



SINGH & ASSOCIATES
Founder - Manoj K. Singh
ADVOCATES & SOLICITORS

Insolvency Round-Up



Vol. I, Issue IV



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Here we are yet again, with the new edition of *Insolvency Round-Up* news-bulletin. I&B Code is developing with each passing order and its provisions are put to judicial scrutiny vis-à-vis peculiar facts & practical circumstances involved in references made to the tribunals. The NCLT and NCLAT is equipped with seasoned members having fine sense of judgment and great appreciation to the ambit of I&B Code, resulting in well reasoned orders/judgments which are acting as precedents for subsequent cases.

In this issue, at first (and in-tandem with the first line of the preceding para), we discuss in length the evolution and development of insolvency law. The article also includes some note-worthy cases which shaped the insolvency law in the country.

I&B Code, similar to other laws and policies initiated by the Government, acknowledges the benefits or ease of doing business to be given to start-up sector. Accordingly, a write-up on fast track insolvency resolution process available to start-up companies as enshrined under I&B Code is included in this issue.

Further, we ponder over the question whether an application under section 9 of I&B Code is maintainable at the instance of workmen association. In this regard critical appreciation of a few recent judgments/orders by the Tribunals form part of the relevant article.

Thereafter, we present a case note on section 14 of I&B Code qua a bar for proceedings against guarantor before Debt Recovery Tribunal. By way of appraising two orders (*Sanjeev Shriya v. State Bank of India and Ors. Writ C No. 30285 of 2017 connected with Deepak Singhania and Another v. State Bank of India, Writ C No. 30033 of 2017*) passed by Hon'ble Allahabad High Court deliberate on whether the liability of personal guarantors of a company where moratorium under Section 14 of I&B Code is in force.

Furthermore, in wake of simplifying the applicability of I&B Code we have included an article on the issue of who being actually authorized to initiate the insolvency resolution process. Here we discuss and analyze the law which has been discussed by the Hon'ble Bench of NCLAT in *Tirupati Infra Project Pvt. Ltd. v. Bank of India*, and *Palogix Infrastructure Pvt. Ltd. v. ICICI Bank Ltd.*

I&B Code provides for some strict timelines that are to be adhered to by the concerned parties whilst taking appropriate actions under the Code. The Hon'ble Supreme Court of India in the matter titled *Surendra Trading Company v. Juggilal Kamlapat Jute Mills* recently put an end to the dilemma of timelines with respect to various actions to be undertaken under I&B Code at the time of admission of application filed under section 7, 9 and 10 of I&B Code for the purpose of initiating CIRP.

We sincerely hope that you find the articles of this *Insolvency Round-Up* issue interesting & enriching as well and throw more light on the various aspects of the Code. Please feel free to send your valuable inputs / comments at newsletter@singhassociates.in.

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Thank you.



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DEVELOPMENT OF INSOLVENCY LAW – A DIFFERENT LAW EVERY DAY!

Stability and predictability of the legal system is undeniably an essential component of the “Rule of Law” and in its absence, people have great difficulty managing their affairs effectively. The issue attains enormous proportion in the field of commercial law as there is nothing that the corporate enterprises fear more than uncertainty. There is an old management principle according to which “*you can’t manage what you cannot predict*”, which conversely implies that unless something is predictable, it cannot be managed. Corporate enterprises always want to tread the path where there is a fair amount, if not absolute, stability. Stability and predictability of the regulatory environment and the applicable laws rank high amongst the important variables enterprises consider while making investment decisions and hence, these factors have a direct bearing on the ease of doing business in a country.

INSOLVENCY AND BANKRUPTCY CODE

The Insolvency and Bankruptcy Code (“the Code”) is a new legislation to manage the Insolvency resolution process for corporate persons, individuals and partnership firms. The structure, functioning and even some of the provisions of the Code are of such kinds that have not existed before in any form and hence difficult to draw a *pari materia* with any existing provision of law.

In case of any new enactment, the law evolves and jurisprudence is settled over time. What is generally expected is that evolution of the law will relate to certain imminent clarifications to streamline the procedure and settle existing legal principles as applicable to the new enactment. However, in case of the IBC 2016, while the Code is a comprehensive piece of legislation wherein great effort has gone to detail every possible situation that may arise; the situation since its enactment is more like the goalposts are being shifted way too frequently, thereby, causing a lot of uncertainty and delay in what is proposed to be a time bound and simple process.

