

In view of rule 23A it was contended that a joint petition is maintainable.

9. It was further contended that the appellant himself has admitted that a suit was filed by appellant before the hon'ble High Court of Bombay but therein the appellant has not disputed the transactions of sale/purchase in terms of quality/quantity of goods supplied nor has disputed the existence of debt. The only contention it sought to raise is that the goods were meant for consumption of another end-user, namely, "Aartee Commodities (UK) Ltd." and that the said end user has not paid any amount to the appellant despite the notice of demand for supplies made.

10. Insofar as issuance of notice under section 8 of the I&B Code through a lawyer is concerned, according to respondents, notice under section 8 can also be given through a lawyer. Learned counsel for the respondents submitted that settled position is that the procedures are hand maiden of justice which cannot defeat the substantive rights of the parties. The matter of procedure is within the realm of curial law and are not to be read in a manner that defeat the very purpose and the intent of enactment or in a manner that takes away or abridge, the substantive rights of the party. Therefore, the format of demand notice cannot be stated to be mandatory and that it does not suggest or mandate that it is to be issued by an operational creditor personally.

11. Insofar as certificate by financial institutions is concerned, it was contended that in the case of Smart Timing Steel Ltd. v. National Steel & Agro Industries Ltd., the Appellate Tribunal while held the requirement of certificate is mandatory, but in that case no such certificate was filed by the party. In the said case the creditor had no office in India and no certificate of an financial institution was filed. On the other hand, in the present case, the respondents along with their application to the Adjudicating Authority has filed a certificate by a banking company which maintains its operations to prove that no payment has been received in response to the notice for demand issued under section 8 of the I&B Code. Since the requirement of certificate by a financial institution which has been held to be mandatory is only for the purpose of confirming or ascertaining through a trustworthy source like any financial institution to find out, whether any payment has been received in response to the demand notice or not. Learned counsel

submitted that in the present case a certificate of bank albeit incorporated under the law of Germany has been produced to affirm that no payment has been received.

12. It was also submitted that the appellant has accepted that the end customer is "Aartee Commodities (UK) Ltd." which has to make payment (though this assertion is being denied by the respondents) and such end customer has not made payment to the appellant, therefore, non-payment of the invoice is an admitted fact and require no further elaboration by way of independent certificate in the manner interpreted by the Appellate Tribunal. However, as the certificate of the foreign bank has been produced in support of the claim that no amount has been received by the respondents any other interpretation would frustrate the rights of a foreign entities to file an insolvency petition as an operational creditor under the I&B Code.

13. The questions involved in this appeal are :

- (i) Whether a joint application by two or more operational creditors under section 9 of the I&B Code is maintainable?
- (ii) Whether it is mandatory to file of recognised financial institution along with an application under section 9 of the I&B Code?
- (iii) Whether the demand notice with invoice under section 8 of the I&B Code can be issued by any lawyer on behalf of an operational creditor?
and
- (iv) Whether there is an existence of dispute, if any, in the present case?

14. To decide the issues, it is desirable to notice the difference between sections 7 and 9 of I&B Code. Apart from the fact that some of the questions already stand decided by this Appellate Tribunal but in this appeal, we have given main thrust on the questions not decided earlier, i.e., maintainability of a joint application under section 9 of the I&B Code and whether a notice under section 8, can be given through a lawyer.

15. Initiation of insolvency resolution process by 'financial creditor' **either by itself or jointly** with other Financial Creditors is provided in section 7 of the I&B Code. As per sub-section (1) of section 7 of the I&B Code, the trigger of filing of an application by a financial creditor **by himself or jointly with other financial creditors** before the Adjudicating Authority is when a default in respect of any financial debt has occurred. Sub-section (2) of section 7 of the I&B Code provides that a financial creditor to make an application on the prescribed form and manner and with documents as prescribed in sub-section (3) of section 7 of the I&B Code. The relevant

provision of section 7 of the I&B Code 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.”

16. Unlike section 7 of the I&B Code, before making an application to the Adjudicating Authority under section 9 of the I&B Code, the requirements under section 8 of the I&B Code are required to be fulfilled, as apparent from the said provision, as quoted below :

“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 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. Persons who may initiate corporate insolvency resolution process. Initiation of corporate insolvency resolution process by financial creditor. Insolvency resolution by operational creditor.

(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.

17. Under sub-section (1) of section 8 of the I&B Code, an operational creditor on occurrence of a default, is required to deliver the notice of payment of unpaid debt or get copy of the invoice payment of the defaulted amount served on the corporate debtor. This is the condition, precedent under sections 8 and 9 of the I&B Code, unlike section 7 before making an application to the adjudicating authority under section 9 of the I&B Code. Under sub-section (1) of section 9 of the Code, the right to file an application accrues after expiry of ten days from the delivery of demand notice or copy of invoice, as the case may be. If the operational creditor does not receive payment from the corporate debtor or notice of dispute under sub-section (2) of section 8, the operational creditor only thereafter may file an application before the Adjudicating Authority for the initiation of corporate insolvency resolution process.

18. An application under section 9 of I&B Code is required to be filed in such format and manner and accompanied by such fee, as may be prescribed. The operational creditor along with the application is required to furnish documents as mentioned in clauses (a), (b), (c) and (d) of sub-section (3) of section 9 of I&B Code, and quoted below :

“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.”*

19. From the aforesaid provisions of sections 8 and 9 of I&B Code, it is clear that unlike section 7, a notice under section 8 is to be issued by an “operational creditor” individually and the petition under section 9 has to be filed by operational creditor individually and not jointly.

20. Otherwise also it is not practical for more than one operational creditor to file a joint petition. Individual operational creditors will have to issue their individual claim notice under section 8 of the I&B Code. The claim will vary which will be different. Date of notice under section 8 of the I&B Code in different cases will be different. It will have to be issued in format(s). Separate Form 3 or Form 4 will have to be filled. Petition under section 9 in the format will contain, separate individual data.

21. The respondents have relied on rule 23A on the NCLT Rules, 2016 but as the said rule has not been adopted by section 10 of the I&B Code, the rule 23A is not applicable to the application under section 9 of the I&B Code. For the reasons aforesaid, we hold that a joint application under section 9 by one or more operational creditor is not maintainable.

22. Second question raised is, whether it is mandatory to file “certificate of recognised financial institution” along with an application under section 9 of the I&B Code ?

23. The aforesaid issue was considered by this Appellate Tribunal in *Smart Timing Steel Ltd. (supra)*. By judgment dated 19th May 2017 in Company Appeal (AT) (Insolvency) No. 28 of 2017, Appellate Tribunal while held that filing of “certificate of recognised financial institution” maintaining account of the operational creditor confirming that there is no payment of unpaid

operational debt made by the corporate debtor is mandatory, observed as follows :

'11. On perusal of entire section (3) along with sub-sections and clauses, inclusive of proviso, it would be crystal clear that, the entire provision of sub-clause (3) of section 9 required to be mandatorily followed and it is not empty statutory formality.

12. Sub-section (2) stipulates filing of an application under sub-section (1) only in the form and manner and accompanied with such fees as may be prescribed. The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Adjudicating Authority Rules, 2016') are also enacted in exercise of the power conferred by clauses (c), (d), (e), (f), of sub-section (3) read with sections 7, 8, 9 and 10 of the I&B Code. The rules provide the procedure required to be followed by filing an application by corporate insolvency resolution process. As per rule 6 of the Adjudicating Authority Rules, 2016, an operational creditor shall make an application for initiating the corporate insolvency process under section 9, in Form 5 accompanied with documents and records required therein. As per sub-rule (2) of rule 6 it is mandatory again to despatch a copy of application filed with the adjudicating authority, by registered post or speed post to the registered office of the corporate debtor.

13. The provisions of sub-section (3) mandates the operational creditor to furnish copy of invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor, an affidavit to the effect that, there is no notice given by the corporate debtor relating to dispute of unpaid operational debt, 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 such other information as may be stipulated. Sub-section (5) of section 9 is procedure required to be followed by Adjudicating Authority. One can say that procedural part is not mandatory but is directory.

14. The provision being "directory" or "mandatory" has fallen for consideration before hon'ble Supreme Court on numerous occasions. In Manilal Shah v. Sardar Sayed Ahmed [1955] 1 SCR 108, the hon'ble Apex Court held that where statute itself provide consequences of breach or non-compliance, normally the provision has to be regarded as having mandatory in nature.

15. One of the cardinal principles of interpretation of statute is that, the words of statute must prima facie be given their ordinary meaning, unless

of course, such construction leads to absurdity or unless there is something in the context or in the object of the statute to the contrary. When the words of statute are clear, plain and unambiguous, then, the courts are bound to give effect to that meaning, irrespective of the consequences involved. Normally, the words used by the Legislature themselves declare the legislative intent particularly where the words of the statute are clear, plain and unambiguous. In such case, effort must be to give a meaning to each and every word used by the Legislature and it is not sound principle of construction to brush aside words in statute as being redundant or surplus, and particularly when such 10 words can have proper application in circumstances conceivable within the contemplation of the statute.

16. For determination of the issue whether a provision is mandatory or not, it will be desirable to refer to decision of hon'ble Supreme Court in State of Mysore v. V K Kangan [1976] 2 SCC 895. In the said case, the hon'ble Supreme Court specifically held :

"10. In determining the question whether a provision is mandatory or directory, one must look into the subject-matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured. No doubt, all laws are mandatory in the sense they impose the duty to obey on those who come within its purview. But it does not follow that every departure from it shall taint the proceedings with a fatal blemish. The determination of the question whether a provision is mandatory or directory would, in the ultimate analysis, depend upon the intent of the law-maker. And that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other."

17. Therefore, it is clear that the word "shall" used in sub-section (3) of section 9 of I&B Code is mandatory, including clause (e) therein.'

24. In this case, we find that the certificate dated 6th March, 2017 attached by respondents has not been issued by any financial institution as defined in sub-section (14) of section 3 of the I&B Code, 2016 but has been issued by **Misr Bank** which is a foreign bank and is not recognised as a financial institution. The said Certificate has been issued by 'collecting agency' as distinct from financial institution and genuity of the same cannot be verified by the adjudicating authority. We also find that the affidavit in support of insolvency application, as prescribed in Form 5 of the Adjudicating Authority Rules has not been filed, which mandates that 'no notice of dispute received

to be returned or it is returned when dispute was raised', has to be enclosed by the operational creditor. In absence of such certificate from notified financial institution, and as Form 5 is not complete, we hold that the application under section 9 of the I&B Code, was not maintainable.

25. Next question is whether the demand notice with invoice under section 8 of the I&B Code can be issued by any "lawyer on behalf of an the operational creditor" ?

26. To determine the said issue it is desirable to refer to section 8 of the I&B Code which reads 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 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. Persons who may initiate corporate insolvency resolution process. Initiation of corporate insolvency resolution process by financial creditor. Insolvency resolution by operational creditor.*

(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."

27. From a plain reading of sub-section (1) of section 8, it is clear that on occurrence of default, the operational creditor is required to deliver the demand notice of unpaid operational debt and copy of the invoice demanding payment of the amount involved in the default to the corporate debtor in

such form and manner as is prescribed.

28. Sub-rule (1) of rule 5 of the Adjudicating Authority Rules mandates the operational creditor to deliver to the corporate debtor the demand notice in Form 3 or invoice attached with the notice in Form 4, as quoted below :

“Rule 5. (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.”

29. Clauses (a) and (b) of sub-rule (1) of Rule 5 of the Adjudicating Authority Rules provides the format in which the demand notice/invoice demanding payment in respect of unpaid operational debt is to be issued by operational creditor. As per rule 5(1)(a) and (b), the following person(s) are authorised to act on behalf of operational creditor, as apparent from the last portion of Form 3 which reads as follows :

“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 [name of corporate debtor].

Yours sincerely,

<i>Signature of person authorised to act on behalf of the operational creditor</i>
<i>Name in block letters</i>
<i>Position with or in relation to the operational creditor</i>
<i>Address of person signing.”</i>

30. From bare perusal of Form 3 and Form 4, read with sub-rule (1) of rule 5 and section 8 of the I&B Code, it is clear that an operational creditor can apply himself or through a person authorised to act on behalf of operational creditor. **The person who is authorised to act on behalf of operational creditor is also required to state “his position with or in relation to the operational creditor”, meaning thereby the person authorised by operational creditor must hold position with or in relation to the operational creditor and only such person can apply.**

31. The demand notice/invoice demanding payment under the I&B Code is required to be issued in Form 3 or Form 4. Through the said formats, the corporate debtor is to be informed of, particulars of operational debt, with a

demand of payment, with clear understanding that the operational debt (in default) required to pay the debt, as claimed, unconditionally within ten days from the date of receipt of letter failing which the operational creditor will initiate a corporate insolvency process in respect of corporate debtor, as apparent from last paragraph No. 6 of notice contained in Form 3, and quoted above.

Only if such notice in Form 3 is served, the corporate debtor will understand the serious consequences of non-payment of operational debt, otherwise like any normal pleader notice/advocate notice, like notice under section 80 of Code of Civil Procedure, 1908 ('CPC') or for proceeding under section 433 of the Companies Act, 1956, the corporate debtor may decide to contest the suit/case if filed, distinct corporate resolution process, where such claim otherwise cannot be contested, except where there is an existence of dispute, prior to issue of notice under section 8.

32. In view of provisions of I&B Code, read with Rules, as referred to above, we hold that an "advocate/lawyer" or "chartered accountant" or "company secretary" in absence of any authority of the Board of directors, and holding no position with or in relation to the operational creditor cannot issue any notice under section 8 of the I&B Code, which otherwise is a lawyer's notice as distinct from notice to be given by operational creditor in terms of section 8 of the I&B Code.

33. In the present case as an advocate/lawyer has given notice and there is nothing on record to suggest that the lawyer has been authorised by "Board of directors" of the respondent—"DF Deutsche Forfait AG" and there is nothing on record to suggest that the lawyer hold any position with or in relation with the respondents, we hold that the notice issued by the lawyer on behalf of the respondents cannot be treated as a notice under section 8 of the I&B Code and for that the petition under section 9 at the instance of the respondents against the appellant was not maintainable.

34. The other question raised is whether there is existence of dispute, if any, in the present case ?

35. From bare perusal of record it is clear that the respondents issued a winding up notice on the appellant on 8th December, 2015, i.e., much prior to issuance of lawyer's notice purported to be under section 8 of the I&B Code. On receipt of such notice, the appellant disputed the claim by detailed reply dated 3rd January, 2017. Apart from that the respondents were relying on document dated 27th December, 2013 to fix liability on the appellant, which according to appellant was not signed by the appellant such fact was brought to the notice of the respondents as back as in the year 2013.

36. In *Kirusa Software (P.) Ltd. v. Mobilox Innovations (P.) Ltd. Company Appeal (AT) (Insolvency) No. 6 of 2017*, this Appellate Tribunal decided as to what is the meaning of 'dispute' and "existence of dispute" in terms of section 8 of the I&B Code and sub-section (5) of section 5 of I&B Code and by judgment dated 24th May, 2017 held as follows :

'15. For the purposes of Part II only of the Code, some terms/words have been defined. Sub-section (6) of section 5 defines "dispute", to include, unless the context otherwise requires, a dispute pending in any suit or arbitration proceedings relating to : (a) existence of amount of the debt; (b) quality of goods or service; (c) breach of a representation or warranty. The definition of "dispute" is "inclusive" and not "exhaustive". The same has to be given wide meaning provided it is relatable to the existence of the amount of the debt, quality of good or service or breach of a representation or warranty.

16. Once the term "dispute" is given its natural and ordinary meaning, upon reading of the Code as a whole, the width of "dispute" should cover all disputes on debt, default, etc., and not be limited to only two ways of disputing a demand made by the operational creditor, i.e. either by showing a record of pending suit or by showing a record of a pending arbitration. The intent of the Legislature, as evident from the definition of the term "dispute", is that it wanted the same to be illustrative (and not exhaustive). If the intent of the Legislature was that a demand by an operational creditor can be disputed only by showing a record of a suit or arbitration proceeding, the definition of dispute would have simply said dispute means a dispute pending in arbitration or a suit.

18. Admittedly in sub-section (6) of section 5 of the I&B Code, the Legislature used the words "dispute includes a suit or arbitration proceedings". If this is harmoniously read with section (2) of section 8 of the I&B Code, where words used are "existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings", the result is disputes, if any, applies to all kinds of disputes, in relation to debt and default. The expression used in sub-section (2) of section 8 of the I&B Code "existence of a dispute, if any," is disjunctive from the expression "record of the pendency of the suit or arbitration proceedings". Otherwise, the words "dispute, if any", in sub-section (2) of section 8 would become surplus usage.

19. Sub-section (2) of section 8 of the I&B Code cannot be read to mean that a dispute must be pending between the parties prior to the notice of demand and that too in arbitration or a civil court. Once parties are already

before any judicial forum/authority for adjudication of disputes, notice becomes irrelevant and such an interpretation renders the expression "existence of a dispute, if any, in sub-section (2) of section 8 itiose....

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

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

23. It is a fundamental principle of law that multiplicity of proceedings is required to be avoided. Therefore, if disputes under sub-section (2)(a) of section 8 read with sub-section (6) of section 5 of the I&B Code are confined to a dispute in a pending suit and arbitration in relation to the three classes under subsection (6) of section 5 of the I&B Code, it would violate the definition of operational debt under sub-section (21) of section 3 of the I&B Code and would become inconsistent thereto, and would bar operational creditor from invoking sections 8 and 9 of the Code.

24. Sub-section (6) of section 5 read with sub-section (2)(a) of section 8 also cannot be confined to pending arbitration or a civil suit. It must

include disputes pending before every judicial authority including mediation, conciliation, etc., as long there are disputes as to existence of debt or default, etc., it would satisfy sub-section (2) of section 8 of the I&B Code....

26. *The definition of “dispute” for the purpose of section 9 must be read along with expression operational debt as defined in section 5(21) of I&B Code, 2016 means :*

(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;” Thus the definition of “dispute”, “operational debt” is read together for the purpose of section 9 is clear that the intention of Legislature to lay down the nature of “dispute” has not been limited to suit or arbitration proceedings pending but includes other proceedings “if any”.

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

28. *The dispute under I&B Code must relate to specified nature in clause (a), (b) or (c), i.e., existence of amount of debt or quality of goods or service or breach of representation or warranty. However, it is capable of being discerned not only from in a suit or arbitration from any document related to it. For example, the “operational creditor” has issued notice under Code of Civil Procedure, 1908 prior to initiation of the suit against the operational creditor which is disputed by “corporate debtor”. Similarly notice under section 59 of the Sales and Goods Act if issued by one of the party, a labourer/employee who may claim to be operation creditor for the purpose of section 9 of I&B Code may have raised the dispute with the State Government concerning the subject-matter, i.e., existence of amount of debit and pending consideration before the competent Government. Similarly, a dispute may be pending in a Labour Court about existence of amount of debt. A party can move before a High Court under writ jurisdictions against Government, corporate debtor (public sector undertaking). There may be cases where one of the party has moved before the High Court under section 433 of the Companies Act, 1956 for initiation of liquidation proceedings against the “corporate debtor” and dispute is pending. Similarly, with regard to quality of foods, if the corporate debtor has raised a dispute, and brought to the notice of the*

“operational creditor” to take appropriate step, prior to receipt of notice under sub-section (1) of section 8 of the I&B Code, one can say that a dispute is pending about the debt. Mere raising a dispute for the sake of dispute, unrelated or related to clause (a) or (b) or (c) of sub-section (6) of section 5, if not raised prior to application and not pending before any competent court of law or authority cannot be relied upon to hold that there is a “dispute” raised by the corporate debtor. The scope of existence of “dispute”, if any, which includes pending suits and arbitration proceedings cannot be limited and confined to suit and arbitration proceedings only. It includes any other dispute raised prior to section 8 in this in relation to clause (a) or (b) or (c) of sub-section (6) of section 5. It must be raised in a court of law or authority and proposed to be moved before the court of law or authority and not any got up or mala fide dispute just to stall the insolvency resolution process.

29. There may be other cases such as a suit relating to existence of amount of debt stands decided and decree is pending for execution. Similarly, existence of amount of debt or quality of goods or service for which a suit have been filed and decreed; an award has been passed by Arbitral Panel, though petition under section 34 of Arbitration and Conciliation Act, 1996 may be pending. In such 20 case the question will arise whether a petition under section 9 will be maintainable particularly when it was a suit or arbitration proceeding is not pending, but stand decided ? Though one may argue that insolvency resolution process cannot be misused for execution of a judgment and decree passed in a suit or award passed by an arbitration Tribunal, but such submission cannot be accepted in view of Form 5 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 wherein a decree in suit and award has been shown to be a debt for the purpose of default on non-payment.

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

37. In view of the decision of *Kirusa Software (P.) Ltd. (supra)*, as a notice of winding up dated 8th December, 2016, was issued by respondents and the claim was disputed by appellant by detailed reply dated 3rd January, 2017, i.e., much prior to purported notice under section 8, issued by lawyer and a suit between the parties is pending, we hold that there is an existence of 'dispute', within the meaning of section 8 read with sub-section (5) of section 5 of I&B Code and, therefore, the petition under section 9 preferred by respondents against the appellant was not maintainable.

38. In view of detailed reasons and finding recorded above, we hold the impugned order is illegal and set aside the impugned order dated 10th April, 2017 passed by the learned Adjudicating Authority, Mumbai Bench in Company Petition No. 45/Mah/2017 of 2017.

39. In effect, order(s), if any, passed by learned Adjudicating Authority appointing any "interim resolution professional" or declaring moratorium, freezing of account and all other order(s) passed by Adjudicating Authority pursuant to impugned order and action, if any, taken by the "interim resolution professional", including the advertisement, if any, published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The joint application preferred by respondent under section 9 of the I&B Code is dismissed. Learned Adjudicating Authority will now close the proceeding. The appellant-company is released from all the rigour of law and is allowed to function independently through its Board of directors from immediate effect.

40. Learned Adjudicating Authority will fix the fee of interim resolution professional if appointed and the respondents will pay the fees of the interim resolution professional, for the period he has functioned. The appeal is allowed with aforesaid observation and direction. However, in the facts and circumstances of the case, there shall be no order as to cost.

Sd/-
(Mr. Balvinder Singh)
Member (Technical)

Sd/-
(Justice S.J. Multhopadhaya)
Chairperson

NEW DELHI

28th July, 2017

ANNEXURE X.15

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.15135 OF 2017

MACQUARIE BANK LIMITED

...APPELLANT

VERSUS

SHILPI CABLE TECHNOLOGIES LTD.