HOW THE LAW IS ‘EVOLVING’?

Here are some instances:

- Flat Buyers under assured return: In *Nikhil Mehta vs. AMR Infrastructure*¹, on 23.01.2017, while deciding the petition filed by flat buyers under an assured return program, the NCLT principal bench held that the flat buyers didn’t fall in the definition of either financial or operational creditors and hence dismissed the petition. However, on 21.07.2017, the Appellate Tribunal held the flat buyers under the assured return program, to be financial creditors and directed the NCLT bench to admit the petition if complete otherwise.
- Guarantors: In *Schweitzer Systemtek vs. Phoenix ARC limited*², on 03.07.2017, the NCLT bench at Mumbai held that the moratorium in terms of Section 14 of the Code applies only to the proceeding against the corporate debtor and not to the proceedings initiated against its directors and other guarantors. In effect, recovery proceedings under DRT and SARFAESI against the guarantors would continue despite the Corporate Debtor being placed under insolvency. However, on 06.09.2017, the Hon’ble High Court of Allahabad, while deciding on *Sanjeev Shriya vs. State Bank of India & Ors*³, held that the moratorium would extend to the proceedings against the guarantors of the corporate debtors as well.
- Right of Board of Directors: In *Steel Konnect vs. Hero Fincorp*⁴, on 29.08.2017, the NCLAT held that despite the board being suspended after the moratorium coming in place, the Board of Directors can initiate an appeal on behalf of the Corporate Debtor, against the insolvency petition being admitted. However, a few days later, the Hon’ble Apex court in *Innoventive vs.*

¹ C.P No (ISB)-03(PB)/2017 at NCLT and Company Appeal (AT) (Insolvency) No. 07 of 2017 at NCLAT

² T.C.P No. 1059

³ WRIT - C No. - 30285 of 2017

⁴ Company Appeal (AT) (Insolvency) No. 51 of 2017



ICICI⁵ held that an appeal by the Board of Directors, on behalf of the Corporate Debtor, against the order admitting the insolvency application, would not be maintainable.

- Power of attorney – In *ICICI Bank v. Palogix Infrastructure*⁶, on 12.04.2017, the NCLT bench at Kolkata held that specific power of attorney to initiate insolvency proceedings is required to be executed and a general power of attorney will not suffice. However, on 20.09.2017, while deciding on the appeal, the NCLAT held that power of attorney itself is not required to initiate insolvency petition and a mere authorization is good enough.
- Limitation: In *Deem Roll-Tech vs. RS Steel & Energy*⁷, on 31.03.2017, the NCLT Principal held that the Limitation Act is applicable to the provisions of the Code. However, on 11.08.2017, in *Neelkanth Township vs Urban Infrastructure Trustees*⁸, the NCLAT held that nothing in the Code seems to suggest that the provision of the Limitation Act are applicable to initiate the Corporate Insolvency Resolution process.

Various NCLT benches across the country have taken different views on maintainability of insolvency process during pendency of winding up proceedings before Hon'ble High Courts. So much so that now a special bench has been constituted by the President of NCLT to decide on the issue. Similarly, various benches and the Appellate Tribunal have taken contrary views on several issues including Bankers Book of Evidence Certificate, Bankers Certificate regarding non-payment of debt in case of petition by operational creditor, and relaxation of 7 days period to cure defects. Recently, in *Jaypee Infratech Ltd*, the NCLT bench at Allahabad admitted the insolvency petition against Jaypee Infratech which, having several businesses, is a builder of residential apartments and had accepted deposits from individuals towards flats proposed to be constructed. However, in terms of priority for settling the claims, the flat buyers stood at the bottom of the pyramid i.e. below the workmen, secured creditors, statutory dues, employees and operational creditors. On a petition made by the concerned flat buyers, the

Hon'ble Apex court initially suspended the insolvency proceedings only to reinstate it a few days later; however, not without a few riders i.e. deposit of 2000 crores by the parent company and submission of an interim resolution plan within 45 days. Though none of the two riders are under any existing provision of the Code, it is open to speculation if this will constitute precedence in future instances of builder-buyer disputes.

There are many more instances of such diametrically opposite stands which have been taken by various tribunals, the Appellate Tribunal and the Hon'ble High Courts on important issues of the Code and there is a fair chance that more will be witnessed by the time this article sees the light of the day. Not just the professionals involved in resolution process, but also the government of the day, the industry and even the public at large is keenly watching as to how the situation develops and how important aspects of the legislation are finally settled by the Hon'ble Supreme Court. For sure the journey will take time but it would be an interesting journey nonetheless.

P.s. - It is interesting to note that not all reversals in settled principles have come while deciding appeals in the same matter. Ergo, in all likelihood multiple litigations are waiting to be triggered including instances where the resolution process is already underway. It will be interesting to watch as to how these instances are managed without compromising on the overall intent of the Code.

⁵ CIVIL APPEAL NOs. 8337-8338 OF 2017

⁶ CP 37/2017at NCLT Kolkata and Company Appeal (AT) (Insol) No. 30 of 2017 at NCLAT

⁷ Company Application No. (I.B.) 24/PB/2017

⁸ Company Appeal (AT) (Insolvency) No. 44 of 2017



FAST TRACK INSOLVENCY PROCESS WITH RESPECT TO START-UPS

The Insolvency and Bankruptcy Code, 2016 (hereinafter referred as “the Code”) passed by the Parliament is a welcome overhaul of the existing framework dealing with insolvency of corporate, individuals, partnerships and other entities. It paves the way for much needed reforms while focusing on creditors-driven insolvency resolution. One of the main essences of the Code is Time Bound Resolution Process of the financial assets of the company. The Code gives timeline of 180 days for Corporate Insolvency Resolution Process (hereinafter referred as “CIRP”), which can be extended to 270 days, for completion of the resolution process⁹. However, the Code also provides provisions to further expedite the resolution process in the form of Fast Track Insolvency Resolution Process. It aims to accelerate the insolvency resolution process of certain categories of corporate debtors with lesser complexities. The fast track process which can be initiated by a creditor or the corporate debtor itself, cuts down the time taken to complete an insolvency resolution to almost half as compared to the regular process under the Code.

The Insolvency and Bankruptcy Board of India (hereinafter referred as “IBBI”), in exercise of its power conferred by sections 58, 196, and 208 read with section 240 of the Code, has notified the Insolvency and Bankruptcy Board of India (Fast Track Resolution Process for Corporate Persons) Regulations, 2017 (hereinafter referred as “the Regulation”. These Regulations provide the process right from initiation of insolvency resolution of eligible corporate debtors till its conclusion with approval of the resolution plan by the Adjudicatory Authority. The time period given for the completion of Fast Track Resolution Process is 90 days, as against 180 days for CIRP. However, the Insolvency Resolution Professional may apply to Adjudicating Authority for the extension of time for a further period of 45 days in case of Fast Track Process and 90 days for CIRP.

An application for fast track corporate insolvency resolution process may be made in respect of the following corporate debtors, namely:

- A small company, as defined under clause (85) of section 2¹⁰ of the Companies Act, 2013; or
- A Start-up (other than the partnership firm), as defined in the Government of India notification issued by the Ministry of Commerce and Industry¹¹;
- An unlisted company with total assets, as reported in the financial statement of the immediately preceding financial year, not exceeding Rs. 1 Crore.

The Regulations also laid down important definitions and procedure to carry out the resolution process:

- Regulation 2(1)(j) defines “fast track process period” which means the period of ninety days beginning from the fast track commencement date and ending on the ninetieth day; whereas the Regulation also defines “fast track commencement date” under regulation 2(1)(l) which means the date of admission of an application by the Adjudicating Authority for initiating the fast track process under Chapter IV of Part II of the Code.
- The public announcement inviting proof of claims is to be made by the interim resolution

¹⁰ “small company” means a company, other than a public company,—

- (i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or
- (ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees;

Provided that nothing in this clause shall apply to—

- (A) a holding company or a subsidiary company;
- (B) a company registered under section 8; or
- (C) a company or body corporate governed by any special Act;

¹¹ G.S.R. 501 (E) notification dated 23rd May, 2017, available at: <http://startupindia.gov.in/notification.php>

⁹ Section 12 of the Insolvency and Bankruptcy Code, 2016



professional for a fast track insolvency resolution process within 3 days of his appointment.