...RESPONDENT

WITH

CIVIL APPEAL NO.15481 OF 2017

CIVIL APPEAL NO.15447 OF 2017

JUDGMENT

R.F. Nariman, J.

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

2. The facts contained in the three appeals are similar. For the purpose of this judgment, the facts contained in Civil Appeal No.15481 of 2017 will now be set out. Hamera International (P.) Ltd. executed an agreement with the appellant, Macquarie Bank Ltd., Singapore, on 27th July, 2015, by which the appellant purchased the original supplier's right, title and interest in a supply agreement in favour of the respondent. The respondent entered into an agreement dated 2nd December, 2015 for supply of goods worth US\$6,321,337.11 in accordance with the terms and conditions contained in the said sales contract. The supplier issued two invoices dated 21st December, 2015 and 31st December, 2015. Payment terms under the said invoices were 150 days from the date of bill of lading dated 17th December, 2015/ 19th December, 2015. Since amounts under the said bills of lading were due for payment, the appellant sent an email dated 3rd May, 2016 to the contesting

respondent for payment of the outstanding amounts. Several such emails by way of reminders were sent, and it is alleged that the contesting respondent stated that it will sort out pending matters. Ultimately, the appellant issued a statutory notice under Sections 433 and 434 of the Companies Act, 1956. A reply dated 5th October, 2016 denied the fact that there was any outstanding amount.

3. After the enactment of the Code, the appellant issued a demand notice under Section 8 of the Code on 14th February, 2017 at the registered office of the contesting respondent, calling upon it to pay the outstanding amount of US\$6,321,337.11. By a reply dated 22nd February, 2017, the contesting respondent stated that nothing was owed by them to the appellant. They further went on to question the validity of the purchase agreement dated 27th July, 2015 in favour of the appellant. On 7th March, 2017, the appellant initiated the insolvency proceedings by filing a petition under Section 9 of the Code. On 1st June, 2017, the National Company Law Tribunal ('NCLT') rejected the petition holding that Section 9(3)(c) of the Code was not complied with, inasmuch as no certificate, as required by the said provision, accompanied the application filed under Section 9. It, therefore, held that there being non-compliance of the mandatory provision of Section 9(3)(c) of the Code, the application would have to be dismissed at the threshold. However, the NCLT also went into the question as to whether a dispute has been raised in relation to the operational debt and found that such dispute was in fact raised by the reply to the statutory notice sent under Sections 433 and 434 of the Companies Act, 1956 and that, therefore, under Section 9(5)(ii)(d), the application would have to be dismissed.

4. By the impugned judgment dated 17th July, 2017, the National Company Law Appellate Tribunal ('NCLAT') agreed with the NCLT holding that the application would have to be dismissed for non-compliance of the mandatory provision contained in Section 9(3)(c) of the Code. It further went on to hold that an advocate/lawyer cannot issue a notice under Section 8 on behalf of the operational creditor in the following terms :

“In the present case, as the notice has been given by an advocate/lawyer and there is nothing on the record to suggest that the lawyer was authorised by the appellant, and as there is nothing on the record to suggest that the said lawyer/ advocate hold any position with or in relation to the appellant-company, we hold that the notice issued by the advocate/lawyer on behalf of the appellant cannot be treated as notice under Section 8 of the I&B Code. And for the said reason also the petition under Section 9 at the instance of the appellant against the respondent was not maintainable.”

5. Shri Mukul Rohatgi, learned senior advocate appearing on behalf of the appellant, referred us to various provisions of the Code. According to learned senior counsel, on a conjoint reading of Section 9(3)(c), rule 6 and Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Adjudicating Authority Rules'), it is clear that Section 9(3)(c) is not mandatory, but only directory and that, in the said Section, 'shall' should be read as 'may'. He cited a number of judgments for the proposition that when serious general inconvenience is caused to innocent persons or the general public without really furthering the object of the particular Act, the said provision should not be read as mandatory, but as directory only. Further, according to learned senior counsel, Section 9(3)(c) is a procedural Section, which is not a condition precedent to the allowing of an application filed under Section 9(1). This is further clear from the fact that under Section 9(5), if there is no such certificate, the application does not need to be rejected. He also stressed the fact that at the end of Form 5, what has to be attached to the application, by way of Annexure III, is a copy of the relevant accounts from banks/financial institutions maintaining accounts of the operational creditor confirming that there is no payment of the operational debt only "if available". Also, according to learned counsel, this is only an additional document, which along with other documents that are mentioned in Item 8 of Part V, would go to prove the existence of the operational debt. The word "confirming" in Section 9(3)(c) would also show that this is only one more document that can be relied upon by the operational creditor, apart from other documents, which may well prove the existence of the operational debt. According to learned senior counsel, on the second ground as well it is clear, on a perusal of Form 5, that a "person authorised to act on behalf of the operational creditor" is a person who can sign Form 5 on behalf of the operational creditor. Also, the expression "position with or in relation to the operational creditor" shows that a lawyer, who is authorised by the operational creditor, is certainly within the said expression. He also referred us to Section 30 of the Advocates Act, 1961 and judgments on the effect of the expression "practise" when it applies to lawyers, vis-a-vis Tribunals such as the NCLT and NCLAT.

6. Shri Arvind Datar, learned senior advocate, supported the arguments of Shri Rohatgi and went on to add that the definition of 'person' contained in Section 2(23) of the Code includes a person resident outside India, and when read with the definition of "operational creditor" in Section 5(20) of the Code would make it clear that persons, such as the appellant, are certainly operational creditors within the meaning of the Code. He stressed the fact that if a copy of the certificate under Section 9(3)(c) can only be from a

“financial institution” as defined under Section 3(14) of the Code, and if a non resident bank or financial institution, such as the appellant, may not be included either as a scheduled bank under Section 3(14)(a) or as such other institution as the Central Government may by notification specify as a financial institution under Section 3(14)(d), it is clear that Section 9(3)(c) cannot operate to non-suit the appellant, as it would be impossible to get a certificate from a financial institution as defined. This being the case, he argued that the Court should add words into the expression “financial institution”, as it would otherwise lead to absurdity and that if Section 9(3)(c) is held to be mandatory, then a certificate from a foreign bank, who is not a “financial institution” as defined under the Code, should be read into Section 9(3)(c). Otherwise, the learned senior counsel supported Shri Rohatgi’s argument that Section 9(3)(c) is a directory provision which need not mandatorily be complied with. A further argument was made that the definition in Section 3(14), though exhaustive, is subject to context to the contrary and that, therefore, it is clear that a financial institution would include a bank outside the categories mentioned in Section 3(14) when it comes to an operational creditor who is a resident outside India.

7. All these arguments were countered by Dr. A M Singhvi, learned senior counsel appearing on behalf of the respondent. First and foremost, according to learned senior counsel, the object of the Code is not that persons may use the Code as a means of recovering debts. The Code is an extremely draconian piece of legislation and must, therefore, be construed strictly. If this is kept in mind, it is clear that Section 9(3)(c) is mandatory and requires to be complied with strictly or else the application should be dismissed at the threshold. He stated that in the context of it being recognised by our judgments that a financial creditor and operational creditor are completely, differently and separately dealt with in the Code, and that so far as an operational creditor is concerned, it is important to bear in mind that a very low threshold is required in order that an operational creditor’s application be rejected, namely, there being a pre-existing dispute between the parties. According to learned senior counsel Section 9(3)(c) is a jurisdictional condition precedent, which is clear from the expression ‘initiation’ and the expression ‘shall’, both showing that the Section is a mandatory condition precedent which has to be satisfied before the Adjudicating Authority can proceed further. According to learned senior counsel, a copy of the certificate from a financial institution is a very important document which makes it clear, almost conclusively, that there is an unpaid operational debt. According to him, the principle contained in **Taylor v. Taylor** (1875) 1 Ch.D 426, has been followed by a number of judgments and is applicable inasmuch as

when a statute requires a particular thing to be done in a particular manner, it must be done in that manner or not at all. He also referred us to various Sections of the Code, the Insolvency and the Adjudicating Authority Rules, Form 5 in particular, together with the Viswanathan Committee Report and Joint Committee Report of the Parliament. According to the learned senior counsel, it is clear from the definition of “financial institution” contained in Section 3(14) that certain foreign banks are included within the expression “scheduled banks” under Section 3(14)(a) and that, under Section 3(14)(d), the Central Government may, by notification, specify other foreign banks as financial institutions. It is only where operational creditors have dealings with banks which fall within Section 3(14), that they can avail the opportunity of declaring a corporate debtor as insolvent under Sections 8 and 9 of the Code. Persons who may be residents outside India and who bank with entities that are not contained within the definition of Section 3(14) would, therefore, be outside the Code.

8. According to the learned senior counsel, the consequence of not furnishing a copy of the certificate under Section 9(3)(c) is that, under Section 9(5)(ii)(a), the application that is made would be incomplete and, subject to the proviso, would have to be dismissed on that score. Also, according to the learned senior counsel, the NCLAT was right in following the judgment contained in **Smart Timing Steel Ltd. v. National Steel & Agro Industries Ltd.** decided on 19th May, 2017, which, according to the learned senior counsel, has merged in an order of this Court dismissing an appeal from the said judgment.

9. According to the learned senior counsel, a lawyer’s notice cannot be given under Section 8, read with the Adjudicating Authority Rules and Form 5 therein. Either the operational creditor himself must send the requisite notice, or a duly authorised agent on his behalf should do so, and such authorised agent can only be an ‘insider’, namely, a person who is authorised by the operational creditor, being an employee, director or other person from within who alone can send the notice under Section 8 and sign the application under Section 9. Dr. Singhvi also stated that it is clear, from Forms 3 and 5, that only a person authorised to act on behalf of the operational creditor can send the notice and/or sign the application. He stressed the word ‘position’ with or in relation to the operational creditor and stated that this would also indicate that it is only an insider who can be so authorised by the operational creditor and not a lawyer. According to learned senior counsel, the provisions contained in certain statutes such as Section 434(2) of the Companies Act, 1956 and rule 4 of the Debts Recovery Tribunal (Procedure) Rules, 1993 under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (‘Debts Recovery Rules’) would also make it clear that where a lawyer

can do things on behalf of a party, it is expressly so mentioned unlike the present case.

10. Having heard learned counsel for the parties, it is necessary to set out the relevant Sections of the Code and the Adjudicating Authority Rules.

‘3. In this Code, unless the context otherwise requires, –....

(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;....

(14) “financial institution” means –

- (a) a scheduled bank;
- (b) financial institution as defined in Section 45-I of the Reserve Bank of India Act, 1934;
- (c) public financial institution as defined in clause (72) of Section 2 of the Companies Act, 2013; and
- (d) such other institution as the Central Government may by notification specify as a financial institution;....

(23) “person” includes –

- (a) an individual;
- (b) a Hindu undivided family;
- (c) a company;
- (d) a trust;
- (e) a partnership;
- (f) a limited liability partnership; and
- (g) any other entity established under a statute, and includes a person resident outside India;

(25) “person resident outside India” means a person other than a person resident in India;

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

(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 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.

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

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.	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 or 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 [name of corporate debtor].

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 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,	
2.	DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE 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*].

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.'

11. The first thing to be noticed on a conjoint reading of Sections 8 and 9 of the Code, as explained in **Mobilox Innovations (P.) Ltd. v. Kirusa Software (P.) Ltd.**, Civil Appeal No. 9405 of 2017 decided on 21st September, 2017, at paragraphs 33 to 36, is that Section 9(1) contains the conditions precedent for triggering the Code insofar as an operational creditor is concerned. The requisite elements necessary to trigger the Code are :

- (i) occurrence of a default;
- (ii) delivery of a demand notice of an unpaid operational debt or invoice demanding payment of the amount involved; and
- (iii) the fact that the operational creditor has not received payment from the corporate debtor within a period of 10 days of receipt of the demand notice or copy of invoice demanding payment, or received a reply from the corporate debtor which does not indicate the existence of a pre-existing dispute or repayment of the unpaid operational debt.

12. It is only when these conditions are met that an application may then be filed under Section 9(2) of the Code in the prescribed manner, accompanied with such fee as has been prescribed. Under Section 9(3), what is clear is that, along with the application, certain other information is also to be furnished. Obviously, under Section 9(3)(a), a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor is to be furnished. We may only indicate that under Rules 5 and 6 of the Adjudicating Authority Rules, read with Forms 3 and 5, it is clear that, as Annexure I thereto, the application in any case must have a copy of the invoice/demand notice attached to the application. That this is a mandatory condition precedent to the filing of an application is clear from a conjoint reading of Sections 8 and 9(1) of the Code.

13. When we come to Section 9(3)(b), it is obvious that an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt can only be in a situation where the corporate debtor has not, within the period of 10 days, sent the requisite notice by way of reply to the operational creditor. In a case where such notice has, in fact, been sent in reply by the corporate debtor, obviously an affidavit to that effect cannot be given.

14. When we come to clause (c) of Section 9(3), it is equally clear that 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 is certainly not a condition precedent to triggering the insolvency process under the Code. The expression 'confirming' makes it clear that this is only a piece of evidence, albeit a very important piece of evidence, which only "confirms" that there is no payment of an unpaid operational debt. This becomes clearer when we go to sub-clause (d) of Section 9(3) which requires such other information as may be specified has also to be furnished along with the application.

15. When Form 5 under rule 6 is perused, it becomes clear that Part V

thereof speaks of particulars of the operational debt. There are 8 entries in Part V dealing with documents, records and evidence of default. Item 7 of Part V is only one of such documents and has to be read along with Item 8, which speaks of other documents in order to prove the existence of an operational debt and the amount in default. Further, annexure III in the Form also speaks of copies of relevant accounts kept by banks/financial institutions maintaining accounts of the operational creditor, confirming that there is no payment of the unpaid operational debt, only "if available". This would show that such accounts are not a pre-condition to trigger the Code, and that if such accounts are not available, a certificate based on such accounts cannot be given, if Section 9 is to be read the Adjudicating Authority Rules and the Forms therein, all of which set out the statutory conditions necessary to invoke the Code.

16. In **State of UP v. Babu Ram** [1961] 2 SCR 679 at 701-702, this Court dealt with the position of rules made under a statute as follows :

'What then is the effect of the said propositions in their application to the provisions of the Police Act and the rules made thereunder ? The Police Act of 1861 continues to be good law under the Constitution. Para 477 of the Police Regulations shows that the rules in Chapter XXXII thereof have been framed under Section 7 of the Police Act. Presumably, they were also made by the Government in exercise of its power under Section 46(2) of the Police Act. Under para 479(a) the Governor's power of punishment with reference to all officers is preserved; that is to say, this provision expressly saves the power of the Governor under article 310 of the Constitution. "Rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act, and are to be judicially noticed for all purposes of construction or obligation" : see Maxwell "On the Interpretation of Statutes", 10th edn., pp. 50-51. The statutory rules cannot be described as, or equated with, administrative directions. If so, the Police Act and the rules made thereunder constitute a self-contained code providing for the appointment of police officers and prescribing the procedure for their removal.'

Equally, in **Desh Bandhu Gupta v. Delhi Stock Exchange** [1979] 4 SCC 565 at 572, this Court laid down the principle of *contemporanea expositio* as under :

'The principle of *contemporanea expositio* (interpreting a statute or any other document by reference to the exposition it has received from contemporary authority) can be invoked though the same will not always

be decisive of the question of construction (Maxwell 12th ed. p. 268). In Crawford on Statutory Construction (1940 edn.) in para 219 (at pp. 393-395) it has been stated that administrative construction (i.e., contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction, commonly referred to as practical construction, although not controlling, is nevertheless entitled to considerable weight; it is highly persuasive. In *Baleshwar Bagarti v. Bhagirathi Dass* [ILR 35 Cal. 701 at 713] the principle, which was reiterated in *Mathura Mohan Saha v. Ram Kumar Saha* [ILR 43 Cal. 790 : AIR 1916 Cal. 136] has been stated by Mukerjee, J, thus :

“It is a well settled principle of interpretation that Courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it. I do not suggest for a moment that such interpretation has by any means a controlling effect upon the Courts; such interpretation may, if occasion arises, have to be disregarded for cogent and persuasive reasons, and in a clear case of error, a Court would without hesitation refuse to follow such construction.”

However, Dr. Singhvi referred to the following three judgments for the proposition that rules cannot override the substantive provisions of an Act : **D T U v. B B L Hajelay** [1972] 2 SCC 744 (para 13); **ADM (Rev.) Delhi Admn. v. Siri Ram** [2000] 5 SCC 451 (para 16) and **Ispat Industries Ltd. v. Commissioner of Customs** [2006] 12 SCC 583 (para 21). The aforesaid judgments only have application when rules are ultra vires the parent statute. In the present case, the rules merely flesh out what is already contained in the statute and must, therefore, be construed along with the statute. Read with the Code, they form a self-contained code being contemporanea expositio by the Executive which is charged with carrying out the provisions of the Code. The true construction of Section 9(3)(c) is that it is a procedural provision, which is directory in nature, as the Adjudicatory Authority Rules read with the Code clearly demonstrate.

17. There may be situations of operational creditors who may have dealings with a financial institution as defined in Section 3(14) of the Code. There may also be situations where an operational creditor may have as his banker a non-scheduled bank, for example, in which case, it would be impossible for him to fulfill the aforesaid condition. A foreign supplier or assignee of such supplier may have a foreign banker who is not within Section 3(14) of the Code. The fact that such foreign supplier is an operational creditor is

established from a reading of the definition of 'person' contained in Section 3(23), as including persons resident outside India, together with the definition of "operational creditor" contained in Section 5(20), which in turn is defined as "a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred". That such person may have a bank/financial institution with whom it deals and which is not contained within the definition of Section 3(14) of the Code would show that Section 9(3)(c) in such a case would, if Dr. Singhvi is right about the sub-Section being a condition precedent, amount to a threshold bar to proceeding further under the Code. The Code cannot be construed in a discriminatory fashion so as to include only those operational creditors who are residents outside India who happen to bank with financial institutions which may be included under Section 3(14) of the Code. It is no answer to state that such person can approach the Central Government to include its foreign banker under Section 3(14) of the Code, for the Central Government may never do so. Equally, Dr. Singhvi's other argument that such persons ought to be left out of the triggering of the Code against their corporate debtor, despite being operational creditors as defined, would not sound well with article 14 of the Constitution, which applies to all persons including foreigners. Therefore, as the facts of these cases show, a so-called condition precedent impossible of compliance cannot be put as a threshold bar to the processing of an application under Section 9 of the Code.

18. However, it was argued that there are various other categories of creditors who cannot file insolvency petitions, such as government authorities who have pending tax dues. Such authorities have ample powers under taxation statutes to coercively collect outstanding tax arrears. Besides they form a class, as a whole, who are kept out of the Code, unlike persons who are resident outside India who, though being operational creditors, are artificially divided, if we are to accept Dr. Singhvi's argument, into two sub-classes, namely, those who bank with an institution that is recognised by Section 3(14) of the Code and those who do not. This argument also does not commend itself to us.

19. It is true that the expression 'initiation' contained in the marginal note to Section 9 does indicate the drift of the provision, but from such drift, to build an argument that the expression 'initiation' would lead to the conclusion that Section 9(3) contains mandatory conditions precedent before which the Code can be triggered is a long shot. Equally, the expression 'shall' in Section 9(3) does not take us much further when it is clear that Section 9(3)(c) becomes impossible of compliance in cases like the present. It would amount to a situation wherein serious general inconvenience would be caused to innocent

persons, such as the appellant, without very much furthering the object of the Act, as has been held in the **State of Haryana v. Raghubir Dayal** [1995] 1 SCC 133 at paragraph 5 and obviously, therefore, Section 9(3)(c) would have to be construed as being directory in nature.

20. Even otherwise, the important condition precedent is an occurrence of a default, which can be proved, as has been stated hereinabove, by means of other documentary evidence. Take for example the case of an earlier letter written by the corporate debtor to the operational creditor confirming that a particular operational debt is due and payable. This piece of evidence would be sufficient to demonstrate that such debt is due and that default has taken place, as may have been admitted by the corporate debtor. If Dr. Singhvi's submissions were to be accepted, despite the availability of such documentary evidence contained in the Section 9 application as other information as may be specified, such application filed under Section 9 would yet have to be rejected because there is no copy of the requisite certificate under Section 9(3)(c). Obviously, such an absurd result militates against such a provision being construed as mandatory.

21. It is unnecessary to further refer to arguments made on the footing that Section 7 qua financial creditors has a process which is different from that of operational creditors under Sections 8 and 9 of the Code. The fact that there is no requirement of a bank certificate under Section 7 of the Code, as compared to Section 9, does not take us very much further. The difference between Sections 7 and 9 has already been noticed by this Court in **Innovative Industries Ltd. v. ICICI Bank** Civil Appeal Nos. 8337-8338 of 2017 decided on 31st August, 2017, as follows :

'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.’

The fact that these differences obtain under the Code would have no direct bearing on whether Section 9(3)(c) ought to be construed in the manner indicated by Dr. Singhvi.

22. It was also submitted that Sections 65 and 76 of the Code provide for criminal prosecution against banks issuing false bank certificates and that a foreign bank issuing such a certificate may not be amenable to the jurisdiction of the Code. It is unnecessary to answer this submission in view of the fact that the necessity for such a certificate has itself been held by this judgment to be directory in nature.

23. Equally, Dr. Singhvi’s argument that the Code leads to very drastic action being taken once an application for insolvency is filed and admitted and that, therefore, all conditions precedent must be strictly construed is also not in sync with the recent trend of authorities as has been noticed by a concurring judgment in **Ms. Eera through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi)** Criminal Appeal Nos. 1217-1219 of 2017 decided on 21st July, 2017. In this judgment, the correct interpretation of Section 2(1)(d) of the Protection of Children from Sexual Offences Act, 2012 arose. After referring to the celebrated **Heydon’s case**, 76 ER 637 [1584] and to the judgments in which the golden rule of interpretation of statutes was set out, the concurring judgment of R F Nariman, J, after an exhaustive survey of the relevant case law, came to the conclusion that the modern trend of case law is that creative interpretation is within the *Lakshman Rekha* of the Judiciary. Creative interpretation is when the Court looks at both the literal language as well as the purpose or object of the statute, in order to better determine what the words used by the draftsman of the legislation mean. The concurring judgment then concluded :

‘It is, thus, clear on a reading of English, U.S., Australian and our own Supreme Court judgments that the “*Lakshman Rekha*” has in fact been extended to move away from the strictly literal rule of interpretation back to the rule of the old English case of **Heydon**, where the Court must have recourse to the purpose, object, text, and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle. It started out by the rule as stated in 1584 in **Heydon’s case**, which was

then waylaid by the literal interpretation rule laid down by the Privy Council and the House of Lords in the mid-1800s, and has come back to restate the rule somewhat in terms of what was most felicitously put over 400 years ago in **Heydon's case**:'

In dealing with penal statutes, the Court was confronted with a body of case law which stated that as penal consequences ensue, the provisions of such statutes should be strictly construed. Here again, the modern trend in construing penal statutes has moved away from a mechanical incantation of strict construction. Several judgments were referred to and it was held that a purposive interpretation of such statutes is not ruled out. Ultimately, it was held that a fair construction of penal statutes based on purposive as well as literal interpretation is the correct modern day approach.

24. However, **Dr. Singhvi cited Raghunath Rai Bareja v. Punjab National Bank** [2007] 2 SCC 230 and relied upon paragraphs 39 to 47 for the proposition that the literal construction of a statute is the only mode of interpretation when the statute is clear and unambiguous. Paragraph 43 of the said judgment was relied upon strongly by the learned counsel, which states :

“In other words, once we depart from the literal rule, then any number of interpretations can be put to a statutory provision, each judge having a free play to put his own interpretation as he likes. This would be destructive of judicial discipline, and also the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people. Even if the literal interpretation results in hardship or inconvenience, it has to be followed (see *G P Singh's Principles of Statutory Interpretations, 9th edn., pp. 45-49*). Hence, departure from the literal rule should only be done in very rare cases, and ordinarily there should be judicial restraint in this connection.”

Regard being had to the modern trend of authorities referred to in the concurring judgment in **Ms. Eera through Dr. Manjula Krippendorf (supra)**, we need not be afraid of each Judge having a free play to put forth his own interpretation as he likes. Any arbitrary interpretation, as opposed to fair interpretation, of a statute, keeping the object of the Legislature in mind, would be outside the judicial ken. The task of a Judge, when he looks at the literal language of the statute as well as the object and purpose of the statute, is not to interpret the provision as he likes but is to interpret the provision keeping in mind Parliament's language and the object that Parliament had in mind. With this caveat, it is clear that judges are not knight-errants free to roam around in the interpretative world doing as each

Judge likes. They are bound by the text of the statute, together with the context in which the statute is enacted; and both text and context are Parliaments', and not what the Judge thinks the statute has been enacted for. Also, it is clear that for the reasons stated by us above, a fair construction of Section 9(3)(c), in consonance with the object sought to be achieved by the Code, would lead to the conclusion that it cannot be construed as a threshold bar or a condition precedent as has been contended by Dr. Singhvi.

25. Dr. Singhvi then argued that the application of the principle in **Taylor (supra)** should be followed when it comes to the correct interpretation of Section 9(3)(c) of the Code. The principle of **Taylor (supra)**, namely, that where a statute states that a particular act is to be done in a particular manner; it must be done in that manner or not at all, was followed by the Privy Council in **Nazir Ahmad v. King Emperor** 63 IA 372 (1936). In that case, the Privy Council held that Sections 164 and 364 of the Code of Criminal Procedure, 1898 prescribed the mode in which confessions are to be recorded by Magistrates, when made during investigation, and a confession before a Magistrate not recorded in the manner provided was inadmissible. In **Ukha Kolhe v. State of Maharashtra** [1964] 1 SCR 926 at 948-949, a Constitution Bench of this Court held that the principle contained in **Taylor (supra)** would not apply when proof of a specified fact could be obtained by means other than that statutorily specified. The argument in that case was that Sections 129A and 129B prescribed the mode of taking blood in the course of investigation of an offence under the Bombay Prohibition Act, 1949, and that, therefore, production or examination of a person before a registered medical practitioner during the course of such investigation is the only method by which consumption of an intoxicant may be proved. After setting out Sections 129A and 129B and the judgment of the Privy Council in **Nazir Ahmad (supra)**, this Court held :

“The rule in *Taylor v. Taylor* [1875] 1 Ch.D 426 on which the Judicial Committee relied has, in our judgment, no application to this case. Section 66(2), as we have already observed, does not prescribe any particular method of proof of concentration of alcohol in the blood of a person charged with consumption or use of an intoxicant. Section 129A is enacted primarily with the object of providing when the conditions prescribed are fulfilled, that a person shall submit himself to be produced before a registered medical practitioner for examination and for collection of blood. Undoubtedly, Section 129A(1) confers power upon a Police or a Prohibition Officer in the conditions set out to compel a person suspected by him of having consumed illicit liquor, to be produced for examination and for collection of blood before a registered medical practitioner. But proof of

concentration of alcohol may be obtained in the manner described in Section 129A(1) and (2), or otherwise; that is expressly provided by sub-Section (8) of Section 129A. The power of a Police Officer to secure examination of a person suspected of having consumed an intoxicant in the course of investigation for an offence under the Act is undoubtedly restricted by Section 129A. But in the present case the Police Officer investigating the offence had not produced the accused before a medical officer; it was in the course of his examination that Dr. Kulkarni, before any investigation was commenced, came to suspect that the appellant had consumed liquor, and he directed that specimen of blood of the appellant be collected. This step may have been taken for deciding upon the line of treatment, but certainly not for collecting evidence to be used against the appellant in any possible trial for a charge of an offence of consuming liquor contrary to the provisions of the Act. If unlawful consumption of an intoxicant by a person accused, may be proved otherwise than by a report obtained in the conditions mentioned in Section 129A(1) and (2), there would be no reason to suppose that other evidence about excessive concentration of alcohol probative of consumption is inadmissible. Admissibility of evidence about concentration of alcohol in blood does not depend upon the exercise of any power of the Police or Prohibition Officer. Considerations which were present in Nazir Ahmad case [1936] LR 63 IA 372 regarding the inappropriateness of Magistrates being placed in the same position as ordinary citizens and being required to transgress statutory provisions relating to the method of recording confessions also do not arise in the present case.”

26. This judgment applies on all fours to the facts of the present case inasmuch as, like Section 129A(8) of the aforesaid Act, proof of the existence of a debt and a default in relation to such debt can be proved by other documentary evidence, as is specifically contemplated by **Section 9(3)(d)** of the Code. Like Section 66(2) of the aforesaid Act in *Ukha Kolhe* (supra), Section 8 of the Code does not prescribe any particular method of proof of occurrence of default. Consequently, we are of the opinion that the principle contained in **Taylor (supra)** does not apply in the present situation.

27. Also, in **Madan & Co. v. Wazir Jaivir Chand** [1989] 1 SCC 264 at 268-270, the interpretation of Section 11 of the Jammu and Kashmir Houses and Shops Rent Control Act, 1966 was under consideration of this Court. As stated in paragraph 4 of the judgment, the controversy in that case turned on the question whether the notice sent by the respondent by registered post can be said to have been served and the petitioner can be said to have been in receipt of the said notice.

In the words of the judgment :

“4. On the terms of the above Sections, the controversy in this case turned on the question whether the notice sent by the respondent by registered post on 26th November, 1976 can be said to have been served and the petitioner can be said to have been in receipt of the said notice. If the answer to this question is in the affirmative, as held by all the Courts concurrently, there is nothing further to be said. The contention of the appellant tenant, however, is that the statute postulates a factual service of the notice on, and the actual receipt of it by, the tenant and that this admittedly not being the position in the present case, no eviction could have been decreed.

5. Shri Soli J Sorabjee, learned counsel appearing for the tenant submitted that the safeguards in Sections 11 and 12 of the Act are intended for the benefit and protection of the tenant and that, therefore, where the Act provides for the service of the notice, by post, this requirement has to be strictly complied with. He referred to the decisions in *Hare Krishna Das v. Hahnemann Publishing Co. Ltd.* [1965-66] 70 Cal. WN 262 and *Surajmull Ghanshyamdas v. Samadarshan Sur* AIR 1969 Cal. 109/ILR [1969] 1 Cal. 379 to contend that such postal service can neither be presumed nor considered to be good service where the letter is returned to the sender due to the non-availability of the addressee. He urges that, in the absence of any enabling provision such as the one provided for in Section 106 of the Transfer of Property Act, service by some other mode, such as affixture, cannot be treated as sufficient compliance with the statute. In this context, he referred to the frequently applied rule in *Taylor v. Taylor* [1875] 1 Ch.D 426 that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. He urged that even if service by affixture can be considered to be permissible, there are stringent prerequisites for service by affixture, such as those outlined in order V, rules 17 to 19, of the Code of Civil Procedure ('CPC') and that these prerequisites were not fulfilled in the present case. He pointed out that even under the CPC, service by such affixture can be recognised as valid only if sincere and vigilant attempts to serve the notice on the addressee personally are unsuccessful. In the present case, it is submitted, the evidence shows that the postman made no serious efforts to ascertain the whereabouts of the addressee even though the evidence showed that a servant of the petitioner firm was known to the postman and was present in the neighbourhood. He, therefore, submitted that the High Court should have

dismissed the suit for eviction filed by the landlord on the ground that the requirements of Sections 11 and 12 of the Act were not satisfied.”

The Court turned down the contention based on Taylor (*supra*) in the following terms :

“We are of opinion that the conclusion arrived at by the Courts below is correct and should be upheld. It is true that the proviso to clause (i) of Section 11(1) and the proviso to Section 12(3) are intended for the protection of the tenant. Nevertheless it will be easy to see that too strict and literal a compliance of their language would be impractical and unworkable.”

‘In this situation, we have to choose the more reasonable, effective, equitable and practical interpretation and that would be to read the word “served” as “sent by post”, correctly and properly addressed to the tenant, and the word “receipt” as the tender of the letter by the postal peon at the address mentioned in the letter. No other interpretation, we think, will fit the situation as it is simply not possible for a landlord to ensure that a registered letter sent by him gets served on, or is received by, the tenant.’

This judgment is also supportive of the proposition that when the principle in **Taylor (*supra*)** leads to impractical, unworkable and inequitable results, it cannot be applied out of context in situations which are predominantly procedural in nature.

28. The decision in **Smart Timing (*supra*)** by the NCLAT, which was relied upon by the impugned judgment, was then pressed into service by Dr. Singhvi stating that an appeal from this judgment has been dismissed by this Court and that, therefore, following the principle in **Kunhayammed v. State of Kerala** [2000] 6 SCC 359, the NCLAT’s judgment has merged with the Supreme Court’s order dated 18th August, 2017, which reads as follows :

“Heard the learned counsel appearing for the appellant. We do not find any reason to interfere with the order dated 19th May, 2017 passed by the National Company Law Appellate Tribunal, New Delhi. In view of this, we find no merit in the appeal.

Accordingly, the appeal is dismissed.”

Whether or not there is a merger, it is clear that the order dated 18th August, 2017 is not “law declared” within the meaning of article 141 of the Constitution and is of no precedential value. Suffice it to state that the said order was

also a threshold dismissal by the Supreme Court, having heard only the learned counsel appearing for the appellant.

29. Dr. Singhvi then relied upon the Viswanathan Report dated November 2015, in particular Box 5.2, which reads as follows :

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 Box 5.3 under what the Adjudicator will accept as requirements to trigger the IRP.

30. Item 2 in Box 5.2 does show that for the corporate debtor to trigger the IRP, it must be able to submit all the documentation that is defined in the Code and that different documentation is required insofar as financial creditors and operational creditors are concerned, as is evident from Item 4 in Box 5.2. The sentence which is after Box 5.2 is significant. It reads, “therefore, the Code requires that the creditor can only trigger the IRP on clear evidence of default.” Nowhere does the report state that such “clear evidence” can only be in the shape of the certificate, referred to in Section 9(3)(c), as a condition precedent to triggering the Code. In fact, in Item 2(c) in Box 5.3, the Committee, by way of drafting instructions for how the IRP can be triggered, states :

“If an operational creditor has applied, the application contains :

- (i) Record of an undisputed bill against the entity, and where applicable, information of such undisputed as filed at a registered information utility.”

31. When it comes to the Joint Committee report dated April 2016, the draft Section contained therein, namely, the definition of financial institution contained in Section 3(14) of the Code, has added into it a sub-clause (c) which is a public financial institution as defined in Section 2(72) of the Companies Act, 2013. Apart from this, the draft statute that was placed before the Joint Committee contains Section 9(3)(c) exactly as it is in the present Code. This report again does not throw much light on the point at issue before us.

32. Shri Mukul Rohatgi strongly relied upon a recent judgment delivered by this Court in **Surendra Trading Co. v. Juggilal Kamalapat Jute Mills Co. Ltd.** Civil Appeal No. 8400 of 2017 decided on 19th September, 2017. In this case, the question of law framed by the NCLAT for its decision was whether the time limit prescribed for admitting or rejecting a petition for initiation of the insolvency resolution process is mandatory. The precise question was whether, under the proviso to Section 9(5), the rectification of defects in an application within 7 days of the date of receipt of notice from the Adjudicating Authority was a hard and fast time limit which could never be altered. The NCLAT had held that the 7 day period was sacrosanct and could not be extended, whereas, insofar as the Adjudicating Authority is concerned, the decision to either admit or reject the application within the period of 14 days was held to be directory. This Court, in disagreeing with the NCLAT on the 7-day period being mandatory, held :

“We are not able to decipher any valid reason given while coming to the conclusion that the period mentioned in proviso is mandatory. The order of the NCLAT, thereafter, proceeds to take note of the provisions of Section 12 of the Code and points out the time limit for completion of insolvency resolution process is 180 days, which period can be extended by another 90 days. However, that can hardly provide any justification to construe the provisions of proviso to sub-Section (5) of Section 9 in the manner in which it is done. It is to be borne in mind that limit of 180 days mentioned in Section 12 also starts from the date of admission of the application. Period prior thereto which is consumed, after the filing of the application under Section 9 (or for that matter under Section 7 or Section 10), whether by the Registry of the Adjudicating Authority in scrutinising the application or by the applicant in removing the defects or by the Adjudicating Authority in admitting the application is not to be taken into account. In fact, till the

objections are removed it is not to be treated as application validly filed inasmuch as only after the application is complete in every respect it is required to be entertained. In this scenario, making the period of seven days contained in the proviso as mandatory does not commend to us. No purpose is going to be served by treating this period as mandatory. In a given case there may be weighty, valid and justifiable reasons for not able to remove the defects within seven days. Notwithstanding the same, the effect would be to reject the application.”

The Court further went on to hold :

“Further, we are of the view that the judgments cited by the NCLAT and the principle contained therein applied while deciding that period of fourteen days within which the Adjudicating Authority has to pass the order is not mandatory but directory in nature would equally apply while interpreting proviso to sub-Section (5) of Section 7, Section 9 or sub-Section (4) of Section 10 as well. After all, the applicant does not gain anything by not removing the objections inasmuch as till the objections are removed, such an application would not be entertained. Therefore, it is in the interest of the applicant to remove the defects as early as possible.

Thus, we hold that the aforesaid provision of removing the defects within seven days is directory and not mandatory in nature. However, we would like to enter a caveat.

We are also conscious of the fact that sometimes applicants or their counsel may show laxity by not removing the objections within the time given and may take it for granted that they would be given unlimited time for such a purpose. There may also be cases where such applications are frivolous in nature which would be filed for some oblique motives and the applicants may want those applications to remain pending and, therefore, would not remove the defects. In order to take care of such cases, a balanced approach is needed.

Thus, while interpreting the provisions to be directory in nature, at the same time, it can be laid down that if the objections are not removed within seven days, the applicant while refiling the application after removing the objections, file an application in writing showing sufficient case as to why the applicant could not remove the objections within seven days. When such an application comes up for admission/order before the Adjudicating Authority, it would be for the Adjudicating Authority to decide as to whether sufficient cause is shown in not removing the defects beyond the period of seven days. Once the Adjudicating Authority is satisfied

that such a case is shown, only then it would entertain the application on merits, otherwise it will have right to dismiss the application.”

This judgment also lends support to the argument for the appellant in that it is well settled that procedure is the handmaid of justice and a procedural provision cannot be stretched and considered as mandatory, when it causes serious general inconvenience. As has been held in **Mahanth Ram Das v. Ganga Das** [1961] 3 SCR 763 at 767-768, we have travelled far from the days of the laws of the Medes and the Persians wherein, once a decree was promulgated, it was cast in stone and could not be varied or extended later :

“Such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time but was set upon and robbed by thieves the day previous, he could not ask for extension of time, or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians. Cases are known in which Courts have moulded their practice to meet a situation such as this and to have restored a suit or proceeding, even though a final order had been passed.”

33. Insofar as the second point is concerned, the first thing that is to be noticed is that Section 8 of the Code speaks of an operational creditor delivering a demand notice. It is clear that had the Legislature wished to restrict such demand notice being sent by the operational creditor himself, the expression used would perhaps have been ‘issued’ and not ‘delivered’. Delivery, therefore, would postulate that such notice could be made by an authorised agent. In fact, in Forms 3 and 5 extracted hereinabove, it is clear that this is the understanding of the draftsman of the Adjudicatory Authority Rules, because the signature of the person “authorised to act” on behalf of the operational creditor must be appended to both the demand notice as well as the application under Section 9 of the Code. The position further becomes clear that both forms require such authorised agent to state his position with or in relation to the operational creditor. A position with the operational creditor would perhaps be a position in the company or firm of the operational creditor, but the expression “in relation to” is significant. It is a very wide expression, as has been held in **Renusagar Power Co. Ltd. v. General Electric Co.** [1984] 4 SCC 679 at 704 and **State of Karnataka v.**

Azad Coach Builders (P.) Ltd. [2010] 9 SCC 524 at 535, which specifically includes a position which is outside or indirectly related to the operational creditor. It is clear, therefore, that both the expression “authorised to act” and “position in relation to the operational creditor” go to show that an authorised agent or a lawyer acting on behalf of his client is included within the aforesaid expression.

34. Quite apart from the above, Section 30 of the Advocates Act states as follows :

“**Right of advocates to practise.** – Subject to provisions of this Act, every advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the territories to which this Act extends, –

- (i) in all Courts including the Supreme Court;
- (ii) before any tribunal or person legally authorised to take evidence; and
- (iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise.”

That the expression ‘practise’ is an expression of extremely wide import, and would include all preparatory steps leading to the filing of an application before a Tribunal. This is clear from a Constitution Bench judgment of this Court in **Harish Uppal (Ex-Capt.) v. Union of India** [2003] 2 SCC 45 at 72, which states :

“The right of the advocate to practise envelopes a lot of acts to be performed by him in discharge of his professional duties. Apart from appearing in the Courts he can be consulted by his clients, he can give his legal opinion whenever sought for, he can draft instruments, pleadings, affidavits or any other documents, he can participate in any conference involving legal discussions, he can work in any office or firm as a legal officer, he can appear for clients before an arbitrator or arbitrators, etc.”

35. The doctrine of harmonious construction of a statute extends also to a harmonious construction of all statutes made by Parliament. In **Harshad S Mehta v. State of Maharashtra** [2001] 8 SCC 257 at 280-81, the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 was held, insofar as the criminal jurisdiction of the Special Court was concerned, to be harmoniously construed with the Code of Criminal Procedure, 1973 in the following terms :

‘48. To our mind, the Special Court has all the powers of a Court of Session and/or Magistrate, as the case may be, after the prosecution is instituted or transferred before that Court. The width of the power of the Special

Court will be same whether trying such cases as are instituted before it or transferred to it. The use of different words in Sections 6 and 7 of the Act as already noticed earlier also shows that the words in Section 7 that the prosecution for any offence shall be instituted only in the Special Court deserve a liberal and wider construction. They confer on the Special Court all powers of the Magistrate including the one at the stage of investigation or inquiry. Here, the institution of the prosecution means taking any steps in respect thereof before the Special Court. The scheme of the Act nowhere contemplates that it was intended that steps at pre-cognisance stage shall be taken before a Court other than a Special Court. We may note an illustration given by Mr. Salve referring to Section 157 of the Code. Learned counsel submitted that the report under that Section is required to be sent to a Magistrate empowered to take cognisance of offence. In relation to offence under the Act, the Magistrate has no power to take cognisance. That power is exclusively with the Special Court and, thus, report under Section 157 of the Code will have to be sent to the Special Court though the Section requires it to be sent to the Magistrate. It is clear that for the expression "Magistrate" in Section 157, so far as the Act is concerned, it is required to be read as "Special Court" and likewise in respect of other provisions of the Code. If the expression "Special Court" is read for the expression "Magistrate", everything will fall in line. This harmonious construction of the provisions of the Act and the Code makes the Act work. That is what is required by principles of statutory interpretation. Section 9(1) of the Act provides that the Special Court shall in the trial of such cases follow the procedure prescribed by the Code for the trial of warrant cases before the Magistrate. The expression "trial" is not defined in the Act or the Code. For the purpose of the Act, it has a wider connotation and also includes in it the pre-trial stage as well. Section 9(2) makes the Special Court, a Court of Sessions by a fiction by providing that the Special Court shall be deemed to be a Court of Sessions and shall have all the powers of a Court of Sessions. In case, the Special Court is held not to have the dual capacity and powers both of the Magistrate and the Court of Sessions, depending upon the stage of the case, there will be a complete hiatus. It is also to be kept in view that the Special Court under the Act comprises of a High Court Judge and it is a Court of exclusive jurisdiction in respect of any offence as provided in Section 3(2) which will include offences under the Indian Penal Code, the Prevention of Corruption Act and other penal laws. It is only in the event of inconsistency that the provisions of the Act would prevail as provided in Section 13 thereof. Any other interpretation will make the provision of the Act unworkable which could not be the intention of the Legislature. Section

9(2) does not exclude Sections 306 to 308 of the Code from the purview of the Act. This Section rather provides that the provisions of the Code shall apply to the proceedings before the Special Court. The inconsistency seems to be only imaginary. There is nothing in the Act to show that Sections 306 to 308 were intended to be excluded from the purview of the Act.'