- If Interim Resolution Professional, after analyzing the financial record of the company, concludes that the fast track process is not applicable to the corporate debtor, then he can make an application to the Adjudicating Authority to pass converting the fast track process into CIRP¹².

In the light of above discussion, it is pertinent to discuss in detail one of the types of above mentioned corporate debtor on which the fast track process is applicable, i.e. Start-ups.

An entity can be considered as a “Start-Up”¹³:

- If it is incorporated as a private limited company (as defined in the Companies Act, 2013) or registered as a partnership firm (registered under section 59 of the Partnership Act, 1932) or a limited liability partnership (under the Limited Liability Partnership Act, 2008) in India; and
- Is within seven years from the date of its incorporation/registration; however, in the case of Start-Ups in the biotechnology sector, the period shall be up to ten years from the date of its incorporation/registration; and
- If its turnover for any of the financial years since incorporation/ registration has not exceeded Rs. 25crores; and
- If it is working towards innovation, development or improvement of products or processes or service, or if it is a scalable business model with a high potential of employment generation or wealth creation.
- Provided that any such entity formed by splitting up or reconstruction of a business already in existence shall not be considered a “Start-Up”.

The process of recognition as a “Start-up” shall be through an online application made over the mobile app/ portal set by the Department of Industrial Policy and Promotion. Entities will be required to submit the online application along with the Certificate of Incorporation/Registration and other relevant details as may be sought. Start-ups must also submit a write-up about the nature of their business - highlighting how is it working towards innovation, development or improvement of products or process or services or its scalability in terms of employment generation or wealth creation¹⁴.

The Start-Up ecosystem is gaining attraction due to various initiatives taken by the Government of India. A fast track insolvency process under the Code is an efficacious way to encourage upcoming and future businesses as the Code provides easier exit to the creditors in case of failed ventures. Faster resolution will attract investors to start-ups, most of which don't survive long, as well as small firms. This could be one of the reasons why the Government, as a part of its Start-Up India Initiative, wanted to give start-ups an easy option to exit within 90 days.

CONCLUSION:

The very purpose of introducing Fast Track Regulation is to lower down the burden of small companies from following the cumbersome procedure of Resolution Process as specified under the Code for larger companies. However, as reflected from the Regulation, the process is almost same as that of the resolution process of larger companies, only the moratorium period has been reduced to 90 days and some other procedural time frame has been reduced. Thus, it would be fair to say that 90 days' time limit has ensured that the Resolution Professional works in expeditious manner. Moreover, the Fast Track Regulation should make it easier for the Creditors proposing resolution for smaller companies.

¹² Regulation 17 of Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2017

¹³ Supra note 3

¹⁴ Supra Note 3



WHETHER AN APPLICATION UNDER SECTION 9 OF THE INSOLVENCY & BANKRUPTCY CODE, 2016 IS MAINTAINABLE AT THE INSTANCE OF WORKMEN ASSOCIATION?

Under Chapter II of The Insolvency and Bankruptcy Code, 2016 (hereinafter to be referred as the “Code”), the mechanism for the initiation of the Corporate Insolvency Resolution Process (hereinafter to be referred as “CIRP”) against the Corporate Debtor¹⁵; Financial Creditor¹⁶, Operational Creditor¹⁷ have been provided for according to the provisions of Section 7, 9, and 10 of the Code respectively.

The law is still crystallizing the fact as to which entities can come under the respective categories for initiation of CIRP as mentioned above. For instance the case of Nikhil Mehta vs. AMR Infrastructure¹⁸, looked at the question of whether the flat buyers will come under either of the two categories viz. Operational Creditors or Financial Creditors; in the case of D Ramjee vs. Aruna Hotels¹⁹, the Chennai bench of the Adjudicating Authority (hereinafter referred to as “NCLT”) looked into the question of whether individuals can approach the NCLT for initiating the CIRP against the employer over the non-payment of various salary dues.