Similarly, in **CTO v. Binani Cements Ltd.** [2014] 8 SCC 319 at 332, the rule of construction of two Parliamentary statutes being harmoniously construed was laid down as follows :

"35. Generally, the principle has found vast application in cases of there being two statutes : general or specific with the latter treating the common subject-matter more specifically or minutely than the former. Corpus Juris Secundum, 82 CJS Statutes § 482 states that when construing a general and a specific statute pertaining to the same topic, it is necessary to consider the statutes as consistent with one another and such statutes, therefore, should be harmonised, if possible, with the objective of giving effect to a consistent legislative policy. On the other hand, where a general statute and a specific statute relating to the same subject-matter cannot be reconciled, the special or specific statute ordinarily will control. The provision more specifically directed to the matter at issue prevails as an exception to or qualification of the provision which is more general in nature, provided that the specific or special statute clearly includes the matter in controversy – *Edmond v. United States* 137 L Ed 2d 917/520 US 651 (1997), *Warden v. Marrero* 41 L Ed 2d 383/417 US 653 (1974)."

More recently, in **Binoy Viswam v. Union of India** [2017] 7 SCC 59 at 132, this Court construed the Income-tax Act, 1961 and the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 harmoniously in the following manner :

"98. In view of the above, we are not impressed by the contention of the petitioners that the two enactments are contradictory with each other. A harmonious reading of the two enactments would clearly suggest that whereas enrolment of Aadhaar is voluntary when it comes to taking benefits of various welfare schemes even if it is presumed that requirement of Section 7 of the Aadhaar Act that it is necessary to provide Aadhaar number to avail the benefits of schemes and services, it is up to a person to avail those benefits or not. On the other hand, purpose behind enacting Section 139AA of the Act is to check a menace of black money as well as money laundering and also to widen the income-tax net so as to cover those persons who are evading the payment of tax."

36. The non-obstante clause contained in Section 238 of the Code will not override the Advocates Act as there is no inconsistency between Section 9, read with the Adjudicating Authority Rules and Forms referred to hereinabove, and the Advocates Act. In **Balchand Jain v. State of MP** [1976] 4 SCC 572 at 585-86, the anticipatory bail provision contained in Section 438 of the Code of Criminal Procedure was held not to be wiped out by the non-obstante clause contained in rule 184 of the Defence and Internal Security of India Rules, 1971. Fazal Ali, J concurring with the main judgment, held :

“16. Having regard to the principles enunciated above, we feel that there does not appear to be any direct conflict between the provisions of rule 184 of the Rules and Section 438 of the Code. However, we hold that the conditions required by rule 184 of the Rules must be impliedly imported in Section 438 of the Code so as to form the main guidelines which have to be followed while the Court exercises its power under Section 438 of the Code in offences contemplated by rule 184 of the Rules. Such an interpretation would meet the ends of justice, avoid all possible anomalies and would at the same time ensure and protect the liberty of the subject which appears to be the real intention of the Legislature in enshrining Section 438 as a new provision for the first time in the Code. We think that there is no real inconsistency between Section 438 of the Code and rule 184 of the Rules and, therefore, the non obstante clause cannot be interpreted in a manner so as to repeal or override the provisions of Section 438 of the Code in respect of cases where rule 184 of the Rules applies.”

Similarly, in **R S Raghunath v. State of Karnataka** [1992] 1 SCC 335 at 348, the non-obstante clause contained in rule 3(2) of the Karnataka Civil Services (General Recruitment) Rules, 1977 was held not to override the Karnataka General Service (Motor Vehicles Branch) (Recruitment) Rules, 1976. It was held :

“As already noted, there should be a clear inconsistency between the two enactments before giving an overriding effect to the non-obstante clause but when the scope of the provisions of an earlier enactment is clear the same cannot be cut down by resort to non-obstante clause. In the instant case we have noticed that even the General Rules of which rule 3(2) forms a part provide for promotion by selection. As a matter of fact rules 1(3)(a), 3(1) and 4 also provide for the enforceability of the Special Rules. The very rule 3 of the General Rules which provides for recruitment also provides for promotion by selection and further lays down that the methods of recruitment shall be as specified in the Special Rules, if any. In this

background if we examine the General Rules it becomes clear that the object of these Rules only is to provide broadly for recruitment to services of all the departments and they are framed generally to cover situations that are not covered by the Special Rules of any particular department. In such a situation both the Rules including rules 1(3)(a), 3(1) and 4 of General Rules should be read together. If so read it becomes plain that there is no inconsistency and that amendment by inserting rule 3(2) is only an amendment to the General Rules and it cannot be interpreted as to supersede the Special Rules. The amendment also must be read as being subject to rules 1(3)(a), 3(1) and 4(2) of the General Rules themselves. The amendment cannot be read as abrogating all other Special Rules in respect of all departments. In a given case where there are no Special Rules then naturally the General Rules would be applicable. Just because there is a non-obstante clause, in rule 3(2) it cannot be interpreted that the said amendment to the General Rules though later in point of time would abrogate the special rule the scope of which is very clear and which co-exists particularly when no patent conflict or inconsistency can be spelt out.

As already noted rules 1(3)(a), 3(1) and 4 of the General Rules themselves provide for promotion by selection and for enforceability of the Special Rules in that regard. Therefore, there is no patent conflict or inconsistency at all between the General and the Special Rules.”

In **Central Bank of India v. State of Kerala** [2009] 4 SCC 94 at 141-42, the non-obstante clauses contained in Section 34(1) of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and Section 35 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 were held not to override specific provisions contained in the Bombay Sales Tax Act, 1959 and the Kerala Sales Tax Act 1963 dealing with a declaration of a first charge in the following terms :

“130. Undisputedly, the two enactments do not contain provision similar to the Workmen’s Compensation Act, etc. In the absence of any specific provision to that effect, it is not possible to read any conflict or inconsistency or overlapping between the provisions of the DRT Act and the Securitisation Act on the one hand and Section 38C of the Bombay Act and Section 26B of the Kerala Act on the other and the non-obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate qua or affect the proceedings initiated by banks, financial institutions and other secured

creditors for recovery of their dues or enforcement of security interest, as the case may be.

131. The Court could have given effect to the non-obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act vis-a-vis Section 38C of the Bombay Act and Section 26B of the Kerala Act and similar other State legislations only if there was a specific provision in the two enactments creating first charge in favour of the banks, financial institutions and other secured creditors but as Parliament has not made any such provision in either of the enactments, the first charge created by the State legislations on the property of the dealer or any other person, liable to pay sales tax, etc., cannot be destroyed by implication or inference, notwithstanding the fact that banks, etc., fall in the category of secured creditors.”

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

37. However, Dr. Singhvi referred to rule 4 of the Debts Recovery Rules and Section 434(2) of the Companies Act, 1956, which state as follows :

“4. Procedure for filing applications. –

(1) The application under Section 19 or Section 31A, or under Section 30(1) of the Act may be presented as nearly as possible in Form-I, Form-II and Form-III, respectively annexed to these rules by the applicant in person or by his agent or by a duly authorised legal practitioner to the Registrar of the Bench within whose jurisdiction his case falls or shall be sent by registered post addressed to the Registrar.

(2) An application sent by post under sub-rule (1) shall be deemed to have been presented to the Registrar the day on which it was received in the office of the Registrar.

(3) The application under sub-rule (1) shall be presented in two sets, in a paper book along with an empty file size envelope bearing full address of the defendant and where the number of defendants is more than one, then sufficient number of extra paper-books together with empty file size

envelopes bearing full address of each of the defendant shall be furnished by the applicant.

434. Company when deemed unable to pay its debts. –

(2) The demand referred to in clause (a) of sub-Section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by any agent or legal adviser duly authorised on his behalf, or in the case of a firm, if it is signed by any such agent or legal adviser or by any member of the firm.”

The argument then made was that when Parliament wishes to include a lawyer for the purposes of litigation or to a pre-litigation stage, it expressly so provides, and this not being so in the Code, it must be inferred that lawyers are excluded when it comes to issuing notices under Section 8 of the Code. We are afraid that this argument must be rejected, not only in view of what has been held by us on a reading of the Code and on the harmonious construction of Section 30 of the Advocates Act read with the Code, but also on the basis of a judgment of this Court in **Byram Pestonji Gariwala v. Union Bank of India** [1992] 1 SCC 31 at 47-48. In this judgment, what fell for consideration was order XXIII, rule 3 of the Code of Civil Procedure, 1908 after its amendment in 1976. It was argued in that case that a compromise in a suit had, under order XXIII, rule 3, to be in writing and “signed by the parties”. It was, therefore, argued that a compromise effected by counsel on behalf of his client would not be effective in law, unless the party himself signed the compromise. This was turned down stating that Courts in India have consistently recognised the traditional role of lawyers and the extent and nature of the implied authority to act on behalf of their clients, which included compromising matters on behalf of their clients. The Court held there is no reason to assume that the Legislature intended to curtail such implied authority of counsel. It then went on to hold :

‘38. Considering the traditionally recognised role of counsel in the common law system, and the evil sought to be remedied by Parliament by the CPC (Amendment) Act, 1976, namely, attainment of certainty and expeditious disposal of cases by reducing the terms of compromise to writing signed by the parties, and allowing the compromise decree to comprehend even matters falling outside the subject-matter of the suit, but relating to the parties, the Legislature cannot, in the absence of express words to such effect, be presumed to have disallowed the parties to enter into a compromise by counsel in their cause or by their duly authorised

agents. Any such presumption would be inconsistent with the legislative object of attaining quick reduction of arrears in Court by elimination of uncertainties and enlargement of the scope of compromise.

39. To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorised representative. If a power of attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorisation by vakalatnama, act on behalf of his client. Not to recognise such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in Court. If the Legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated.

40. Accordingly, we are of the view that the words “in writing and signed by the parties”, inserted by the CPC (Amendment) Act, 1976, must necessarily mean, to borrow the language of order III, rule 1, CPC :

“[A]ny appearance, application or act in or to any Court, required or authorised by law to be made or done by a party in such Court, may except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent, or by a pleader, appearing, applying or acting as the case may be, on his behalf :

Provided that any such appearance shall, if the Court so directs, be made by the party in person.”

38. Just as has been held in *Gariwala* (supra), the expression “an operational creditor may on the occurrence of a default deliver a demand notice “ under Section 8 of the Code must be read as including an operational creditor’s authorised agent and lawyer, as has been fleshed out in Forms 3 and 5 appended to the Adjudicatory Authority Rules.

39. For all these reasons, we are of the view that the NCLAT judgment has to be set aside on both counts. Inasmuch as the two threshold bars to the applications filed under Section 9 have now been removed by us, the NCLAT will proceed further with these matters under the Code on a remand of these matters to it. The appeals are allowed in the aforesaid terms.

not complete as it was not accompanying the documents, as mandated by sub-section (3) of Section 7 of the 'I & B Code'.

- (ii) The application under section 7 is time barred, as the debt claimed related to the years 2011, 2012 and 2013.
- (iii) That the 'default of debt' as claimed by Respondent has not been admitted by the Corporate Debtor and
- (iv) That the Respondent is not a 'Financial Creditor', but an Investor.

3. Learned counsel for the appellant submitted that an application by a 'Financial Creditor' under Section 7 can only be filed when it is furnished with the documents provided under sub-section (3) of Section 7 and none other, namely (a) a record of the default as recorded with the information utility (b) Such other record or evidence of default as may be specified.

4. The expression "such other record of evidence of default" as may be specified can only be such record or evidence as is specified by the Insolvency and Bankruptcy Board of India (hereinafter referred to as "the Board") under sub-section 2(f) of Section 240 of 'I & B Code'. Reliance was also placed on definition of the word "specified" as defined under Section 3(32) of the 'I&B Code'.

5. Learned counsel for the appellant placed reliance on decision of this Appellate Tribunal in "Smart Timing Steel Ltd. v. National Steel & Agro Industries Ltd." Company Appeal (AT) (Insolvency) No. 28 of 2017 to suggest that the provision of sub-section 3(a) of Section 7 is mandatory.

6. It was also submitted that it was the duty of the Insolvency and Bankruptcy Board of India (In short "Board") to specify Regulations and in absence of the same the proceeding under Section 7 of 'I & B Code' cannot be initiated.

7. In support of the second contention it was submitted that the time barred debt cannot be enforced by filing an application for Corporate Insolvency Resolution Process. The claim of the 'Financial Creditor', is completely time barred as the debenture certificates were due for redemption as far back as in the years 2011, 2012 and 2013 respectively. Consequently, the application filed by the 'Financial Creditor' in the year 2017 is hopelessly time barred.

8. It was next submitted that the respondent does not come within the meaning of "Financial Creditor" as defined in sub-section (7) read with sub-section (8) of Section 5 of the 'I & B code'. No 'financial debt' is owed to the Respondent.

9. Counsel for the Appellant further submitted that 'Debenture Certificates'

forming basis of claim of the Respondent do not fall within the definition of 'financial debt' as provided under sub-section (8) of Section 5 of the 'I & B Code'. A plain reading of the definition of 'financial debt' makes it apparent that it is the debt which is only if disbursed against the consideration for time value of money. Therefore, there has to be a consideration flowing from the advance of money which is at par with the **time value of money**. Since the 'debenture certificates' issued to the Respondent were carrying zero interest and another was carrying only one percent interest, the same were not issued against consideration for time value of money, as envisaged under sub-section (8) of Section 5. The debenture certificates were purchased by Respondent only by way of an investment, and do not come within the meaning of 'financial debt'.

10. Learned Counsel for the appellant also placed reliance on definition of "debt" as defined under sub-section (11) of Section 3 of the 'I & B Code'. It was further contended that there is pendency of proceedings between the parties as the 'Financial Creditor' has already invoked arbitration against the 'Corporate Debtor' for the same cause of action which is an admitted fact.

11. In reply Learned Counsel appearing on behalf of the respondent submitted that in absence of the Regulations framed by the Board, the statutes (I & B Code) cannot be made ineffective, having come into force since 15th December 2016. Reliance was also placed on Insolvency and Bankruptcy (Adjudicating Authority Rules, 2016) (hereinafter referred to as Adjudicatory Rules) framed by the Central Government, under section 239 of the I & B Code'.

12. Learned Counsel for the respondent submitted that the Balance Sheet of 'Corporate Debtor' was noticed by Learned Adjudicating Authority, before admitting the case. Reliance was also placed on Regulation 8(2) and 'Form-C' of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (hereinafter referred to 'Corporate Person'), Regulation 2016.

13. The question to be determined is whether in absence of record of default as recorded with the information utility or any other "record or evidence of default" specified by the Board, an application under Section 7 is maintainable or not?

14. Process of initiation of Insolvency Resolution process by a financial creditor is provided in Section 7 of the I & B Code. As per sub-section (1) of Section 7 of the I & B Code, the trigger for filing of an application by a financial creditor before the Adjudicating Authority is when a default in respect

of any financial debt has occurred. Sub-section (2) of Section 7 provides that the financial creditor shall make an application in prescribed form and manner and with prescribed documents, including “record of the default” recorded with the information utility or such other record or evidence of default as may be specified”.

15. Once the application is filed by the ‘Financial Creditor’ with the Adjudicating Authority, the Adjudicating Authority, within 14 days of the receipt of the application under sub-section (2) of Section 8 required to ascertain the existence of default from the records of an information utility or on the basis of other evidence furnished by the ‘financial creditor’ under sub-section (3)(a) of Section 7.

16. ‘Financial Creditor’ along with the application required to be furnished information and other facts as prescribed under sub-section (3) of Section 7. Where the Adjudicating Authority is satisfied that a default has occurred and the application under sub-section (2) is complete, and there are no disciplinary proceedings pending against the proposed resolution professional, it can admit such application and in case the application is incomplete, required to provide 7 days’ time to complete the record and on failure is to dismiss the application.

17. The aforesaid facts are to be considered from the procedure for initiation of corporate insolvency resolution process by ‘financial creditor’ as mandated under Section 7 of ‘I & B Code’, and quoted below: -

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

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

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

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

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

- (c) *any other information as may be specified by the Board.*
- (4) *The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).*
- (5) *Where the Adjudicating Authority is satisfied that—*
- (a) *a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or*
 - (b) *default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:*
- Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.*
- (6) *The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).*
- (7) *The Adjudicating Authority shall communicate—*
- (a) *the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;*
 - (b) *the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.”*

18. It is well settled that rules of procedure are to be construed not to frustrate or obstruct the process of adjudication under the substantive provisions of law. A procedural provision cannot override or affect the substantive obligation of the adjudicating authority to deal with applications under Section 7 merely on the ground that Board has not stipulated or framed Regulations with regard to sub-section 3(a) of Section 7. The language of Section 240, whereby Board have been empowered to frame regulations is clear that the said regulation should be consistent with the 'I & B' Code and the rules made thereunder by the Central Government.

19. In exercise of power conferred by Section 239 read with Sections 7, 8, 9 and 10 of the 'I & B code, the Central Government framed the rules known as "Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as Adjudicating Authority Rules, 2016). As per Rule 41, a 'Financial Creditor' required to apply itself or jointly in an application under Section 7 in terms of Form-1 attached thereto. Part V of Form-1 deals with particulars of 'Financial Debt' (documents, record and evidence of default), as quoted below: -

"PART V

PARTICULARS OF FINANCIAL 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. PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)

3. RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)

4. 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)

5. THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE (ATTACH A COPY)

6. A RECORD OF DEFAULT AS AVAILABLE WITH ANY CREDIT INFORMATION COMPANY (ATTACH A COPY)

7. COPIES OF ENTRIES IN A BANKERS BOOK IN ACCORDANCE WITH THE BANKERS BOOKS EVIDENCE ACT, 1891 (18 OF 1891)

8. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT"

20. The rules framed by the Central Government under Section 239 having prescribed the documents, record and evidence of default as noticed above, we hold that in absence of regulation framed by the Board relating to record of default recorded with the information utility or other record of evidence of default specified, “the documents”, ‘record’ and ‘evidence of default’ prescribed at Part V of Form-1, of the Adjudicatory Rules 2016 will hold good to decide the default of debt for the purpose of Section 7 of the ‘I & B Code’.

21. We further hold that the ‘Regulations framed by the Board’ being subject to the provisions of ‘I & B Code’ and rules framed by the Central Government under Section 239, ‘Part V of Form - 1’ of Adjudicating Authority Rules, 2016 framed by Central Government relating to ‘documents’, ‘record’ and ‘evidence of default’, will override the regulations, if framed by the Board and if inconsistent with the Rule. However, it is always open to Board to prescribe additional records in support of default of debt, such as records of default recorded with the information utility or such other record or evidence of default in addition to the records as mentioned in Part V of Form-I.

22. At this stage, it is pertinent to note that the Board has also framed Insolvency Resolution Process for Corporate Persons, Regulations, 2016 (‘Corporate Persons Regulation’ for short). It has come into force since Notification dated 30th November 2016 was issued. Regulation 8 of ‘Corporate Persons Regulation’, 2016 relate to claims by ‘Financial Creditor’. Regulation 11(2) relates to existence of debt due to ‘Financial Creditor’, which is to be proved on the basis documents mentioned therein and quoted below: -

“8. Claims by financial creditors.

(1) A person claiming to be a financial creditor of the corporate debtor shall submit proof of claim to the interim resolution professional in electronic form in Form C 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 financial creditor 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 financial contract supported by financial statements as evidence of the debt;

- (ii) *a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;*
- (iii) *financial statements showing that the debt has not been repaid;*
or
- (iv) *an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.”*

23. 'Form - C attached to the Regulation relates to proof of claim of 'Financial Creditor' whereunder at Serial No. 10, the 'Financial Creditor' is supposed to refer the list of documents in proof of claim in order to prove the existence and non-payment of claim dues to the 'Operational Creditor'.

Therefore, the stand of the appellant that the Board has not framed any Regulations, relating to clause (a) of sub-section (3) of Section 7, cannot be accepted.

24. The next ground taken on behalf of the appellant is that the claim of the respondent is barred by limitation, as the Debentures were matured between the year 2011 - 2013 is not based on Law. There is nothing on the record that Limitation Act, 2013 is applicable to I & B Code. Learned Counsel for the appellant also failed to lay hand on any of the provision of I & B Code to suggest that the Law of Limitation Act, 1963 is applicable. The I & B Code, 2016 is not an Act for recovery of money claim, it relates to initiation of Corporate Insolvency Resolution Process. If there is a debt which includes interest and there is default of debt and having continuous course of action, the argument that the claim of money by Respondent is barred by Limitation cannot be accepted.

25. Next question arises is whether the respondent come within the meaning of 'Financial Creditor' or not.

26. For determination of the aforesaid issue, it is desirable to notice meaning of 'Financial Creditor', as defined in sub-section (7) of Section 5 of I & B Code', and quoted hereunder: -

'(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'

27. 'Financial Debt' means a debt along with interest, if any, which is disbursed against the consideration of time value and money as defined in sub-section (8) of Section 5, as quoted below: -

‘Sec.5. Definitions - In this Part, unless the context otherwise requires, —

XXXX

(8) “financial debt” means a debt alongwith 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.’*

28. Clause (c) of sub-section (8) of Section 5 deals with any amount raised pursuant to any note purchase facility or the issue of bonds, notes, **debentures**, loan stock or any similar instrument.

29. From the aforesaid provision, we find that the debentures come within the meaning of ‘Financial Debt’ as defined in Clause (c) of sub-section (8) of Section 5.

30. ‘Debt’ is defined in sub-section (11) of Section 3 means:

'(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'

31. It is admitted that the appellant is debenture holder. The Respondent- 'Corporate Debtor' also pleaded that the appellant is Investor. From the relevant facts as we noticed above, we find that the Respondent- 'Corporate Debtor' has a liability and obligation in respect of amount which is due to the debenture holder from the 'Corporate Debtor', including 'Financial Debt' i.e the amount due on maturity of debentures.

32. The 'default' means non-payment of debt as defined in sub-section (12) of Section 3, as below:—

'(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'

33. The fact as pleaded and not disputed by Respondent - 'Corporate Debtor' that the 'debenture holder' (Appellant) and amount matured in the year 2011, 2012 and 2013 has not been paid. Thus, we find there is a default as defined under section 3(12) of the I & B Code.

The 'Corporate Debtor' had a liability and obligation in respect of claim of respondent which includes the 'Financial Debt', including those come within clause (c) of sub-section (8) of Section 5. As per the agreement, the same was liable to be paid from the date of maturity along with interest, if any and the same having not paid, the default of debt is apparent.

34. This apart we find that the amount of debt and interest, as shown by appellant was to be disbursed against consideration for time value of the money. Therefore, it cannot be stated that debentures on maturity do not come within the purview of amount payable against the consideration for the time value of the money.

35. In the aforesaid background, the Learned Adjudicating Authority having admitted the application under Section 7, the application being complete, no interference is called for.

36. In absence of any merit the appeal is dismissed. However, in the facts and circumstances, there shall be no order as to cost.

Sd/-
(Mr. Balvinder Singh)
Member (Technical)

Sd/-
(Justice S.J. Multhopadhaya)
Chairperson

NEW DELHI
11th August, 2017

ANNEXURE X.17

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI**

(Arising out of Order dated 11.04.2017 passed by the National Company Law Tribunal, New Delhi Bench, New Delhi in Company Petition No. (IB)41(ND)/2017)

Company Appeal (AT) (Insolvency) No. 47 of 2017

IN THE MATTER OF:

M/s. Speculum Plast Pvt. Ltd.

... Appellant

Versus

PTC Techno Pvt. Ltd.

... Respondent

Present: For Appellant: Shri Shubho Jana and Ms. Kanti Mohan Rustagi, Advocates

For Respondent: Shri Dhruv Gupta, Advocate

WITH

Company Appeal (AT) (Insolvency) No. 76 of 2017

(Arising out of Order dated 25.04.2017 passed by the National Company Law Tribunal, New Delhi Bench, New Delhi in Company Petition No. (IB)-27(PB)/2017)

IN THE MATTER OF:

Parag Gupta & Associates

Appellant

Versus

B.K. Educational Services Pvt. Ltd.

Respondent

Present: For Appellant: Shri Mukul K. Gupta and Shri N.K. Singh, Advocates

For Respondent: Ms. Ruchi Khurana and Shri Pertpal Singh, Advocates

WITH
Company Appeal (AT) (Insolvency) No. 78 of 2017
(Arising out of Order dated 04.05.2017 passed by the National Company Law Tribunal, New Delhi Bench, New Delhi in Company Petition No. (IB)-77(ND)/2017)

IN THE MATTER OF:

Ashlay Infrastructure Pvt. Ltd.

Appellant

Versus

LDS Engineers Pvt. Ltd.

Respondent

Present: For Appellant: Ms. Jhankar Rastogi with Shri Navodaya Singh Rajpurohit, Advocates

For Respondent: Shri H.D. Arya, Advocate

JUDGEMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

1. In all these appeals as common question of law is involved, they were heard together and are being disposed of by this common judgment.

2. The question that arises for determination in these appeals is :

Whether Limitation Act, 1963 is applicable for triggering “corporate insolvency resolution process” under Insolvency and Bankruptcy Code, 2016 (‘I&B Code’)?

3. According to learned counsel for the appellant(s) I&B Code is a ‘Special Act’ enacted by Parliament and is a “self-contained code” and in absence of any specific provision made therein the Limitation Act, 1963 is not applicable for triggering “corporate insolvency resolution process”.

4. To substantiate the arguments, learned counsel for the appellant(s) relied on the report of the “Bankruptcy Law Reforms Committee” to suggest that the legislative intent behind the formulation of the I&B Code is to formulate a “single law”, independent of any other law including the Limitation Act.

5. On the other hand, according to learned counsel for the respondents- “corporate debtor(s)” the Limitation Act, 1963 is applicable for triggering “corporate insolvency resolution process” under I&B Code which is to be read in conjunction with the provisions of the Companies Act, 2013 and other Acts, as far as they are applicable.

6. It was submitted that the “Adjudicating Authority”, as defined in sub-Section (1) of Section 5 of the I&B Code being “National Company Law Tribunal” as constituted under Section 408 of the Companies Act, 2013, the provisions of Chapter XXVII of the Companies Act, 2013 including Section 433 of the said Act are applicable as it is not in conflict with the provisions of the I&B Code.

7. Further, according to learned counsel for the “corporate debtor(s)”, as the I&B Code nowhere specifically bars the applicability of the Companies Act, 2013, Section 433 of the Companies Act, 2013 is applicable to I&B Code.

8. Referring to Sections 424, 425, 433, 434 and 430 of the Companies Act, 2013, it was contended that the aforesaid provisions necessarily imply that the law of limitation and procedure of the Tribunal are applicable to the I&B Code.

9. On merit, learned counsel for the “corporate debtor(s)” submitted that all the application in question, having filed beyond the period of three years, the application for triggering “corporate insolvency resolution process” were not maintainable.

10. Mr. A S Chandhiok, learned senior counsel, who assisted the court as amicus curiae, submitted that the doctrine of limitation and prescription is based on two broad considerations.

First, there is a presumption that the right not exercised for a long time becomes non-existent. The second is that the rights of debt or right on property or rights in general should not be in a state of constant uncertainty, doubt and suspense.

Reliance was placed on *Salmond : Jurisprudence* 12th edn., pp. 438 and 439, and observation of hon’ble Abbott, CJ, in *Battley v. Faulkner* [1820] 3 B & Aid 288.

11. It was submitted that the above principles were also recognised by the Supreme Court of India in **Rajinder Singh v. Santa Singh** AIR 1973 SC 2537.

12. It was further submitted that the object of fixing time-limit for litigation is based on Public Policy, fixing a life span of legal remedies for the purpose of general welfare as held by Supreme Court in **N Balakrishnan v. M A Krishnamurthy** [1998] 31 CLA 139 (SC)/[1998] 7 SCC 123.

13. According to learned amicus curiae, the Limitation Act was enacted in the year 1963, when the provisions relating to all kinds of winding up of the companies were governed by the Companies Act, 1956 wherein the question of limitation arose at two stages, *i.e.*,

- (i) When winding up petition was presented before the hon'ble High Court, and
- (ii) When the creditor presented its claim against the company in winding up before the official liquidator.

14. It was contended that it is a settled principle of law, that bar of limitation applied to the winding up petitions which used to be presented before the hon'ble High Court and a creditor is not entitled to file a winding up petition based on a debt, if the debt is, otherwise time-barred.

15. Learned amicus curiae referred to Section 3 of Limitation Act, 1963 and submitted that the bar of limitation would apply to a claim filed by a creditor before the official liquidator attached to the hon'ble High Court in terms of Companies Act, 1956, though the official liquidator is not a court or a Judicial Tribunal or Quasi-Judicial Tribunal, but an executive appointed and authority recognised under the Companies Act, 1956. Such official liquidator merely invites claims and submits report before the hon'ble High Court.

16. According to him now under the I&B Code the insolvency professional takes the position of the official liquidator, but with greater role to play, than the official liquidator.

17. Learned amicus curiae also relied on Section 433 of the Companies Act, which provides that the provision of Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal as the case may be. It was also submitted that the Limitation Act, 1963 is also applicable for "corporate insolvency resolution process".

18. Learned amicus curiae placing reliance on sub-Section (6) of Section 60 of the I&B Code submitted that the said provision makes it clear that the Limitation Act, 1963 is applicable to the proceedings under I&B Code.

19. It was further submitted that the Legislature in sub-Section (5) of Section 60 has not used the expression "Adjudicating Authority", but retained the word "National Company Law Tribunal" which also clears the intent of the Legislature that Section 433 of the Companies Act, 2013 is applicable for triggering the corporate insolvency resolution process under Sections 7 or 9 and 10 of the I&B Code.

Reliance was also placed on definition of "Adjudicating Authority" as defined under sub-Section (1) of Section 5 of the I&B Code which means National Company Law Tribunal constituted under Section 408 of the Companies Act, 2013.

20. According to learned senior counsel, even if it is accepted that I&B Code is self-contained code, unless it expressly bars the provision(s), the other provisions can be made applicable. Reliance was placed on hon'ble Supreme Court decision in **Girnar Traders (3) v. State of Maharashtra [2011] 3 SCC 1**, wherein two legislations fell for consideration before the Apex Court, namely, the Maharashtra Regional and Town Planning Act, 1966 ('MRTP Act'), and the "Land Acquisition Act, 1894". The appellant in the said case had urged that the provisions of the Land Acquisition Act would mutatis mutandis apply to an acquisition under the MRTP Act. The respondent had, in contradiction, taken plea that MRTP Act was a self-contained code in itself and as such the provisions of Land Acquisition Act could not be referred to. In the said case, the Supreme Court considering the aforesaid question raised by the parties held :

"69. For an Act to be a self-contained code, it is required to be shown that it is a complete legislation for the purpose for which it is enacted. The provisions of the MRTP Act relate to preparation, submission and sanction of approval of different plans by the authorities concerned which are aimed at achieving the object of planned development in contradistinction to haphazard development. An owner/person interested in the land and who wishes to object to the plans at the appropriate stage a self-contained adjudicatory machinery has been spelt out in the MRTP Act. Even the remedy of appeal is available under the MRTP Act with a complete chapter being devoted to acquisition of land for the planned development. Providing adjudicatory mechanism is one of the most important facets of deciding whether a particular statute is a complete code in itself or not."

21. We have noticed the rival contentions, the relevant provisions of law and decisions, as referred to above.

22. For determination of the issue, it is to be noticed as to whether I&B Code is a self- contained code or not.

In **M/s. Innoventive Industries Ltd v. ICICI Bank and Anr.** [2017] 140 CLA 39 (SC)/2017 SCC OnLine SC 1025 the Supreme Court noticed the Statement of Objects and Reasons in passing the I&B Code based on various reports, most important of which the report of Bankruptcy Law Reforms Committee of November 2015, and observed :

"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."

23. In paragraph 16 of the said judgment, the Supreme Court noticed the Bankruptcy Law Reforms Committee Report of November 2015 and the "key economic question" in the Bankruptcy Process highlighted by Bankruptcy Law Reforms Committee, as quoted below :

"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.”

24. In the said decision of Supreme Court the “Principles driving the design” the new Insolvency and Bankruptcy Resolution framework has been noticed as quoted below :

“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.”*

25. The aforesaid “principles driving the design” shows that the Code has been framed to facilitate the assessment of viability of the enterprise at a very early stage; to enable symmetry of information between creditors and debtors; to ensure a time-bound process to better preserve economic value; to ensure a collective process; to respect the rights of all creditors equally; to ensure that when the negotiations fail to establish viability; the outcome of bankruptcy must be binding and to ensure clarity of priority, and that the rights of all stakeholders are upheld in resolving bankruptcy.

26. The Supreme Court in *Innoventive Industries Ltd. (supra)* referring to different provisions of the I&B Code, observed :

“59. 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...”

The hon'ble Supreme Court further held :

“60. 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....”

The hon'ble Supreme Court further proceeded to hold :

‘63. 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.”

27. Thereby it is clear that the I&B Code is complete code in itself.

28. Limitation Act, 1963 is the general legislation on the law of limitation. Section 3 prescribes “bar of limitation”, as quoted below :

“3. Bar of limitation. – (1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

(2) For the purposes of this Act – (2) For the purposes of this Act –

(a) a suit is instituted –

- (i) in an ordinary case, when the plaint is presented to the proper officer;
- (ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and
- (iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;

(b) any claim by way of a set off or a counter-claim, shall be treated as

a separate suit and shall be deemed to have been instituted –

- (i) in the case of a set off, on the same date as the suit in which the set off is pleaded;
 - (ii) in the case of a counter-claim, on the date on which the counter-claim is made in court;
- (c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court.”

29. In view of aforesaid provisions in **Mukri Gopalan v. Cheppilat Puthanpuravil Aboobacker** [1995] 5 SCC 5, the Supreme Court examined the question whether Limitation Act, 1963 will apply to the Kerala Buildings (Lease and Rent) Control Act, 1965. Though, the court noticed that the Act prescribes a period of limitation, which is different from the period of limitation under the Limitation Act, 1963, in absence of any exclusion of Sections 4 to 24 of the Limitation Act 1963, the Supreme Court held that those Sections 4 to 24 of Limitation Act, 1963 shall be applicable to the Kerala Buildings (Lease and Rent) Control Act, 1965.

30. However, in **Hukumdev Narain Yadav v. Lalit Narain Mishra** [1974] 2 SCC 133, a three-Judges Bench of the Supreme Court, while examining the question as to whether the Limitation Act, 1963 would be applicable to the provisions of Representation of People Act, held as under :

“17.... but what we have to see is whether the scheme of the special law, that is in this case the Act, and the nature of the remedy provided therein are such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation.”

31. From the decision of Supreme Court in **Hukumdev Narain Yadav (supra)**, it is clear that even if there exists no express exclusion in the special law, the court reserves the right to examine the provisions of the special law, to arrive at a conclusion as to whether the legislative intent was to exclude the operation of the Limitation Act, 1963 or not.

32. To examine the legislative intent to decide whether the I&B Code excludes the operation of the Limitation Act, 1963, it is desirable to refer the previous Acts on Insolvency, namely, the Presidency-Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920.

33. In Part VII of the “Presidency-Towns Insolvency Act, 1909”, the period of limitation was prescribed under Sections 101, which reads as follows :

“101. Limitation.

The period of limitation for an appeal from any act or decision of the official assignee, or from an order made by an officer of the court empowered under Section 6, shall be twenty days from the date of such act, decision or order, as the case may be.”

34. Section 101A related to computing the period of limitation for any suit or other legal proceedings, which reads as follows :

“101A. Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or other legal proceeding (other than a suit or legal proceeding in respect of which the leave of the court was obtained under Section 17) which might have been brought but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded :

Provided that nothing in this Section shall apply to any suit or other legal proceeding in respect of a debt provable but not proved under this Act.”

35. Similarly in the Provincial Insolvency Act, 1920 under Section 78 the limitation was prescribed, as quoted below :

“78. Limitation. – (1) *The provisions of Sections 5 and 12 of the Indian Limitation Act, 1908 (9 of 1908), shall apply to appeals and applications under this Act, and for the purpose of the said Section 12, a decision under Section 4 shall be deemed to be a decree.*

(2) Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree or [other than a suit or application in respect of which the leave of the court was obtained under sub-Section (2) of Section 28] which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded :

Provided that nothing in this Section shall apply to a suit or application in

respect of a debt provable but not proved under this Act.”

36. The Presidency-Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 have been repealed by Section 243 of the I&B Code, relevant provision of which reads as follows :

“243. Repeal of certain enactments and savings. – (1) *The Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 are hereby repealed.*

(2) *Notwithstanding the repeal under sub-Sections (1), –*

- (i) *all proceedings pending under and relating to the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 immediately before the commencement of this Code shall continue to be governed under the aforementioned Acts and be heard and disposed of by the concerned courts or tribunals, as if the aforementioned Acts have not been repealed;*
- (ii) *any order, rule, notification, regulation, appointment, conveyance, mortgage, deed, document or agreement made, fee directed, resolution passed, direction given, proceeding taken, instrument executed or issued, or thing done under or in pursuance of any repealed enactment shall, if in force at the commencement of this Code, continue to be in force, and shall have effect as if the aforementioned Acts have not been repealed;*
- (iii) *anything done or any action taken or purported to have been done or taken, including any rule, notification, inspection, order or notice made or issued or any appointment or declaration made or any operation undertaken or any direction given or any proceeding taken or any penalty, punishment, forfeiture or fine imposed under the repealed enactments shall be deemed valid;*
- (iv) *any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure or existing usage, custom, privilege, restriction or exemption shall not be affected, notwithstanding that the same respectively may have been in any manner affirmed or recognised or derived by, in, or from, the repealed enactments;*
- (v) *any prosecution instituted under the repealed enactments and pending immediately before the commencement of this Code before any court or tribunal shall, subject to the provisions of this Code, continue to be heard and disposed of by the concerned court or tribunal;*
- (vi) *any person appointed to any office under or by virtue of any repealed*

enactment shall continue to hold such office until such time as may be prescribed; and

(vii) any jurisdiction, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not in existence or in force shall not be revised or restored.

(3) The mention of particular matters in sub-Section (2) shall not be held to prejudice the general application of Section 6 of the General Clauses Act, 1897 with regard to the effect of repeal of the repealed enactments or provisions of the enactments mentioned in the Schedule.”

37. Though the aforesaid two Acts have been repealed, in the I&B Code, the Legislature did not choose to prescribe any separate provisions of ‘limitation’ as was made in Section 101 of the Presidency-Towns Insolvency Act, 1909 or sub-Section (1) of Section 78 of the Provincial Insolvency Act, 1920 whereunder provisions of Sections 5 and 12 of the Indian Limitation Act, 1908 were made applicable to appeals and applications under the aforesaid Acts and the decision under the provisions was treated to be decree.

38. However, the provision of computing the period of limitation prescribed for any suit or other legal proceeding, as ordered to be excluded in Section 101A of the Presidency-Towns Insolvency Act, 1909 and sub-Section (2) of Section 78 of the Provincial Insolvency Act, 1920 has been retained with appropriate modification under sub-Section (6) of Section 60 of the I&B Code, as quoted below :

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

39. The aforesaid provisions, makes clear the intent of the Legislature which necessarily excluded the provisions of Sections 4 to 24 of the Limitation Act, 1963.

40. A separate time period has been prescribed under different provisions of the I&B Code such as :

Fourteen days’ time allowed under sub-Section (4) of Section 7 and sub-Section (4) of Section 10 of the I&B Code has been allowed to the Adjudicating Authority to ascertain fact and thereafter to admit or reject the application, if incomplete.

41. Similarly, ten days' expiry period prescribed under sub-Section (1) of Section 9 from the date of delivery of the notice or invoice demanding payment under sub-Section (1) of Section 8 of the I&B Code has been prescribed for filing an application under Section 9 of the I&B Code.

42. Like, Sections 7 and 8 of the I&B Code under sub-Section (5) of Section 9, the Adjudicating Authority has been allowed fourteen days' time to admit or reject the application if incomplete, provided before rejecting an application seven days' time is to be granted to the applicant to remove the defects.

43. Under Section 12 of the I&B Code, one hundred and eighty days time has been prescribed for completion of insolvency resolution process though it is open to the Adjudicating Authority to extend the period, but not exceeding ninety days' (Total 270 days). If the Resolution Plan is not received within the aforesaid period by Adjudicating Authority or it rejects the same, under Section 33 liquidation proceedings shall be initiated.

44. For preferring appeals under Section 61 while thirty days time has been allowed, the Appellate Tribunal has been allowed only fifteen days time beyond thirty days to condone the delay.

45. Under Section 62 of the I&B Code, against order of Appellate Tribunal, an appeal can be preferred by aggrieved person to the Supreme Court but such appeal is required to be preferred within forty-five days and the Supreme Court has been allowed to condone the delay but not exceeding fifteen days.

There are other provisions where such time limit has been prescribed, which is different from the time prescribed under the Limitation Act, 1963.

46. From the aforesaid provision, we find that the scheme of the Special Act, i.e., the I&B Code, and the nature of the remedy provided therein are such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided by it.

47. Insofar as, the application under Section 433 of the Companies Act, 2013 is concerned, we are of the view that the said provision is not applicable for the following reasons :

Under Section 255 of the I&B Code, certain provisions of the Companies Act, 2013 have been amended in the manner specified in the Eleventh Schedule of the I&B Code. Thereunder Section 424 of the Companies Act, 2013 has been made part of the I&B Code for the purpose of following procedural or principles of natural justice.

Section 433 of the Companies Act, 2013 relates to limitation as quoted

below :

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

However, Section 433 of the Companies Act, 2013 has not been amended to make it as a part of the I&B Code, therefore, we hold that Section 433 which relates to limitation of the Companies Act, 2013, ipso facto will not be applicable to I&B Code.

48. There is a provision of limitation under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ('DRT Act') and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act').

49. By Section 249 of the I&B Code, the DRT Act has been amended in the manner specified in the Fifth Schedule. In the said Act, sub-Section (1) and sub-Section (4) of Section 1 has been amended, as quoted below :

- (a) In sub-Section (1), for the words “Due to Banks and Financial Institutions” the words “and Bankruptcy” shall be substituted;
- (b) In sub-Section (4), for the words “the provision of this Code”, the words “Save as otherwise provided, the provisions of this Code”, shall be substituted.’

50. Section 24 of the DRT Act relates to limitation, as quoted below :

“24. Limitation.– *The provisions of the Limitation Act, 1963 (36 of 1963), shall, as far as may be, apply to an application made to a Tribunal.*”

Section 24 of the said Act has not been amended by I&B Code and thereby not made applicable to I&B Code.

51. Similarly, by Section 251 of the I&B Code the SARFAESI Act has been amended in the manner specified in the Seventh Schedule. Thereunder in sub-Section (9) of Section 13, for the words “In the case of”, the words and figures “Subject to the provisions of the ‘I&B Code, in the case of” have been substituted.

52. Section 36 of the SARFAESI Act relate to limitation, as quoted below :

“36. Limitation. – *No secured creditor shall be entitled to take all or any of the measures under sub-Section (4) of Section 13, unless his claim in respect of financial asset is made within the period of limitation prescribed under the Limitation Act, 1963 (36 of 1963).*”

However, Section 36 of the SARFAESI Act has not been amended to make applicable to I&B Code.

53. In view of the aforesaid discussion, we hold that Section 24 of the Recovery of Debts and Bankruptcy Act, 1993 and Section 36 of the SARFAESI Act, 2002 are not applicable to the proceedings for initiation of corporate insolvency resolution process.

54. On the other hand, the committee by its report suggested to frame law for insolvency resolution process to facilitate the assessment of viability of the enterprise at a very early stage; to enable symmetry of information between creditors and debtors; to ensure a time-bound process to better preserve economic value; to ensure a collective process; to respect the rights of all creditors equally; to ensure that when the negotiations fail to establish viability, the outcome of bankruptcy must be binding and to ensure clarity of priority, and that the rights of all stakeholders are upheld in resolving bankruptcy, as noticed above.

55. In *Innoventive Industries Ltd.* (supra) the Supreme Court held that 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. While noticing the key economic question in the bankruptcy process, the Supreme Court noticed the report of the Bankruptcy Law Reforms Committee, and observed that there is only one forum for evaluating possibilities, and for taking a decision there is a creditors committee, where all “financial creditors” have votes in proportion to the magnitude of debt that they hold. As mentioned, the Supreme Court also noticed that “speed is the essence” under I&B Code. We find that the Committee never suggested that for admitting the “resolution process” question of limitation, should also be considered.

56. The matter can be looked at from another angle. If law of limitation prescribed under the Limitation Act, 1963 is made applicable, one may take a plea that default of debt is barred by limitation to initiate corporate insolvency resolution process under Section 7 or Section 9 of the I&B Code. However, such stand cannot be taken, where a corporate applicant applies for initiation of corporate insolvency resolution process against itself (‘corporate debtor’), having no capacity to pay back the debt and default having occurred. The law of limitation cannot be made applicable for filing an application under Section 10, which otherwise will render the provisions of Section 10 of the I&B Code redundant as the corporate applicants, do not file application for money claim. This apart, there may be companies which are closed for more than three years and having failed to pay a debt, such

sick companies will have to be allowed to continue resulting in depreciation of the value of its assets for time to come, which is against the Statement and Object of the I&B Code.