Similarly, the issue of whether an application under Section 9 of the Code will be maintainable at the instance of Workmen Association, was raised in the case of J.K. Jute Mills Mazdoor Morcha vs. Juggilal Kamlatpat Jute Mills Co. Ltd²⁰ before the Appellate Authority (hereinafter referred to as the “NCLAT”). The said matter arose out of an appeal against the order dated 28th April 2017 passed by the Allahabad bench of

the NCLT, wherein the application preferred by the Appellant/Workmen Association under Section 9 of the Code had been dismissed despite the fact that in the impugned order, the NCLT had accepted the contention that the Corporate Debtor cannot deny the liability for making payments of workmen’s wages.

In the present appeal the appellants had approached the NCLAT on the grounds that they fall under the meaning of operational creditors under Section 5(20) of the Code since the Corporate Debtor owed operational debt to its workmen and employees in respect of services including employment as per sub section (21) of Section 5 of the Code; the appellants also contended that the Trade Union is a ‘person’ as defined under the provisions of sub section (23)(g) of the Trade Union Act read with Section 5(20) and (21) of the Code, and hence the petition is maintainable under the Code.

On the other hand, it was the contention of the respondent that the appellant’s application under Section 9 of the Code is not maintainable as no ‘operational debt’ as envisaged under the provisions of sub-section (2) of Section 5 of the Code was owed, and further they also contended that upon reading of sub-section (20) of Section 5 along with Form 5 of Insolvency & Bankruptcy (Application to Adjudicating Authority Rules) 2016, (hereinafter referred to Adjudicating Authority Rules), it becomes clear that the application under Section 9 can only be filed by an ‘operational creditor’, that is an individual workman himself or the person who has been specifically authorized to act on behalf of the workmen, the implication of this fact is that since the Appellant here is a Trade Union, it will lack the authority to issue the demand notice and subsequently file the insolvency application under the Code. The Respondents went on to contend further, that there is a pre-existing dispute prior to the filing on Section 9 application in the form of a pending civil suit before the Delhi High Court, and in that regard, the case of *Kirusa Software Pvt. Ltd. vs. Mobilox Innovations*

15 “corporate debtor” means a corporate person who owes a debt to any person

16 “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

17 “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

18 *Company Appeal (AT) (Insolvency) No. 7 of 2017, Order dated 21.07.2017*

19 *Company Appeal (AT) (Insolvency) No. 59 of 2017, Order dated 02.08.2017*

20 *Company Appeal (AT) (Insolvency) No. 82 of 2017*



*Pvt Ltd*²¹. becomes applicable which had held that, in the event that there exists a dispute, the application under Section 9 will not be maintainable. Further, the respondents also relied on the case of *Smart Timing Steel Ltd. vs. National Steel and Agro Industries Limited*²² which stated that the submission of certificate from any Financial Institution is mandatory for filing the application under Section 9 and that the same was not provided by the appellants.

CONCLUSION

The NCLAT, after going through the contentions of both the parties, examined the Code to ascertain whether a Trade Union will come under the meaning of 'operational creditor', and in that regard, the definition of 'Operational Debt'²³ as defined under sub-section(21) of Section 5 was examined to ascertain who can claim to be 'Operational Creditor' . The NCLAT concluded that the following can come under the definition of Operational Creditors:-

- "The person who has claim in respect of provision of goods (supplied) to the 'corporate debtor';
- Persons who have provided services to the 'corporate debtor', including those who are in employment; and
- Central Government, State Government and Local Authorities, who are entitled to claim debt in respect of dues arising under any Law for time being in force."

Based on the above mentioned criteria, it was held that any Trade Union or any association of workmen cannot come within the definition of 'operational creditor' as no services were rendered by the workmen's association/ trade union to the Corporate Debtor and thereby no due that could have been termed as, "debt" as defined under sub-section 11 of Section 3 could be ascertained. However, the NCLAT at the same time also held that *"it does not mean that an application under Section 9 of I&B Code is not maintainable at the instance of an individual employee/workman who has rendered*

services to the 'corporate debtor' and if there is debt and default, such individual workman/ employee can prefer an application under Section 9 giving details of debt and date of default but it should not be less than one lakh rupees in view of Section 4 of the I&B Code." This case, apart from stating that Trade Unions and Workmen Association cannot file their application under Section 9 of the Code, also further sheds light on the fact that employees can initiate CIRP against their employers if the operational dues are more than Rs One Lakh.