57. Similarly, in a case which is not barred by limitation, if application filed under Section 7 or Section 9 or Section 10 of the I&B Code is admitted, pursuant to public notice under Section 15 of the I&B Code, the interim resolution professional is required to receive and collect all the claims as may be submitted by creditors to him, as stipulated in clause (b) of sub-Section (1) of Section 18. In such case, once the creditors put their claim, the insolvency resolution professional cannot reject the claim on the ground that the claim is barred by limitation, as the provision of Limitation Act, 1963 will not be applicable for filing a claim before the interim resolution professional. Similarly, the committee of creditors while deciding the resolution plan, cannot reject any such claim, on the ground that the same is barred by limitation though the committee of creditors may not make any provision in the resolution plan on the ground of unexplained delay.

58. Even if it is accepted that the Limitation Act, 1963 is applicable, though we have held otherwise, in that case also application under Section 7 or 9 or 10 cannot be rejected on the ground that the application is barred by limitation for being filed beyond three years for following reasons.

Except article 137 of Part II, i.e., 'other applications', as quoted below, no other provisions of Limitation is applicable in the matter of filing application under Section 7 or 9 or 10 :

Part II – Other application

<i>Description of application</i>	<i>Period of Limitation</i>
137. Any other application for which no period of limitation is provided elsewhere in this division.	Three years Time from which period begins to run when the right to apply accrues

59. From article 137 of the Limitation Act, 1963, it is clear that the period of three years is to be counted from the date right to apply accrues to a financial creditor or operational creditor or corporate debtor.

60. For initiation of corporate insolvency resolution process, the right to apply accrues under Section 7 or Section 9 or Section 10 only with effect from 1st December, 2016 when I&B Code has come into force, therefore, the right to apply under Section 7 or Section 9 or Section 10 in all present

cases having accrued after 1st December, 2016, such applications cannot be rejected on the ground that the application is barred by limitation.

61. Learned amicus curiae rightly contended that there should be a time limit for raising claim, including money claim. In this regard, it is desirable to refer the definition of 'debt' and 'default' as defined in sub-Sections (11) and (12) of Section 3 of the I&B Code, and quoted below :

'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;

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.'

62. From the aforesaid definition, it is clear that 'debt' is a liability or obligation in respect of a claim which is due from any person and includes a "financial debt" and "operational debt". It is further clear that 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", it amounts to 'default'.

63. Now, the question arises, whether a person can claim any amount due from another, a corporate debtor after long delay on the ground that Limitation Act, 1963 is not applicable?

64. To decide the aforesaid issue, it is necessary to notice the doctrine of limitation and prescription, as held by jurists and hon'ble courts. The doctrine of limitation and prescription is based on two broad considerations. First, there is a presumption that the right not exercised for a long time is non-existent. In **Salmond : Jurisprudence** 12th edn., pp.438 and 439, the learned author described the doctrine in the following words :

"In order to avoid the difficulty and error that necessarily result from lapse of time the presumption of the coincidence of fact and right is rightly accepted as final after a certain number of years. Whoever wishes to dispute this presumption must do so within the period, otherwise his right, if has one will be forfeited as a penalty for his neglect, vigilantibus non dormientibus jura subvenient (laws come to the assistance of the vigilant and not of the sleepy)."

65. It is also necessary to ensure that the rights of debt, in property or rights in general should not be in a state of constant uncertainty, doubt and suspense. Abbott, CJ, in **Battley (supra)** the court observed that "the statute of limitation was intended for relief and quiet of the defendant and to prevent the persons from being harassed at a distant period of time after the committing of the injury complained of".

66. The above principles have been also recognised by the Supreme Court of India in **Rajinder Singh (supra)**, wherein the Supreme Court observed :

“The object of law of limitation is to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party’s own inaction, negligence or laches.”

67. The object of fixing time-limit for litigation is based on Public Policy, fixing a life span of legal remedies for the purpose of general welfare. The Supreme Court in **N Balakrishnan (supra)**, inter alia, observed :

“.....the rules of limitation are not meant to destroy the rights of the parties but are meant to see that the parties do not resort to dilatory tactics but seek their remedy promptly and the law of limitation fixes a life span for legal injury suffered and that it is enshrined in the maxim interest reipublicae ut sit finis litum, i.e., it is for the general welfare that a period to be put to litigation and this is not meant to destroy the rights of the parties, but they are meant to see that the party do not resort to dilatory tactics but seek their remedy promptly because the idea is that every legal remedy must be alive for a legislatively fixed period of time.”

68. In view of the settled principle, while we hold that the Limitation Act, 1963 is not applicable for initiation of corporate insolvency resolution process, we further hold that the doctrine of limitation and prescription is necessary to be looked into for determining the question whether the application under Section 7 or Section 9 can be entertained after long delay, amounting to laches and thereby the person forfeited his claim.

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

70. Therefore, if it comes to the notice of the Adjudicating Authority that the application for initiation of corporate insolvency resolution process under Section 7 or Section 9 has been filed after long delay, the Adjudicating Authority may give opportunity to the applicant to explain the delay within a reasonable period to find out whether there are any laches on the part of the applicant.

71. The stale claim of dues without explaining delay, normally should not be entertained for triggering corporate insolvency resolution process under Section 7 and 9 of the I&B Code.

72. However, the aforesaid principle for triggering an application under Section

10 of the I&B Code cannot be made applicable as the corporate applicant does not claim money but prays for initiation of corporate insolvency resolution process against itself, having defaulted to pay the dues of creditors.

Insofar it relates to filing of claim before the insolvency resolution professional, in case of stale claim, long delay and in absence of any continuous cause of action, it is open to resolution applicant to decide whether such claim is to be accepted or not, and on submission of resolution plan, the committee of creditors may decide such question. If any adverse decision is taken in regard to any creditor disputing the claim on ground of delay and laches, it will be open to the aggrieved creditor to file objection before the Adjudicating Authority against resolution plan and for its necessary correction who may decide the same in accordance with the observations as made above.

73. Coming to merits of present matter, in the case of **Speculum Plast (P.) Ltd. v. PTC Techno (P.) Ltd.** in Company Appeal (AT) (Insolvency) No. 47 of 2017, the Adjudicating Authority by impugned order dated 11th April, 2017 has not decided the question whether Limitation Act, 1963 is applicable in the proceeding for initiation of corporate insolvency resolution process or not and without deciding the same rejected the case on the ground that the amount legally recoverable is beyond the period of limitation. It has not been noticed that the invoices raised are of the period from 1st April, 2013 to 19th September, 2013, and, therefore, default must have occurred after September 2013. The I&B Code having come into effect on 1st December, 2016, the Adjudicating Authority was not correct in dismissing the application on the ground that the application is beyond the period of limitation.

74. For the reasons aforesaid, we set aside the impugned order dated 11th April, 2017 passed by the Adjudicating Authority (National Company Law Tribunal) New Delhi in Company Petition No. (IB)-41(ND)/2017 and remit back the case to the Adjudicating Authority, New Delhi to find out whether the application is otherwise complete or not and, after notice and hearing the parties, will pass appropriate orders in accordance with law. In case, the application is complete, the Adjudicating Authority will admit the application preferred by the appellants. In case it is incomplete, the appellant be granted minimum seven days' time to remove the defects in terms of proviso to sub-Section (5) of Section 9 of the I&B Code.

75. In **Parag Gupta v. B K Educational Services (P.) Ltd.** in Company Appeal (AT) (Insolvency) No. 76 of 2017, the Adjudicating Authority observed that the amount having been paid between the period 1st October, 2012 and 5th February, 2013, there was nothing on the record to suggest that it would extend the limitation to recover the same. The Income-tax Returns filed by

corporate debtor for the assessment years 2014-15 and 2015-16 were not taken into consideration as it does not specify that the short-term borrowings of over 8 crore including the loans alleged to have been given by the appellants as barred by limitation has taken into consideration for rejecting the application for non-initiation of corporate insolvency resolution process, the impugned order dated 25th April, 2017 cannot be sustained.

76. For the reasons aforesaid, the impugned order dated 25th April, 2017 passed by the Adjudicating Authority in Company Petition No. (IB)-27(PB)/2017 is set aside and we remit the case to the Adjudicating Authority who after notice and hearing the parties will consider the application under Section 7 of the I&B Code preferred by the appellant-Mr. Parag Gupta and without going into question of limitation, if application is complete, will admit the application. In case of any defect, the appellant be granted seven days' time to remove the defects in terms of proviso to sub-Section (5) of Section 9 of the I&B Code. Further, if the application is not maintainable for any other reasons, the Adjudicating Authority record such reason.

77. In **Ashlay Infrastructure (P.) Ltd. v. LDS Engineers (P.) Ltd.** in Company Appeal (AT) (Insolvency) No. 78 of 2017, the Adjudicating Authority rejected the application preferred by the appellant on the ground that it is time barred. The impugned order dated 4th May, 2017 having been passed on the basis that the Limitation Act, 1963 is applicable for initiation of corporate insolvency resolution process, the said order cannot be sustained.

78. We accordingly set aside the impugned order dated 4th May, 2017 passed in Company Petition No. (IB)-77(ND)/2017 and remit the case to the Adjudicating Authority who after notice and hearing the parties will consider the application preferred by appellant under Section 9 of the I&B Code and without going into question of limitation, if application is complete, will admit the application. In case of any defect, the appellant be granted seven days' time to remove the defects in terms of proviso to sub-Section (5) of Section 9 of the I&B Code. Further, if the application is not maintainable for any other reasons, the Adjudicating Authority may record such reason.

79. All the appeals are allowed with aforesaid observations and directions. However, in the facts and circumstances, there shall be no order as to cost.

ANNEXURE X.18

ITEM NO.30 COURT NO.12 SECTION XVII

SUPREME COURT OF INDIA

RECORD OF PROCEEDINGS

Civil Appeal No(s). 23988/2017

B.K EDUCATIONAL SERVICES PVT LTD Appellant(s)

VERSUS

PARAG GUPTA AND ASSOCIATES Respondent(s)

(FOR ADMISSION and IA No.140884/2017-STAY APPLICATION)

Date : 10-01-2018 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN

HON'BLE MR. JUSTICE NAVIN SINHA

For Appellant(s) Mr. Robin R. David, Adv.

Mr. Pritpal Singh, Adv.

Ms. Ruchi Khurana, Adv.

Mr. Munawwar Naseem, Adv.

Mr. Dhiraj Philip, Adv.

For M/s. Dua Associates, AOR

For Respondent(s)

UPON hearing the counsel the Court made the following

ORDER

Issue notice, returnable within two weeks.

There shall be a stay of remand in the meantime.

(R. NATARAJAN)

COURT MASTER (SH)

(SAROJ KUMARI GAUR)

COURT MASTER

ANNEXURE X.19

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeals (AT)(Ins) No.31 of 2017

IN THE MATTER OF:

Era Infra Engineering Ltd.

...Appellant

Vs

Prideco Commercial Projects Pvt Ltd.

...Respondent

Present: Mr. Manoj K. Singh, Mr. Vijaya Singh, Ms Bornali Roy, Mr Mahip Singh, Mr. Gyanendra Kumar, Mr. Tanuka De, Advocates for the appellant.

ORDER

03.05.2017- The Appellant/Corporate Debtor has challenged the order(s) dated 12th April, 2017, passed by the Adjudicating Authority, Principal Bench, New Delhi in Insolvency Petition No. 26(ND) of 2017. By one of the order the Adjudicating Authority held that the order is being passed, within 14 days, as per Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I&B Code' for short). By the other order dated 12th April 2017, the Adjudicating Authority initiated Insolvency Resolution Process by admitting the application, appointed interim resolution professional, ordered Moratorium and passed the following directions:

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

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

10. The insolvency resolution professional shall also take steps and perform his duties in terms of Section 15, 17 &

18. All personnel of the Corporate Debtor including its promoters are expected to extend full cooperation to the interim resolution professional as is provided by Section 19 and any other provisions of the Code. The insolvency professional shall submit his report to us within four weeks.

11. The petition stands disposed of in above terms.”

2. Counsel for the Appellant/Corporate Debtor submitted that the Adjudicating Authority initiated the insolvency process under section 9 of the I & B Code, 2016, and admitted the case, though the Application

preferred by Operational Creditor was not complete. It is contended that the Appellant/ Corporate Debtor was not served any notice under section 8 of the I & B Code, 2016, and the petition was not filed in terms of (Form 3) Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

3. On notice, the Respondent/Operational Creditor has appeared and filed reply affidavit. Ld. Counsel appearing on behalf of Operational Creditor while accepted that no notice under section 8 of I & B Code, 2016, was served on the Appellant/Corporate Debtor, it is submitted that the other formalities were completed. It is further submitted that earlier a notice was issued to the Appellant/Corporate Debtor under section 271 of the Companies Act, 2013, for winding up which should be treated to be a notice for the purpose

of section 8 of the I & B Code, 2016. However, such submissions made on behalf of the Operational Creditor cannot be accepted in view of the mandatory provision under section 8 of the I & B Code read with Rule 5 of Insolvency and Bankruptcy, (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as I & B 'Rules' for short).

4. Insolvency resolution by an Operational Creditor can be initiated only on the occurrence of a default which is to be followed by a demand notice of unpaid Operational Debtor as stipulated sub-section (1) of Section 8, as quoted below:

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

5. Rule 5 of I & B Rules also mandates an Operational Creditor to deliver the Corporate Debtor a demand notice in Form 3 or a copy of an invoice attached with a notice in Form 4, as quoted below:

“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. The application for initiation of corporate insolvency resolution process, thereafter can be filed by Operational Creditor after expiry of period of 10 days from the date of delivery of the notice or invoice demanding payment, as provided under sub-section (1) of section 9.

7. Only thereafter, in terms of sub-section (5) of Section 9, the Adjudicating Authority, within 14 days of receipt of the application, by an order is required to either admit the application, if complete or to reject the application if

incomplete, provided seven days' time is granted for completion of the application if incomplete. As per clause (ii) (c) & (d) of sub-section (5) of section 9, the adjudicating authority is required to reject the application, in absence of affidavit that the Operational Creditor in absence of delivery of demand of notice or invoice demanding payment to the Corporate Debtor. In this connection we refer Section 9 of the I & B Code, as quoted below:

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

(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.*

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”

Section 230 reads as follows: “The Board may, by general or special order in writing delegate to any member or officer of the Board subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Code (except the powers under section 240 as it may deem necessary”

8. Admittedly, no notice was issued by Operational Creditor under section 8 of the I & B Code, 2016. Demand notice by Operational Creditor stipulated under Rule 5 in Form 3 has not been served. Therefore, in absence of any expiry period of tenure of 10 days there was no question of preferring an application under section 9 of I & B Code, 2016.

9. The Adjudicating Authority has failed to notice the aforesaid facts and the mandatory provisions of law as discussed above. Though the application was not complete and there was no other way to cure the defect, the impugned order cannot be upheld.

10. For the reasons aforesaid, we set aside the order dated 12th April 2014 passed by the Adjudicating Authority. The application preferred by Operational Creditor under section 9 stands dismissed being incomplete. All orders, interim arrangement etc. as has been made are vacated, moratorium as declared earlier is quashed, appointment of interim resolution professional also stands quashed. All action taken by interim resolution profession is declared illegal. The appeal is allowed with the aforesaid observations.

(Justice S.J. Mukhopadhaya)
Chairperson
(Mr. Balvinder Singh)
Member (Technical)

ANNEXURE X.20

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
COMPANY APPELLATE JURISDICTION**

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

(arising out of Order dated 23rd January, 2017 passed by NCLT, New Delhi Bench in C.P No (ISB)-03(PB)/2017)

IN THE MATTER OF:

Nikhil Mehta and Sons

...Appellants

Vs

AMR Infrastructure Ltd.

...Respondent

Present: For Appellant: - Mr. Varun Kathuria, Advocate

For Respondent: - Mr. Ajay Verma, Advocate

JUDGEMENT

SUDHANSU JYOTI MUKHOPADHAYA, J

This appeal has been preferred by appellants against order dated 23rd January 2017 passed by 'Adjudicating Authority (National Company Law Tribunal), Principal bench, New Delhi whereby and whereunder the 'Adjudicating Authority' held that appellants are not 'Financial Creditor' as defined under section 5(7) of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as 'I & B' Code). The adjudicatory authority further held that as many winding up petitions are pending before the Hon'ble Delhi High Court against the 'Corporate Debtor' and Financial Liquidator has been appointed, the application preferred by appellants for triggering insolvency process by invoking Section 7 of the 'I & B' Code read with Rule-4 and Rule-9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016 (hereinafter referred to as 'Adjudicating Authority' Rules, 2016) is not maintainable.

2. The case of the appellants and the submission as made by learned counsel for the appellants are as follows:—

The appellants reached different agreements/Memorandum of Understanding with respondent M/s. AMR Infrastructures Limited (hereinafter referred to

as 'Corporate Debtor') for purchase of three units being a residential flat, shop and office space in the projects, Kessel-I Valley, One Mall and One Home which were being developed by and promoted by 'Corporate Debtor'.

3. The one of the unit was purchased by the Appellant(s) under the 'Committed Return Plan' as per which if the Appellant(s) were to pay a substantial portion of the total sale consideration upfront at the time of Execution of the MOU, and the Respondent undertook to pay a particular amount to the buyer/purchaser (The appellant(s) in this case) each month, as Committed Returns/ Assured Returns from the date of execution of the MOU till the time the actual physical possession of the unit is handed over to the buyer/purchaser. In the said projects the appellants also had an option to choose the construction/time linked payment plan as per which they were required to pay a certain percentage of the sale consideration amount at various stages of construction of the project.

4. The Respondent started paying the committed returns to the Appellant(s) as per the MOU, but stopped paying the committed returns to the Appellant(s) from April, 2014, for the unit of the Appellants No. 3 and 4, and from January, 2014, for the units of the remaining Appellants, unilaterally and without assigning any reason. The Appellants contacted the Respondent on various occasions demanding the release/payment for their monthly committed returns but to no avail.

5. Having no other option, the Appellants had jointly filed an Application U/ s. 7 of the Insolvency and Bankruptcy Code, 2016, before the Adjudicating Authority on 16.01.2017 which was dismissed vide order dated 23.01.2017, which is why the present Appeal has been filed.

6. It is the case of the Appellants that the concept and plan of payment of Committed Returns/Assured Returns by the builders/real estate developers such as the Respondent, is a method adopted by them to mobilise funds/ raise finance from the general public/open market at much lower rates than what is normally made available to them by banking and other financial institutions without having the obligation to offer security or any collateral and without there being any regulatory body to supervise and oversee such a transaction thereby making the Appellants the "Financial Creditors" of the Respondent as defined U/s. (5)(8)(f) of the I & B Code.

7. It is for this reason that the Respondent had offered to pay a fixed monthly amount to the Appellants as Committed Returns/Assured Returns if the Appellants were willing to pay a substantial portion of the entire consideration amount upfront to them at the time of booking their units, as the Respondent

was getting easy access to the funds of the Appellants without having to offer/pledge any collateral/security in return. It is pertinent to mention here that there were no other contingencies/conditions/criteria which were to be fulfilled/met by the Appellants in order to get the monthly committed returns and therefore, the agreement/Memorandum of Understanding and transaction between the Appellants and the Respondent were not a simple real-estate transaction. The Appellants have also placed on record the order dated 19.12.2014 passed by SEBI in the matter of M/s. MVL Limited wherein it has held that such transactions where the developer offers to pay assured returns to the buyers “are not pure real estate transactions, rather they satisfy all the ingredients of a Collective Investment Scheme as defined under Section 11AA of the SEBI Act,” and has made other observations as well stating that the developer was engaged in “fund mobilization activity” by offering assured returns. Copy of the SEBI Order is at pages 451 to 473 of the Appeal.

8. It is the case of the Appellants that various winding up petitions have been filed and are pending against the Respondent for non-payment of the assured returns to various buyers wherein the Respondent has admitted liability and has offered to settle the claims but has not yet been able to do so. Therefore, since the provision of the Winding up under the Companies Act, stands substituted by the Insolvency and Bankruptcy Code, 2016, then the Appellants should be entitled to relief under the I & B Code itself.

9. It is the case of the Appellants that they are undoubtedly “creditors” of the Respondent as defined under the I & B Code, to whom an admitted and quantified “debt” is owed by the Respondent and who have a valid “claim” against the Respondent as has been defined under the I & B Code and therefore, the Adjudicating Authority should have heard and allowed the claim/application of the Appellants holding them to be “Financial Creditors” as defined under the I & B Code.

10. Further case of the Appellants is that as per the latest balance sheet of the respondent, the amount which is to be paid to the Appellants by the Respondent as Committed Returns/Assured Returns is shown as “Commitment Charges” under the header of “Financial Costs”. The Respondents has not filed any reply to the said claim of the Appellants despite of being given an opportunity to do so by this Appellate Tribunal. The said balance sheet is at pages 34-63 of the paper book dated 17.04.2017 of the Appellants and the relevant entry is at page 60 of the said paper book.

11. According to Appellants they are the “Financial Creditors” of the

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

12. The Respondent-Corporate Debtor has appeared but not filed any affidavit denying the averments made by appellants or the enclosures attached with the appeal.

13. The petition for condonation of delay of seven days in preferring the appeal under Section 61(2) of the I & B Code' has been filed. Taking into consideration the grounds taken therein particularly that number of petitions were wrongly mentioned in the original impugned judgment and on hearing the parties the delay of seven days in preferring the appeal is condoned.

14. The question arises for consideration in this appeal are: -

- (i) Whether the appellants who reached with agreements/Memorandum of Understandings with respondent for the purchase of three units being a residential flat, shop and office space in the projects developed, promoted and marketed by the respondent come within the meaning of 'Financial Creditor' as defined under the provisions of sub-section (5) of Section 7 of the I & B code and
- (ii) Whether an application for triggering insolvency process under Section 7 of I & B code' is maintainable where winding up petitions have been initiated and pending before Hon'ble High Court against the 'Corporate Debtor'.