²¹ *Company Appeal (AT) (Insolvency) 6 of 2017*

²² *Company Appeal (AT) (Insolvency) No. 28 of 2017*

²³ *"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;*



CASE NOTE: SECTION 14 IBC- A BAR FOR PROCEEDINGS AGAINST GUARANTOR BEFORE DEBT RECOVERY TRIBUNAL (DRT)

In the case of *Sanjeev Shriya v. State Bank of India and Ors. Writ C No. 30285 of 2017 connected with Deepak Singhania and Another v. State Bank of India, Writ C No. 30033 of 2017*, the Hon'ble Allahabad High Court has decided the question of the liability of personal guarantors of a company where moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 (Code) is in force.

FACTUAL BACKGROUND:

The petitioners were ex-directors of M/s LML Limited (Company) and they had executed a deed of guarantee dated 28.03.2005 in favor of State Bank of India (SBI). The Company was declared as sick industrial company by the Board of Industrial and Financial Reconstruction on 08.05.2007. Thereafter, SBI filed an application under Section 19(3) of the Recovery of Debts and Bankruptcy Act, 1993 (RDB Act) before Hon'ble DRT for recovery of debt against the Company as principal borrower and the petitioners as the guarantors. An interim order dated 30.03.2017 was passed by Hon'ble DRT requiring the Company and the guarantors to disclose particulars/ assets specified by SBI. Meanwhile, the Company approached the Hon'ble Adjudicating Authority (NCLT, Allahabad) by preferring a company petition under Section 10 of the Code seeking initiation of corporate insolvency resolution procedure. The Hon'ble Adjudicating Authority, vide its order dated 30.05.2017 admitted the application and declared moratorium under Section 14. In furtherance to the order of the Hon'ble Adjudicating Authority, the petitioners sought a stay of the DRT proceedings on the grounds that the matter is pending before Hon'ble Adjudicating Authority and that moratorium has been issued. On 06.07.2017, Hon'ble DRT passed an order stating that the Hon'ble Adjudicating Authority's order dated 30.05.2017 is qua proceedings only against the Company and there is no order to restrain proceedings against individual guarantors/ mortgagors. The petitioners have challenged the order dated 06.07.2017 passed by the Hon'ble DRT.

ISSUE

Whether SBI can be allowed to pursue proceedings, under Section 19 of the RDB Act, for recovery of loan amount taken by the Company before Hon'ble DRT against the guarantors when the Hon'ble Adjudicating Authority has already issued moratorium under Section 14 of the Code?

PETITIONER'S SUBMISSIONS:

It was submitted by the petitioners that the proceedings before Hon'ble DRT is without jurisdiction, as the insolvency proceeding has commenced under the Code and moratorium has been issued under Section 14 and the parties have already appeared before the interim resolution professional. It was argued that Hon'ble DRT cannot adjudicate upon any claims of alleged debt and without crystallization/ determination of debt, Hon'ble DRT cannot proceed against the guarantors. The action initiated by Hon'ble DRT is contradictory to the aim and object of the Code, which has been enacted to consolidate and amend the laws relating to re-organization and insolvency resolution. Further, Hon'ble DRT has erred in law while interpreting the order of the Hon'ble Adjudicating Authority - to state that there is neither any specific order by the Hon'ble Adjudicating Authority nor there is any restriction to proceed against individual guarantors.

RESPONDENT'S SUBMISSIONS:

The Respondent has raised a preliminary objection stating that the writ petition is liable to be dismissed because of availability of efficacious alternative remedy, that is, the validity of DRT order can be challenged before the Hon'ble Debt Recovery Appellate Tribunal. It was argued that under the Code, there is no restriction on proceedings against the guarantor independently and that the rights of the bank are flowing from the deed of guarantee executed by the petitioners. Further, the recovery proceedings were initiated by the bank - before the Hon'ble DRT - prior to the Hon'ble Adjudicating Authority's order dated



30.05.2017 and the said order does not affect the DRT proceeding against petitioners as guarantors.

DECISION

It was held by the Hon'ble High Court that the liability of the Company and petitioners is co-extensive but the entire proceeding is still in a fluid stage and for the same cause of action, two split proceedings cannot go simultaneously before Debt Recovery Tribunal as well as National Company Law Tribunal. It was held that the liability has not been crystallized either against the principal debtor or guarantors and hence, the proceeding pending before the Hon'ble Debt Recovery Tribunal cannot continue and the same was stayed till finalization of corporate insolvency resolution process or till the Hon'ble National Company Law Tribunal approves the resolution plan under Section 31 or passes an order for liquidation of corporate debtor under Section 33, as the case may be.



INSOLVENCY RESOLUTION PROCESS: WHO IS AUTHORIZED TO INITIATE?

A question arises as to who can file application under the Code on behalf of the Companies or Corporate Persons as they are juristic entities. The law with respect to this has been discussed by the Hon'ble Bench of NCLAT in *Tirupati Infra Project Pvt. Ltd. v. Bank of India*,²⁴ and *Palogix Infrastructure Pvt. Ltd. v. ICICI Bank Ltd.*²⁵

In the former case, in response to the objection raised by Corporate Debtor, the Hon'ble Bench noted that the person who has filed the application under Section 7, is an officer of Bank of India (Financial Creditor) and was authorized by the Board of Directors to do so. Thus, it was held that the application brought before the Adjudicating Authority was in a legal manner and rightly admitted. It is to be noted here that in this case, the person was appointed to act as Senior Manager by power of attorney dated 05.01.2017, in respect of necessary matters including insolvency and bankruptcy.

The law with respect to the same was then discussed in detail in *Palogix Infrastructure*. The facts from which the dispute arose were that a general power of attorney was given in favour of one legal manager of the bank on 20.10.2014. The said power of attorney authorized the holder to commence and institute any proceedings before any Court of Law including National Company Law Tribunal. Acting under this power of attorney, an application was filed under section 7 of the Code against Palogix Infrastructure for default on a payment of a loan. Since the power of attorney was awarded before the Code came into existence, the question arose if the power so granted can be contemplated to include the power to take actions under the Code.

The case originally arose before the Kolkata Bench of NCLT, wherein two members, gave divergent opinions. While the learned Technical Member did not find any fault in the attorney holder's initiation of a proceeding under section 7 of the Code; the learned Judicial Member held that there should be specific authorization to initiate CIRP. In view of divided opinion of the Bench,

the Hon'ble President of NCLT constituted a special bench to give a rest to the controversy.

By majority judgment, the Adjudicating Authority held that there should be specific authorization to the power of attorney holder to initiate CIRP under the Code. It was observed that the provisions under the Companies Act, 1956 regarding winding up proceedings differ from the provisions under the Code regarding insolvency process and the power given generally to initiate winding up, can never be stretched to embrace the power to initiate a corporate insolvency resolution proceeding under section 7 of the Code. Thus, the petitioner bank was directed, vide order dated 12.04.2017, to rectify the defect accordingly within 7 days. It was in appeal to this order that the NCLAT bench delivered its order on 20.09.2017.

The Hon'ble Bench of NCLAT categorically ruled that a 'Power of Attorney Holder' is not competent to file an application on behalf of a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant'. It was held that in terms of Rule 23(1) of NCLT Rules, 2016 and Form 1 of I&B (Application to Adjudicating Authority) Rules, 2016, a 'Financial Creditor' being a juristic person can only act through an 'Authorized Representative'. It is to be noted that Rule 23 of NCLT Rules, 2016 is applicable to application filed under section 7, 9 and 10 of the Code as per Rule 10 of the Adjudicating Authority Rules. The relevant rule 23(1) states as follows:

- Every petition, application, caveat, interlocutory application, documents and appeal shall be presented in triplicate by the appellant or applicant or petitioner or respondent, as the case may be, in person or by his duly authorized representative or by an advocate duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same.'

This 'Authorized Representative' is distinct from the 'Power of Attorney Holder'. The court said that the I&B Code is a complete code in itself. The provision of the

²⁴ *Company Appeal (AT) (Insolvency) No. 99 of 2017.*

²⁵ *Company Appeal (AT) (Insolvency) No. 30 of 2017.*



Power of Attorney Act, 1882 cannot override the specific provision of the Code, which requires that a particular act should be done by a person in the manner as prescribed there under. The Bench referred to Section 2 of the Power of Attorney Act, 1882 which is reproduced below:

- Execution under Power-of-Attorney: The donee of a power-of-attorney may, if he thinks fit, execute or do any instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof. This section applies to powers-of-attorney created by instruments executed either before or after this Act comes into force.'