15. To determine the first question it is desirable to notice and refer provisions of Section 5(7) and 5(8) and Section 7 of the 'I & B code', which are set out below:—

"5. In this Part, unless the context otherwise requires, —

(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;*

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

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

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

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

(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”

16. From a bare perusal of Section 7, it is patent that the insolvency process can be triggered by a 'Financial Creditor' or jointly against the 'Corporate Debtor' when default or debt has occurred.

17. The first question arises for consideration is as to who is a 'Financial Creditor'. Learned Adjudicating Authority, for determination of the aforesaid issue examined the definition provided in Section 5 (7) and 5(8) and in the impugned judgment rightly observed:—

"12. A perusal of definition of expression 'Financial Creditor' would show that it refers to a person to whom a Financial debt is owed and includes even a person to whom such debt has been legally assigned or transferred to. In order to understand the expression 'Financial Creditor', the requirements of expression 'financial debt' have to be satisfied which is defined in Section 5(8) of the IBC. The opening words of the definition clause would indicate that a financial debt is a debt along with interest which is disbursed against the consideration for the time value of money and it may include any of the events enumerated in sub-clauses (a) to (i). Therefore the first essential requirement of financial debt has to be met viz. that the debt is disbursed against the consideration for the time value of money and which may include the events enumerated in various sub-clauses. A Financial Creditor is a person who has right to a financial debt. The key feature of financial transaction as postulated by section 5(8) is its consideration for time value of money. In other words, the legislature has included such financial transactions in the definition of 'Financial debt' which are usually for a sum of money received today to be paid for over a period of time in a single or series of payments in future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. In Black's Law Dictionary (9th edition) the expression 'Time Value' has been defined to mean "the price associated with the length of time that an investor must wait until an investment matures or the related income is earned". In both the cases, the inflows and outflows are distanced by time and there is a compensation for time value of money. It is significant to notice that in order to satisfy the requirement of this provision, the financial transaction should be in the nature of debt and no equity has been implied by the opening words of Section 5(8) of the IBC. It is true that there are complex financial instruments which may not provide a happy situation to decipher the true nature and meaning of a transaction. It is pertinent to point out that the concept 'Financial Debt' as envisaged under Section 5(8) of the IBC is distinctly different than the one prevalent in England as provided in its Insolvency Act, 1986 and the 'Rules' framed thereunder. It appears

that in England there is no exclusive element of disbursement of debt laced with the consideration for the time value of money. However, forward sale or purchase agreement as contemplated by Section 5(8)(f) may or may not be regarded as a financial transaction. A forward contract to sell product at the end of a specified period is not a financial contract. It is essentially a contract for sale of specified goods. It is true that some time financial transactions seemingly restructured as sale and repurchase. Any repurchase and reverse repo transaction are sometimes used as devices for raising money. In a transaction of this nature an entity may require liquidity against an asset and the financier in return sell it back by way of a forward contract. The difference between the two prices would imply the rate of return to the financier. (See Taxman's Law Relating to IBC, 2016 by Vinod Kothari & Sikha Bansal)."

18. However, while examining the nature of transactions of the present case the learned Adjudicating Authority came to a conclusion that the appellants do not come within the meaning of 'Financial Creditor', as in the case in hand "Assured Returns" is associated with the delivery of possession of the properties and has got nothing to do with the requirement of Section 5(8), the time value of money which is mercifully missing in the transaction in hand, with following observations:—

"When we examine the nature of transactions in the present case, we find that it is a pure and simple agreement of sale or purchase of a piece of property.

The agreement to sell a flat or office space etc. Merely because some "assured amount" of return has been promised and it stands breached, such a transaction would not acquire the status of a 'financial debt' as the transaction does not have consideration for the time value of money, which is a substantive ingredient to be satisfied for fulfilling requirements of the expression 'Financial Debt'.

Essentially in the case in hand 'Assured Returns' is associated with the delivery of possession of the aforementioned properties and has got nothing to do with the requirement of sub-section (8) of section 5. It is the consideration for the time value of money which is mercifully missing in the transaction in hand. The classical transaction which would cover the definition of financial debts is illustrated in sub-clause (a) of sub-section (8) of Section 5 i.e. the money borrowed against the payment of interest. Learned Counsel of Applicants has not been able to show from any material on record or otherwise that it is a financial transaction in which a debt has been disbursed against the consideration for the time value of

money and he being the Financial Creditor is entitled to trigger the insolvency process against the Respondent in accordance with Section 7 of the IBC.”

From the provisions of Law and discussion as made and quoted above, we find that following essential criteria's to be fulfilled for a Creditor to come within the meaning of 'Financial Creditor':—

- (i) A person to whom a 'Financial debt' is owed and includes a person whom such debt has been legally assigned or transferred to*
- (ii) The debt along with interest, if any, is disbursed against the consideration for time value of money and include any one or more mode of disbursed as mentioned in clauses (a) to (i) of sub-section (8) of Section 5.*

19. To determine the question whether appellants came within the meaning of 'Financial Creditor', it is desirable to notice the relevant clause of one of the Memorandum of Understanding dated 12th April 2008 reached between the appellants and the Respondent-Corporate Debtor, relevant portion of which is quoted below:—

“AND whereas the Developer has represented that it shall complete the construction of the Shopping Mall on or before December 2009, in all respects and shall render the shopping mall ready for occupation & possession by the said date unless the construction is stoped or odelayed on account of factors beyond the control of Developer, as stipulated in the later part of this memorandum of Understanding.”

AND WHEREAS the Investor is interested in booking of Shop No. E-47 measuring 1453.432 sq. ft. For a total consideration amount of Rs. 46,67,402/- (rupees Forty Six Lachs Sixty Seven Thousand four Hundred Two Only). The Investor acknowledge, that the Developer has readily provided all information & clarifications as required by them but that they has not unduly relied upon and is not influenced by any architect's plans, advertisements representations, warranties, statements or estimates of any nature whatsoever whether written or oral made by the Developer.

“Cheque of Rs. 27,00,000/- payable on Punjab National Bank vide Cheque No. 462365 dated 19.03.2008.

Cheque of Rs. 9,00,000/- payable Punjab National Bank vide Cheque No. 462350 dated 19.03.2008.

The receipt of which is acknowledged by the Developer and the Developer hereby discharge the Investor of all the Payments under this MOU except

the amount of Rs. 10,17,402/- which is payable at the time of possession.

Since the Investor has paid most of the consideration as on 19.03.2008, the Developer is ready to pay the monthly committed return to the Investor but the Investor does not require the monthly return till December, 2008 i.e. for the 9 month. So the DEVELOPER hereby undertakes to make a consolidated payment of Rs. 99,600/- (Rupees Ninety Nine Thousand Six Hundred only) less TDS as applicable every calendar month to the INVESTOR as a committed return w.e.f January 2009 up to the date of handing over of possession to the INVESTOR.

The Investor has given the first leasing rights to the Developer and Developer hereby assures the investor that they will assist the Investor in leasing out the shop as per general market trends and practices prevailing till time of possession. The developer further assures the investor that if they are not able to lease the unit till possession they will pay the amount of Rs. 1,10,000/-per month w.e.f. dated of possession till unit is first leased out.”

20. From the aforesaid agreement/Memorandum of Understanding it is clear that appellants are “investors” and has chosen “committed return plan”. The respondent in their turn agreed upon to pay monthly committed return to investors. Thus, the amount due to the appellants come within the meaning of ‘debt’ as defined in Section 3(11) of the I & B Code’ which reads as follows:—

“(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;”

21. The appellants have enclosed the annual return of Respondent-Corporate Debtor dated 31st March 2014. Therein the amount deposited by ‘investors’ including the appellants as has been shown as committed return while giving the ‘financial cost’/at par with interest on loans, as shown below:-

“27 FINANCIAL COSTS

Interest on Loans	39,83,980.89.00	9,33,359.01.00
Leasing Charges	5,93,29,559.00	1,96,67,593.00
Interest & Penalties for non-compliance	55,85,518.00	59,75,659.05
Commitment Charges	15,30,91,296.00	32,32,97,199.00
Processing Fee	7,49,449.00	

Bank Charges	7,76,690.19	4,71,313.03
	23,35,16,293.00	35,03,45,123.09"

22. Form 16-A shows the TDS deducted from the interest earned by the appellant Nikhil Mehta under Section 194-A of the Income-tax Act 1961. Therein summary of payment including amount credited has been shown as follows:—

Summary of Payment			
Amount paid/	Nature of Payment credited (Rs.)	Date of payment/ credit (dd/mm/yyyy)	Status of Booking
41,107.00	194A-Interest other than Interest on Securities	30/04/2011	MATCHED
41,107.00	194A-Interest other than Interest on Securities	30/05/2011	MATCHED
41,107.00	194A-Interest other than Interest on Securities	30/06/2011	MATCHED
Summary of Tax Deducted at Source in respect of deductee			
Quarter	Receipt Numbers of original quarterly statements of TDS under sub-section (3) of section 200	Amount of tax deducted in respect of the deductee (Rs.)	Amount of tax deposited/ remitted in respect of deductee (Rs.)
Q1	BHRXHRAC	12,333.00	12,333.00

23. From the 'Annual Return' of the Respondent and Form-16A, we find that the 'Corporate Debtor' treated the appellants as 'investors' and borrowed the amount pursuant to sale purchase agreement for their commercial purpose treating at par with 'loan' in their return. Thereby, the amount invested by appellants come within the meaning of 'Financial Debt', as defined in Section 5(8)(f) of I & B Code, 2016 subject to satisfaction as to whether such disbursement against the consideration is for time value of money, as discussed in the subsequent paragraphs.

24. Learned Adjudicating Authority has rightly highlighted the opening word

of the definition clause which indicate that a 'financial debt' is a debt along with interest which is **disbursed against the consideration for the time value of money** and may include any of the events enumerated in sub-clauses (a) to (i). Therefore, it is to be seen whether the amount paid by the appellants to the Corporate Debtor, fulfil the other condition of "disbursement against consideration of time value and money", to come within the definition of "Financial Creditor" having satisfied that the Corporate Debtor raised the amount through a transaction of sale and purchase of agreement having commercial effect of a borrowing (Section 5(8)(f)).

25. The agreement shows that the respondent agreed to complete the construction of shopping mall on or before December 2009, in all respects, and was required to complete and handover the shop in the shopping mall before the said date. It is not the case of the respondent that the construction was stopped or delayed on account of factors beyond the control of the respondent, as stipulated in the later part of the Memorandum of Understanding. It was agreed upon by the respondent that since the appellants have paid most of the amount the respondent was ready to pay "monthly committed returns" to the appellants. However, as the appellants were not required the monthly return till December 2008 i.e. for 9 months so the Respondent-Corporate Debtor undertook to make a consolidated payment of Rs. 99,600/- less TDS. For every calendar month the Corporate Debtor was liable to pay committee return w.e.f. January 2009 till the date of handing over of the possession to the appellants. Therefore, it is clear that the amount disbursed by the appellants was "against the consideration of the time value of the money" and "the Respondent-Corporate Debtor raised the amount by way of sale - purchase agreement, having a commercial effect of borrowing." This is also clear from annual returns filed by Respondent and not disputed by the Respondent-Corporate Debtor in their annual returns, wherein the amount so raised/borrowed has been shown as 'commitment charges' under the head "Financial cost". The financial cost includes "Interest of loans" and other charges. Therefore, the 'commitment charge', which include interest on loan, shown against the head "Financial cost" having accepted by the Corporate Debtor in their annual return, we hold that the appellants have successfully proved that they are 'financial Creditor' within the meaning of Section 5(7) of the I & B Code'.

26. Learned Adjudicating Authority while rightly interpreted the provisions of law to understand the meaning of expression 'financial creditor' at paragraph 12 of the impugned judgment as quoted above, but failed to appreciate the nature of transactions in the present case and wrongly came to a conclusion "that it is a pure and simple agreement of sale and purchase of a piece of

property and has not acquired the status of a financial debt as the transaction does not have consideration for the time value of money”.

27. For the reasons aforesaid, we set aside the impugned judgment dated 23rd January 2017 passed by the learned Adjudicating Authority in C.P. No. (ISB)-03(PB)/2017 and remit the matter to Adjudicating Authority to admit the application preferred by appellants and pass appropriate order, if the application under Section 7 of the 'I & B Code' is otherwise complete. In case it is found to be not complete, the appellants should be given seven days' time to complete the application as per proviso to Section 7 of the 'I & B Code'.

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

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

21st July, 2017

ANNEXURE X.21

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI****Company Appeal (AT) (Insolvency) No. 95 of 2017****IN THE MATTER OF:****Lokhandwala Kataria Construction Pvt. Ltd. ...Appellant****Versus****Nisus Finance & Investment Manager LLP. ...Respondent****Present: For Appellant:** - Shri Abhiman Vashist, Sr. Advocate, Shri Peshwan Jehangir and Shri Snehal Kakrania, Advocates**For Respondent:** Shri Shiv Kumar Suri and Shri Shikhil Suri, Advocates**ORDER**

13.07.2017 This appeal is preferred by the appellant, Corporate Debtor against order dated 15th June, 2017 passed by learned Adjudicating Authority (National Company Law Tribunal) Mumbai Bench, Mumbai in CP No.61/1&BP/NCLT/MAH/2017 whereby and whereunder the application preferred by the respondent, financial creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as I&B Code') has been admitted, with following observation and direction:

"It is very much evident on the record the first cheque issued for redemption of the part of the debenture being dishonoured, it is evident that default has occurred and the Corporate Debtor is under obligation to make repayment to the debenture holders, the same not being made, this application is fit for initiating corporate insolvency resolution process. Accordingly, this application is hereby admitted."

Learned counsel appearing on behalf of the respondent - Financial Creditor submitted that the parties have settled the dispute and part amount has already been paid. This is also highlighted by learned counsel for Corporate Debtor. However, such settlement cannot be ground to interfere with the impugned order in absence of any other infirmity.

At this stage, we may notice and refer Rule 8 of I&B (Application to

Adjudicating Authority) Rules, 2016, which reads as follows:

“8 Withdrawal of Application - The Adjudicating Authority may permit withdrawal of the application made under Rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission. ”

Thus, before admission of an application under Section 7, it is open to the Financial Creditor to withdraw the application but once it is admitted, it cannot be withdrawn and is required to follow the procedures laid down under Sections 13, 14, 15, 16 and 17 of I&B Code, 2016. Even the Financial Creditor cannot be allowed to withdraw the application once admitted, and matter can not be closed till claim of all the creditors are satisfied by the corporate debtor.

Mere admission without subsequent step of advertisement having carried out, would not amount to refusal of claim of other creditors. Such submission as made by learned counsel for the appellant cannot be accepted in view of the provisions of the Act.

Learned counsel for the appellant requests to exercise inherent power, under Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 which reads as follows:

“11. Inherent powers - Noting in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal.”

However, as the said Rule 11 has not been adopted for the purpose of I&B Code, 2016 and only Rules 20 to 26 have been adopted in absence of any specific inherent power and where there is no merit, the question of exercising inherent power does not arise.

We find no merit in this appeal. The appeal is accordingly dismissed. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Balvinder Singh]
Member (Technical)

ANNEXURE X.22

**IN THE SUPREME COURT OF INDIA CIVIL APPELLATE
JURISDICTION**

CIVIL APPEAL NO. 9279 OF 2017

LOKHANDWALA KATARIA CONSTRUCTION PRIVATE LIMITED

Appellant(s)

VERSUS

NISUS FINANCE AND INVESTMENT MANAGERS LLP Respondent(s)

O R D E R

- 1) Heard the learned Senior Counsel appearing for the parties.
- 2) The present appeal raises an interesting question as to whether, in view of Rule 8 of the I&B (Application to Adjudicating Authority) Rules, 2016, the National Company Law Appellate Tribunal could utilize the inherent power recognized by Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 to allow a compromise before it by the parties after admission of the matter.
- 3) By the impugned order dated 13.07.2017, the National Company Law Appellate Tribunal was of the view that the inherent power could not be so utilized. According to us, prima facie this appears to be the correct position in law.
- 4) However, since all the parties are before us today, we utilize our powers under Article 142 of the Constitution of India to put a quietus to the matter before us. We take the Consent Terms dated 28.06.2017 and 12.07.2017 entered into between the parties on record and also record the undertaking of the appellant before us to abide by the Consent Terms in toto. The appellant also undertakes to pay the sums due on or before the dates mentioned in the aforesaid Consent Terms.
- 5) With this, the present appeal is disposed of.

6) In view of our order made today, nothing further survives in the aforesaid appeal.

..... J
(ROHINTON FALI NARIMAN)

.....
(SANJAY KISHAN KAUL)

New Delhi;
July 24, 2017

ITEM NO.41 COURT NO.12 SECTION XIV
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS
Civil Appeal No(s). 9279/2017
LOKHANDWALA KATARIA CONSTRUCTION PRIVATE LIMITED
Appellant(s)

VERSUS

NISUS FINANCE AND INVESTMENT MANAGERS LLP Respondent(s)
(IA No.58825/2017-STAY APPLICATION AND IA No.58826/2017-
EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT and IA
No.59782/2017-PERMISSION TO FILE ADDITIONAL DOCUMENTS)

Date : 24-07-2017 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

For Appellant(s) Mr. Mukul Rohatgi, Sr. Adv.
Mr. K.V. Viswanathan, Sr. Adv. Mr. Prateek Kumar, Adv.
Snehal Kakrania, Adv.
Mr. Peshwan Jehangir, Adv.
Ms. Anushak Sharda, Adv.
M/s. Khaitan & Co., AOR

For Respondent(s) Mr. Krishnan Venugopal, Sr. Adv. Mr. Shikhil Suri,
Adv.
Mr. Shiv Kumar Suri, AOR Ms. Shilpa Saini, Adv.

UPON hearing the counsel the Court made the following

O R D E R

The appeal is disposed of in terms of the signed order. Pending applications, if any, also stand disposed of.

(R. NATARAJAN)
COURT MASTER

(SAROJ KUMARI GAUR)
COURT MASTER

(Signed order is placed on the file)

ITEM NO.6

COURT NO.12

SECTION IX

SUPREME COURT OF INDIA

RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) No(s). 26824/2017

(Arising out of impugned final judgment and order dated 19-07-2017 in CP No. 1081/2017 passed by the National Company Law Tribunal, Mumbai Bench)

UTTARA FOODS AND FEEDS PRIVATE LIMITED

Petitioner(s)

VERSUS

MONA PHARMACHEM

Respondent(s)

Date : 13-11-2017 This petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

For Petitioner(s) Mr. Shyam Divan, Sr. Adv.
Ms. Malini Sud, Adv.
Mr. Hemant Sethi, Adv.
Mr. Vikas Mishra, Adv.
Mr. S.P.Singh Chawla, Adv.
Ms. B. Vijayalakshmi Menon, AOR

For Respondent(s) Mr. Diggaj Pathak, Adv.
Ms. Shweta Sharma, Adv.
Ms. Vishaki Bhatia, Adv.

UPON hearing the counsel the Court made the following

ORDER

Leave granted.

The appeal is allowed in terms of the signed order.

Pending applications, if any, shall stand disposed of.

(SHASHI SAREEN)
AR CUM PS

(SAROJ KUMARI GAUR)
BRANCH OFFICER

(Signed order is placed on the file)

ANNEXURE X.24**REPORTABLE IN THE SUPREME COURT OF INDIA****CIVIL APPELLATE JURISDICTION****CIVIL APPEAL NOs. 8337-8338 OF 2017****M/S. INNOVENTIVE INDUSTRIES LTD.****...APPELLANT**

VERSUS

ICICI BANK & ANR.**...RESPONDENTS****JUDGMENT****R.F. 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, it 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 IRP 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 debt 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 :

“Article 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. 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

interstate 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 Amaldas 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 cliché 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 trenching 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 **Shyamkant 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 Amaldas 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 **Shyamkant 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 Amaldas 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 :

“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 yielded 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 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 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 or 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.

.....J.

(R.F. Nariman)

.....J.

(Sanjay Kishan Kaul)

New Delhi;

August 31, 2017.

ANNEXURE X.25

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 51 of 2017

(arising out of Order dated 19th April, 2017 passed by the National Company Law Tribunal, Ahmedabad Bench in CP (IB) No. 5/7/NCLT/AHM/ 2017).

IN THE MATTER OF:

Steel Konnect (India) Private LimitedAppellant

Vs.

M/s Hero Fincorp Limited ...Respondent

Present: For Appellant: - Shri Vivek Sibal, Ms. Pooja
M.Saizal, Advocates and Shri Ajoy Tola, C.A.

For Respondent: - Shri Venancio D'Costa and Ms. Astha

JUDGEMENT

Justice Sudhansu Jyoti Mukhopadhaya, Chairperson

The respondent M/s. Hero Fincorp Limited (hereinafter referred to as 'Financial Creditor') preferred an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I & B Code'), for initiation of Corporate Insolvency Resolution Process against Appellant-'Corporate Debtor'. The Learned Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench, by impugned order dated 19th April 2017 in C.P. No. (IB) 05/NCLT/AHM/2017, admitted the application, appointed an Interim Resolution Professional and passed order of moratorium with certain observations and directions in terms of 'I & B Code'.

2. Learned Counsel for the appellant submitted that the impugned order was passed by the Adjudicating Authority in violation of Rules of natural justice without giving any notice to the Appellant - 'Corporate Debtor'.

3. It was also submitted that no post filing notice under Rule 4(3) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as 'Adjudicating Authority Rules') was given by the respondent - "Financial Creditor". A notice was served on appellant,

purported to be a notice under Rule 4(3), was pre-filing notice with wrong date of admission of the application mentioned therein.

4. It was further submitted that a record of default recorded with the information utility or a record of default available with any Credit Information Company (CIBIL) or copies of entries in Banker's book in accordance with the Bankers Book Evidence Act, 1891 as required in terms of Form - I read with Rule 4 of the Adjudicating Authority Rules was not filed. Reliance was also placed on sub-section (3) of Section 7 to suggest that record of default recorded with the information utility or such other record or evidence of default as specified by Insolvency & Bankruptcy Board of India (IBBI) has not been filed.

5. On the other hand, according to Learned Counsel for the respondents, the appellant has no locus to file this appeal after appointment of Interim Resolution Professional, who has already taken over the management of the 'Corporate Debtor'. The powers of Board of Directors, since then stands suspended in terms of Section 17(l)(a) & (b) of the 'I & B Code'.

6. In so far as notice under Rule 4(3) is concerned, according to Learned Counsel for the respondent proper notice was issued to the 'Corporate Debtor' who had appeared before Learned Adjudicating Authority on 17th April 2017 and was given ample opportunity to present the case.