Thus, upholding the order of the NCLT, the Appellate Tribunal held that a specific authorization is required to initiate process under the Code. Entry 5 of Form 1 requires the 'name and address of the person authorized to submit application in its behalf, and hence a general power of attorney in someone's favour to initiate legal proceedings is not sufficient authorization under the Code. Furthermore, an observation was made by the court, that if an officer of a bank has been authorized to grant loan or for recovery of loan, it is sufficient authorization to initiate CIRP under the Code. And it cannot be pleaded that no specific grant has been made to initiate CIRP.

The law, thus, stands clarified that a general power of attorney holder cannot act on behalf of the Financial Creditor/Operational Creditor/Corporate Applicant under the Code. An insolvency resolution process can and may have adverse consequences on the welfare of the company, hence it becomes imperative that it is initiated by someone who is duly authorized. The Authorized Person can be authorized for specific operations under the Code or if he has been given power to grant a loan then he has the capacity to recover the same on a default.



THE AFFIRMATION OF TIMELINES UNDER THE INSOLVENCY AND BANKRUPTCY CODE

The Honorable Supreme Court of India on September 19, 2017 affirmed the order passed by the National Company Law Appellate Tribunal "NCLAT" in the case of *Surendra Trading Company v. Juggilal Kamlatpat Jute Mills*²⁶ putting an end to the dilemma of timelines with respect to various actions to be undertaken under the Insolvency and Bankruptcy Code "IB Code", at the time of admission of application filed under 7, 9 and 10 of IB Code for the purpose of initiating Corporate Insolvency Resolution Process "CIRP".

BACKGROUND

In the present case, the operational creditor, Surendra Trading Company "STP" filed an application under Section 8 of the IB Code against the corporate debtor, J.K Jute Mills Company Ltd "JK", for a claim amounting to Rs. 17,06,766 "unpaid debt". The application was filed without complying with Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which provides for certain prerequisites which need to be completed while filing an application under IB Code. Thereafter, STP was given a seven-day additional period to rectify the defect in the application in accordance to Section 9(5) of the Code which they failed to do within the requisite time and claimed that the time period under Section 9(5) is not mandatory. The NCLAT thereby held that the 7 day time period to remove the defects in the application is mandatory in nature and the 14 days time period to ascertain the existence of default is discretionary.

ANALYSIS

The Supreme Court thereby overruled the order of NCLAT and also mandated the status of various timelines under the Code:-

- The timelines under Section 7(5), 9(5) and 10(4) to remove the defects in the insolvency application within seven days is discretionary and not mandatory in nature, in cases where an application in writing shows sufficient case

²⁶ Supreme Court Of India, Civil Appeal No. 8400 of 2017, September 19, 2017

as to why the applicant could not remove the objections within seven days, the court may extend the time period instead of directly rejecting the application under the code. In other words, an application for condonation of delay needs to be filed whereby there is delay beyond the time prescribed.

- In order to calculate the seven-day period under section 7, 9 and 10, to remove the defects in the insolvency application the holidays such as Saturday, Sunday and other holidays to be excluded.²⁷
- The timeline of fourteen days to ascertain the existence of a default from the records of an information utility under the code whereby, the adjudicating authority has to admit or reject the application, are directory in nature and the same is to be calculated from the date of receipt of application by the court and not from the acceptance of application, the same has been quoted in the case of *Nikhil Mehta v. AMR Infrastructure Ltd.*²⁸
- The term of the interim resolution professional "IRP", for managing the affairs of the company until the appointment of resolution professional, will be thirty days as provided in Section 16(5) of the code.
- The Supreme Court further clarified that the limit of 180 days, which is extendable further in certain cases up to 90 days, for the completion of insolvency resolution process starts from the admission of the application for the resolution process.

CONCLUSION

The statutory scheme laying down time limits sends a clear message, as rightly held by NCLAT also, that time is the essence of the Code. The Code has thereby set

²⁷ NCLAT, Company Appeal (AT) (Insolvency) No. 30 of 2017, April 12, 2017

²⁸ NCLAT, Company Appeal (AT) (Insolvency) No. 07 of 2017, January 23, 2017



strict timelines which makes it one of the most scrupulous laws in the country and reflects the purpose of the legislature, making India - a speedier justice forum.



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