7. Relying on the decision of the Appellate Tribunal in *Innoventive Industries Ltd. v. ICICI Bank* (Company Appeal (AT)(Ins.) Nos. 1 and 2 of 2017 decided on 15th May 2017), it was contended that the Adjudicating Authority is required to issue only a limited notice to the 'Corporate Debtor' before admitting a case for ascertainment of existence of default. It was submitted that along with application under Section 7 of 'I & B Code' preferred before the Learned Adjudicating Authority, notice was issued to appellant under Rule 4(3) of the Adjudicating Authority Rules, intimating that the said application is likely to be listed. Therefore, according to respondent there is no violation of Rule 4(3) of the Rules or the principles of natural justice.

8. In so far as statement of account is concerned it was contended that Learned Adjudicating Authority, before admitting the application under Section 7 of the 'I & B Code', is only required to ascertain whether there has been a default of debt on the part of the 'Corporate Debtor'. In the present case, the 'Financial Creditor', apart from filing the statement of accounts duly certified by the office of the 'Financial Creditor's Company, filed records of default which is available with CIBIL. In so far as Banker's Book of Evidence Act, 1891 is concerned, it is submitted that the same is not applicable to the non-banking financial companies.

9. We have heard learned counsel for the parties and perused the record.

10. In “M/s. Innoventive Industries Limited Vs. ICICI Bank & Ann” - Company Appeal (AT) (Insol.) No. 1 & 2 of 2017, this Appellate Tribunal by judgment dated 15th May 2017, noticed the exception of the principle of rules of natural justice, as follows: —

“42. From the aforesaid decisions of Hon'ble Supreme Court, the exception on the Principle of Rules of natural justice can be summarised as follows: —

- (i) Exclusion in case of emergency,*
- (ii) Express statutory exclusion,*
- (iii) Where discloser would be prejudicial to public interests,*
- (iv) Where prompt action is needed,*
- (v) Where it is impracticable to hold hearing or appeal,*
- (vi) Exclusion in case of purely administrative matters,*
- (vii) Where no right of person is infringed,*
- (viii) The procedural defect would have made no difference to the outcome,*
- (ix) Exclusion on the ground of ‘no fault’ decision maker etc.”*

11. In the said case this Appellate Tribunal, taking into consideration the facts that though notice was not issued to “M/s. Innoventive Industries Limited” (Appellant), but the said appellant having appeared and heard by Adjudicating Authority at the time of admission of the application under Section 9 of the ‘I & B Code’, observe and held as under: —

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

12. In the present case we find that the respondent issued post filing notice

under Rule 4(3) along with application under Section 7 of 'I & B Code'. In the said notice date of hearing was shown as 11th April 2017 but the matter was listed before the Adjudicating Authority, a day earlier on 10th April 2017. In the aforesaid background, the Adjudicating Authority adjourned the matter, and directed to issue notice on respondent. When the application was taken up for admission on 19th April 2017, the appellant appeared through their lawyers, Mr. Ketan Parikh with Mr. Pavan Godiawala. Paragraph 6 of the impugned order dated 19th April 2017 suggests that both the counsel for the "Financial Creditor" (Respondent) and "Corporate Debtor" (Appellant) were heard wherein after the impugned order was passed.

In the aforesaid background, we hold that even if it is presumed that no separate notice was issued by Adjudicating Authority to the "Corporate Debtor", the appellant having heard before passing the impugned order, the question of remitting the case for hearing on the ground of non-compliance of principles of natural justice does not arise as it will be futile. For the reason aforesaid we are not inclined to interfere with the impugned order dated 19th April 2017 on the ground that no notice was issued to appellant by the Adjudicating Authority.

13. For the same reason, we also reject the plea taken by the appellant that the notice under Rule 4(3) of the Adjudicating Authority Rules was a pre-filing notice, wrong date of hearing having shown therein.

14. Whether enclosures of record of default or copies of entries in Banker's Book as required in terms of Form - 1, read with Rule 4 of the Adjudicating Authority Rules and sub-section (3) of Section 7 of the 'I & B Code', is mandatory or not fell for consideration before this Appellate Tribunal in **Neelkanth Township & Construction (P.) Ltd. v. Urban Infrastructure Trustees Ltd.** - Company Appeal (AT) (Insolvency) No. 44 of 2017 by its judgment dated 11th August 2017. In the said case, this Appellate Tribunal held:

'18. It is well settled that rules of procedure are to be construed not to frustrate or obstruct the process of adjudication under the substantive provisions of law. A procedural provision cannot override or affect the substantive obligation of the adjudicating authority to deal with applications under Section 7 merely on the ground that Board has not stipulated or framed Regulations with regard to sub-section 3(a) of Section 7. The language of Section 240, whereby Board have been empowered to frame regulations is clear that the said regulation should be consistent with the 'I & B' Code and the rules made thereunder by the Central Government.

19. In exercise of power conferred by Section 239 read with Sections 7,

8, 9 and 10 of the 'I&B code, the Central Government framed the rules known as "Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as 'Adjudicating Authority Rules, 2016). As per Rule 41, a 'Financial Creditor' required to apply itself or jointly in an application under Section 7 in terms of Form-1 attached thereto. Part V of Form-1 deals with particulars of 'Financial Debt' (documents, record and evidence of default), as quoted below: —

“PART V

**PARTICULARS OF FINANCIAL 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. PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)

3. RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)

4. 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)

5. THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE (ATTACH A COPY)

6. A RECORD OF DEFAULT AS AVAILABLE WITH ANY CREDIT INFORMATION COMPANY (ATTACH A COPY)

7. COPIES OF ENTRIES IN A BANKERS BOOK IN ACCORDANCE WITH THE BANKERS BOOKS EVIDENCE ACT, 1891 (18 of 1891)

8. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT”

20. *The rules framed by the Central Government under Section 239 having prescribed the documents, record and evidence of default as noticed above, we hold that in absence of regulation framed by the Board relating to record of default recorded with the information utility or other record of evidence of default specified, “the documents”, ‘record’ and ‘evidence of default’ prescribed at Part V of Form-1, of the Adjudicatory Rules, 2016 will hold good to decide the default of debt for the purpose of Section 7 of the ‘I & B Code’.*

21. *We further hold that the ‘Regulations framed by the Board’ being subject to the provisions of ‘I & B Code’ and rules framed by the Central Government under Section 239, ‘Part V of Form - 1 of Adjudicating Authority Rules, 2016 framed by Central Government relating to ‘documents’, ‘record’ and ‘evidence of default’, will override the regulations, if framed by the Board and if inconsistent with the Rule. However, it is always open to Board to prescribe additional records in support of default of debt, such as records of default recorded with the information utility or such other record or evidence of default in addition to the records as mentioned in Part V of Form-I.*

22. *At this stage, it is pertinent to note that the Board has also framed Insolvency Resolution Process for Corporate Persons, Regulations, 2016 (‘Corporate Persons Regulation’ for short). It has come into force since Notification dated 30th November 2016 was issued. Regulation 8 of ‘Corporate Persons Regulation’, 2016 relate to claims by ‘Financial Creditor’. Regulation 11(2) relates to existence of debt due to ‘Financial Creditor’, which is to be proved on the basis documents mentioned therein and quoted below:—*

“8. Claims by financial creditors.

(1) A person claiming to be a financial creditor of the corporate debtor shall submit proof of claim to the interim resolution professional in electronic form in Form C 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 financial creditor 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 financial contract supported by financial statements as evidence of the debt;*
- (ii) *a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;*
- (iii) *financial statements showing that the debt has not been repaid; or*
- (iv) *an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.”*

23. *‘Form - C’ attached to the Regulation relates to proof of claim of ‘Financial Creditor’ whereunder at Serial No. 10, the ‘Financial Creditor’ is supposed to refer the list of documents in proof of claim in order to prove the existence and non-payment of claim dues to the ‘Operational Creditor’.*

Therefore, the stand of the appellant that the Board has not framed any Regulations, relating to clause (a) of sub-section (3) of Section 7, cannot be accepted.’

15. The case of the appellant is covered by the decision in “**Neelkanth Township & Construction (P.) Ltd. (supra)**”. For the said reason, the contention with regard to documents, records and evidence of default as raised by appellant is also rejected.

For determination of the issue whether the “Corporate Debtor” can prefer appeal under Section 61 of the ‘I & B Code’ through the Board of Directors, which stand suspended after admission of an application it is necessary to refer to Section 17, which reads as follows:—

“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;*
 - (b) *the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional;*
 - (c) *the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional;*

- (d) the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.*
- (2) The interim resolution professional vested with the management of the corporate debtor shall—*
 - (a) act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;*
 - (b) take such actions, in the manner and subject to such restrictions, as may be specified by the Board;*
 - (c) have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor;*
 - (d) have the authority to access the books of account, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified”*

16. From Clause (a) of sub-section (1) of Section 17 while it is clear that the Management of affairs of the ‘Corporate Debtor’ stand vested with the ‘Interim Resolution Professional’, such vesting is limited and restricted to the extent of power vested under sub-section (2) of Section 17 which empowers the ‘Interim Resolution Professional’ to act and execute in the name of ‘Corporate Debtor’ all deeds, receipts, and other documents, if any, to take such action in the manner and subject to such restrictions, as may be specified by the Board and have access of authority to the electronic records of ‘Corporate Debtor’, books of account, records etc.

From the aforesaid provision we find that “Interim Resolution Professional” has not been vested with any specific power to sue any person on behalf of the ‘Corporate Debtor’. However, in case of such difficulty, it is always open to the ‘Interim Resolution Professional’ to bring to the notice of the Adjudicating Authority for appropriate order.

17. Admittedly, ‘Corporate Debtor’ was a party respondent to the resolution process when application under Section 7 or 9 is preferred. The ‘Corporate Debtor’ represented itself, at the initial stage before the Adjudicating Authority through the Board of Directors or person authorised by the Board of Directors. It is only after hearing the ‘Corporate Debtor’ the Adjudicating Authority can pass an order under Section 7 or 9, admitting or rejecting the application.

18. Once the application under Section 7 or 9 is admitted, the 'Corporate Insolvency Resolution Process' starts in such case one of the aggrieved party being the 'Corporate Debtor' has a right to prefer an appeal under Section 61, apart from any other aggrieved person like Director(s) of the company or members, who do not cease to be Director(s) or member(s), as they are not suspended but their function as 'Board of Director(s)' is suspend.

19. The 'Corporate Debtor' if represented before the Adjudicating Authority through its Board of Directors or any person authorised by Board of Directors or its officers, for the purpose of preferring an appeal, no objection can be raised that the 'Corporate Debtor' cannot appear through its Board of Directors or authorised person or officer through whom 'Corporate Debtor' represented before the Adjudicating Authority.

Once a 'Corporate Debtor' appeared before the Adjudicating Authority through its Board of Director(s) or its officers or through authorised person and is heard before admission of an application under 'I & B Code', being aggrieved such 'Corporate Debtor' cannot prefer an appeal under Section 61 on the ground that the 'Corporate Debtor' appeared through another person 'Interim Resolution Professional', though he had not appeared before the Adjudicating Authority.

20. Though the Board of Directors or partners of 'Corporate Debtor', as the case may be is suspended and their power can be exercised by the 'Interim Resolution Professional', but such exercise of power is limited to the extent to sub-section (2) of Section 17 of the 'I & B Code' and not for any other purpose. If the matter is looked from another angle, it will be clear as to why 'Corporate Debtor' should not be represented through 'Interim Resolution Professional' for preferring an appeal under Section 61 of the 'I & B Code'. The Role of 'Interim Resolution Professional' starts after initiation of 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor'. The 'Interim Resolution Professional' once given consent to function directly or indirectly he cannot challenge his own appointment, except in case where he has not given consent. If the 'Corporate Debtor' is left in the hands of 'Interim Resolution Professional' to raise his grievance by filing an appeal under Section 61, it will be futile, as no 'Interim Resolution Professional' will challenge the initiation of 'Insolvency Resolution Process' which ultimately result into the challenge of his appointment.

21. For example, if an application under Section 7 or 9 is admitted and at the stage of admission, the 'Interim Resolution Professional' is not appointed and such appointment is made later on within 14 days of admission under Section 16, then in case of appointment of an ineligible 'Interim Resolution

Professional' against whom a Departmental proceeding is pending, can the 'Corporate Debtor' prefer appeal under Section 61 challenging the appointment of 'Interim Resolution Professional', if the 'Corporate Debtor' is asked to be represented through the same very 'Interim Resolution Professional'? The answer will be in negative means a 'Corporate Debtor' in such case cannot be represented to the 'Interim Resolution Professional', whose appointment is under challenge and for all purpose to be represented through the person who represented the 'Corporate Debtor' at the stage of admission before the Adjudicating Authority.

22. At this stage, it is desirable to notice that though pursuant to Section 17, the 'Board of Directors' of a 'Corporate Debtor' stand suspended (for a limited period of 'Corporate Resolution Process maximum 180 days or extended period of 90 days i.e. 270 days), but they continued to remain as Directors and members of the Board of Directors for all purpose in the records of Registrar of Companies under the Companies Act, 2013.

23. For the reasons aforesaid, we also reject the plea taken by Learned Counsel for the appellant that the "Corporate Debtor" has no locus to prefer appeal under sub-section (1) of Section 61 through its Board of Directors or authorise person or its officers except through the "Interim Resolution Professional".

24. We find no merit in this appeal. It is accordingly dismissed. However, in the facts and circumstances of the case the parties shall bear the respective costs.

(Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

29th August 2017

ANNEXURE X.26

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH

MA 701 in C.P. 1055/I&BP/2017

Under section 33 & 60(5) of the IBC, 2016

In the matter of
Roofit Industries Limited

Jitender Kumar Jain
Resolution Professional

.... Applicant

Order delivered on 22.01.2018

Coram: Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Applicant : Jitender Kumar Jain
Resolution Professional

Per V. Nallasenapathy, Member (Technical)

ORDER

1. Mr. Jitender Kumar, the Resolution Professional of Roofit Industries Ltd. filed this Application under sections 33 and under section 60(5) of the Insolvency & Bankruptcy Code (the Code), praying for the following reliefs :

- (a) Pending disposal of this application, the Applicant be allowed to continue to act as the Resolution Professional of the Corporate Debtor from 26th December, 2017 till final disposal of this application.
- (b) The Corporate Debtor be liquidated in terms of the provisions of the Chapter - III of the Insolvency Code.
- (c) To appoint some other insolvency professional as the liquidator of the Corporate Debtor (in place of the Resolution Professional because the Resolution Professional is unwilling to act liquidator of the Corporate Debtor) as per the provisions of section 34 of the Insolvency Code.
- (d) To allow the payment of remuneration to the Applicant / Resolution Professional for the period starting from 26th December, 2017 till

final disposal of this application for acting as the Resolution Professional of the Corporate Debtor at a rate equal to the remuneration paid during the CIRP period as part of Corporate insolvency resolution process cost or liquidation case, as the case may be.

- (e) Any other relief or reliefs in favour of the Applicant/ Corporate Debtor as this Hon'ble Tribunal deems fit and proper.

2. The Corporate Debtor M/s. Roofit Industries Ltd. was put on in Insolvency Resolution process, on its own Petition under section 10 of the Code, by an Order of this Adjudicating Authority dated 28.06.2017. The Applicant herein was appointed as Interim Resolution Professional, he has made a public announcement of insolvency resolution process in two newspapers and on the website of Insolvency and Bankruptcy Board of India (IBBI).

3. In the first meeting of the Committee of Creditors (CoC) held on 27.7.2017, the Applicant was confirmed as Resolution Professional as per Section 22 of the Code. The Corporate Insolvency resolution period expired on 26.12.2017 and no extension of the Corporate Insolvency Resolution period was sought. The Applicant states that no resolution plan has been received and hence this Application is filed under section 33 of the Code seeking Liquidation Order.

4. The Petition reveals that the following are the immovable properties of the Corporate Debtor:

No.	Particulars	Type of Property
1.	B-15, MIDC Mirjole, Ratnagiri - 415 639, Cement Sheet Factory	Land, Building & Plant & Machinery
2.	Plot No.379, Village Abitghar, Taluka Wada, Dist. Thane 421 363 Gat No.379-B (part) &	Land, Building Plant & Machinery
3.	B-42, SIPCOT Industrial Complex, Gummidipoondi - 601 201, Chennai Survey No.12 part, 13 part, 14 part & 19 part land	Land, Building & Plant & Machinery
4.	Survey No.206-207, District- Trivellore, Taluka Gummidipoondi, Chennai.	Land & Building
5.	Shop No.II, 5th floor, Topaz Building, Panjagutta, Hyderabad.	Shop

6.	A-91/92, MIDC Daund, Pune-Solapur Road, Kurkhumbh 413801 Plot No.A-91 and A-92	Plant & Machinery, Land and Building
7.	E-25, MIDC, Chikalthana, Aurangabad - 431210 Plot No.E-25	Land & Building
8.	2nd floor, South Square Building, Near Manorama Junction, Ernakulam	Office
9.	Plot No.39, B-Nanji Industrial Estate, S. No.200/1/2, Village Kharadpada, Silvassa - 396203	Land & Building.

5. The Petition further reveals that previously the assets of the Corporate Debtor were attached under the provisions of Maharashtra Protection of Interest of Depositors (in Financial Establishment) Act, 1999 by the competent authority under the said Act and subsequently the said attachment was released by the MPID Court by its Order dated 18.8.2017 made in an Application filed by the Resolution Professional, which is inclusive of a sum of Rs.40,00,000 in cash plus interest accrued. However, the said sum of Rs. 40,00,000 is not yet received by the Resolution Professional.

6. The Petition also reveals that the valuation of properties was undertaken by me resolution Professional by appointing two Valuers and the Report is also enclosed. After the receipt of liquidation value of the Corporate Debtor, two advertisements inviting expression of interest in terms of Section 25 of the Code was given. The Petition further reveals that the following expressions of interest was received by the Applicant:

- (a) Robuster Constructware LLP in respect of Kurkumbh property.
- (b) PR Developers in respect of all the properties.
- (c) Gummidipoondi Roofit Employees' Welfare Foundation for B-42 Gummidipoondi factory.
- (d) Phoenix ARC Private Limited as resolution applicant.
- (e) Madras Building Products Private Limited for B-42 Gummidipoondi Factory.
- (f) Mr. E. C. John in respect of Wada property.

7. The Applicant further submits that the following two proposals were received in respect of B-42 Gummidipoondi Factory :

- (a) Gummidipoondi Roofit Employees' Welfare Foundation of 17 December, 2017.

(b) Madras Building Products Private Limited on 18 December, 2017.

The above proposals were laid before the fourth meeting of the CoC held on 21 December, 2017.

8. The Applicant further states that Resolution Plan from Gummidipoondi Roofit Employees' Welfare Association, which is only in respect of B-42 Gummidipoondi Factory (excluding other units), was received on the night of 20th December, 2017 i.e. less than one day prior to the CoC meeting scheduled at 11 a.m. on 21.12.2017 the said Resolution Plan was not presented before the CoC because of the reason that the Resolution Professional did not have enough time to examine the Resolution Plan. However, the same was informed to the Coc.

9. Since the CIRP period of 180 days ended on 26.12.2017 and no Resolution Plan for the Corporate Debtor is received by the Resolution Professional, except for B-42 Gummidipoondi Factory only, submitted by the Gummidipoondi Roofit Employees' Welfare Association, the Resolution Professional filed this Application for liquidation under section 33 of the Code. Considering the fact that the Resolution Plan submitted by the above said Employees' Association is only in respect of Gummjidipoondi Factory excluding other units, this Bench is of the view that the Resolution Plan cannot be considered for a particular unit excluding others and hence, the same cannot be considered as a Resolution at all under the Code.

10. On hearing the submissions of the Applicant and on reading the Application and the documents enclosed therein, for the RP has complied with the procedure laid under the Code r/w Regulations of CIRP, for the valuation report filed by the valuer has not been disputed by the CoC, on verification, we are of the view that this case is fit to pass liquidation order as mentioned under sub-section 2 of section 33 of the Code and accordingly, the Corporate Debtor is ordered to be liquidated.

11. The Resolution Professional/Applicant herein has stated that he is not willing to act as a Liquidator of the Corporate Debtor. However, section 34(1) of the Code provides that where the Adjudicating Authority passes an order for Liquidation of the Corporate Debtor under section 33, the Resolution Professional appointed for the Corporate Insolvency resolution process under Chapter - II shall act as a liquidator for the purpose of liquidation unless replaced by the Adjudicating Authority under sub-section (4). In view of this provision, this Adjudicating Authority cannot concede the request of the Applicant. Apart from this, the Resolution Professional having dealt with the Corporate Debtor during the last six months it is not advisable to make somebody else as Liquidator because of the mere reason that no funds are

available with the Corporate Debtor to pay the remuneration for RP.

12. Consequently, the Applicant Resolution Professional is appointed as the Liquidator as provided under section 34(1) of the Code. All powers of the board of directors, key managerial personnel and the partners of the corporate debtor, as the case may be, shall cease to have effect and shall be vested in the liquidator;

13. This Bench hereby directs the personnel of the corporate debtor to extend all assistance and cooperation to the liquidator as may be required by him in managing the affairs of the corporate debtor.

14. Since Liquidation order has been passed no suit or other legal proceedings shall be instituted by or against the Corporate Debtor, save and except as mentioned in section 52 of the Code, as to institution of legal proceedings by the Liquidator, he is at liberty to initiate suit or legal proceedings with prior approval of this Adjudicating Authority, but this direction shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

15. This order shall be deemed to be a notice of discharge to the officers, employees and workmen of the Corporate Debtor except to the extent of business the Corporate Debtor carrying.

16. We hereby direct that the fee shall be paid to the Liquidator as envisaged under Regulation 4 of IBBI (Liquidation Process) Regulations, which forms part of the liquidation cost.

17. The Liquidator appointed herein is directed to issue public announcement stating that the Corporate Debtor is in liquidation and also required to send the copy of this Order to the concerned Registrar of Companies as required under section 33(1) of the Code.

18. Accordingly, this Application is hereby allowed directing the Liquidator appointed in this case to initiate liquidation process as envisaged under Chapter-III of Insolvency and Bankruptcy Code 2016 by following the liquidation process given in IBBI (Liquidation Process) Regulations 2016.

Sd/-
V. NALLASENAPATHY
Member (Technical)

Sd/-
B. S.V. PRAKASH KUMAR
Member (Judicial)

